

The Scottish Ministers are asked:

1. **Section 4(1):** Please reconsider whether the affirmative procedure would be more appropriate for regulations made under the power in section 4(1) of the Bill.
2. **Section 7(1):** Please reconsider whether the affirmative procedure would also be more appropriate for regulations made under the power in section 7(1) of the Bill.
3. **Section 8(2):** 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.
4. **Section 9(1):** 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.
5. **Section 31:** 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.
6. **Sections 15, 32 and 48:** 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?

The Scottish Ministers respond as follows:

1. Section 4(1): Modification of the list of relevant court disposals

Section 4(1) of the Bill enables the Scottish Ministers to amend the list of relevant disposals in section 3 for which the court can make an electronic monitoring requirement. The section 4(1) power is subject to the negative procedure. The Delegated Powers Memorandum explains that the negative procedure was chosen as the types of disposals that can be added are limited and the imposition of electronic monitoring is a matter for the court's discretion. The Scottish Ministers consider that these arguments remain valid.

The Scottish Ministers acknowledge that the power in section 4(1) will enable the amendment of primary legislation but there are numerous examples of delegated powers which enable primary legislation to be amended and which are subject to the negative procedure. For example, section 8(5) of the Victims and Witnesses (Scotland) Act 2014 contains a list of offences and the victims of those offences may request their interviewer to be of a specific gender. Section 8(7) enables the Scottish Ministers to modify this list by order and this power is subject to the negative procedure.

The Scottish Ministers consider that making the power in section 4(1) subject to the negative procedure is appropriate for the following reasons—

- it can be used to remove or alter an existing entry in section 3 which would represent a restriction on the court's ability to make an electronic monitoring requirement thereby reducing the scope of electronic monitoring;
- it can be used to add disposals to the list in section 3 but only in so far as the new disposal represents a restriction on an offender's movements or consumption of alcohol, drugs or other substances; and
- the exercise of the power to add a new disposal to the list in section 3 will only authorise a court to make an electronic monitoring requirement in relation to that disposal. The court will retain full discretion as to whether it is appropriate to impose electronic monitoring in the individual circumstances of each case.

2. Section 7(1)(e): Prescribing licence conditions to which EM may apply

Section 7(1)(e) of the Bill enables the Scottish Ministers to specify in Regulations additional types of early release licence conditions which can be electronically monitored. The Bill provides that Regulations made under section 7(1)(e) are subject to the negative procedure. The Delegated Powers Memorandum explains that the negative procedure was chosen as the types of conditions that can be added are limited; the imposition of electronic monitoring is a matter for the Scottish Ministers' or the Parole Board's discretion; and the power does not enable the amendment of primary legislation. The Scottish Ministers consider that these arguments remain valid.

While similar issues arise here compared to section 4(1), the main difference is that Regulations under this power will not amend primary legislation – the power simply enables the Scottish Ministers to list additional early release conditions in the Regulations. There are no types of licence conditions imposed on early release from prison which have not been listed in section 7(1) so the

power in section 7(1)(e) cannot be used unless and until further forms of early release from prison are created by statute.

The Scottish Ministers consider that making the power in section 7(1)(e) subject to the negative procedure is appropriate for the following reasons—

- it enables Ministers to prescribe further early release conditions which can be made subject to electronic monitoring but only in so far as the further conditions represent a restriction on an offender's movements or consumption of alcohol, drugs or other substances; and
- the exercise of the power to prescribe further early release conditions will only authorise the Scottish Ministers to make an electronic monitoring requirement in relation to those conditions. Where early release licence conditions are imposed by Ministers on the recommendation of the Parole Board, the imposition of electronic monitoring is essentially at the Parole Board's discretion. Electronic monitoring can only be imposed by Ministers, either with or without the Parole Board's recommendation, where it is appropriate in the circumstances of the individual case.
- the exercise of the power in section 7(1)(e) will not involve any amendment to primary legislation; and
- the list in section 7(1) currently comprises an exhaustive list of the statutory powers of early release from prison so the section 7(1)(e) power to add further early release conditions could not be used until further powers of early release are created.

