The Scottish Parliament
Pàrlamaid na h-Alba

DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

36th Meeting, 2014 (Session 4)

Tuesday 16 December 2014

The Committee will meet at 9.30 am in the Robert Burns Room (CR1).

1. **Choice of Deputy Convener:** The Committee will choose a new Deputy Convener.

2. **Decision on taking business in private:** The Committee will decide whether to take items 9 and 10 in private.

3. **Consideration of the work of the Committee during the parliamentary year:** The Committee will take evidence from—

   Joe FitzPatrick, Minister for Parliamentary Business; Steven MacGregor, Legislation Programme Manager, Parliament and Governance Division; Paul Cackette, Solicitor, Scottish Government Legal Directorate, Scottish Government.

4. **Instruments subject to affirmative procedure:** The Committee will consider the following—

   Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft];
   Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft];
   Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft];
   Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2015 [draft];
   Secure Accommodation (Scotland) Amendment Regulations 2015 [draft].

5. **Instruments subject to negative procedure:** The Committee will consider the following—

   Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 2) Order 2014 (SSI 2014/336);

Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337);
Land and Buildings Transaction Tax (Prescribed Proportions) (Scotland) Order 2014 (SSI 2014/350);
Land and Buildings Transaction Tax (Qualifying Public or Educational Bodies) (Scotland) Amendment Order 2014 (SSI 2014/351);
Land and Buildings Transaction Tax (Definition of Charity) (Relevant Territories) (Scotland) Regulations 2014 (SSI 2014/352).

6. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

Reservoirs (Scotland) Act 2011 (Commencement No. 1) Order 2014 (SSI 2014/348 (C.30));
Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Miscellaneous) 2014 (SSI 2014/349).

7. **Mental Health (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

8. **Public Bodies Act Consent Memorandum:** The Committee will consider the following draft Order under Section 9 of the UK Public Bodies Act 2011—

Public Bodies (Abolition of the Home Grown Timber Advisory Committee) Order 2015 [draft].

9. **Air Weapons and Licensing (Scotland) Bill:** The Committee will consider further the delegated powers provisions in this Bill at Stage 1.

10. **Consideration of the work of the Committee during the parliamentary year:** The Committee will consider the evidence it heard earlier in the meeting.

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The papers for this meeting are as follows—

Agenda Items 3 and 10

Briefing Paper (private) DPLR/S4/14/36/1(P)

Agenda Items 4, 5 and 6

Legal Brief (private) DPLR/S4/14/36/2(P)

Agenda Items 4, 5 and 6

Instrument Responses DPLR/S4/14/36/3

Agenda Item 7

Mental Health (Scotland) Bill - as introduced

Mental Health (Scotland) Bill - Delegated Powers Memorandum

Briefing Paper DPLR/S4/14/36/4

Agenda Item 8

The Public Bodies (Abolition of the Home Grown Timber Advisory Committee) Order 2015 [draft]

Briefing Paper (private) DPLR/S4/14/36/5(P)

Agenda Item 9

Air Weapons and Licensing (Scotland) Bill - as introduced

Air Weapons and Licensing (Scotland) Bill - Delegated Powers Memorandum

Briefing Paper (private) DPLR/S4/14/36/6(P)

DELEGATED POWERS AND LAW REFORM COMMITTEE

36th Meeting, 2014 (Session 4)

Tuesday 16 December 2014

Instrument Responses

INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft]

On 3 December 2014, the Scottish Government was asked:

1. The explanatory note states that the Order exercises the power in section 27(1) of the Regulation of Investigatory Powers (Scotland) Act 2000 in relation to surveillance which is carried out on premises at a time when any part of those premises are used for a legal consultation. However regulation 3(2) lists under 7 heads the types of premises in respect of which directed surveillance is to be treated as intrusive surveillance for the purposes of the 2000 Act. It appears that there may be other types of premises that may be used for a legal consultation which are not so listed. (For instance, premises used by a professional legal adviser which are not the place of business of the adviser).

The policy note explains that the Order follows upon the ruling of the House of Lords in *McE. v. Prison Service for Northern Ireland* (2009 UKHL 15). It also explains that in that case the Secretary of State did not challenge the decision of the Divisional Court in Northern Ireland that the procedures used to authorise "directed surveillance" were disproportionate to the infringement of an individual's right to a private consultation with a lawyer under Article 8 of the European Convention on Human Rights (right to respect for private and family life).

