

# **POLICE AND FIRE REFORM (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Scottish Parliament's Standing Orders, in relation to the Police and Fire Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **BACKGROUND**

3. The purpose of the Bill is to create a single police service and a single fire and rescue service. The Bill sets out the governance arrangements and framework for the new services. In addition, it provides:
  - a modern purpose for the police service and updated oath for constables;
  - a statutory framework for the delivery of police and fire and rescue services and appropriate scrutiny and oversight arrangements; and
  - arrangements for the transfer of existing officers and staff to both services.
4. To facilitate the establishment of single services the Bill abolishes the existing unitary police and fire authorities (Fife and Dumfries and Galloway) and the 6 joint police and joint fire boards which are established by amalgamation schemes made under the provisions of the Police (Scotland) Act 1967 and the Fire (Scotland) Act 2005 by bringing together a number of local authorities (who are individual police and fire authorities under the enabling legislation) to form joint boards.
5. A more detailed explanation of the Bill's purpose can be found in the Policy Memorandum.

### **Outline of Bill provisions**

6. The Bill is in 3 Parts. Part 1 deals with police, Part 2 deals with fire and rescue and Part 3 deals with general provisions. The Bill also includes 7 schedules setting out the detailed arrangements in relation to a number of areas covered by the Bill.

## **Part 1 Police Reform**

7. **Part 1** largely replaces the legislation underpinning policing in Scotland, the Police (Scotland) Act 1967, and puts in place a new modernised framework for policing. The Bill also repeals Part 1, Chapter 1 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 which established the Scottish Police Services Authority (SPSA) and the Scottish Crime and Drug Enforcement Agency (SCDEA). It amends Part 1, Chapter 2 of that Act which established the Police Complaints Commissioner for Scotland to rename it and extend the provisions in that Part to provide for more robust scrutiny of policing.

8. Police officers are office holders, not employees. This means their terms and conditions of service are set out in statute rather than being governed primarily by employment law. It is for this reason that the bill sets out detailed arrangements for the establishment of the Police Service and the appointment etc. of constables, including, in section 49, the power for the Scottish Ministers to make regulations governing the appointment and terms and conditions of service of police officers. The Scottish Government anticipates that the regulations made under this section will largely replicate those currently in force under the 1967 Act.

## **Part 2 – Fire Reform**

9. **Part 2** amends the Fire (Scotland) Act 2005 to establish the Scottish Fire and Rescue Service and transfers to it fire-fighting, fire safety and other functions under that Act.

## **Part 3 – General**

10. **Part 3** makes a number of general provisions relating to subordinate legislation, minor and consequential amendments to other legislation and commencement.

## **APPROACH TO USE OF DELEGATED POWERS**

11. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or be included in subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to:

- Ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation; and
- Allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

## **General subordinate legislation provision**

12. Section 120 contains general provisions about subordinate legislation. It provides for different provision to be made for different purposes and permits the powers to be used to make supplementary, incidental, consequential, transitional, transitory or saving provisions as the Scottish Ministers consider appropriate. Subordinate legislation made under the provisions relating to the Police Investigations and Review Commissioner will be subject to the procedures

set out in section 103 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, as amended by paragraph 22(11) of schedule 6 to this Bill. Subordinate legislation made under the provisions introduced by Part 2 of the Bill will be subject to the procedures set out in section 88 of the Fire (Scotland) Act 2005.

13. An order made under section 10(2), an order made under section 11(5), an order made under section 41D(1) of the 2006 Act (to be inserted by section 67 of the Bill), orders made under paragraphs 7A(8) or 7B(4) of schedule 4 to the 2006 Act (to be inserted by paragraph 22(13)(b) of schedule 6 to the Bill) and an order made under section 121 containing provisions which add to, replace or omit the text of an Act are subject to the affirmative procedure. No procedure is specified for commencement orders, orders to appoint days for staff and constables to transfer to the new services, staff, constables and property transfer orders and schemes. All other powers are subject to the negative resolution procedure.

## **DELEGATED POWERS**

14. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

### **PART 1 – POLICE REFORM**

#### **Section 5(1) The Authority must comply with any direction (general or specific) given by the Scottish Ministers**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** direction

**Parliamentary procedure:** no procedure

#### *Provision*

15. Section 5(1) requires the Scottish Police Authority (the Authority) to comply with any direction given by the Scottish Ministers.

16. The power cannot be used for directions in relation to a specific operation being or to be carried out by the Police Service, or the way in which the Police Service is carrying out (or is to carry out) a specific operation.

#### *Reason for taking power*

17. This power enables the Scottish Ministers to direct the Authority to undertake particular actions which are in the wider public interest or to address significant concerns about the operation of its functions or the policing of Scotland.

