



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

1st Meeting, 2015 (Session 4)

Tuesday 6 January 2015

The Committee will meet at 10.15 am in the Mary Fairfax Somerville Room (CR2).

1. **Decisions on taking business in private:** The Committee will decide whether to take items 7, 8 and 9 in private.
2. **Subordinate legislation:** The Committee will take evidence on the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015 [draft] from—

Paul Wheelhouse, Minister for Community Safety and Legal Affairs, Denise Swanson, Head of Access to Justice Unit, and Alastair Smith, Directorate for Legal Services, Scottish Government.

3. **Subordinate legislation:** Paul Wheelhouse (Minister for Community Safety and Legal Affairs) to move—

S4M-11913—That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015 [draft] be approved.

4. **Subordinate legislation:** The Committee will take evidence on the—

Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft];

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

Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft];

from—

Paul Wheelhouse, Minister for Community Safety and Legal Affairs, Graeme Waugh, Investigatory Powers Team, Police Division, and Kevin Gibson, Directorate for Legal Services, Scottish Government.

5. **Subordinate legislation:** Paul Wheelhouse (Minister for Community Safety and Legal Affairs) to move—

S4M-11910—That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft] be approved;

S4M-11915—That the Justice Committee recommends that the Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft] be approved;

S4M-11916—That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft] be approved.

6. **Subordinate legislation:** The Committee will consider the following negative instruments—

Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (SSI 2014/339);

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).

7. **Modern Slavery Bill (UK Parliament legislation):** The Committee will consider a draft report on the legislative consent memorandum (LCM(S4) 35.1).

8. **Subordinate legislation:** The Committee will consider a draft report on the Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 [draft].

9. **Assisted Suicide (Scotland) Bill:** The Committee will further consider a draft report to the Health and Sport Committee.

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Clerk to the Justice Committee
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The papers for this meeting are as follows—

Agenda items 2 and 3

Paper by the clerk

J/S4/15/1/1

[Advice and Assistance \(Assistance by Way of Representation\) \(Scotland\) Amendment Regulations 2015](#)

Agenda items 4 and 5

Paper by the clerk

J/S4/15/1/2

[Regulation of Investigatory Powers \(Covert Surveillance and Property Interference - Code of Practice\) \(Scotland\) Order 2015](#)

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

[Regulation of Investigatory Powers \(Covert Human Intelligence Sources - Code of Practice\) \(Scotland\) Order 2015](#)

Agenda item 6

Paper by the clerk

J/S4/15/1/3

[Regulation of Investigatory Powers \(Authorisation of Covert Human Intelligence Sources\) \(Scotland\) Order 2014 \(SSI 2014/339\)](#)

[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 \(SSI 2014/337\)](#)

Agenda item 7

Private paper

J/S4/15/1/4 (P)

Agenda item 8

Private paper

J/S4/15/1/5 (P)

Agenda item 9

Private paper

J/S4/15/1/6 (P)

Justice Committee

1st Meeting, 2015 (Session 4), Tuesday 6 January 2015

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:
 - **the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015 [draft].**

Introduction

2. The Children and Young People (Scotland) Act 2014 amended the Children's Hearings (Scotland) Act 2011 to allow a pre-hearing panel or children's hearing to determine whether an individual previously deemed to be a 'relevant person' in relation to a child for the purposes of the 2011 Act should continue to be deemed so.
3. This instrument makes assistance by way of representation (ABWOR) to a child or relevant person for a pre-hearing panel that is considering whether an individual should continue to be deemed a relevant person, subject to the same criteria usually applied for ABWOR at a children's hearing.
4. Further details on the purpose of the instrument can be found in the policy note (see below) and an electronic copy of the instrument is available at:
<http://www.legislation.gov.uk/sdsi/2015/9780111025222/contents>

Consultation

4. The policy note states that the Scottish Legal Aid Board has been consulted on the draft provisions.

Delegated Powers and Law Reform Committee consideration

5. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 9 December 2014 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

Justice Committee consideration

6. The Justice Committee is required to report to the Parliament on the instrument by 19 January 2015.
7. The instrument is subject to affirmative procedure (Rule 10.6 of Standing Orders). The Cabinet Secretary for Justice has lodged motion S4M-11913 proposing that the Committee recommends approval of the instrument. The Minister for Community Safety and Legal Affairs is due to attend the meeting on 6 January to answer any questions on the instrument, and then, under a separate agenda item, to speak to and move the motion for approval. It is for the Committee to decide whether

or not to agree to this motion, and then to report to the Parliament by 19 January 2015. The Parliament will then be invited to approve the instrument.

8. The Committee will be asked to delegate to the Convener authority to approve the report on the instrument for publication.

**Policy Note: Advice and Assistance (Assistance by Way of Representation)
(Scotland) Amendment Regulations 2015 [draft]**

The above instrument was made in exercise of the powers conferred by section 9 of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

Policy Objectives

The Children and Young People (Scotland) Act 2014 amended the Children's Hearings (Scotland) Act 2011 to allow a pre-hearing panel or children's hearing to determine whether an individual previously deemed to be a "relevant person" in relation to a child for the purposes of the 2011 Act should continue to be deemed a relevant person. It also amends the Legal Aid (Scotland) Act 1986 to ensure that Children's Legal Aid is available to a person to appeal a decision that they should no longer be a relevant person to the sheriff.

This instrument makes assistance by way of representation (ABWOR) to a child or relevant person for a pre-hearing panel which is considering whether an individual should continue to be deemed a relevant person, subject to the same criteria usually applied for ABWOR at a children's hearing.

Consultation

The Scottish Legal Aid Board has been consulted on the draft provisions.

Impact Assessments

An equality impact assessment has been completed on the draft SSI and will follow under separate cover. There are no equality impact issues.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is minimal, though beneficial, in that the opportunity for business may increase.

Scottish Government
Justice Directorate
25 November 2014

Justice Committee

1st Meeting, 2015 (Session 4), Tuesday 6 January 2015

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instruments:

- Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft];
- Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft];
- Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft];

Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft]

2. This instrument brings into force a revised Code of Practice relating to covert surveillance authorised under the Regulation of Investigatory Powers (Scotland) Act 2000 and interference with property or wireless telegraphy under Part III of the Police Act 1997. The revised Code reflects organisational changes, such as the creation of Police Scotland, and new arrangements for directed surveillance on matters subject to legal confidentiality to be treated as intrusive surveillance (as set out in the draft Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 – see below).

