CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

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 and Licensing (Scotland) Bill. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of provisions in the Criminal Justice and Licensing (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each provision and explains the reasons for seeking the proposed delegated powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF BILL PROVISIONS

2. The Bill contains provisions that will deliver a series of reforms to strengthen, modernise and improve the effectiveness of the justice system in Scotland.

3. The Bill will be a very wide-ranging piece of legislation that includes provisions to reform community penalties, improve criminal law, modernise court procedures and assist victims and witnesses. It also contains measures that will help address Scotland’s drinking culture through reforms to licensing law. The Bill is split into 11 parts.

- Part 1 – Sentencing;
- Part 2 – Criminal law;
- Part 3 – Criminal procedure;
- Part 4 – Evidence;
- Part 5 – Criminal justice;
- Part 6 – Disclosure;
- Part 7 – Mental disorder and unfitness for trial;
- Part 8 – Licensing under Civic Government (Scotland) Act 1982;
- Part 9 – Alcohol licensing;
This document relates to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

- Part 10 – Miscellaneous; and
- Part 11 – General.

4. Further information about the Bill’s provisions is contained in the Explanatory Notes (and Financial Memorandum) published separately as [SP Bill 24–EN] and in the Policy Memorandum published separately as [SP Bill 24–PM].

APPROACH TO USE OF DELEGATED POWERS - OUTLINE

5. The Bill contains a number of delegated powers provisions which are explained in more detail below. 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:
   - strike the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in light of experience, without the need for primary legislation;
   - make proper use of parliamentary time; and
   - allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation.

GENERAL SUBORDINATE LEGISLATION PROVISION

6. Section 143 contains the general subordinate legislation provisions. Subsection (1) provides that all powers to make regulations or orders under the Bill are exercisable by statutory instrument. Subsection 2(a) permits the powers to be used to make, incidental, supplementary, consequential, transitional, transitory or saving provisions. Subsection 2(b) also allows for different provision to be made for different purposes or different areas.

7. The provisions containing delegated powers are listed below with an explanation of each power, why the power has been taken in the Bill and why the selected form of parliamentary procedure, if any, has been considered appropriate.

SUBORDINATE LEGISLATION POWERS - DETAIL

Section 12(2)(a) – Power to specify the submission date for the first Scottish Sentencing Council Business Plan

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

Provision

8. The power will allow the Scottish Ministers to specify the day by which the Scottish Sentencing Council must submit its first three year business plan. Thereafter, the day for submission of the plan will be the first day of each subsequent three year period.


Reason for taking this power

9. We consider it appropriate to provide flexibility to the Sentencing Council in terms of the preparation and submission of its first business plan.

Choice of procedure

10. This is a procedural and administrative necessity and does not require a high level of scrutiny from the Parliament. Negative resolution procedure is considered appropriate.

Section 14 (new section 227A(8) of the 1995 Act) – Power to change the powers of Justice of the Peace courts to impose requirements on an offender

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 227A makes provision for the court to impose a community payback order (CPO) on an offender, who has committed an offence, which would otherwise be punishable by imprisonment. Subsection (2) sets out the different requirements that can be included in a CPO. Subsection (3) requires the court to be satisfied that the seriousness of the offence(s) warrant imposition of a CPO. Subsection (4) provides two exceptions to the imposition of a CPO as an alternative to custody, specifically a level 1 unpaid work or other activity requirement, or a level 1 unpaid work or other activity requirement with a supervision requirement. Subsections (5) and (6) set out the restrictions on requirements a justice of the peace court may impose. Subsection (7) requires the court to ensure that the requirements, which form a CPO, are compatible. Subsections (8) and (9) provide powers for the Scottish Ministers to amend the requirements which may be imposed by the justice of the peace court by means of statutory instrument. Subsection (10) provides definitions of court, imprisonment and a level 1 unpaid work and other activity requirement.

Reason for taking this power

12. This power will enable Scottish Ministers to change the powers of Justice of the Peace courts to impose requirements on an offender. Subsections (5) and (6) restrict the powers of Justice of the Peace courts to three specific requirements, in contrast to the wider powers available to other courts as specified in subsection (2). The power would enable these to be varied, either extended or restricted, without recourse to primary legislation. An order making power is considered appropriate to add or remove the requirements which can be imposed by Justice of the Peace courts and can be brought forward in shorter timescales than primary legislation.

Choice of procedure

13. Changes could result in more onerous requirements being imposed on offenders by the Justice of the Peace courts and therefore we consider the appropriate level of parliamentary scrutiny should be by affirmative resolution.
Section 14 (new section 227B(2) of the 1995 Act) – Power to specify by Act of Adjournal the nature 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

14. Section 227B sets out the general procedures which a court requires to apply before imposing a Community Payback Order (CPO). Subsection (2) provides that before making a CPO, the court requires to obtain and take account of a report from a local authority officer. This report must contain such information as is specified by Act of Adjournal. A CPO cannot be made unless such a report has been secured. Subsection (3) sets out who should receive a copy of the report. Subsection (4) provides that before making the order, the court must explain in open court, to the offender the purpose and effect of the CPO and the consequences for the offender should he/she fail to comply with its terms. Subsection (5) requires the offender to confirm that he/she understands and is willing to comply with all the requirements which form the CPO.