18. The Authority will be responsible for a significant proportion of the Scottish Budget and an important area of public policy. It is therefore appropriate, as is common in wider Scottish Government public bodies policy, for the Scottish Ministers to have a power to direct the Authority which will be exercised only under exceptional circumstances. The Scottish Ministers have no power of direction over the Chief Constable.

*Choice of procedure*

19. No Parliamentary procedure applies, however the directions are required to be published and laid before the Scottish Parliament.

**Section 10(2) – Power to modify the declaration for appointment of an individual as a constable**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** affirmative procedure

*Provision*

20. Section 10 provides for an individual to be appointed to the office of constable only where the individual has made a declaration before a sheriff or justice of the peace. Sub-section (2) enables the Scottish Ministers to modify that declaration by order.

*Reason for taking power*

21. This power is considered necessary and appropriate to enable the Scottish Ministers to modify the declaration if required for whatever reason. Under the 1967 Act the declaration is included in secondary legislation. As part of the framework for a new single service the Scottish Government considered that the declaration should be modernised and placed on the face of the Bill. The order making power provides the flexibility to further amend the declaration in future without the need for primary legislation.

*Choice of procedure*

22. An order made under this provision will be subject to affirmative procedure. This is appropriate as any change to the declaration would be an amendment to the primary legislation.

**Section 11(5) – Power to add and remove ranks**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by statutory instrument  
**Parliamentary procedure:** affirmative procedure

*Provision*

23. Section 11(1) provides the ranks which a constable may hold in the Police Service of Scotland. Subsection (5) enables the Scottish Ministers to add or remove ranks, but only where that rank is below that of assistant chief constable.

*Reason for taking power*

24. This power is considered necessary and appropriate to ensure that the Scottish Ministers can facilitate organisational change within the Police Service of Scotland, either by adding or deleting ranks to respond to changing operational requirements.

*Choice of procedure*

25. Regulations made under this provision will be subject to affirmative procedure. This procedure is appropriate given the list of ranks appears on the face of the legislation. Furthermore, the regulations will also be subject to statutory consultation to ensure the views of those directly affected by the regulations are considered by the Scottish Ministers.

**Section 15(2) – Power to prescribe types of service as being “temporary service” and to make further provisions as necessary.**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by statutory instrument**

**Parliamentary Procedure: negative procedure**

*Provision*

26. Section 15 makes provision for constables to be engaged in service outwith the Police Service on temporary service (or secondment), with the consent of the Chief Constable. Under section 15(2)(a) the Scottish Ministers can, by regulations, prescribe types of service as “temporary service”, and under section 15(2)(a) make whatever further provision they consider appropriate. A constable on temporary service is to continue to hold the office of constable, but does not have the powers and privileges of a constable unless they remain under the direction and control of the Chief Constable or the nature of the temporary service means it remains appropriate for them to retain their police powers. At the end of the temporary service, a constable is entitled to revert to the Police Service in the rank in which they were serving immediately before the period began and to be treated as if the constable had continued to serve in the Police Service for the purposes of the constable’s rate of pay. Subsection (2)(b) enables the Scottish Ministers to make further provision in this respect as they consider appropriate.

*Reason for taking power*

27. As police officers are office holders and their terms and conditions of service are set by statute it is necessary to make statutory provision to enable those officers to work outwith the Police Service whilst they remain police officers. Over time the types of temporary service are likely to change and there needs to be flexibility to make any changes without the need for primary legislation. This power enables the Scottish Ministers to ensure that a police officer is able to undertake temporary service with a wide range of other employers or services and for that range of services to change over time to take account of newly established bodies or to facilitate new types of joint working. It is preferable to have the capacity to do this without the need to await a suitable vehicle in primary legislation and providing for this in secondary legislation means that it will be possible to make arrangements for temporary service as best serves the Service, without the need for primary legislation.

*Choice of procedure*

28. Regulations made under these provisions will be subject to negative procedure. In essence the effect of the order is to define the types of service which are to be considered as temporary service and to make clear the conditions that attach to that service. This procedure is appropriate given the administrative nature and detail of these regulations and the probability of the power being used regularly as a result of the negotiation of terms and conditions.

**Section 49 – Power to make regulations as to the governance, administration and conditions of service of constables and police cadets**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by statutory instrument**

**Parliamentary procedure: negative procedure**

*Provision*

29. Section 49 gives the Scottish Ministers powers to make regulations for the governance, administration and conditions of service of constables (including special constables) and police cadets. Sections 50 to 54 set out in more detail the areas in which regulations can be made. These cover appointments; promotions; probation; efficiency and effectiveness; restrictions on private life or business interests; resignation; retirement; conditions of service; duties; disciplinary procedures; and personal records. Section 55 requires the Scottish Ministers to consult and share a draft of the regulations with the Chief Constable, the Authority, the staff associations and where appropriate the Police Negotiating Board for the United Kingdom and section 56 allows regulations to make provision for the delegation of functions.

