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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Management of Offenders (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 20 March, 15 and 22 May 2018, the Delegated Powers and Law Reform Committee considered the delegated powers in the Management of Offenders (Scotland) Bill (“the Bill”).ⁱ The Committee submits this report to the lead Committee for the Bill (the Justice Committee) under Rule 9.6.2 of Standing Orders.
2. The Bill was introduced by the Cabinet Secretary for Justice, Michael Matheson MSP, on 22 February 2018. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱⁱ

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

Bill overview

3. The Bill is divided into four Parts and has 50 sections and two schedules.

- **Part 1** sets out an overarching system of electronic monitoring, consolidating and expanding on provision made in a number of existing enactments. It provides for the court (when making certain disposals) or the Scottish Ministers (when setting certain parole licence conditions) to require the offender to submit to electronic monitoring by means of an approved device.

Regulations may prescribe what an approved device is and provide for the use made of an approved device and information obtained from it. The information can relate to the offender's whereabouts in some way or an offender's consumption, taking or ingesting of alcohol, drugs or other substances. The court, or, as the case may be, the Scottish Ministers, must designate a person to be responsible for monitoring the offender and inform the offender of that designation. The data from the device may be used as evidence in a hearing on whether the monitoring requirement or the underlying disposal or licence condition has been breached.

- **Part 2** of the Bill ("Disclosure of convictions") amends the Rehabilitation of Offenders Act 1974 (the "1974 Act"). It reduces the periods of time during which certain previous convictions have to be disclosed. Part 2 extends the maximum length of both custodial sentences, and sentences of detention for young offenders and children, that are capable of being spent (i.e. eventually excluded from the requirement to disclose a conviction) from 30 months to 48 months. Part 2 also gives new powers to the Scottish Ministers in relation to alternatives to prosecution and regulates how powers under the 1974 Act are exercisable. A number of changes are also made to update, restructure and improve the accessibility of the 1974 Act.
- **Part 3** of the Bill amends existing legislation (primarily, the Prisoners and Criminal Proceedings (Scotland) Act 1993 relating to the Parole Board for Scotland. This includes amendments to the composition of the Parole Board, to the functions and requirements of the Parole Board in relation to prisoners and to the role of the Scottish Ministers in certain types of parole cases. Part 3 also makes provision relating to the independence of the Parole Board and repeals provisions of the Custodial Sentences and Weapons (Scotland) Act 2007 relating to the Parole Board. The Scottish Ministers may by regulations authorise the chairperson of the Parole Board for Scotland to make provision about administrative arrangements within the Parole Board.
- **Part 4** of the Bill contains the "ancillary and final matters" of the Bill and follows a similar form to other bills.

Consideration of the Bill

4. At its meeting on Tuesday 20 March 2018, the Committee agreed to write to the Scottish Government to raise questions in relation to six of the delegated powers in the Bill. The Committee's questions, and the response received from the Scottish Government to them, is included in the **Annex** to this report.
5. The Committee reports as follows on the delegated powers in the Bill. The Committee is content with the remaining delegated powers.

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

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

Provisions

6. Section 3(2) of the Bill sets out the disposals in respect of an offender for which a court may additionally require the offender to submit to electronic monitoring. The orders listed in section 3(2) are a restriction of liberty order, a drug treatment and testing order, a community payback order, a sexual offences prevention order, and an order relating to sexual risk or harm. With the exception of the last two disposals, existing legislation allows the court to order electronic monitoring in addition to the underlying disposal.
7. The delegated power is contained in section 4(1) of the Bill, which provides that the Scottish Ministers may by regulations modify the list in section 3(2) so as to add, alter or remove an entry, or limit an entry so as to specify a certain aspect of what a court may do.
8. An entry included in the list in section 3(2) by virtue of the power may relate to anything, at any stage in criminal proceedings, which can be made or imposed by a court with respect to an offender or to which an offender can otherwise be made subject by a court. An entry may not, however, relate to something under which an offender is to be detained in custody.
9. The monitoring requirement imposed in respect of the orders listed in section 3(2) must also concern an offender's whereabouts in some way or an offender's consumption, taking or ingesting of alcohol, drugs or other substances.
10. Regulations under section 4(1) of the Bill are subject to the negative procedure.

Comments

11. The Committee recognises that the types of disposals that can be added are limited and that the imposition of electronic monitoring is a matter for the court's discretion, which it is required to exercise ensuring compliance with the European Convention on Human Rights ("the Convention") in the particular circumstances of each case.

12. Nevertheless, the Committee considers on balance that the affirmative procedure would be more appropriate. This is because extending the regime of electronic monitoring is a significant policy choice, particularly in light of the intrusive nature of electronic monitoring.
13. The power in section 4(1) is also one which would allow primary legislation (i.e. the list of disposals in section 3(2) of the Bill as enacted) to be modified by secondary legislation. It is customary for such powers to be subject to the affirmative procedure. The Scottish Government argued that there are examples of powers to modify primary legislation using subordinate legislation which are subject to the negative procedure. It cited section 8 of the Victims and Witnesses (Scotland) Act 2014 (the “2014 Act”), which provides that regulations subject to the negative procedure can modify a list of offences, the victims of which may request the interviewer to be of a specific gender. However, the Committee considers that this can be distinguished from the power in section 4(1) of the Bill on the basis that the power in section 8 of the 2014 Act affords additional protections to victims, as opposed to extending the regime of electronic monitoring, which encroaches on a person’s liberty.
14. The Committee also considers that the ability to monitor consumption of “other substances” is particularly wide, and is something the lead Committee may wish to consider the scope of further. It is not yet clear what substances it is envisaged it would be appropriate to monitor the consumption of other than alcohol and drugs.