Reason for taking this power

15. Section 227B(2) precludes a court from imposing a Community Payback Order without first obtaining a report from the relevant local authority. Setting out the details of the information to be included in the report 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

16. 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 227E(6) of the 1995 Act) – Power to provide that the form of the Community Payback Order 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: None

Provision

17. Section 227E(1) provides that a CPO is to be regarded as a sentence of the court. Subsection (2) provides that the court must give reasons in open court for imposing the CPO. Subsection (3) provides that the court in imposing a CPO is not prevented from taking other actions e.g. imposing a disqualification on the offender, making an order for forfeiture on the
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offence or ordering the offender to find caution for good behaviour. Subsections (4) and (5) set out the arrangements to be followed by the clerk of the court with regard to those who should receive copies of the order and how they should be given. Subsection (6) provides for the form of the order to be set out in an Act of Adjournal.

Reason for taking this power

18. Subsection 227(E)(6) provides for the form of Community Payback Orders to be set out by Act of Adjournal. The format of the report 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 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 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

20. Section 227I sets out the provisions the court must apply when imposing a CPO with an unpaid work or other activity requirement. Subsection (2) provides that the nature of the unpaid work or other activity requirement is not to feature as part of the order but rather to be determined by the responsible officer. Subsection (3) specifies the minimum and maximum number of hours that constitute an unpaid work or other activity requirement. Subsections (4) and (5) provide for two levels of unpaid work and other activity to be known as level 1 and level 2 and define the range of hours within these levels. Subsections (6) and (7) provide that the Scottish Ministers have the power to make an order varying the minimum and maximum hours of unpaid work or other activity that an offender can be required to perform. Subsection (8) defines ‘specified’ as relating to the unpaid work and activity requirement in the CPO.

Reason for taking this power

21. Subsection (3) sets out the minimum and maximum hours that constitute an unpaid work or other activity requirement and subsection (4) provides a definition of a level 1 such requirement. Subsection (6) provides for Scottish Ministers to vary the number of hours stated in subsections (3) and (4) 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.
Choice of procedure

22. 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 they object to.

Section 14 (new section 227J(3) of the 1995 Act) – Power to make regulations to allow justice of the peace courts to impose a level 2 unpaid work and 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

23. Section 227J sets out further provisions in relation to an unpaid work or other activity requirement. Subsection (1) restricts the court to imposing this requirement only on an offender aged 16 years or over. Subsection (2) provides that this requirement can only be imposed by the court, where the court considers the offender to be suitable to perform the unpaid work or other activity requirement. Subsections (3) and (4) provide for the Scottish Ministers to make regulations to allow justice of the peace courts to impose a level 2 unpaid work or other activity requirement.

Reason for taking this power

24. Scottish Ministers may at some future date wish to adjust the powers of justice of the peace courts in the light of the summary justice reforms in respect of an unpaid work or other activity requirement in excess of 100 hours but subject to the overall maximum of 300 hours.

Choice of procedure

25. Exercise of these powers by Scottish Ministers could result in more onerous requirements being imposed on offenders. For this reason it is felt that the affirmative resolution procedure would be more appropriate.

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: Negative resolution of the Scottish Parliament

Provision

26. 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. Subsections (3) and (4) provide the Scottish Ministers with powers to vary the limits specified in subsection (2).
Reason for taking this power

27. Scottish Ministers may wish at some future date to vary in the light of experience with the new order the current balance within subsection (2) of up to 30%/30 hours of other activity (whichever is the lesser) within an unpaid work or other activity requirement.

Choice of procedure

28. In varying the existing balance between the unpaid work and other activities components of the requirement it is possible that the unpaid work element might decrease. 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 they object to.

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, provision for travel expenses and record keeping

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

Provision

29. 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, provision for travel expenses and record keeping.

Reason for taking this power

30. These are essentially administrative matters and would not normally be the subject of primary legislation.

Choice of procedure

31. 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(2) of the 1995 Act) – Power to specify the nature 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

32. Section 227Z(1) and (2) require the court when considering varying a CPO to first obtain a report from the responsible officer. Subsection (3) indicates who is to be provided with a copy of the report. Subsection (4) sets out that when varying the order the court must explain in ordinary language to the offender (a) the purpose and effect of each of the proposed varied requirements, (b) the consequences of non-compliance and (c) any variations to progress review arrangements. Subsection (5) requires confirmation from the offender that he/she understands the variations and is willing to comply with each of them.

Reason for taking this power

33. 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 containing such information relating to the offender as may be specified by Act of Adjournal.

