



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

7th Meeting, 2018 (Session 5)

Tuesday 27 February 2018

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Subordinate legislation:** The Committee will take evidence on the Courts Reform (Scotland) Act 2014 (Consequential and Supplemental Provisions) Order 2018 [draft] from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs, Paula Stevenson, Tribunals Policy Branch, Gery McLaughlin, Courts and Judicial Appointments Branch, and Samantha Rore, Directorate for Legal Services, Scottish Government.

2. **Subordinate legislation:** Annabelle Ewing (Minister for Community Safety and Legal Affairs) to move—

S5M-10335—That the Justice Committee recommends that the Courts Reform (Scotland) Act 2014 (Consequential and Supplemental Provisions) Order 2018 [draft] be approved.

3. **Subordinate legislation:** The Committee will take evidence on the Proceeds of Crime Act 2002 (Searches under Part 5: Constables in Scotland: Code of Practice) Order 2018 [draft] from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs, Alastair Crerar, Organised Crime Unit, Alan Nicholson, Proceeds of Crime Act Policy Advisor, and Carla McCloy-Stevens, Directorate for Legal Services, Scottish Government.

4. **Subordinate legislation:** Annabelle Ewing (Minister for Community Safety and Legal Affairs) to move—

S5M-10337—That the Justice Committee recommends that the Proceeds of Crime Act 2002 (Searches under Part 5: Constables in Scotland: Code of Practice) Order 2018 [draft] be approved.

5. **Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).
6. **Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).
7. **Appointment of European Union Reporter:** The Committee will decide which of its members to appoint as its European Union Reporter.
8. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting on 22 February 2018.

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The papers for this meeting are as follows—

**Agenda items 1 and 2**

Paper by the clerk - Courts Reform (S) Act 2014 J/S5/18/7/1  
(Consequential and Supplemental Provisions) Order 2018

**Agenda items 3 and 4**

Paper by the clerk - POCA 2002 (Searches under Part 5 - J/S5/18/7/2  
Constables in Scotland - Code of Practice) Order 2018

**Agenda item 5**

[Offensive Behaviour at Football and Threatening Communications \(Repeal\) \(Scotland\) Bill and all associated documents](#)

**Agenda item 6**

[Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Bill and all associated documents](#)

**Agenda item 7**

Paper by the clerk - EU Reporter J/S5/18/7/3

**Agenda item 8**

Paper by the clerk - Justice Sub-Committee on Policing J/S5/18/7/4

**Justice Committee**

**7<sup>th</sup> Meeting, 2018 (Session 5), Tuesday 27 February 2018**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

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

- [Courts Reform \(Scotland\) Act 2014 \(Consequential and Supplemental Provisions\) Order 2018 \[draft\]](#)

**Introduction**

2. This instrument is made under section 137 of the Courts Reform (Scotland) Act 2014 (“the Act”).

3. Articles 2 to 4 of the Order transfer responsibility from Scottish Ministers to the Scottish Courts and Tribunals Service (SCTS) for (i) payment of remuneration etc. to members of the Mental Health Tribunal for Scotland, (ii) payment of allowances to Justices of the Peace and (iii) payments to members of the Scottish Tribunals. This is in consequence of the conferral of administrative support functions to the SCTS by section 130 of the Act.

4. Article 5 amends section 16(7) of the Act to add temporary sheriffs principal to the list of judicial officers for which Scottish Ministers may determine different amounts of remuneration. This is to take account of the possibility that a qualifying former sheriff principal might be appointed as a part-time sheriff principal and would need to be paid a daily fee.

5. Further details on the purpose of the instrument can be found in **Annexe A**.

**DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

6. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 6 February 2018 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

**JUSTICE COMMITTEE CONSIDERATION**

7. The Justice Committee is required to report to the Parliament on the instrument by 14 March 2018. The Minister for Community Safety and Legal Affairs has lodged motion S5M-10335 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 27 February to answer any questions on the instrument and to move the motion for approval.

8. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 14 March 2018. Thereafter, the Parliament will be invited to approve the instrument.

