

## MEMORANDUM ON DELEGATED POWERS

### FAMILY LAW (SCOTLAND) BILL

#### Purpose

1. As required under rule 9.4A, this Memorandum has been prepared by the Scottish Executive to accompany the Family Law (Scotland) Bill introduced in the Scottish Parliament on 7 February 2005. It details the provisions in the Family Law (Scotland) Bill that confer powers to make subordinate legislation. It describes the persons upon whom the powers are conferred, the form in which the powers are to be exercised, the Parliamentary procedure to which the powers are to be subject and why it is considered necessary to delegate the powers. It does not form part of the Bill and has not been endorsed by the Parliament.
2. A Policy Memorandum and an Explanatory Note and Financial Memorandum are printed separately as SP Bill 36–PM and SP Bill 36–EN.

#### Background to the Bill

3. The Bill seeks to support the aims set out in the Policy Memorandum by introducing changes to update Scottish family law. Family law provides the legal framework that regulates responsibilities and rights between couples and between children and their parents and others with an interest in their welfare. Scotland, in common with many other countries, has, in recent decades, seen significant changes in family formation and in attitudes towards the family. The Bill makes a range of provisions designed to address the legal vulnerabilities experienced by family members in Scotland today and to ensure that family law protects the best interests of children regardless of the type of family to which they belong. The provisions of the Bill impact on a number of aspects of family law and include:

- the rules regulating divorce;
- parental responsibilities and rights (PRRs) for fathers;
- protection against domestic abuse;

as well as introducing new legal safeguards for cohabiting couples and their children. The Bill also contains a number of technical amendments designed to remove anomalies and clarify various matters relating to marriage and to the domicile of children.

#### Delegated Powers

##### Section 17(3) Parental responsibilities and parental rights of unmarried fathers

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

4. Section 17(3) confers on Scottish Ministers the power to make regulations making provision for or in connection with specifying cases in which a father –
  - (a) who was not married to the mother at the time of the child’s conception or subsequently; and
  - (b) is not registered as the child’s father under any of the enactments mentioned in section 3(1A) of the Children (Scotland) Act 1995 (as inserted by section 17(3) of the Bill

shall have parental responsibilities and parental rights in relation to the child.

*Justification for taking this power*

5. Subsections (1) and (2) of section 17 amend the Children (Scotland) Act 1995. The amendment in subsection (2)(b) gives PRRs to unmarried fathers who, in the future, register the birth of their child jointly with the mother. The registration must be under one of the provisions referred to in subsection (3). At present, a father will only automatically acquire such responsibilities and rights if he was married to the child’s mother at the time of conception or subsequently.
6. Subsection 17(3) refers to the relevant provisions for registration in Scotland, England, Wales and Northern Ireland. This subsection also provides Scottish Ministers with the power to make regulations to recognise the PRRs of fathers with children whose births were registered outwith the United Kingdom. The intention is to allow provision to be made so that registration as the child’s father under equivalent legislation in other countries will also confer parental responsibilities and rights in respect of a child subject to the law of Scotland, as long as the registration required the consent of the mother and took place at a time when it conferred equivalent parental responsibilities and rights in the jurisdiction concerned. Taking regulation making powers will allow sufficient flexibility for the Scottish Ministers to specify (and adjust in future as necessary) those jurisdictions in which registration of the father will confer PRRs.
7. In terms of section 103(2) of the Children (Scotland) Act, such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for a provision of this nature.

Section 34 Short title and commencement

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

8. Section 34 provides for the Scottish Ministers by order to appoint a day when the provisions of the Bill shall come into force. Such an order may appoint different days for different purposes and include such transitional or saving provision as the Scottish

Ministers consider necessary or expedient in connection with the coming into force of the provisions brought into force.

*Justification for taking this power*

9. This order-making power is required to ensure effective commencement of the Bill and to ensure that nothing in this Bill, when enacted, shall affect any legal proceedings already commenced or any application made to the court before the Act comes into operation.
10. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for a provision of this nature.