Choice of procedure

34. 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 227ZB(12) of the 1995 Act) – Power to amend the maximum duration of a restricted movement requirement

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

Provision

35. Section 227ZB(12) provides for Scottish Ministers to substitute a different number of months for the number of months specified in section 227ZB(9)(b). This links with section 227ZD which provides for the maximum duration of a restricted movement requirement and provides for Scottish Ministers to amend this by regulation.
Reason for taking this power

36. The power is required to ensure that any changes made to section 227ZD(4)(b) are reflected in section 227ZB.

Choice of procedure

37. Affirmative resolution. See explanation for section 227ZD(3) below.

Section 14 (new section 227ZD(3) of the 1995 Act) – Power to specify the maximum number of hours and the maximum duration in months a restricted movement requirement may be imposed for

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

Provision

38. Section 227ZD(3) provides that a restricted movement requirement may not require an offender to remain at a specified place for more than 12 hours in any one day. Section 227ZD(4)(b) provides that the maximum duration of a restricted movement requirement is 12 months. Section 227ZD(6) confers powers on Scottish Ministers to amend by regulation both the maximum duration (in months) of a restricted movement requirement and the maximum number of hours in any one day a restricted movement requirement may be imposed for.

Reason for taking this power

39. The purpose of providing a power for Scottish Ministers to amend the maximum hours and/or months is to provide a level of flexibility, enabling the courts to impose remote monitoring requirements for longer durations or to restrict an offender to an address for longer periods in any one day. Equally, the maximum durations may be reduced.

Choice of procedure

40. Changes to the regulations could make the remote monitoring requirement more onerous for the offender. For this reason, we consider that in order to provide the necessary level of parliamentary scrutiny, any changes should follow the affirmative resolution procedure.

Section 14 (new section 227ZG of the 1995 Act) – Effect of application of section 245C of the Criminal Procedure (Scotland) Act 1995 (remote monitoring of offenders subject to restriction of liberty orders)

41. Although not strictly a new power, the Committee may wish to be aware of the effect of the amendments made by new section 227ZG on the existing power contained in section 245C of the 1995 Act. Section 227ZG applies section 245C of the Criminal Procedure (Scotland) Act 1995 (which makes provision about remote monitoring of offenders subject to restriction of liberty orders) so that section 245C and regulations made under section 245C also apply to offenders subject to community payback orders with restricted movement requirements.
Regulations made under section 245C specify the equipment which may be used to monitor compliance with the restricted movement requirement.

Section 14 (new section 227ZH(1) of the 1995 Act) – Power to specify the courts which may impose restricted movement requirements, the method of monitoring compliance with a restricted movement requirement and the class of offender who may be made subject to a restricted movement requirement

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

Provision

42. Section 227ZH(1) provides for Scottish Ministers to prescribe by regulations:

(a) the courts which may impose restricted movement requirements;

(b) the method of monitoring compliance with such requirements (in practice this is via electronic monitoring or “tagging”); and

(c) the class of offender in respect of whom a remote monitoring requirement may be imposed.

Reason for taking this power

43. The purpose of providing Scottish Ministers with this power is to:

(a) enable only certain courts or classes to impose a remote monitoring requirement, for example Sheriff Courts or High Court;

(b) specify the type of monitoring which can be used to monitor compliance (enabling other forms of remote monitoring to be used as the technology is improved and developed);

(c) specify upon which offenders a remote monitoring requirement may be imposed.

Choice of procedure

44. We consider that the negative procedure provides the necessary level of parliamentary scrutiny given the limited nature of these regulations which simply specify courts/monitoring/class of offender rather than the more substantive elements of the remote monitoring requirement itself.
Section 14 (new section 227ZJ(2) of the 1995 Act) – Power to prescribe the persons or class of persons with whom local authorities should consult about the nature of the unpaid work to be undertaken in their areas as part of an unpaid work or other activities requirement

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

Provision

45. Section 227ZJ(1) requires local authorities to consult prescribed persons annually about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their areas. Subsection (2) defines “prescribed persons” as such persons or class or class of persons as prescribed by Scottish Ministers by regulations.

Reason for taking this power

46. This power is designed to enable Scottish Ministers to specify the groups and organisations local authorities require to consult about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their areas. An order making power is considered appropriate for this purpose and would allow amendments if needed to be made without recourse to primary legislation.

Choice of procedure

47. 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 18(2) – Power to prescribe the length of sentence of imprisonment which determines meaning of “short-term custody and community sentence” and “custody and community sentence”

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

Provision

48. Section 18(2) enables the Scottish Ministers to prescribe by order the length of sentence of imprisonment which determines the meaning of “short-term custody and community sentence” and “custody and community sentence” to be referred to in section 4 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“2007 Act”).

Reason for taking this power

49. The power to prescribe the period is necessary to provide Scottish Ministers with the flexibility required to accommodate changing trends in sentencing, types of offences and the management of offenders. By way of example, on the basis of future data it may be shown that the custody and community sentence is more effective for sentences of one year or more.
Choice of procedure

50. An order made under this subsection must be laid in draft before, and approved, by a resolution of the Scottish Parliament. As the period of imprisonment in the definition of “short-term custody and community sentence” and “custody and community sentence” will result in potentially significant changes to, for example, the way a number of prisoners serve their sentences (by spending, longer or shorter periods in custody), it is considered that the affirmative procedure is appropriate.

