



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

33rd Meeting, 2018 (Session 5)

Tuesday 18 December 2018

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

1. **Decision on taking business in private:** The Committee will decide whether to take item 7 in private.
2. **Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Rt Hon Lady Dorrian, Lord Justice Clerk, Judiciary of Scotland;

Tim Barraclough, Executive Director Judicial Office, Scottish Courts and Tribunals Service.

3. **Management of Offenders (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

John Watt, Chair, Parole Board for Scotland;

Yvonne Gailey, Chief Executive, Risk Management Authority;

Dr Johanna Brown, Consultant Forensic Psychiatrist, Royal College of Psychiatrists in Scotland;

James Maybee, Principal Officer (Criminal Justice)/Interim Chief Social Work Officer, Highland Council, representing Social Work Scotland.

4. **European Union (Withdrawal) Act 2018:** The Committee will consider a proposal by the Scottish Government to consent to the UK Government legislating using the powers under the Act in relation to the following UK statutory instrument proposal—

The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018.

5. **Proposed integration of the British Transport Police in Scotland into Police Scotland:** The Committee will consider an update from the Scottish Government.
6. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting held on 6 December 2018.
7. **Work programme:** The Committee will consider its work programme.

Stephen Imrie
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5195
Email: justicecommittee@parliament.scot

The papers for this meeting are as follows—

Agenda item 2

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| Paper by the clerk - Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill | J/S5/18/33/1 |
| Private paper - Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill | J/S5/18/33/2 (P) |

Agenda item 3

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| Paper by the clerk - Management of Offenders (Scotland) Bill | J/S5/18/33/3 |
| Private paper - Management of Offenders (Scotland) Bill | J/S5/18/33/4 (P) |

Agenda item 4

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| Paper by the clerk - EU (Withdrawal) Act 2018 | J/S5/18/33/5 |
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Agenda item 5

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| Private paper - Integration of BTP in Scotland into Police Scotland | J/S5/18/33/6 (P) |
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Agenda item 6

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| Paper by the clerk - Justice Sub-Committee on Policing | J/S5/18/33/7 |
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Agenda item 7

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| Private paper - work programme | J/S5/18/33/8 (P) |
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Justice Committee
33rd Meeting, 2018 (Session 5), Tuesday 18 December 2018
Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill
Paper by the clerk

Introduction

1. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill is a Scottish Government Bill and was introduced in the Scottish Parliament on 12 June 2018. The Bill and accompanying documents can be found [here](#). A SPICe briefing on the Bill can be found [here](#).
2. The Bill sets out reforms relating to the use of special measures¹ in criminal cases. In particular, it seeks to improve the way in which the evidence of child and other vulnerable witnesses is dealt with by encouraging greater use of pre-recording evidence in advance of a criminal trial.
3. It is currently possible for a vulnerable witness to give evidence in advance of any criminal trial using the following special measures:
 - prior statement – allowing evidence to be given in the form of a written statement or recorded interview
 - evidence by commissioner – using a recording of evidence taken before a sheriff or High Court judge (questioning of the witness is still carried out by prosecution and defence lawyers).
4. The Bill introduces a “new rule”, applying to child witnesses in the most serious cases,² which would generally require all of the child’s evidence to be given using a prior statement and/or evidence by commissioner. This rule would not, however, apply to child accused.
5. The Scottish Government would have the power to extend the application of the rule in the future, for example, to other offences or to adult deemed vulnerable witnesses (i.e. witnesses who are the complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking).
6. The Bill makes various other changes to the current process for the pre-recording of evidence. For example, the Bill introduces a new procedural hearing, to be known as a “ground rules hearing”, which will be used to prepare for the taking of evidence by a commissioner (e.g. by deciding on the form of questions to be asked).

¹ Special measures are intended to assist vulnerable witnesses in giving evidence in criminal cases.

² Such as murder, human trafficking, rape and other certain sexual offences.

7. The Bill also seeks to streamline the process for arranging the use of standard special measures.³

Justice Committee consideration

8. The Bill was referred to the Justice Committee for Stage 1 scrutiny and the Committee issued a [call for evidence](#) on 4 July 2018. 30 responses were received and can be accessed [here](#).
9. At its meeting on 20 November the Committee took evidence from the Scottish Government Bill Team – the officials responsible for assisting the Cabinet Secretary for justice in formulating the policy and drafting of the Bill.
10. At its meeting on 27 November the Committee took evidence from two panels of witnesses. The first panel comprised representatives from Barnardo's Scotland, Children 1st and the Scottish Children's Reporter Administration. The second panel comprised representatives from Action on Elder Abuse, ASSIST, the Mental Welfare Commission for Scotland and Victim Support Scotland.
11. At its meeting on 4 December the Committee took evidence from two panels of witnesses. The first panel comprised representatives from the Crown Office and Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland and the Miscarriages of Justice Organisation. The second panel comprised representatives from Police Scotland and Social Work Scotland.
12. At its meeting on 18 December the Committee will take evidence from the Rt Hon Lady Dorrian, Lord Justice Clerk, and Tim Barraclough, Executive Director, Judicial Office for Scotland.
13. At a future meeting in January 2019 the Committee will take closing evidence on the Bill from the Cabinet Secretary for Justice.

