The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

7th Meeting, 2014 (Session 4)

Tuesday 4 March 2014

The Committee will meet at 10.00 am in Committee Room 4.

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

2. **EU engagement:** The Committee will take evidence on the UK Government's 2014 EU opt-out decision from-—

   Roseanna Cunningham, Minister for Community Safety and Legal Affairs, Neil Rennick, Deputy Director, Law Reform Division, Danny Jamieson, Policy Manager, Criminal Law and Licensing Division, and Alicia McKay, Legal Services, Scottish Government.

3. **Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012:** The Committee will take evidence on the operation of the Act from—

   Roseanna Cunningham, Minister for Community Safety and Legal Affairs, Tom McMahon, Head of Community Safety Unit, and Gery McLaughlin, Head of Community Safety Law, Scottish Government.

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

   Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26).

5. **Work programme:** The Committee will consider its work programme.

J/S4/14/7/A

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The papers for this meeting are as follows—

Agenda item 2

Paper by the clerk	J/S4/14/7/1
Private paper	J/S4/14/7/2 (P)

Agenda item 3

Private paper	J/S4/14/7/3 (P)
Inquiry into the operation of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012	
Correspondence received by members of the Justice Committee	

Agenda item 4

Paper by the clerk	J/S4/14/7/4
Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)	

Agenda item 5

Private paper	J/S4/14/7/5 (P)

Justice Committee

7th Meeting, 2014 (Session 4), Tuesday, 4 March 2014

UK Government's 2014 EU opt-out decision

Note by the clerk

Purpose

1. This paper provides some background to the Committee's evidence session with the Minister for Community Safety and Legal Affairs in relation to the UK Government's 2014 EU opt-out decision.

UK Government's 2014 EU opt-out decision

2. Protocol 36 of the Treaty of Lisbon enables the UK Government to decide, by 31 May 2014, whether or not the UK should continue to be bound by approximately 130 police and criminal justice measures which were adopted in the Council of Ministers before the Lisbon Treaty came into force, or if it should exercise its right to opt out of these measures. If the UK chooses not to exercise the block opt-out, the measures would come under the jurisdiction of the EU Court of Justice and the enforcement powers of the EC on 1 December 2014.

3. The Committee has continued to monitor developments with this issue since the Home Secretary's announcement on 15 October 2012 that the UK Government's thinking at that time was to exercise the block opt-out. However, the Committee agreed not to conduct an inquiry into the opt-out decision at that time, on the basis that the House of Lords EU Select Committee was already undertaking a wide-ranging inquiry into the issue, including receiving evidence from the Lord Advocate, Faculty of Advocates, Law Society of Scotland and the Association of Chief Police Officers in Scotland. In its report of 23 April 2013, the HoL EU Select Committee concluded that the UK Government had not made a convincing case to opt out of the 130 measures and that to do so would have negative repercussions for the UK's internal security.

4. On 9 July, the UK Government published a list of 35 measures that it would seek to re-join if the opt-out is exercised. The HoL EU Select Committee also re-opened its inquiry on 18 July to look at the 35 measures identified and published its report on 30 October stating that it was concerned that the UK Government had given insufficient consideration to the possible substantive and reputational damage of not seeking to re-join a number of other measures.

5. The Prime Minister wrote to the EU on 24 July to give formal notification of the UK Government's intention to exercise the block opt-out. The UK Government has also announced that a second debate would be held in both houses on the final package of measures to be opted back into. (The first debates and votes on the opt-out decision took place in July.)

6. At its meeting on 14 January 2014, the Justice Committee agreed to invite the Minister to give evidence on the implications for Scotland if the UK Government does only opt into 35 of the 130 pre-Lisbon measures. To inform this evidence session, the Committee requested views from the Scottish Government, Lord Advocate, Law Society of Scotland, Faculty of Advocates and Police Scotland. To date, responses

have been received from the Scottish Government, Lord Advocate and Law Society of Scotland and these are attached as an Annexe to this paper. Other responses will be circulated to Members and published on the Committee"s web pages once received.

7. **The Committee is invited to consider the responses received and to explore related issues on the opt-out and its implications for Scotland with the Minister for Community Safety and Legal Affairs at the evidence session.**

ANNEXE

Extract of response from the Cabinet Secretary for Justice in relation to the UK Government's 2014 EU opt-out decision

UK Government"s 2014 opt-out decision
The Committee has asked the Scottish Government for commentary on 4 specific matters:

a) details of the level of consultation by the UK Government in relation to the 35 measures that it intends to opt back into;
b) whether it is content with the 35 measures identified;
c) the implications for the Scottish criminal justice system if there is any time lag between the date of the block opt-out and the opting back into any of the 35 measures; and
d) whether there are any implications for Scotland of the UK Government not opting back into the remaining 95 (approx.) pre-Lisbon police and criminal justice measures.

The Committee is aware of the background to Article 10 of Protocol 36 of the EU Treaties, which was negotiated by the then UK Government as part of the Treaty of Lisbon in 2009, enabling the UK to decide, by 31 May 2014, whether or not to be bound by the over 130 pre-Lisbon Treaty justice and police co-operation measures already in force in 2009. If the UK Government decided not to opt out, or to negotiate to opt back in to specific measures, these measures would become subject to the jurisdiction of the Court of Justice of the European Union and the enforcement powers of the European Commission on 1 December 2014.

