



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

7th Meeting, 2019 (Session 5)

Tuesday 26 February 2019

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

1. **Prosecution of elder abuse:** The Committee will take evidence from—

Lesley Carcary, Director, Action on Elder Abuse Scotland;

Adam Stachura, Head of Policy and Communications, Age Scotland;

Gordon Paterson, Chief Inspector (Adult Services), Care Inspectorate;

and then from—

Anthony McGeehan, Head of Policy, Crown Office and Procurator Fiscal Service;

Rosalyn McTaggart, Law Society of Scotland;

Chief Superintendent John McKenzie, Head of Safer Communities, Police Scotland.

2. **European Union (Withdrawal) Act 2018:** The Committee will consider whether the following instrument has been laid under the appropriate procedure—

Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft].

3. **Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012 (in private):** The Committee will continue its consideration of a draft report.

J/S5/19/7/A

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The papers for this meeting are as follows—

Agenda item 1

Paper by the clerk - prosecution of elder abuse	J/S5/19/7/1
Private paper - prosecution of elder abuse	J/S5/19/7/2 (P)

Agenda item 2

Paper by the clerk - EU Exit SSI	J/S5/19/7/3
Private paper - EU Exit SSI	J/S5/19/7/4 (P)

Agenda item 3

Private paper - Police and Fire Reform (Scotland) Act 2012	J/S5/19/7/5 (P)
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Justice Committee

7th Meeting, 2019 (Session 5), Tuesday 26 February 2019

Prosecution of elder abuse

Note by the clerk

Introduction

1. In 2017, the Justice Committee was the lead committee for the parliamentary scrutiny of the Domestic Abuse (Scotland) Bill. As part of the Stage 1 scrutiny process on the Bill, the Committee received evidence from stakeholders on the issue of elder abuse, and whether the provisions of the Bill might provide a mechanism to address the prosecution of elder abuse.
2. The Bill received Royal Assent as the [Domestic Abuse \(Scotland\) Act 2018](#) on 9 March 2018 (the 2018 Act). The provisions of the 2018 Act were not extended to cover the issue of elder abuse. However, the Committee recognised that this subject would benefit from further debate. The Committee agreed, in principle, to undertake a one-off oral evidence session to explore themes around the possible need for a new offence, or statutory aggravator, in relation to elder abuse.
3. On 5 February 2019, the Committee agreed to undertake an evidence session on this issue at its meeting on 26 February. This evidence session will allow the Committee to consider the subject with relevant stakeholders and then decide what further action, if any, it wishes to take on the issue.

Background to the session

4. The 2018 Act provides for a new statutory offence of domestic abuse against a partner or ex-partner. The new offence is intended to cover behaviour which is already criminal, as well as abuse which might not be captured by existing offences. It is intended that it will help enable the effective prosecution of behaviour that is controlling, coercive and emotionally or psychologically abusive. The Cabinet Secretary for Justice has [announced](#) that the relevant provisions of the 2018 Act relating to controlling, coercive and emotionally or psychologically abusive behaviour will come into force in Scotland on 1 April 2019.
5. Furthermore, in January 2017, the Scottish Government appointed the former Judge of the Court of the Session, Lord Bracadale, to conduct an Independent Review of Hate Crime Legislation in Scotland. In his [final report](#) in May 2018, Lord Bracadale commented on the issue of elder abuse stating-

“There should be a new statutory aggravation based on age hostility. Where an offence is committed, and it is proved that the offence was motivated by hostility based on age, or the offender demonstrates hostility towards the victim based on age during, or immediately before or after, the commission of the offence, it will be recorded as aggravated by age hostility. The court would be required to state that fact on conviction and take it into account when sentencing.”

“The Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability.”

6. In light of the provisions of the 2018 Act coming into force, and the views expressed by Lord Bracadale in his report on Hate Crime Legislation in Scotland, the Committee felt the time is now appropriate to reconsider the themes around the prosecution of elder abuse.

Approach to evidence taking

7. The Committee agreed to explore the following themes with witnesses as part of its evidence session on 26 February-

- Elder abuse in wider family/household relationships, and whether the new domestic abuse offence established in the 2018 Act provides a model for a specific offence of elder abuse.
- The merits of introducing a new statutory aggravator applying to situations where a more general offence involves elder abuse.
- The ability and willingness of victims to be able to report elder abuse.
- The specialist skills required within the police and prosecution system to adequately address elder abuse.
- Any parallels in the criminal protections extended to persons based on certain equality protected characteristics, (such as gender, race, disability, and those under a certain age etc.) and the lack of a specific aggravating factor in relation to offences targeted at those over a certain age.
- Whether the Scottish Government is fully meeting its international human rights commitments to older people in terms of addressing elder abuse.

