

CRIMINAL JUSTICE (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Criminal Justice (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

3. The amended or new delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Section D1 — Provisions about possession of alcohol

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative procedure**

Provision

4. Provision Section D1 was inserted at Stage 2 and provides the Scottish Ministers with a new power to amend section 61 of the Crime and Punishment (Scotland) Act 1997. Section 61 of the 1997 Act relates to confiscation of alcohol from persons under 18. The new power in section D1 would allow the Scottish Ministers to confer powers on a constable to search a person under 18 for alcohol and to dispose of any alcohol found.
5. The use of the power is subject to the Scottish Ministers duty to consult being fulfilled. Section D1(2) provides that Scottish Ministers must publicly consult on the regulations prior to laying a draft of them before the Scottish Parliament.

6. The power is subject to a sunset clause under section E1(2), meaning that section D1 will be regarded as repealed if no regulations are made under section D1 within 2 years of the coming into effect of the first code of practice on stop and search.

Reason for taking this power

7. This new power is required in consequence of the abolition of “consensual stop and search” under section A1 of the Bill. It originates with a recommendation by the independent advisory group on stop and search, which was chaired by John Scott QC. The group identified a potential gap in the law, which means that while the police have powers to confiscate alcohol from children, they do not have a statutory power to search them for alcohol and have instead been relying on consensual searches as a means of doing so. The Advisory Group were not able to form a concluded view on whether such a power was necessary or desirable. The Group therefore recommended that the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under the age of 18 for alcohol.

8. It was considered appropriate to include an enabling power in the Bill to ensure that the power to search children for alcohol can be introduced by regulations. The potential need for a power to search for alcohol arises from the abolition of consensual stop and search and the introduction of a code of practice about the carrying out of searches. This regulation making power would only be used if it were to be confirmed, following a public consultation that the abolition of consensual stop and search, which is currently relied on, would mean that searches in such circumstances require to be able to continue, meaning that it would be it should be considered necessary and appropriate to create a bespoke new power. It is considered appropriate to allow for a new power of search to be introduced in secondary legislation, to ensure that, if it is required, the power to search for alcohol can be put in place at the same time as consensual stop and search is abolished, rather than leaving a gap in the law while waiting for the opportunity to make the change in primary legislation. The regulations will be subject to statutory consultation requirements and affirmative procedure. The sunset clause will ensure that the enabling power will only be used if the consultation demonstrates that it is necessary to do so following the abolition of consensual search.

Choice of procedure

9. Police powers to search children raise important considerations, not least because the exercise of those powers will involve interference with the rights of children who are searched. The Parliament has a strong interest in stop and search and the rights of children. It is therefore considered appropriate that regulations under section D1 should be subject to the level of scrutiny afforded by affirmative procedure. The Cabinet Secretary stated at Stage 2 that consideration would be given at Stage 3 as to whether an enhanced form of affirmative procedure would be appropriate here.

Section K1 — Bringing code of practice into effect

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

Provision

10. Section K1 provides the Scottish Ministers with a new power to appoint a day on which a code of practice about the carrying out of searches is to come into effect. A copy of the proposed code must be laid at the same time as the draft regulations and that code must have been subject to consultation under section J1 (consultation on code of practice). The first set of draft regulations under this power must be laid no later than 1 year after the Bill receives Royal Assent.

Reason for taking this power

11. This new power is required in consequence of recommendations made by the independent advisory group on stop and search, which was chaired by John Scott QC. The group made a number of recommendations including the creation of a Code of Practice on stop and search and that this Code of Practice should be the subject of public consultation.

12. The recommendations of the independent advisory group were published only a very short period before Stage 2 consideration of the Bill began. Due to the requirement for public consultation on the Code of Practice it was deemed appropriate that the Bill contain an enabling power to allow Scottish Ministers to implement the code only after it had been consulted on and the Scottish Parliament given an opportunity to consider its terms.