The over 130 pre-Lisbon Treaty measures include some which are defunct, but also others which are vital to tackling cross-border crime and security matters, including the European Arrest Warrant and measures relating to co-operation and information sharing between justice agencies.

We have accepted throughout that it is unavoidable for the UK Government to have to reach a decision on the 2014 opt out. However, we have also been clear that Scotland and Scottish justice agencies have a strong interest in and concern about the UK"s final decision.

Details of the level of consultation by the UK Government
There are established arrangements for consultation at Ministerial and official levels between the UK and Scottish Governments on EU justice and home affairs matters, in particular around decisions arising from the UK"s power to choose whether to opt in to specific post-Lisbon Treaty justice and home affairs measures. Whilst differences of view arise, in general these arrangements operate broadly effectively, within the terms of the current constitutional arrangements.

This contrasts with our experience with reference to the 2014 opt-out decision. Whilst Scottish Government officials have sought to maintain contact with officials in the UK Home Office and Ministry of Justice throughout the opt out process, this official engagement has mainly been at a technical level, for example, in relation to factual assessment of individual dossiers with regard to practical application and implementation. **However, I would assess the level of consultation by UK**

Ministers on the 2014 opt out decision overall, and in particular at Ministerial level, as unsatisfactory.

Given the potential implications of the opt out decision for the efficient operation of Scotland‟s devolved justice system, I wrote to UK Ministers in April 2012 and again in August 2012, emphasising the need for effective dialogue and consultation before any decision on the opt-out was taken and emphasising the Scottish Government‟s preferred position to remain opted in to these measures. Despite this, no prior notification was received by Scottish Ministers ahead of the Home Secretary‟s announcement on 15 October 2012 confirming the UK Government‟s initial thinking to exercise the block opt out and to opt back in to only certain measures.

Both the Home Secretary and the Secretary of State for Justice wrote subsequent to the 15 October announcement, acknowledging the need for dialogue at Ministerial level between the UK and Scottish Governments and with operational organisations in Scotland. James Brokenshire MP, then Minister for Security in the Home Office, visited Edinburgh in January 2013. During his visit, Scottish Ministers expressed concern about the UK Government‟s preferred position and the lack of clarity about the basis for this position or the process for identifying the measures which the UK Government planned to opt back into. The concerns of the Scottish police, prosecutors and legal professions about the opt-out decision were also emphasised to the UK Minister.

These specific concerns were reflected in the Report of the House of Lords European Union Committee report of its inquiry into the 2014 opt-out decision, published in April 2013, to which I, the Lord Advocate, Scottish police, the Law Society and Faculty of Advocates all provided evidence:

http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/159/159.pdf.

Despite this, no prior notification was again provided at Ministerial level ahead of the Home Secretary‟s further announcement on 9 July 2013, which confirmed the UK Government‟s formal decision to exercise the opt out, and the list of 35 measures to which it planned to negotiate with the Commission and Member States to opt back into. Specifically in relation to your question, the UK Government did not divulge the composition of the list to the Scottish Government in advance of the 9 July announcement, or the basis on which specific measures were either included or excluded.

I should emphasise that concerns about how the UK Government has handled the opt out decision are not unique to the Scottish Government or Scottish justice agencies. Various Committees of both the Westminster House of Lords and House of Commons and the Northern Ireland Government have all expressed negative views about how UK Ministers have conducted this process.

<u>List of 35 measures which the UK plans to opt back in to</u>
You ask whether the Scottish Government is content with the list of measures that the UK Government intends to opt back into. The list of 35 measures was set out in Command Paper 8671 published by UK Ministers on 9 July 2013, the same day that they announced their decision to exercise the block opt out. The list of 35 measures includes those which we and justice agencies in Scotland would have been most concerned at not participating in, including the European Arrest Warrant; measures

associated with the functions and operation of Europol and Eurojust; measures facilitating the sharing of information; Joint Investigative Teams; mutual recognition of financial penalties and confiscation orders; cross-border police co-operation, etc.

However, notwithstanding this, **I can confirm that Scottish Ministers are not content with the list of 35 measures which UK Ministers plan to opt back in to**. The reasons for this view reflect both general and specific concerns:

- As noted above, our stated preference was to remain fully opted in to all pre-Lisbon police and criminal justice measures as best representing the interests of justice in Scotland and effective EU co-operation.

- We are concerned, in particular, about the uncertainty associated with the UK having to negotiate with the Commission and EU Members States to opt back in to the specific 35 measures and the risk of a potential gap in access to these measures.

- We do not believe that the UK Government has made a clear or compelling case to justify exercising the block opt in.

- Nor do we believe the UK Government has adequately explained its choice of 35 measures and those which it will not opt back in to.