Section 19 (section 9B(5)) – Power to amend the number of days before half-sentence during which a prisoner can be removed from prison

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

Provision

51. Section 19 inserts into the Custodial Sentences and Weapons (Scotland) Act 2007 a new schedule 6 which modifies certain provisions of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (the “1993 Act”) on a temporary basis pending the coming into force of the repeal of that Part. As modified, section 9B(5) of the 1993 Act allows the Scottish Ministers by order to amend the number of days specified in section 9B(1), that is the number of days before half-sentence during which the prisoner can be removed from prison.

Reason for taking this power

52. The early removal scheme needs to correlate to the existing provisions for Home Detention Curfew contained in section 3AA of the 1993 Act. The period during which a prisoner can be removed under the new scheme is equivalent to the period during which HDC is available for other prisoners. Were the period for HDC to be changed, as provided for by section 3AA(6)(c), it would be desirable to keep the period for the early removal scheme in line.

Choice of procedure

53. Affirmative resolution procedure (see modified section 9B(6)) is considered appropriate as this is the same procedure as for orders under section 3AA(6) of the 1993 Act in relation to the Home Detention Curfew.
Section 30(3) (inserted section 1A(3)(c)) – Power to prescribe documents valid for establishing the age of a purchaser

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

Provision

54. Section 30 inserts new section 1A into the Crossbows Act 1987 (the “1987 Act”) to establish a defence for a person charged with an offence under section 1 of the 1987 Act. One aspect of the proposed defence is that the accused is required to have taken reasonable steps to establish the purchaser’s or hirer’s age. A passport and European Union photocard driving licence are the two documents listed as being valid forms of documentation able to be relied upon to establish a purchaser’s or hirer’s age. The enabling power contained within inserted subsection 1A(3)(c) will allow the Scottish Ministers to prescribe any further documents that will be valid for the purpose of establishing the age of a customer.

Reason for taking this power

55. We consider the order-making power is required to prescribe other suitable means of establishing age that the Scottish Ministers may wish to add. This power follows the approach taken within section 102 of the Licensing (Scotland) Act 2005 relating to the sale of alcohol to those aged under 18.

Choice of procedure

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

Section 31(4) (inserted subsection (4B)(c)) – Power to prescribe documents valid for establishing the age of a purchaser

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

Provision

57. Section 31 inserts new subsection 4 into section 141A of the Criminal Justice Act 1988 (the “1988 Act”) to establish a defence for a person charged with an offence under section 141A(1) of the 1988 Act. One aspect of the proposed defence is that the accused is required to have taken reasonable steps to establish the purchaser’s or hirer’s age. A passport and European Union photocard driving licence are the two documents listed as being valid forms of documentation able to be relied upon to establish a purchaser’s or hirer’s age. The enabling power contained within inserted subsection 4B(c) will allow the Scottish Ministers to prescribe any further documents that will be valid for the purpose of establishing the age of a customer.
Reason for taking this power

58. We consider the order-making power is required to prescribe other suitable means of establishing age that the Scottish Ministers may wish to add. This power follows the approach taken within section 102 of the Licensing (Scotland) Act 2005 relating to the sale of alcohol to those aged under 18.

Choice of procedure

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

Section 57(3) (inserted section 113A(4)(c)) – Power to specify classes of person who may have access to the trial judge’s observations in relation to an expedited appeal under sections 107A, 107B and 107D of the Criminal Procedure (Scotland) Act 1995

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

Provision

60. Section 55 of the Bill inserts new sections 107A, 107B and 107D into the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”). These provisions permit the Crown to appeal against certain decisions by a judge that bring a criminal case to an end without a decision by a jury and against certain findings relating to the admissibility of prosecution evidence. Where it is considered practicable for the appeal to be heard and determined during an adjournment of the trial it will be possible for the appeal to be “expedited”, allowing the appeal to be considered by the High Court with the existing trial being continued and avoiding the need for the Crown to raise a fresh prosecution if the appeal succeeds.

61. Section 57(3) inserts new section 113A into the 1995 Act. This permits the trial judge to provide observations on the case and the grounds of appeal to the High Court. The written observations of the judge are available only to (a) the High Court; (b) the parties; and (c) any other person or classes of person prescribed by Act of Adjournal.

Reason for taking this power

62. In relation to existing criminal appeals, section 113 of the 1995 Act provides for the trial judge to provide the High Court with a report on the case generally and on the grounds of appeal. Section 113(4) provides that that report shall be available to the High Court, the parties and such other persons as may be so prescribed by Act of Adjournal. The same position is being adopted here in relation to access to the trial judge’s observations on an expedited appeal. The decision as to who should be able to access a copy of the trial judge’s observations is a detailed matter related to court procedure. The power is included to add some flexibility to these provisions. It is not considered necessary or desirable to compile a restrictive list that would require amendment by primary legislation if such a need for access arose. The delegation of this power to the High Court of the Justiciary reflects the proposals of the Scottish Law Commission in its Report on Crown Appeals (SCOT LAW COM No. 212).
Choice of procedure

63. Detailed matters related to court procedure, such as the access to a judge’s observations on an appeal case relate to the type of matters which are not considered appropriate to be included in primary legislation. We consider that such procedural 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).