8. In advance of the oral evidence session on 26 February, the Committee has received the following written submissions:

- [Action on Elder Abuse Scotland](#)
- [Age Scotland](#)
- [Care Inspectorate](#)
- [Law Society of Scotland](#)
- [Police Scotland](#)
- [Protect – speak up, stop harm](#)
- [Social Work Scotland](#).

9. The Committee also expects to receive a written submission from the Crown Office and Procurator Fiscal Service in advance of the meeting. This will be posted on the [inquiry website](#) once it is available.

10. Following the evidence session on 26 February, the Committee will decide what further action, if any, it may wish to take on the issue of the prosecution of elder abuse.

**Justice Committee clerks
February 2019**

Justice Committee**7th Meeting, 2019 (Session 5), Tuesday 26 February 2019****Subordinate legislation – Brexit SSI****Note by the clerk****Introduction**

1. This paper has been produced in relation to the following Scottish Statutory Instrument (SSI):

[The Services of Lawyers and Lawyer's Practice \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2019 \[draft\]](#)

2. This instrument has been made under the powers conferred on devolved authorities in the European Union (Withdrawal) Act 2018 ("the Act") to deal with deficiencies arising from EU withdrawal.
3. The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland, in the event that the UK leaves the EU without a negotiated settlement (i.e. without a deal). It will also provide for a range of rights for Swiss nationals, or others who are professionally recognised in Switzerland and who have Swiss legal qualifications to practice in Scotland under certain conditions. Further information on the policy objectives of the instrument is attached at **Annex A**.
4. The instrument is subject to scrutiny in **two stages**, as set out below.

Parliamentary procedure

5. The Scottish Ministers have discretion about whether instruments made in exercise of the powers in Schedule 2 to the Act should be subject to the affirmative or the negative procedure, unless the instrument makes provision falling within one of the categories which attracts the mandatory affirmative procedure.
6. A [protocol](#) has been agreed between the Scottish Government and Scottish Parliament which sets out the process for committees dealing with such instruments. The protocol provides for a process of "**sifting**" to apply to certain instruments made under powers conferred by Schedule 2 the Act. This is the first stage in the new process. Under this process, the lead committee for an instrument can recommend that the parliamentary scrutiny procedure attached to that instrument on laying should be changed and the Scottish Government should take steps to change the procedure accordingly.
7. This enables committees to recommend a change where they consider that the matter is of such significance that it requires active Parliamentary approval (or conversely is not so significant that it requires Parliamentary time to be allocated to its approval).
8. Where a lead committee recommends a change in the procedure it should make a report to the Parliament. Where a lead committee is content with the proposed procedure then it may simply minute that, but could still report its conclusions to

the Parliament. Where a lead committee recommends a change in procedure, the Scottish Government would be expected to meet that recommendation and to do so as soon as possible.

9. In any event, a change in the procedure attached to the instrument would not normally be expected to mean a change in the content of the instrument. Accordingly, while subject to a different procedure, the instrument would normally be treated as the same instrument for the purposes of timing and the 40-day scrutiny period allowed by Standing Orders for the original instrument will normally continue to run.
10. The second stage in the process is scrutiny of the instrument itself, in accordance with the usual procedures for negative or affirmative SSIs. This second stage is likely to take place at a later Committee meeting in March 2019.

Procedure for this SSI

11. **Scottish Ministers have chosen the affirmative procedure to apply to the scrutiny of this SSI in the Parliament.**
12. **The Committee will be asked whether it agrees that the affirmative procedure is the appropriate procedure for considering this SSI.**

Categorisation

13. The protocol referred to above also sets out three different levels of prioritisation based on the significance of an SSI. These are set out at the **Annex B** to this paper.
14. Standard scrutiny processes will still apply to the consideration of SSIs, depending on the procedure assigned to the particular instrument. That is to say, all SSIs will be considered by the Delegated Powers and Law Reform (DPLR) Committee from a technical perspective irrespective of what category they fall into. Furthermore, all instruments will be referred to a lead committee, again irrespective of the category they fall into and they will be considered in the normal way that a laid only, negative or affirmative instrument would be considered.
15. The protocol does not prescribe a process that lead committees should apply to the scrutiny of matters falling into the different categories, but by categorising instruments it provides committees with a guide as to what they might wish to prioritise.
16. **This particular SSI has been categorised as medium.**
17. **The Committee will be asked if it has a view on the categorisation of this SSI.**

Next steps

18. The clerks will make arrangements to report the views of the Committee on this SSI to the Parliament and Government. The Committee will then consider the policy content of the SSI at a later meeting and decide if it is content for the instrument to be made.