*Reason for taking power*

30. These provisions are necessary as police officers are office holders and not employees. Their terms and conditions of service are therefore largely set in secondary legislation rather than through a contract of employment governed by employment law. Although cadets are not police officers they are appointed with a view to becoming officers and their terms and conditions are therefore broadly equivalent and are provided for through regulations. The Scottish Government anticipates that the first set of regulations made under section 49 of this Bill will be largely the same as those currently in operation under the 1967 Act, updated to take account of the establishment of a single police service. Regulations will be amended from time to time following appropriate statutory consultation and formal negotiation with the Chief Constable, the Authority and the staff associations. That, and the detailed technical and administrative nature of the material that will be included in these regulations and the need to have flexibility to amend at regular intervals, means that it is not thought appropriate to incorporate these matters in the Bill.

*Choice of procedure*

31. Regulations made under these provisions will be subject to negative procedure. This procedure is appropriate given the administrative nature and detail of these regulations and the probability of the power being used regularly as a result of the negotiation of terms and conditions.

**Section 63, new section 33A:- Power to prescribe what is a “serious criminal offence” for the purposes of investigation by the PIRC**

**Power Conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by statutory instrument**

**Parliamentary procedure: negative procedure**

*Provision*

32. Section 63 inserts section 33A into the Police, Public Order and Criminal Justice (Scotland) Act 2006 (the 2006 Act). Section 33A provides for the general functions of the Police Investigations and Review Commissioner. Section 33A(2)(b) gives the Scottish Ministers power to prescribe offences as being a serious criminal offence for the purposes of section 33A(1)(b)(i).

*Reason for taking power*

33. The Commissioner will investigate any circumstances in which there is an indication that a person serving with the police may have committed a serious criminal offence. This will be done under the direction of the appropriate prosecutor, and will include offences resulting in death or serious injury, or other offences prescribed by regulations.

34. This power could be used to expand the types of offences that the Commissioner may investigate under the direction of the appropriate prosecutor without the need for amending primary legislation.

*Choice of procedure*

35. Regulations made under this provision will be subject to negative procedure. The power only categorises an offence as a serious criminal offence which the appropriate prosecutor may then direct to the PIRC to investigate; the appropriate prosecutor is not obliged to order an investigation, nor would the outcome of the investigation be influenced as a result. Negative procedure therefore provides the appropriate degree of scrutiny.

**Section 65 – Power to specify other circumstances as being serious incidents involving the police**

**Power Conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by statutory instrument**

**Parliamentary procedure: negative procedure**

*Provision*

36. Section 65 inserts section 41B into the 2006 Act. Section 41B(1)(b)(ii) and 41B(1)(c) provide respectively the Scottish Ministers with power to specify additional types of weapon which may have been used, and other circumstances which constitute a serious incident involving the police, for the purposes of investigation by the Commissioner.

*Reason for taking power*

37. The Commissioner will investigate serious incidents involving the police including incidents where firearms or other weapons are used by the police, where direct or indirect contact with the police may have contributed to death or serious injury, or any other circumstances as specified in regulations.

38. This power could be used to expand the types of incidents involving the police which would be considered serious and may be investigated by the Commissioner without the need for amending primary legislation.

*Choice of procedure*

39. Regulations made under this provision will be subject to negative procedure. The power categorises a matter as being a serious incident involving the police which the Commissioner may then investigate; the outcome of the investigation would in no way be influenced as a result. Negative procedure therefore provides the appropriate degree of scrutiny.

**Section 67 – Power to make provision about investigations by the Commissioner**

**Power Conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by statutory instrument**

**Parliamentary procedure: affirmative procedure**

*Provision*

40. Section 67 inserts section 41D into the 2006 Act. Section 41D(1) gives the Scottish Ministers power to make provision about investigations by the Commissioner in relation to serious incidents involving the police and the investigations undertaken by the Commissioner in the public interest. The provision sets out what the regulations may cover in particular. This order is made under section 103 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, as amended by paragraph 22(11) of schedule 6 to this Bill.

*Reason for taking power*

41. This power will allow the Scottish Ministers to prescribe in the regulations such matters as: a requirement on the Chief Constable and the Authority to refer matters to the Commissioner; the circumstances in which the Commissioner must, may or need not carry out investigations; time limits for investigations; and the delegation of functions to the Commissioner.

*Choice of procedure*

42. Regulations made under this provision will be subject to affirmative procedure. This procedure is appropriate to allow the Scottish Parliament the opportunity to consider the detail of the form and procedures of investigations, the circumstances under which the Commissioner will carry out investigations and other matters relating to investigations by the Commissioner.