Section 59 (inserted section 18B(6)) – Power to prescribe list of relevant offences for purposes of new sections 18B and 18C of the Criminal Procedure (Scotland) Act 1995

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

Provision

64. Section 59 of the Bill inserts new sections 18B and 18C into the Criminal Procedure (Scotland) Act 1995. Section 18B provides that forensic data which is taken from a child upon their arrest or detention may be retained for an initial period of 3 years providing the child is referred to a children’s hearing on grounds of having committed a relevant offence, and this ground is accepted or found to be established by a sheriff.

65. New section 18B(6) provides that a “relevant offence” is a relevant sexual and violent offence which is prescribed in an order by the Scottish Ministers.

66. In accordance with the definition of a “relevant violent offence” and a “relevant sexual offence”, the Scottish Ministers may prescribe any offence which is listed in section 19A(6) as a “relevant offence” for the purposes of sections 18B and 18C of the 1995 Act.

Reason for taking this power

67. To enable full consultation with stakeholders on the type of sexual and violent offences which should be prescribed for the purpose of the new provisions. This will enable the list to be reviewed following an assessment of the initial operation of the policy.

68. Prescribing the list of relevant offences by using an order will also provide the flexibility to amend the list of relevant offences without having to amend primary legislation on each occasion a new offence is to be added or removed. Prescribing relevant offences in an order will also mean that all the offences will be contained in one place which will be more accessible and easier for the users of the legislation.

Choice of procedure

69. The order will be subject to affirmative procedure (section 18B(9)) as this is considered to provide the appropriate level of parliamentary scrutiny.
Section 66(1) (inserted section 271U(3)) – Power to prescribe procedure for an appeal against a witness anonymity order

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

Provision

70. Section 66 inserts new section 271U into the Criminal Procedure (Scotland) Act 1995. The new section confers a right of appeal to the High Court against the making of a witness anonymity order by a court. An appeal can be made by the prosecution or the accused. The court of first instance has to grant leave to appeal, and parties to the proceedings can be heard as part of this consideration. Appeals can also be made about the varying or discharging of an order (and refusals to vary or discharge an order). Subsection (3) provides that the procedure in relation to appeals is to be prescribed by Act of Adjournal.

Reason for taking this power

71. We consider such matters of detail should not be included on the face of the Bill with the mechanics of the appeal process able to be prescribed by Act of Adjournal.

Choice of procedure

72. Such detailed matters regarding court procedures are not considered appropriate for inclusion in primary legislation. It is appropriate for the Court to regulate its own procedures in order to achieve the effective operation of the provisions (see section 305 of the Criminal Procedure (Scotland) Act 1995, which makes provision about Acts of Adjournal generally).

Section 70(3) (inserted section 26G(1)) – Power to amend the list of persons mentioned in section 26C(2) of the Public Finance and Accountability (Scotland) Act 2000 by adding or removing a public body and to modify the application of new Part 2A of that Act to a public body so added

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

Provision

73. Inserted section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000 provides a power for the Scottish Ministers to add a public body to the list of persons mentioned in section 26C(2); to modify the application of Part 2A of the Act in relation to a public body so added; or to remove a person from that list. The list in section 26C(2) is of the persons whom Audit Scotland may require to disclose data to them for the purposes of a data matching exercise. It consists of those bodies and office holders whose accounts are audited by the Auditor General for Scotland (or sent to him for auditing), local authorities and other such bodies audited under Part 7 of the Local Government (Scotland) Act 1973, Licensing Boards, and officers/members of...
such bodies &c. An order may include incidental, consequential, supplementary or transitional provisions as the Scottish Ministers think fit.

**Reason for taking this power**

74. While the list in section 26C is fairly comprehensive, and would automatically include any new public bodies whose accounts are audited by the Auditor General, the power is taken to allow for additional public bodies to be added in future e.g. if different audit arrangements are made for a particular body. The power to modify the application of Part 2A in relation to such a body, and to make incidental, consequential &c provision gives flexibility so that appropriate arrangements can be made for particular bodies.

**Choice of procedure**

75. By virtue of section 27(3) of the 2000 Act, orders under inserted section 26G(1) are subject to negative procedure.

**Section 72(7) (inserted section 40A(4)) – Power to add to or otherwise modify the specification of “exploitation offences”**

**Provision**

76. Inserted section 40A of the Antisocial Behaviour etc. (Scotland) Act 2004 specifies the “exploitation offences” in respect of which the new powers to make closure notices and orders apply. Subsection (4) provides a power for the Scottish Ministers by order to add to or otherwise modify the specification of offences. By virtue of section 141(2) of the 2004 Act, an order may make incidental, consequential &c. provision.

**Reason for taking this power**

77. While the list of offences already specified in section 40A(1) is comprehensive, the power allows the list to be kept up to date and for additional forms of exploitation offence to be added should they be identified.

**Choice of procedure**

78. By virtue of section 141(3) of the 2004 Act, orders under inserted section 40A(4) are subject to negative procedure.
Section 79(2) (inserted section 113BA(1)) – Power to amend the meanings of “criminal conviction certificate”; “central records”; “criminal record certificate”; “relevant matter” and “enhanced criminal record certificate” in Part 5 of the Police Act 1997

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

Provision
79. Section 79(2) inserts a new section 113BA into the Police Act 1997 (“the 1997 Act”) giving Scottish Ministers a power to amend 5 definitions in the 1997 Act. Scottish Ministers will be able to bring orders to the Scottish Parliament to amend the meanings of “criminal conviction certificate”; “central records”; “criminal record certificate”; “relevant matter” and “enhanced criminal record certificate”.

