

# **CRIMINAL JUSTICE (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, in relation to the Criminal Justice (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions 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.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **Outline of Bill provisions**

3. The Bill seeks to support the aims set out in the Policy Memorandum by introducing reforms to modernise and enhance the efficiency of the Scottish criminal justice system. The provisions in the Bill take forward a range of the Scottish Government's key justice priorities. Some of these provisions have been developed from the recommendations of two independent reviews: Lord Carloway's review of criminal law and practice<sup>1</sup> and Sheriff Principal Bowen's review of sheriff and jury procedure<sup>2</sup>. The Scottish Government sought views on these recommendations in two separate consultations.<sup>3</sup> A further consultation was also carried out on whether additional safeguards may be required if the requirement for corroboration is removed.<sup>4</sup>
4. The Bill is in seven parts:
  - Part 1 (Arrest and Custody) includes provisions on the powers of the police to arrest, hold in custody and question a person who is suspected of committing an offence. This part also provides for the rights of such persons in custody and makes specific provision for vulnerable persons and children.
  - Part 2 (Corroboration and Statements) provides for the abolition of the corroboration rule in criminal proceedings as well as the admissibility of mixed and exculpatory statements.

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<sup>1</sup><http://www.scotland.gov.uk/Publications/2012/07/4794>

<sup>2</sup><http://www.scotland.gov.uk/Publications/2010/06/10093251/0>

<sup>3</sup><http://www.scotland.gov.uk/Publications/2012/07/4794>;  
<http://www.scotland.gov.uk/Publications/2012/12/8141/0>

<sup>4</sup><http://www.scotland.gov.uk/Publications/2012/12/4628>

- Part 3 (Solemn Procedure) makes a number of amendments to the solemn procedure set out in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) such as imposing a duty on parties in criminal proceedings to communicate, increasing the length of time for which an accused person can be remanded before having to be brought to trial from 110 to 140 days, and increasing the jury majority required for a guilty verdict.
- Part 4 (Sentencing) increases the maximum sentence for handling offensive weapons offences, places a specific duty on the court to consider whether it is appropriate to punish an offender for committing an offence while on early release, and increases the flexibility for different levels of court to consider imposing a punishment on such offenders.
- Part 5 (Appeals and SCCRC) amends the 1995 Act to make changes to appeal procedures in the High Court and adjusts how the Appeal Court will consider Scottish Criminal Case Review Commission referrals.
- Part 6 (Miscellaneous) creates a statutory aggravation of people trafficking which will apply in cases where an accused commits an offence connected with people trafficking. This part also makes provision to enable the use of TV links by courts and establishes and sets out the functions for a Police Negotiating Board for Scotland.
- Part 7 (Final Provisions) contains general and ancillary provisions.

### **Rationale for subordinate legislation**

5. The Bill contains a number of new delegated powers provisions which are explained in more detail below.

6. The delegated powers conferred by the Bill are either of a procedural or technical nature or relate to matters which, because of their nature, require a flexible procedure and thus it is felt appropriate that they be dealt with by subordinate legislation.

7. 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 providing flexibility to respond to changing circumstances with the benefit of experience, without the need for primary legislation;
- Anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation;
- Make proper use of valuable Parliamentary time;
- Ensure sufficient flexibility to respond to changing circumstances and to make changes; and

- Allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation.

## **Delegated Powers**

### **QUESTIONING A PERSON WHO HAS BEEN OFFICIALLY ACCUSED**

**Section 28(3)(a) – Power to prescribe the form to be used for an application to the court for permission to question a person officially accused of committing an offence.**

**Power conferred on:** The High Court of Justiciary  
**Power exercisable by:** Act of Adjournal  
**Parliamentary procedure:** Laid only

#### *Provision*

8. Generally, once a person has been officially accused of an offence (i.e. charged with it by a constable or accused of it in a complaint, petition or indictment) anything that the person may say to the police about the offence in response to questioning will be inadmissible as evidence. Section 27 will allow the police or prosecutor to apply to the appropriate court for authorisation to question a person about an offence after the person has been officially accused of committing it and anything the person says in response to questioning so authorised will be admissible evidence (unless the statement is inadmissible for a reason other than its having been made after the person was officially accused).