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

## Policy Note

### Courts Reform (Scotland) Act 2014 (Consequential and Supplemental Provisions) Order 2018 [draft]

#### Policy Objectives - Consequential provisions

1. Section 130 the Court Reform (Scotland) Act 2014 provided for the Scottish Tribunals Service to join the Scottish Court Service to become the Scottish Courts and Tribunals Service (SCTS), as a consequence to this transfer the following amendments are necessary to make the payment of fees and expenses the responsibility of SCTS.
2. The Mental Health (Care and Treatment) (Scotland) Act 2003 make it the responsibility of the Scottish Ministers to pay members of the Mental Health Tribunal for Scotland (MHTS) fees and expenses. Article 2 of this Order amends the Mental Health (Care and Treatment) (Scotland) Act 2003 and transfers responsibility for the payment of remuneration etc. to members of the MHTS from the Scottish Ministers to the SCTS.
3. Article 3 of this Order amends the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 transferring responsibility for the payment of allowances to JPs from Scottish Ministers to the SCTS, in accordance with a scheme devised by it and after consultation with the Scottish Ministers.
4. Article 4 of this Order amends the Tribunals (Scotland) Act 2014 transferring responsibility to make payments to members of the Scottish Tribunals from the Scottish Government to the SCTS.
5. Paragraph 13(2)(a) of schedule 7 to the Tribunals (Scotland) Act 2014 provides that the Scottish Ministers may determine the terms and conditions on which tribunal members hold their position including remuneration, allowances and expenses. The statute is silent on who is to make these payments. Whilst Scottish Ministers will continue to determine the rate at which tribunal members are paid it is appropriate for the responsibility for paying members to transfer to the SCTS.

#### Policy Objectives - Supplemental provision

6. Paragraph 16(7)(a) of the Courts Reform (Scotland) Act 2014 provides a list of fee paid judicial officers for payment of remuneration as the Scottish Ministers may determine. Article 5 of this Order amends the list to also include a temporary sheriff principal.

#### Commencement

7. The Order is scheduled to come into force on 1 April 2018.

## Consultation

8. Discussion has taken place between the Scottish Government and the Scottish Courts and Tribunals Service. No formal consultation has taken place on the Order as it is being made as a consequence of the Act which has already been the subject of separate consultation exercise. The Scottish Government consulted on the Bill in early 2013. The consultations can be viewed on the Scottish Government website at [www.scotland.gov.uk/Publications/2013/02/5302](http://www.scotland.gov.uk/Publications/2013/02/5302)
9. An Equality Impact Assessment was completed for the Tribunals (Scotland) Bill <http://www.scotland.gov.uk/Resource/0042/00421637.pdf>

## Impact Assessments and Financial Effects

10. The changes made in this order are technical amendments and we do not consider there is a requirement for any impact assessments on this occasion.
11. A Business and Regulatory Impact Assessment is not required as the instrument has no substantial financial effects on the Scottish Government, local government or on business.

**Justice Committee**

**7<sup>th</sup> Meeting, 2018 (Session 5), Tuesday 27 February 2018**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following affirmative instrument:
  - [Proceeds of Crime Act 2002 \(Searches under Part 5: Constables in Scotland: Code of Practice\) Order 2018 \[draft\]](#)

**Introduction**

2. This instrument is made under sections 293(4) and 303H(4) of the Proceeds of Crime Act 2002 (“POCA”).
3. The Order brings into operation, on 16 April 2018, a new code of practice for constables conducting searches under Part 5 of POCA in relation to the civil recovery of the proceeds of crime. This is in consequence of amendments made to Part 5 of POCA by sections 14 and 15 of the Criminal Finances Act 2017, which come into force on 16 April 2018.
4. Further details on the purpose of the instrument can be found in **Annexe A**.

**DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

5. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 6 February 2018 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

**JUSTICE COMMITTEE CONSIDERATION**

6. The Justice Committee is required to report to the Parliament on the instrument by 14 March 2018. The Cabinet Secretary for Justice has lodged motion S5M-10337 proposing that the Committee recommends approval of the instrument. The Minister for Community Safety and Legal Affairs is due to attend the meeting on 27 February to answer any questions on the instrument and to move the motion for approval.
7. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 14 March 2018. Thereafter, the Parliament will be invited to approve the instrument.
8. **The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

