

SUPPLEMENTARY MEMORANDUM ON DELEGATED POWERS

FAMILY LAW (SCOTLAND) BILL

Purpose

1. This supplementary Memorandum has been prepared by the Scottish Executive to accompany the Family Law (Scotland) Bill following Stage 2 which commenced on 5th October 2005 and concluded on 30th November 2005. It details further provisions in the Family Law (Scotland) Bill that confer powers to make subordinate legislation, and a power which has been removed from the Bill, introduced by way of amendment at Stage 2. It describes the persons upon whom these 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 explains why it is considered necessary to remove a delegated power from the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Further delegated powers

Section 13A Postponement of decree of divorce where religious impediment to remarry exists

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

2. Section 13A confers on Scottish Ministers the power to make regulations prescribing religious bodies for the purpose of the definition of “religious marriage” contained in the section.

Justification for taking this power

3. Section 13A was introduced into the Bill by way of non-Executive amendment at Stage 2. The section inserts a new section 3A into the Divorce (Scotland) Act 1976 to give the court the power, where a party in an action of divorce is prevented by a religious impediment from undertaking a religious marriage, to postpone the grant of decree until the other party to the action has acted to remove or to assist in the removal of the impediment if he or she is able to do so. For the purposes of the section a religious marriage will be a marriage solemnised by a marriage celebrant of a religious body prescribed in regulations made by the Scottish Ministers. The section is intended to assist those who, as a matter of faith, can only remarry within their religion but who are currently prevented from doing so until an impediment is removed.

4. In terms of section 3A(9) of the Divorce (Scotland) Act 1976, as inserted by section 13A of the Bill, 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. It is appropriate that this matter be dealt with by

secondary legislation to provide for flexibility and the opportunity to consult with interested parties on the technical detail required in this area.

Section 14A(3) Financial provision on divorce and dissolution of civil partnership: Pension Protection Fund

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

5. Section 14A(3)(d) provides for the Scottish Ministers to make regulations prescribing a method for the verification and apportionment of compensation payable by the Board of the Pension Protection Fund which forms part of matrimonial property.

Justification for taking this power

6. In terms of the Pensions Act 2004 the Board of the Pension Protection Fund will, in respect of the pension schemes provided for in that Act, pay compensation to persons who have lost their pension as a result of the scheme having been wound up. Section 14A of the Bill seeks to amend section 10 of the Family Law (Scotland) Act 1985 so that where such compensation is payable it will form part of matrimonial property. The regulation making power will allow the Scottish Ministers to provide for verification of the compensation payable and the proportion which shall form part of matrimonial property for the purposes of financial provision on divorce. This power will sit alongside the existing power in section 10(8) and (8A) for Scottish Ministers to make regulations in relation to the calculation and verification of benefits in respect of a pension which forms part of matrimonial property.

7. In terms of section 10(9) of the Family Law (Scotland) Act 1985, such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The technical nature of these provisions is more appropriately dealt with by secondary legislation. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, expedition and convenience in what is essentially a very technical area of the law and, on the other, the need for scrutiny for a provision of this nature.

Section 14A(4) Financial provision on divorce and dissolution of civil partnership: Pension Protection Fund

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

9. In the event that the Board of the Pension Protection Fund assumes responsibility for a pension scheme, section 14A(4)(a) makes provision for the Scottish Ministers to prescribe any modifications necessary to an order made under section 12A(2) of the Family Law (Scotland) Act 1985 to enable that order to be implemented by the Board.

Justification for taking this power

10. There may be cases where, at the time when the Board of the Pension Protection Fund assumes responsibility for a pension scheme, an order which has been made under section 12A(2) of the Family Law (Scotland) Act 1985 has not yet been implemented by the trustees or managers of that scheme. The regulation making power is necessary to ensure that in all cases where the Board has assumed responsibility for a pension scheme a court order made under section 12A(2) can be implemented by the Board.

11. In terms of section 12A(9) of the Family Law (Scotland) Act 1985, 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 32A Ancillary provision

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order made by statutory instrument
Parliamentary procedure:	Negative resolution procedure or affirmative resolution procedure

12. Section 32A provides for the Scottish Ministers by order to make such consequential, transitional or saving provision as they consider appropriate in consequence of or to give full effect to the Family Law (Scotland) Bill as enacted.

Justification for taking this power

13. This order-making power is necessary to ensure that full effect can be given to the Bill once it is enacted. The power will allow the Scottish Ministers to make any modifications to primary legislation or subordinate legislation which are consequential on the Bill. It will ensure that any transitional or savings provisions which are necessary in relation to existing statutory rights or obligations can be made.

14. An order under this section which amends or modifies subordinate legislation 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.

15. An order under this section which modifies primary legislation shall not be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament. The affirmative resolution procedure is considered to offer the appropriate level of scrutiny for a provision of this nature.

16. In consequence of the new ancillary provision at 32A of the Bill section 34(4) of the Bill is no longer required as the commencement order will not include any transitional or savings provisions. These, if required, will be made by a separate negative instrument and accordingly section 34(4) has been removed.

Delegated power removed from the Bill

Section 17(3) Parental responsibilities and 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

17. Section 17(3) of the Bill as introduced conferred on the 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 rights in relation to the child.

Justification for removing the power

18. The regulation making power at section 17(3) was intended to allow the Scottish Ministers to make regulations to recognise the parental responsibilities and rights of fathers of children whose births were registered outside the United Kingdom, as long as the registration was made with the mother's consent and conferred equivalent parental responsibilities and rights in the jurisdiction concerned. It was decided that this power is unnecessary as the concept of parental responsibilities and rights as enacted in the Children (Scotland) Act 1995 and similar legislation in other parts of the United Kingdom is unlikely to be replicated in similar form in other jurisdictions and accordingly such a power would never be used.