3. Section 8(1): Prescribing types of approved devices

Section 8(1) of the Bill enables the Scottish Ministers to prescribe approved devices for the purposes of sections 1(1) and 5(1). This power is clarified in section 8(2) which states that a type of device that may be prescribed under section 8(1) "includes" a device for monitoring the offender's movements or consumption. The concern being raised is that section 8(2) implies that devices could be specified which monitor other aspects of the offender's behaviour.

The wording of section 8(2) was designed to create sufficient flexibility so as to avoid an argument that a device which monitors movement or consumption doesn't fall clearly within the definition of monitoring movement or consumption. In addition, it avoids an argument that a device with dual functionality (for example, one which monitors movement and internet usage) falls outwith the description of what an approved device can monitor.

Electronic monitoring imposed under section 1 or 5 of the Bill is for a stated purpose – the monitoring of the offender's compliance with the specified movement or consumption restriction and with the obligations set out in section 12 of the Bill. Accordingly, even if a device is capable of monitoring other forms of behaviour, the monitoring of those other forms of behaviour would not be authorised by the court or Ministers.

The Scottish Ministers consider that the flexibility offered by the wording of section 8(2) is desirable to avoid any difficulties connected with the precise technical specifications of any device that is to be prescribed under section 8(1). The Scottish Ministers consider that the purpose of electronic monitoring

as detailed in sections 1(4) and 5(4) of the Bill ensures that approved devices must be capable of monitoring an offender's movement or consumption and that electronic monitoring is limited to those behaviours.

4. Section 9(1): Provision about the use of EM devices and information

Section 9(1) of the Bill enables the Scottish Ministers to make provision in Regulations about the use of approved devices and the information obtained through EM. We have provided that Regulations made under section 9(1) are subject to the negative procedure. The Delegated Powers Memorandum explains that the negative procedure was chosen as the provision to be made under this power will mainly be restrictive, limiting how much information can be gathered and how it can be used. The Scottish Ministers consider that these arguments remain valid.

In support of using negative procedure, the actions of the Ministers in monitoring offenders must be ECHR compliant under section 57(2) of the Scotland Act 1998. The use of the section 9(1) power is therefore not necessary to ensure ECHR compliance but it could strengthen compliance. The provision made under section 9(1) will mainly restrict the use of devices and the information they provide in order to limit the interference with an offender's ECHR Article 8 rights. Furthermore, there is no power to amend primary legislation.

The Scottish Ministers consider that making the power in section 9(1) subject to the negative procedure is appropriate for the following reasons—

- the operation of electronic monitoring can be overseen by the Scottish Ministers so as to respect the Convention Rights of offenders without additional provision under section 9 and this is reinforced by Ministers' obligations under section 57(2) of the Scotland Act 1998;
- the exercise of the power in section 9(1) enables Ministers to create more robust rules for the operation of the electronic monitoring regime so as to further protect the Convention Rights of the offender;
- the exercise of the power in section 9(1) will not involve any amendment to primary legislation.

5. Section 31: Regulating disclosure periods for alternatives to prosecution

We can confirm that 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 under the 1974 Act but doesn't allow for new disposals to be added via secondary legislation. However, the new Table A sets out a revised 'default' disclosure period of 12 months, (6 months for persons under 18 at date of conviction), for any sentence not mentioned in Table A, Table B, section 5(2D) or any sections 5C to 5J of the 1974 Act.

The purpose of this default disclosure period is to ensure that any new criminal court disposal that is created but not included in the 1974 Act, for whatever reason, will have a disclosure period of 12 months, (6 months if under 18 at date of conviction). This means that the individual receiving such a disposal will be protected under the 1974 Act from having to disclose it after 12 months, (6 months if under 18 at date of conviction).

The Scottish Ministers may, however, consider that there are sound policy reasons to increase or decrease the default disclosure period which would apply to a particular new court disposal. Section 5(11) does not enable the 1974 Act to be amended so as to include a reference to a new court disposal and provide, for that disposal, a bespoke disclosure period different from the default disposal period. The Ministers would therefore need to wait until a suitable vehicle of primary legislation was available. However, during that time, the default period in Table A would apply to any new conviction, so ensuring that the period for which the offender has to wait to obtain the protection of the 1974 Act begins as soon as the conviction is made.