*This document relates to the Police and Fire Reform (Scotland) Bill (SP Bill 8) as introduced in the Scottish Parliament on 16 January 2012*

**Section 71(2) – Power to appoint inspectors of constabulary**

**Power conferred on: Her Majesty the Queen**

**Power exercisable by: Order in Council**

**Parliamentary procedure: no procedure**

*Provision*

43. Section 71(2) gives Her Majesty power to appoint such numbers of inspectors of constabulary in Scotland by Order in Council as the Scottish Ministers may determine.

*Reason for taking power*

44. The appointment by Order in Council provides for the appointment of an individual to be made without the need for new legislation whenever a new inspector is to be appointed.

*Choice of procedure*

45. The power will be subject to no procedure. This is suitable for administrative matters such as this and is consistent with the equivalent provision in the Police (Scotland) Act 1967. The Order in Council would be required to be laid before the Scottish Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

**Section 84(1)(b) – Power to specify the type of goods and services the SPA may provide**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order made by statutory instrument**

**Parliamentary procedure: negative procedure**

*Provision*

46. Section 84 makes provision for the Authority to provide goods and services to any other public body or office-holder. Subsection (1)(b) provides the Scottish Ministers with power to specify the type of goods and services that may be provided to persons other than public bodies or office holders, and the persons to which they may be provided.

*Reason for taking power*

47. This power provides flexibility around the type of goods and services that can be provided and the persons or bodies which are to receive them. Over time this list is likely to change and there needs to be flexibility to do this without the need for primary legislation.

*Choice of procedure*

48. An order made under this provision will be subject to negative procedure. This procedure is appropriate given the administrative nature of the provision and the likelihood of the power being used regularly.

**Section 84(3)(b) – Power to specify the type of goods and services the Police Service may provide**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative procedure

*Provision*

49. Section 84 makes provision for the Authority, with the consent of the Chief Constable, to make arrangements for the Police Service to provide goods and services (other than police services) to any other public body or office-holder. Subsection (3)(b) provides the Scottish Ministers with power to specify the type of goods and services that may be provided to persons other than public bodies or office holders, and the persons to which they may be provided.

*Reason for taking power*

50. This power provides flexibility around the type of goods and services that can be provided and the persons or bodies which are to receive them. Over time this list is likely to change and there needs to be flexibility to do this without the need for primary legislation

*Choice of procedure*

51. An order made under this provision will be subject to negative procedure. This procedure is appropriate given the administrative nature of this provision and the probability of the power being used regularly.

**Section 97(1) paragraph (e) of definition of “international joint investigation team” – Power to specify an international agreement to which the United Kingdom is a party and in accordance with which an investigation team is formed**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative procedure

*Provision*

52. The definition of “international joint investigation team” lists 4 international agreements under which joint international agreements may be formed. Paragraph (e) of the definition gives the Scottish Ministers power to specify other international agreements to which the UK is a party for the purposes of section 24, 87, 88 or 93.

*Reason for taking power*

53. This power allows the Scottish Ministers to keep the definition of a joint investigation team in line with any changing international agreements, without the need for primary legislation.

*Choice of procedure*

54. An order made under this provision will be subject to negative procedure. It is expected that the necessary scrutiny, including any changes to devolved legislation, will already have been applied before the UK becomes a party to applicable international agreements and therefore the same level of scrutiny will not be appropriate here. Negative procedure therefore provides the appropriate level of scrutiny.

## **PART 2 – FIRE REFORM**

### **Section 99, new schedule 1A, paragraph 2(4) – Power to modify minimum and maximum number of members of SFRS**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** order made by statutory instrument

**Parliamentary procedure:** negative procedure

*Provision*

55. Section 99 inserts Schedule 1A into the Fire (Scotland) Act 2005. Paragraph 2 provides for the Scottish Ministers to appoint members of SFRS. Subsection (4) provides that SFRS is to consist of no fewer than seven nor more than eleven members, including a chairing member. Sub-paragraph (4) provides power for the Scottish Ministers to amend by order the minimum and maximum number of board members.

*Reason for taking power*

56. These arrangements reflect current best practice on optimum board size and have flexibility built into them. It is considered appropriate that there should be power to amend the minimum and maximum number of board members if this proves necessary in the light of experience without requiring further primary legislation. Sub-paragraph (4) provides power for the Scottish Ministers to amend by order the minimum and maximum number of board members.

*Choice of procedure*

57. An order made under this provision will be subject to negative procedure. The power allows for altering the number of SFRS members without changing the structure or functions of SFRS, as agreed by the Scottish Parliament, in any way.

### **Section 99, new schedule 1A paragraph 3(d) – Power to specify persons of such other descriptions who may be disqualified from membership of the SFRS Board**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** order made by statutory instrument

**Parliamentary procedure:** negative procedure

*Provision*

58. Paragraph 3 of new Schedule 1A of the 2005 Act describes persons who are disqualified from appointment and from holding office, as a member of SFRS. Sub-paragraph (d) of paragraph 3 gives the Scottish Ministers power to prescribe other descriptions of persons who should be disqualified from appointment.