Please clarify therefore why it is considered that the terms of regulation 3 give effect to the House of Lords decision in McE., in relation to compliance with Article 8?

2. Given that there is no explanation in the explanatory note or policy note, please clarify why regulation 3(2)(c) does not include reference to any premises in which individuals may be detained under paragraph 16(1B) of schedule 2 to the Immigration Act 1971 (where a person has been required to submit to further examination and may be detained under authority of an immigration officer for no longer than 12 hours)?

The Scottish Government responded as follows:

1. The case of *McE* concerned the right of a detained person to a private consultation with a lawyer. It was held that the authorisation of surveillance of such consultations as directed surveillance under RIPA was inadequate to protect the Article 8 rights of the appellants to the holding of those consultations in private (though it was emphasised that surveillance of such consultations was not absolutely prohibited). The direct issue in the case was therefore not protection of legally

privileged communications at common law, but rather the right to a private communication with a lawyer in a particular setting (a place of detention) (see, e.g., Lord Phillips at para 20). The Secretary of State's concession in that case was made on that basis (see Lord Carswell at para 94) and paragraph (2)(a) to (e) of article 3 of the Order is designed to address the issue directly in point in *McE*.

It is accepted, however, that a consultation with a lawyer which enjoys protection under Article 8 may take place outwith circumstances in which a person is detained. It is further accepted that where such a consultation involves communications subject to legal professional privilege, the rationale expressed in *McE* for employing a more stringent authorising regime may apply. But such a regime requires also to be practical and capable of effective operation by the police. In particular, it has to be noted that authorisations for covert surveillance under RIP(S)A require to be granted before the surveillance occurs and so certainty as to which authorising procedure to follow is required from the outset.

The Scottish Government proposes the approach of determining in advance when an individual is to be entitled to a private consultation with a lawyer (i.e. where a consultation between a lawyer and client is to take place on premises mentioned in paragraph (2) (f) and (g) of article 3) and applying the intrusive surveillance authorising regime in respect of surveillance in those specified circumstances. You will note in particular that the Order focuses on the individuals engaged in the communication and the place where it occurs as reasonable indicators as to whether that communication requires to be afforded additional protection. This could in fact lead to intrusive surveillance authorisations being required even though a communication may not be legally privileged (because not every communication between a lawyer and a client is protected by legal privilege).

An alternative approach would be to treat directed surveillance as intrusive surveillance by reference to the precise content of the communication. In other words, by requiring an intrusive surveillance authorisation where it is considered that an operation will involve surveillance of legally privileged communications. That would require, in advance of an operation commencing, a determination as to whether surveillance of a legally privileged communication would occur. We consider such an approach to be too open-ended and incapable of clear practical application. First, it would require certainty from the outset as to whether the subject of surveillance would engage in a private and legally privileged communication with a lawyer. Second it would not provide sufficient clarity to the subject of surveillance as to the circumstances in which he could consult a lawyer in the knowledge that intrusive surveillance authorisation procedures must be adhered to.

It is the Scottish Government's view that the chosen approach complies with Article 8 because it establishes clearly circumstances in which an individual is entitled to consult with a lawyer without being subject to directed surveillance under RIPSA. Adopting a regime by reference to the nature of the communication would, by contrast, afford inappropriate and impractical discretionary power to authorisers and, accordingly, would be inaccessible and may give rise to unforeseeable consequences for the individual. By providing that covert surveillance at the place of business of a legal adviser which is likely to lead to surveillance of a legal consultation should be treated as intrusive surveillance, individuals are provided with a forum in which they may consult with a legal adviser without the risk of the lower directed surveillance standards applying. It should be noted that this approach has

been adopted elsewhere in the UK and has been the subject to judicial review proceedings in Northern Ireland (*RA's Application* [2010] NIQB 99). There was held to be no incompatibility with Article 8 in those proceedings.

2. The answer to the second question relates to the explanation given above. The intention is to provide for enhanced authorisation procedures in circumstances where it is likely that an individual will require to consult privately with a lawyer.