The same process does not apply to AtPs. An AtP is a category of disposal and if that category is expanded by primary legislation the 1974 Act needs to be updated to take account of the change. However, there is no default disclosure period for AtPs under the 1974 Act. This means that if a new AtP is created, the person receiving it will not be protected under the 1974 Act until the new AtP is added to section 8B and the disclosure period set out under schedule 3. As such, the new AtP will always be required to be self-disclosed.

In this situation, the Scottish Ministers have taken the view that it is preferable that the flexibility of secondary legislation should be capable of being used if and when needed to provide for a disclosure period for a new category of AtP. If not, then a suitable primary legislative route would be needed which may not be possible in respect of relevant timescales associated with implementation of the new AtP. It is hoped and expected any legislation establishing new AtPs would amend the 1974 Act directly, but this regulation-making power is deemed appropriate to respond swiftly as needed if this does not happen for any given reason.

6. Section 48: Ancillary provision – overlap with sections 15 and 32

Section 48 of the Bill enables the Scottish Ministers to make ancillary provision for the purposes of, in connection with or for giving full effect to the Bill. There is a gloss in section 15 of the Bill which allows Regulations made under Part 1 of the Bill to make ancillary provision (including provision of temporary or local effect). Section 32 of the Bill adds a similar gloss for subordinate legislation made under the Rehabilitation of Offenders Act 1974 (via a new section 10A of that Act). The concern being raised is that the general ancillary powers in section 48 could be used to make provision which is supplemental to supplemental provision made by virtue of sections 15 or 32.

Sections 15 and 32 are specific to their respective parts of the Bill. Section 15 represents a gloss on delegated powers found in Part 1 rather than being delegated powers in itself.

Section 32 similarly does not confer any power to make subordinate legislation. Rather, it enables existing powers to be exercised more broadly. Importantly, new section 10A of the 1974 Act, inserted by section 32, relates to existing *order-making* powers in the 1974 Act, and so does not overlap with section 48 (which concerns *regulation-making* powers). Section 32 implicitly

acknowledges that the existing order-making powers in the 1974 Act can be exercised by the Scottish Ministers in devolved areas by virtue of devolved competence passing to them under section 53 of the Scotland Act 1998. It differs from the general ancillary power in that it is not free-standing - it is necessarily linked to order-making powers under the 1974 Act as exercisable by the Scottish Ministers. Any ancillary provision under section 10A may be made only in connection with an order made by the Scottish Ministers under the 1974 Act.

Ancillary provision can therefore only be made by virtue of sections 15 and 32 where Regulations are being made under separate powers in Part 1 of the Bill or orders are being made under the 1974 Act. Section 48 is not reliant on the exercise of Regulations under Part 1 of the Bill or orders under the 1974 Act.

The gloss in section 15 is necessary to enable Ministers to use the various powers in Part 1 of the Bill to introduce new forms of electronic monitoring by way of pilot projects restricted by time or location. For example, the introduction of electronic monitoring for a new court disposal or to monitor an offender's consumption of alcohol or drugs. Section 32 creates a gloss for delegated powers found in the 1974 Act and it would be cumbersome to have to rely on the delegated powers in the Bill to make ancillary provision for the purposes of another Act.

The Scottish Ministers consider that there is a clear need for separate powers to make ancillary provision but also consider that the potential overlap between these powers will not create any practical or legal difficulties. Section 48 must be used for the purposes of, in connection with, or for giving greater effect to the Bill. Whether ancillary provision made under section 48 is supplemental to changes in the law on electronic monitoring or the rehabilitation of offenders, that provision must remain within the limits set out in section 48.

A further argument in favour of retaining the current approach is that the separate provision enables Ministers to choose which power is more appropriate in the given circumstances. The distinction between the different sets of powers is clear but that clarity could be sacrificed if we attempt to carve out sections 15 and 32 from the section 48 power. A carve-out for sections 15 and 32 would be cumbersome and, even if such a carve-out could be achieved, it would leave the same overall powers available to Ministers. The Scottish Ministers consider that for these reasons the existing drafting of sections 15, 32 and 48 should remain.