3. Further details on the purpose of the instrument can be found in the policy note in Annexe A to this paper and an electronic copy of the instrument is available at:

<http://www.legislation.gov.uk/sdsi/2015/9780111025437/contents>

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

4. This instrument provides for directed surveillance in relation to matters subject to legal privilege to be treated as if it were intrusive surveillance. In introducing higher level procedures for authorisation of directed surveillance, the instrument follows the same approach taken by the UK Government.

5. Further details on the purpose of the instrument can be found in the policy note in Annexe A to this paper and an electronic copy of the instrument is available at:

<http://www.legislation.gov.uk/sdsi/2015/9780111025390/contents>

Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft]

6. This instrument brings into force a revised Code of Practice relating to the covert human intelligence sources (CHIS) authorised under the Regulation of Investigatory Powers (Scotland) Act 2000. The Code has been updated to reflect organisational changes, such as the creation of Police Scotland, and new arrangements for authorisation of CHIS in relation to matters subject to legal confidentiality, and for relevant sources (as set out in the negative instrument: the Regulation of Investigatory Powers (Authorisation of Covert Intelligence Sources) (Scotland) Order 2014 (SSI 2014/339)).

7. Further details on the purpose of the instrument can be found in the policy note in Annexe B to this paper and an electronic copy of the instrument is available at: <http://www.legislation.gov.uk/sdsi/2015/9780111025482/contents>

Consultation on the three instruments

8. The Scottish Government conducted a public consultation exercise on the two revised Codes of Practice to be issued under RIPSA, but included a copy of the Order for information. This consultation ran between 13 January and 17 March 2014. The policy notes on the instruments indicated that seven responses were received and none of the respondents opposed the proposals.

9. The policy notes also confirm that neither the Codes nor Order seek to provide any public body with additional powers, but in fact impose tighter controls on existing arrangements.

Correspondence received

10. The Dean of the Faculty of Advocates has written to the Committee expressing concerns regarding the surveillance of lawyer-client discussions arising from two of these affirmative instruments and the related negative instrument¹ also to be considered at this meeting. In his letter, Mr Wolffe QC, states that the instruments are “a significant improvement on the current state of law and, to that extent, I welcome them”. However he questions “whether the SSIs draw the boundaries sufficiently tightly, given the importance of lawyer-client confidentiality”. His letter is attached at Annexe D.

Delegated Powers and Law Reform Committee consideration

11. The Delegated Powers and Law Reform Committee considered these instruments at its meeting on 16 December 2014 and agreed that it did not need to draw the attention of the Parliament to them on any grounds within its remit.

¹ The concerns relate to: (a) the Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2014; (b) the Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014; and (c) the Regulation of Investigatory Powers – Covert Human Intelligence Sources – Draft Code of Practice.

Justice Committee consideration

12. The Justice Committee is required to report to the Parliament on the instruments by 26 January 2015.

13. The instruments are subject to affirmative procedure (Rule 10.6 of Standing Orders). The Cabinet Secretary for Justice has lodged motions S4M-11910, S4M-11915 and S4M-11916 proposing that the Committee recommends approval of the instruments. The Minister for Community Safety and Legal Affairs is due to attend the meeting on 6 January to answer any questions on the instruments, and then, under a separate agenda item, to speak to and move the motions for approval. It is for the Committee to decide whether or not to agree to these motions, and then to report to the Parliament by 26 January 2015. The Parliament will then be invited to approve the instruments.

14. The Committee will be asked to delegate to the Convener authority to approve the report on the instruments for publication.

ANNEXE A

Policy Note: Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft]

1. The above instrument is made in exercise of the powers conferred by section 24(5) of the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). The instrument is subject to the affirmative procedure.

Policy Objectives

2. RIP(S)A requires Scottish Ministers to issue one or more codes of practice relating to the exercise and performance of the powers and duties contained in both RIP(S)A and Part III of the Police Act 1997 (authorisation of interference with property or wireless telegraphy).

3. There are two existing codes, one covering covert surveillance, and the other covering covert human intelligence sources. These were issued in 2002.

4. Both codes have been revised and updated. They contain more expansive information and reflect a number of organisational changes that have taken place since 2002, most notably the amalgamation of the Scottish police forces and the Scottish Crime and Drugs Enforcement Agency into the single Police Service of Scotland.

5. The covert surveillance and property interference code has also been updated to reflect the new arrangements for directed surveillance in relation to matters subject to legal confidentiality to be treated as intrusive surveillance as set out in the Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015.

6. Section 26 of RIP(S)A requires any person exercising or performing any power under RIP(S)A to have regard to the Codes.

Consultation

7. Section 24(3) of RIP(S)A requires Scottish Ministers to publish and consider representations made on draft codes of practice. A public consultation exercise commenced on 13 January 2014 and finished on 17 March 2014. That consultation involved the publication of two revised Codes of Practice (one on covert surveillance and property interference and one on covert human intelligence sources). Seven responses were received, and of those five groups agreed that their responses could be made public:

- the Law Society of Scotland
- Her Majesty's Inspectors of Constabulary for Scotland
- Police Scotland
- The Scottish Human Rights Commission, and
- The Information Commissioner

8. The practice of how the different covert tactics are authorised are well established and the Code does not provide any public body with additional powers.

Impact Assessments

9. There are no equality impact issues and an EQIA has, therefore, not been completed. It is extremely unlikely that any particular group will be impacted by the provisions contained in the code.

Financial Effects

10. A Business and Regulatory Impact Assessment (BRIA) was considered. On the basis, however, that the measures do not impose additional costs or reduce existing costs on business or the third sector, do not impose additional costs on public sector organisations that deliver public services, and do not involve some kind of distribution where there is an exchange of transfer of costs or benefits from one group to another, a BRIA was not considered necessary.

11. The updated code will not impact financially on public authorities or on the Office of Surveillance Commissioners.

Scottish Government
Safer Communities Directorate
Police Division

ANNEXE B**Policy Note: Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft]**

1. The above instrument was made in exercise of the powers conferred by section 27(1)(b) of the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). The instrument is subject to the affirmative procedure.

Policy Objectives

2. Section 27(1)(b) of RIP(S)A gives Scottish Ministers the powers to provide for any description of directed surveillance to be treated for the purposes of RIP(S)A as intrusive surveillance. There are three effects of this power:

- intrusive surveillance may be authorised only where necessary for the prevention or detection of serious crime;
- where surveillance is to be authorised by the Police Service of Scotland it raises the rank at which the surveillance may be authorised from superintendent to chief constable or any senior officer designated by the chief constable; and
- it requires the prior approval of a Surveillance Commissioner before the surveillance can be undertaken.

3. The overall effect is to create a regime for a particular description of directed surveillance that requires consideration at a higher level and includes an element of prior independent oversight before the surveillance can be undertaken.

4. The Order provides for directed surveillance in relation to matters subject to legal privilege to be treated as if it were intrusive surveillance.