On this final point, concern about the lack of effective evidence and justification for the choice of 35 measures in the UK Command Paper was well articulated in the follow-up report of the House of Lords EU Committee, published in October 2013:

"*We are disappointed that the Command Paper presented both the 35 measures which the Government intend to rejoin and the 95 they do not intend to rejoin in an unhelpful manner. We regret that the grounds on which the Government made their selection of measures to seek to rejoin were not set out persuasively in the EMs* [Explanatory Memoranda]."

Our more general concerns about the decision to opt out and the choice of 35 measures are reflected in our responses to the other two issues raised by the Committee.

<u>The implications of any time lag between the date of the block opt-out and opting back into the 35 Measures</u>

In considering the risk of a potential time lag, it may be helpful to set out briefly the process by which the UK must seek to rejoin specific measures. In practice there are two separate processes. For Schengen measures (5 of the 35), the rejoining process requires negotiation and agreement with all EU Members States. For non-Schengen measures (30 of the 35) the rejoining is progressed through negotiation with the European Commission.

Clearly any process relying on the agreement either of the Commission or all Member States carries some level of risk of agreement not being reached or of delay. **The implications of any such time lag would vary depending on the specific measures.** For example, for certain measures, such as the European Arrest Warrant, information sharing protocols or practical police co-operation, there is potential for live judicial processes or criminal investigations being delayed or undermined. The views

of both academics and justice organisations have expressed significant doubts that satisfactory alternative arrangements could be put in place to cover any temporary gap.

The UK Government position is that opt in negotiations could, in principle, be concluded in early course to provide „political and legal certainty for all involved" and have stated that other Member States agree with this approach. Specifically, they have said they consider that „formal steps can be taken by the UK and the EU institutions before 1 December 2014 that facilitate the UK rejoining pre-Lisbon measures, including the EAW" on that day. I have written to the Home Secretary and Secretary of State for Justice, seeking an update on the negotiation processes with the Commission and Member States and reassurance on the steps being taken to avoid any gap in the UK rejoining specific measures.

Implications for Scotland of the UK Government not opting back into c.95 pre-Lisbon Treaty Police and Criminal Justice Measures

You ask about the implications for Scotland with regard to the measures the UK Government is proposing not to opt back into. The UK Government has taken the position that it will only seek to opt back in to measures which it considers to be essential for cross border co-operation and has categorised the other circa 95 measures variously as being defunct, repealed and replaced (either now or pending), not actually required to enable the underlying actions to take place, or requiring minimum standards in substantive law, which the UK already meets and will continue to do so even if it is not bound by the measure in question.

The various reviews by Committees of the Westminster Parliament have identified a number of additional individual measures within the c.95 which they consider that the UK Government should consider opting in to, including for example the European Judicial Network (EJN) and operational matters relating to Europol. The UK Government has, however, rejected these requests to extend the list of 35 measures.

The specific measure we are most concerned about losing is membership of the EJN. As the Lord Advocate has argued, this measure is of utility to Crown Office officials in respect of progressing mutual legal assistance cases. My officials have raised this matter with their UK Government counterparts and I have written to the Home Secretary asking for the EJN to be added to the list of measures which the UK will seek to opt back into.

We are also concerned by the UK Government"s decision to withdraw from a number of minimum standard measures on the grounds that the UK is already compliant with these measures. Signing up to such measures represents a collective statement and reaffirmation that EU Member States across the continent find certain conduct to be unacceptable and, in some cases abhorrent, for example in respect of racism and xenophobia.

One of our primary concerns about the UK Government"s decision to opt out of the c.95 measures is the potential reputational damage which it will have for the UK"s and Scotland"s engagement on vital police and UK co-operation matters and the wider signal it gives to the UK Government"s „direction of travel" on EU matters. During the debate in the House of Commons on 15 July 2013, UK Government Ministers indicated that the opt-out decision forms part of its wider agenda to alter the

relationship between the UK and EU. As the Home Secretary stated: "*We are first and foremost talking about bringing powers back home*."

As we move closer to December 2014, we will seek to continue to keep in touch with the negotiation process at both Ministerial and official levels, in particular about the risk of any gap in the UK opting back into specific measures. However, as noted above, our experience of UK Ministers" willingness to engage on this matter to date has not been encouraging.

The Minister for Community Safety will attend the Justice Committee on 4 March and will be happy to discuss these matters further during the oral evidence session.

Kenny MacAskill
Cabinet Secretary for Justice
18 February 2014

Response from the Lord Advocate in relation to the UK Government's 2014 EU opt-out decision

I thank you for your letter of 17 January 2014 seeking my views on the implications for Scotland of the UK Government"s 2014 block opt-out decision. I welcome the opportunity to provide you with my observations.

Further to the oral evidence I provided to the House of Lords Select Committee on 13 February 2013 I wrote to the Committee providing a list of the measures I would suggest the United Kingdom should opt in to. A copy of that letter is attached for your information.

You will note that the 35 measures the UK Government have stated they would seek to rejoin include all those identified in my letter to the Committee, with the exception of: Council Framework Decision 2005/222/JHA on attacks against information systems; Council Decision 2005/876/JHA on the exchange of information extracted from the criminal record; and Council Decision 2008/976/JHA on the European Judicial Network.