Reason for taking this power
80. The reason for taking this power is to ensure that the Scottish Ministers have the flexibility to respond to any information sharing agreements between the UK and overseas jurisdictions that result in new information sources, outwith the UK, becoming available for use in connection with criminal record checks. This change will enable Ministers, in practice on a day-to-day basis Disclosure Scotland, to gather information from a wider range of sources when discharging Ministers’ functions under the 1997 Act. The power is being taken in secondary legislation through the draft affirmative procedure to enable Ministers to respond quickly and flexibly to new sources of information as and when they become available. Making use of the new source of information should help ensure that the disclosure system is as comprehensive and robust as possible.

Choice of procedure
81. Given the extent of the possible changes to the certificates provided by the order-making power we have provided that the order may only be made by draft affirmative procedure. This will afford the appropriate level of parliamentary scrutiny while still affording Ministers the speed and flexibility to respond to emerging information sharing agreements.

Section 79(3) (inserted subsection (2A)) – Power to make further provision about registration under section 120 of the Police Act 1997 by virtue of regulations made under section 120ZB

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

Provision
82. Section 79(3) inserts two subsections into section 120ZB of the Police Act 1997. Section 120ZB is inserted into the Police Act 1997 by section 81(2) of the Protection of Vulnerable Groups (Scotland) Act 2007 but the provision has not yet been commenced. The new subsection 120ZB(2A) clarifies the regulation-making power at section 120ZB(2)(a).
Reason for taking this power

83. This amendment to the existing regulation-making power is to clarify the existing power of the Scottish Ministers to make regulations relating to fees for registration as a registered person. This amendment will ensure greater flexibility on charges regarding the register held under section 120 of the 1997 Act. The new subsection 120ZB(2A) will allow different fees to be set for applications for inclusion in the register and also for the possibility of these fees being charged annually. This approach should encourage users to manage their entries in the register more effectively.

Choice of procedure

84. Negative resolution was considered the appropriate procedure for the regulation-making power conferred by the Protection of Vulnerable Groups (Scotland) Act 2007 as the regulations relate to the detailed administrative and procedural operation of the registration system. This amendment relates to the detailed tailoring of fees in connection with registration. Given the limited nature of the amendment we consider that the negative resolution procedure continues to provide the appropriate level of parliamentary scrutiny.

Section 81 – Power to enable the Scottish Legal Aid Board to employ solicitors for the purpose of providing criminal legal assistance

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

Provision

85. This section does not insert a new regulation-making power. However it does amend the regulation-making power in section 28A of the Legal Aid (Scotland) Act 1986 to make the scheme set up by regulations (the Public Defence Solicitors Office) permanent rather than for a test basis only. It is not anticipated that a new set of regulations will be made in the near future.

Reason for taking this power

86. No new power is taken in this section as it amends an existing regulation-making power. The purpose of this amendment is to convert the current scheme from one run on a test basis to one of permanency.

Choice of procedure

87. As this amends an existing power it is not considered appropriate to change the procedure.
Section 82(1) (inserted section 133(1A)) – Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice or for wrongful detention prior to the acquittal or a decision to take no proceedings or discontinue proceedings

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

**Provision**

88. Inserted subsection (1A) of section 133 of the Criminal Justice Act 1988 provides that the Scottish Ministers may by order specify further circumstances in respect of which compensation may be paid for a miscarriage of justice or for wrongful detention prior to acquittal or a decision to take no proceedings or discontinue proceedings.

**Reason for taking this power**

89. This power will allow the existing *ex gratia* scheme for compensation to be combined with the statutory scheme (contained in section 133 of the 1988 Act). The *ex gratia* scheme operates under the prerogative and has not been subject to statutory or parliamentary control. The intention is to put that *ex gratia* scheme on a statutory footing. The order-making power allows that *ex gratia* scheme, which was set out in a parliamentary written answer, to be expressed in appropriate statutory terms. It would also permit the expansion of the scheme in future, if that were desired.

**Choice of procedure**

90. By virtue of inserted subsections (8) and (9) of section 133 (inserted by section 82(1)(g) of the Bill), orders under subsection (1A) are subject to negative procedure. This level of parliamentary oversight is considered appropriate given that it replaces the current *ex gratia* scheme for which there is no such oversight.

Section 86(9)(b) – Power to specify bodies which constitute an “investigating agency” for the purpose of creating and submitting schedules in terms of section 86

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

**Provision**

91. Section 86 creates a duty on an investigating officer, whether a police officer or officer of an investigating agency, to create and submit schedules listing information gathered during the course of an investigation which may be relevant to cases which are brought by solemn proceedings only. Section 86(9)(b) enables Scottish Ministers to prescribe by regulations which specific bodies will constitute an “investigating agency” for the purposes of section 86.


