



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

24th Meeting, 2014 (Session 4)

Tuesday 30 September 2014

The Committee will meet at 10.00 am in the Robert Burns Room (CR1).

1. **Decisions on taking business in private:** The Committee will decide whether to take items 8, 9 and 10 in private.
2. **Criminal Justice and Courts Bill (UK Parliament legislation):** The Committee will take evidence on legislative consent memorandum LCM(S4) 32.1 from—

Kenny MacAskill, Cabinet Secretary for Justice, Tansy Main, Head of Police Workforce Sponsorship Team, John McCutcheon, Policy Officer, Youth Justice and Children's Hearings Unit, and Elizabeth Blair, Senior Principal Legal Officer, Directorate for Legal Services, Scottish Government.

3. **Subordinate legislation:** The Committee will take evidence on the Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [draft] from—

Kenny MacAskill, Cabinet Secretary for Justice, Stella Smith, Legal Services Team Leader, Civil Law and Legal System, and Alastair Smith, Solicitor, Directorate for Legal Services, Scottish Government.

4. **Subordinate legislation:** Kenny MacAskill (Cabinet Secretary for Justice) to move—

S4M-10964—That the Justice Committee recommends that the Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [draft] be approved.

5. **Subordinate legislation:** The Committee will consider the following negative instrument—

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No. 2) Order 2014 (SSI 2014/220).

6. **Subordinate legislation:** The Committee will consider the following instrument which is not subject to any parliamentary procedure—  
  
Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210).
7. **EU opt-out:** The Committee will consider correspondence from the Minister for Community Safety and Legal Affairs.
8. **Assisted Suicide (Scotland) Bill:** The Committee will consider its approach to the scrutiny of the Bill at Stage 1.
9. **Draft Budget Scrutiny 2015-16:** The Committee will consider its approach to the scrutiny of the Scottish Government's Draft Budget 2015-16.
10. **Criminal Justice and Courts Bill (UK Parliament legislation):** The Committee will consider the evidence heard earlier in the meeting on legislative consent memorandum LCM(S4) 32.1.

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The papers for this meeting are as follows—

**Agenda item 2**

Paper by the clerk J/S4/14/24/1

Private paper J/S4/14/24/2 (P)

**Agenda items 3 and 4**

Paper by the clerk J/S4/14/24/3

[Legal Profession and Legal Aid \(Scotland\) Act 2007  
\(Membership of the Scottish Legal Complaints Commission\)  
Amendment Order 2014](#)

**Agenda item 5**

Paper by the clerk J/S4/14/24/4

[Title Conditions \(Scotland\) Act 2003 \(Rural Housing Bodies\)  
Amendment \(No. 2\) Order 2014 \(SSI 2014/220\)](#)

**Agenda item 6**

Paper by the clerk J/S4/14/24/5

[Victims and Witnesses \(Scotland\) Act 2014  
\(Commencement No. 2 and Transitional Provision\) Order  
2014 \(SSI 2014/210\)](#)

**Agenda item 7**

Paper by the clerk J/S4/14/24/6

**Agenda item 8**

Private paper J/S4/14/24/7 (P)

Private paper J/S4/14/24/8 (P)

[Assisted Suicide \(Scotland\) Bill and accompanying  
documents](#)

[Analysis of submissions of evidence on the Assisted Suicide  
\(Scotland\) Bill](#)

**Agenda item 9**

**J/S4/14/24/A**

Private paper

J/S4/14/24/9 (P)

Private paper

J/S4/14/24/10 (P)

## **Justice Committee**

**24th Meeting, 2014 (Session 4), Tuesday 30 September 2014**

### **Legislative Consent Memorandum – Criminal Justice and Courts Bill**

#### **Note by the clerk**

#### **Purpose**

1. This paper provides background information for the Committee's evidence session with the Cabinet Secretary for Justice on the Legislative Consent Memorandum (LCM) on the Criminal Justice and Courts Bill.

#### **LCM Process**

2. The LCM process (also known as the Sewel Convention<sup>1</sup>) is the mechanism for the Scottish Parliament to give its consent to the UK Government to legislate on devolved matters in the UK Parliament. Chapter 9B of Standing Orders<sup>2</sup> sets out the procedure governing this process.

3. To give consent, the Parliament must agree to a legislative consent motion. This cannot be lodged until the lead committee (in this case the Justice Committee) has reported on the Bill.

4. In compliance with Standing Orders, an LCM in respect of the Criminal Justice and Courts Bill (annexed to this paper) has been lodged by the Scottish Government which summarises what the Bill does and its policy objectives, and specifies the extent to which the Bill makes provision for any purpose within the legislative competence of the Scottish Parliament.

#### **Criminal Justice and Courts Bill**

##### *Westminster scrutiny*

5. The Bill was introduced in the House of Commons on 5 February 2014. The Bill as introduced did not contain any provisions falling within the terms of the Sewel Convention<sup>3</sup>. The Convention has been engaged by amendments at Committee stage in the House of Lords.

##### *Purpose of LCM*

6. The Bill contains an amendment to the Rehabilitation of Offenders Act 1974 which will resolve a legislative competence issue by seeking to ensure that the Scottish Ministers have adequate powers to bring forward subordinate legislation under that Act to specify areas in relation to which spent disposals from Children's Hearings must still be disclosed. The LCM states that the Scottish Government plans to make an Order specify the types of employment and proceedings that are excluded from the protection afforded by the 1974 Act and, therefore, where disclosure of spent alternatives to prosecution is required.

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<sup>1</sup> Further background information on the Sewel Convention is available in House of Commons Library Note SN/PC/2084, published on 25 November 2005. Available at: <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02084.pdf>

<sup>2</sup> Chapter 9B of the Standing Orders of the Scottish Parliament.

Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/26512.aspx>

<sup>3</sup> Explanatory Notes, p16 <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/en/14169en.pdf>

7. The LCM also covers the offence of police corruption, created by the Bill, which the UK Government wishes to apply to National Crime Agency police officers operating in Scotland.

*Committee consideration*

8. To ensure that the Scottish Parliament's view is taken into account prior to the final stage in the House of Lords (3<sup>rd</sup> Reading), the Scottish Parliament is required to conclude consideration of the LCM by 30 October.

9. The Committee will take evidence on the LCM from the Cabinet Secretary for Justice. It will then consider a draft report at its meeting on 7 October.