Legal Confidentiality

5. The House of Lords, in considering an appeal from the Divisional Court in Northern Ireland, agreed with that Court's decision that 'directed surveillance' under the Regulation of Investigatory Powers Act 2000 (RIPA) of communications between lawyers and their clients breached Article 8 of the European Convention on Human Rights (the right to respect for private and family life). The Secretary of State did not challenge the decision of the Divisional Court that the procedures used to authorise directed surveillance (and CHIS) were disproportionate to the infringement of an individual's right to a private consultation with a lawyer. The process for authorising the conduct or use of a CHIS is in all relevant respects the same as the process for authorising directed surveillance.

6. The UK Government has since made legislation which specifies that both directed surveillance and the conduct or use of a CHIS should be authorised in line with the higher level procedures for authorising intrusive surveillance. This Order follows that approach in relation to the authorisation of directed surveillance in Scotland under RIP(S)A. Authorisation of the conduct and use of covert human intelligence sources in similar circumstances is dealt with in a separate instrument.

Consultation

7. A public consultation exercise commenced on 13 January 2014 and finished on 17 March 2014. The consultation focussed on two revised Codes of Practice to be issued under RIP(S)A, but included a copy of the Order for information. Seven responses were received, and of those five groups agreed that their responses could be made public:

- The Law Society of Scotland
- Her Majesty's Inspectors of Constabulary for Scotland
- Police Scotland
- The Scottish Human Rights Commission, and
- The Information Commissioner

8. The practice of how the different covert tactics are authorised are well established and neither the Codes nor this Order sought to provide any public body with additional powers. The Order in effect seeks to impose tighter controls on existing arrangements and none of the respondents opposed the proposals.

Impact Assessments

9. There are no equality impact issues and an EQIA has, therefore, not been completed. It is extremely unlikely that any particular group will be impacted by the provisions contained in the Order.

Financial Effects

10. A Business and Regulatory Impact Assessment (BRIA) was considered. On the basis, however, that the measures do not impose additional costs or reduce existing costs on business or the third sector, do not impose additional costs on public sector organisations that deliver public services, and do not involve some kind of distribution where there is an exchange of transfer of costs or benefits from one group to another, a BRIA was not considered necessary.

11. Enhancing the existing arrangements, as described in the Order, will not impact financially on Police Scotland or on the Office of Surveillance Commissioners.

Scottish Government
Safer Communities Directorate
Police Division

ANNEXE C**Policy Note: Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft]**

1. The above instrument is made in exercise of the powers conferred by section 24(5) of the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). The instrument is subject to the affirmative procedure.

Policy Objectives

2. RIP(S)A requires Scottish Ministers to issue one or more codes of practice relating to the exercise and performance of the powers and duties contained in both RIP(S)A and Part III of the Police Act 1997 (authorisation of interference with property or wireless telegraphy).

3. There are two existing codes, one covering covert surveillance, and the other covering covert human intelligence sources. These were issued in 2002.

4. Both codes have been revised and updated. They contain more expansive information and reflect a number of organisational changes that have taken place since 2002, most notably the amalgamation of the Scottish police forces and the Scottish Crime and Drugs Enforcement Agency into the single Police Service of Scotland.

5. The code has also been updated to reflect the new arrangements for the authorisation of covert human intelligence sources in relation to matters subject to legal confidentiality, and for relevant sources, as set out in the Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014.

6. RIP(S)A requires any person exercising or performing any power under RIP(S)A to have regard to the Codes.

Consultation

7. Section 24(3) of RIP(S)A requires Scottish Ministers to publish and consider representations made on draft codes of practice. A public consultation exercise commenced on 13 January 2014 and finished on 17 March 2014. That consultation involved the publication of two revised Codes of Practice (one on covert surveillance and property interference and one on covert human intelligence sources). Seven responses were received, and of those five groups agreed that their responses could be made public:

- the Law Society of Scotland
- Her Majesty's Inspectors of Constabulary for Scotland
- Police Scotland
- The Scottish Human Rights Commission, and
- The Information Commissioner

8. The practice of how the different covert tactics are authorised are well established and the Code does not provide any public body with additional powers.

Impact Assessments

9. There are no equality impact issues and an EQIA has, therefore, not been completed. It is extremely unlikely that any particular group will be impacted by the provisions contained in the code.

Financial Effects

10. A Business and Regulatory Impact Assessment (BRIA) was considered. On the basis, however, that the measures do not impose additional costs or reduce existing costs on business or the third sector, do not impose additional costs on public sector organisations that deliver public services, and do not involve some kind of distribution where there is an exchange of transfer of costs or benefits from one group to another, a BRIA was not considered necessary.

11. The updated code will not impact financially on public authorities or on the Office of Surveillance Commissioners.

Scottish Government
Safer Communities Directorate
Police Division

Correspondence from the Dean of the Faculty of Advocates to the Convener in relation to the RIP(S)A instruments

Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2014 (“the Legal Consultations Order”)

Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (“the CHIS Order”)

Regulation of Investigatory Powers – Covert Human Intelligence Sources – Draft Code of Practice

As a result of disclosures in the *Belhaj* case, widely reported in the media, I have become concerned in recent weeks about the vulnerability of lawyer-client communications to surveillance. Although the particular focus of the disclosures in the *Belhaj* case is the work of the intelligence services, the concerns which they raise are more general.

It has come to my attention that the SSIs mentioned above, which are subject to the affirmative resolution procedure, are currently before your Committee. The Faculty did not make submissions to the Government during its consultation process. I welcome the tightening up of the procedures and safeguards which these SSIs will achieve. However in light of my recent consideration of the general questions in this field, I feel obliged to raise an issue of principle with your Committee, so that you may take it into account, as you think appropriate, when considering the Orders.

The two instruments are made under the Regulation of Investigatory Powers (Scotland) Act 2000 (“RIPSA”). RIPSA regulates surveillance activities undertaken in Scotland by the Police Service, the Scottish Administration, Scottish local authorities, the Police Investigations and Review Commissioner, SEPA and the Common Services Agency for the Scottish Health Service: section 8. There is, as you will know, separate UK legislation, the Regulation of Investigatory Powers Act 2000 (“RIPA”), which deals with the activities of the intelligence services and a variety of other public bodies.

The background to the SSIs is *McE* [2009] 1 AC 908, a decision of the House of Lords. The case stands, I think, for the following propositions:

- (1) Legal Professional Privilege is a fundamental right which may be over-ridden only by legislation.
- (2) Communications between a lawyer and his client that are in furtherance of a crime or fraud are not protected by legal professional privilege. This is the so-called “**iniquity exception**”, to which I will return below. It is uncontroversial that communications which fall within the iniquity exception – in effect, when the lawyer is involved in criminality – are not covered by legal professional privilege.
- (3) The 2000 Act permitted covert surveillance between persons in custody and their legal advisers provided that this was undertaken under the Act and the Code of Practice issued under the Act and did not violate Convention rights.