Reason for taking this power

92. It is considered more appropriate that this be set out in detail in an order rather than on the face of the Bill. In addition to existing bodies which submit reports to procurators fiscal, over time, new bodies may be added, or others removed where they no longer carry out that function. Listing such bodies by virtue of an order-making power provides the flexibility to respond to such changes without the need for primary legislation. Although changes should be relatively infrequent, we consider that it would not be an effective use of parliamentary time to require that primary legislation be brought forward to amend the definition of these bodies on each occasion that changes are required.

Choice of procedure

93. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny given the limited nature of the enabling power. It provides only a power to specify which bodies are “investigating agencies” for the purposes of the Bill. It does not confer powers on any bodies nor substantively extend or restrict the range of persons to whom the duties set out in the Bill apply. Such matters are dealt with in the Bill itself. The specification of bodies to be regarded as “investigating agencies” is, therefore, generally administrative in character.

Section 114(3)(c) – Power to specify persons who engage to any extent in the investigation of crime or sudden deaths and submit reports to the procurator fiscal for the purpose of the code of practice in carrying out those functions, as provided for in section 114

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

Provision

94. Section 114 requires the Lord Advocate to issue a code of practice and specifies the persons who must have regard to the code, namely police, prosecutors and any other persons who engage to any extent in the investigation of crime or sudden deaths and who submit reports relating to those investigations to the procurator fiscal and who are prescribed by regulations made by the Scottish Ministers (section 114(3)(c)).

Reason for taking this power

95. It is considered more appropriate that this be set out in detail in regulations rather than on the face of the Bill. In addition to existing bodies which submit reports to procurators fiscal, over time, new persons or bodies may be added, or others removed where they no longer carry out that function. Listing such persons or bodies by virtue of an order-making power provides the flexibility to respond to such changes without the need for primary legislation. Although changes should be relatively infrequent, we consider that it would not be an effective use of parliamentary time to require that primary legislation be brought forward to amend the definition of these persons or bodies on each occasion that changes are required.
Choice of procedure

96. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny given the limited nature of the enabling power. It provides only a power to specify persons who investigate crime or sudden deaths and submit reports to the procurator fiscal for the purposes of the Bill. It does not confer powers on any bodies, or persons, nor substantively extend or restrict the range of persons to whom the duties set out in the Bill apply. Such matters are dealt with in the Bill itself. The specification of such other persons is, therefore, considered to be generally administrative in nature.

Section 115 – Power to make rules of court in relation to Part 6

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>High Court of Justiciary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Act of Adjournal</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
</tr>
</tbody>
</table>

Provision

97. Part 6 of the Bill sets out a statutory regime for disclosure in criminal proceedings. Section 115 enables the High Court to make rules of court by Act of Adjournal in relation to Part 6 of the Bill.

Reason for taking this power

98. Rules of court will be required in relation to how certain provisions are given effect to and to provide forms for applications and other court documents required under Part 6.

Choice of procedure

99. Detailed matters relating to court procedure, such as the content of court forms and administrative directions to the court are the type of matters which are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure. This provision mirrors similar provision in section 305 of the Criminal Procedure (Scotland) Act 1995 in relation to criminal procedure generally.

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

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

100. This provision enables the Scottish Ministers to set mandatory conditions for licences granted under the Civic Government (Scotland) Act 1982.
This document relates to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Reason for taking this power

101. This power recognises that in some circumstances mandatory conditions in respect of particular activities would be better applied consistently across Scotland rather than left to local discretion.

Choice of procedure

102. An order-making power will allow conditions to be applied and updated in accordance with any changes to the types of activity licensed. The choice of affirmative procedure is consistent with the power in the Licensing (Scotland) Act 2005 to amend the lists of mandatory conditions for premises licences and occasional licences, and with the power in section 44 of the 1982 Act to provide for the licensing of additional activities.

Section 126(2)(e) (inserted section 41(2)(h)) – Power to prescribe premises for which a public entertainment licence is not required

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

Provision

103. Section 126 amends the Civic Government (Scotland) Act 1982 so that the exemption that free-to-enter events enjoy in respect of not requiring a public entertainment licence is removed. Subsection (2)(e) inserts a new paragraph (h) into section 41(2) of that Act conferring power on the Scottish Ministers to add by order premises for which a public entertainment licence is not required.

Reason for taking this power

104. Taking an order-making power will allow the list of premises for which a public entertainment licence is not required to be updated to reflect any changes in the public entertainment market.

Choice of procedure

105. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.
Section 129(4) (inserted section 27A(1)) – Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences’ conditions of operation

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

Provision

106. Section 129(4) inserts a new section 27A into the Licensing (Scotland) Act 2005. Subsection (1) confers on the Scottish Ministers the power to prescribe by regulations the matters in respect of which Licensing Boards may vary all or a particular group of premises licences’ conditions of operation.