Choice of procedure

13. The Parliament has shown a keen interest in stop and search provisions, not least because the exercise of those powers will involve interference with the rights of those persons being searched. The provisions for introduction of the code are similar to models used elsewhere, (notably in section 24 of the Regulation of Investigatory Powers (Scotland) Act 2001 (asp 11) and section 67 of the Police and Criminal Evidence Act 1984 (c.60)). It gives Parliamentary control over the introduction of the code and also recognises that, while the code will have legal effect (in the sense that a court must have regard to it), it is unlikely to be drafted in the formal legislative language or format required of secondary legislation. It is therefore considered appropriate that the Parliament is able to exercise control over that code by choosing to affirm the regulations bringing the code into effect.

Section 53A — Further provision about application of Part 1

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative procedure**

Provision

14. Part 1 of the Bill deals with arrests, custody and questioning of suspects. It replaces most existing powers to arrest in respect of offences with a single power of arrest. It also sets out the procedures and consequences of arrest including information to be recorded by the police, the rights of people arrested and duties to take arrested people to a police station. These general provisions about arrest will apply to all arrests (not just those under the Bill or in relation to offences), with the exception of arrests under the Terrorism Act 2000 (“the 2000 Act”) and arrests for service offences.

15. Section 53A provides Scottish Ministers with a new power to make regulations to apply some or all of Part 1 of the Bill to arrests under the 2000 Act and service offences under the Armed Forces Act 2006 (“the 2006 Act”) and, conversely, to disapply some or all of the Part so that it does not operate in relation to people who have been arrested otherwise than in connection with an offence.

Reason for taking this power

16. The 2000 Act and the 2006 Act set out their own rules for people arrested under them and generally the Bill does not impinge on those rules. The 2000 Act for example sets different time periods for keeping people in custody. There may, however, be some aspects of Part 1 that it would be appropriate to apply if they are not already covered by the procedures in those other Acts. For example, for service offences under the 2006 Act, it may be desirable to ensure that provisions relating to access to a third party or information to be recorded at the time of arrest do apply for the short period that someone suspected of a service offence is in the custody of Police Scotland, before being transferred to the custody of the military police. The power in section 53A would allow this provision to be made in regulations. The power to apply the Bill provisions to arrests under the 2000 Act or to service offences under the 2006 Act is unlikely to be used to apply large parts of the Bill to such arrests. It would provide flexibility and future proofing. The Bill is intended to streamline and modernise the law on arresting and keeping people in custody. The exact nature of the provisions required under this power will depend on the extent to which people arrested under the 2000 Act or 2006 Act are dealt with by specific rules under those Acts and the extent to which they are dealt with under standard police procedures. Where the 2000 and 2006 Acts do not make separate provision then this regulation making power could be used to ensure that the modernised and streamlined police powers and procedures set out under the Bill could be applied to arrests under the 2000 Act and 2006 Act. It could, for example, be used to apply section 6 of the Bill in order to require the police to record information about arrests under the 2000 Act.

17. Section 53A would also allow Ministers to disapply some or all of Part 1 using secondary legislation for arrests that aren’t in relation to offences. There are many powers of arrest that do not relate to a person being suspected of committing an offence. For example, under the Adult

Support and Protection (Scotland) Act 2007 there are powers of arrest stemming from the ability of a court to grant a banning order against a ‘subject’ prohibiting them from doing a variety of things – including prohibiting them from being in a specific place.

18. There are other examples and it may not be appropriate in every case for Part 1 of the Bill to apply in its entirety. For example, courts can issue arrest warrants to apprehend witnesses who do not attend court. The purpose of such an arrest is to ensure the witness attends court. It would be appropriate for some information about the arrest to be recorded under section 6. But the person arrested may not need to be provided with the same information as a criminal suspect under section 3. Depending on the timing of the arrest, the police may also need to take the witness straight to court and the section 4 requirement to take them to a police station would not be helpful in these circumstances. The addition of this power will allow the interaction between this Bill and each individual piece of legislation to be specifically tailored as is most appropriate.