- (4) However, covert directed surveillance of such communications under the Act as it then stood infringed Article 8 of the European Convention of Human Rights; authorisations for such surveillance should be made at an enhanced level, such as pursuant to the provisions in the Act for intrusive surveillance.

Following *McE*, delegated legislation was made under RIPA: (a) to deal expressly with the use of covert human intelligence sources to obtain and disclose matters subject to legal professional privilege; and (b) to deal with directed surveillance of specified premises (including lawyers' offices and prisons and other places of detention) when those premises are being used for legal consultations². The SSIs which are before your Committee essentially seek to achieve the same purposes for surveillance authorised under RIPA.

Insofar as the two SSIs which are before your Committee introduce additional safeguards and better regulate surveillance of lawyer-client communications, they are a significant improvement on the current state of the law and, to that extent, I welcome them. The grounds upon which the powers may be exercised are more limited than the powers under the equivalent UK Orders and that too is welcome. I also recognise that there is a significant safeguard in that approval from a Security Commissioner is required for the use of a CHIS under the CHIS Order and (except in cases of urgency) for directed surveillance under the Legal Consultations Order. Nevertheless, I question whether the SSIs draw the boundaries sufficiently tightly, given the importance of lawyer-client confidentiality. The fundamental question is whether surveillance or CHIS activities deliberately directed against consultations between client or lawyer or against legally privileged material should be permitted except where there is a reasonable basis for believing that the iniquity exception, as I have described it above, applies.

I am sure that I need not elaborate on the significance of lawyer-client confidentiality. The Code of Conduct for European Lawyers, to which the Faculty of Advocates adheres, puts it this way:

“It is of the essence of the lawyer’s function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer’s obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.”

The Edward Report, *The Professional Secret: Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community*, prepared for the CCBE (the Council of European Bars and Law Societies – the umbrella organisation for Europe’s bars and law societies) in 1975 by Sir David Edward, explains matters thus:

“The purpose of the law is not to protect the lawyer or his individual client. The purpose is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his rights and, second, to ensure the fair and proper administration of justice. This cannot be achieved unless the relationship

² The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010, SI 2010, No. 123; The Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010, SI 2010, No. 461.

between the lawyer and his client is a relationship of confidence. The rights, duties and privileges given to lawyers are therefore an essential element in the protection of individual liberty in a free society. They exist for the public interest; they have not been created by lawyers for their private benefit.”

The issue is, accordingly, not only of interest to lawyers and to those who seek the advice of lawyers (whether in the context of civil or criminal matters), but is of structural importance in a constitutional democracy governed by the rule of law.

I recognise immediately the importance of the fight against crime and the essential nature of the work of law enforcement agencies – as well as the difficulty of that work. I do not doubt the integrity of the senior staff of those agencies who would be responsible for giving effect to these provisions. I also recognise the acute sensitivity of the balance between security and freedom. Nevertheless, as I have been reflecting on these issues, I have come to question whether it is appropriate to take anything other than a robust approach when it comes to surveillance of legally privileged communications – an approach which would:

- prevent public authorities from deliberately using powers of surveillance, covert human intelligence sources, interception of communications and acquisition of communications data to target legally privileged information except where the iniquity exception applies;
- continue to permit the authorities (with appropriate authorization) to seek access to privileged information where there is a proper basis for apprehension that the lawyer-client relationship is being abused for a criminal purpose (the iniquity exception); and
- make provision, through the Code of Practice, for minimizing the risk of the authorities accidentally obtaining privileged material and stating that when this happens the information so obtained should be destroyed and the matter immediately reported to a Security Commissioner.

Unfortunately, the two SSIs which are before your Committee go further than this. The Legal Consultations Order will permit directed surveillance against consultations between lawyer and client if this is “necessary for the purpose of preventing or detecting serious crime” and the authorized surveillance is proportionate to what is sought to be achieved: RIPSAs, section 10(2). Likewise, under the CHIS Order, a Commissioner may, as I understand it, approve the grant or renewal of authorization to use a covert human intelligence source to obtain communications subject to legal privilege or to provide access to or disclose such communications if, inter alia “the authorization is necessary for the purpose of preventing or detecting serious crime”: regulation 5(2)(b).

Where there is a reasonable apprehension that the iniquity exception applies (in relation to serious crime), the surveillance or the use of the source may, of course, be characterized as “necessary for the purpose of preventing or detecting serious crime”. However, the converse is not necessarily true. Indeed, as the draft Code of Practice states, legal privilege does not apply to communications made with the intention of furthering a criminal purpose, and on that basis it is evidently intended that surveillance under these SSIs may be authorized even in circumstances which would not engage the iniquity exception. It would be better, I would suggest, if the wording

were tightened up so that the powers available under these Orders are available only where there is a reasonable basis for apprehending that the legally privileged communication is made with the intention of furthering a criminal purpose or the lawyer is himself party to criminal activity.

I have raised the issue with the appropriate official in the Justice Department, and will be copying this letter to the Cabinet Secretary for his information. I would be grateful if you would pass this letter to the members of your Committee for their consideration, and would be pleased to amplify any matters arising from it should that be useful.

James Wolffe QC
9 December 2014

Justice Committee

1st Meeting, 2015 (Session 4), Tuesday 6 January 2015

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instruments:
 - Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (SSI 2014/339) (page 1);
 - Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No.2) Order 2014 (SSI 2014/336) (page 4);
 - Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337) (page 7).
2. Further details on the procedure for negative instruments are set out in Annexe A attached to this paper.

Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (SSI 2014/339)

Introduction

3. This instrument alters the authorisation arrangements for the conduct or use of a covert human intelligence source under the Regulation of Investigatory Powers (Scotland) Act 2000 in cases where material subject to legal professional privilege may be obtained or disclosed and in cases where the source in question is a constable or a member of a specified policing body. Separate arrangements are made for each class of case.
4. The instrument comes into force on 2 February 2015.
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/2014/339/contents/made>

Consultation

6. The Scottish Government undertook a public consultation between 13 January and 17 March 2014 which focussed on two revised Codes of Practice to be issued under RIP(S)A, but also included a copy of the Order for information. The policy note states that seven responses were received none of the respondents opposed the proposals. It also stated that neither the Codes nor this Order sought to provide any public body with additional powers and in effect, this Order, seeks to impose tighter controls on existing arrangements.