POLICY NOTE

The Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2, and paragraph 21(b) of schedule 7, of the European Union (Withdrawal) Act 2018. The instrument is subject to affirmative procedure.

Summary Box

The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland, in line with a similar approach being taken in England, Wales and Northern Ireland. It will also provide for a range of rights for Swiss nationals, or others who are professionally recognised in Switzerland and who have Swiss legal qualifications to practice in Scotland under certain conditions.

Policy Objectives

The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland. These are provided for by a reciprocal European framework consisting of Directives and implementing legislation. The Directives will cease to apply in the UK on EU Exit and the reciprocity on which they depend will accordingly cease. This instrument will, therefore, revoke the implementing legislation, thereby realigning the position of EU and EFTA lawyers with other "third country" lawyers. This is subject to transitional provision, to give certain EU and EFTA lawyers the time to make the necessary changes to their practice to comply with the new regulatory framework.

The instrument will also make provision in relation to the UK-Swiss Withdrawal Agreement dated 20 December 2019. Swiss nationals who have legal qualifications recognised by a regulator before Exit Day will have their rights recognised in Scotland permanently; for qualified Swiss lawyers or Swiss lawyers who have not completed their qualifications to register up to 4 years after exit day; for Swiss lawyers and non-Swiss lawyers established or working for a Swiss law firm on a permanent basis, to continue providing services in the UK under contracts extant (live) on exit day for 90 days a year, for the length of the contract, up to 5 years (with scope to for extension by the Joint Committee).

Explanation of the law being amended by the regulations

In the UK, the European Communities (Services of Lawyers) Order 1978 implements the Lawyer's Services Council Directive (77/249/EEC) which allows EU, EFTA and Swiss lawyers to provide services in the UK on a temporary or "fly in fly out" basis, under their home state professional title.

The Lawyer's Establishment Directive (98/5/EC) (LED) was implemented in Scotland by the European Communities (Lawyer's Practice) (Scotland) Regulations 2000.

These Regulations allows lawyers who have registered with the relevant legal services regulator to practise activities that are normally reserved to solicitors and advocates (with some restrictions) under their home state professional title on a permanent basis. Such lawyers, termed “registered European lawyers” (REL) may establish joint practices with solicitors or other lawyers or practise as sole practitioners in much the same way as Scottish solicitors or advocates. They may also seek admission as solicitors or advocates following three years of practice in Scotland or may seek to gain admission as solicitors or advocates through a transfer examination.

Directive 2002/309EC implements the Swiss-EU Free Movement of Persons Agreement in EU law, extending the two relevant Directives – the Lawyers Services Directive and the Lawyers Establishment Directive to Swiss Nationals.

Reasons for and effect of the proposed change or changes on retained EU law

If the UK leaves the EU without a deal, the relevant EU Directives that allow for reciprocal practice and establishment arrangements will no longer apply to the UK. This instrument will realign EU and EFTA lawyers with lawyers qualified in third countries so that they are subject to the same regulatory framework. The provision of temporary services under the Lawyer’s Services Council Directive 1977 will cease in Scotland should the UK leave the EU without a deal. Registered European lawyers will also no longer be able to practise under their home state professional title or be able to seek admission as a solicitor or advocate under the ‘three years’ experience’ route in Scotland. However, they will be able to gain admission as a solicitor or advocate through alternative examination routes open to third country qualified lawyers.

The instrument provides transitional arrangements (up to 11 pm on 31 December 2020) so that relevant lawyers are given adequate time to make alternative arrangements to comply with the new regulatory framework, such as changing practice or transferring qualifications.

Should the UK leave the EU without reaching an agreement, the UK will still be subject to World Trade Organisation (WTO) General Agreement on Trade in Services (GATS) rules. Specifically, ‘most favoured nation’ (MFN) rules prohibit preferential treatment of any signatory state above another (unless one of the permitted exceptions applies). This instrument ensures alignment with the UK’s WTO commitments, and ensures robust regulatory oversight of third country lawyer access to the provision of regulated legal services in Scotland.

EU and EFTA lawyers who have transferred to the Scottish legal profession through the three years’ practice route under the 2000 Regulations or who have taken any transfer examination will be able to retain their Scottish professional title.

The UK Government has negotiated a separation agreement with Switzerland, dealing with the bilateral issues arising from EU law ceasing to apply to the UK, when the UK leaves the EU. The agreement applies from the end of the transitional period as proposed in an Act of Parliament as from Exit Day or from Exit Day in the case that a UK-EU Withdrawal Agreement is not agreed.