Recommendations

15. **The Committee calls on the Scottish Government to amend the Bill at Stage 2 to provide that the power in section 4 is made subject to the affirmative procedure.**
16. **Furthermore, the Committee draws the lead Committee’s attention to the possibility of an electronic monitoring requirement being imposed by the court that concerns an offender’s consumption of “other substances”. The lead Committee may wish to consider further what could be included within the scope of “other substances” insofar as they are not alcohol or drugs.**

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

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

Provisions

17. Section 7(1)(a) to (e) set out the parole licence conditions in respect of an offender for which the Scottish Ministers may additionally require the offender to submit to electronic monitoring.

18. Existing legislation allows the Scottish Ministers to order electronic monitoring in addition to the conditions listed in section 7(1)(a) to (c). By virtue of section 7(1)(d), the conditions that can be subject to an electronic monitoring requirement will now include those relating to temporary release (home leave, unescorted day leave, unescorted day release for compassionate reasons, temporary release for work, and unescorted release for health reasons).
19. The delegated power is contained in section 7(1)(e), which enables the Scottish Ministers by regulations to prescribe additional types of conditions relating to release from imprisonment which can be monitored electronically.
20. Like the power in section 4(1), the power in section 7(1) is limited, insofar as it can only relate to measures concerning an offender's whereabouts or their consumption of alcohol, drugs or other substances.
21. The power to make regulations in section 7(1) is also subject to the negative procedure.

Comments

22. The Committee recognises that the types of conditions that can be added are limited, that the imposition of electronic monitoring is a matter for the Scottish Ministers' or the Parole Board's discretion, and that the power in section 7 does not enable the amendment of primary legislation.
23. The Committee also recognises that the Scottish Ministers are required to act in conformity with an offender's Convention rights when considering whether to impose an electronic monitoring requirement as part of a parole licence condition.
24. Although the power will not be exercised until further forms of early release from prison are created by statute, the Committee nevertheless considers on balance that the affirmative procedure would be more appropriate. Like the power in section 4, extending the regime of electronic monitoring is a significant policy choice.
25. Furthermore, it is not clear that a different parliamentary process should apply to the powers in sections 4 and 7. Therefore, as the Committee recommends that regulations under section 4 should be subject to the affirmative procedure, the Committee considers that regulations made under section 7 should also be made subject to that procedure.
26. In addition, like section 4, the Committee considers that the ability to monitor consumption of "other substances" is particularly wide, and is something the lead Committee may wish to consider the scope of further. It is not yet clear what substances it is envisaged it would be appropriate to monitor the consumption of other than alcohol and drugs.

Recommendations

27. **The Committee calls on the Scottish Government to amend the Bill at Stage 2 to provide that the power in section 7 is made subject to the affirmative procedure.**

28. Furthermore, the Committee draws the lead Committee's attention to the possibility of an electronic monitoring requirement being imposed by the Parole Board and (in some scenarios) the Scottish Ministers that concerns an offender's consumption of "other substances". Again, the lead Committee may wish to consider further what could be included within the scope of "other substances" insofar as they are not alcohol or drugs.

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

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

Provisions

29. Section 9(1) of the Bill allows the Scottish Ministers to make regulations providing for the use of an approved device in connection with a court disposal or licence condition.
30. The regulations may also provide for the use of information obtained through monitoring of an offender by means of an approved device for the purposes of ensuring compliance with both the disposal or licence condition and the generic conditions specified in section 12 that apply to the offender in relation to the device.
31. Subsections (3) and (5) give examples of what the regulations may do. They may set out how a device is to be worn or used in some other way by an offender. They may provide for the circumstances in which a particular type of device is, or is not, to be used and what information may or may not be gathered at a particular time or in particular circumstances. Regulations may also allow or restrict the use or sharing of information obtained through monitoring and fix periods during which such information may be retained and after which such information must be destroyed. However, this list is not exhaustive.
32. Regulations made under section 9(1) are subject to the negative procedure.

Comments

33. The Committee considers that the affirmative procedure would be more appropriate for the regulations made under section 9 given the importance of such regulations to the rights of individuals. Although such provision can be restrictive, therefore guaranteeing Convention rights, it can also be permissive, such as to allow the use or sharing of information obtained through monitoring.
34. Although the Scottish Ministers are required to act compatibility with Convention rights when making subordinate legislation, the Committee considers that it is appropriate for the Parliament to have an enhanced role to scrutinise whether the regulations would comply with Convention requirements.

Recommendation

- 35. The Committee calls on the Scottish Government to amend the Bill at Stage 2 to provide that the power in section 9 is made subject to the affirmative procedure.**

Annex

Letter to the Scottish Government

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

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

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

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

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

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

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

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: regulations**
- **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?

Response from the Scottish Government

The Scottish Ministers are asked:

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.

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.

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.

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.

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.

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:

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.

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.

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.

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.

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.

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.