9. Section 28(3)(a) provides that the form to be used when making a written application under section 27 is to be in any form that may be prescribed by Act of Adjournal.

#### *Reason for taking this power*

10. Being able to specify the form for an application gives the courts a way of specifying what information they will require when considering a section 27 application and how they would like to see that information set out. It is typical for court forms to be prescribed by Act of Adjournal. It would be inappropriate to prescribe the form by primary legislation, not least because it would be a poor use of Parliament's time to deal with this level of administrative detail. In any case, the courts are better placed than the Parliament to decide what information will be required for the assessment of a section 27 application.

#### *Choice of procedure*

11. Acts of Adjournal are subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The contents and layout of court forms is not something that the Parliament needs to scrutinise closely.

12. Section 28(3)(a) provides that the form to be used the police are to use when making a written application under section 27 is to be any form that may be prescribed by Act of Adjournal.

## **VULNERABLE PERSONS**

**Section 34(1)(a) and (b) and section 34(2) – Power to make further provision, by regulation, in relation to who is to be considered a vulnerable person; the type of support they are to receive; who may provide that support; and what training, qualifications or experience are required.**

<b>Power conferred on:</b>	<b>The Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Regulation</b>
<b>Parliamentary procedure:</b>	<b>Affirmative procedure</b>

### *Provision*

13. Section 33 of the Bill provides that where a constable (who may be advised by a police custody and security officer) assesses a person in police custody, who is age 18 or over, as vulnerable due to a mental disorder, they must notify an Appropriate Adult (AA) (though this term is not used in the Bill it is commonly understood in practice) that the vulnerable person requires assistance, as soon as reasonably practicable, to understand what is going on and to facilitate effective communication between them and the police.

14. Paragraphs (a) and (b) of section 34(1) give the Scottish Ministers powers to amend by regulation: the category of person to be considered vulnerable who will require support to assist them to communicate effectively with the police; and the type of support that is to be provided (as set out in section 33(1)(c) and (3)). These powers would involve a change to primary legislation.

15. Subsection (2) allows the Scottish Ministers to specify by regulation who may be considered a suitable person to provide the support detailed in section 33(3) and what training, qualifications or experience is necessary to undertake this support role.

### *Reason for taking this power*

16. There is no immediate intention to use the powers described above in relation to section 34(1)(a) and (b), which are designed to allow for the identification of new conditions which mean that a person requires assistance to facilitate effective communication, or the identification of other appropriate support measures for vulnerable persons. However, these powers will provide the flexibility to allow the Scottish Ministers to do so if it is found to be necessary in the future, without enacting primary legislation.

17. In relation to section 34(2), the Scottish Government does not intend the legislation to interfere with the role of an AA and expect that the police will continue to be able to request AA support for vulnerable persons and children aged 16 and 17 years, and also for victims, and witnesses aged 16 and over, through the current non-statutory route. There is therefore no immediate intention to prescribe who may be an AA or what training, qualifications or experience they should have. However, this power will provide the flexibility to allow the Scottish Ministers to

do so, if it is found to be necessary in the future to address any failings or gaps in service provision, without enacting primary legislation.

*Choice of procedure*

18. These powers are subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation

**SOLEMN PROCEDURE**

**Section 66 (new section 71C(6) of the 1995 Act) – Power to prescribe the form, content and manner of lodging of the written record of the compulsory business meeting, to be set out in an Act of Adjournal.**

**Power conferred on: The High Court of Justiciary**

**Power exercisable by: Act of Adjournal**

**Parliamentary procedure: Laid only**

*Provision*

19. The Bill establishes a requirement on the prosecution and defence to communicate before the first diet and to jointly prepare a written record of their state of preparation. A written record of this meeting must be prepared and lodged with the court prior to the first diet so that the sheriff may have regard to it. The new section 71C(6) gives a power to prescribe by Act of Adjournal (a) the form of the written record; (b) its content; and (c) the manner of its lodging.

*Reason for taking this power*

20. A prescribed set of requirements for the written record will be of assistance in providing guidance to the prosecution and defence agents who have to work together to prepare them, and to the sheriffs who will be using them to establish the efforts parties have made to achieve a proper state of preparedness. There are thousands of sheriff and jury trials every year; it would be very undesirable for the written record to take excessively diverse forms – though the provision does allow a degree of flexibility.