Paragraph 16(1) of Schedule 2 to the Immigration Act 1971 deals with an examination under paragraph 2 of that Schedule which is aimed at determining whether a person who has arrived in the UK is entitled to remain. Paragraph 16(1A) deals with an examination under paragraph 2A which is aimed at determining whether a person who has arrived in the UK with leave to enter should have that leave cancelled. And paragraph 16(2) deals with detention of a person in respect of whom it is thought that directions for removal may be appropriate. In each case the examination is with a view to determining whether the individual can remain in or be removed from the UK and detention is permitted pending not only an examination, but pending a *decision* as to the individual's status. It is likely that at some point during the process before the decision is made that person will be entitled to a private consultation with a lawyer and so any surveillance of a person's communications during that detention should be authorised accordingly.

In contrast, paragraph 16(1B) deals with an examination under paragraph 3(1A) which is aimed at determining whether a person who is attempting to embark on a boat or ship leaving the UK entered the UK lawfully, complied with any conditions of his leave to enter or remain or is prohibited from returning to the UK. Detention is temporary (no more than 12 hours) and there is no determination of the legal status of the person during that period. A private consultation with a lawyer during paragraph 16(1B) detention may therefore be less likely.

In relation to both matters raised above, it should be noted that the code of practice on covert surveillance and property interference provides for additional safeguards in cases not covered by this order but in relation to which it is likely that legally privileged material may be obtained (paragraphs 4.9 to 4.14). These include:

- in cases where there is no intention to obtain legally privileged material but it is likely it may be obtained, the application must identify all steps which will be taken to mitigate the risk of acquiring it (or steps to be taken to exclude its use in any investigation or proceedings).

- in cases where it is likely or intended that an authorisation will result in the obtaining of legally privileged material, the authorisation will only be granted or approved if the authorising officer, or approving Surveillance Commissioner, as appropriate, is satisfied that there are exceptional and compelling circumstances that make the authorisation necessary. Such circumstances will in particular be very restricted where there is a positive intention to obtain legally privileged material.

Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2015 [draft]

On 4 December 2014, the Scottish Government was asked:

Section 90 of the 2011 Act, as amended by section 85 of the 2014 Act, makes provision for the situation where a child / relevant person at a grounds hearing does not accept all of the facts which underpin a section 67 ground for referral (supporting facts), but they accept the ground itself.

Section 90(1B) provides that, in that situation, a ground is to be taken as accepted at the grounds hearing *only if* the grounds hearing considers that (a) the person has accepted sufficient of the supporting facts to support the conclusion that the ground applies in relation to the child, and (b) it is appropriate to proceed in relation to the ground on the basis of only those supporting facts which are accepted by the child and each relevant person.

Where subsection (1B) applies, subsection (1C) provides that the grounds hearing *must* amend the statement of grounds to delete any supporting facts which are not accepted by the child and each relevant person.

Rule 59 of the 2013 Rules, as amended by this instrument, concerns the procedure at a grounds hearing where grounds are put to the child and relevant person. Paragraph (4) provides that the children's hearing *may*, where it considers it appropriate to do so, amend the statement of grounds by amending the facts narrated in the statement of grounds. Paragraph (6) (which is not amended by this instrument) provides that (where paragraph (4) applies) the children's hearing must be satisfied that any amendment to the facts narrated in the statement of grounds do not call into question the acceptance of a section 67 ground by the child or any relevant person.

Can the Scottish Government explain—

1. Why it considers that the provision in rule 59(4) is consistent with the requirement in section 90(1C) that (where a ground is taken to be accepted by virtue of subsection (1B)) the grounds hearing *must* amend the statement of grounds to delete any supporting facts in relation to the ground which are not accepted by the child and each relevant person?

2. Why it considers that the provision in rule 59(6) is consistent with the requirement in section 90(1B) that a ground is only to be taken as accepted if the grounds hearing considers that the facts accepted are sufficient to support the conclusion that the ground applies, and that it is appropriate to proceed in relation to the ground on the basis of those supporting facts only? (We note in this regard that, if the conditions in section 90(1B) are satisfied, it would appear that the amendment of the facts narrated in the statement of grounds could not call into question the acceptance of the ground).

The Scottish Government responded as follows:

Under the current Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, a children's hearing may amend the statement of

grounds where it considers it appropriate to do so. This may be done by (a) removing any facts denied or (b) otherwise amending the statement of grounds, but only where that removal or amendment would not call into question the acceptance of a section 67 ground by the child or relevant person.

