This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 18 June 2008

SEXUAL OFFENCES (SCOTLAND) BILL

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DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of provisions in the Sexual Offences (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each such provision and explains the reasons for seeking the proposed delegated powers. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. This memorandum sets out—

   • the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
   • why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
   • the parliamentary procedure, if any, to which the exercise of this power to make subordinate legislation is to be subject and why it was considered appropriate to make each power subject to the relevant parliamentary procedure.

OUTLINE OF BILL PROVISIONS

3. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. The Bill repeals the common law offences of rape, sodomy, lewd, indecent and libidinous practice or behaviour and clandestine injury to women and a number of statutory sexual offences in addition to creating new statutory offences relating to sexual conduct, in particular where that takes place without consent. It provides a general definition of consent as “free agreement” and supplements this with a non-exhaustive list of factual circumstances in which free agreement, and therefore consent, is absent.

4. The Bill creates new statutory offences of rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure and administering a substance for a sexual purpose. The Bill also creates new ‘protective offences’ which criminalise sexual activity with a person whose capacity to consent to sexual activity is either entirely absent or not fully formed.
either because of their age or because of a mental disorder. Separate ‘protective’ offences are provided for in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15). In addition, the Bill makes it an offence of ‘abuse of position of trust’ for a person who is aged 18 or over and in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person.

5. Further information about the Bill’s provisions are contained in the Explanatory Notes and Financial Memorandum published separately as [SP Bill 11—EN] and in the Policy Memorandum published separately as [SP Bill 11—PM].

APPROACH TO USE OF DELEGATED POWERS – OUTLINE

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to—

- strike the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation;
- make proper use of valuable Parliamentary time;
- allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation; and
- ensure that the legislation can easily be amended to accurately reflect changes to sexual offences legislation in the UK (for example section 29 which contains a power to amend the definition of ‘relevant offences’)

GENERAL SUBORDINATE LEGISLATION PROVISION

7. Section 46 contains the general subordinate legislation provisions and provides that all powers to make orders under the Bill are exercisable by statutory instrument. Subsection (1) also allows different provision to be made for different purposes and permits the powers to be used to make, incidental, supplemental, consequential, transitional, transitory or saving provisions. Subsections (2) and (3) provides that the powers conferred by the Bill on the Scottish Ministers are subject to negative resolution procedure, with the exception of the following—

- orders which make ancillary provision under section 45 to amend primary legislation are subject to affirmative procedure;
- commencement orders made under section 49 are not subject to any parliamentary procedure.

8. The provisions containing delegated powers are listed below with an explanation of each power, why the power has been taken in the Bill and why the selected form of Parliamentary procedure, if any, has been considered appropriate.
SUBORDINATE LEGISLATIVE POWERS – DETAIL

Section 29(5) – Power to specify “relevant offences” for the purpose of section 29(2)

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

9. Section 29(1) provides that it shall be a defence for an accused person who is charged with an offence under sections 21 to 27 (which are concerned with sexual activity involving or directed towards a child aged 13-15) that he or she reasonably believed that the child, with whom he or she engaged in sexual activity, had attained the age of 16 years at the time the conduct took place. Section 29(2) provides that such a defence is not available to an accused if that accused has previously been charged by the police with a ‘relevant offence’. Section 29(5) provides the Scottish Ministers with a power to specify by order which offences or offences of such description will constitute a ‘relevant offence’ for the purpose of section 29(2).

Reason for taking this power

10. The purpose of providing a power for Scottish Ministers to specify a “relevant offence” is that it is considered more appropriate to set out this detail in an order than on the face of the Bill. In addition to certain offences under this Bill, the list of “relevant offences” is likely to include a number of current and historic offences, including not only Scottish offences but other UK sexual offences. Listing such “relevant offences” by virtue of an order making power provides the flexibility to respond to new and changing legislation north and south of the Border without the need for primary legislation. We consider that it would not be an effective use of Parliamentary time to require that primary legislation is brought forward to amend the definition of ‘relevant offence’ on each occasion that the law in this area is amended.

Choice of procedure

11. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny given the limited nature of the enabling power. It provides only a power to specify what a ‘relevant offence’ for the purpose of the defence of reasonable mistake of belief as to age in relation to a charge brought under sections 21 to 27 of the Bill. It does not allow for the creation of a new offence or provide a power to further extend or restrict the range of offences in the Bill to which the defence in section 29(1) can be invoked.
Section 32(1) – Power to amend the definition of what constitutes a ‘position of trust’ in respect of the offence of sexual abuse of trust at section 31.