19. It is considered most appropriate to adapt the provisions of Part 1 using secondary legislation as that will allow the flexibility to make sure that each piece of amending legislation is accounted for and will also allow for future changes without the need for further primary legislation. The main purpose of Part 1 of the Bill is to deal with the system of arrest and custody of people who are suspected of offences. Modernising and clarifying the law on arrest requires consequential changes to be made in relation to non-offending arrests. But the appropriate place to do that is in separate regulations where they can be given the detailed scrutiny afforded by affirmative procedure. The need for changes in relation to non-offending arrests and arrests under the 2000 and 2006 Acts will arise in consequence of this Bill, which makes comprehensive changes to the statutory framework for arresting and holding people in custody. The enabling power will allow appropriate provision to be put in place before Part 1 of the Bill is brought into force.

Choice of procedure

20. Regulations under section 53A would modify the application of primary legislation dealing with the rights of people who are arrested or held in custody by the police. It is therefore considered appropriate for the power to be subject to affirmative procedure.

Section 82A — Duty to undertake a child and family impact assessment

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

Provision

21. Section 82A(5) provides that the Scottish Ministers may by regulations make provision requiring such persons as they may prescribe to undertake a child and family impact assessment in accordance with section 82A(2). Section 82A(2) requires a court to ensure that such an assessment is carried out in order to determine the likely impact of the imprisonment or other detention of a person with responsibility for a child, on the wellbeing of the child, and to identify any support and assistance which will be necessary to meet the child’s wellbeing needs.

Reason for taking this power

22. This power was inserted as part of a non-Government amendment at Stage 2. The amendment was put forward by Mary Fee, MSP and places a duty on the court to ensure that a child and family impact assessment is carried out for the purpose noted above. The intention behind section 82A is to determine the likely impact of parental imprisonment on any child and identify support and assistance for that child. The duty applies where a person who has responsibility for a child has been remanded in custody awaiting trial, has been found by a court to have committed an offence punishable with imprisonment and has been remanded in custody awaiting sentence, or has been sentenced to a term of imprisonment or other detention. The regulation-making power given to Ministers under section 82A(5) is to specify who should actually undertake the assessment which it is the court's duty to ensure is carried out and which takes forward the purpose of section 82A.

Choice of procedure

23. This regulation-making power is to allow Ministers to specify who should undertake child and family impact assessments as provided for in section 82A. As this would place a duty on particular organisations to resource and undertake such assessments, it is considered appropriate for the power to be subject to affirmative procedure so that an appropriate level of parliamentary scrutiny can be undertaken.

Section 86A: (new subsection 305(1A) of the 1995 Act) – Electronic proceedings

Power conferred on: the High Court of Justiciary
Power exercisable by: act of adjournal
Parliamentary procedure: laid, no procedure

Provision

24. Section 305 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that the High Court, through Acts of Adjournal, can regulate practice and procedure in relation to criminal procedure; and, in connection with that, can modify, amend or repeal any enactment in so far as that enactment relates to matters with respect to which an Act of Adjournal may be made.

25. Section 86A introduces a new subsection (1A) into section 305. The new subsection provides that the scope of section 305 includes the power to make provision for something to be done in electronic form or by electronic means.

Reason for taking this power

26. Criminal procedure, both in the 1995 Act and generally, requires the use of many different types of documentation, most of which are presently produced in paper form. These documents may require to be signed or otherwise authenticated, and may also require to be served on or delivered to other parties in the case.

27. This amendment allows the High Court, through Acts of Adjournal, to make such changes as it sees fit to criminal procedure to allow the greater use of electronic documents, signature, and service. The High Court is assisted in its use of Acts of Adjournal by the Criminal Court Rules Council, and it is better placed than the Scottish Ministers to assess and then make provision for when it is appropriate for a particular document, signature, or service requirement to take place electronically.

28. It would also be inappropriate and unnecessary to do this through primary legislation: it would be a poor use of the Parliament's time to deal with this level of administrative detail, particularly given the number of occasions on which legislative change would be required – the 1995 Act alone, for example, contains numerous instances where signature or another form of authorisation is required. Further, court rules allow the court the required flexibility to make modification to their practice and procedure rules in order to ensure their continued effectiveness, without requiring primary legislation in every instance.