## **LEGISLATIVE CONSENT MEMORANDUM**

### **CRIMINAL JUSTICE AND COURTS BILL**

#### **Draft legislative consent motion**

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice is:

“That the Parliament agrees that the relevant provision of the Criminal Justice and Courts Bill, introduced to the House of Commons on 5 February 2014, relating to the amendment of the Rehabilitation of Offenders Act 1974, so far as this matter alters the executive competence of Scottish Ministers, and relating to the activities of officers of the National Crime Agency when those officers are operating in Scotland, should be considered by the UK Parliament.”

#### **Background**

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(c)(ii) of the Parliament’s Standing Orders. The latest version of the Criminal Justice and Courts Bill can be found at:

<http://services.parliament.uk/bills/2014-15/criminaljusticeandcourts.html>

#### **Content of the Criminal Justice and Courts Bill**

3. The Bill makes provision about how offenders are dealt with before and after conviction; amends the offence of possession of extreme pornographic images; the proceedings and powers of courts and tribunals; judicial review; and connected purposes.

#### **Provision which relates to Scotland**

##### *Rehabilitation of Offenders*

4. The Bill contains an amendment to the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) which will resolve a legislative competence issue.
5. In the course of implementation of the Children’s Hearings (Scotland) Act 2011 (the 2011 Act) the Scottish Government encountered a difficulty with part of the package of reforms around treatment of children for the purposes of rehabilitation of offenders and disclosure. The difficulty stemmed from Scottish Ministers’ lack of competence to make an Order under Schedule 3 to the 1974 Act, setting out exclusions and exceptions to the general rule that spent Alternatives to Prosecution (ATPs) from children’s hearings do not need to be disclosed. This Order will specify the types of employment and proceedings that are excluded from the protection afforded by the 1974 Act and, therefore, where disclosure of spent ATPs is required. Some of the types of employment (for example a registered teacher or a doctor) and some proceedings (such as certain proceedings under the Firearms Act 1968 or the Proceeds of Crime Act 2002) fall within reserved areas. While the Scottish Ministers have the power to legislate for the disclosure of spent convictions which impact on reserved areas they do not have the

same power in relation to ATPs which impact on reserved areas. This resulted in the implementation being put on hold, pending resolution of this competence issue.

6. The issue stems from Schedule 3 to the 1974 Act having been inserted by an Act of the Scottish Parliament – the Criminal Justice & Licensing (Scotland) Act 2010. This means that the enabling powers in Schedule 3 are subject to the limitations of devolved competence as provided for by sections 29(2)(b) and (c) of, and Schedule 4 to, the Scotland Act 1998 (the 1998 Act). Section 29(2)(b) of the 1998 Act provides that a provision is outside the legislative competence of the Scottish Parliament if it relates to reserved matters and section 29(2)(c) of the 1998 Act provides that a provision is outside the legislative competence of the Scottish Parliament if it is in breach of the restrictions in Schedule 4 to the 1998 Act (Schedule 4 to the 1998 Act imposes various restrictions preventing the Scottish Parliament from modifying various enactments or rules of law, such as the law on reserved matters).

7. The solution to this issue is to insert (see Clause 18 of the Bill) a new paragraph into Schedule 3 to the 1974 Act which states that the Scottish Ministers can exercise the powers in paragraph 6 and section 7(4), as applied by paragraph 8, without the restrictions in section 29 of the 1998 Act.

#### *Offence of police corruption*

8. Clause 25 (Corrupt or other improper exercise of police powers and privileges) of the Bill), only apply in England and Wales to:

- officers of English & Welsh police forces;
- the British Transport Police (BTP);
- The Civil Nuclear Constabulary (CNC);
- Ministry of Defence Police (MoD); and
- National Crime Agency (NCA) officers (designated by the Director General as having the powers/privileges of a constable).

9. The provisions relate only to Police Officers of English and Welsh forces and to those with a UK wide remit – they do not extend to police staff.

10. The Home Office has advised that the relevant UKG Ministers are strongly in favour of this offence being extended to those forces with a UK-wide remit (BTP, CNC, MoD and NCA) when they are operating in Scotland, and the UK Government has tabled amendments to the Bill to achieve that policy effect.

11. The majority of the functions of the BTP, CNC and MoD police are connected, either directly or indirectly, with the reserved matters for which each force was established. On that basis, the Home Secretary can determine whether officers of these forces in Scotland are covered by this offence. In contrast, NCA officers are engaged in activities in Scotland which are substantially devolved. For example, they exercise the powers of Scottish constables, they carry out general policing functions as well as their specialist functions, they report offences to the Procurator Fiscal and any offences committed in Scotland would be tried in Scottish courts.

## **Reasons for seeking a legislative consent motion**

### *Rehabilitation of Offenders*

12. Primary legislation is the most direct comprehensive mechanism for conferring full executive competence on the Scottish Ministers. Although there are secondary legislative powers in the Scotland Act 1998, these processes can be lengthy and do not, in this instance, provide wholly appropriate solutions.

13. The amendment to the Criminal Justice and Courts Bill adjusts the executive competence of the Scottish Ministers and therefore requires the consent of the Parliament. The amendment to the UK Bill addresses a legislative competence gap which currently presents an obstacle to implementation of Scottish Government policy in the predominantly devolved area of rehabilitation of offenders.

### *Offence of Police corruption*

14. Officers of Police Scotland are already covered by a statutory offence under section 22 of the Police and Fire Reform (Scotland) Act 2012 regarding neglect or violation of duty by a constable of the PSoS, which the Government regard as including negative and positive acts in breach of any of a constable's duties. The offence is punishable by a maximum period of 2 years' imprisonment and an unlimited fine. This offence doesn't however apply to NCA officers operating in Scotland - so not extending the proposed offence to them means that they could only be tried in Scotland under the common law offence of wilful neglect of duty.

15. The Government therefore considers it both sensible and appropriate for provision to be included in the Bill to extend the proposed offence to cover NCA officers operating in Scotland.

## **Consultation**

16. The amendment is a technical measure so has not been the subject of public consultation. However, the Scottish Government has informed relevant stakeholders of the policy and it has previously been considered as part of the Criminal Justice and Licensing Act 2010.

17. As regards the new offence of police corruption, the Scottish Government has informed relevant stakeholders and they are content.

## **Conclusion**

18. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the provisions outlined above should be considered by the UK Parliament.