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Reason for taking this power

The reason for taking this power is to allow for sufficient flexibility to amend the definition of a ‘position of trust’ to reflect any future changes to the arrangements relating to the education or care of young people in Scotland. Ensuring that children are protected from harm by those in positions of trust or responsibility over them has been an area of policy subject to recent developments, and it is possible that further developments in the future may necessitate changes as to what constitutes a ‘position of trust’. Without a power to do so by statutory instrument, primary legislation will be required to ensure that this definition continues to accurately reflect the changes in circumstances in which positions of trust arise. Further, it is considered appropriate to specify the level of detail which may be required to specify any additional conditions in an order rather than place this on the face of the Bill.

Choice of procedure

13. The negative resolution procedure is considered the appropriate level of parliamentary scrutiny in light of the limited nature of the power. The order making power is limited to specifying the conditions in which a person is considered to be in a position of trust. It cannot be used to modify other aspects of section 31 such as the age limit provided for in subsection (1)(b). Given this, the Scottish Government does not consider it would be effective use of the Parliament’s time to require such orders to be subject to affirmative resolution procedure.
Section 35(4) – Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

14. Section 35 creates the offence of sexual abuse of trust of a mentally disordered person. Subsection (1) provides that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in sexual activity with, or directed at, a mentally disordered person. Subsection (2) sets out the classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in, or contracted to provide services in, or who manage, a hospital in which a mentally disordered person is receiving treatment. Subsection (4) defines what is meant by the “provision of care services” for the purpose of subsection (2) and in addition to listing examples of such services contains a power for Scottish Ministers to specify by order such other circumstances which constitute the provision of care services.

Reason for taking power

15. The purpose in taking this power is to ensure that there is sufficient flexibility to amend the definition of the “provision of care services” to reflect any future changes to the way in which care services are provided to persons with a mental disorder, without using primary legislation for this purpose. For example, if in future, circumstances arose where someone provided care services to a person with a mental disorder without a contract being in place between the organisation providing the care service and the individual directly responsible for providing the service, this power would ensure that the definition of “providing care services” can be amended without recourse to primary legislation. An order making power is considered appropriate to specify the level of detail which is required and can be brought forward in shorter timescales than primary legislation.

Choice of procedure

16. The negative resolution procedure is considered the appropriate level of parliamentary scrutiny for any regulations made under this section in light of the limited nature of the enabling power.
Sections 30(6) and 38(4) – Power to prescribe form of notice of alternative verdicts

Power conferred on: The High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

17. Section 38 provides that, where a charge is brought under specified provisions of the Bill, and the court or jury are not satisfied that the accused committed the offence charged but are satisfied that the accused committed a specified alternative offence, the court or jury may acquit the accused of the charge but find the accused guilty of that alternative offence. Subsection (2) provides that an accused cannot be convicted of an offence other than that charged unless fair notice of that fact has been provided to the accused. Subsections (3) and (4) provide that the format of the notice which is to be given to the accused will be prescribed in an Act of Adjournal and must be appended to the indictment or complaint.

18. Section 30 provides that, where a person is charged with an offence against a young child under sections 21 to 26 of the Bill, but for a failure to prove beyond a reasonable doubt that the child had attained the age of 13 when the offence took place, the court or jury may acquit the accused of the charge and find him or her guilty of an alternative offence. Section 30(4) provides that an accused person can only be convicted of an alternative offence in subsection (5) if the court or jury are satisfied that the child had not attained the age of 16 at the time the offence took place and fair notice of the alternative verdict is given to the accused. Subsection (6) applies section 38(3) and (4) to section 30. Therefore, the format of the notice which is to be given to the accused for the purpose of section 30(4) will be prescribed in an Act of Adjournal and appended to the indictment or complaint.

Reason for taking power

19. The power in sections 30(4) and 38(1) to convict a person of an alternative verdict cannot be used unless fair notice has been given to the accused. Therefore, it is important to provide for a power which sets out the format of the notice which has to be given to the accused so as to avoid any subsequent dispute as to what exactly constitutes “fair notice” and whether the condition in section 38(2) has been complied with. The format of any such notice is essentially an administrative matter and would not normally be the subject of primary legislation. The Scottish Government therefore considers it appropriate that the High Court of Justiciary should be able to prescribe this.

