CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Criminal Justice and Licensing (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or substantially amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

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

Section 14 (new section 227B(2A) of the 1995 Act) – Power to prescribe by Act of Adjournal the nature and format of information, to be provided in a report to the court by the local authority before imposition of a community payback order

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

Provision

2. Section 227B sets out the general procedures which a court requires to apply before imposing a community payback order (CPO). At introduction there was a power for the information to be contained in a report from a local authority officer to be specified by Act of Adjournal. Amendments at Stage 2 added the power to prescribe the format of such a report by Act of Adjournal. These powers have been set out in a new subsection (2A). A new subsection (2B) now provides that subsection (2) (requirement for the court to obtain and consider a report from the local authority) does not apply where the court is considering imposing a CPO which contains only a level 1 unpaid work and other activity requirement or which is imposed under section 227M(2) (for fine default). Subsection (2B) is inserted to reduce the burden on local authority social work departments by limiting the types of cases in which reports must be provided.
This document relates to the Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2 (SP Bill 24B)

Reason for taking this power

3. Section 227B(2) precludes a court from imposing a community payback order without first obtaining a report from the relevant local authority unless the circumstances in subsection (2B) apply. Setting out the form of the report and the details of the information to be included in it is essentially an administrative matter and would not normally be the subject of primary legislation. We therefore consider it appropriate that the High Court of Justiciary should be able to prescribe it if required.

Choice of procedure

4. Detailed matters relating to court procedure, such as the content of reports to assist with sentencing decisions, 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 about Acts of Adjournal generally).

Section 14 (new section 227FA(1) of the 1995 Act) - Power to make an order for the payment to offenders of travelling or other expenses in connection with compliance with requirements imposed by community payback orders

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

Provision

5. Section 227FA gives the Scottish Ministers the power to make provision for the payment to offenders of travelling or other expenses in connection with undertaking any of the requirements of a community payback order. This is a new section but the power is pre-existing from the Bill as introduced where it was included at section 227O(2)(c) in a slightly different form. Subsection (1) specifies that Scottish Ministers may provide for such payment by order made by statutory instrument. Subsection (2) provides that an order made under subsection (1) may specify such expenses or provide for them to be determined under the order; to provide for the payments to be made by or on behalf of local authorities and make different provision for different purposes. Subsection (3) specifies that the negative resolution procedure should be followed.

Reason for taking this power

6. These provisions continue the existing power under the 1995 Act (section 245) for ministers to regulate work under community service orders including by making provision for the payment of travelling and other expenses. These are essentially administrative matters and would not normally be the subject of primary legislation.

Choice of procedure

7. The negative resolution procedure is specified in section 245 of the 1995 Act. It is the appropriate level of parliamentary scrutiny in light of the limited nature of the enabling power.
Section 14 (new section 227I(6) of the 1995 Act) – Power to make an order varying the minimum and maximum hours of unpaid work or other activity requirement

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

**Provision**

8. Section 227I sets out the provisions the court must apply when imposing a CPO with an unpaid work and other activity requirement. The power in subsection (6) is pre-existing from the Bill as introduced. The Subordinate Legislation Committee raised a concern about the power as originally drafted, which enabled Scottish Ministers to vary by order the minimum and maximum number of hours of unpaid work and other activity which could be specified in a requirement in a CPO. The Committee recommended that the power should be expressed as a power to vary within defined maximum and minimum limits. New subsection (6A) provides the minimum and maximum number of hours which may be substituted by an order made under subsection (6) for the hours specified in subsections (3) to (5).

**Reason for taking this power**

9. Subsection (3) sets out the minimum and maximum hours that may constitute an unpaid work or other activity requirement, subsection (4) provides a definition of a level 1 unpaid work and other activity requirement and subsection (5) a definition of a level 2 unpaid work and other activity requirement. Subsection (6) provides for Scottish Ministers to vary the number of hours stated in subsections (3), (4) and (5) without recourse to primary legislation. An order-making power is considered more appropriate to make such changes and can be brought forward in shorter timescales than primary legislation. Subsection (6A) sets minimum and maximum hours which may be substituted by order for those already specified.

**Choice of procedure**

10. We consider negative resolution procedure is sufficient for the purpose of varying the number of hours. It is a matter of detail that is unlikely to require to be debated, but use of negative procedure still affords Parliament the opportunity to debate any variation.