It remains my position that the European Judicial Network measure (EJN) ought to be included. It is the experience of the Crown Office and Procurator Fiscal Service (COPFS) that this is a valuable tool in the armoury of prosecutors as it is frequently used by the International Cooperation Unit (ICU) of Crown Office to seek assistance in execution of EAWs abroad and allows for urgent requests to be expedited. The EJN has also provided Scottish prosecutors with a rich source of advice on national law in Member States within very short timescales which has been used to good effect in a number of cases considered by the United Kingdom Supreme Court.

With the exception of the EJN measure, I do not assess there to be any particularly damaging consequences for Scotland of not opting back into the other 94 pre-Lisbon police and criminal justice measures and I am generally supportive of the decision by the UK Government to seek to rejoin the 35 measures listed by them, which includes such important measures as the EAW.

That said there remain implications for Scotland as a result of the block opt-out decision, the main one being the danger of the UK being unable to rejoin the EAW measure. The extent of that danger will be determined and assessed by what mechanism the UK Government seeks to provide a legal base in place of the EAW. I understand that the UK Government has begun negotiations in order to secure a seamless process of block opt-out and opt-in come 1 December 2014. However, the UK Government has thus far not shared its view on what legal base will replace the EAW either as an interim measure or in the event of complete exclusion from the EAW scheme and therefore my concerns in this area subsist.

From evidence given to the House of Lords Select Committee and from what is said in the Government‟s explanatory memorandum, it is believed the UK Government‟s position is that extradition will be achieved through the European Convention on Extradition. This however must be predicated on the basis that Member States which have transposed the EAW framework decision into their national law can transfer a member state out of that scheme and recommence on another legal base.

Different issues would arise for incoming and outgoing requests, should the UK not be able to rejoin the EAW scheme, namely:

Incoming requests
For, requests into the UK, the Government could re-designate Member States as part 2 territories, placing them in the same position as, for example, the United States.

This would have the effect of moving the decision on extradition back to ministerial level where the Cabinet Secretary for Justice in Scotland would be required to certify all incoming requests, the International Cooperation Unit (ICU) would crave and issue a warrant to arrest and thereafter the procedure would be similar to the present system, except, rather than the court make the decision on extradition, the court would refer the case back to the Minister who would then decide if extradition would be ordered. The statutory time frames would be different and extradition would take considerably longer than is presently the case.

It would also open up two areas of appeal, the decision of the court and that of the Minister and involve considerably greater work for colleagues abroad as the request needs to be in a more stringent and detailed form. Importantly, double criminality would require to be applied to offences and the current benefit of the framework list of offences would be lost.

Outgoing requests
The anxiety would be reputational damage caused by the UK opt out. Currently member states operate and execute the EAW efficiently. In future, it would not be unreasonable to assume that executing authorities who would be required to undertake considerably more work on execution of requests from the UK in the old convention form, involving as it does affidavit evidence and issue through the Home Office, would be less able to execute UK requests as quickly as they do currently. The fact that affidavit evidence is required where these have to be drafted, sworn before the court, translated and then issued will inevitably involve more preparation time.

In addition, the speed with which arrest can be effected through use of the EAW would be diminished.

It is envisaged that the UK enter the SIS II (Schengen information system) in 2014. This will enable the UK authorities to place on the system an alert which will be available to police forces in around 20 member states. That however is predicated on the use of the EAW. Red notices which are the equivalent for Convention based requests are issued through Interpol channels.

The greatest danger is that some Member States would no longer be able to accept requests from the UK based on the convention as under their national law some states have taken the view that the EAW as a matter of EU law, replaces the convention base and they cannot revert back to the convention as a legal base for extradition. This would result in not only the UK requiring to take steps to provide interim measures such as a bilateral treaty or new legislation but also the national parliaments of those other states. Under the Lisbon Treaty the UK would be required to meet the cost of any financial implications to Member States. Putting in place bilateral treaties or new legislation would require time and agreement within Member States‟ own systems which would be beyond the control of the UK. This may lead to interim periods where the UK and some Member States would have no legal base at all upon which to seek extradition of fugitive offenders. This would be most keenly felt with the Republic of Ireland.

Although it is the intention of the UK Government to secure opt-in without there being any gap or break in practice of the EAW this is by no means certain and consideration does not appear to have been given to the situation where there is a gap between the UK Government opting out and being able to rejoin, other than reliance on the European Convention on Extradition. This convention cannot however be relied upon by all member states for the reasons explained and in particular cannot be relied upon by the Republic of Ireland.

Frank Mulholland QC
Lord Advocate
18 February 2014

Response from the Law Society of Scotland in relation to the UK Government's 2014 EU opt-out decision

I refer to your letter dated 17 January 2014 addressed to the President of the Law Society, Mr Bruce Beveridge, a copy of which has been passed to me for my attention.

The Law Society of Scotland provided the House of Lords European Union Select Committee with both written and oral evidence in relation to its inquiry into the 2014 opt-out decision.

At that time, we stated that the exercise of the opt-out could have very serious consequences involving cross border crime from both a practical and cost perspective and that such a decision should not be taken before a thorough consideration of the implications is undertaken. We further stated that even if the UK is able to opt back into some measures then this is likely to lead to confusion, complexity and cost.