Choice of procedure

20. Detailed matters related to court procedure, such as the content of court forms relate to the type of matters which are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see section 305 of the Criminal Procedure (Scotland) Act 1995 which makes provision for the Act of Adjournal generally).
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Section 42(4) – Power to prescribe period of notice of defence to offence at section 42(1)

Power conferred on: The High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

21. Section 42 re-enacts section 16A of the Criminal Law (Consolidation) (Scotland) Act 1995 (with amendments). In accordance with section 42(1) and (2) an individual who is not a UK national will commit an offence if he or she incites another person to commit sexual conduct outside the UK if (a) the intended conduct would amount to a listed offence in Scotland if the conduct were to have taken place in Scotland and (b) if the intended conduct also constitutes an offence in the law in force in the country in which it was intended to take place.

22. Section 42(4) provides that the condition specified in subsection 42(2) (the intended conduct must be an offence in the country in which is was intended to take place) is taken to be satisfied unless, not later than such time as the High Court may by Act of Adjournal prescribe, serve a notice on the prosecutor, stating—

- that on the facts as alleged with respect to the accused’s conduct, the condition is not in the accused’s opinion, satisfied;
- the grounds for the accused’s opinion; and
- requiring the prosecutor to prove that the condition is satisfied.

Reason for taking power

23. Section 42(4) creates a power for the High Court to make rules specifying the time period within which a person who is not a UK national and who is accused of an offence under section 42 must notify the prosecution, of the reasons they do not consider their conduct to have satisfied the conditions at section 42(2). The time period within which the defence should be required to serve such a notice is essentially an administrative and procedural matter for the High Court to determine and as such is not considered appropriate to be included in primary legislation.

Choice of procedure

24. Rules made under this power are procedural and administrative. Detailed matters related to court procedure, such as the timescales in which notices should be sent to the prosecution relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure.
Section 43(4) – Power to prescribe period of notice of defence to offence at section 43(2)(b)

Power conferred on: The High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

25. Section 43 re-enacts section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995. In accordance with section 43(2), a UK resident will commit an offence if he or she does an act in a country outside the UK if (a) the act would amount to a listed offence in Scotland if the conduct were to have taken place in Scotland and (b) if the act also constitutes an offence in law in force in the country in which it was intended to take place.

26. Section 43(4) provides that the condition specified in section 43(2)(b) is taken to be satisfied unless, not later than such time as the High Court may by Act of Adjournal prescribe, serve a notice on the prosecutor, stating—

- that on the facts as alleged with respect to the act of the accused, the condition is not in the accused’s opinion, satisfied;
- the grounds for the accused’s opinion; and
- requiring the prosecutor to prove that the condition is satisfied.

Reason for taking power

27. Section 43(4) creates a power for the High Court to make rules specifying the time period within which a person accused of an offence at section 43(2)(b) must notify the prosecution, of the reasons they do not consider their conduct to have satisfied the condition at section 43(2)(b). The time period within which the accused should be required to serve such a notice is essentially an administrative and procedural matter for the High Court and as such is not considered appropriate to be included in primary legislation.

Choice of procedure

28. Rules made under this power are procedural and administrative. Detailed matters related to court procedure, such as the content of court forms relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure.
Section 45 – Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Generally negative resolution but affirmative resolution if modifying the text of an Act.

Provision

29. Section 45 of the Bill confers on Scottish Ministers a power to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill. Section 45(2) provides that the power extends to the modification of any enactment, instrument or document.

Reason for taking power

30. Any body of new law, particularly one such as contained in this Bill, which seeks to replace a significant part of the common law with statutory provision, may give rise to the need for a range of ancillary provisions. For example, whilst a number of consequential modifications have been identified prior to the introduction of the Bill, it may be that not all of the consequences have been identified and as such further changes may be required. The order making power is considered to be necessary by the Scottish Government to allow for this flexibility.

31. The Scottish Government considers that the power to make such provision should extend to the modification of enactments. Without the power to make incidental, supplementary and consequential provision, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament’s or the Scottish Government’s resources.

32. The power, whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it necessary or expedient to do so for the purposes of, or in consequence of, or for giving full effect to the Bill or any provision of it.

Choice of procedure

33. Section 47(3) provides that any order made under this section will be subject to affirmative resolution procedure if it adds to, replaces or omits any part of the text of an Act. Otherwise, it will be subject to negative resolution procedure. The Scottish Government considers that this provides the appropriate level of parliamentary scrutiny for the powers conferred.
Section 49(2) Commencement

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: None

Provision

Section 49 of the Bill provides that with the exception of sections 1(4), 13(3) and 45 to 47, the Scottish Ministers may by order bring the provisions of the Bill into force. As is the usual practice any such commencement orders will not be subject to parliamentary procedure.
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