The new procedure introduced by the amendments to section 90 of the Children's Hearings (Scotland) Act 2011 by section 85 of the Children and Young People (Scotland) Act 2014 now addresses the situation where a child or relevant person does not accept facts narrated in the statement of grounds. In these circumstances, section 90 now provides that the hearing is required to delete supporting facts which are not accepted by the child or relevant person if the hearing considers that the child or relevant person has accepted sufficient of the supporting facts to support the conclusion that the ground applies in relation to the child and it is appropriate to proceed in relation to the ground on the basis of only those supporting facts. Accordingly, where facts are not accepted, a children's hearings is now required to follow the new section 90 procedure and Rule 59 has been amended to remove from Rule 59 the procedure by which the hearing would previously have dealt with facts which were denied.

A hearing may, however, find itself in a situation where, after the statement of grounds is put to the child and the relevant persons it becomes clear that the facts as set out in the statement of grounds require some amendment. We understand that this might arise where, for example, there is an inaccuracy in a relevant date which, if amended, would allow the hearing to proceed. In this circumstance, following discussion with the child and relevant persons, the hearing would decide whether the facts can be amended in accordance with Rule 59(4) and (6) and if so, the facts would be amended and the hearing would proceed.

In answer to both of the questions above, Rule 59(4) as amended is not inconsistent with the provision in section 90(1C). Rule 59(4) and section 90(1B) and (1C) deal with different circumstances. The new section 90 procedure will be used where facts are not accepted by a child or relevant person and in that situation, the hearing will proceed in accordance with section 90(1B), applying the test in section 90(1C). Rule 59(4) will be used by hearings to make minor amendments to the statement of facts and the test at Rule 59(6) will be used where the hearing is considering making such an amendment. Children's hearings require to be able to address both sets of circumstances and the new section 90 procedure and the Rule 59(4) procedure will sit alongside each other to be used by the hearing as appropriate.

Secure Accommodation (Scotland) Amendment Regulations 2015 [draft]

On 5 December 2014, the Scottish Government was asked:

1. New regulation 8(6)(ba) makes reference to "children's hearings" and "grounds hearings" both in terms of section 95(2) of the 2011 Act. Section 95(2) refers only to "grounds hearings". Section 90 of the 2011 Act defines a grounds hearing as being a children's hearing arranged by virtue of section 69(2) or 95(2).
Can the Scottish Government clarify why new regulation 8(6)(ba) makes reference to both "children's hearings" and "grounds hearings"? Is it intended that both terms should be taken to refer to the same type of hearing (i.e. grounds hearings under section 95(2))? If so, does the Scottish Government consider that the regulation is sufficiently clear, or would the Scottish Government propose to take corrective action?

2. New regulation 8(6)(ba) refers to "the children's hearing which the grounds hearing has required the Reporter to arrange under section 95(2) of the 2011 Act". Section 95(2) refers to the Principal Reporter rather than to the Reporter. Does the Scottish Government agree that the new provision should refer to the Principal Reporter, and if so is any corrective action proposed?

The Scottish Government responded as follows:

1. Section 95(4) of the Children's Hearings (Scotland) Act 2011 (the 2011 Act) as inserted by the Children and Young People (Scotland) Act 2014 gives power to a "grounds hearing" to make an interim compulsory supervision order. Section 95(2) of the 2011 Act gives a "grounds hearing" power to require the Principal Reporter to arrange another grounds hearing. A "grounds hearing" is defined in section 90(1) of the 2011 Act as a children's hearing arranged by virtue of section 69(2) or 95(2) of the 2011 Act. A grounds hearing is, therefore, a particular type of children's hearing. It is only a grounds hearing which may make an interim compulsory supervision order under section 95(4) and the Principal Reporter can only be required under section 95(2) to arrange another grounds hearing. Accordingly it is only that type of children's hearing which could be covered by the references to "children's hearing" in regulation 8(6)(ba). There is no intention to make reference in this regulation to a different type of hearing. It is accepted that the regulation could have been clearer if "grounds hearing" had been used throughout but the Scottish Government does not consider that the use of "children's hearing" to be legally incorrect. Those operating these Regulations will do so with reference to the 2011 Act and the Scottish Government does not consider that there will be any confusion in that sector. Accordingly the Scottish Government would not intend taking any corrective action.