We specifically expressed concerns that, with regard to the European Arrest Warrant, that it would not be in the UK‟s interest for individuals who commit crimes in other EU Member States to be able to treat the UK as a safe haven, knowing that their offending

was either non extraditable or that it was likely to be subject to a more cumbersome extradition process for another country to seek return by that route.

A copy of our written response to the House of Lords Select Committee on the European Union is attached for ease of reference.

We remain seriously concerned that there has been no proper consultation from UK Government prior to the Home Secretary‟s announcement on 9 July 2013 which confirmed the UK Government‟s decision to exercise the opt out and the list of 35 measures which they had planned to negotiate with the Commission and the Member States to opt back into.

With regard to the consequences of not opting back into around 35 of the Pre Lisbon Police and Criminal Justice Measures, the Society believes that the opt out should not have been exercised at all. In particular, the Society notes the reference that it made in its written submission to the House of Lords European Union Select Committee at Paragraph 11. The Centre for European Legal Studies Working Paper „Opting out of EU Criminal Law; what is actually involved?‟ states that:

“The UK‟s withdrawal from these instruments would seem to send a negative message as regards to the UK‟s attitude to Law and Order, and international efforts to further it. By withdrawing from them, the UK would appear to be telling other Member States (and indeed its own citizens and the rest of the world) that it considers the forms of anti-social conduct they are aimed at – Terrorism, Money Laundering, People Smuggling, Cyber Crime and so on and so forth – are not so grave as to require international cooperation to deal with them effectively”.

Accordingly we remain seriously concerned at the decision to exercise the opt-out and, with regard to the 35 measures which UK Ministers plan to opt back into, we believe that it is for UK Government to demonstrate now that they have a plan that there will be no “gap” between the block opt out coming into effect and opting back into individual measures such as the European Arrest Warrant. Also we believe that the proposal which form part of such a strategy require to be scrutinised robustly and debated by Westminster.

We understand that there have not been any formal negotiations as yet between the UK Government and the European Institutions.

With reference to the European Judicial Network not been included in the list of 35 measures, we see there being no reason not to opt back into this measure.

I trust that this information is of some assistance to you in advance of your evidence session fixed for 11 March but should you require further information, please don‟t hesitate to contact me.

Alan McCreadie
Law Reform, Law Society of Scotland
25 February 2014

Justice Committee

7th Meeting, 2013 (Session 4), Tuesday 4 March 2014

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:

- Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26).

2. Further details on the procedure for negative instruments are set out in Annexe B attached to this paper.

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)

Introduction

3. The purpose of the instrument is to amend Schedule 2 to the Prisons and Young Offenders Institutions (Scotland) Rules 2011, which provide for the constitution of visiting committees, to reflect the opening of HMP & YOI Grampian and the closure of HMPs Aberdeen and Peterhead.

4. The instrument comes into force on 3 March 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/2014/26/contents/made

Consultation

6. The policy note on the instrument confirms that operational managers and policy colleagues within the Scottish Prison Service, the relevant local authorities and the Association of Visiting Committees have been consulted and that the local authorities for the new prison, HMP & YOI Grampian, have agreed the visiting committee's membership.

Delegated Powers and Law Reform Committee consideration

7. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 18 February 2014 and draws to the attention of the Justice Committee that no saving or transitional provision is made for the visiting committees for Aberdeen and Peterhead prisons which are being wound up to allow them to complete any investigations into complaints which are ongoing notwithstanding the closure of those prisons and to report for the period 1 April 2013 to their abolition.

8. The DPLR Committee also draws to the attention of the Committee and the Scottish Government that similarly no saving or transitional provision is made in the proposed draft order abolishing visiting committees and replacing them with lay prison monitors (the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014).

9. The DPLR Committee further reports to the Parliament a failure in communication and planning within the Scottish Prison Service, which resulted in non-compliance with the 28 day rule.

10. The relevant extract from the DPLR Committee's report on the instrument is reproduced on page 3 of this paper.

11. In addition, the Convener of the DPLR Committee has written to the Justice Committee highlighting the DPLR Committee's concerns. In his letter to the Committee, Mr Don intimated that he had written to the Scottish Government on this matter (a copy of the letter is attached at Annexe A).

Justice Committee consideration

12. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 17 March 2014. Therefore, the Committee has the opportunity to return to this instrument at its meeting next week on 11 March.

13. In the meantime, the Committee may wish to consider asking for further information from the Scottish Government in relation to the absence of transitional arrangements that has been highlighted by the DPLR Committee. The Committee may also wish to write to the Association of Visiting Committees for comment.

Policy Note: Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)

1. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 ("the Amendment Rules") were made in the exercise of the powers conferred by sections 8 and 39 of the Prisons (Scotland) Act 1989. These Rules amend The Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the Prison Rules") and they are subject to negative procedure.

Policy Objective

2. The Cabinet Secretary announced in August 2007 that a new publicly operated prison was to be built in the Peterhead area to replace the existing facilities there and at HMP Aberdeen. HMP & YOI Grampian has been built on part of the HMP Peterhead site and is scheduled to open in March 2014 and will be fully operational by late April. HMPs Peterhead and Aberdeen have been closed and their status as prisons will be discontinued once the Discontinuance of Aberdeen and Peterhead Prisons (Scotland) Order 2014 comes into force.