*Reason for taking power*

59. This power is considered appropriate to ensure no conflict arises between the role of board members and any other role they may hold. It also allows the necessary ability to respond to new and emerging circumstance and legislation.

*Choice of procedure*

60. An order made under this provision will be subject to negative procedure, given its administrative nature.

**Section 112, new section 41A(6) – Power to set the start date of the 3 year period to which the first strategic plan relates**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order made by statutory instrument**

**Parliamentary procedure: negative procedure**

*Provision*

61. Section 112 requires SFRS to prepare a strategic plan setting out how it proposes to carry out its functions during a period of 3 years. The plan sets out outcomes by reference to which the carrying out of its functions may be measured and any such other material relating to its functions or to any period as SFRS thinks fit.

*Reason for taking power*

62. Section 112 inserts section 41A into the 2005 Act. Sub section (6) of section 41A gives the Scottish Ministers power to appoint a day before which SFRS must endeavour to secure the approval of the Scottish Ministers to the strategic plan. The 3 year period to which the strategic plan relates is then defined as the 3 years starting on that day, as provided in subsection (2)(a) of section 41A.

63. The 3 year planning period will need to be set in accordance with when SFRS is established and the timing of any new or amended fire and rescue framework. It will also be necessary to take into account prevailing circumstances when SFRS is established and to allow SFRS sufficient time to prepare, consult on and submit a plan for approval. Given these variables, it is appropriate for the date to be set by the Scottish Ministers by order at a later date, in discussion with SFRS.

*This document relates to the Police and Fire Reform (Scotland) Bill (SP Bill 8) as introduced in the Scottish Parliament on 16 January 2012*

*Choice of procedure*

64. An order made under this provision will be subject to negative procedure. The start of the 3 year period is of an administrative nature and therefore affirmative procedure is unnecessary.

**Section 116, new section 42A – Power to give SFRS general or specific directions**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: no procedure**

*Provision*

65. Section 116 inserts section 42A into the Fire (Scotland) Act 2005. The provision enables the Scottish Ministers to give SFRS general or specific directions.

*Reason for taking power*

66. This power enables the Scottish Ministers to direct SFRS to undertake particular actions which are in the wider public interest to address significant concerns about the operation of its functions.

67. SFRS will be responsible for delivering a core public service, and with it will have responsibility for a significant proportion of the Scottish Budget and an important area of public policy. It is therefore appropriate, as is common in wider Scottish Government public bodies policy, for the Scottish Ministers to have a power to direct SFRS which will be exercised only under exceptional circumstances.

*Choice of procedure*

68. No Parliamentary procedure applies, however the directions are required to be published and then laid before the Scottish Parliament.

**Section 117, new section 43A – Power to appoint by Order in Council Inspectors of SFRS**

**Power conferred on: Her Majesty the Queen**

**Power exercisable by: Order in Council**

**Parliamentary procedure: no procedure**

*Provision*

69. Section 117 gives Her Majesty power to appoint by Order in the Council a Chief Inspector of SFRS and such number of Inspectors as the Scottish Ministers may determine.

*Reason for taking power*

70. The appointment by Order in Council provides for the appointment of an individual to be made without the need for new legislation whenever a new Chief Inspector or Inspector is to be appointed.

*Choice of procedure*

71. The power will be subject to no procedure. This is considered to be an appropriate level of scrutiny for administrative matters such as this and is consistent with the equivalent provision in the Fire (Scotland) Act 2005. The Order in Council would be required to be laid before the Scottish Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

### **PART 3 - GENERAL**

#### **Section 121 - Ancillary Provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative / affirmative procedure

*Provision*

72. Section 121(1) enables the Scottish Ministers to make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, or in consequence of or for giving full effect to, any provision made by or under this Bill.

*Reason for taking power*

73. To enable the Scottish Ministers to adequately give effect to the provisions in this Bill.

*Choice of procedure*

74. An order made under this section which contains a provision which adds to, omits or replaces any part of an Act is subject to the affirmative procedure. Any other order made under this section is subject to the negative procedure. These procedures are typical for ancillary powers.

#### **Section 122 – Transitional Provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative procedure

*Provision*

75. Section 122(1) enables the Scottish Ministers to make transitional, transitory and savings provisions in connection with the coming into force of any provision of this Act.

*Reason for taking power*

76. This order is necessary to allow for flexibility as provisions within the Bill are brought into force. Without the power, it may be necessary to return to the Scottish 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 the Scottish Parliament or the Scottish Government. 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 in connection with the coming into force of any provision of the Bill.