**Scottish Government  
August 2014**

## **Justice Committee**

**24<sup>th</sup> Meeting, 2014 (Session 4), Tuesday 30 September 2014**

### **Subordinate legislation**

#### **Note by the clerk**

#### **Purpose**

1. This paper invites the Committee to consider the following affirmative instrument:
  - Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [draft].

#### **Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [draft]**

#### **Introduction**

2. The draft Order was laid under section 1(2) of, and paragraph 2(7) of schedule 1 to, the Legal Profession and Legal Aid (Scotland) Act 2007 and all other enabling powers. This Order replaces an Order laid on 6 June 2014, which was withdrawn after it incorrectly stated the number of legal/lay members of the Board of the Scottish Legal Complaints Commission. This error arose due to a misunderstanding between Scottish Government and Scottish Legal Complaints Commission (SLCC) officials.
3. The purpose of the instrument is to make changes to the number and composition of the membership of the SLCC by reducing the number of the board from 12 to 9, thereby placing current practice on a statutory footing.
4. Further details on the purpose of the instrument can be found in the policy note in Annexe A to this paper and an electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/sdsi/2014/9780111024133/contents>

#### **Consultation**

5. The policy note confirms that paragraph 2(7) of schedule 1 to the Legal Profession and Legal Aid (Scotland) Act 2007 allows the Scottish Ministers to amend, by order, the size of the board, and that consultation is not required.

#### **Delegated Powers and Law Reform Committee consideration**

6. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 5 August 2014 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

#### **Justice Committee consideration**

7. The Justice Committee is required to report to the Parliament on this instrument by 28 October 2014.

8. The instrument is subject to affirmative procedure (Rule 10.6. of Standing Orders). The Cabinet Secretary for Justice has lodged motion S4M-10964 proposing that the Committee recommends the approval of the instrument. The Cabinet Secretary for Justice will attend the Committee meeting on 30 September to answer any questions on the instrument, and then, under a separate agenda item, will be invited to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 28 October 2014.

9. The Parliament will then be invited to approve the instrument.

**10. The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

## **ANNEXE A**

### **Policy Note: Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [draft].**

The above order is made in exercise of the powers conferred by section 1(2) of and paragraph 2(7) of schedule 1 to the Legal Profession and Legal Aid (Scotland) Act 2007 and all other powers enabling them to do so.

The instrument, which will make amendments to primary legislation, is subject to the affirmative procedure.

#### **Background**

The Scottish Legal Complaints Commission (SLCC) and other stakeholders wrote to the Minister for Community Safety on 28 November to request a number of changes to the Legal Profession and Legal Aid (Scotland) Act 2007 in order to improve the workings of the act

Following consultation on a draft instrument, the SLCC made us aware that the number of their Board members is only 9 while the Act states it should be 12. As work was ongoing on the instrument to alter the 2007 act, it seemed logical to do this at the same time.

The Board is currently operating efficiently with 9 members and that 12 members are not required or affordable for the organisation.

#### **Policy objectives**

This Order makes certain changes to the number and composition of the membership of the Scottish Legal Complaints Commission.

#### **Reducing the membership of the Scottish Legal Complaints Commission**

This order will reduce the numbers of the board of the SLCC from 12 to 9, placing on a statutory footing what is current practice. The order will “make sure our public services are high quality, continually improving, efficient and responsive to local people’s needs”, this is in keeping with the Scottish Government’s National Outcomes.

#### **Consultation**

Paragraph 2(7) of schedule 1 to the Legal Profession and Legal Aid (Scotland) Act 2007 allows for Minister to amend, by order, the size of the board. Consultation is not required.

#### **Regulatory impact assessment**

A BRIA was not prepared as the amendment relates to the board membership, and will not lead to costs or savings for business, third or public sector organisations, regulators or consumers. It is a technical change which will only affect the Board. Guidance states that in these circumstances a BRIA is not required.

## **Financial Implications**

This instrument has no additional financial effects on the Scottish Government, local government or business.

Directorate for Justice  
July 2014

**Justice Committee**

**24<sup>th</sup> Meeting, 2014 (Session 4), Tuesday 30 September 2014**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following negative instrument:
  - Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No. 2) Order 2014 (SSI 2014/220).
2. Further details on the procedure for negative instruments are set out in Annexe A attached to this paper.

**Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No. 2) Order 2014 (SSI 2014/220)**

**Introduction**

3. The purpose of the instrument is to amend the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order 2004 by adding one body, Mull and Iona Community Trust, as a prescribed rural housing body.<sup>1</sup>
4. The instrument comes into force on 29 October 2014.
5. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/ssi/2014/220/contents/made>

**Consultation**

6. The policy note on the instrument confirms that a consultation is not required as applicants either meet the terms of the legislation or they do not.

**Delegated Powers and Law Reform Committee consideration**

7. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 19 August 2014 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

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<sup>1</sup> A rural housing body has the power to control the future of certain properties through the creation of rural housing burdens. Land or buildings may be sold for the purpose of creating affordable housing in a rural area. Inserting a rural housing burden will give a rural housing body the ability to intervene should there be an attempt to resell the property in the future for some purpose contrary to the objective of affordable housing (eg. as a holiday home). It is possible for rural housing burdens to include terms which, for instance, set the price at which the property can be bought by the rural housing body.

## **Justice Committee consideration**

8. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 3 November 2014.

## **Policy Note: Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No. 2) Order 2014 (SSI 2014/220)**

The powers to make this Order are conferred by section 43(5) of the Title Conditions (Scotland) Act 2003 (“the 2003 Act”). The instrument is subject to the negative procedure.

## **Policy Objective**

Section 43(5) of the 2003 Act provides that Scottish Ministers may prescribe such body as they think fit to be a rural housing body. A rural housing body will be able, when selling rural housing or land, to reserve a right to repurchase the property or land in the event of it coming up for sale. As a consequence, rural housing bodies will have the ability to control future sales. Ministers also have the power, under the 2003 Act, to determine that a body shall cease to be a rural housing body.

The right to repurchase may only be used over rural land. Rural land means land other than excluded land. Excluded land has the same meaning as in the Land Reform (Scotland) Act 2003, namely settlements of over 10,000 people.

This Order amends the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order 2004 by adding one body, Mull and Iona Community Trust, as a prescribed rural housing body.