Section 14 (new section 227K(3) of the 1995 Act) – Power to vary the limits of the current balance of other activity within the unpaid work or other activity requirement

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

**Provision**

11. Section 227K(1) provides for the split between unpaid work and other activity to be determined by the responsible officer subject to limits set out in subsection (2) on the maximum number of hours of other activity that can count towards the requirement. In response to concerns from the Subordinate Legislation Committee the pre-existing power in subsection (3) has been amended at stage 2 to narrow the scope of the power to allow the Scottish Ministers to
vary the limits specified in subsection (2), rather than a broad power to amend subsection (2). Again in response to concerns from the Committee subsection (4) now requires any such order made to follow the affirmative resolution procedure.

Reason for taking this power

12. Scottish Ministers may wish at some future date to vary in the light of experience the current balance within subsection (2) between unpaid work and other activity. Subsections (3)(a) and (b) enable the percentage of hours or number of hours to be amended.

Choice of procedure

13. Varying the existing balance between the unpaid work and other activities components of the requirement may alter the perceived balance between punishment and rehabilitation as aims of the community payback order. Any such change is likely to require debate and use of the affirmative procedure will enable an appropriate level of parliamentary scrutiny.

Section 14 (new section 227O(1) of the 1995 Act) – Power to make rules about the performance of unpaid work and other activity requirements in relation to a daily maximum number of hours, calculations of time undertaken and record keeping

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

Provision

14. New section 227O(1) of the 1995 Act gives the Scottish Ministers the power to make rules about the performance of unpaid work and other activity requirements in relation to a daily maximum number of hours, calculations of time undertaken and record keeping. This is a pre-existing power from the Bill as introduced. The provisions relating to payment to offenders of travelling or other expenses in connection with undertaking any of the requirements of a community payback order, which were in 227O(2)(c) in the Bill as introduced, have been moved to new section 227FA. A new subsection (2A) has been inserted which provides that rules under subsection (1) may confer functions on responsible officers and includes rules on how such officers are to exercise functions under the 1995 Act.

Reason for taking this power

15. These are essentially administrative matters and would not normally be the subject of 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.
Section 14 (new section 227Z(2A) of the 1995 Act) – Power to prescribe the nature and format of information to be provided by a responsible officer in a report to the court before variation of a community payback order

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

Provision

17. Section 227Z sets out the general procedures which a court requires to apply before varying a community payback order (CPO). At introduction there was a power for the information to be contained in a report from a local authority officer to be specified by Act of Adjournal. Amendments at Stage 2 added the power to prescribe the format of such a report by Act of Adjournal. These powers have been set out in a new subsection (2A). A new subsection (2B) provides that subsection (2) (requirement for the court to obtain and consider a report from the local authority) does not apply where the court is considering imposing a CPO which contains only a level 1 unpaid work and other activity requirement or which is imposed under section 227M(2) (for fine default). Subsection (2B) is inserted to reduce the burden on local authority social work departments by limiting the types of cases in which reports must be provided.

Reason for taking this power

18. Section 227Z(2) provides that where the court is considering varying a community payback order, the court must not make the variation unless it has obtained and taken account of a report from the responsible officer unless the circumstances in subsection (2B) apply. Setting out the form of the report and details of the information to be included in it is essentially an administrative matter and would not normally be the subject of primary legislation. We therefore consider it appropriate that the High Court of Justiciary should be able to prescribe it if required.

Choice of procedure

19. Detailed matters relating to court procedure, such as the content of reports to assist with decisions on variation of orders, relate to 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 about Acts of Adjournal generally).
Section 14 (new section 227ZD(6) of the 1995 Act) – Power to make regulations to specify the maximum number of hours for which an offender can be required to be at any place in any one day, and to specify the maximum duration of a restricted movement requirement