Correspondence received

7. As referred to in paper 1, the Dean of the Faculty of Advocates has written to the Committee expressing concerns regarding the surveillance of lawyer-client discussions in relation to this Order and two of the affirmative SSIs¹ also to be considered at this meeting. His letter is attached at Annexe D to that paper.

Delegated Powers and Law Reform Committee consideration

8. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 9 December 2014 and agreed that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

Justice Committee consideration

9. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 19 January 2014.

Policy Note: Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (SSI 2014/339)

1. The above instrument was made in exercise of the powers conferred by sections 7(4)(b), 8(1) and (2), 19(8) and 28(4) of the Regulation of Investigatory Powers (Scotland) Act 2000. The instrument is subject to the negative procedure.

Policy Objectives

2. The Regulation of Investigatory Powers (Scotland) Act (RIP(S)A) gives Scottish Ministers the powers to prescribe additional requirements in relation to the authorisation of covert human intelligence sources (CHIS) over and above those already provided for under RIP(S)A. There are two broad policy objectives contained in the Order:

- in matters where a CHIS is likely to obtain matters subject to legal privilege (Part 2 of the Order), to introduce an additional requirement of obtaining approval from a Surveillance Commissioner before the authorisation can be granted, and to limit the granting of such authorisations to cases involving the prevention and detection of serious crime;
- for cases where a CHIS is also a member of a relevant police force (i.e. an undercover operative) Parts 3 and 4 of the Order contain provision:
 - to require that the authorising officer be an Assistant Chief Constable or above,
 - to notify a Surveillance Commissioner that an authorisation is being made, and
 - to require the prior approval of a surveillance Commissioner if the authorisation is to extend beyond a period of 12 months.

¹ The concerns relate to: (a) the Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2014; (b) the Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014; and (c) the Regulation of Investigatory Powers – Covert Human Intelligence Sources – Draft Code of Practice.

Legal Confidentiality

3. The House of Lords, in considering an appeal from the Divisional Court in Northern Ireland, agreed with that Court's decision that 'directed surveillance' under the Regulation of Investigatory Powers Act 2000 (RIPA) of communications between lawyers and their clients breached Article 8 of the European Convention of Human Rights (the right to respect for private and family life). The Secretary of State did not challenge the decision of the Divisional Court that the procedures used to authorise directed surveillance (and CHIS) were disproportionate to the infringement of an individual's right to a private consultation with a lawyer. The process for authorising the conduct or use of a CHIS is in all relevant respects the same as the process for authorising directed surveillance.

4. The UK Government has since made legislation which specifies that both directed surveillance and the conduct or use of a CHIS should be authorised in line with the higher level procedures for authorising intrusive surveillance. This Order follows that approach in relation to authorisations of the conduct or use of a CHIS in Scotland under RIP(S)A. Authorisations for directed surveillance in similar circumstances are dealt with in a separate instrument.

Enhanced arrangements for Undercover Operatives (UCOs)

5. An independent report published in February 2012 by Her Majesty's Inspectorate of Constabulary (England and Wales) examined police authorisation of UCOs (defined as 'relevant sources' in the Order) deployed against public order and domestic extremist subjects. Extensive media reporting focused on the collapse of a trial involving a UCO, the withholding of the UCO's true identity from the court, his access to legally privileged information on behalf of the police, and his conducting sexual relationships within the groups he was assigned to.

6. The HMIC report made a number of recommendations relating to additional safeguards to reduce the risk of long term police-authorized undercover operatives deployed for long periods being, or becoming, engaged in inappropriate activity.

7. As a consequence, this Order introduces new safeguards relating to authorisations in such cases, including the raising of the authorisation level within the Police Service to assistant chief constable in ordinary cases and raising that level to deputy chief constable and requiring approval of a Surveillance Commissioner if the authorisation exceeds 12 months.

Additional provisions

8. The Order also contains minor amendments to reflect organisational changes within the Common Services Agency for the Scottish Health Service and the Scottish Environment Protection Agency. These are provided for at Part 5 of the Order.

Consultation

9. A public consultation exercise commenced on 13 January 2014 and finished on 17 March 2014. The consultation focussed on two revised Codes of Practice to be issued under RIP(S)A, but included a copy of the Order for information. Seven responses were received, and of those five groups agreed that their responses could be made public:

- the Law Society of Scotland
- Her Majesty's Inspectors of Constabulary for Scotland
- Police Scotland
- The Scottish Human Rights Commission, and
- The Information Commissioner

10. The practice of how the different covert tactics are authorised are well established and neither the Codes nor this Order sought to provide any public body with additional powers. The Order in effect seeks to impose tighter controls on existing arrangements and none of the respondents opposed the proposals.

Impact Assessments

11. There are no equality impact issues and an EQIA has, therefore, not been completed. It is extremely unlikely that any particular group will be impacted by the provisions contained in the Order.

Financial Effects

12. A Business and Regulatory Impact Assessment (BRIA) was considered. On the basis, however, that the measures do not impose additional costs or reduce existing costs on business or the third sector, do not impose additional costs on public sector organisations that deliver public services, and do not involve some kind of distribution where there is an exchange of transfer of costs or benefits from one group to another, a BRIA was not considered necessary.

13. Enhancing the existing arrangements, as described in the Order, will not impact financially on Police Scotland or on the Office of Surveillance Commissioners.

Scottish Government
Safer Communities Directorate
Police Division

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

Introduction

10. This instrument transposes Framework Decision 2009/299/JHA on the application of the principle of mutual recognition to financial penalties. The 2009 Framework Decision amends Framework Decision 2005/214/JHA to enhance procedural rights where financial penalties have been imposed at trial in the absence of the persons concerned.

11. The instrument came into force on 1 December 2014.

12. 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/2014/336/contents/made>

Consultation

13. The policy note states that transposition of the 2009 Framework Decision will only affect the courts and that the changes are minor and procedural in nature. The Order was therefore considered by the Scottish Court Service, as the central authority for administration of the mutual recognition of financial penalties provisions.

Delegated Powers and Law Reform Committee consideration

14. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 16 December 2014 and agreed to draw it to the attention of the Parliament as there had been a failure to observe the requirement to leave a minimum of 28 days between laying and coming into force of the instrument. However, the DPLR Committee found the breach acceptable in this instance, due to the urgent circumstances which have arisen; namely the powers in section 2(2) of the European Communities Act 1972 could only be used to make the instrument no earlier than 1 December, as on that date the UK Government opted into the Council Framework Decision 2009/299/JHA which the Order gives effect to. The Framework Decision also required to be fully transposed and implemented on 1 December.

15. The relevant extract from the DPLR Committee's report is reproduced at Annexe B.

Justice Committee consideration

16. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 19 January 2015.