*Choice of procedure*

21. Detailed matters relating to court procedure 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 1995 Act, which makes provision about Acts of Adjournal generally). The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

**Section 67 (new section 83B(1)(a) of the 1995 Act) – Power to provide that the form of the minute continuing a trial diet or adjourned diet from sitting day to sitting day is to be set out in an Act of Adjournal**

**Power conferred on:** The High Court of Justiciary  
**Power exercisable by:** Act of Adjournal  
**Parliamentary procedure:** Laid only

*Provision*

22. The new section 83B(1) provides that a trial diet or, if it is adjourned, the adjourned diet, may be continued from sitting day to sitting day without it actually having been commenced. Under the new section 83B(1)(a) it may be continued in such a way by means of a minute to be signed by the sheriff clerk: the form of the minute may be prescribed by Act of Adjournal. The new section 83B(1)(b) provides that it may be thus continued up to a maximum number of sitting days as the minute may have prescribed.

*Reason for taking this power*

23. The new section 83B(1) allows for administrative efficiency in arranging when a diet may be held. To allow this administrative efficiency there must be a recognised form of minute by which diets may be continued. The power allows this recognised form of minute to be prescribed.

*Choice of procedure*

24. Detailed matters relating to court procedure 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 1995 Act, which makes provision about Acts of Adjournal generally). The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

**AGGRAVATION BY PEOPLE TRAFFICKING**

**Section 85 Meaning of expressions used – Power to modify subsections (1) to (3) of that section, to modify the meaning of the expressions “people trafficking offence”, the “public official” and “international organisation”.**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulation  
**Parliamentary procedure:** Negative procedure

*Provision*

25. Section 83 of the Bill makes provision about a statutory aggravation which applies in cases where an accused commits an offence connected with people trafficking and sets out the circumstances in which an offence can be regarded to have been aggravated by a connection with people trafficking. Section 84 makes similar provision about a statutory aggravation which applies in cases where a public official, acting or purporting to act in the course of his duties commits a people trafficking offence. Section 85 defines the terms “people trafficking offences”, “public

official” and “international organisation” for the purposes of sections 83 and 84, and enables Scottish ministers to modify the meaning of these expressions.

*Reason for taking this power*

26. The power is intended to ensure that the statutory aggravation by people trafficking can be taken into account in respect of any new people trafficking offences created by other legislation, or if the current people trafficking offences are modified. The power also allows for the definition of “public official” and “international organisation” to be modified if it is considered appropriate to do so, for example, in light of experience of the statutory aggravation operating in the courts.

*Choice of procedure*

27. It is anticipated that any changes to these sections would in general be a consequence of changes in other legislation and the negative procedure would be appropriate.

**ANCILLARY**

**Section 88 – Power to make ancillary regulations**

**Power conferred on:**            **The Scottish Ministers**  
**Power exercisable by:**       **Regulation**  
**Parliamentary procedure:** **Affirmative if amends primary legislation, otherwise negative**

*Provision*

28. Section 88(1) of the Bill enables the Scottish Ministers to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, any provision made by or under the Bill.

*Reason for taking this power*

29. This power is necessary to allow flexibility as provisions in the Bill are brought into force. The power is limited to the extent that it can only be used if Scottish Ministers consider it necessary or expedient in connection with the coming into force of any provision of the Bill.

*Choice of procedure*

30. 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 90 – Commencement**

<b>Power conferred on:</b>	<b>The Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Order</b>
<b>Parliamentary procedure:</b>	<b>Laid only</b>

### *Provision*

31. Section 90(2) enables the Scottish Ministers to appoint days on which the provisions in the Bill come into force (other than sections contained in Part 7 of the Bill which come in to force on the day after Royal Assent). An order may include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with the coming into force of the provisions.

### *Reason for taking power*

32. The power is necessary to enable Scottish Ministers to appropriately commence the provisions in the Bill.

### *Choice of procedure*

33. 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 orders.

*This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the  
Scottish Parliament on 20 June 2013*

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