This SSI reflects the provisions of the UK-Swiss Separation Agreement applicable to the provision of legal services in Scotland. The Agreement provides continuity for Swiss lawyers working in Scotland, allows Swiss lawyers to provide services on a temporary basis

in Scotland for up to 90 days per calendar year under a contract extant on exit day for up to 5 years (subject to extension by Joint Committee), whilst providing certainty or Swiss lawyers intending to work in Scotland on a permanent basis in the future.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Minister for Community Safety, Ash Denham, has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 does no more than is appropriate”. This is the case because instrument amends deficiencies arising from withdrawal from the EU. In the event of EU exit with no deal, the framework for reciprocal arrangements relating to the provision of legal services would no longer be in place. By revoking the 1978 Order and the 2000 Regulations, the instrument ensures compliance with World Trade Organisation rules. The instrument provides for a transition period that would mitigate consequences for those affected by these provisions and allow them reasonable time to take action to comply with the new regulatory framework.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minister for Community Safety, Ash Denham, has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action given that the reciprocal arrangements in respect of lawyers practice in the EU and EFTA (with the exception of Swiss-qualified lawyers) will no longer apply.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minister for Community Safety has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Minister for Community Safety, Ash Denham, has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This heading is not applicable.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable

An indication of how the regulations should be categorised in relation to the significance of the change proposed.

Medium – Ministers have a limited policy choice but with more significant implications in so far as the instrument removes existing individual rights to practise and establish in Scotland.

Statement setting out the Scottish Ministers' reasons for their choice of procedure

We do not consider that this instrument is subject to the affirmative procedure for any of the reasons set out in paragraph 1(2) of schedule 7 of the European Union (Withdrawal) Act 2018. However, we believe that it should nonetheless be taken forward under that procedure for two reasons. First, the instrument removes existing individual rights to practise and establish in Scotland. The instrument primarily ensures compliance with international obligations. Secondly, in terms of ensuring consistency with precedent in relation to Parliamentary procedures, the 1978 Order itself was adopted by affirmative procedure. The 2000 Regulations were adopted by negative procedure. Further, the instrument makes amendments to primary legislation, affecting the operation of the Solicitors (Scotland) Act 1980.

Further information

Consultation

No formal consultation was carried out in relation to the Services of Lawyers and Lawyer's Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019. However, we have engaged with relevant legal services regulatory bodies during the process of drafting this instrument.

Impact Assessments

Full impact assessments have not been prepared for this instrument. The instrument seeks to do no more than is necessary to realign EU and EFTA lawyers with lawyers qualified in third countries so that they are subject to the same regulatory framework, and to make separate arrangements for Swiss lawyers further to the UK Swiss Separation Agreement. Accordingly, there are no equality, children's or privacy impact issues. The instrument does not alter Scottish Government's current environmental policies and priorities and, therefore the amendments do not have a significant impact on the environment.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is [attached](#). The impact of this policy on businesses providing legal services is negligible. The bodies regulating legal services in Scotland will require to make amendments to rules in the regulatory frameworks.

Scottish Government
Justice Directorate
18 February 2019

ANNEX B

CATEGORIES OF PRIORITISATION (EXTRACT FROM PROTOCOL)**Low**

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law with no policy change;
- Clear there is no significant policy decision for Ministers to make;
- Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”.

This is an illustrative list and not a comprehensive view of what falls into this category. It would be expected that instruments falling into this category would be negative instruments.

Medium

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Instruments predominantly concerned with technical detail but which include some more significant provisions that may warrant subject committee scrutiny;
- Instruments where Ministers have a limited policy choice but with more significant implications.

This is an illustrative list and not a comprehensive view of what falls into this category.

High

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Instruments in which a more significant policy decision is being made by Scottish Ministers;
- Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK where there is a policy choice with significant implications about which public authority it should be e.g. a regulatory function exercisable by either SEPA or Scottish Water where Parliament may have an interest in the policy choice made by Scottish Ministers;
- Replacement, abolition, or modification of certain EU functions that have significant implications e.g. reporting (both receiving and making reports), monitoring, compliance and enforcement;

- Sub-delegation – creating or amending a power to legislate, including transferring EU legislative powers to Scottish Ministers or to another UK public authority;
- Provision which materially increases or otherwise relates to a fee in respect of a function exercisable by a UK public authority. This could include changes to the group of bodies or individuals required to pay such fees;
- Provision which creates, or widens the scope of, a criminal offence, or which increases the penalty which may be imposed in respect of a criminal offence;
- Provision which involves a significant financial impact on individuals, business, public sector or the economy;
- Provision which creates, widens the scope of, or increases the level of fine for a fixed penalty.

This is an illustrative list and not a comprehensive view of what falls into this category.