*Choice of procedure*

77. This is a residual power that is included to ensure that any unforeseen obstacle to the transition to the Scottish Police Authority or to SFRS can be addressed. There are precedents for this kind of power, which is restricted by the fact that only transitional and transitory provision can be made. Bearing in mind the limited scope of the power, in terms of the subject matter and nature of the provision that can be made, it is felt that the negative procedure will provide sufficient Parliamentary scrutiny.

**Section 124 – Commencement**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** no procedure

*Provision*

78. Section 124(2) enables the Scottish Ministers to appoint days on which the provisions in the Bill come into force (other than sections 120, 121, 122 and 125 which come into force on the day after Royal Assent).

*Reason for taking power*

79. To enable the Scottish Ministers to appropriately commence the provisions in the Bill.

*Choice of procedure*

80. The power will be subject to no procedure which is standard for commencement powers.

**SCHEDULES**

**Schedule 1 paragraph 2(4) - Power to modify the minimum or maximum number of members of the Scottish Police Authority**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative procedure

*Provision*

81. Schedule 1 paragraph 2 enables the Scottish Ministers to appoint members of the Scottish Police Authority. Sub-paragraph (1) provides that the Authority is to consist of no fewer than seven nor more than eleven members, including a chairing member. Sub-paragraph (4) gives the Scottish Ministers the power to change the minimum or maximum number of members.

*Reason for taking power*

82. These arrangements reflect current best practice on optimum board size and have flexibility built into them. It is considered appropriate that there should be power to amend the minimum and maximum number of Authority members if this proves necessary in the light of experience without requiring further primary legislation.

*Choice of procedure*

83. An order made under this provision will be subject to negative procedure. The power allows for altering the number of Authority members without changing the structure or functions of the Authority, as agreed by the Scottish Parliament, in any way.

**Schedule 1 paragraph 3(h) - Power to specify persons of such other descriptions who may be disqualified from membership of the Scottish Police Authority**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order made by statutory instrument**

**Parliamentary procedure: negative procedure**

*Provision*

84. Paragraph 3 of schedule 5 describes persons who are disqualified from appointment or from holding office as a member of the Authority. Sub-paragraph (h) gives the Scottish Ministers power to prescribe other descriptions of persons who should be disqualified from appointment.

*Reason for taking power*

85. This power is considered appropriate to enable the Scottish Ministers to ensure that no conflict arises between the role of Authority members and any other role they may hold. It also allows the necessary ability to respond to new and emerging circumstances and legislation.

*Choice of procedure*

86. An order made under this provision will be subject to negative procedure, given its administrative nature.

**Schedule 3 paragraph 4 - Power to make rules about the procedure on appeals to a police appeals tribunal**

**Power conferred on: the Scottish Ministers**

*This document relates to the Police and Fire Reform (Scotland) Bill (SP Bill 8) as introduced in the Scottish Parliament on 16 January 2012*

**Power exercisable by: rules made by statutory instrument**  
**Parliamentary procedure: negative procedure**

*Provision*

87. Paragraph 4 of schedule 3 provides the Scottish Ministers with power to make rules pertaining to the police appeals tribunal procedure.

*Reason for taking power*

88. The rules will set out in detail what are largely administrative provisions. It is not considered appropriate to include such detailed provisions in primary legislation.

*Choice of procedure*

89. Rules made under this provision will be subject to negative procedure. This procedure is appropriate for detailed technical matters and is consistent with other types of court or tribunal rules.

**Schedule 4 paragraph 2(1) – Power to appoint a day (or days) for the transfer of constables, staff, property, etc.**

**Power conferred on: the Scottish Ministers**  
**Power exercisable by: order made by statutory instrument**  
**Parliamentary procedure: no procedure**

*Provision*

90. Schedule 4 provides for the transfer of constables, staff and property etc. Paragraph 2(1) of schedule 4 gives the Scottish Ministers power to specify the date on which police constables and staff will transfer to the Police Service of Scotland or Scottish Police Authority.

*Reason for taking power*

91. In preparation for the establishment of the service, it will be necessary to ensure that constables and staff transfer at the appropriate time. It may be necessary for different staff to transfer on different dates or for all staff to transfer on a particular date to support the smooth and effective transition to the new service. The date or dates cannot at this stage be specified as it will depend on work undertaken with and by the existing services and the result of timescales for transition. It is therefore appropriate for the date or dates to be set by order in due course.

*Choice of procedure*

92. An order made under this provision will be subject to no parliamentary procedure as it is simply determining the date on which constables and staff will transfer in accordance with the provisions set out in the Bill and is therefore analogous with a commencement order.

