CRIMINAL PROCEDURE (LEGAL ASSISTANCE, DETENTION AND APPEALS) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. It describes the purpose of the subordinate legislation provision in the Bill and outlines the reasons for seeking the proposed power. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill makes provision in relation to the questioning of persons on suspicion of having committed an offence by the police. In particular—
   - It will enshrine a right to legal advice for suspects being questioned by the police.
   - It will extend the existing 6 hour period for police detention.
   - Section 2 is to amend the Legal Aid (Scotland) Act 1986 (“the Legal Aid Act”) to confer on the Scottish Ministers a power to make advice and assistance available, in such circumstances as they may prescribe, without reference to the financial limits under section 8 of that Act.
   - It will make provision to reinforce the principles of certainty and finality set out in the Supreme Court’s judgment in Cadder v Her Majesty's Advocate [2010] UKSC 43.

Rationale for subordinate legislation

4. The Bill provides for only one delegated power (section 2). In deciding to take a power to make subordinate legislation rather than make provision on the face of the Bill, the Scottish Government had regard to the need to—
This document relates to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 October 2010

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances, without having to include the necessary provision in primary legislation;
- make proper use of valuable, and this being proposed as an emergency Bill especially limited, Parliamentary time;
- anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

Delegated power

Section 2 – Criminal advice and assistance: automatic availability in certain circumstances

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

5. Section 2 will insert a new section 8A into the Legal Aid Act to allow advice and assistance to be made available without reference to the financial limits under section 8 of that Act in such circumstances as the Scottish Ministers may, in regulations, prescribe to any “relevant client”. The expression “relevant client” is defined to mean any person who has a right of access to a solicitor under the new section 15A of the Criminal Procedure (Scotland) Act 1995, which will be inserted by section 1 of the Bill. Thus, in the circumstances which the Scottish Ministers prescribe in regulations, advice and assistance will be available to anyone who is being questioned by the police prior to charge.

6. Advice and assistance is the type of State funded legal advice made available to suspects prior to charge. At present advice and assistance is available only to those who are eligible in terms of section 8 of the Legal Aid Act. That means it is currently available to anyone whose disposable capital is below £1,664 and who either has less than £238 per week disposable income or who is (directly or indirectly) in receipt of income support, an income-based jobseeker’s allowance or an income-related allowance under Part 1 of the Welfare Reform Act 2007. The figures prescribed in section 8 are annually adjusted by regulations to take account of inflation. They were most recently adjusted by the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2010 (S.S.I. 2010/139).

Reason for taking power

7. Section 1 of the Bill will create a right to legal advice for suspects before and during questioning by the police. For that right to be practical and effective solicitors will need to be available wherever and whenever required. In order to ensure that solicitors are readily available at police stations throughout Scotland the Government will work closely with solicitors in private practice and the Scottish Legal Aid Board (“the Board”).

8. It is likely that a mixture of solicitors in private practice and solicitors employed by the Board will have to be used to ensure that solicitors are available as and when required. Furthermore, to ensure that the necessary availability of solicitors can be secured at a reasonable
cost to the public purse the Board may choose to enter into contracts with solicitors’ firms to provide cover in particular localities. The Board’s powers to employ solicitors and enter into contracts are limited in the sense that they can only employ solicitors to provide, and enter into contracts for the provision of, “legal aid” and “advice and assistance” as defined by the Legal Aid Act. If advice and assistance remains subject to the section 8 eligibility criteria solicitors directly employed, or with whom the Board has a specific contract to provide advice and assistance, will be unable to advise a suspect who is ineligible for advice and assistance. Moreover even establishing whether the suspect is eligible or not may be problematic as a person detained by the police is unlikely to have about his or her person the documentation a solicitor needs to establish eligibility.

9. To prevent the difficulties described above from arising, and thereby ensure that the comprehensive coverage necessary to make the right to legal advice for suspects before and during police interview practical and effective, advice and assistance may need to be made available without reference to the financial limits under section 8 of the Legal Aid Act. To allow a degree of flexibility in defining the circumstances in which advice and assistance is to be made available without reference to the financial limits, the Government considers it most appropriate to define those circumstances in subordinate legislation rather than attempt to do so in the Bill.

Choice of procedure

10. The Government recognises that any change to the eligibility criteria for State funded legal assistance requires thorough Parliamentary scrutiny. The affirmative procedure is therefore considered appropriate. This is consistent with the approach taken throughout the Legal Aid Act in relation to powers which modify the eligibility criteria for legal aid and advice and assistance.
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