2. The Scottish Government agrees that the reference in the new provision to "Reporter" should be to "Principal Reporter". Unlike in many of the instruments made under the 2011 Act, "Reporter" is not a defined term in these Regulations. The reference in regulation 8(6)(ba) to "the Reporter" refers back to section 95(2) which makes it clear that it is the Principal Reporter who is required to arrange another grounds hearing. The reference in regulation 8(6)(ba) to "Reporter" can only, therefore, be to the Principal Reporter. While the new provision could have been clearer in this respect, it is not considered that the reference to Reporter is capable of any meaning other than the Principal Reporter. The Scottish Government would not therefore intend taking any corrective action.

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 2) Order 2014 (SSI 2014/336); and
Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337)

Breach of laying requirements: letter to Presiding Officer

The Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014, SSI 2014/337, and The Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 2) Order 2014, SSI 2014/336, were made by the Scottish Ministers under section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972. They are being laid before the Scottish Parliament and will come into force today, 1 December 2014.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) that Act, this letter explains why.

As the Cabinet Secretary for Justice explained in his letter of 9 October 2014 to the Conveners of the Justice and Delegated Powers and Law Reform (DPLR) Committees, non-compliance in this case is connected with the process under which the UK will opt out of a number of pre-Lisbon Treaty 3rd Pillar criminal justice measures, then opt back into a group of 35 measures. The opt out/opt in occurs today, in accordance with transitional arrangements set out in Protocol 36 of the Lisbon Treaty.

The moment the UK opts back into the 35 measures, including the two measures implemented by the instruments above, they become binding on the UK and must be fully transposed and implemented to avoid risk of EU infraction proceedings.

The Scottish Ministers have used section 2(2) of the European Communities Act 1972 to make the instruments implementing the two measures. That power can only be used to implement "EU obligations" as defined in that Act, but pre-Lisbon Treaty 3rd Pillar measures only become "EU obligations" today once the UK opt in takes place. Regrettably, this combination of circumstances has resulted in the Scottish Ministers also having to make, lay and bring the instruments into force today.

Although these instruments, made by the negative procedure, have not been laid in Parliament for a minimum of 28 clear days before coming into force, the Scottish Government was able to provide early notice of this unusual set of circumstances to the Parliament. We have worked closely with the Justice and Delegated Powers and Law Reform Committees to ensure they have had an opportunity to offer a view on the procedural options available and undertake informal scrutiny in advance of the instruments coming into force.

Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 2) Order 2014 (SSI 2014/336)

On 5 December 2014, the Scottish Government was asked:

The Policy Note for the instrument explains that Council Framework Decision 2009/299/JHA is within the chapter of "third pillar" measures which has been subject to the UK Government's "opt-out" and one of the individual measures that the UK Government has sought to participate in from 1 December 2014. The letter of 1 December submitted to the Presiding Officer with the instrument confirms that the "opt in" to the Framework Decision has occurred as expected on that date.

As it is not explained within the documents that accompany the instrument, and as the "opt in" is the basis on which the instrument has been made under section 2(2) of the European Communities Act 1972, please explain which instrument/s have been issued on 30 November or 1 December to give effect to the opt-in. Could you send a copy of the instrument/s or a link to it/them? (I appreciate that it may not have been possible to explain this in the documents that accompany the instrument, given that it required to be made on 1 December).

The Scottish Government responded as follows:

The UK opt-in was effected by a letter from the Prime Minister to the President of the Council of the EU.

The opt-in is publically recognised by a Commission Decision of 1 December 2014 (2014/858/EU). That Decision is a matter of public record, and can be found in the Official Journal of the European Union L 345, 1.12.2014, p.6. The text of the Decision can be accessed online at the following url:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.345.01.0006.01.ENG

The annex to the Decision lists the EU measures that the UK has opted into with effect from December 1. Number 21 on the list is the measure that S.S.I. 2014/336 gives effect to, and the measure that appears as number 25 on the list is given effect in Scots law by S.S.I. 2014/337.

Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337)

On 5 December 2014, the Scottish Government was asked:

The Policy Note for the instrument explains that Council Framework Decision 2009/829/JHA is within the chapter of "third pillar" measures which has been subject to the UK Government's "opt-out" and one of the individual measures that the UK Government has sought to participate in from 1 December 2014. The letter of 1 December submitted to the Presiding Officer with the instrument confirms that the "opt in" to the Framework Decision has occurred as expected on that date.

