



The Scottish Parliament  
Pàrlamaid na h-Alba

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### **Management of Offenders (Scotland) Bill at Stage 1**

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 20 March and seeks an explanation of the following matters:

#### **Section 4(1) – Modification of the list of relevant court disposals**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>negative</b>

The negative procedure applies to regulations made under section 4(1) which modify the list of disposals in section 3(2) for which the court may additionally impose an electronic monitoring requirement.

While recognising the court's role in deciding whether to impose an electronic monitoring requirement in the individual circumstances of each offender, extending the regime of electronic monitoring to other types of disposal is a significant policy choice, particularly given the intrusive nature of electronic monitoring. It is also generally considered appropriate that the affirmative procedure applies to regulations that may modify primary legislation.

**Accordingly, please reconsider whether the affirmative procedure would be more appropriate for regulations made under the power in section 4(1) of the Bill.**

**Section 7(1)(e) – Power to prescribe types of licence conditions to which electronic monitoring may apply**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>negative</b>

The negative procedure applies to regulations made under section 7(1)(e), which allow the Scottish Ministers to specify conditions relating to release from imprisonment or detention in respect of which an electronic monitoring requirement may additionally be imposed.

The Scottish Ministers or, as the case may be, the Parole Board will be required to have regard to the individual circumstances of each offender when deciding whether to impose an electronic monitoring requirement. However, extending the regime of electronic monitoring to other types of parole licence condition is a significant policy choice, particularly given the intrusive nature of electronic monitoring.

**Accordingly, please reconsider whether the affirmative procedure would also be more appropriate for regulations made under the power in section 7(1) of the Bill.**

**Section 8(1) – Power to prescribe types of approved devices**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>negative</b>

In terms of section 8(1) of the Bill, an approved device is (in relation to a requirement imposed in connection with a court disposal or a parole licence condition) an electronic device of a type prescribed in regulations made by the Scottish Ministers. Section 8(2) provides that a type of device that may be prescribed in such regulations “*includes*” a device for monitoring an offender’s whereabouts in some manner or a device for detecting whether an offender has consumed, taken or ingested alcohol, drugs or other substances.

By way of contrast, the regulation-making powers in sections 4 and 7 are limited to where the underlying disposal or condition (respectively) concerns the offender’s whereabouts in some manner or a device for detecting whether an offender has consumed, taken or ingested alcohol, drugs or other substances.

**Please explain why it is considered appropriate that the type of device that may be prescribed under the power in section 8 could be a device for a purpose or purposes other than that set out in section 8(2). If so, please explain (a) what these other purposes might be; and (b) why it is considered that the scope of the power is sufficiently limited.**

**Section 9(1) – Power to make provision about the use of approved devices and information obtained via electronic monitoring**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>

**Parliamentary procedure: negative**

Section 9(1) of the Bill confers a power on the Scottish Ministers to make regulations containing provision about the use of approved devices and the information obtained from electronic monitoring.

The regulations will be important to ensuring compliance with article 8 of the European Convention on Human Rights. Although provision made under the regulations can be restrictive, it can also be permissive – for example, the regulations can allow the use or sharing of information obtained through monitoring.

**Given the importance of regulations made under section 9 to the rights of individuals, please reconsider whether it would be more appropriate that the affirmative procedure applies to such regulations.**

**Section 31 – Regulating which alternatives to prosecution have disclosure periods and what those disclosure periods are**

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

Section 31(2) of the Bill inserts new section 8C into the Rehabilitation of Offenders Act 1974 (the “1974 Act”). This allows the Scottish Ministers by regulations to modify the list of circumstances in section 8B(1) of the 1974 Act in which a person is given an alternative to prosecution by adding, removing or amending an entry. A regulation-making power is also taken to modify paragraph 1 of schedule 3 of the 1974 Act by amending, removing or adding provision specifying when an alternative to prosecution becomes spent.

Paragraph 34 of the DPM explains that at the time of passing the Criminal Justice and Licensing (Scotland) Act 2010 the intention was to replicate the provisions of the 1974 Act, as they apply to convictions, for alternatives to prosecution, but that this was missed.

The existing power in section 5(11)(a) of the 1974 Act permits substitution of different periods or terms for the periods or terms already set out on the face of the 1974 Act. However, it does not appear to allow provision to be made to specify additional disposals that can be subject to the protections of the 1974 Act.

**Please explain why the additional power in section 31 of the Bill to specify the list of circumstances in section 8B(1) of the 1974 Act in which a person is given an alternative to prosecution is necessary and appropriate.**

**Section 48 – Ancillary powers**

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

Section 48 of the Bill confers a standalone regulation-making power on the Scottish Ministers to make ancillary provision.

This power is in addition to section 15 of the Bill, which allows regulations made under Part 1 of the Bill to make ancillary provision. Section 32 of the Bill also inserts new section 10A into the 1974 Act, which provides that any power exercisable by the Scottish Ministers to make an order under the 1974 Act includes a power to make ancillary provision. Section 32 also provides that any power to make an order under section 5(11) of the 1974 Act that is exercisable by the Scottish Ministers includes the power to make consequential provision modifying any enactment, including the 1974 Act.

**Please explain why is it considered necessary and appropriate to confer a standalone regulation-making power which could, for example, make provision supplemental to supplemental provision already made using powers extended by sections 15 or 32 of the Bill.**

**Would it not be more appropriate that the extended powers conferred in sections 15 and 32 of the Bill are carved out of the standalone power to make ancillary provision in section 48 of the Bill?**

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Thursday 12 April.

Thank you.

Euan Donald  
**Clerk to the Delegated Powers and Law Reform Committee**