The power to make this Order may only be exercised where the object or function, or one of the principal objects or functions, of the body concerned is to provide housing or land for housing (section 43(6) of the 2003 Act). Mull and Iona Community Trust complies with this requirement.

Previous amending Orders designating rural housing bodies were made in 2004, 2006, 2007, 2008, 2013 and 2014.

## **Consultation**

A consultation is not required as applicants either meet the terms of the legislation or they do not.

## **Impact Assessments**

An equality impact assessment has not been undertaken on the basis that this policy does not have any impact on equality issues.

## **Financial effects**

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. With the limited information received from the BRIA process, we conclude that the impact of this Order on existing businesses in the area is generally positive. The Order enables a further rural housing body to provide affordable housing for

current and future communities. This is likely to contribute to sustaining existing businesses and may attract new businesses.

**Civil Law and Legal System Division**  
**August 2014**

**ANNEXE A****Negative instruments: procedure**

Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

**Guidance on subordinate legislation**

Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee’s web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/64215.aspx>

## **Justice Committee**

**24<sup>th</sup> Meeting, 2014 (Session 4), Tuesday 30 September 2014**

### **Subordinate legislation**

#### **Note by the clerk**

#### **Purpose**

1. This paper invites the Committee to consider the following instrument which is not subject to any parliamentary procedure:

- Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210).

#### **Introduction**

2. The purpose of the instrument (the first relating to measures affecting the criminal justice system) is to bring into force sections 8, 23 (except subsections (7) and (14)), 27, 28 and 29, and to commence sections 2, 6, and 26, but only for the purposes of allowing subordinate legislation to be made in advance of these provisions being commenced fully in a subsequent commencement order.

3. The instrument came into force on 13 August 2014.

4. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at:

<http://www.legislation.gov.uk/ssi/2014/210/contents/made>

#### **Consultation**

5. The policy note on the instrument confirms that a public consultation paper *Making Justice Work for Victims and Witnesses* was published prior to the development and introduction of the Bill for the 2014 Act. The policy note also states that in addition informal consultation with stakeholders was undertaken throughout the Bill process and continues in relation to the implementation of the 2014 Act.

#### **Delegated Powers and Law Reform Committee consideration**

6. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 12 August 2014 and agreed to draw the instrument to the attention of the Parliament.

7. This instrument is a commencement order which contains complex transitional provisions.<sup>1</sup>

8. Commencement orders are generally not subject to any parliamentary procedure. Therefore there are no rules governing the timescale between the laying of the instrument and it coming into force (unlike the 28-day period associated with negative

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<sup>1</sup> Commencement orders can contain transitional provisions to deal with the transition from the old law to the new law.

instruments). There is also no requirement on the Scottish Government to provide a policy note to accompany commencement orders when they are laid.

9. Although these are standard arrangements for no procedure instruments, difficulties can arise where instruments such as this one contain transitional provisions which are complex. In particular, it can at times be difficult to understand the policy intention behind the transitional provisions. There is also often not enough time for any scrutiny of the instrument by the DPLR Committee and the lead committee before the instrument comes into force.

10. For these reasons, the DPLR Committee has previously negotiated particular arrangements with the Scottish Government for the management of commencement orders that contain complex transitional provisions.

11. Firstly, the Government has agreed that such instruments will be accompanied by a policy note in order to aid the DPLR Committee and the lead committee in the scrutiny of the provisions.

12. Secondly, the Government has agreed that, where possible, it will aim to allow at least 40 days between an instrument containing significant/complex ancillary provisions being laid, and the date on which the provisions are brought into force by the instrument. This allows a reasonable period of time to address any issues raised in the course of scrutiny before the instrument takes effect.

13. In the case of this instrument, only 19 days were allowed between the laying of the instrument and it coming into force which only allowed for scrutiny by the DPLR Committee the day before the instrument came into force and no scrutiny was possible by the Justice Committee before the coming into force date. In addition, although a policy note was produced, it did not adequately explain the policy intention behind the instrument.

14. In terms of the detail of the instrument, the DPLR Committee noted that article 3 of the Order contains complex transitional provisions, which enable persons with rights prior to 13 August to receive information in relation to offenders under the Criminal Justice (Scotland) Act 2003 as amended, to benefit from the enhanced information and representation provisions commenced by the Order. Given the complexity and length of those provisions, the DPLR considered that it would have been useful to the scrutiny of the Order had the Policy Note or the Explanatory Note contained more detail as to the effects and purpose of the existing legislation affected by article 3, and the effects of the article.

15. In response to these concerns, the Scottish Government produced a revised policy note which provides more detail on the instrument. The revised version is included in this paper.

16. The DPLR Committee also considered that it might also have been useful had the planned timing of this instrument allowed a longer period than 19 days between the date when it was laid before the Parliament and the date when the provisions are brought into force, given that the Scottish Government aims where possible to allow a period of 40 days where an instrument contains complex transitional provisions.

17. In light of the matters set out above, the DPLR Committee has written to the Scottish Government and the Standards, Procedures and Public Appointments

Committee regarding the procedure relating to the scrutiny of commencement orders containing complex transitional provisions.

18. The relevant extract from the DPLR Committee's report on the instrument is reproduced on page 8 of this paper.

### **Justice Committee consideration**

19. The instrument was laid on 24 July 2014 and the Justice Committee has been designated as lead committee.

#### *Procedure*

20. This instrument is not subject to any parliamentary procedure. It has been referred to the Committee under Rule 10.1.3 of Standing Orders. However, there is no formal requirement for the Committee to consider it.

21. The Committee has agreed that these types of instruments will not normally be placed on a Committee agenda unless—

- the Delegated Powers and Law Reform Committee has drawn the instrument to the lead Committee's attention on technical grounds; or
- a Member of the Justice Committee has proposed to the Convener that the instrument goes on the agenda, and the Convener agrees.

22. In addition, where the clerks are aware of particular issues with an instrument not subject to parliamentary procedure, they will draw this to the Convener's attention, for consideration of whether to put it on the agenda.

### **Recommendation**

23. The Committee is invited to note the instrument and make any comment on it. In particular, in light of the concerns raised by the DPLR Committee, the Committee is invited to endorse the conclusions reached in the DPLR Committee's report.

24. In particular, the Committee is invited to endorse the DPLR Committee's concerns that, despite the earlier commitment by the Scottish Government, further information had to be sought on the policy intention behind the instrument as the original policy note was inadequate; and that a period longer than 19 days should have been made available between the instrument being laid and it coming into force to allow for adequate parliamentary scrutiny of the instrument.