³ Children and adult deemed vulnerable witnesses (i.e. witnesses who are complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking) are automatically entitled to standard special measures: a screen to stop the witness from seeing the accused; giving evidence using a live television video link; and a supporter who can sit with the witness when giving evidence.

Justice Committee

33rd Meeting, 2018 (Session 5), Tuesday 18 December 2018

Management of Offenders (Scotland) Bill

Note by the clerk

Introduction

1. The [Management of Offenders \(Scotland\) Bill](#) was introduced on 22 February 2018. It is a Scottish Government Bill. The Bill makes provision in three discrete areas, linked by a common theme of the management of offenders:
 - electronic monitoring of offenders: drawing together various legal provisions on monitoring into a single source and making some updates to the law including extending the potential for monitoring;
 - disclosure of convictions: making substantial amendment to the Rehabilitation of Offenders Act 1974, the general approach being to reduce the requirement to disclose convictions (for instance by, in general, shortening the period during which a prior conviction must be disclosed);
 - Parole Board for Scotland: a small number of reforms concerning the membership and administration of the Board.
2. A SPICe briefing on the Bill can be accessed [here](#).
3. The Committee launched a [call for views](#) on the Bill on 16 March 2018. The deadline for responses was 20 April 2018. All written submissions received and accepted as evidence are published on the Committee's [webpage](#).

Justice Committee consideration

4. At its meeting on [24 April 2018](#), the Committee took evidence from the Scottish Government Bill Team (the group of officials responsible for assisting the Cabinet Secretary for Justice in formulating the policy and drafting of the Bill and in steering it through the Parliamentary process).
5. At its meeting on [8 May 2018](#), the Committee took evidence from two panels of witnesses. The first panel comprised representatives of Community Justice Scotland and Social Work Scotland. The second panel comprised representatives of Families Outside, Positive Prison? Positive Futures, Scottish Women's Aid and Victim Support Scotland.
6. At its meeting on [15 May 2018](#), the Committee took evidence from representatives of the Edinburgh Bar Association, Howard League Scotland, the Law Society of Scotland and the Scottish Centre for Crime and Justice Research, as well as Liz Dougan, Partner, Brazenall and Orr Solicitors.

7. At its meeting on [22 May 2018](#), the Committee heard from representatives of the Scottish Courts and Tribunals Service, Police Scotland, the then HM Chief Inspector of Prisons Scotland, followed then by the Parole Board.
8. At its meeting on [5 June 2018](#), the Committee took evidence from Rt Hon Lord Turnbull, Scottish Sentencing Council, and also then from Michael Matheson, then Cabinet Secretary for Justice, Scottish Government.

Independent reviews into the murder of Mr Craig McClelland

9. On 6 June 2018, the then Cabinet Secretary for Justice, Michael Matheson, announced that he had ordered two independent reviews into Home Detention Curfews (HDCs) by HMICS and HMIPS following the murder of Mr Craig McClelland of Paisley in July 2017 by Mr James Wright whilst the latter was unlawfully at large during his release from prison on a Home Detention Curfew.
10. When these reviews were announced, the Justice Committee agreed to postpone further consideration of the Management of Offenders (Scotland) Bill, pending publication of the reports. Additionally, the deadline for stage 1 of the Bill was extended to 19 December 2018.
11. [HMIPS](#) and [HMICS](#) have now produced their reports and the current Cabinet Secretary for the Justice, Humza Yousaf, made a [statement](#) in the Chamber on 25 October.
12. At its meeting of [20 November](#), the Committee re-commenced its consideration of the Management of Offenders (Scotland) Bill at stage 1 with a focus on HDCs and issues more generally around breaches of electronic monitoring, risk assessment, roles and responsibilities of different organisations etc. It took evidence from representatives of HM Inspectorate of Constabulary in Scotland, HM Inspectorate of Prisons for Scotland, Police Scotland and the Scottish Prisons Service.