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

1. The Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 2) Order 2014 was made in exercise of the power conferred by section 2(2) of the European Communities Act 1972. The Order is subject to the negative procedure.

2. Council Framework Decision 2009/299/JHA ('the 2009 Framework Decision') amends Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties ('the 2005 Framework Decision'), to enhance procedural rights where financial penalties have been imposed at trial in the absence of the persons concerned. The 2009 Framework Decision was adopted on 26 February 2009.

3. It is one of the chapter of 'third pillar' measures subject to the UK Government's opt-out, and one of the individual measures that the UK Government seeks to participate in from 1 December 2014.

Policy Objectives

4. The purpose of this Order is to transpose the amendments made by the 2009 Framework Decision to the 2005 Framework Decision.

5. Mutual recognition of judicial decisions is the process by which a decision taken by a judicial authority in one Member State is recognised and enforced by another as if it were taken by the judicial authorities of that other Member State².

6. The 2005 Framework Decision was transposed by the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009 (SSI 2009/342)('the 2009 Order'). The 2009 Order introduced a scheme which enables Scottish fines and fixed penalties of a value greater than €70 to be enforced elsewhere in the EU and vice versa. It does so by adding new provisions to the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'). The 2005 Framework Decision applies to a wide range of offences such as theft, criminal damage or road traffic, listed in article 5, in relation to which financial penalties can be imposed. The 2009 Order came into force on 12 October 2009.

7. The 2009 Framework Decision amends the 2005 Framework Decision by clarifying the circumstances in which a financial penalty which has been made in a person's absence can be recognised and executed in another Member State. This Order transposes the 2009 Framework Decision by amending the 1995 Act.

8. Transposition of the 2009 Framework Decision also requires a consequential amendment to Form 54.1: Form of certificate issued under section 223A(1) of the 1995 Act. A request to have the certificate amended has been made to has been made to the Criminal Courts Rules Council.

9. A related instrument was laid before the Parliament on 2 October 2014 – the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 1) Order 2014 ("the No. 1 Order"). The No. 1 Order amends the 1995 Act to reflect more explicitly the terms of the 2005 Framework Decision and is not connected with the implementation of the 2009 Framework Decision. The No. 1 Order was laid separately because it is to be made under a domestic power which requires it to be scrutinised under affirmative procedure.

Consultation

10. The Order has been considered by the Scottish Court Service who are the central authority for the administration of the mutual recognition of financial penalties provisions and act as designated officials for the competent authority. The transposition of the 2009 Framework Decision will only affect the courts and the changes are minor and procedural in nature. As their practical impact is limited and there are no financial implications for individuals, business or the third sector, we do not believe there is a requirement for formal public consultation.

Impact Assessment

11. There are no equality impact issues and a Equality Impact Assessment (EQIA) has not been completed. The Order amends the administrative processes to be followed in accepting another Member States' financial penalty for enforcement. The changes to the process are minor and do not require the central or competent authority to make any decision that may involve, or impact on, protected characteristics.

² See point 36 of the conclusions of the Tampere European Council of 15-16 October 1999

Financial Effects

12. A final Business and Regulatory Impact Assessment (BRIA) has not been completed. The Order amends the administrative processes to be followed in accepting another Member States' financial penalty for enforcement. The changes to the administrative processes are minor. The Scottish Court Service, as the central authority, are content that there will be no significant operational impact arising from this Order that cannot be met from existing resources.

Scottish Government
Justice Directorate
1 December 2014

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

Introduction

17. This instrument gives effect to Framework Decision 2009/829/JHA on the European Supervision Order which promotes mutual recognition within the EU of judicial decisions relating to non-custodial pre-trial supervision measures (bail in Scotland) which may be imposed on an accused person in criminal proceedings. The policy intention underlying the Framework Decision is to increase the likelihood that non-residents who are prosecuted in a different member state will be granted bail rather than remanded in custody.

18. The Framework Decision is one of the 'third pillar' measures subject to the UK Government's opt-out, and one of the individual measures that the UK Government seeks to participate in from 1 December 2014. The instrument therefore came into force on 1 December 2014.

19. 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/2014/337/contents/made>

Consultation

20. The policy note states that the Regulations have been considered by an operational working group on the ESO Framework Decision, consisting of representatives of the Crown Office and Procurator Fiscal Service, the Scottish Court Service and Police Scotland, who represent those who will be charged with giving effect to the ESO Framework Decision requirements.

Delegated Powers and Law Reform Committee consideration

21. The Delegated Powers and Law Reform (DPLR) Committee considered the instrument at its meeting on 16 December 2014 and agreed to draw it to the attention of the Parliament as there had been a failure to observe the requirements to leave a minimum of 28 days between laying and coming into force of the instrument. However, the DPLR Committee found the breach acceptable in this instance, due to the urgent circumstances which had arisen; namely the powers in section 2(2) of the European Communities Act 1972 could only be used to make the instrument no earlier than

1 December, as on that date the UK Government opted into the Council Framework Decision 2009/829/JHA which the Regulations give effect to. The Framework Decision also required to be fully transposed and implemented on 1 December.

22. The relevant extract from the DPLR Committee's report is reproduced at Annexe C.

Justice Committee consideration

23. If the Committee agrees to report to the Parliament on the instrument, it is required to do so by 19 January 2015.

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

1. The Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (the Regulations) are made in exercise of the power conferred by section 2(2) of the European Communities Act 1972. The Regulations are subject to the negative procedure.

2. Council Framework Decision 2009/829/JHA of 23 October 2009 *on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention* entered into force on 1 December 2009. It has become generally known as the European Supervision Order (ESO) Framework Decision. The ESO Framework Decision is one of the 'third pillar' measures subject to the UK Government's opt-out, and one of the individual measures that the UK Government seeks to participate in from 1 December 2014.

Policy Objectives

3. The policy objective behind the Regulations is to give effect to the ESO Framework Decision.

4. The ESO Framework Decision promotes mutual recognition within the EU of judicial decisions relating to non-custodial pre-trial supervision measures which may be imposed on accused persons in criminal proceedings. In Scotland the term we use for such supervision measures is bail. Mutual recognition of judicial decisions is the process by which a decision taken by a judicial authority in one member State is recognised and enforced in another³. The aim of the ESO Framework Decision is to allow, in certain circumstances, a person accused of a crime in one member State to return home to another member State and be supervised there until the person's trial starts in the member State where the offence took place, or to enable a person accused of a crime at home to move to another member State and be supervised there while awaiting trial.