Choice of procedure

29. Such administrative matters can appropriately be dealt with, in terms of section 305 of the 1995 Act (as amended by this provision), by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Schedule 3: (new schedule 2A to the Police and Fire Reform (Scotland) Act 2012) — Police Negotiating Board for Scotland

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative when using paragraph 4(6) only or affirmative procedure when using paragraph 4(6) combined with paragraphs 4B or 4C

Provision

30. Schedule 3 inserts a new schedule 2A into the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). Paragraph 4(6) of schedule 2A provides for the constitution of the Police Negotiating Board for Scotland (“PNBS”), or any revision of it, to be given effect by regulations. Paragraph 4B of schedule 2A provides that regulations under paragraph 4(6) may include provisions disapplying or modifying the mandatory rules in schedule 1 to the Arbitration (Scotland) Act 2010 in relation to arbitrations taking place in accordance with the PNBS constitution. Paragraph 4C of schedule 2A provides that regulations under paragraph 4(6) may include provisions specifying, by reference to particular matters or circumstances, what are qualifying cases for the purposes of new section 55CA of the 2012 Act (inserted by section 87 of the Bill). Section 55CA(1) requires the Scottish Ministers to take all reasonable steps as appear to them necessary to give effect to PNBS representations under section 55B(1) which are based on arbitration, but only in qualifying cases. Section 55B(1) representations would relate to police pay, allowances and expenses, public holidays and leave, and hours of duty.

Reason for taking this power

31. The role of PNBS is to consider and make representations to the Scottish Government on police matters, in particular on the pay and conditions of constables. The PNBS constitution will set out in detail how the PNBS will operate, including its membership, procedures and organisation. The constitution will be a document of an administrative nature and it will need to be changed from time to time to enable the PNBS to adapt and change its structures as necessary to fulfil its role: this makes it unsuitable for primary legislation. The Bill as introduced to the Parliament did not provide for any parliamentary scrutiny over the making of the constitution. Paragraph 4(6), inserted by way of a Stage 2 amendment, will provide an opportunity for the Scottish Parliament to scrutinise the constitution and any changes to it, enhancing the fairness and transparency of the constitution-making process.

32. The PNBS constitution will set out procedures for disputes within PNBS to be referred to an arbitration process which would be subject to the Arbitration (Scotland) Act 2010 (“the 2010 Act”). The mandatory arbitration rules in the 2010 Act are designed primarily for commercial arbitrations and some rules may be unsuitable for this statutory arbitration. For example the rules, which are set out in schedule 1 to the 2010 Act, refer throughout to “the parties”, “the referring party”, “the other party”, whereas in a PNBS arbitration there will be only one party (the PNBS) referring a matter of internal dispute to arbitration. Paragraph 4B enables the Scottish Ministers to disapply or modify the 2010 Act rules as appropriate for PNBS arbitrations. Paragraph 4B is in similar terms to the order-making power at section 17 of the 2010 Act (which is subject to affirmative procedure by virtue of section 33(3) of the 2010 Act).

33. The Scottish Government wishes in certain circumstances (“qualifying cases”) to be bound to give effect to section 55B(1) representations made by PNBS where those representations are based on an arbitration decision. The Scottish Government intends to consult further on the detail of what will be a qualifying case; it is envisaged that this will be limited to arbitration decisions on certain matters, for example the main police pay award, and only so many times a year. Paragraph 4C enables the Scottish Ministers to set out the qualifying cases in regulations and there will be corresponding provision in the PNBS constitution made under paragraph 4(6).

Choice of procedure

34. Section 87(2A) of the Bill amends section 125 of the 2012 Act in respect of the procedure which will apply to this regulation-making power. Accordingly, negative procedure will apply to regulations which only give effect to the PNBS constitution under paragraph 4(6); however, affirmative procedure will apply in relation to regulations which also make provision of the type referred to in paragraphs 4B or 4C. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to provisions disapplying or modifying primary legislation in the Arbitration (Scotland) Act 2010 or expanding on the application of section 55CA of the 2012 Act by setting out qualifying cases. In contrast the PNBS constitution is essentially a procedural and administrative document and scrutiny in accordance with negative procedure is appropriate.

*This document relates to the Criminal Justice (Scotland) Bill as amended at Stage 2
(SP Bill 35A)*

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