Today's meeting

13. During today's meeting, the Justice Committee will take evidence from:
 - John Watt, Chair, The Parole Board in Scotland
 - Social Work Scotland
 - Risk Management Authority
 - Dr Johanna Brown, Consultant Forensic Psychiatrist, Royal College of Psychiatrists

Justice Committee

33rd Meeting, 2018 (Session 5), Tuesday 18 December 2018

European Union (Withdrawal) Act 2018 – Consent to UK Statutory Instruments

Note by the clerk

Introduction

1. Members will be aware that the European Union (Withdrawal) Act 2018 received Royal Assent on 26 June 2018 (the 2018 Act). The 2018 Act paves the way for the UK and Scottish parliaments to begin the process of considering regulations to convert non-domestic EU law into UK law, which will need to be implemented speedily and flexibly.

2. Members will recall that the process by which the UK leaves the EU requires consideration to be given as to whether the current body of law within the UK needs to be amended to reflect the fact that the UK will no longer be a member of the EU after exit day. At present, there are many references in regulations, for example, to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU.

3. Some of the necessary changes to the statute book will be done through Scottish Statutory Instruments (SSIs) in the usual way. However, a number will be done through Statutory Instruments (SIs) passed in the UK Parliament with the consent of the Scottish Parliament based on the recommendation of the Scottish Government (SI notifications). Consent will be sought as these SIs will make changes to devolved powers and/or executive competences. Such changes should be broadly technical in nature. [Protocols](#) governing arrangements for both of these processes have been agreed to with the Scottish Government.

SI Notification

4. At today's meeting, Members will consider the following [SI notification](#) from the Scottish Government on proposed Regulations-

- [The Law applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment\) \(EU Exit\) Regulations 2018](#):

5. These proposed Regulations were published¹ by the UK Government on 10 December, and are designed to address deficiencies in retained EU law relating to private international law applicable to contractual and non-contractual obligations so that the rules which determine the applicable law continue to operate effectively after the UK's exit from the EU.

¹ The Law applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018: <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-law-applicable-to-contractual-obligations-and-non-contractual-obligations-amendment-etc-eu-exit-regulations-2018>

6. The proposed Regulations are to be made using the powers in section 8 of 2018 Act to address deficiencies in retained EU law arising from the withdrawal of the UK from the EU. The 2018 Act incorporates the EU Regulations on the Rome Convention into domestic UK law from the point the UK's leaves the EU.

7. The timing of this SI Notification gives fewer than the agreed 28 days for the Parliament to consider it. The reason provided is that "drafting issues emerged late". This is the fourth occasion the Justice Committee has received a SI Notification with less than 28 days for parliamentary consideration, based on this justification.

Rome I and II

8. The UK is a party to the 1980 Rome Convention on the law applicable to contractual obligations between EU members states.² The Convention entered into force in the UK in 1991.

9. In 2008, Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (referred to as Rome I) and Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (referred to as Rome II) set out the rules, applicable by EU Member States (except Denmark), for determining, where there is conflict, which law applies to respectively: contractual obligations; and non-contractual obligations.

10. This provides uniformity across the EU on which law applies where there is a cross-border element to a contractual obligation. For example, where the parties to a contractual obligation live in different member states and an alleged delict takes place in a third member state. The objective of the Rome I and II rules is to increase legal certainty within the EU by ensuring that the same national law applies to cross-border cases across the EU.

11. In the UK, the operation of Rome I and Rome II is supported by provisions in various pieces of primary and secondary legislation. These are set out in the SI Notification from the Scottish Government. The Notification indicated that, in the main, these rules are capable of continuing to be applied in the UK after it leaves the EU, as they do not depend on membership of the EU. The policy behind the proposals is to retain the status quo as far as possible with amendments limited to those required to make that work effectively in the context of the UK not being an EU Member State.

12. The proposed Regulations from the UK Government amend the retained EU law to correct provisions which are being retained but no longer work correctly in the context of the UK ceasing to be an EU Member State. They will also omit those

² 1980 Rome Convention on the law applicable to contractual obligations: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.1998.027.01.0034.01.ENG

provisions which relate to those aspects of the EU Regulations which are no longer relevant to the UK after it has left the EU.

Clarification on retrospective effect

13. Page 3 of the SI Notification from the Scottish Government makes reference to some retrospective effect in relation to the operation of the Rome I regulations. However, the Scottish Government has now provided the clerks with updated information stating that, after further consideration, the Scottish Government's view is that there is no retrospective effect to these regulations.

Views from officials and external bodies

14. The clerks approached other parliamentary officials to seek their views, if any, on the proposals. In addition, the notification has been placed on the Committee's website for public awareness.

15. Parliamentary officials were of the view that the proposal for this SI does not present any problems, as the rules on choice of law in the Rome I and II Regulations also apply to non-EU Member States and so would continue to apply to the UK after it leaves the EU.