3. The Prison Rules set out provisions relating to the regulation and management of Prisons and Young Offenders Institutions and various matters concerning those who are required to be detained in these institutions (such as their classification, treatment, discipline, employment and control).

4. In terms of section 8 of the 1989 Act, Rules made under section 39 must provide for the constitution of visiting committees. Schedule 2 to the Prison Rules details the number of VC members to be appointed for each prison and the name of the appointing Authority. This Schedule requires to be amended to reflect the opening of HMP & YOI Grampian and closure of HMPs Aberdeen and Peterhead.

Impact Assessment

5. The Equality and Diversity impact assessment was carried out and it was determined that the changes to Schedule 2 would have no impact on prisoners, staff or visitors to the prison.

Consultation

6. There has been consultation with operational managers and policy colleagues within the Scottish Prison Service, the relevant local authorities and the Association of Visiting Committees. The local authorities for the new prison, HMP & YOI Grampian have agreed the VC membership.

Financial Effect

7. The Cabinet Secretary for Justice confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Extract from the Delegated Powers and Law Reform Committee 15th Report 2014

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) *(Justice Committee)*

1. This instrument amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the 2011 rules") in order to establish a prison visiting committee for the new prison at Grampian and to dis-establish the existing prison visiting committees for HMP Aberdeen and HMP Peterhead.

2. The Rules are subject to the negative procedure and will come into force on 3 March 2014.

3. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points relating to the application of rule 146 and 153 of the 2011 rules. The correspondence is reproduced at the Appendix.

4. The correspondence sets out the Scottish Government's view on how the members of the visiting committees for HMP Aberdeen and HMP Peterhead will be removed from office once the instrument takes effect on 3 March 2014.

5. In this context the Committee notes that the instrument makes no saving provision for the visiting committees for Aberdeen and Peterhead beyond the date of closure of the prisons. Such a period would permit those committees to complete any ongoing investigations or to report on their activities under rule 153 for the period from 1 April 2013 to their abolition. The Committee notes that in relation to previous prison closures such a period has been allowed for such purposes by way of transitional and saving provision.

6. The Committee takes a keen interest in ensuring that transitional and saving provision is made where that is appropriate. The Committee accepts that it is not aware of whether there are any ongoing complaints or other administrative matters which require to be dealt with and that questions about how any such matters should be handled raise questions of policy.

7. **The Committee therefore draws to the attention of the Justice committee that no saving or transitional provision is made for the visiting committees for Aberdeen and Peterhead prisons which are being wound up to allow them to complete any investigations into complaints which are ongoing notwithstanding the closure of those prisons and to report for the period 1 April 2013 to their abolition.**

8. **The Committee also agreed to write to the Justice committee and the Scottish Government drawing to their attention that similarly no saving or transitional provision is made in the proposed draft order abolishing visiting committees and replacing them with lay prison monitors (the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014).**

9. The instrument is subject to the negative procedure and therefore is subject to the 28 day rule in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA"). This instrument does not observe the rule. As required by section 31(3) of ILRA the Scottish Prison Service has provided an explanation for this as follows:

> "The member of staff who was tasked to prepare the SSI misread instructions from SPS operational colleagues regarding the opening of the new prison, HMP & YOI Grampian. It had been their understanding that although the new prison would open on 3 March 2014, it would not be operational until April 2014. Further that there would be no prisoners located in the Prison until April and hence no requirements for a visiting committee until this time. However, while reviewing the paperwork to begin the preparations for the SSI, it was noted that a small number of prisoners will be relocated to HMO & YOI Grampian on the day it opens, 3 March 2014. Although HMP & YOI Grampian will become fully operational by April 2014, it will become operational in March 2014."

10. The Committee accepts that having found itself in the position outlined in the explanation, as a matter of practical expediency, the Scottish Government had little alternative but to proceed to make the instrument without observing the requirements of the 28 day rule. The reason why the Scottish Government found itself in this position appears to the Committee to have resulted from a failure in communication and planning within the Scottish Prison Service. The Committee considers that this is completely unsatisfactory and could have been avoided.

11. **The Committee draws the instrument to the attention of the Parliament under reporting ground (j). The requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 have not been complied with as fewer than 28 sitting days have been allowed between the instrument being laid before the Parliament and the date on which it comes into force.**

12. **The Committee finds that a failure in communication and planning within the Scottish Prison Service is the reason for non-compliance with the 28 day rule. The Committee finds this to be completely unsatisfactory and reports to the Parliament accordingly.**

Appendix

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)

On 6 February 2014, the Scottish Government was asked:

Rule 146(1) of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 requires that a visiting committee must be constituted in accordance with the remainder of that rule for each prison specified in column 1 of Schedule 2 to those regulations. Rule 146(2) and columns 2 and 3 of that Schedule identify by whom the membership of that committee is to be appointed by allocating responsibility to local authorities. Rule 146(4) determines by when the local authorities must make those appointments. Rule 146(5) sets out when persons appointed under rule 146(4) take office. Rule 146(6) specifies when members of visiting committees cease to hold office as read with rule 146(7).