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision
20. New section 227ZD of the 1995 Act makes provision about restricted movement requirements that can be imposed by a community payback order. Section 227ZD(3) specifies the maximum number of hours for which an offender can be required by a restricted movement requirement to be at any place in any one day. It sets the maximum to be 12 hours. Section 227ZD(6)(a) permits the making of regulations to specify a different maximum. This power was included in the Bill as introduced. Section 227ZD4A(b) specifies the maximum duration of a restricted movement requirement to be 12 months. Section 227ZD6(b) permits the making of regulations to specify a different maximum. In its Stage 1 report, the Subordinate Legislation Committee noted that section 227ZB(9)(b) of the Bill as introduced also specified a maximum duration for a restricted movement requirement, and that 227ZB(12) would have permitted the Scottish Ministers to substitute the number of months specified in subsection (9)(b) with another number of months. The Committee noted its concern that these two figures could be varied without maintaining parity and we agreed with these concerns in our response to the Committee. Sections 227ZB(9)(b) and 227ZB(12) have been removed from the Bill at Stage 2.

Reason for taking this power
21. The Scottish Ministers may at some future date wish in the light of experience to vary the maximum period of time for which an offender may be required to remain in one place in any one day, or to vary the maximum duration of a restricted movement requirement. These are matters of detail that would not be appropriate for primary legislation.

Choice of procedure
22. The Scottish Parliament may wish to debate any changes to the limits specified in sections 227ZD(3) and 227ZD4A(b) and the affirmative resolution procedure would provide the opportunity for it to do so.

Section 24A(1) – Power to modify any enactment for the purposes of implementing UK obligations arising from the EU Council Framework Decision 2008/947/JHA on the mutual recognition of judgements and probation decisions

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

Provision
23. Section 24A provides an order making power for the Scottish Ministers to make provision for the purposes of implementing the Council Framework Decision 2008/947/JHA on
the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The Framework Decision makes provision for offenders subject to supervision in the community as part of a community sentence or following release on license from custody to return to their home country and to be supervised in that country. Subsection (2) provides that such an order may confer functions on Scottish Ministers or other persons. Subsection (3) provides that such an order may modify any enactment.

Reason for taking this power

24. In order to implement the Framework Decision amendments will be required to existing legislation. The complexity in devising a scheme, identifying the legislation which requires amendment and consulting fully with partner agencies means that it has not been possible to include the amendments to existing legislation in the Bill. Section 24A will enable Scottish Ministers to implement the UK’s obligations under the Framework Decision as they affect Scotland. The deadline for implementation of the Framework Decision is 6th December 2011.

Choice of procedure

25. Exercise of the order making power will involve modifications to primary legislation and so a high level of parliamentary scrutiny is required. For this reason the affirmative resolution procedure is considered most appropriate.

Section 52A(2) – Power to make further provision in Scotland implementing UK obligations arising from the EU Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

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

Provision

26. It is intended that the Framework Decision will be implemented by the amendments made to the Bill at Stage 2, in sections 41, 52 and 52A and schedule 2A. These amendments change a number of statutes (and references to previous convictions in the Bill itself) to ensure that Scottish courts will be able to consider previous convictions in other EU countries on the same basis as they would consider Scottish previous convictions throughout the criminal proceedings: at the pre-trial stage, at the trial and at the time of sentencing. Section 52A(2) provides an Order-making power which will enable the Scottish Ministers to make any further amendments to legislation which are required to fully implement the Framework Decision. The power is limited to the extent that it can only be used to implement provisions which are necessary to comply with the Framework Decision. Subsection (3) provides that such an order may confer functions on the Scottish Ministers or other persons. Subsection (4) provides that an order made under the provision may modify any enactment.
This document relates to the Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2 (SP Bill 24B)

Reason for taking power

27. Although the amendments made to the Bill at Stage 2 are intended to achieve implementation of the Framework Decision, it is thought possible that not every Act of Parliament that makes a relevant reference to a previous conviction or other related term has been identified. If other Acts are identified that need to be updated to conform with the Framework Decision, this power will permit the change to be made by Order, rather than by primary legislation.