## Policy Note

### Proceeds of Crime Act 2002 (Searches under Part 5: Constables in Scotland: Code of Practice) Order 2018 [draft]

#### Policy Objectives

1. The purpose of this instrument is to bring into operation, on 16 April 2018, a new code of practice for constables conducting searches under Part 5 of POCA in relation to the civil recovery of the proceeds of crime. This is in consequence of amendments made to Part 5 by sections 14 and 15 of the Criminal Finances Act 2017 (“the 2017 Act”), which come into force on 16 April 2018.
2. The new code combines a revised code of practice for constables conducting cash searches under section 289 of POCA (as amended by section 14 of the 2017 Act) with a new code of practice for constables conducting searches for “listed assets” under section 303C of POCA (as inserted by section 15 of the 2017 Act). These search powers are necessary to enable constables to fully exercise their power to seize cash and/or “listed assets” for the purposes of civil forfeiture under Part 5 of POCA.
3. Section 289 allows constables to search individuals, premises and vehicles for cash which is recoverable property (obtained through unlawful conduct), or is intended by any person for use in unlawful conduct, and which is not less than the minimum amount (currently £1,000 as per S.I. 2006/1699). Section 14 of the 2017 Act expands the definition of “cash” in section 289(6) to include gaming vouchers, fixed-value casino tokens and betting receipts.
4. Section 15 of the 2017 Act inserts new sections 303B to 303Z into Part 5 of POCA so as to extend the civil forfeiture regime to include certain personal (or moveable) property, referred to as “listed assets”. These are defined in section 303B as: precious metals, precious stones, watches, artistic works, face-value vouchers and postage stamps. Similar to section 289, section 303C allows constables to search individuals, premises and vehicles for a listed asset which is recoverable property (obtained through unlawful conduct), or is intended by any person for use in unlawful conduct, and which is not less than the minimum value (£1,000 as per section 303Y).
5. The search powers under sections 289 and 303C are subject to certain conditions and limits. Accordingly, sections 293 and 303H of POCA require the Scottish Ministers to make a code of practice in connection with the exercise of these powers by constables in Scotland. As the powers are essentially the same, it was considered appropriate to regulate their use by virtue of a single (combined) code of practice. It was also considered appropriate to align it with the Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland, which was subject to extensive public consultation and revision prior to its being laid before the Scottish Parliament on 11 January 2017 and coming into effect on 11 May 2017. Additionally, though, the code includes guidance specifically relevant to the POCA powers and in this respect it aligns with the equivalent codes issued by the Home Office (which apply to officers of Revenue and Customs and immigration officers operating in

Scotland). By providing greater familiarity, clarity and simplicity, this will help ensure compliance and consistency of practice.

6. The combined code of practice is intended to ensure that the responsibilities of constables undertaking searches for cash under section 289, and for listed assets under section 303C, are clearly set out and accessible. It explains the scope of the search powers and emphasises the need to have reasonable grounds for suspicion to conduct a search. It also sets out: (a) the process for obtaining prior approval for a search and for submitting a report to the “Appointed Person” where it was not practicable to obtain judicial approval before conducting a search; (b) the steps a constable must take prior to, and during, a search of individuals, premises and vehicles, and (c) the information to be recorded in relation to any search that has taken place.
7. So far as the combined code relates to cash searches, it constitutes the third revision of the code of practice issued under section 293 of POCA and replaces the code which was brought into operation on 1 June 2015 (“the 2015 code”). This instrument therefore revokes the Proceeds of Crime Act 2002 (Cash Searches: Constables in Scotland: Code of Practice) Order 2015 (SSI 2015/220), which brought the 2015 code into operation.
8. The code will be available to view on the Scottish Government website (<http://www.gov.scot/Publications/Recent>) and at all police stations in Scotland, including those at ports where the powers are (or are likely to be) used.

### Consultation

9. The Scottish Ministers published a draft of the combined code of practice and launched a public consultation paper in November 2017, entitled “Code of Practice on the Exercise by Constables in Scotland of Search Powers Conferred by Sections 289 and 303C of the Proceeds of Crime Act 2002”. It was brought to the attention of consultees with a particular interest or expertise in these matters, including the Police Service of Scotland, the Crown Office and Procurator Fiscal Service, the Law Society of Scotland, the Scottish Human Rights Commission and the Equality and Human Rights Commission. Following the consultation, the Scottish Ministers considered the few representations that were made to them and modified the draft where appropriate.

### Impact Assessments

10. The UK Government undertook Impact Assessments in relation to the Bill for the 2017 Act. These can be found at: <https://services.parliament.uk/bills/2016-17/criminalfinances/documents.html>. Also, equalities and children’s rights and welfare issues had already been carefully considered and addressed in developing the 2017 code of practice for Stop and Search of the Person, on which the combined code of practice under Part 5 of POCA is largely based. Scottish Government human rights and equalities officials were closely involved in the development of the draft Code and their suggestions and recommendations are fully reflected in the final draft Code. In addition, the Equality and Human Rights Commission, Scotland’s Commissioner for Children and Young People and the Transgender Alliance were included in the list of

named consultees for the public consultation. No additional equalities or children's welfare issues, or wider impacts, were identified.

