

## Justice Committee

### Criminal Justice (Scotland) Bill

#### Written submission from Robert Wyllie

1. The long title of the Criminal Justice (Scotland) Bill mentions its purpose as being to make provision about criminal justice. This includes provision about the rights of suspects in police custody.

2. In determining an appeal from the Divisional Court in Northern Ireland, the House of Lords confirmed in 2009<sup>1</sup> that covert surveillance by public authorities of legally privileged consultations in prisons and police stations could in principle be authorised under the Regulation of Investigatory Powers Act 2000, but that enhanced authorisation procedures were necessary in order for such surveillance to be compliant with the European Convention on Human Rights.

3. The UK Government responded to the judgment by making statutory instruments<sup>2</sup> which required, among other things, that any such surveillance be authorised by a Surveillance Commissioner rather than a senior officer of the relevant public authority. Different arrangements operate in the case of the intelligence agencies who now apply to the Secretary of State for authorisation.

4. In Scotland the relevant statute is the Regulation of Investigatory Powers (Scotland) Act 2000 which is an Act of the Scottish Parliament. It has the same lack of enhanced authorisation procedures for legally privileged consultations that was identified as a problem by the House of Lords in respect of the UK statute. However, corresponding provision to that made by the UK Government to rectify these defects has not been made to date by the Scottish Government.

5. It is submitted that the Government has been unacceptably slow in responding to this issue, potentially calling into question the legality of any such surveillance activity that has taken place to date. It therefore calls for Parliamentary intervention. Such intervention can usefully take place by making amendments to this Bill to provide for at least the same safeguards to be applied in Scotland as provided for in the UK statutory instruments.

6. The Committee is invited to recommend that such amendments be made.

Robert Wyllie  
17 July 2013

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<sup>1</sup> *In re McE (Appellant) (Northern Ireland), In re C (AP) and another (Appellants) (Northern Ireland), In re M (Appellant) (Northern Ireland)* [2009] UKHL 15.

<sup>2</sup> Namely the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2009 and the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010