Reason for choice of procedure

28. Section 143(4) provides that any order made under this section will be subject to affirmative resolution procedure. As any order may include modifications to primary legislation, we consider that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

Section 67A(1) – Power to make provision in Scotland implementing UK obligations arising from the EU Council Framework Decision 2008/978/JHA on the European evidence warrant

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

Provision

29. Section 67A of the Bill was inserted by amendment at stage 2, and makes provision in relation to the implementation of the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

30. The power in section 67A(1) will enable Scottish Ministers to make provision by affirmative order to give effect to the Framework Decision. The power will permit Scottish Ministers to confer functions on themselves, the Lord Advocate and on other persons and therefore includes provision for the conferral of functions. The Order made under the provision may modify any enactment. As part of the enforcement regime for the Framework Decision, the power will permit the creation of new offences and penalties. Adoption of the EEW will allow Member States to obtain:

- objects, documents and data (including from a third party), from a search of premises including the private premises of the suspect; and
- historical data on the use of any services including financial transactions, historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques,

for the purpose of sharing them between Member States for use in proceedings in criminal matters.
Reason for taking power

31. Implementation of the Framework Decision is required by 19 January 2011. Implementing the Framework Decision by Order will permit further time to consult with key stakeholders on the detail of the provisions for implementing the Framework Decision in Scotland. It will also allow the Scottish Government to bring forward provisions in discussion with the UK Home Office, which has yet to take steps to implement the Decision in the rest of the UK. An additional point is that there are currently two EU initiatives under discussion that may lead to this Framework Decision being revised and possibly replaced. The likelihood of this is not clear, but implementation by Order will allow the Scottish Government to respond to these EU developments as and when they occur.

Reason for choice of procedure

32. As the power is fairly broad in nature, the affirmative procedure is considered to be appropriate. In other cases where powers have been taken to implement European Framework Decisions by Order (e.g. section 56 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, which allowed Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties to be implemented by Order) that Order has been subject to the affirmative procedure.

Section 74A(2) (new section 85(5) of the 2003 Act) - Power to make regulations specifying frequency with which a person subject to the sex offender notification requirements who has no sole or main residence in the UK must notify the police of the required information

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary Procedure: Affirmative resolution of the Scottish Parliament

Provision

33. Section 74A was introduced into the Bill by way of a Scottish Government amendment at Stage 2. Section 74A (1) and (2) amend section 85 (1), and (3) and inserts new subsections (5) and (6) into section 85 of the Sexual Offences Act 2003 (“the 2003 Act”). New subsections (5) and (6) allows the Scottish Ministers to make regulations prescribing the frequency of the periodic notification requirement provided for under section 85 in relation to those sex offenders who do not have a sole or main residence, but who are nevertheless in the UK. The prescribed frequency under the regulations shall not exceed one year. Currently under section 85, all sex offenders subject to the notification requirements are required to notify the police annually of the information specified in section 83.

Reason for taking this power

34. It is felt appropriate to provide the Scottish Ministers with the power to provide for more frequent notification under section 85 of the 2003 Act in relation to homeless sex offenders who may otherwise be able to abscond more easily, as they only need notify the police of an address or location where they can be found regularly. It is also intended to prevent exploitation of the provisions by those offenders with a main or sole residence who nevertheless attempt to notify as homeless in an attempt to evade the police.
35. The frequency of reporting is to be set out in regulations rather than fixed on the face of the Bill because this provides the Scottish Ministers with more flexibility to vary the intervals in the future. The need to alter the frequency of the prescribed periods will be largely shaped by operational experience and what is considered necessary to protect the public. It is therefore important that any changes can be made at the earliest opportunity. Taking a regulation making power will enable the Scottish Ministers to take such action.

Choice of procedure

36. We take the view that the affirmative resolution procedure will provide the appropriate level of Parliamentary scrutiny in line with the regulation making powers provided in section 138(2) of the 2003 Act, given that the use of this power will impose a more frequent reporting requirement on certain types of sex offender and that failure to comply with this requirement will be a criminal offence.

Section 74A(3) and (6) (section 138 of 2003 Act) – Power to make ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order or regulations by statutory instrument

Provision

37. Section 74A (3) and (6) was introduced into the Bill by way of a Scottish Government amendment at Stage 2. Section 74A (3)-(6) amends section 138 of the Sexual Offences Act 2003 (“the 2003 Act”). The amendment does not provide Scottish Ministers with any additional subordinate legislation powers but modifies the scope of the subordinate legislation powers which the Ministers can exercise under Part 2 of the 2003 Act.