Reason for taking this power

107. Under new section 27A(1), Licensing Boards will be able to vary the conditions of all or a group of premises licence in their area. These conditions dictate how premises will operate. A Licensing Board can impose licence conditions when granting the premises licence or following a hearing concerning the conduct of individual premises. New section 27A(1) enables Licensing Boards to impose a condition en bloc which is a significant increase in Licensing Boards’ power. This provision enables Scottish Ministers to set out the subject matter of the variations that a Licensing Board may apply, ensuring a consistency within the national framework within which Licensing Boards operate. At present Ministers intend to make regulations enabling Licensing Boards to vary conditions relating to the restriction on the purchase of alcohol at off-sale premises for people aged under 21.

Choice of procedure

108. In those areas designated by Scottish Ministers, Licensing Boards will be able to impose conditions en bloc on licensed premises. This is a significant change in their powers from only being able to apply conditions on a premises by premises basis. It is therefore considered that the affirmative resolution procedure is appropriate.

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

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

Provision

109. Section 140(1) confers power on the Scottish Ministers to make regulations imposing and setting out the detail of a social responsibility levy.
This document relates to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Reason for taking this power

110. Taking a regulation-making power will allow the Scottish Government to discuss further with the licensed trade and other interests the detail of how the levy should be imposed, applied and collected. It will further allow flexibility for the detail of the levy to be revised in the future to keep pace with the changing nature of the licensed trade.

Choice of procedure

111. Given the scope of the power taken, affirmative resolution procedure is considered appropriate.

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

<table>
<thead>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Generally negative resolution but affirmative resolution if modifying the text of an Act</td>
</tr>
</tbody>
</table>

Provision

112. Section 146(1) of the Bill confers on 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 this power

113. Any body of new law may give rise to the need for a range of ancillary provisions. For example, whilst a number of consequential modifications have been identified prior to the introduction of the Bill, it may be that not all of the consequences have been identified and as such further changes may be required. We consider the order-making power to be necessary to allow for this flexibility.

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

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

Choice of procedure

116. Section 143(4)(b) provides that any order made under this section will be subject to affirmative resolution procedure if it modifies any part of the text of an Act. Otherwise, it will
be subject to negative resolution procedure. We consider that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

**Section 147(1) – Power to make transitory, transitional and saving provision necessary or expedient in connection with the coming into force of any provisions in the Bill**

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

**Provision**

117. Section 147(1) of the Bill confers on Scottish Ministers a power to make by order such transitory, transitional and saving provision as they consider necessary or expedient in connection with the coming into force of any provisions in the Bill. Section 147(2) provides that the power extends to the modification of any enactment (including the Bill).

**Reason for taking this power**

118. We consider the order-making power to be necessary to allow for flexibility as provisions within the Bill are brought into force. Without the power, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which could be dealt with through this power. That would not be an effective use of resources by Parliament or the Scottish Government.

119. The power, whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it necessary or expedient to do so in connection with the coming into force of any provisions of the Bill.

**Choice of procedure**

120. Section 143(4)(b) provides that any order made under this section will be subject to affirmative resolution procedure if it modifies any part of the text of an Act. Otherwise, it will be subject to negative resolution procedure. We consider that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

**Section 148(1) – Power to commence provisions of the Bill**

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

**Provision**

121. Section 148(1) of the Bill provides that with the exception of sections 143-148, the Scottish Ministers may by order bring the provisions of the Bill into force. The provisions in the Bill can be commenced at different times. Section 143(3) has the effect that any such commencement orders will not be subject to parliamentary procedure.
Paragraph 2(3) of schedule 1 – Power to specify the procedures for the nomination and appointment of members of the Scottish Sentencing Council

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

Provision

122. Paragraph 2 of schedule 1 sets out the procedure for appointment of members of the Scottish Sentencing Council. Paragraph 2(3) enables the Scottish Ministers to set out in regulations the procedures for the nomination and appointment of members.

Reason for taking this power

123. It is considered more appropriate that the details of the nominations and appointment procedures be set out in regulations rather than on the face of the Bill.

Choice of procedure

124. Given the limited enabling power, negative resolution procedure is considered appropriate.

Paragraph 10(3) and (4) of schedule 2 – Power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-term custody and community sentences” or “custody and community sentences”

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

Provision

125. Paragraph 10(3) and (4) of schedule 2 enables the Scottish Ministers to prescribe by order the length of periods of detention for those under 21 years of age which will determine when Part 2 of the 2007 Act applies to such a person as a “short-term custody and community sentence” and when Part 2 applies to such a person as a “custody and community sentence”.

Reason for taking this power

126. A person under 21 years of age cannot be sentenced to imprisonment, but will instead be sentenced to a period of detention. The provisions in Part 2 operate by reference to the term of imprisonment that a person is sentenced to and so do not apply to people under 21. Section 55 of the 2007 Act sets out how Part 2 is to apply to people under 21. The reason for taking the power is to allow the Scottish Ministers to take account of changes in the length of period of imprisonment that determines when a sentence of imprisonment is a custody and community sentence and when it is a short-term custody and community sentence (as provided for in the definitions of those terms in section 4 of the 2007 Act).
Choice of procedure

127. An order made under this provision must be laid in draft before, and approved, by a resolution of the Scottish Parliament. As the period of detention in the definition specified in the regulations will result in potentially significant changes to, for example, when a person aged under 21 is released from detention, it is considered that the affirmative procedure is appropriate.
This document relates to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM