



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

21st Meeting, 2020 (Session 5)

Tuesday 15 September 2020

The Committee will meet at 10.15 am in a virtual meeting and be broadcast on www.scottishparliament.tv.

1. **Defamation and Malicious Publications (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Professor John Blackie, University of Strathclyde;

Christopher Brookmyre, Author;

Campbell Deane, Bannatyne Kirkwood France & Co.

2. **Subordinate legislation:** The Committee will take evidence on the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [draft] from—

Humza Yousaf, Cabinet Secretary for Justice, Susan Black, Senior Policy Officer (Civil Law and Legal System), and Heather McClure, Solicitor, Scottish Government Legal Directorate, Scottish Government.

3. **Subordinate legislation:** Humza Yousaf (Cabinet Secretary for Justice) to move—

S5M-22416—That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [draft] be approved.

4. **Subordinate legislation:** The Committee will take evidence on the Management of Offenders (Scotland) Act 2019 (Consequential Amendments) Regulations 2020 [draft] from—

Humza Yousaf, Cabinet Secretary for Justice, Philip Lamont, Head of Criminal Law, Practice and Licensing Unit, and Douglas Kerr, Solicitor, Scottish Government Legal Directorate, Scottish Government.

5. **Subordinate legislation:** Humza Yousaf (Cabinet Secretary for Justice) to move—

S5M-22518—That the Justice Committee recommends that the Management of Offenders (Scotland) Act 2019 (Consequential Amendments) Regulations 2020 [draft] be approved.

6. **Subordinate legislation:** The Committee will take evidence on the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2020 [draft] from—

Humza Yousaf, Cabinet Secretary for Justice, Scottish Government.

7. **Subordinate legislation:** Humza Yousaf (Cabinet Secretary for Justice) to move—

S5M-22573—That the Justice Committee recommends that the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2020 [draft] be approved.

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

Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2020 (SSI 2020/246)

9. **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 proposals-

The Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020

European Institutions and Consular Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1391)

10. **Defamation and Malicious Publications (Scotland) Bill (in private):** The Committee will review the evidence heard earlier in the meeting.

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Edinburgh
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The papers for this meeting are as follows—

Agenda item 1

Note by the Clerk

J/S5/20/21/1

PRIVATE PAPER

J/S5/20/21/2 (P)

Agenda items 2,3,4,5, 6 and 7

Note by the Clerk

J/S5/20/21/3

Agenda item 8

Note by the Clerk

J/S5/20/21/4

Agenda item 9

Note by the Clerk

J/S5/20/21/5

Note by the Clerk

J/S5/20/21/6

Justice Committee

21st Meeting, 2020 (Session 5), Tuesday, 15 September 2020

Defamation and Malicious Publications (Scotland) Bill

Paper from the Clerk

Introduction

1. The Defamation and Malicious Publications (Scotland) Bill (“the Bill”) was introduced by the Cabinet Secretary for Justice on 2 December 2019. The Bill and accompanying documents can be accessed [here](#).

2. The purpose of the Bill is to clarify and strengthen the statutory underpinning of defamation in Scots law. The Bill seeks to do this by placing certain key elements of Scots common law on defamation on a statutory basis. The Bill will also replace and restate, in one place, elements of the existing statutory provisions in Scots law.

3. According to the policy memorandum which accompanies the Bill, the overarching policy objective of the Bill is “to modernise and simplify the law of defamation (and the related action of malicious publication) in Scotland in order to:

- strike a more appropriate balance between freedom of expression and the protection of individual reputation; and
- clarify the law and improve its accessibility.

Approach to Stage 1 consideration

4. The Committee began taking oral evidence on the Bill on 17 March 2020. However, this process was temporarily suspended as a result of the hiatus in parliamentary business caused by the COVID-19 pandemic. The Justice Committee recommenced taking oral evidence on the Bill from witnesses on Tuesday 25 August.

5. It is expected Stage 1 scrutiny of the Bill will to continue throughout September and October, and the Committee would report to the Parliament on the general principles before the end of October 2020.

Oral evidence

6. At its meeting on 8 September, the Committee will continue taking oral evidence on the Bill by hearing from a panel of witnesses. They are—

- Professor John Blackie, University of Strathclyde; Christopher Brookmyre, Author, and Campbell Deane, Bannatyne Kirkwood France & Co..

7. This evidence session will take place remotely, with Members and witnesses appearing via live video conferencing. Members of the public can watch the evidence session live on the Scottish Parliament TV website from 10:15 am on Tuesday 15 September: <https://www.scottishparliament.tv/>
8. Following this evidence session, the Committee will consider the evidence received as part of the Stage 1 scrutiny of the Bill.
9. To date, the Committee has taken oral evidence on the Bill on-
 - [17 March](#) (Scottish Government Bill Team),
 - [25 August](#) (BBC Scotland, NUJ, Scottish Newspaper Society and Scottish PEN),
 - [1 September](#) (Faculty of Advocates, Law Society of Scotland, Dr Stephen Bogle and Dr Bobby Lindsay, University of Glasgow), and
 - [8 September](#) (Dr Andrew Scott, London School of Economics; Gavin Sutter, Queen Mary University of London; Mark Scodie, TripAdvisor UK Ltd and Ally Tibbitt, The Ferret).

Written evidence

10. Written submission on the Bill have been received from the following witnesses giving oral evidence on 15 September-
 - [Dr John Blackie submission](#);
 - [Mr Campbell Deane submission](#).
11. Other written submissions received by the Committee in response to its call for views on the Bill are [available on the Committee's webpage](#).
12. A [SPICe briefing](#) setting out the key issues in the Bill is also available online.
13. Following the oral evidence they provided on 17 March, the Scottish Government Bill Team has provided [supplementary written evidence on take down procedure in England and Wales](#).

Justice Clerks
10 September 2020

Justice Committee

21st Meeting, 2020 (Session 5), Tuesday 15 September 2020

Subordinate legislation

Note by the clerk

Purpose

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

- [The International Organisations \(Immunities and Privileges\) \(Scotland\) Amendment Order 2020 \[draft\]](#)
- [The Management of Offenders \(Scotland\) Act 2019 \(Consequential Amendments\) Regulations 2020 \[draft\]](#)
- [The Equality Act 2010 \(Specification of Public Authorities\) \(Scotland\) Order 2020 \[draft\]](#)

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [draft]

2. The International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [draft] is made in exercise of the powers conferred by sections 1(2) of the International Organisations Act 1968.

3. The Order amends the International Organisations (Immunities and Privileges) (Scotland) Order 2009 to confer immunities and privileges, insofar as they are within devolved competence, upon the Square Kilometre Array Observatory (“the Observatory”) and its representatives, experts and members of staff.

The Management of Offenders (Scotland) Act 2019 (Consequential Amendments) Regulations 2020 [draft]

4. The Management of Offenders (Scotland) Act 2019 (Consequential Amendments) Regulations 2020 [draft] is made in exercise of the powers conferred by section 62(1) of the Management of Offenders (Scotland) Act 2019.

5. The Regulations amend Part II of schedule 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 to maintain consistency with the terminology of the Rehabilitation of Offenders Act 1974 following that Act’s amendment by the Management of Offenders (Scotland) Act 2019.

The Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2020 [draft]

6. The Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2020 [draft] is made in exercise of the powers conferred by section 151(3) of the Equality Act 2010 (“the 2010 Act”).

7. The Order adds the Scottish Biometrics Commissioner to the list of Scottish public authorities in Part 3 of schedule 19 of the Equality Act 2010 (“the Act”). The public authorities listed in that Part are subject to the public sector equality duty in section 149 of the Act. The public sector equality duty is to have regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Act, to advance equality of opportunity and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

8. Further details on the purpose of each of the instruments can be found in the policy notes attached in the Annex.

Delegated Powers and Law Reform Committee Consideration

9. The Delegated Powers and Law Reform Committee considered the first of the instruments at its meeting on 18 August 2020 and the latter two at its meeting on 1 September 2020 and agreed that it did not need to draw them to the attention of the Parliament on any grounds within its remit.

Justice Committee Consideration

10. The Committee is required to report to the Parliament on the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2020 [draft] by 18 September 2020.

11. The Management of Offenders (Scotland) Act 2019 (Consequential Amendments) Regulations 2020 [draft] requires to be reported on by 29 September 2020.

12. The Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2020 [draft] requires to be reported on by 28 September.

13. Motions S5M-22416, S5M-22518 and S5M-2573 have been lodged proposing that the Committee recommends approval of the instruments. The Cabinet Secretary for Justice is due to attend the meeting on 15 September to answer any questions on the instruments and to move the motions for approval.

14. It is for the Committee to decide whether or not to agree to the motions, and then to report to the Parliament. Thereafter, the Parliament will be invited to approve the instruments.

15. The Committee is asked to delegate to the Convener authority to approve the reports on the instruments for publication.

POLICY NOTE**THE INTERNATIONAL ORGANISATIONS (IMMUNITIES AND PRIVILEGES)
(SCOTLAND) AMENDMENT ORDER 2020****SSI 2020/**

1. The above instrument is proposed to be made in exercise of the powers conferred by sections 1(2) of the International Organisations Act 1968 and all other powers enabling Her Majesty to do so.
2. The purpose of this instrument is to amend the International Organisations (Immunities and Privileges) (Scotland) Order 2009 to confer immunities and privileges, insofar as they are within devolved competence, upon the Square Kilometre Array Observatory (“the Observatory”) and its representatives, experts and members of staff.
3. The Observatory was established by the Convention establishing the Square Kilometre Array Observatory done in Rome on 12 March 2019 (“the Convention”). The United Kingdom will become a member of the Observatory in accordance with Article 6(1) of the Convention when the Convention enters into force for the United Kingdom. The date on which the Convention enters into force for the United Kingdom will be published on the relevant page of UK Treaties Online which can be found at this link: <https://www.gov.uk/uk-treaties>

Policy Objectives

4. The Convention obliges the United Kingdom to abide by the terms of the instruments of the Observatory, including the Protocol on Privileges and Immunities of the Square Kilometre Array Observatory, and to confer legal capacity and privileges and immunities on the Observatory and on specified categories of individuals connected with the Observatory.
5. The draft Order confers such privileges and immunities on the Observatory and its representatives, experts and staff. The privileges and immunities conferred by the Order reflect those that have been agreed by the parties to the Convention.
6. The Order deals only with those matters which are within the legislative competence of the Scottish Parliament. There is a related instrument, which deals with reserved matters as regards Scotland and with other UK jurisdictions, that is subject to consideration by the UK Parliament.
7. This Order and the parallel UK Order are necessary to help secure compliance by the UK with its international obligations.

Effect of Order

8. This Order amends the International Organisations (Immunities and Privileges)(Scotland) Order 2009 (“the principal Order”) by adding a new schedule 18.

9. The amendments are being made to implement the Protocol on Privileges and Immunities of the Square Kilometre Array Observatory (found at Annex A of the Convention), in respect of matters which are within the legislative competence of the Scottish Parliament. The Protocol gives privileges and immunities to the Observatory, its Director-General, representatives, experts and staff. Reserved matters are dealt with in the parallel UK Order.
10. Paragraph 2 of the new schedule 18 provides that the Observatory shall have immunity from suit and legal process except to the extent that, by a decision of the Council, the Observatory expressly waives such immunity. Paragraph 2 also provides further exceptions where that immunity would not apply, such as civil liability in respect of damage caused by a vehicle operated by the Observatory.
11. Paragraph 3 provides that official archives of the Observatory are inviolable in accordance with the Vienna Convention on Diplomatic Relations of 1961. This means that the state cannot access or remove them.
12. Paragraph 4 provides the Observatory shall have relief from non-domestic rates on the premises of the Observatory and is otherwise, within the scope of its official activities, exempt from all devolved and local taxes. Paragraph 4(2) provides the exception where exemptions and reliefs would not apply which include the disposal or hiring out of goods acquired or imported in circumstances where their acquisition or importation benefitted from an exemption or relief.
13. Paragraph 5 provides that the Director-General and members of staff shall have immunity from suit and legal process in respect of things done or omitted to be done in the course of performance of official duties except in the case of motor traffic offences committed by them or of damage caused by a motor vehicle belonging to or driven by them. In the case of the Director-General immunity can be waived by the Council and in the case of a member of staff can be waived by the Director-General. Paragraph 5(3) provides that Director-General and members of staff shall have exemption and privileges in respect of personal baggage to the extent necessary to protect official papers and documents which relate to the official activities of the Observatory in accordance with the Vienna Convention on Diplomatic Relations of 1961.
14. Paragraph 6 provides similar arrangements for representatives of members of the Observatory, except where they are waived by the government of that member. No privilege or immunity will be conferred on:
 - a member of the official staff of representatives of members of the Observatory other than designated delegates, alternates, advisers, and secretaries of delegations;
 - any person as the representative of Her Majesty's Government in the United Kingdom or as a member of the official staff of such a representative;
 - families of representatives or a member of the family or members of their official staffs.
15. Paragraph 7 provides that experts shall have exemption and privileges in respect of personal baggage to the extent necessary to protect official papers and documents which relate to the official activities of the Observatory in accordance with the Vienna Convention on Diplomatic Relations of 1961. This immunity can be waived by the Director-General of the Observatory.

16. Under the Scotland Act 1998, international relations (including relations with international organisations) is reserved to the Westminster Parliament. However, to the extent that the UK's obligations in respect of international organisations fall within devolved competence – for instance, conferral of immunity from criminal and civil proceedings, and relief from local and devolved taxes – the making of orders under section 1 of the 1968 Act to meet those obligations is subject to procedure in the Scottish Parliament, given the terms of paragraph 7(2) of Part I of schedule 5 of the Scotland Act 1998, under which the observance and implementation of international obligations is a devolved matter. The effect of section 118(4) of the Scotland Act 1998 is that a power to make an Order in Council in a pre-commencement enactment (i.e. an Act preceding the Scotland Act 1998) which is exercisable within devolved competence must be approved by a resolution of the Scottish Parliament rather than the UK Parliament. Consequently, Orders in Council made by Her Majesty under section 1 of the 1968 Act, so far as they are within devolved competence, are subject to approval by the Scottish Parliament.

Consultation

17. The instrument has been prepared in consultation with the Foreign and Commonwealth Office and other relevant United Kingdom Government Departments. No external consultation was undertaken as this Order implements provisions of an international agreement to which the United Kingdom will be obliged to give effect as a matter of international law once the Convention enters into force. This is consistent with the general practice on Orders made under the International Organisations Act 1968

Impact Assessments

18. No equality impact assessment has been completed as there is no effect on people other than those to whom the UK Government has afforded privileges and immunities.

Financial Effects

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

Scottish Government
Justice Directorate
August 2020

POLICY NOTE

THE MANAGEMENT OF OFFENDERS (SCOTLAND) ACT 2019 (CONSEQUENTIAL AMENDMENTS) REGULATIONS 2020

SSI 2020/XXX

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by section 62(1) of the Management of Offenders (Scotland) Act 2019 and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

Purpose of instrument:

To amend Part II of schedule 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 to maintain consistency with the terminology of the Rehabilitation of Offenders Act 1974 following that Act's amendment by the Management of Offenders (Scotland) Act 2019.

Policy Objectives

1. As a result of changes to the Rehabilitation of Offenders Act 1974 ("the 1974 Act") made by the Management of Offenders (Scotland) Act 2019 ("the 2019 Act"), it is necessary to adjust the terminology in Part II of schedule 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 ("the 1980 Act") so that it refers to "protected person" rather than "rehabilitated person". The need for this change is to maintain consistency with the terminology now provided for in the 1974 Act.

Amendment to the 1974 Act

2. The provisions in Part 2 of the 2019 Act reforms the 1974 Act so that it achieves a more appropriate balance between the rights of people not to disclose their previous offending behaviour and to move on with their lives while ensuring the rights of the public to be protected are effectively maintained. The provisions also increase the clarity of the legislation and make it more accessible to those required to understand it.
3. Therefore, the provisions can be split into the following five broad areas:
 - reduce the period of disclosure for the majority of sentences,
 - bring more people within the scope of the protections under the 1974 Act,
 - provide an enabling power to bring forward regulations to create an independent review mechanism for certain sentences greater than 48 months,
 - increase the clarity and accessibility of the legislation, and
 - change the terminology used within the legislation to reduce confusion about the purpose of disclosure.
4. In respect of terminology, the changes make the 1974 Act much clearer as to the purposes of a disclosure requirement. The 2019 Act makes the following changes to the terminology in the 1974 Act:

- “rehabilitated person” will become “protected person”.
- “rehabilitation period” will become “disclosure period”.
- “sentence excluded from rehabilitation under this act” will become “excluded sentence”.
- “a sentence subject to rehabilitation under this Act” will become “disclosable sentence”.
- “rehabilitated living persons” will become “living protected persons”.

Amendment to the 1980 Act

5. As referred to above, the 1974 Act refers to “rehabilitated persons”. The 1974 Act is amended by the 2019 Act to instead refer to “protected persons”. Part II of schedule 1 of the 1980 Act currently refers to persons who are “rehabilitated persons” for the purposes of the 1974 Act. These Regulations amend Part II of schedule 1 of the 1980 Act to the effect that it will instead refer to persons who are “protected persons” for the purpose of the 1974 Act.

Consultation

6. As these Regulations make provision in consequence of the 2019 Act no formal consultation was necessary.

Impact Assessments

7. An EQIA and a CRWIA in relation to the Bill for the 2019 Act were completed and published prior to the Bill being introduced into the Scottish Parliament.

Financial Effects

8. The financial effects of this policy are set out under the financial memorandum which accompanied the Bill for the 2019 Act. The Cabinet Secretary for Justice confirmed prior to the 2019 Act being introduced to Parliament that no BRIA was necessary.

Scottish Government
Justice Directorate
19 August 2020

POLICY NOTE

THE EQUALITY ACT 2010 (SPECIFICATION OF PUBLIC AUTHORITIES) (SCOTLAND) ORDER 2020

S.S.I. 2020/XXX

The above instrument is proposed to be made in exercise of the powers conferred by section 151(3) of the Equality Act 2010 (“the 2010 Act”). The instrument is subject to the affirmative procedure.

Purpose of the instrument. The instrument adds the Scottish Biometrics Commissioner (“the Commissioner”) to the list of public authorities in Part 3 of schedule 19 of the 2010 Act required to comply with the public sector equality duty.

Policy Objective

The public sector equality duty in section 149(1) of the 2010 Act requires public authorities to have due regard, when exercising their functions, to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Those bodies and office holders subject to the public sector equality duty are listed in Part 3 of schedule 19 of the 2010 Act.

The Scottish Biometrics Commissioner Act 2020 (“the 2020 Act”) established the office of the Commissioner who will have oversight of the acquisition, use, retention and disposal of biometric data (fingerprints, DNA samples, facial images etc.) for policing and criminal justice purposes.

The draft Order proposes to add the Commissioner to Part 3 of schedule 19 of the 2010 Act so as to require the Commissioner to comply with the public sector equality duty. It is considered that this duty should be extended to the Commissioner so that the Commissioner must have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Act when exercising any of their functions in the 2020 Act.

Consultation

In accordance with the requirement under section 152(3) of the 2010 Act, the Commission for Equality and Human Rights was consulted and are content with the proposal to add the Scottish Biometrics Commissioner to schedule 19 of the 2010 Act.

Impact Assessments

An equality impact assessment (EQIA) was completed on the Scottish Biometrics Commissioner Bill (“the Bill”) which preceded the 2020 Act. This assessment is published at: <https://www.gov.scot/publications/scottish-biometrics-commissioner-bill-equality-impact-assessment-eqia-results/>. The assessment concluded that the proposed functions of the Commissioner had the potential to have a positive impact on protected characteristic groups identified in the 2010 Act with no negative impact identified.

That assessment also made reference to the intention of the Scottish Government, once the Bill was passed, to add the Commissioner to schedule 19 of the Equality Act 2010 thereby making the Commissioner subject to the public sector equality duty to reduce or eliminate discrimination. The duty will therefore have an effect on how the Commissioner conducts reviews; the recommendations the Commissioner makes; and the content of the code of practice, as the Commissioner may make special mention or take a special interest in what the police are doing to eliminate discrimination. This instrument therefore seeks to achieve that policy objective. As the proposal in this instrument is primarily consequential in nature to the 2020 Act, it is therefore considered that no further EQIA is required for this instrument.

A Children’s Rights and Wellbeing Impact Assessment (CRWIA) was completed on the Scottish Biometrics Commissioner Bill which preceded the 2020 Act. This assessment is published at: <https://www.gov.scot/publications/scottish-biometrics-commissioner-bill-child-rights-wellbeing-assessment-crwia/>. The assessment concluded that the proposed functions of the Commissioner would have a positive impact on the rights of Children and Young People with no negative impact identified. As the proposal in this instrument is primarily consequential in nature to the 2020 Act, it is considered that no further CRWIA is required for this instrument.

No Privacy Impact Assessment was required for this instrument because there is no change in how personal data is managed as a result of it.

Due to the technical aspect of this instrument there is no requirement for a Strategic Environmental Assessment.

Financial Effects

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 business.

Scottish Government
Directorate for Safer Communities
August 2020

Justice Committee

21st Meeting, 2020 (Session 5), Tuesday 15 September 2020

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:
 - [The Mental Health Tribunal for Scotland \(Practice and Procedure\) \(No. 2\) Amendment Rules 2020](#) [see page 3];
2. If the Committee agrees to report to the Parliament on the instrument, it is required to do so by 28 September 2020.

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 1 September 2020 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

Procedure for negative instruments

4. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. 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).
5. 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.
6. 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.
7. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

8. 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. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
9. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

10. 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/delegated-powers-committee.aspx>

Recommendation

11. **The Committee is invited to consider the instrument.**

POLICY NOTE**THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURE) (NO. 2) AMENDMENT RULES 2020****SSI 2020/246**

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by sections 21(4) and 326 and paragraph 10 of schedule 2 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Purpose of instrument:

To amend the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 (“the 2005 Rules”) to take into account amendments made by section 26 of the Management of Offenders (Scotland) Act 2019 (“the 2019 Act”) to the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”).

Policy Objectives

1. To ensure the 2005 Rules operate effectively and appropriately in order for the Mental Health Tribunal for Scotland (“the Tribunal”) to be able to consider an application by a patient or the patient’s named person asking for the disclosure period applicable to the patient’s compulsion order to end.
2. The Rehabilitation of Offenders Act 1974 (“the 1974 Act”) sets out the rules as to when a conviction is considered “spent”. Whether a conviction is spent or not has implications for disclosure of that conviction in different contexts. Section 6 of the 1974 Act sets out the rules that apply to determine when a conviction becomes spent. These rules depend on the disclosure period applicable to the sentence(s) imposed in respect of the conviction.

2019 Act

3. Section 26(2) of the 2019 Act inserts a new section 5G of the 1974 Act. This new section provides that convictions for which compulsion orders are given are to be disclosed from the date of conviction until the order ceases or ceased to have effect.
4. However, this disclosure period will be subject to a new process which will allow an application to be made to the Tribunal asking for the disclosure of that conviction to end.
5. An application of this type is made under section 164A of the 2003 Act (as inserted by section 26(4) of the 2019 Act). Section 26 of the 2019 Act also amends section 257A(3) of the 2003 Act to apply to applications under section 164A. This means that the persons listed in section 257A(9)(a) to (d) can initiate an application where

the patient does not have a named person, where the patient has attained the age of 16 and where the patient is incapable in relation to a decision as to whether to initiate an application. Section 167A of the 2003 Act sets out the duties of the Tribunal on receipt of an application.

6. If an application is made, the Tribunal shall allow the patient, the patient's named person, any guardian of the patient, any welfare attorney of the patient, the mental health officer, the patient's responsible medical officer, the patient's primary carer, any curator ad litem appointed in respect of the patient by the Tribunal and any other person appearing to the Tribunal to have an interest in the application to make oral or written representations and to lead or produce evidence.
7. In making a decision on an application under section 164A, the test that the Tribunal must consider is whether it is satisfied that, without the provision of medical treatment of the kind mentioned in section 139(4)(b) of the 2003 Act to the patient, there would be a significant risk to the safety of other persons. Where the Tribunal is so satisfied, it must refuse the application to bring the person's disclosure requirement to an end. If the Tribunal does not consider that this test is met, they are required to make a determination that the disclosure period applicable to the compulsion order ends with immediate effect.
8. Applications can be made 12 months after the compulsion order is given. If the application is successful the disclosure period applicable to the compulsion order will end. If a person's application is not successful then they may apply again. However, they are not able to apply until 12 months after their previous application was refused.
9. Once the Tribunal makes its determination it will be empowered to share the outcome of its decision with Disclosure Scotland but only where a request is received by the Tribunal from Disclosure Scotland. In practice such a request will be made as a result of a disclosure application being made to Disclosure Scotland.
10. The 2005 Rules set out the procedure which applies to proceedings before the Tribunal. This instrument will amend the 2005 Rules to accommodate the new application process.

2005 Rules

11. Rule 3 of this instrument amends the definition of "party" in rule 2 of the 2005 Rules. This means that the patient's responsible medical officer will be a party in any proceedings in relation to an application under section 164A of the 2003 Act.
12. Rule 4 of this instrument amends rule 13(1) of the 2005 Rules to include applications under section 164A of the 2003 Act. This means that the procedure set out in rule 13¹ applies to such applications.

¹ <http://www.legislation.gov.uk/ssi/2005/519/article/13/made> as amended by rule 4(1) of the Mental Health Tribunal for Scotland (Practice and Procedure (No. 2) Amendment Rules 2017: <http://www.legislation.gov.uk/ssi/2017/172/article/4/made>.

13. Rule 5 of this instrument amends rule 20(1) of the 2005 Rules to include applications under section 164A of the 2003 Act. Rule 20 sets out the circumstances in which an application may be withdrawn.
14. Rule 6 of this instrument amends rule 72(5A) of the 2005 Rules to include applications under section 164A of the 2003 Act. This amendment means that, by virtue of the operation of Rule 72(5A) and (5B), the Clerk to the Tribunal must send a copy of the application, along with the Tribunal's decision in relation to an application, to the Mental Welfare Commission for Scotland.

Consultation

15. The Scottish Government has had extensive engagement on reforming the 1974 Act with key stakeholders, employers and members of the public. The Scottish Government also published a consultation paper in May 2015². The consultation closed on 12 August 2015 and the responses were published on 16 October 2015³. The analysis of the consultation responses was published on 22 December of 2015⁴.
16. Scottish Government justice officials had numerous discussions and held numerous meetings with the Tribunal in order to help the Scottish Government develop the policy under section 26 of the 2019 Act. Discussions also took place with the Royal College of Psychiatrists. This engagement was extremely beneficial in developing a suitable disclosure policy for those individuals who have a mental health condition, convicted of an offence and given a compulsion order as a sentence.

Information Commissioner's Office (ICO)

17. Legislation which relates to the processing of personal data triggers the requirement under regulation 36(4) of the GDPR for consultation with the Information Commissioner's Office ("ICO"). This instrument relates to the processing of personal data by virtue of the amended rule 13 of the 2005 Rules requiring certain information to be included in an application under section 164A of the 2003 Act. The Scottish Government has consulted with the ICO and the ICO has provided advice.

Impact Assessments

18. An EQIA and a CRWIA in relation to the Bill for the 2019 Act were completed and published prior to the Bill being introduced into the Scottish Parliament. As the 2019 Act was introduced on 22 February 2018 and GDPR came into force on 28 May 2018 a data protection impact assessment (DPIA) was not completed. It was not a requirement at that time. However, after consulting with the ICO a DPIA for legislation was completed in respect of this instrument.

² <http://www.gov.scot/Publications/2015/05/5592>

³ <http://www.gov.scot/Publications/2015/10/3324>

⁴ <http://www.gov.scot/Publications/2015/12/1435>

Financial Effects

19. The financial effects of this policy are set out under the financial memorandum accompanying the Bill for the 2019 Act. The Cabinet Secretary for Justice confirmed prior to the 2019 Act being introduced to Parliament that no BRIA was necessary.

Scottish Government
Justice Directorate
19 August 2020

Justice Committee

21st Meeting, 2019 (Session 5), Tuesday 15 September 2020

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

Note by the clerk

Introduction

1. The European Union (Withdrawal) Act 2018 (the 2018 Act) sets out the process for the UK and Scottish parliaments to consider regulations to convert non-domestic EU law into UK law.
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 a SI notification (**see Annex A**) from the Scottish Government on the following SI:
 - **The Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020**
5. The Scottish Government states that relevant officials in the Crown Office and Procurator Fiscal Service and Police Scotland have been consulted about the proposed Regulations to confirm the appropriateness of the significance and impact of the proposed changes from an operational perspective.
6. As Annex A notes, the Scottish Ministers believe the changes in the proposed Regulations are necessary to ensure the continued effective operation of Law Enforcement and Criminal Justice law.

Action

- 7. 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.**

SI Notification: The Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020

A brief explanation of law that the proposals amend

The proposed Regulations make amendments to address failures of retained EU law to operate effectively and to make savings and transitional provision in respect of certain law enforcement matters and procedures which have begun but will not be completed before the end of the Transition Period.

The proposed Regulations make technical amendments to the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 (SI 2019/742) (“the Law Enforcement Regulations”) as well as the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/780) (“the Criminal Justice Regulations”). To clarify, none of the provisions in the Criminal Justice Regulations which are being amended by the proposed Regulations extend to Scotland. The Law Enforcement Regulations were approved by the UK Parliament in March 2019 to come into force on “exit day”. They were made with the consent of Scottish Ministers following notification to and approval of the Scottish Parliament. The notification was considered by the Justice Committee at its meeting on 23 October 2018 when it recommended approval to the proposed consent.

http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/EU_Justice_-_Notification_to_Scottish_Parliament_-_HO_SI_-_1_October_201....pdf

As set out in the notification relating to the Law Enforcement Regulations the area of law being amended is retained EU law in the area of Law Enforcement and Criminal Justice Cooperation (often referred to as “Internal Security”). The Law Enforcement Regulations make provision in these areas for the situation where no negotiated agreement was reached with the EU.

The purpose of the proposed Regulations is to provide technical fixes to UK legislation to deliver a functioning statute book at the end of the Transition Period, regardless of the outcome of negotiations in the area of Law Enforcement and Criminal Justice Cooperation, that reflects the Withdrawal Agreement reached between the UK and the EU and the EEA EFTA Separation Agreement reached between the UK and Norway, Iceland and Liechtenstein (“the Agreements”). Title V of the Withdrawal Agreement makes provision in respect of ongoing judicial cooperation proceedings in criminal matters relating to certain EU instruments for law enforcement (such as alerts, expertise and judicial advice) and information exchange (such as data and intelligence sharing).

Similar provisions are made in the EEA EFTA Agreement. These provisions are referred to as “other separation issues”. Scotland’s participation in these measures has been via the UK, as the competent member state, and the legislation covers a complex mix of reserved and devolved matters. The proposed Regulations make necessary, technical amendments to the Law Enforcement Regulations to update them in light of the Agreements. The separation provisions of the Agreements will

take effect at the end of the Transition Period irrespective of the outcome of the UK-EU and UK-EEA EFTA negotiations in the area of Law Enforcement and Criminal Justice Cooperation.

The proposed Regulations also fix a number of deficiencies in retained EU law in this area which would otherwise arise at the end of the Transition Period. Subsequent to the making of the Law Enforcement Regulations, further retained EU law has come into force and a further deficiency in existing retained EU law has been identified. The proposed Regulations therefore make the necessary amendments to prevent deficiencies arising at the end of the Transition Period.

Summary of the proposals and how these correct deficiencies

The proposed Regulations are being brought forward by the UK Government under powers in the European Union (Withdrawal) Act 2018 (as well as powers under the Extradition Act 2003 and the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”). The purpose of the proposed Regulations is to provide an operable legal framework for the separation provisions in the Agreements. The 2020 Act implements the terms of the Agreements into domestic law but further amendments to UK law are required by the proposed Regulations to ensure that the separation provisions are given full effect in the domestic legal system.

The proposed Regulations also address deficiencies in relation to retained EU law which have come into force since the Law Enforcement Regulations and the Criminal Justice Regulations were made, namely: Eurojust and the Schengen Information System (SIS II) Regulations (which came into force in December 2019), the EU Surrender Agreement with Norway and Iceland (which came into force in November 2019), along with EU Regulations in relation to asset freezing and confiscation (which will come into force in December 2020).

Additionally, the proposed Regulations will make changes regarding Prüm (e.g. transitional data provisions) to reflect the UK’s connection to Prüm, and will list Italy as a “participating country” for relevant parts of the Crime (International Co-operation) Act 2003 (reflecting that Italy has brought the European Convention on Mutual Assistance in Criminal Matters into force).

The provisions will revoke retained EU law, insert or modify transitional and savings provisions to ensure the EU legal framework continues to apply to ongoing cases and procedures and to ensure continued protection measures for law enforcement data stocks accrued prior to the end of the Transition Period under the Law Enforcement and Criminal Justice measures. Drafting which is no longer effective is also removed.

Specifically, provisions are made in respect of deficiencies and for transitional and savings measures arising in the following areas:

- Mutual Legal Assistance (MLA)
- Cross-border Surveillance
- Rights in criminal proceedings
- Asset Freezing orders
- Asset Confiscation orders
- Criminal records exchange (ECRIS)

- Information and intelligence exchange
- European Investigation Orders (EIO)
- Joint Investigation Teams (JITs)
- Eurojust and Europol
- Passenger Name Record Data
- Schengen law enforcement co-operation agreement
- Financial Intelligence Units (FIUs)
- Prüm – exchange of DNA data
- Swedish Initiative
- Schengen Information System (SIS II)
- Asset recovery offices;
- Passenger Name Records (PNR)
- Schengen convention – MLA, extradition/surrender and police cooperation (in relation to EEA EFTA states), and
- General provision on data and information protection (in so far as it applies to the Law Enforcement and Criminal Justice co-operation measures).

An explanation of why the change is considered necessary

The proposed Regulations are necessary to ensure that the UK has a functioning legal framework that gives full effect to the Agreements and ensures a smooth transition to retained EU law at the end of the Transition Period. These changes are made to ensure the law is clear and accessible to operational partners. They provide continuity of law, requiring the continued application of particular EU Law Enforcement and Criminal Justice measures in the UK in respect of cases and procedure which are ongoing at the end of the Transition Period.

Scottish Government categorisation of significance of proposals

Category A - requiring the lowest level of scrutiny – on the basis that the proposed changes –

- Are Technical in nature;
- ensure continuity of law;
- involve no significant policy decision for Ministers to make – there being an “obvious” policy answer
- update references which are no longer appropriate following exit from the EU

Impact on devolved areas

Criminal justice, criminal law and policing are within devolved competence of the Scottish Parliament. The changes affect the scope of the tools and measures available to tackle crime. This impact will be across the UK and is not specific to Scotland.

Summary of engagement/consultation

Relevant officials in the Crown Office and Procurator Fiscal Service and Police Scotland have been consulted about the proposed Regulations to confirm the appropriateness of the significance and impact of the proposed changes from an operational perspective.

A note of other impact assessments, (if available)

The UK Government has prepared an impact assessment which will be provided when the proposed Regulations are laid.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

The proposed Regulations relate to a complex mix of reserved and devolved matters. The Scottish Ministers believe the changes in the proposed Regulations are necessary to ensure the continued effective operation of Law Enforcement and Criminal Justice law. The measures are technical in nature and are necessary to give full effect to the Agreements, to fix deficiencies and to make provision in respect of the continuation of certain Law Enforcement and Criminal Justice measures and procedures which are ongoing at the end of the Transition Period. There is very limited, if any, policy choice in this area as the transitional provisions of the proposed Regulations implement the Agreements which have been entered into. The UK Government has consulted the Scottish Government about the proposed SI; and officials have worked with UKG to ensure the drafting delivers for our interests and respects the devolution settlement.

It is a pragmatic and consistent approach to continue to legislate in this area by amending the Law Enforcement Regulations on a UK-wide basis. It is a continuation of the approach taken in relation to the Law Enforcement Regulations which were made on a UK basis with the consent of the Scottish Ministers. It ensures a cohesive approach to criminal justice across the UK given the movement of criminals around the UK and the shared objectives of the UK Government and the Scottish Government in this policy area.

In respect of the provisions fixing retained EU law and updating references in domestic legislation, the policy is the same across the UK and it makes pragmatic sense for the changes to be done at a UK level.

In relation to participation in EU agencies such as Eurojust and Europol and in the EU Law Enforcement and Criminal Justice measures relating to judicial and police co-operation, and information and intelligence sharing, participation is required at UK level making it appropriate for the proposals to be taken forward at UK level. Intended laying date (if known) of instruments likely to arise

The SI is subject to affirmative procedure and will be laid in the Autumn. We would welcome a view from the committee as soon as possible, however the Scottish Parliament will have 28 days for consideration if needed under the agreed protocol to consider the proposal to consent to the SI.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

N/A

Information about any time dependency associated with the proposal

The proposed Regulations will need to come into force prior to the end of the Transition Period.

Scottish Government

Justice Committee

21st Meeting, 2019 (Session 5), Tuesday 15 September 2020

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

Note by the clerk

Introduction

1. The European Union (Withdrawal) Act 2018 (the 2018 Act) sets out the process for the UK and Scottish parliaments to consider regulations to convert non-domestic EU law into UK law.
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 a SI notification (**see Annex A**) from the Scottish Government on the following SI:
 - **The European Institutions and Consular Protection (Amendment etc.) (EU Exit) (Amendment) Regulations 2020**

Views from officials and external bodies

5. The clerks approached other parliamentary officials to seek their views, if any, on the proposals. No issues have been raised.