38. The amendment provides that any order or regulations made under sections 83, 84, 85, 86, 87, 96 or 130 of the 2003 Act can make supplementary, incidental, consequential, transitional, transitory or saving provisions. The amendment amends section 138 of the 2003 Act to make it clear that all such orders or regulations can also make different provision for different purposes. The 2003 Act already has such provision in relation to the regulation making powers under sections 86(4), 87(6) and 96(4) but the amendment ensures that this power is neatly contained in one section (section 138), as opposed to being repeated in different sections throughout Part 2 of the 2003 Act. As a consequence, section 74A(3) to (5) repeal sections 86(4), 87(6) and 96(4) of the 2003 Act.

Reason for taking this power

39. The amendment to section 138 of the 2003 Act will allow the Scottish Ministers to make any subordinate legislation under Part 2 of the 2003 Act and ensures that there is the power to make any supplemental, incidental, consequential, transitional, transitory or savings provisions any regulations or orders.
40. Section 138 of the 2003 Act does not expressly provide that any subordinate legislation made under Part 2 of the 2003 Act can make supplemental, incidental, consequential, transitional, transitory or savings provision and different provision for different purposes (the regulation making powers under sections 86, 87 and 96 do enable different provision to be made for different purposes). There are numerous precedents for enabling subordinate legislation to make such general provision such as section 103 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, section 59 of the Sexual Offences (Scotland) Act 2009 and section 165 of Marine (Scotland) Act 2010 in case this is deemed to be necessary in the future.

41. There are significant changes made by the Bill to the 2003 Act and it is possible that not all of the consequences of them have been identified. Furthermore, the future exercise of the other subordinate legislative powers in Part 2 of the 2003 Act could also require supplemental, incidental, consequential, transitional, transitory or savings provision to be made to address a matter that may not have been identified or anticipated. This provision allows flexibility if further changes are found to be necessary.

Choice of procedure

42. Section 138 of the 2003 Act provides that any orders or regulations made under sections 83, 84, 85, 86, or 130 of that Act will be subject to the affirmative resolution procedure. Therefore, if any supplementary, incidental, consequential, transitional, transitory or savings provision is necessary to include under those regulations, such provision will also be subject to affirmative procedure. Section 138 of the 2003 Act provides that any regulations made under section 87 or 96 of that Act will be subject to negative resolution procedure. Therefore, if supplementary, incidental, consequential, transitional, transitory or savings provision is necessary to include under those regulations, such provision will also be subject to affirmative procedure.

43. As noted above, the amendment does not adopt any new procedure. It plugs into the existing Parliamentary procedures which certain regulation making powers are already subject to and which Parliament have already considered provides the most appropriate level of scrutiny for the regulation making powers conferred.

Section 79A(3) (new section 9B(6) of the 1974 Act) – Power to make provision to except the disclosure of information on alternatives to prosecution which originates from an official record, in particular cases or classes of disclosure, from the offence of unauthorised disclosure

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

Provision

44. Section 79A of the Bill inserts a new section 9B into the Rehabilitation of Offenders Act 1974. Subsection (3) makes it an offence where a person who, in the course of their official duties, has custody or access to any official record or information contained in an official record which imputes that a named or otherwise identifiable living person has committed, been charged with, prosecuted for, or given an alternative to prosecution (ATP) in respect of an offence which
has been the subject of an ATP which is now spent if, knowing or having reasonable cause to suspect that the information is ATP information, they disclose it, otherwise in the course of their duties, to another person. New section 9B(6) provides that the Scottish Ministers may by order provide for the disclosure of ATP information derived from an official record to be excepted from subsection (3) in such cases or classes of cases which are specified in the order.

Reason for taking power
45. To replicate the existing order making power the Scottish Ministers have under section 9(5) of the Rehabilitation of Offenders Act 1974 for the unauthorised disclosure of spent convictions. This power provides the Scottish Ministers with flexibility to determine what relevant information can be disclosed from an official record.

Reason for choice of procedure
46. It is recognised that the creation of any exception to this offence under the Rehabilitation of Offenders Act 1974 merits full consideration and approval by the Scottish Parliament. Therefore, an order made under this section would be subject to affirmative procedure. The existing order making power in section 9(5) of the 1974 Act is also subject to the affirmative procedure by virtue of section 10 of that Act.

