This document relates to the Abusive Behaviour and Sexual Harm (Scotland) Bill (SP Bill 81) as introduced in the Scottish Parliament on 8 October 2015

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Abusive Behaviour and Sexual Harm (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions contained in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF BILL PROVISIONS

2. The Bill is in three parts. Part 1 (Abusive behaviour) includes provision for a new specific aggravator in relation to offences committed against partners and ex-partners, for a specific offence concerning the non-consensual sharing of private, intimate images (often called “revenge porn”) and makes provision to allow courts to make a non-harassment order in cases where the court is satisfied that a person did harass another person but a conviction does not take place due to the mental or physical condition of the person.

3. Part 2 (Sexual harm) makes provision to require juries in sexual offence cases to be given specific directions about how to consider the evidence, ensures that sexual offences against children committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland and reforms the system of civil orders available to protect communities from sexual harm.

4. Part 3 contains general and ancillary provision.

RATIONALE FOR SUBORDINATE LEGISLATION

5. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing or unforeseen circumstances quickly, in light of experience, without the need for primary legislation; and

- ensure the proper use of parliamentary time is made.
DELEGATED POWERS

Section 8 – Time Limit set by Act of Adjournal

Power conferred on: the High Court of Justiciary
Power exercisable by: act of adjournal
Parliamentary procedure: laid only

Provision

6. Section 8 inserts a new section 54A into the Sexual Offences (Scotland) Act 2009. Section 54(1) provides that if a person does an act elsewhere in the United Kingdom which would, if done in Scotland, constitute a listed offence then the person commits that listed offence. “Listed offences” are those listed in Part 2 of schedule 4 to the 2009 Act. However, section 54A(2) provides that person who is not a habitual resident of Scotland will only commit an offence if the act would also constitute an offence under the law in force in the country where the act took place.

7. Section 54A(4) makes provision to the effect that the condition specified in section 54A(2) is taken to be satisfied unless, not later than such time as the High Court may by Act of adjournal prescribe, the accused serves a notice on the prosecutor—
   
   • stating that on the facts as alleged with respect to the act in question, the condition is not in the accused’s opinion, satisfied;

   • setting the grounds for the accused’s opinion; and

   • requiring the prosecutor to prove that the condition is satisfied.

Reason for taking power

8. Section 54A(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 54A(1) must notify the prosecution, of the reasons they do not consider their conduct to have satisfied the condition at section 54A(2). 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

9. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. Acts of adjournal are not normally subject to Parliamentary procedure. In this instance the determination of time limits will be in order to ensure the smooth running of the courts and relate to court practice and procedure. As such this is a matter for the courts to regulate in accordance with the principle of the separation of powers.
Section 14(5)(a) – Time limit for serving notice

Power conferred on: the Court of Session  
Power exercisable by: act of sederunt  
Parliamentary procedure: laid only

Provision

10. Section 11 of the Bill permits the Chief Constable to apply for the sheriff to make a sexual harm prevention order (SHPO). A SHPO may only be made against a “qualifying offender”, and a “qualifying offender” is a person to whom section 12, 13 or 14 of the Bill applies. Section 14 applies to a person (the “respondent”) who has been convicted of an “equivalent offence”, has been cautioned in respect of an equivalent offence, has been found not guilty by reason of insanity in respect of an equivalent offence, or is under a disability but has done the act constituting the equivalent offence.

11. Section 14(3) defines an “equivalent offence” as an act which, at time it was done, constituted an offence under the law in force in a country outside the United Kingdom, and which is an act which, at the time it was done, would have constituted an offence listed in certain parts of the Sexual Offences Act 2003, if it had been done in any part of the United Kingdom. Section 14(5) sets out that the definition set out subsection (3) is taken to be satisfied unless a respondent serves a notice on the Chief Constable, not later than such time as rules of court may provide. The notice—

- states that on the facts as alleged with respect to the act in question, that the condition is not in the respondent’s opinion, satisfied;

- sets out the grounds for the respondent’s opinion; and

- requires the Chief Constable to prove that the condition is satisfied.

Reason for taking power

12. Section 11 applications are civil proceedings, (as evidenced by the appeal provisions set out in section 21(3)), and “rules of court” are defined in the Interpretation and Legislative Reform (Scotland) Act 2010 as including acts of sederunt. Accordingly the power in section 14(5)(a) is to be used to make an act of sederunt to set a time limit for the service of a notice under that section. The time period within which the respondent should be required to serve such a notice is essentially an administrative and procedural matter for the court and as such is not considered appropriate to be included in primary legislation.

Choice of procedure

13. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. Acts of sederunt are not normally subject to Parliamentary procedure. In this instance the determination of time limits will be in order to ensure the smooth running of the courts and relate to court practice and procedure. As such this is a matter for the courts to regulate in accordance with the principle of the separation of powers.
Section 40 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative if amends primary legislation, otherwise negative

Provision

14. Section 40(1) of the Bill enables the Scottish Ministers to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to, the Bill.

Reason for taking this power

15. This power is necessary to allow flexibility when commencing provisions in the Bill or that may arise in light of experience on the operation of the Act. The power is limited to the extent that it can only be used if Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill. Several of the Bill’s provisions are inserted into or interact with other processes or legislation. While the Scottish Government has given careful consideration to such interaction there may be unforeseen matters which require the assistance of this ancillary power in order to ensure the proper effect of the Bill is realised. That is particularly so given the technical nature of some of the provisions and, in particular, the complex and cross-jurisdictional landscape in which the system of civil orders for the prevention of sexual harm will operate.

Choice of procedure

16. Regulations made under this section which contain a provision which adds to, omits or replaces any part of an Act are subject to affirmative procedure. Otherwise, regulations made under this section are subject to negative procedure. This approach is normal for ancillary powers of this type.

Section 43 – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: laid only

Provision

17. Section 43 of the Bill enables the Scottish Ministers to make regulations appointing days on which the provisions in the Bill come into force (other than sections 40, 42 and 44, which come in to force on the day after Royal Assent). Regulations may include such transitional, transitory or saving provision.

Reason for taking this power

18. The power is necessary to enable Scottish Ministers to commence the provisions in the Bill appropriately by allowing them to take into account the existing law and provide for the transition to the system established by those provisions.
Choice of procedure

19. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. This is typical for commencement regulations. The nature of the laying requirement means that the Scottish Government anticipates the use of this power to effect straightforward and obvious transitional, transitory or saving provisions only. The Government would intend to make use of the powers in section 40, which benefit from a higher degree of scrutiny, in order to give effect to complex transitional, transitory or saving provisions.
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