Action

6. **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.**

SI NOTIFICATION: THE EUROPEAN INSTITUTIONS AND CONSULAR PROTECTION (AMENDMENT ETC.) (EU EXIT) (AMENDMENT) REGULATIONS 2020

Where the Scottish Government intends to consent to the UK Government laying statutory instruments (SIs) under the European Union (Withdrawal) Act 2018 that include proposals relating to devolved competencies, the Scottish Government has undertaken to notify the Scottish Parliament to enable the Parliament to scrutinise its intention to consent.

The approval process is set out in a [protocol](#) designed to aid parliamentary scrutiny of SI notifications.

To support committee consideration of such notifications the SI protocol categorises proposals that may be included in a notification, so as to assist committees to prioritise scrutiny of more significant proposals.

The Scottish Government has submitted an SI Notification in relation to the European Institutions and Consular Protection (Amendment etc.) (EU Exit) (Amendment) Regulations 2020. The Scottish Government considers that the notification can be classified as **Category A** in terms of its significance under the SI protocol.

According to the SI protocol, where Notifications are considered to be category A it is expected that matters would:

“not necessarily be so significant as to require a committee to take evidence from the relevant Scottish Minister or stakeholders. While proposals under category A may not be significant, committees would retain the right to take evidence on such proposals for SIs should they wish to do so and could come to the view that the Scottish Parliament should not give its approval to the Scottish Ministers giving their consent to UK Ministers”.

The table below (taken from the protocol) sets out an illustrative guide to the type of matters that may fall into category A.

Category A

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;
- Clear there is no significant policy decision for Ministers to make;
- Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer;
- Proposals where Ministers have a policy choice but with limited implications, e.g. only one obvious policy option as to which body may provide an opinion or receive a report;
- Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK, where a choice as to whether that should be amended to be the Secretary of State for Scotland, Scottish Ministers or somebody else is consistent with the devolution settlement or replicates what happens in practice now;
- 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.

The European Institutions and Consular Protection (Amendment etc.) (EU Exit) (Amendment) Regulations 2020

Background

In 2018, the Scottish Parliament considered a Scottish Government SI Notification on [the European Institutions and Consular Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1391\)](#) (“the 2018 Regulations”). The 2018 Regulations amend and revoke the EU legislation that governs the functioning of the institutions of the European Union.

By way of background, the Treaty on the Functioning of the European Union (“TFEU”) includes various Protocols which set out rules governing institutions and bodies of the EU. Specifically, provision is made regarding privileges and immunities for persons involved with the Court of Justice of the European Union (“CJEU”) and the European Union itself. This includes privileges and immunities for Members of the European Parliament (MEPs) and officials and other servants of the European Union. For short these persons are described below as “EU personnel”.

In terms of devolved matters, the relevant provisions relate to immunity of EU personnel from legal proceedings in respect of acts performed in an official capacity and are set out in:

- Protocol (No 3) of the TFEU on the statute of the Court of Justice of the European Union. Protocol (No 3) makes provision for the roles of judges and Advocates-General; and

- Protocol (No 7) of the TFEU on the privileges and immunities of the European Union. Protocol (No 7) sets out the privileges and immunities granted to the EU and to a range of other EU institutions and officials.

According to the Explanatory Note for the 2018 Regulations:

“Part 2 makes repeals and savings of relevant directly effective treaty rights preserved under section 4(1) of the EUWA. In particular, Part 2 ensures that those rights, which will become redundant as result of the UK’s withdrawal from the EU, cease to apply on exit day.

Part 2 also provides for the saving of various immunities provided under the Treaty on the Functioning of the European Union in respect of actions taken by the relevant persons in an official capacity prior to exit day. Regulation 3 revokes, amongst other provisions, provisions relating to the rights of EU citizens to receive (and obligations of Member States to provide) consular or diplomatic protection in the territory of third countries in which the Member State of which they are nationals is not represented.

Part 3 makes amendments and revocations in respect of three EU regulations preserved under section 3 of the Act which will become redundant on and after exit day so as to ensure that they continue to apply to direct retained EU law in their amended form after exit day.

In particular, regulations 9 and 10 amend EU regulations relating to references to the official languages of the European Union while regulation 11 amends the EU regulation relating to the rules on the interpretation of time periods in EU law.”

The notification was considered by the Justice Committee at its meeting on 4 December 2018 when it recommended approval to the proposed consent. The 2018 Regulations were laid in the UK Parliament on 21 December 2018 to come into force on “exit day”. They were made with the consent of the Scottish Ministers.

What does this notification actually do?

The new SI notification proposes making minor changes to the 2018 Regulations principally to change when they come into force (to change this date to the end of the implementation period, 31 December 2020) and to take account of the relevant separation provisions that have now been agreed in the Withdrawal Agreement with the EU. The need for these changes has arisen since the 2018 Regulations were made. According to the Scottish Government, the changes are necessary because:

“Privileges and immunities are being removed for persons such as Members of the European Parliament, because it would be inappropriate for those individuals to continue receiving those privileges and immunities once the UK has left the EU and its institutions. The 2018 Regulations dealt with this. The current proposal is to make technical fixes to those regulations to amend dates and remove redundant provisions.”

The Scottish Government states that these changes are minor and technical hence the category A status.

In terms of devolved coverage, the Scottish Government states:

“Privileges and immunities apply across the UK and across devolved and reserved legislation.

Criminal law and policing are within devolved competence. The impact of the removal of these immunities in respect of devolved areas will be limited to in the activities of relevant individuals in those devolved areas for which they will no longer enjoy immunity, namely immunity from legal proceedings as described above.

The specific measure in these regulations are entirely technical in nature and have very limited impact.”

A draft of the instrument itself has not been provided by the Scottish Government.

Iain McIver
SPICe Research