### **Policy Note: Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210)**

1. The above instrument is made in exercise of the powers conferred by section 34(2) and (3) of the Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act").

### **Policy objectives**

2. The 2014 Act introduces various measures to improve the support and information available to victims and witnesses of crime in Scotland, and is being implemented in stages. This instrument (the first relating to measures affecting the criminal justice system) brings into force on 13 August 2014 the following sections:

- **Section 8 – Certain offences: victim's right to specify gender of interviewer**

Section 8 allows victims or alleged victims of certain types of offence to specify the gender of the investigating officer who is to carry out the interview. The types of offences are sexual offences; human trafficking; an offence the commission of which involves domestic abuse; and stalking.

- **Section 23 (except subsections (7) and (14)) – Victim statements**

Section 23 makes changes to the timing of the submission of victim statements; the age at which individuals can submit victim statements in their own right (changing this from 14 to 12); and the age at which individuals can receive information about the release of offenders under section 16 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”). Section 23 also enables the Scottish Ministers to prescribe the form and manner in which victim statements may be made. However, the relevant provisions (subsections (7) and (14)) are not being commenced in this instrument, pending further detailed consideration of how this order-making power may be used.

- **Section 27 - Victim's right to receive information about release of offender etc.**

Section 27 amends section 16 of the 2003 Act to enable all eligible victims, rather than those who are victims of a limited number of offences, to receive information about the release of offenders.

- **Section 28 - Life prisoners: victim's right to make oral representations before release on licence**

Section 28 enables victims to make oral representations to the Parole Board for Scotland when prisoners serving a term of life imprisonment become eligible for release on licence.

- **Section 29 - Temporary release: victim's right to make representations**

Section 29 enables victims who are eligible to receive information under section 16 of the 2003 Act to make written representations about the licence conditions that may be imposed when a prisoner first becomes eligible for temporary release from prison.

3. The instrument also commences sections 2 (standards of service), 6 (disclosure of information about criminal proceedings), and 26 (victim surcharge), but only for the purposes of allowing subordinate legislation to be made in advance of these provisions being commenced fully in a subsequent commencement order.

4. In addition, the instrument makes transitional provision in relation to sections 23, 27, 28 and 29 of the 2014 Act. An explanation of these transitional provisions is set out below.

### **Transitional provision – Eligibility to receive information, and make representations, concerning the release etc. of offenders**

5. Section 16 of the 2003 Act provides for victims to receive information about the release etc. of offenders, where the offender has been sentenced to imprisonment for a period of 18 months or more. The information relates to the circumstances in which a prisoner leaves prison, due to, for example, temporary release, escape, release on licence or parole, the prisoner's death or end of sentence. Such information is supplied

in practice through the Victim Notification Scheme (“VNS”), which is administered by the Scottish Prison Service.

6. Section 23 of the 2014 Act includes a change to the age at which individuals can receive information about the release etc. of offenders under section 16 of the 2003 Act, lowering this from 14 to 12. Individuals under the age specified cannot register to receive information in their own right, but a parent or carer can register to receive information on their behalf.

7. This change requires transitional provision to be made in relation to those who, before the commencement date of 13 August 2014, registered to receive information on behalf of a child. Otherwise, registered parents/carers of children aged 12 or 13 would immediately lose their entitlement to receive information under section 16 of the 2003 Act, and registered parents/carers of children under 12 would have their entitlement to information significantly altered (i.e. no longer being entitled to receive information until their child is 14).

8. If individuals have registered to receive information through the VNS, it is considered preferable that the conditions relating to this are not significantly altered where doing so would, as in this case, require them to make a further and unexpected decision in relation to a potentially sensitive subject.

9. Article 3(1) and (2) of the Order therefore makes transitional provision to preserve the current entitlement of those already registered to receive information on behalf of a child. Despite the “specified amendments” set out in article 3(8) (on which more detail is provided in the annex to this note), parents and carers who, before 13 August 2014, registered to receive information will be able to continue to receive information until the child is 14 (i.e. the VNS will generally operate as it did before that date). Although, the information they will receive under section 16 of the 2003 Act will be as modified by section 27 of the 2014 Act. However, in order to avoid putting the children in question at a disadvantage, if they wish to register in their own right once they are aged 12 or older, they can do so, and information will then be sent to them directly.

10. Section 17 of the 2003 Act provides for certain individuals to be given an opportunity to make written representations in relation to the release of a prisoner on licence. Eligibility to make such representations is linked to the eligibility to receive information under section 16 of the 2003 Act. Accordingly, article 3(4) and (5) of the Order makes transitional provision in relation to parents or carers who, before 13 August 2014, registered to be given an opportunity to make such representations on behalf of a child. Despite the “specified amendments” set out in article 3(8) (on which more detail is provided in the annex to this note), they will continue to be entitled to make representations under section 17 of the 2003 Act until the child is 14, unless the child is 12 or 13 and chooses to register to make representations on his or her own behalf. They will also be entitled to be given (where applicable) the opportunity to make the new forms of representations introduced by sections 28 and 29 of the 2014 Act, namely oral representations under section 17(1)(b) of the 2003 Act in relation to the release on licence of an individual serving a sentence of life imprisonment and written representations under section 17A of the 2003 Act in relation to the temporary release of a prisoner.

11. For all those registering to receive information (or to be given an opportunity to make representations) on or after 13 August 2014, the new age limits will apply.

12. Transitional provision is also made in relation to all other individuals who, before 13 August 2014, registered to receive information under section 16 of the 2003 Act or to be given an opportunity to make representations under section 17 of the 2003 Act. Article 3(3) and (6) of the Order provides that, where immediately before 13 August 2014 an individual is entitled to receive information or make representations under section 16 or 17 of the 2003 Act, his or her entitlement continues after that date, and encompasses the changes made by the 2014 Act.

13. So, an individual who immediately before 13 August 2014 is entitled to receive information under section 16 of the 2003 Act will continue to be entitled to receive information under that section, but as modified by section 27 of the 2014 Act. Similarly, an individual who immediately before 13 August 2014 is entitled to make representations under section 17 of the 2003 Act will continue to be so entitled, but will also be entitled to make the new forms of representations introduced by sections 28 and 29 of the 2014 Act (see paragraph 10).