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The annex to the Decision lists the EU measures that the UK has opted into with effect from December 1. Number 21 on the list is the measure that S.S.I. 2014/336 gives effect to, and the measure that appears as number 25 on the list is given effect in Scots law by S.S.I. 2014/337.

INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Miscellaneous) 2014 (SSI 2014/349)

This SSI is being laid on the day it is made, and it comes into force on the following day. As the normal practice of the Lord President's Private Office is to allow a longer period between the laying and coming into force of SSIs, we wish to provide an explanation for the departure from that practice on this occasion.

Paragraph 2(3) of this SSI amends Form 54.1 of the Criminal Procedure Rules 1996, which prescribes the form of certificate to be issued under section 223A(1) of the Criminal Procedure (Scotland) Act 1995. Such a certificate is issued for the purposes of Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties ("the 2005 Framework Decision"). That Framework Decision is amended by Council Framework Decision 2009/299/JHA ("the 2009 Framework Decision"), and paragraph 2(3) amends Form 54.1 in consequence of the 2009 Framework Decision.

However, as the Delegated Powers and Law Reform Committee will be aware, the United Kingdom in July 2013 exercised its opt-out in respect of all justice and home affairs measures. It proposed to opt back into a package of 35 measures on 1 December 2014, including the 2005 Framework Decision. On 1 December, the European Commission adopted a decision to allow the UK to do so. As a result, the Scottish Ministers made, laid and brought into force on 1 December two SSIs, including the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 2) Order 2014. That SSI amends the Criminal Procedure (Scotland) Act 1995 in consequence of the amendments made to the 2005 Framework Decision by the 2009 Framework Decision.

We are aware that Scottish Government officials gave evidence to the Committee in connection with the opt-out and its implications for the laying of proposed subordinate legislation at the Committee's meeting on 18 November 2014. In a similar fashion to the Scottish Government, this office took the view that provision to transpose the Framework Decision could only be made once the United Kingdom had opted back in as regards that particular measure.

As the provisions of the Framework Decision are intended to safeguard the rights of accused persons, the view was taken that they should be transposed as quickly as possible once the European Commission's decision on the UK's proposed opt-in was known. This SSI therefore comes into force on the day after it is laid. This office acknowledges that this is a departure from its normal practice, but thinks that it is necessary to do so in the highly unusual circumstances surrounding the opt-out.

In the circumstances, we hope that the Committee finds this explanation for the very brief period between laying and coming into force to be acceptable. If we can be of further assistance to the Committee, then please do not hesitate to contact us.

DELEGATED POWERS AND LAW REFORM COMMITTEE

36th Meeting, 2014 (Session 4)

Tuesday 16 December 2014

Mental Health (Scotland) Bill

Response from the Scottish Government

Background

1. The Committee reported on the delegated powers in the Mental Health (Scotland) Bill[1] on 29 October 2014, in its 61st report of 2014.

2. The response from the Scottish Government to the report is reproduced at the Annex.

Scottish Government response

Section 45(2) – Right to make representations

Provision

3. Section 45(2) of the Bill inserts new sections 17B-D into the Criminal Justice (Scotland) Act 2003. The new section 17B affords a person who is to be given information by virtue of the new victim notification scheme a right to make representations before certain decisions are taken in respect of the offender. Those representations must be about how the decision in question might affect the victim or the victim's family.

4. The new section 17C(2) of the Criminal Justice (Scotland) Act 2003 obliges the Scottish Ministers to issue guidance as to how written representations made under the new section 17B are to be framed and how oral representations are to be made.

Committee consideration

5. On first considering the Bill, the Committee agreed to write to the Government to ask whether guidance issued under the new section 17C(2) of the Criminal Justice (Scotland) Act 2003 would be published.

[1] Mental Health (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Mental%20Health%20(Scotland)%20Bill/b53s4-introd-bookmarked.pdf

6. The Government stated that it did not consider it necessary to impose a statutory requirement to publish guidance made under section 17C(2). It explained that the policy intention behind issuing guidance in relation to the victim representation scheme could only be achieved if the guidance was made available to victims. The Government therefore intended to publish any such guidance in order to achieve its policy aim.