Section 79A(4) (Paragraph 6(a) of the new Schedule 3 to the 1974 Act) – Power to exclude or modify the provisions which concern a person being asked for information in relation to alternatives to prosecution in proceedings before a judicial authority

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

Provision
47. Section 79A(4) of the Bill inserts a new Schedule 3 into the Rehabilitation of Offenders Act 1974. Paragraph 3(1) of the new Schedule 3 to the 1974 Act provides that where a person receives an alternative to prosecution (ATP) which becomes spent, that person is be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an ATP in relation to that offence. Paragraph 6(a) of the new Schedule 3 to the 1974 Act provides that the Scottish Ministers may by order exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) of this Schedule in relation to questions put in such circumstances as may be specified in the order. Therefore, the Scottish Ministers will have the power to exclude or modify the application of the provisions which concern a person being asked for information in relation to alternatives to prosecution in proceedings before a judicial authority. However, paragraphs (a) to (c) of paragraph 3(2) were referred to in error and the intention is to provide an order making power in relation to paragraphs 4(2) and (3) of the new Schedule 3 to the 1974 Act. We intend to lodge an amendment to this provision at Stage 3 to correct this error. If this order making power is amended at Stage 3 it will mirror the order making power in section 4(4)(a) of the 1974 Act. Orders made under that provision have specified various offices and types of employment where the employer can ask questions about spent convictions.
Reason for taking power

48. The Scottish Ministers already have order making powers under provisions in the Rehabilitation of Offenders Act 1974 to make exceptions to the application of the general rule which is set out in section 4(1) of the 1974 Act that a person should be treated for all purposes in law as a person who has not been given a previous conviction once it becomes spent. We wish to mirror the order making powers currently contained in the 1974 Act provisions to apply them to ATP’s.

Reason for choice of procedure

49. It is recognised that the creation of an exception to the general rule that a person should be treated as if they have not been given an ATP once it has become spent merits full consideration and approval by the Scottish Parliament. Therefore, an order made under this section would be subject to affirmative procedure.

Section 79A(4) (Paragraph 6(b) of the new Schedule 3 to the 1974 Act) – Power to provide for exceptions in cases/classes of cases/particular types of alternatives to prosecution to the protection afforded under section 79A in respect of spent alternatives to prosecution

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Provision

50. Section 79A of the Bill inserts a new Schedule 3 into the Rehabilitation of Offenders Act 1974. Paragraph 6(b) of the new Schedule 3 to the 1974 Act provides that the Scottish Ministers may by order provide for exceptions from any of the provisions of paragraphs 4 and 5 of this Schedule in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order. Therefore, the Scottish Ministers will have the power to provide for exceptions to the general "rule" in paragraph 4 that a person who is asked particular questions, other than in judicial proceedings, can treat the question as not relating to ATP’s which have become spent and that person cannot be subjected to any liability or be prejudiced in law due to their failure to acknowledge or disclose this information. However, paragraph 4 of the new Schedule 3 was referred to in error in this provision and the intention is to provide an order making power solely in relation to paragraph 5 of the new Schedule 3 to the 1974 Act. We intend to lodge an amendment to this provision at Stage 3 to correct this error.

51. Similarly, the Scottish Ministers will have the power to provide for exceptions to the provision in paragraph 5 of the new Schedule 3 to the 1974 Act that any obligation imposed by a rule of law or provisions in an agreement/arrangement to disclose information does not extend to alternatives to prosecution and ancillary circumstances and that a person cannot be dismissed/excluded from any office, profession, occupation or employment, or be prejudiced in any way in any occupation or employment, as a result of their failure to disclose this information.
Reason for taking power

52. The Scottish Ministers already have a similar power under section 4(4)(b) of the Rehabilitation of Offenders Act 1974 in relation to a person’s previous convictions. The power sought under this provision replicates this existing power, but for spent alternatives to prosecution, and also makes reference to paragraph 4 of the new Schedule 3 to the 1974 Act. This provision is also included to correspond with the relevant provisions contained in the Criminal Justice and Immigration Act 2008 for England and Wales (in paragraph 6 of Schedule 10 to the 2008 Act, which inserts paragraph 4(b) of Schedule 2 into the 1974 Act).

Reason for choice of procedure

53. It is recognised that any creation of an exception to the general rule that a person should be treated as if they have not been given an ATP once it has become spent merits full consideration and approval by the Scottish Parliament. Therefore, an order made under this section would be subject to affirmative procedure. The existing order making power in section 4(4)(b) of the 1974 Act is also subject to the affirmative procedure by virtue of section 10 of that Act.