### **Transitional provision – Oral representations before release of certain prisoners on licence**

14. As mentioned, the Order enables individuals who, immediately before 13 August 2014, are entitled to make representations under section 17 of the 2003 Act, to benefit from the changes made by section 28 of the 2014 Act (where applicable). Section 28 amends section 17 of the 2003 Act to allow oral representations to be made to the Parole Board for Scotland (“PBS”) in relation to the release of prisoners serving a sentence of life imprisonment. Article 3(7) of the Order makes transitional provision to deal with cases where an individual would be eligible to make oral representations under section 17 of the 2003 Act (as amended), but the relevant decision by PBS is to be made soon after the commencement date.

15. In such cases, there would be insufficient time to arrange for oral representations to be made. To address this, article 3(7) provides that the opportunity to make oral representations will only be given to individuals where the decision is to be taken on or after 13 September 2014. This will ensure that, following commencement on 13 August 2014, PBS can offer the opportunity to give oral representations to relevant individuals, with sufficient time for such representations to be made before the decision on release is taken. This does not, of course, affect an individual’s right to be given an opportunity to make written representations under section 17 of the 2003 Act.

### **Consultation**

16. A public consultation paper, “Making Justice Work for Victims and Witnesses”<sup>2</sup>, was published prior to the development and introduction of the Bill for the 2014 Act. This closed in July 2012, and non-confidential responses<sup>3</sup> and an analysis<sup>4</sup> are available.

17. In addition, informal consultation with stakeholders (including various victim support groups and the justice organisations affected by the legislation) was

<sup>2</sup> <http://www.scotland.gov.uk/Publications/2012/05/8645/0>

<sup>3</sup> <http://www.scotland.gov.uk/Publications/2012/09/3650/0>

<sup>4</sup> <http://www.scotland.gov.uk/Publications/2013/01/8185/0>

undertaken throughout the Bill process, and continues in relation to the implementation of the 2014 Act.

## Impact assessments

18. An Equality Impact Assessment was carried out prior to introduction of the Bill<sup>5</sup>.

**Justice Directorate  
Scottish Government  
July 2014**

## ANNEX

### DETAIL ON THE DEFINITION OF “SPECIFIED AMENDMENTS” IN ARTICLE 3(8)

1. Paragraphs 9 and 10 of the policy note explain that article 3(1), (2), (4) and (5) of the Order makes transitional provision to preserve existing rights under sections 16 and 17 of the 2003 Act to receive information, and make representations, on behalf of a child under 14 years of age. Such provision applies despite the “specified amendments” set out in article 3(8) of the Order.

2. Accordingly, the definition of “specified amendments” in article 3(8) includes reference only to those amendments made by section 23 of the 2014 Act which affect a person’s current entitlement to receive information on behalf of a child under 14 years of age, either under section 16(1) (by virtue of subsection (5)(b)(ii)) or (7) of the 2003 Act. Because eligibility to make representations under section 17 of the 2003 Act is dependent on the eligibility to receive information under section 16 of that Act, the “specified amendments” also affect a person’s current entitlement to make representations on behalf of a child under 14 years of age.

3. The “specified amendments” are therefore those amendments made by -

- section 23(1) and (4) of the 2014 Act to section 14 of the 2003 Act (victim statements), so far as they apply in relation to section 16(5)(a) of the 2003 Act, and
- section 23(8) to (12) of the 2014 Act to section 16 of the 2003 Act.

4. Further explanation as to why subsections (1) and (4) of section 23 fall under the definition of “specified amendments”, but subsections (2) and (3) of that section do not, is provided below.

#### *Section 23(1) and (4) of the 2014 Act*

5. Section 23(1) and (4) of the 2014 Act amends the definition of “qualifying person” in section 14(8) of the 2003 Act. The definition of “specified amendments” in article 3(8) includes reference to these amendments because the “qualifying person” definition applies also in relation to section 16(5)(a) of the 2003 Act (by virtue of section 16(6) of that Act). Together with the amendments made by section 23(9) and (11) of the 2014 Act in particular, they affect a person’s existing right to receive information under section 16(7) (as read with section 16(5)(a)) of the 2003 Act on behalf of a child under 14 years of age.

<sup>5</sup> <http://www.scotland.gov.uk/Publications/2013/02/3668/0>

6. Although the amendments to the “qualifying person” definition apply also in relation to section 16(5)(b)(i) of the 2003 Act (by virtue of section 16(6) of that Act, as amended), they have no bearing on existing rights to receive information on behalf of a child under 14 years of age. Section 16(5)(b)(i) of the 2003 Act provides for a qualifying person to receive information on behalf of a person who is incapable by reason of mental disorder or inability to communicate. However, at present, a qualifying person does not include a child under 14 years of age by virtue of section 14(8) of the 2003 Act. Therefore, the definition of “specified amendments” in article 3(8) includes reference to the amendments made by section 23(1) and (4) of the 2014 Act only in so far as they apply in relation to section 16(5)(a) of the 2003 Act.

*Section 23(2) and (3) of the 2014 Act*

7. Section 23(2) of the 2014 Act amends section 14(5) of the 2003 Act, to extend the time within which victim statements must be laid before the court. This has no bearing on the right to receive information under section 16 of the 2003 Act, therefore the definition of “specified amendments” in article 3(8) does not include reference to this amendment.

8. Section 23(3) of the 2014 Act amends section 14(6)(b) of the 2003 Act. Only the amendment to section 14(6)(b)(i) applies in relation to section 16 of the 2003 Act, by virtue of a cross-reference to that provision in section 16(5)(b)(i). As mentioned above, section 16(5)(b)(i) provides for a qualifying person to receive information on behalf of a person who is incapable by reason of mental disorder or inability to communicate. The amendment excepts from that provision qualifying persons who have not attained the age of 12 years. However, given that a qualifying person currently does not include a child under 14 years of age, the amendment does not affect a person’s right to receive information on behalf of a child under 14 years of age and is therefore not included in the definition of “specified amendments”.

***Extract from the Delegated Powers and Law Reform Committee 48<sup>th</sup> Report 2014***

**Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210) (*Justice Committee*)**

1. This instrument brings certain provisions of the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) into force on 13 August 2014.