16. Additionally, evidence to the Justice Committee in January 2018 from Prof Paul Beaumont of the University of Aberdeen, addressed the issue of Rome I and II regulation, after the UK leaves the EU-

“The Rome I and II Regulations regulate the application of foreign law (i.e. a law other than the law of the forum) to cases heard in an EU court concerning contractual and non-contractual obligations respectively. Both Regulations have universal application so the courts in EU Member States will continue to apply Scots law when it is the law identified by the rules in those Regulations post-Brexit without any deal being required. The UK intends to continue to apply Rome I and II as part of UK law post-Brexit so for the foreseeable future nothing will change”.³

17. The clarification in relation to possible retrospective effect is noted. Retrospective legislation is legislation which has an effect on matters which arose before the legislation was made. ‘Changing the rules after the event’ can be unfair and undermine legal certainty, so there is a presumption against it except in cases of necessity. This arises in relation to the Rome Convention 1980, an international agreement which the SI will repeal. The Rome Convention determines which law is applicable to contracts entered into between 1991 and 16 December 2009.

³ Professor Paul Beaumont written submission 24 January 2018, page 3: http://www.parliament.scot/S5_JusticeCommittee/Inquiries/Brexit-Beaumont.pdf

18. Given that the notification proposes to replicate the rules of the Rome Convention as far as possible in domestic legislation, and given that (unlike most other areas of EU law in this field) Member States will continue to apply the same rules to the UK after EU withdrawal, it appears that even if there were any retrospective effect, it would be minor and unavoidable in the circumstances.

Action

19. **Members are asked to consider the SI notification covered by this note and consider whether to agree with the view of the Scottish Government that it should consent to the relevant changes being made by the UK Government.**

Justice Committee Clerks
13 December 2018

Justice Committee

33rd Meeting, 2018 (Session 5), Tuesday 18 December 2018

Feedback from the Justice Sub-Committee on Policing

Note by the clerk

1. The Justice Sub-Committee on Policing met on 6 December 2018 when it took evidence on Police Scotland's role in the immigration process.
2. On [26 October 2017](#) the Sub-Committee held an evidence session on Police Scotland's engagement with black and minority ethnic communities in Scotland. During that evidence session issues were raised about Police Scotland's role in assisting the Home Office compliance and enforcement teams in the enforced removal of people from residential properties in Scotland.
3. Following the evidence session, the then Convener at that time, Mary Fee MSP, wrote to [Police Scotland](#) and the [Crown Office and Procurator Fiscal Service](#) (COPFS) to ask them to consider undertaking a review of how they are working together, and with other justice stakeholders, in providing services to migrant communities in Scotland. The Convener also suggested that this review could include how both organisations work with the Home Office immigration compliance and enforcement teams. [Police Scotland](#) and the [COPFS](#) both agreed to take initial steps to undertake such a review.
4. In November 2018 [Police Scotland](#) and the [COPFS](#) provided an update on this work.
5. The evidence session on 6 December provided an opportunity for the Sub-Committee to consider progress made and to consider any issues raised during the previous evidence session and within the written evidence received on the implementation and impact of Police Scotland's role in the immigration process.
6. On 6 December the Sub-Committee heard from Police Scotland and the Scottish Refugee Council.
7. The Sub-Committee heard that Police Scotland are required to assist the Home Office immigration enforcement team in arresting, detaining and deporting people that it has identified. Police Scotland's role is to ensure that the process is carried out peacefully.
8. The Sub-Committee heard that it is the Home Office's role to carry out a risk assessment prior to any operation. Police Scotland indicated that they hoped that this would include an assessment of risk and vulnerability, for example consideration of the impact on children if their parents were to be detained. The Sub-Committee agreed to write to the Home Office for clarification of this issue and for information on its community-based alternatives to immigration detention.
9. Police Scotland would, if it was deemed necessary, carry out a community impact assessment prior to an operation, and would carry out a risk assessment before detaining an individual. The Sub-Committee heard that Police Scotland does not

have a statutory duty to work with, or inform, third sector organisations or other relevant stakeholders, even confidentially, that it is to detain an individual. The Scottish Refugee Council indicated that cross-agency working could improve the impact of the immigration process in Scotland.

10. The Sub-Committee wrote to Police Scotland to request information on the number of times Police Scotland has attended to assist in a Home Office Immigration Enforcement action and the number of people held in police custody cells at the request of the Home Office, since Police Scotland was created.
11. The Sub-Committee also agreed its forward work programme and agreed to schedule an evidence session with the Chief Constable in January 2019.
12. It will next meet on 17 January 2019.