The purpose of the instrument appears to be to dis-establish the visiting committees for HMP Aberdeen and HMP Peterhead with effect from 3 March 2014 and to establish a visiting committee for HMP Grampian with effect from that date.

1. The instrument modifies Schedule 2 to the principal regulations. The effect of article 2(b) is to require a visiting committee to be constituted for HMP Grampian in accordance with rule 146. A question arises as to whether this instrument goes far enough to establish a visiting committee for HMP Grampian since rule 146(4) does not appear to make provision for the establishment of a new visiting committee other than immediately after a council election. Rule 146(4)(a) deals with that scenario. By contrast rule 146 (4)(b) deals with circumstances where the requisite number of members were not elected in accordance with (4)(a), (4)(c) deals with vacancies as a result of committee members ceasing to hold office and (4)(d) deals with “any other vacancy” occurring. The question is whether “vacancies” have occurred for the purposes of rule 146(4)(d) by virtue of the modification made to Schedule 2 or not. It would appear to require a strained construction to be placed on rule 146(4)(d) were it intended to include the creation of a completely new visiting committee as “vacancies occurring in that committee”. In particular the operation of (4) is material to determining under (5) the date on which functions will vest in the members of the new visiting committee. It is suggested that the current circumstances are not provided for by the drafting of rule 146 and that specific provision is required to achieve that legal effect. I am aware that this was the approach taken in SSI 2012/26. Nevertheless, on a proper construction of rule 146 I consider that this question requires to be addressed.

2. The effect of the removal of references to HMP Aberdeen and HMP Peterhead from Schedule 2 will be to disapply the duty imposed by rule 146(1) to constitute a visiting committee for those prisons. It is submitted that this is a different legal effect to the desired effect of dis-establishing the visiting committees that were established under this rule. It would appear that rule 146(6)(7) does not achieve this effect either. Is separate provision to this effect not required?

3. The Scottish Government is also asked whether its policy is that rule 153 will apply to the proposed visiting committee for HMP Grampian for the period up to 31 March 2014. If not, is a transitional provision not required to disapply this rule?

The Scottish Government responded as follows:

1. The purpose of the Amendments Rules is to dis-establish the visiting committees (VCs) for HMP Aberdeen and HMP Peterhead and to establish a VC for HM Grampian. The Amendment Rules remove the entries for HMP Aberdeen and HMP Peterhead from the table in Schedule 2 and add an entry for HMP Grampian to that table. The Scottish Government's position is that this is sufficient to provide for the dis-establishment of the VCs for HMP Aberdeen and HMP Peterhead and that it is also sufficient for the establishment of a VC for HMP Grampian.

Section 8 of the Prisons (Scotland) Act 1989 provides that rules made under section 39 of the Act must provide for the constitution of VCs appointed in accordance with those rules. This obligation is given effect to by rule 146 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the Prison Rules"). Rule 146(1) of the Prison Rules provides that a VC must be constituted (in accordance with rule 146) for each prison listed in the table in Schedule 2 to the Prison Rules. Accordingly, the addition of HMP Grampian to the table in Schedule 2 provides that a VC must be established for HMP Grampian.

Rule 146(2) of the Prison Rules makes provision for the appointment of VC members by local authorities. The number of VC members to be appointed by each council, and the number of VC members appointed by each council who must not be members of that council are all specified in the table in Schedule 2. The addition of HMP Grampian to the table in Schedule 2 means that the members of that VC must be appointed by the councils specified in that entry and in line with the numbers specified in that entry.

As the Committee have rightly pointed out, rule 146(4) is key to the appointment of members of a new VC such as HMP Grampian. It is clear from paragraph (1) of rule 146 that a VC must be appointed and the nature of the VC's membership is made clear by paragraph 2 of that rule. Paragraph (4) of rule 146 provides how the appointment of the VC members should take place.

Paragraph (4)(a) provides that members must be appointed at a meeting of the council held no later than 2 months after the council elections. The members of the VC for HMP Grampian cannot be appointed through this process as there have been no recent council elections held by the relevant councils. Paragraph (4)(c) does not apply here as it caters for the situation where a VC member resigns, has their membership terminated or ceases to be a member of the relevant council.

Paragraph (4)(b) provides that the member or members of a VC to be appointed by a council in terms of paragraph (2) must be appointed—

"if for any reason the requisite number of members of a visiting committee is not appointed at the proper time in terms of sub-paragraph (a), at a meeting of the council held as soon as possible after that time;"

The Scottish Government's position is that, as the requisite number of members of HMP Grampian cannot be appointed at a meeting held within 2 months of the council elections in terms of paragraph (4)(a), they must be appointed under paragraph (4)(b) at a meeting of the council held as soon as possible thereafter.

Once the Amendment Rules come into force, there will be an obligation to constitute a VC for HMP Grampian (rule 146(1)) and the obligation to appoint members to that VC will fall on the relevant councils specified in Schedule 2 to the Prison Rules (rule

146(2)). The relevant councils will therefore require to convene a meeting in accordance with rule 146(4)(b) in order to appoint the requisite number of members. The members of the VC for HMP Grampian will consequently take office on the day following their appointment in accordance with rule 146(5)(b).