2. It also makes transitional provisions in respect of the commencement of some provisions of the 2014 Act.

3. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced in the Annexe. The Committee accepted that the Government’s response clarified certain matters in relation to the effects of the transitional provisions in article 3. An explanation of these matters was required, as the Committee considered that a more detailed explanation of the various effects of article 3, and the effects and purpose of the existing legislation affected by the article, would have been useful in the Policy Note or the Explanatory Note to the instrument. The Committee considers that this would have been useful for this particular instrument, given the complexity and length of the provisions in article 3.

4. The Scottish Government aims where possible to allow a period of 40 days between the date of laying a commencement order before the Parliament and the date

when the provisions commenced by the order will come into force, where the order contains complex transitional provisions. This instrument was laid on 24 July and came into force on 13 August. Nineteen calendar days have therefore been allowed for scrutiny of the instrument before the date when the relevant provisions came into force. The Committee was only in a position to consider the instrument on the day prior to 13 August, owing to the different summer Parliamentary recess dates this year. The timing has also meant that the Justice Committee has not been able to consider the instrument before the provisions have come into force.

5. The Scottish Government has explained in the correspondence that, although the intention was to lay this instrument earlier, laying had to be delayed to address certain operational concerns which arose in the course of finalising the necessary arrangements.

6. **The Committee therefore notes that article 3 of the Order contains complex transitional provisions, which enable persons with rights prior to 13 August to receive information in relation to offenders under the Criminal Justice (Scotland) Act 2003 as amended, to benefit from the enhanced information and representation provisions commenced by the Order.**

7. **Given the complexity and length of those provisions, it would have been useful to the scrutiny of the Order had the Policy Note or the Explanatory Note contained more detail as to the effects and purpose of the existing legislation affected by article 3, and the effects of the article.**

8. **It might also have been useful, had the planned timing of this instrument allowed a longer period than 19 days between the date when it was laid before the Parliament and the date when the provisions are brought into force, given that the Scottish Government aims where possible to allow a period of 40 days, where an instrument contains complex transitional provisions.**

9. **In light of the matters set out above, the Committee agreed to write to the Scottish Government and the Standards, Procedures and Public Appointments Committee regarding the procedure relating to the laying of Commencement Orders containing complex transitional provisions.**

## **ANNEXE**

### **Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210)**

**On 4 August 2014, the Scottish Government was asked:**

(1) Article 3(1) and (2) makes transitional provision to preserve the entitlement of those already registered to receive information, on behalf of a child under 14 years old, under the provisions of section 16(1) of the 2003 Act (by virtue of section 16(5)(b)(ii) of that Act) despite “specified amendments” set out in Article 3(8). The “specified amendments” include those made by section 23(1) and (4) of the 2014 Act, and so do not include those made by section 23(2) or (3). Sections 23(2) to (4) all contain amendments to section 14 of the 2003 Act in relation to the provision of victim statements, subsection (1) introducing those amendments.

(a) As it does not appear to be explained in the explanatory note or the policy note, could the Scottish Government explain why the definition of “specified amendments” in

article 3(8) does not include reference to the amendments made by section 23(2) and (3) of the 2014 Act, but does include reference to section 23(1) and (4). Why is the effect of the provision appropriate, or could there be any omission?

(b) Could you also clarify why article 3(8)(a) limits the application of the provision as only in relation to section 16(5)(a) of the 2003 Act, but does not extend the application to also include section 16(5)(b), as again this does not appear to be explained by the explanatory note or policy note?

(2) The Scottish Government has undertaken informally to the Committee that where a commencement order contains complex transitional provisions, or such provisions with significant effects, then if possible it will seek to allow a period of 40 days between the date of laying and the date when the provisions will come into force. In this case, a 40 day period has not been implemented. (The instrument was laid on 24 July and will come into force on 13 August, and so 9 clear Parliamentary sitting days have been allowed for scrutiny of the instrument before the date when the instrument comes into force).

Accordingly could the Scottish Government explain why in this instance a period of 40 days has not been allowed for between the laying date and the coming into force date of the instrument?

**The Scottish Government responded as follows:**

(1)(a) The definition of “specified amendments” in article 3(8) is intended to include reference only to the amendments made by section 23 of the 2014 Act which affect a person’s current entitlement to receive information on behalf of a child under 14 years of age, either under section 16(1) (by virtue of subsection (5)(b)(ii)) or (7) of the 2003 Act.

Accordingly, the definition of “specified amendments” in article 3(8) does not include reference to the amendments made by section 23(2) and (3) of the 2014 Act, as they do not fall into this category. Section 23(2) amends section 14(5) of the 2003 Act, to extend the time within which victim statements must be laid before the court. This has no bearing on the right to receive information under section 16 of the 2003 Act. Section 23(3) amends section 14(6)(b) of the 2003 Act. Only the amendment to section 14(6)(b)(i) applies in relation to section 16 of the 2003 Act, by virtue of a cross-reference to that provision in section 16(5)(b)(i). Section 16(5)(b)(i) of the 2003 Act provides for a qualifying person to receive information on behalf of a person who is incapable by reason of mental disorder or inability to communicate. The amendment excepts from that provision qualifying persons who have not attained the age of 12 years. However, at present, a qualifying person does not include a child under 14 years of age by virtue of section 14(8) of the 2003 Act. The amendments made by section 23(3) of the 2014 Act, therefore, do not relate to a person’s right to receive information under section 16 of the 2003 Act on behalf of a child under 14 years of age.

Section 23(1) and (4) of the 2014 Act amends the definition of “qualifying person” in section 14(8) of the 2003 Act. The definition of “specified amendments” in article 3(8) includes reference to these amendments because the “qualifying person” definition applies also in relation to section 16(5)(a) of the 2003 Act (by virtue of section 16(6) of that Act). Together with the amendments made by section 23(9) and (11) of the 2014 Act in particular, they affect a person’s existing right to receive information under

section 16(7) (as read with section 16(5)(a)) of the 2003 Act on behalf of a child under 14 years of age.

(1)(b) Sub-paragraph (a) of the definition of “specified amendments” in article 3(8) limits the application of the amendments made by section 23(1) and (4) of the 2014 Act, so as to specify only those which affect existing rights to receive information under section 16 of the 2003 Act on behalf of a child under 14 years of age. In so far as the amendments to the “qualifying person” definition apply in relation to section 16(5)(b)(i) of the 2003 Act (by virtue of section 16(6) of that Act, as amended), they have no bearing on such rights. As mentioned, this is because the “qualifying person” definition currently exempts children under 14 years of age from the right to receive information on behalf of an incapable person by virtue of section 16(5)(b)(i) of the 2003 Act.