7. The Government's response also made reference to a similar power in section 17(4) of the Criminal Justice (Scotland) Act 2003 (inserted by the Victims and Witnesses (Scotland) Act 2014) which requires Ministers to issue guidance in relation to representations made by victims to parole boards. The Government pointed out that there is no statutory requirement for guidance made under section 17(4) to be published.

8. The Committee, however, was of the view that guidance should be made publicly available as a general matter of principle. In reaching this view, the Committee noted the potential importance of the guidance. It will be used by members of the public to help them in framing representations that they wish to make in respect of decisions that may affect them. The Committee therefore considered that the Scottish Government should be required to publish guidance made under section 17C(2).

9. The Committee's report therefore recommended that section 45(2) be amended at Stage 2 so as to include a requirement that guidance issued under the new section 17C(2) of the Criminal Justice (Scotland) Act 2003 be published.

Scottish Government response

10. The Government's response to the Committee's report reiterates much of its earlier response to the Committee on section 45(2), as noted above.

11. The Government restates its intention to publish guidance made under section 17C(2), but remains of the view that there should not be a requirement for the guidance to be published.

12. The Government further explains that the guidance will only achieve its intended purpose if it is made available to victims who wish to make representation under the new victim representations scheme to be established by the Bill. The Government therefore makes clear that the guidance will be made available to victims.

13. The Government again refers to existing section 17(4) of the Criminal Justice (Scotland) Act 2003 which relates to guidance on representations made by victims to parole boards. The Government reiterates that there is no requirement for that guidance to be published. The Government does not consider this to be problematic as, as with the new section 17C(2) discussed above, the guidance will only serve its purpose if it is made available to victims.

Conclusion

14. Members are invited to make any comments they wish on the Bill at this stage. If substantial amendments are made to the delegated powers provisions contained in the Bill, the Committee will have a further opportunity to consider the Bill after stage 2.

Recommendation

15. **Members are invited to note the Scottish Government's response on the Bill and to make any comments they wish at this stage.**

ANNEX

Correspondence from the Scottish Government, dated 9 December 2014:

The Scottish Government welcomes the Delegated Powers and Law Reform Committee's Report on the Delegated Powers Memorandum that accompanies the Mental Health (Scotland) Bill ("the Bill"). The Government would like to thank the Committee's members for their thorough scrutiny of the delegated powers contained within the Bill.

The Government offers the following response to the recommendation made in the Committee's report (which relates to a power to issue guidance in section 45(2) of the Bill).

The Committee's report states the following at paragraph 20:-

> "The Committee considers that, as a matter of general principle, where guidance is to be issued, it should be published, and a requirement to publish the guidance should be included on the face of the legislation conferring the power."

At paragraph 21 of its report the Committee continues:-

> "The Committee draws the power in section 45(2) (that is the guidance making power) of the Bill to the attention of the Parliament. The Committee recommends that section 45(2) be amended at Stage 2 so as to include a requirement that guidance issued under the new section 17C(2) of the Criminal Justice (Scotland) Act 2003 be published."

The Government notes the comments made by the Committee, but the Government's position remains as set out in the letter the Government sent to the Committee on 19 August. Namely, the Government does not consider it necessary to impose a statutory requirement to publish guidance issued in exercise of proposed section 17C(2) of the Criminal Justice Act.

The Government does not agree with the Committee's view that "as a matter of general principle" a requirement to publish guidance should always be included on the face of legislation. The Government considers that legislation should always be drafted in a way that takes account of context.

The context, in this case, is that the Government is being empowered to produce guidance about the making of representations under the victim representations' scheme which is to be established by the Bill. The guidance will only achieve its purpose of helping victims to put their representations into proper form if it is published, in the sense of being made available to victims who wish to make representations. So naturally having made guidance for that purpose, the Government will make it available to victims.

The Government's letter to the Committee of 19 August made the point that a directly parallel guidance-making power already contained in section 17(4) of the Criminal Justice Act is not accompanied by a statutory duty to publish the guidance made under it. The Committee remarks at paragraph 19 of its report that the absence of a publication duty in relation to section 17(4) is not, of itself, a reason not to include such a duty in relation to new section 17C(2). The Government agrees. It is perhaps worth clarifying that the point being made in the letter of 19 August is that in relation to section 17(4) it was not thought problematic that there was no duty to publish the guidance, because it was appreciated that the policy goal behind making the guidance could only be served if any guidance made was appropriately publicised.