**Financial Effects**

11. The Cabinet Secretary for Justice confirms that no BRIA is necessary, as the instrument has no financial effects on the Scottish Government, local government or on business.

**Justice Committee**

**7th Meeting, 2018 (Session 5), Tuesday 27 February 2018**

**Appointment of European Union Reporter**

**Note by the clerk**

**Background**

*The Scottish Parliament's European Union Strategy*

1. The Committee is being asked to appoint a European Reporter as Mary Fee MSP, was the previous European reporter, but is no longer a member of the Committee. Each subject committee is required to appoint an EU reporter.

2. A Parliament-wide strategy for European Union (EU) engagement and scrutiny was introduced following a Chamber debate on the European and External Relations Committee's 4<sup>th</sup> Report 2010 (Session 3) on the [Impact of the Treaty of Lisbon on Scotland](#). As part of this strategy, the subject committees and the then Equal Opportunities Committee took on an enhanced role in relation to early engagement on EU issues and the scrutiny of EU legislative proposals.

3. Part of that enhanced role for committees involves the appointment of an EU Reporter. Under Rule 12.6.2 of Standing Orders, subject committees and the Equal Opportunities Committee are responsible for appointing an EU Reporter—

12.6.2 Each subject committee and the Equal Opportunities Committee shall appoint a committee member (other than a committee substitute) (referred to as a "European Reporter") to bring to the attention of the committee any European Union ("EU") issue, proposal for EU legislation, or implementation of European Communities or EU legislation, as he or she may determine is appropriate.

4. Until the UK withdraws from the EU, it will continue to be involved in the decision-making processes relating to EU policies and will have an obligation to implement EU legislation. Thus, the Parliament's EU strategy will still need to consider EU matters. However, the Convener of the European and External Relations Committee has indicated that the role of EU reporters and the Parliament's annual process of identifying and reporting on EU priorities should be further developed to take into account the implications and process of leaving the EU.

*The Role of the EU Reporter*

5. Currently the role of the EU Reporter is to act as a "conduit" for EU matters within the Committee. This role remains relevant while the UK is still an EU Member State and will involve—

- Highlighting the EU dimension of the Committee's work;

- Taking the lead on consideration of any subsidiarity<sup>1</sup> concerns in relation to EU legislative proposals, or those proposals introduced by the UK Government in relation to the UK's ongoing relationship with the EU;
- Speaking to EU issues;
- Highlighting any EU dimension within policy debates;
- Acting as liaison between the Committee and the European and External Relations Committee.

6. The European and External Relations Committee agreed that the role of the EU reporter will include the following additional elements—

- Identifying issues relating to the formulation of the UK's position on its future relationship with the EU that are relevant to the Committee's work and highlighting areas where the Committee may wish to undertake scrutiny work;
- Identifying issues relating to the process of leaving the EU that are relevant to the Committee's work and highlighting areas where the Committee may wish to undertake scrutiny work; and
- Liaising with the European and External Relations Committee on its work on the implications for Scotland of the vote in the referendum to leave the EU.

## Decision

7. The Committee is invited to nominate a member to act as EU Reporter for the Committee.

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<sup>1</sup> Article 5 of the Treaty on European Union: 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

**Justice Committee**

**7th Meeting, 2018 (Session 5), Tuesday 27 February 2018**

**Feedback from the Justice Sub-Committee on Policing**

**Note by the clerk**

1. The Justice Sub-Committee on Policing met on 22 February 2018 when it took evidence on Durham Constabulary's reports on Police Scotland's Counter Corruption Unit.
2. The Sub-Committee took evidence from Michael Barton, Chief Constable, and Darren Ellis, Senior Investigator of Durham Constabulary.
3. Chief Constable Barton told the Sub-Committee that he had concerns about Police Scotland changing the remit from an investigation to an inquiry, Police Scotland's obstruction in some ways, in particular its legal department, and that the risk-averse culture it had adopted had unnecessarily prolonged the process.
4. The Sub-Committee also considered its forward work programme and agreed to hold a further evidence session on Durham Constabulary's investigation into Police Scotland's Counter Corruption Unit. The Sub-Committee agreed to take evidence from Police Scotland on 15 March on the issues raised during the evidence session.