5. The policy intention underlying the ESO Framework Decision is to increase the likelihood that non-residents who are prosecuted in a different member State will be granted bail rather than remanded in custody. This is not only to counter the presumption that non-residents are a 'flight risk' and avoid the trial state bearing the financial cost of the detention, but also to avoid other adverse impacts associated with

³ See point 33 of the [conclusions of the Tampere European Council of 15-16 October 1999](#)

lengthy pre-trial detention on individuals with no community ties to the trial state⁴: being cut off from family and friends, the effects of detention on their physical and mental health and the risk of being absent from and consequently losing employment. Equally, it is designed to enable accused persons wishing to take up employment or other opportunities in another member State in exercise of their right to freedom of movement within the EU, to do so and still be effectively supervised while awaiting trial.

6. As summarised by Fair Trials International:

“All too often, criminal courts order the detention of non-residents because they presume them to be a flight risk, or, if they release them, require them to stay in the trial state because they do not have confidence that they can be adequately supervised at home. The ESO Framework Decision provides an answer to these problems, allowing the court to rely on the authorities of other Member States to supervise the defendant, thus removing one of the main avoidable causes of detention of non-residents.”⁵

Competent Authority

7. Under the ESO Framework Decision, a decision on supervision measures, both in terms of issuing a measure for monitoring in another member State or executing a measure on behalf of another member State, can only be taken by a competent authority. The Regulations provide that in Scotland the competent authority is a Scottish court.

Monitoring of Scottish bail conditions in another State

8. The Regulations provide that any Scottish court that can grant bail in criminal proceedings (i.e. the High Court, any Sheriff Court and any Justice of the Peace Court) can request the authorities in another member State to monitor the accused person’s compliance with the bail conditions.

9. Scottish courts are required by the Regulations to consult so far as practicable with the authorities of other member States prior to making requests for supervision measures to be recognised, and in order to facilitate the smooth and efficient monitoring of the bail conditions.

10. Under existing bail procedures in Scotland an accused will always be made aware of the bail conditions which apply to them. The Regulations provide that bail conditions will only be transferred to another member State for monitoring where the accused expresses an intention to reside there. This could include where they wish to return home or where they wish to move to another member State, for example to take up employment.

11. The member State that is to take on the monitoring of the bail conditions (“the executing State”) must recognise the Scottish court’s decision on supervision measures (i.e. bail) unless one of the grounds for non-recognition set out in the ESO Framework Decision apply. The accused may be liberated on bail under restrictions pending acceptance of the request by the executing State. An example of the sorts of

⁴ See [Rt Hon Sir Scott Baker’s independent review of extradition laws published in October 2011](#)

⁵ See [The Guide to the European Supervision Order](#) by Fair Trials International, September 2012

restrictions that may be imposed at this stage is that the accused may not leave Scotland until the request is accepted by the executing State. If such a restriction is imposed a future hearing to consider the outcome of the request can be fixed if that is appropriate.

12. The executing State can choose to adapt the measures so as to be compatible with its domestic law. The Scottish court can withdraw the certificate requesting monitoring of the supervision measure if it is not content with the adapted measures, provided monitoring in the executing State has not begun. A notification by an executing State that they intend to adapt a supervision measure will be passed on to the prosecutor and accused person in the case who can call for a bail review, which may lead to the request for recognition of supervision measures being withdrawn. The Scottish bail order will remain as issued notwithstanding any adaptation by the executing State.

13. Any breach of Scottish bail conditions reported by the executing State will be notified to the prosecutor in the case against the accused. The breach report will be considered by the prosecutor in line with normal case management procedures and, if necessary, appropriate action can be taken to vary or recall the bail decision, and criminal proceedings may be raised for breach of bail.

Monitoring of another State's supervision measures in Scotland

14. The ESO Framework Decision requires arrangements to be put in place in Scotland to recognise and monitor supervision measures issued in another member State (referred to in the ESO Framework Decision as the "issuing State"). The ESO Framework Decision only requires recognition of measures that require a person to:

- inform the authority monitoring the supervision measures of any change of residence;
- not enter certain locations;
- stay at a specified location;
- comply with certain restrictions for leaving the territory of the monitoring country;
- report at specified times to a specified authority; and
- refrain from contacting specific persons connected to the alleged crime.

15. The Regulations provide for requests from other member States regarding Scotland to be sent to the Scottish central authority. A central authority, in terms of the ESO Framework Decision, is a body that assists the competent authority charged with making decisions under the Framework Decision. In Scotland, the central authority will be the Scottish Court Service. When it receives a request for recognition of a decision on supervision measures from another State, it will allocate the request to the appropriate sheriff court, which will typically be the court with jurisdiction for the place in Scotland where the accused lives.

16. On receipt of the request, the court will consider it in light of the grounds for rejection and compatibility of the supervision measures with Scots law. If the supervision measures are not compatible with Scots law, then the sheriff court can refuse to recognise the decision, or choose to adapt the measures to correspond as closely as possible to the original measures imposed.

17. Once accepted compliance with the supervision measures will be monitored by Police Scotland. The Police will have a power of arrest over individuals who breach an incoming supervision measure. Anyone in breach of the supervision measures will be

brought before the sheriff court which would be able to release the person or remand him or her for up to 28 days (or 21 days if the person is under 18).

18. The sheriff court is responsible for notifying the competent or central authority of the issuing State of any breach of a supervision measure. It is for the issuing State to make any subsequent decisions on supervision measures, in accordance with their national law and procedures. If, under its law, the issuing State must hear the accused before varying the supervision measures or issuing an arrest warrant, telephone and video conferencing may be used.

19. Where the issuing State issues an arrest warrant for breach of a supervision measure, the European Arrest Warrant may be used to return the individual back to the issuing State for trial.

20. The Regulations anticipate cross-jurisdictional issues that may arise within the UK in relation to the monitoring of supervision measures imposed in another member State. For example, if Police Scotland find someone in Scotland who appears to have breached the terms of a supervision measure that has been recognised by a court in England and Wales, or in Northern Ireland, they will notify the relevant police force in the other part of the UK. Police Scotland will also notify the Scottish authorities if they receive information from a police force in another part of the UK that a person subject to supervision measures recognised by a sheriff court in Scotland has been found breaching a supervision measure in another part of the UK.

Consultation

21. The Regulations have been considered by an operational working group on the ESO Framework Decision, consisting of representatives of the Crown Office & Procurator Fiscal Service, the Scottish Court Service and Police Scotland, who represent between them those who will be charged with giving effect to the ESO Framework Decision's requirements.