**Schedule 4 paragraph 11(1) – Power to make a staff transfer scheme**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** scheme

**Parliamentary procedure:** no procedure

*Provision*

93. Paragraph 3 and paragraph 10 of schedule 4 provide for the transfer of constables, joint board staff and employees of a local authority who are to be treated as police employees to the Police Service of Scotland or Scottish Police Authority on a day the Scottish Ministers may by order appoint.

94. Paragraph 11 of schedule 4 makes provision for the transfer to the Police Service of Scotland or the Authority of persons who are employed by a local authority and whose employment relates to the carrying out of functions conferred on the police service. The Scottish Ministers may make a staff transfer scheme which makes provisions for the transfer of such persons.

95. Sub-paragraph (3) of paragraph 11 provides that before making a staff transfer scheme, the Scottish Ministers must consult any local authority or other person whose rights, liability and obligations are to be transferred.

*Reason for taking power and choice of procedure*

96. The scheme will need to make detailed provision in order to capture all appropriate staff and ensure that they are dealt with in an effective and principled fashion. Individual local authorities will be best placed to set the arrangements for their own areas, subject to the approval of the Scottish Ministers. Bearing in mind the level of detail involved, and from the perspective of maintaining confidentiality, it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

**Schedule 4 paragraph 16(1) – Power to make a police property transfer scheme**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** scheme

**Parliamentary procedure:** no procedure

*Provision*

97. To ensure a seamless transition to the Police Service of Scotland, the intention is that property belonging to the Scottish Ministers, local authorities, joint police boards or the SPSA can be transferred to the Authority or a local authority on such date as the Scottish Ministers specify.

*Reason for taking power and choice of procedure*

98. Paragraph 16 of schedule 4 provides a power for the Scottish Ministers to make a police property transfer scheme which makes provision for or in connection with the transfer to the Authority of property, rights, liabilities and obligations currently belonging to the Scottish

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Ministers, local authorities, joint police boards or the SPSA, and which relate to the Authority's functions or police functions.

99. The scheme will need to make detailed provision in order to capture all property, rights, liabilities and obligations and ensure that they are dealt with in an effective and principled fashion. Local authorities, joint police boards and the SPSA will be best placed to set the arrangements for their own areas, subject to the approval of the Scottish Ministers. Bearing in mind the level of detail involved, it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

**Schedule 4 paragraph 17 – Power to make a local authority property transfer scheme**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

*Provision*

100. Paragraph 17 of schedule 4 provides a power for the Scottish Ministers to make a local authority property transfer scheme, which makes provision for or in connection with the transfer to a specified local authority, rather than the Authority, of property, rights, liabilities and obligations currently belonging to a specified joint board.

*Reason for taking power and choice of procedure*

101. As for police property schemes, it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

**Schedule 5 paragraph 1 – Power to appoint a day (or days) for the transfer of staff, property, etc.**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order made by statutory instrument**

**Parliamentary procedure: no procedure**

*Provision*

102. Schedule 5 provides for the transfer of staff, property etc. Paragraph 1 of schedule 5 gives the Scottish Ministers power to specify the day or dates on which SFRS staff will transfer to the Scottish Fire and Rescue Service.

*Reason for taking power*

103. In preparation for the establishment of the service it will be necessary to ensure that SFRS staff transfer at the appropriate time. It may be necessary for different staff to transfer on different dates or for all staff to transfer on a particular date to support the smooth and effective transition to the new service. The date or dates cannot at this stage be specified as it will depend on work undertaken with and by the existing services and the result of timescales for transition. It is therefore appropriate for the date or dates to be set by order in due course.

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*Choice of procedure .*

104. An order made under this provision will be subject to no parliamentary procedure as it is simply determining the date on which SFRS staff will transfer in accordance with the provisions set out in the Bill and is therefore analogous with a commencement order.

**Schedule 5 paragraph 3 – Power to make a staff transfer scheme**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

*Provision*

105. Paragraph 2 of schedule 5 provides for the transfer of all joint board staff to SFRS on a day the Scottish Ministers may by order appoint.

106. Paragraph 3 makes provision for the transfer to SFRS of persons who are employed by a local authority or are members of the staff of the Scottish Ministers and whose employment relates to the carrying out of functions conferred on SFRS. The Scottish Ministers may make a staff transfer scheme which makes provisions for the transfer of such persons.

107. Paragraph 4 sets out the effect on a contract of employment of a staff transfer scheme. Sub-paragraph (9) provides that, before making a staff transfer scheme, the Scottish Ministers must consult any local authority or other person whose rights, liability and obligations are to be transferred.