(2) The Scottish Government endeavours, so far as possible, to maximise the time available for parliamentary scrutiny. Regrettably, it was not possible to allow for a period of 40 days between the date of laying this instrument and the date when the provisions come into force. A period of 19 days has been allowed on this occasion. To assist the various justice partners responsible for implementing the 2014 Act, and ensure a smooth transition, a programme of phased implementation was negotiated. An initial commencement date of 13 August 2014 was agreed with those partners, and welcomed by relevant interest groups. Practical arrangements, including arrangements to revise IT systems, have been made accordingly. It is therefore important that the provisions come into force as planned. However, although the intention was to lay this instrument earlier, laying had to be delayed to address certain operational concerns which arose in the course of finalising the necessary arrangements. Accordingly, the Scottish Government prepared a detailed Policy Note to explain the purpose and effect of the transitional provision in article 3, in order to help with the scrutiny of this instrument.

**Justice Committee**

**24th Meeting, 2014 (Session 4), Tuesday 30 September 2014**

**EU opt-out decision**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the latest update from the Minister for Community Safety and Legal Affairs on the current negotiations arising from the UK Government's decision to opt out of all police and criminal justice measures adopted prior to the Lisbon Treaty.

**Background**

2. At an informal briefing on 5 August, Scottish Government officials provided a briefing to the Committee on the status of the negotiations between the UK Government, the European Commission, and member states. During this briefing, the Committee heard that the Scottish Government had sought clarification regarding the latest UK Government's position on transitional measures that could apply if agreement is not reached by 1 December 2014. Scottish Government officials also advised the Committee that adjustments had been made to the list of measures that the UK is proposing to opt back into.

3. The Committee therefore agreed to write to the Minister for Community Safety and Legal Affairs seeking further information on (a) transitional arrangements that could apply after 1 December 2014, and (b) the changes to the list of opt-in measures and whether these would have any particular impact on Scotland.

4. The Minister's response of 5 September (at Annexe) states that:

"We understand from the UK Government that Protocol 36 provides for transitional measures if these are required. Technical matters, including the possible need for transitional measures, are being discussed in a working group attended by all Member States in Brussels. Although the Scottish Government is not party to this working group, our assessment is that this is a credible interpretation of the treaties, given that Article 10.4 of Protocol 36 provides that "the Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements" with regard to the opt out decision."

5. The Minister also provides details of the measures removed from and added to the list of measures that the UK is now proposing to opt back into and explains that only the European Judicial Network, which is being added to the list at the request of the Scottish Government and Lord Advocate, has any impact on Scottish interests. In addition, the Minister advises that her officials will keep the Committee updated with information as and when received.

**Recommendation**

6. **The Committee is invited to consider the Minister's response and to agree whether it wishes to take any further action at this stage.**

**ANNEXE****Correspondence from the Minister for Community Safety and Legal Affairs in relation to the UK Government's EU opt-out decision**

Thank you for your letter of Thursday 7 August regarding the 3<sup>rd</sup> pillar opt out. I am glad that you found the briefing from officials on Tuesday 5 August useful.

You have asked for information about the adjustments to the list of measure the UK is now proposing to opt back into, and whether this will have any particular impact in Scotland. Our assessment is that, with the exception of the European Judicial Network (EJN), the changes will not have a particular impact for Scottish interests. I would however add that as our preference was to remain fully opted in, where a measure has been removed, other than through being superseded, the foregoing comments should not be read as approval of the list per se.

In terms of the changes to the opt-in list, the differences between the updated list in Command Paper 8897 published in July 2014 and the original list published in Command Paper 8671 in July 2013 are as follows:

Measures Removed from the List

- Two measures – that relating to CEPOL, the European Police College, and that relating to Freezing Orders – have been 'Lisbonised' by the new CEPOL measure and the European Investigation Order respectively. As a result, these measures are no longer subject to the opt-out and fall off the UK's list.
- The UK will no longer seek to rejoin the Special Intervention Units measure.
- The UK will no longer seek to rejoin the European Genocide Network.
- The UK will not rejoin the Schengen Handbook, as other Member States consider this measure to have been superseded by other measures.

Measures Added to the List

- The UK will now seek to rejoin the European Judicial Network.
- The UK will now seek to rejoin three Europol implementing measures which the UK Government accepts others consider to be integral to our continued participation in the main Europol measure.
- The UK will now seek to rejoin the SIS II networks measure which is considered by other Member States to be integral to the operation of SIS II.

I am reassured that the European Judicial Network (EJN) has been added to the list after strong representations from Scottish Government Justice Ministers and the Lord Advocate. The EJN is regularly used by the International Cooperation Unit of the Crown Office and a strong working relationship has developed between the Scottish contact points and their counterparts in other Member States.

With regard to Special Intervention Units, the main benefit was seen to be participation in an operational police network at the EU level, called Atlas. However, the Commission

has now confirmed that the UK can continue working through Atlas even if it does not participate in the overarching measure. Whilst it is regrettable that the Genocide Network has been removed as part of the trade off which has seen other measures added, nonetheless Scottish practitioners advise that alternatives such as Eurojust and the EJM are available if a serious crime of this nature was under investigation.

You also asked about the latest UK Government position on transitional measures and the basis on which they might be progressed. The UK Government reports that it remains confident an agreement can be reached that will allow the UK to formally rejoin measures on 1 December without an operational gap occurring. We understand from the UK Government that Protocol 36 provides for transitional measures if these are required. Technical matters, including the possible need for transitional measures, are being discussed in a working group attended by all Member States in Brussels. Although the Scottish Government is not part to this working group, our assessment is that this is a credible interpretation of the treaties, given that Article 10.4 of Protocol 36 provides that “the Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements” with regard to the opt out decision. Notwithstanding, we continue to urge the UK Government to conclude negotiations with other Member States as quickly as possible so that transitional measures are avoided.

As such, I have instructed my officials to maintain close relations with their counterparts in the Home Office and Ministry of Justice on the progress of the negotiations with other Member States and the possible need for transitional measures. I welcome further discussion with you on this matter and my officials will keep you updated with more information as and when we receive it.

Roseanna Cunningham  
Minister for Community Safety and Legal Affairs  
5 September 2014