Impact Assessment

22. An Equality Impact Assessment and Privacy Impact Assessment have been completed and are attached.

Financial Effects

23. A Business and Regulatory Impact Assessment has also been completed.

Scottish Government
Justice Directorate
1 December 2014

ANNEXE A**Negative instruments: procedure**

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

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

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

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

Guidance on subordinate legislation

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

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

***Extract from the Delegated Powers and Law Reform Committee's 74th Report
2014***

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

1. The Order transposes amendments made by Council (EU) Framework Decision 2009/299/JHA to a Framework Decision 2005/214/JHA on the mutual recognition of financial penalties.
2. Scottish provision implementing that 2005 Framework Decision is contained in the Criminal Procedure (Scotland) Act 1995 (sections 223A to 223T, and Schedules 11 and 12). The Order implements the amendments made by the EU Framework Decision 2009/299/JHA, by making some amendments to the 1995 Act. The provisions modify the grounds on which recognition of a decision imposing a financial penalty may be refused, because the decision was not the result of a trial at which the person subject to the penalty appeared in person.
3. The Order also adjusts the consultation requirements between Member States, and changes the information which must be included in the certificate which is sent to other Member States when Scotland requests recognition of financial penalties imposed here.
4. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Appendix A.
5. The Order was made and laid before Parliament on 1 December 2014 and also came into force on that date. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the "28 day rule", as set out in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA"). The correspondence (which also relates to SSI 2014/337) is reproduced at Appendix C.
6. The Committee received oral evidence from Scottish Government officials on the proposals for both this instrument and the Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337) as also reported on below⁶. The evidence session was held on 18 November 2014, and included discussion of the proposed timing of making the instruments and of bringing them into force.
7. The breach of the "28 day rule" does not affect the validity of the instrument. The required letter to the Presiding Officer explaining the breach has been provided. The letter explains that the breach of the rule arises from the process under which the UK has opted out of a number of pre-Lisbon Treaty criminal justice measures, and then opted back into a group of 35 measures. The "opt out/opt in" occurred as anticipated on 1 December 2014, in accordance with certain transitional arrangements which are set out in Protocol 36 of the Lisbon Treaty. The opt-in has been publically recognised by a Commission Decision of 1 December 2014 (2014/858/EU).

⁶ Scottish Parliament Delegated Powers and Law Reform Committee *Official Report* 18 November 2014 available here: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9646&mode=pdf>

8. When the UK opted back into the 35 measures, including the Framework Decision 2009/299/JHA, they became binding on the UK and required to be fully transposed and implemented on 1 December 2014, to avoid the risk of EU infringement proceedings. The letter to the Presiding Officer has explained that regrettably this combination of circumstances has resulted in the Scottish Ministers also having to make, lay and bring this Order into force on 1 December 2014.

9. **The Committee therefore draws the instrument to the Parliament's attention on reporting ground (j) as there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument has been laid before Parliament and came into force on 1 December 2014, so that the requirement to leave a minimum of 28 days between laying and coming into force has not been complied with.**

10. **However, the Committee finds the breach acceptable in this instance, due to the urgent circumstances which have arisen. The powers in section 2(2) of the European Communities Act 1972 could only be used to make the instrument no earlier than 1 December, as on that date the UK Government opted into the Council Framework Decision 2009/299/JHA which the Order gives effect to. The Framework Decision also required to be fully transposed and implemented on 1 December.**

11. **The Committee welcomes that the Scottish Government provided it with early notice of its proposals for this Order, and of the unusual set of circumstances which have required the breach of the "28 day rule".**

Appendix A

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.

ANNEXE C

***Extract from the Delegated Powers and Law Reform Committee's 74th Report
2014*****Mutual Recognition of Supervision Measures in the European Union (Scotland)
Regulations 2014 (SSI 2014/337)**

1. The Regulations give effect in Scotland to the EU Framework Decision 2009/829/JHA on mutual recognition of decisions on supervision measures, as an alternative to provisional detention. That Decision is known as the “*ESO Framework Decision*”. In Scottish terms, supervision measures as an alternative to provisional detention means pre-trial bail.
2. Schedule 1 of the Regulations deals with cases where a Scottish court requests that another EU member state monitors bail conditions imposed in Scotland, while the accused person subject to the conditions is in the other State’s territory.
3. Conversely, schedule 2 deals with cases where another EU member state requests that a person’s compliance with supervision measures imposed in the other State is monitored while the person is in Scotland.
4. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Appendix B.
5. The Regulations were made and laid before the Parliament on 1 December 2014, and also came into force on that date. The Scottish Government has provided a letter to the Presiding Officer to explain the failure to comply with the “28 day rule”, as set out in section 28(2) of ILRA. The correspondence (which also relates to SSI 2014/336) is reproduced at Appendix C.
6. The Committee received oral evidence from Scottish Government officials on the proposals for both this instrument and SSI 2014/336 as reported on above.⁷ The evidence session was held on 18 November 2014, and included discussion of the proposed timing of making the instruments and of bringing them into force.
7. The breach of the “28 day rule” does not affect the validity of the instrument. The required letter to the Presiding Officer explaining the breach has been provided. The letter explains that the breach of the rule arises from the process under which the UK has opted out of a number of pre-Lisbon Treaty criminal justice measures, and then opted back into a group of 35 measures. The “opt out/opt in” occurred as anticipated on 1 December 2014, in accordance with certain transitional arrangements which are set out in Protocol 36 of the Lisbon Treaty. The opt-in has been publically recognised by a Commission Decision of 1 December 2014 (2014/858/EU).
8. When the UK opted back into the 35 measures, including the Framework Decision 2009/829/JHA, they became binding on the UK and required to be fully transposed and implemented on 1 December 2014, to avoid the risk of EU infraction proceedings. The letter to the Presiding Officer has explained that regrettably this combination of circumstances has resulted in the Scottish Ministers also having to make, lay and bring the Regulations into force on 1 December 2014.

⁷ Scottish Parliament Delegated Powers and Law Reform Committee *Official Report* 18 November 2014 available here: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9646&mode=pdf>

9. The Committee therefore draws instrument to the Parliament's attention on reporting ground (j) as there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument has been laid before Parliament and came into force on 1 December 2014, so that the requirement to leave a minimum of 28 days between laying and coming into force has not been complied with.

10. However, the Committee finds the breach acceptable in this instance, due to the urgent circumstances which have arisen. The powers in section 2(2) of the European Communities Act 1972 could only be used to make the instrument no earlier than 1 December, as on that date the UK Government opted into the Council Framework Decision 2009/829/JHA which the Regulations give effect to. The Framework Decision also required to be fully transposed and implemented on 1 December.

11. The Committee welcomes that the Scottish Government provided it with early notice of its proposals for these Regulations, and of the unusual set of circumstances which have required the breach of the "28 day rule".

Appendix B

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.

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.

Appendix C

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.