Section 79A(4) (Paragraph 8(1) of the new Schedule 3 to the 1974 Act) – Power to exclude the application of paragraph 3 of the new Schedule 3 to the 1974 Act in relation to any proceedings before a judicial authority specified in the order to such an extent and for such purposes as may be so specified

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Provision

54. Section 79A of the Bill inserts a new Schedule 3 into the Rehabilitation of Offenders Act 1974. Section 7(4) of the 1974 Act allows the Scottish Ministers by order to exclude the application of section 4(1) of the 1974 Act. Paragraph 8(1) of the new Schedule 3 to the 1974 Act applies section 7(4) of the 1974 Act in relation to alternatives to prosecution (ATP) by reference, which applies for the purpose of excluding the application of paragraph 3 of that Schedule. This power is to allow the Scottish Ministers, by order, to provide an exception in certain types of proceedings to the general “rule” that information relating to spent ATP’s does not require to be disclosed in judicial proceedings.

Reason for taking power

55. This is not a new power as the Scottish Ministers already have this power in the Rehabilitation of Offenders Act 1974 in relation to a person’s previous convictions in section 7(4). This provision will allow the Scottish Ministers to exclude the application of paragraph 3 of the new Schedule 3 of the 1974 Act for alternatives to prosecution.

Reason for choice of procedure

56. It is recognised that the creation of an exception to the general rule that a person should be treated as if they have not been given an ATP once it has become spent merits full consideration and approval by the Scottish Parliament. It is already provided that this order
making power in section 7(4) of the 1974 Act is subject to the affirmative procedure by virtue of section 10 of that Act.

Section 121(3) (inserted section 3A(1) of 1982 Act) – Power to set mandatory conditions for licences granted under the Civic Government (Scotland) Act 1982

57. Section 121(3) inserts section 3A into the Civic Government (Scotland) Act 1982. Section 3A enables the Scottish Ministers to prescribe by order mandatory licence conditions. New section 3A(3A) provides that such an order is subject to the affirmative procedure.

58. With reference to the entry in the delegated powers memorandum provided with the introduction of the Bill entitled as above, we can confirm that a Stage 2 amendment amended new section 3A so that the power is exercisable through affirmative procedure. This was the intention (and is what the delegated powers memorandum provided with the introduction of the Bill states at paragraphs 100-102), but the Subordinate Legislation Committee noted that the provision in section 121(3) didn’t achieve the policy intent (as the provision provided for the power being exercisable through negative procedure). Our Stage 2 amendment remedied this.

Section 124A (section 39 of 1982 Act) – Power to specify the requirements that a food hygiene order is to state compliance with

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

Provision

59. Section 124A amends section 39 of the Civic Government (Scotland) Act 1982. Section 39 provides that certain applications for a street trader’s licence must be refused unless a certificate as to compliance with certain requirements of regulations made under section 16 of the Food Safety Act 1990 is provided. Section 124A amends this to provide that the certificate to be produced may specify such requirements as the Scottish Ministers may by order specify. The intention is to specify requirements currently provided in the Food Hygiene (Scotland) Regulations 2006 (SSI 2006/3) which were made under the European Communities Act 1972.

Reason for taking power

60. Taking a power provides flexibility to allow the requirements of the certificate to be amended to reflect any changes in food safety legislation.

Reason for choice of procedure

61. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.
Section 131A (inserted section 39A of 2005 Act) – Power to prescribe the form, manner and timings for a Licensing Board’s statement of reasons following a review of a premises licence

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

Provision

62. Section 131A inserts a new section 39A into the Licensing (Scotland) Act which requires a Licensing Board to notify premises licence holders and applicants of its decision following a review of a premises licence. It also sets out the when the premises licence holder and applicant can request, and a Licensing Board must issue, a statement of reasons for the Licensing Board’s decision. Section 39A(6) provides that the statement of reasons must be in the form and manner as may be prescribed and be issued by such time as may be prescribed. Section 147(1) of the Licensing (Scotland) Act 2005 defines “prescribed” as meaning prescribed in regulations made by the Scottish Ministers.