*Reason for taking power and choice of procedure*

108. The scheme will need to make detailed provision in order to capture all appropriate staff and ensure that they are dealt with in an effective and principled fashion. Individual local authorities and staff of the Scottish Ministers will be best placed to set the arrangements for their own areas, subject to the approval of the Scottish Ministers. Bearing in mind the level of detail involved, and from the perspective of maintaining confidentiality, it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

**Schedule 5 paragraph 5 – Power to make an SFRS property transfer scheme**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

*Provision*

109. To ensure a seamless transition to SFRS, the intention is that property belonging to the Scottish Ministers, local authorities and joint fire and rescue boards can be transferred to SFRS on such date as the Scottish Ministers specify.

110. Paragraph 5 of schedule 5 provides a power for the Scottish Ministers to make an SFRS property transfer scheme which makes provision for or in connection with the transfer to SFRS of property, rights, liabilities and obligations currently belonging to the Scottish Ministers, local authorities and joint fire and rescue boards, and which relate to SFRS functions.

*Reason for taking power and choice of procedure*

111. The scheme will need to make detailed provision in order to capture all property, rights, liabilities and obligations and ensure that they are dealt with in an effective and principled fashion. Local authorities and joint fire and rescue boards will be best placed to set the arrangements for their own areas, subject to the approval of the Scottish Ministers. Bearing in mind the level of detail involved, it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

**Schedule 5 paragraph 6 – Power to make a local authority property transfer scheme**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** scheme

**Parliamentary procedure:** no procedure

*Provision*

112. Paragraph 6 of schedule 5 provides a power for the Scottish Ministers to make a local authority property transfer scheme, which makes provision for or in connection with the transfer to a specified local authority, rather than SFRS, of property, rights, liabilities and obligations currently belonging to a specified joint board.

*Reason for taking power and choice of procedure*

113. As for SFRS property schemes, it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

**Schedule 6, paragraph 22(13)(b) - Power to apply provisions of the Bill etc to staff of the Police and Investigations Review Commissioner**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** order made by statutory instrument

**Parliamentary procedure:** affirmative procedure

*Provision*

114. Paragraph 22(13)(b) of Schedule 6 provides for the Scottish Ministers to apply any provisions of the 2012 Act to the constables or other persons appointed by the Commissioner as members of staff under paragraph 7A of schedule 4 to the 2006 Act. This order is made under section 103 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, as amended by paragraph 22(11) of schedule 6 to this Bill.

*Reason for taking power*

115. The Commissioner's staff may be seconded from police services in the UK or elsewhere or recruited directly. In order to carry out investigations staff members will have all the powers and privileges of a police constable.

116. This power may be used by the Scottish Ministers to apply provisions within the Act to the Commissioner's staff such as those in relation to the functions of constables set out in section 20 of the Bill. For example, the duty to attend court to give evidence, or the duty to make such reports to the appropriate prosecutor as may be needed. Other provisions, such as section 22 which relates to failure to perform duty and section 23, failure to return equipment, may also need to be applied.

*Choice of procedure*

117. The order will be subject to affirmative procedure. This provides the appropriate level of Parliamentary scrutiny because the power would involve the application with modifications of primary legislation.

**Schedule 6, paragraph 22(13)(b) - Power to apply enactments relating to investigation of offences to PIRC investigations**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order made by statutory instrument**

**Parliamentary procedure: affirmative procedure**

*Provision*

118. Paragraph 22(13)(b) of schedule 6 inserts section 7B into the 2006 Act and provides power to apply any enactment relating to investigations by constables to investigations by the Commissioner's staff. This order is made under section 103 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, as amended by paragraph 22(11) of schedule 6 to this Bill.

*Reason for taking power*

119. The Commissioner's staff will carry out investigations into a range of incidents involving persons serving with the police. Some will be under the direction of an appropriate prosecutor, others at the request of the Chief Constable or the Authority.

120. This power is in relation to investigations under the direction of an appropriate prosecutor into circumstances in which there is an indication that a person serving with the police may have committed a serious criminal offence including circumstances in which death or serious injury has resulted. Other types of serious criminal offences that the Commissioner may investigate will be defined in regulations (as set out in paragraphs above).

121. The Commissioner may designate a member of his staff to take charge of any investigation and other staff members to assist the member designated to take charge. As set out above in paragraph 39 these staff members will have the powers and privileges of a constable throughout Scotland. Investigations may include gathering evidence, questioning witnesses,

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surveillance, and obtaining prints and samples. Part II of the Criminal Procedure (Scotland) Act 1995 sets out police functions in relation to, for example, questioning potential witnesses and obtaining samples.

122. The Scottish Ministers may use the power in 22(13)(b) to apply provisions such as those set out in the Criminal Procedure (Scotland) Act 1995 to investigations carried out by the Commissioner's staff.

*Choice of procedure*

123. The order will be subject to affirmative procedure. This provides the appropriate level of Parliamentary scrutiny because the power would involve the application with modifications of primary legislation.

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# **POLICE AND FIRE REFORM (SCOTLAND) BILL**

## **DELEGATED POWERS MEMORANDUM**