2. Rule 146(1) of the Prison Rules creates an obligation to constitute VCs for the prisons specified in Schedule 2 and this obligation is carried out by local authorities appointing VC members under rule 146(2) and Schedule 2. The removal of a prison from Schedule 2 removes the obligation to constitute a VC for that prison and the obligation to appoint members to that VC. However, there is no provision in the Prison Rules for the discontinuance of a VC by the Scottish Ministers or for the automatic termination of the appointment of VC members on the discontinuance of the committee.

The Scottish Government's position is that a VC will be formally discontinued once the necessary amendments have been made to Schedule 2 to the Prison Rules and the members of the relevant VC have been removed from office. Rule 146(7) makes provision for the cessation of the term of office of VC members. Rule 146(7)(b) provides that a member of a VC ceases to hold office if the council who appointed that member terminates the member's appointment on one of four specific grounds. Rule 146(7)(b)(ii) provides that a council can terminate the appointment of a member on being satisfied that the member is, for any reason (other than a failure to perform his or her duties), incapable of carrying out his or her duties.

The VCs for HMP Aberdeen and HMP Peterhead will have no continuing duties as both of those prisons have now been closed and are to be formally discontinued as prisons once the Discontinuance of Aberdeen and Peterhead Prisons (Scotland) Order 2014 comes into force. The members of the VCs for Aberdeen and Peterhead are therefore incapable of carrying out their duties and it will be open for the relevant councils to terminate the appointment of the members of the VCs for HMP Aberdeen and HMP Peterhead under rule 146(7)(b)(ii). The termination of the membership of the VCs for HMP Aberdeen and HMP Peterhead by the relevant councils will be the final step in discontinuing the VCs.

Aberdeen City Council and Aberdeenshire Council are currently tasked with appointing the members of the VCs for HMP Aberdeen and HMP Peterhead and on the coming into force of the Amendment Rules, those councils will be obliged to appoint some of the members of the VC for HMP Grampian. From discussions between Aberdeen City Council, Aberdeenshire Council and SPS, those councils intend to appoint most of the HMP Aberdeen and HMP Peterhead VC members to the VC for HMP Grampian. It will fall to those councils to firstly terminate the appointment of the HMP Aberdeen and HMP Peterhead VC members under rule 146(7)(b)(ii) before appointing those individuals to the VC for HMP Grampian under rule 146(2).

Accordingly, it is not considered necessary to provide for the termination of the appointment of the members of the VCs for HMP Aberdeen and HMP Peterhead as that can be attended to as part of the appointment process for the VC for HMP Grampian.

3. The Scottish Government does not propose to disapply the obligations in rule 153 to the VC for HMP Grampian and the VC for HMP Grampian will be required to report in accordance with that rule. It is acknowledged that any such report will only encompass a few weeks and will not be as detailed as would otherwise be the case. However the Scottish Ministers have the power, in terms of rule 149(1) to require the

VC to inquire into and report upon any matter in connection with the prison. The VC also have ongoing duties to report to the Scottish Ministers in terms of rule 149(2) and (3). Even though the initial report under rule 153 may be necessarily limited, there are opportunities for more detailed reporting later in the year.

ANNEXE A

Letter from the Convener of the Delegated Powers and Law Reform Committee to the Convener of the Justice Committee

Dear Christine

The Delegated Powers and Law Reform Committee considered the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) on 18 February. The instrument amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011 in order to establish a prison visiting committee for the new prison at Grampian and to dis-establish the existing prison visiting committees for HMP Aberdeen and HMP Peterhead.

The Committee agreed to draw the instrument to ther attention of the Parliament under reporting ground (j) as it failed to comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

The Committee also agreed to draw certain other matters in relation to the instrument to the attention of the Justice Committee, as lead Committee for the instrument. These are detailed in the Committee's report on the instrument.

In particular, the Committee noted that the instrument makes no saving provision for the visiting committees for HMP Aberdeen and HMP Peterhead beyond the date of closure of the prisons. Without such a period those committees would be unable to complete any ongoing investigations or to report on their activities under rule 153 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 for the period from 1 April 2013 to their abolition. The Committee also noted that in relation to previous prison closures such a period has been allowed for such purposes by way of transitional and saving provision.

In considering the instrument, the Committee noted that a similar issue arises in relation to the forthcoming draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 which proposes to abolish visiting committees and to replace them with lay monitors. Again, the Committee noted that no provision is made for saving the functions of the visiting committees that are to be abolished in order for them to complete their investigations into complaints which are ongoing at the time the public service reform order takes effect.

The Committee was concerned by the apparent lack of transitional and saving provisions contained in the forthcoming order. However, the Committee considers that questions regarding how ongoing complaints or other administrative issues should be dealt with during the transitional period are primarily matters of policy. Accordingly, I write to draw this matter to the attention of the Justice Committee, as the likely lead Committee for the draft order when it is laid before Parliament in due course.

I have also written to the Scottish Government on this matter.

Nigel Don MSP
Convener
27 February 2014

ANNEXE B

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