Reason for taking power

63. It is considered preferable for this level of detail to be contained in secondary rather than primary legislation. This will allow changes to be made over time to reflect more modern practices which may ultimately reduce administration for Licensing Boards.

Reason for choice of procedure

64. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 132B (section 50 of 2005 Act) – Power to specify the requirements that a food hygiene order is to state compliance with

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

Provision

65. Section 132B amends section 50 of the Licensing (Scotland) Act 2005. Section 50 provides that a food hygiene certificate must state that the premises comply with certain requirements of regulations made under section 16 of the Food Safety Act 1990. Section 132B amends this to provide that a food hygiene certificate must state that the premises comply with such requirements as the Scottish Ministers may by order specify. The intention is to specify requirements currently provided in the Food Hygiene (Scotland) Regulations 2006 (SSI 2006/3) which were made under the European Communities Act 1972.
Reason for taking power

66. Taking a power provides flexibility to allow the requirements of the certificate to be amended to reflect any changes in food safety legislation.

Reason for choice of procedure

67. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 138A(6) (section 15 of the 2005 Act) – Power to specify the procedure to be followed in the exercise of the Licensing Standards Officer’s powers of entry, inspection and seizure

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

Provision

68. Section 15 of the Licensing (Scotland) Act 2005 provides Licensing Standards Officers with powers to enter and inspect premises in the course of an investigation of licensed premises. Section 138A amends section 15 of the Licensing (Scotland) Act 2005 to extend the powers of Licensing Standards Officers so that they can take copies of documents and seize substances, articles or documents in the course of an investigation of licensed premises. Section 138A(6) inserts subsection (7) into section 15 of the Licensing (Scotland) Act 2005. Section 15(7) enables Scottish Ministers to make regulations about the procedures to be followed in the exercise of the powers of entry, inspection and seizure.

Reason for taking power

69. To provide flexibility to enable the Scottish Ministers to consider the procedures being used for exercise the powers of entry, inspection and seizure and, if it is considered necessary, to bring forward regulations.

Reason for choice of procedure

70. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 138A(6) (section 15 of the 2005 Act) – Power to set out the treatment of items seized by Licensing Standards Officers

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

Provision

71. Section 138A amends section 15 of the Licensing (Scotland) Act 2005 to provide Licensing Standards Officers with powers to seize substances, articles or documents in the
This document relates to the Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2 (SP Bill 24B)

course of an investigation of licensed premises. Section 138A(6) inserts subsections (9) and (10) in section 15 of the Licensing (Scotland) Act 2005. Section 15(9) and (10) provides a power for the Scottish Ministers to make provision about the treatment of any item seized under section 15(2)(d). This may include provision about the retention, use, return, disposal or destruction of these items and about compensation for these items.

Reason for taking power

72. To provide flexibility to enable the Scottish Ministers to consider the appropriate procedures regarding the treatment of any item seized under section 15(2)(d) and, if it is considered necessary in light of experience of the use of the powers, to bring forward regulations.

Reason for choice of procedure

73. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 146(1) – Power to make supplementary, incidental or consequential provision for the purposes of, in consequence of or giving full effect to any provision of the Bill

Power conferred on: The Scottish Ministers
Power exercisable by: Order by statutory instrument
Parliamentary procedure: Generally negative resolution but affirmative resolution if modifying any enactment

Provision

74. As noted in paragraph 112 of the delegated powers memorandum provided with the introduction print of the Bill, section 146(1) of the Bill confers on the Scottish Ministers a power to make by order such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of or for giving full effect to any provision of the Bill. Section 146(2) provides that the power extends to the modification of any enactment (including the Bill).

Reason for taking power

75. See paragraphs 113-115 of the delegated powers memorandum provided with the introduction print of the Bill.

Reason for choice of procedure

76. Section 143(4)(aa) provides that any order made under this section will be subject to affirmative resolution procedure if it modifies any enactment (otherwise an order under this section would be subject to negative resolution procedure). Such a modification could take the form of textual or non textual amendment.

77. We consider that in the context of this Bill it is appropriate that any amendment to primary legislation using the order making power under section 146 should be exercised by Order made subject to affirmative procedure, whether the amendments are achieved by textual
amendment of the Act or otherwise. In other circumstances it may be more appropriate to reserve the use of affirmative procedure only to cases where textual amendments to an Act are being made.
CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM