JUSTICE COMMITTEE

AGENDA

21st Meeting, 2012 (Session 4)

Tuesday 19 June 2012

The Committee will meet at 10.00 am in Committee Room 3.

1. **Decisions on taking business in private:** The Committee will decide whether to take items 11, 12 and 13 in private.

2. **Crime and Courts Bill (UK Parliament legislation):** The Committee will take evidence on legislative consent memorandum LCM(S4)11.1 from—
   
   Roseanna Cunningham, Minister for Community Safety and Legal Affairs;
   

3. **Subordinate legislation:** The Committee will take evidence on the Licensed Legal Services (Specification of Regulated Professions) (Scotland) Regulations 2012 [draft] from—
   
   Roseanna Cunningham, Minister for Community Safety and Legal Affairs;
   
   Bobby Sandeman, Head of Courts and Legal Services Reform, Michael Green and Jim McCulloch, Policy Officers, Courts and Legal Services Reform, and Michael Gilmartin, Solicitor, Scottish Government.

4. **Subordinate legislation:** Roseanna Cunningham (Minister for Community Safety and Legal Affairs) to move—
   
   S4M-3156—That the Justice Committee recommends that the Licensed Legal Services (Specification of Regulated Professions) (Scotland) Regulations 2012 [draft] be approved.

5. **Subordinate legislation:** The Committee will take evidence on the Legal Services (Scotland) Act 2010 (Ancillary Provision) Regulations 2012 [draft] from—
Roseanna Cunningham, Minister for Community Safety and Legal Affairs;

Bobby Sandeman, Head of Courts and Legal Services Reform, Michael Green and Jim McCulloch, Policy Officers, Courts and Legal Services Reform, and Michael Gilmartin, Solicitor, Scottish Government.

6. **Subordinate legislation:** Roseanna Cunningham (Minister for Community Safety and Legal Affairs) to move—

S4M-3159—That the Justice Committee recommends that the Legal Services (Scotland) Act 2010 (Ancillary Provision) Regulations 2012 [draft] be approved.

7. **Subordinate legislation:** The Committee will take evidence on the Fire and Rescue Service (Framework) (Scotland) Order 2012 (SSI 2012/146) from—

Roseanna Cunningham, Minister for Community Safety and Legal Affairs;

Evie McLaren, Head of Fire Strategy and Performance Team, and Alicia McKay, Solicitor, Scottish Government.

and decide whether to make any recommendation in relation to the instrument.

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

Licensed Legal Services (Interests in Licensed Providers) (Scotland) Regulations 2012 (SSI 2012/154);

Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167).

9. **Subordinate legislation:** The Committee will consider the following instruments which are not subject to any parliamentary procedure—

Act of Sederunt (Summary Causes Rules Amendment) (Personal Injuries Actions) 2012 (SSI 2012/144);

Legal Services (Scotland) Act 2010 (Commencement No. 2 and Transitional Provisions) Order 2012 (SSI 2012/152);


10. **Proposed Criminalisation of the Purchase of Sex (Scotland) Bill:** The Committee will consider the proposer’s statement of reasons why a case for the proposed Bill has already been established and take evidence from—

Rhoda Grant;

Claire Menzies Smith, Non-Executive Bills Unit.
11. **Proposed Criminalisation of the Purchase of Sex (Scotland) Bill:** The Committee will decide whether it is satisfied with the reasons given in the statement of reasons for not consulting on the draft proposal.

12. **Crime and Courts Bill (UK Parliament legislation):** The Committee will consider its views on LCM(S4)11.1 in order to inform the drafting of its report and whether to delegate to the Convener authority to agree its report to the Parliament.

13. **Work programme:** The Committee will consider its work programme, including consideration of whether to seek approval for the appointment of a budget adviser and of EU priorities for the coming year.

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The papers for this meeting are as follows—

**Agenda item 2**

Paper by the Clerk J/S4/12/21/1

Paper by SPICe J/S4/12/21/2

*Crime and Courts Bill and all other documents*

**Agenda item 3**

SSI cover note J/S4/12/21/3

*Licensed Legal Services (Specification of Regulated Professions) (Scotland) Regulations 2012 [draft]*

**Agenda item 5**

SSI cover note J/S4/12/21/4

*Licensed Legal Services (Scotland) Act 2010 (Ancillary Provision) Regulations 2012 [draft]*

**Agenda item 7**

SSI cover note J/S4/12/21/5

*Fire and Rescue Service (Framework) Order 2012 (SSI 2012/146)*

**Agenda item 8**

SSI cover note J/S4/12/21/6

*Licensed Legal Services (Interests in Licensed Providers) (Scotland) Regulations 2012 (SSI 2012/154)*

SSI cover note J/S4/12/21/7

*Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167)*

**Agenda item 9**

SSI cover note J/S4/12/21/8

*Act of Sederunt (Summary Causes Rules Amendment) (Personal Injuries Actions) 2012 (SSI 2012/144)*
SSI cover note J/S4/12/21/9

Legal Services (Scotland) Act 2010 (Commencement No. 2 and Transitional Provisions) Order 2012 (SSI 2012/152)

SSI cover note J/S4/12/21/10

Criminal Justice and Licensing (Scotland) Act 2012 (Commencement No. 10 and Saving Provisions) Order 2012 (SSI 2012/160)

Agenda item 10

Paper by the Clerk J/S4/12/21/11

Proposed Criminalisation of the Purchase of Sex (Scotland) Bill Statement of Reasons Why Consultation is Unnecessary

Agenda item 13

Paper by the Clerk (private paper) J/S4/12/21/12 (P)

Paper by SPICe (private paper) J/S4/12/21/13 (P)

Paper for information

Letter from the Scottish Government on the UK Justice and Security Bill J/S4/12/21/14
Justice Committee

21st Meeting, 2012 (Session 4), Tuesday 19 June 2012

Legislative Consent Memorandum on the Crime and Courts Bill

Note by the Clerk

Background

1. The UK Crime and Courts Bill was introduced to the House of Lords on 10 May 2012. The Bill is wide-ranging in effect: see further the Legislative Consent Memorandum (―LCM‖ – see Annexe 1) and the SPICe briefing on the Bill, included with papers for the 19 June meeting.

2. Two areas of the legislation extend into devolved matters:
   - the establishment of the National Crime Agency;
   - consequential amendments associated with the extension of the powers of UKBA immigration officers.

3. The Bill also extends the Executive competence of the Scottish Ministers, by giving them the power to set the limits for, and specify the controlled substances that will trigger, a new drug-driving offence.

4. As these three elements of the Bill require the legislative consent of the Scottish Parliament, an LCM has been lodged by the Cabinet Secretary for Justice for consideration by the Parliament under rule 9B.3.1(a) of Standing Orders. This includes a draft legislative consent motion, setting out the Scottish Government’s view that the Parliament should agree to the UK Parliament legislating in these three areas. The clerks understand that the motion will be taken in the last week before recess. This will mean that the Scottish Parliament will have expressed a view in time for amending stages in the House in which the Bill was introduced (probably July), in line with preferred practice for legislative consent motions.

5. Following its introduction, the LCM was referred by the Parliamentary Bureau to the Justice Committee for consideration. Under Standing Orders, the Committee considering an LCM must report on it, and must —normally do so at least 5 days before the legislative consent motion is taken.

6. The main purpose of a Committee reporting on an LCM is to advise the Scottish Parliament whether the Committee agrees with the draft motion set out in the LCM.

7. On 29 May, the Committee considered its approach to the LCM and agreed to invite the Minister for Community Safety and Legal Affairs to give evidence. The Committee also agreed to seek written evidence from a range of stakeholders. Responses from the small number of stakeholders who wished to express a view and were able to do so within the tight timescale are included in Annexe 2.

NB: The LCM itself has an Annexe, which the Scottish Government has referred to as Annex A

The use of "normally" amounts to a recognition that on some occasions (as where, for instance, there is a late amendment affecting the powers of the Scottish Parliament/Scottish Ministers made to a UK Bill), it may be virtually impossible to meet this deadline.
8. Where a Bill that is the subject of an LCM makes provision for subordinate legislation in a way that affects the competence or powers of the Scottish Parliament or Scottish Ministers, Standing Orders require that this be considered by the Subordinate Legislation Committee. The Crime and Court Bill LCM does make provision in this way. The Subordinate Legislation Committee has considered the LCM and its report is provided in Annexe 3.

For action

9. As set out above, the Committee has only a very tight timescale to consider and agree a report on the LCM. To ensure compliance with Standing Orders, a report would need to be published overnight on Wednesday 20 June.

10. An additional agenda item (item 12) has been provided for the 19 June meeting to enable the Committee to hold a private discussion on the themes arising from the evidence-taking session with the Minister and to consider what recommendations to set out in the report. The Committee is also expressly invited (under item 12):

   a) to consider whether it agrees that the provisions in the Bill relating to the powers of the Scottish Parliament and Scottish Ministers should be legislated upon by the UK Parliament; and

   b) to delegate authority to the Convener to approve publication of the report.

11. If Members found it helpful, the clerks would be happy to circulate a draft report amongst Members for final comments before the Convener approves publication on Wednesday 20\textsuperscript{th}, although the deadline for comments would necessarily be very tight.
Annexe 1

LEGISLATIVE CONSENT MEMORANDUM
CRIME AND COURTS BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

—That the Parliament agrees that the relevant provisions of the Crime and Courts Bill, introduced in the House of Lords on 10 May 2012, relating to the establishment of the National Crime Agency; provisions for a new drug-driving offence; and to allow those detained in Scotland by immigration officers to be able to access legal advice on the same terms as those detained by police officers; so far as these matters fall within the legislative competence of the Scottish Parliament or alter the functions of Scottish Ministers, should be considered by the UK Parliament."

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(a) of the Parliament’s Standing Orders. The Crime and Courts Bill was introduced in the House of Lords on 10 May 2012. The latest version of the Bill can be found at:

http://services.parliament.uk/bills/2012-13/crimeandcourts.html

Content of the Crime and Courts Bill

3. The main purpose of the Crime and Courts Bill will be to repeal the legislation that established the UK Serious Organised Crime Agency (SOCA) and the National Policing Improvement Agency (NPIA), and replace both agencies with the new National Crime Agency (NCA). The Bill will establish the NCA based on similar legislative provisions as SOCA currently has and Scottish Government officials have ensured that the necessary legislative safeguards that existed for SOCA’s operational activity in Scotland have been replicated in legislation to set up the NCA.

4. The Bill also seeks to introduce a new ‘drug-driving’ offence which will cover Scotland as well as England and Wales. Action in this area is reserved, but one aspect of the new offence (the power to set the drug-driving limits that will trigger the new offence) is being executively devolved to Scottish Ministers and the Scottish Government will work with UK Government in taking forward plans for the new offence.

5. The Bill will also aim to increase the transparency and efficiency of the appointments process for Justices of the UK Supreme Court, and other judicial office-holders.

6. In addition, the Bill looks to extend the range of powers afforded to immigration officers, which is largely a matter for the UK Government, as these powers will only be exercised in relation to immigration crimes. However, there are implications for the Scottish Justice system as the proposals would extend the powers of UKBA immigration officers operating in Scotland to bring their procedures into line with UKBA Customs officers and other Scottish law enforcement agencies.
7. A further consequence of these immigration changes is an amendment to Legal Aid arrangements in Scotland to ensure that those people detained by immigration officers in Scotland can access legal advice on the same terms as those detained by police officers following the Cadder judgement.

8. The Bill therefore contains provisions that fall within the legislative competence of the Scottish Parliament and extending those provisions to Scotland has made the Bill a relevant Bill for a Legislative Consent Motion under the Standing Orders of the Scottish Parliament.

Provisions which relate to Scotland

9. There are three specific aspects of the Bill that relate to Scotland and that will require the legislative consent of the Scottish Parliament. These are:

- the establishment of the National Crime Agency;
- setting the limits for and the ability to specify the controlled substances that will trigger the new drug-driving offence; and
- consequential amendments associated with the extension of the powers of UKBA immigration officers.

10. Full details of the individual clauses of the Bill that relate to Scotland and an explanation of why they require the consent of the Scottish Parliament are included at Annex A.

Reasons for seeking a Legislative Consent Motion

National Crime Agency

11. It is essential that provisions about the way in which NCA officers can operate in Scotland come into force at the same time as the National Crime Agency is created. The Crime and Courts Bill seeks to clarify the interfaces between the National Crime Agency, and both the Police Service of Scotland and Crown Office and Procurator Fiscal Service. Crime prevention and detection is devolved in Scotland, as is the investigation and prosecution of crime in Scotland, which is carried out under the direction of the Lord Advocate. It would not make sense for the devolved aspects of these interfaces to remain undefined pending legislation in the Scottish Parliament. Further, the proposed provisions relating to devolved matters in Scotland must be part and parcel of the legislation required to set up the National Crime Agency to ensure an effective response to serious and organised crime, economic crime, and child exploitation throughout the United Kingdom. Therefore, it is vital that these devolved provisions are put in place seamlessly in accordance with establishment of the NCA.

12. As crime prevention and detection and the investigation and prosecution of crime is devolved, these provisions fall within the legislative competence of the Scottish Parliament and therefore require the consent of the Scottish Parliament. These provisions also confer new functions on Scottish Ministers.
Powers of Immigration Officers/Legal Aid

13. New powers are to be afforded to immigration officers across the UK over four areas in connection with their role of investigating serious and organised immigration crime. These proposals will in effect bring the powers of UKBA immigration officers (across the UK) into line with UKBA customs officers and in certain cases into line with the criminal justice system in Scotland. It therefore appears sensible to allow these proposals to proceed to ensure a consistent and efficient approach is taken to the investigation of immigration criminality across the UK. These proposals relate to reserved matters, since the powers are only exercisable in relation to immigration/nationality offences.

14. As a consequence of these proposals, a change to the Legal Aid (Scotland) Act 1986 is also being proposed. This change will ensure that those people detained by immigration officers in Scotland will have the same right to legal advice and access to the police station duty scheme run by the Scottish Legal Aid Board as those detained by police officers following the Cadder judgement. The result of the changes to the legal aid legislation is to alter the powers of the Scottish Ministers and will require the legislative consent of the Scottish Parliament.

Drug-driving offence

15. The ability to set the drug-driving limits as part of the new drug-driving offence in Scotland will be a useful additional tool in helping to make Scotland’s roads safer with less lives being lost. The purpose of the new offence is to enable effective action to be taken without the need to prove impairment on a case-by-case basis. In line with our approach on drink-driving, it may have been preferable to devolve all responsibility relating to the creation of the new drug-driving offence, but nonetheless, having the power to set the drug-driving limits is a useful responsibility to have as part of our desire to improve road safety in Scotland. As this provision will confer new functions on Scottish Ministers, in relation to setting the limits for drug-driving (and the ability to specify the controlled substances the new offence is to apply to) in Scotland, it will require the legislative consent of the Scottish Parliament.

Consultation

16. The provisions in relation to the National Crime Agency in the Bill have been drafted following a detailed UK Government consultation process (Policing in the 21st Century: Reconnecting the Police and the People) to seek views on the establishment of the National Crime Agency – the responses to the consultation were published by the Home Office in December 2010. In addition, Scottish Government officials have considered the legal and policy implications of all aspects of the Bill and have sought the views of the Association of Chief Police Officers in Scotland (ACPOS) and for the Crown Office in producing advice on whether or not the provisions should extend to Scotland.

17. There has been no specific consultation by the UK Government on the proposed new offence for drug-driving to date. However, the UK Government have established an independent expert panel to consider the setting of the drug-driving limits, which is expected to report later in the year and the output of that group will be carefully considered by the Scottish Government before taking forward these proposals.
Financial Implications

18. No additional direct costs to the Scottish Government or any significant additional direct costs to the Scottish Criminal Justice Sector are envisaged as a result of the NCA provisions.

19. The new drug-driving offence should mean that it is easier to prosecute drug-drivers in the future, with the additional number of prosecutions depending, in part, on the levels set for the drug-driving limits. It is expected that any additional costs arising can be met from the current running costs of the Scottish justice system.

20. We anticipate only minimal impact on expenditure at the most as a result of the changes to be made to the legal aid arrangements. Currently, immigration officers arrange for Scottish police officers to detain about 100 people a year in Scotland. In future, they will be able to make these detentions themselves.

Conclusion

21. Extending the relevant provisions in the Bill to apply in Scotland will ensure that an efficient and effective law enforcement response to serious organised crime, economic crime, child exploitation and immigration crime can be throughout the United Kingdom. These are all crimes that have no respect for borders or boundaries and must be tackled across multiple jurisdictions and the proposals in the Crime and Courts Bill will seek to provide measures to address these acts of criminality. In addition, the proposals for a new drug driving offence will ensure that more effective action can be taken against irresponsible drivers who take drugs and get behind the wheel.

22. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the relevant provisions as outlined above which fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Scottish Government
May 2012
ANNEX A

CRIME AND COURTS BILL – LEGISLATIVE CONSENT MEMORANDUM

Detail on provisions which relate to Scotland

1. The following paragraphs describe the specific provisions, for which consent is sought in terms of the Legislative Consent Motion, and provide background on their application in Scotland.

Part 1 – The operation of the National Crime Agency in relation to Scotland

2. **Policy Intent:** To extend to Scotland specific provisions on how the proposed new National Crime Agency (NCA) will operate in Scotland and to ensure an optimum working relationship with the Police Service of Scotland.

3. **Background:** The Bill will establish this new Agency which will have some UK functions and some functions limited to England and Wales only. Specifically, the NCA will replace and take on all of the functions of the UK-wide Serious Organised Crime Agency (SOCA) and will also take on some of the functions previously exercised by the UK National Police Improvement Agency. In general, these provisions will mean that officers working for the NCA will continue to have a UK-wide remit. From a Scottish perspective, the proposals to establish the NCA will largely replicate the role and operational arrangements of SOCA that currently exist in Scotland. As organised crime does not respect borders and boundaries, the Bill will provide the flexibility to allow NCA officers to have an operational role in Scotland.

4. The main aspects of the Bill will therefore:
   - Require that Scottish Ministers are consulted in the process of setting the strategic priorities for the NCA, preparing the NCA’s annual report and in the preparation of an NCA framework document. In addition, the Bill creates a requirement that a copy of the annual plan and framework document must be laid in the Scottish Parliament;
   - Requires that Scottish police officers are under a general duty to co-operate with NCA officers and also allows for requests for assistance to be made by the Director General of the NCA to the Chief Constable of the Police Service of Scotland and from the Chief Constable of the Police Service of Scotland to the Director General of the NCA;
   - Require a high level agreement between the NCA and the Scottish Ministers, expressly setting out how the powers and privileges of a constable are to be exercised by NCA agents in Scotland;
   - Require that an Assistant Chief Constable (or someone of higher rank) within the Police Service of Scotland agrees with the Director General of the NCA when NCA officers can exercise the powers and privileges of a constable in Scotland in respect of a particular operation;
   - Require that any inspections of the NCA (in relation to their activities in Scotland) must only be conducted after consulting Scottish Ministers and provide that any resulting inspection may be jointly carried out between HM
Inspectorate of Constabulary and HM Inspectorate of Constabulary for Scotland; and

- Ensure that all NCA officers operating in Scotland are subject to the direction of the Lord Advocate and Procurators Fiscal as regards the investigation and prosecution of crime.

5. The provisions: Part One of the Crime and Courts Bill deals with the establishment, activities and powers of the NCA in 16 clauses. These are as follows:

Clauses 1 to 4 – The NCA and its officers

- Clause 1, along with Schedule 1 and elements of Schedule 3, will establish the NCA - consisting of NCA officers. It is to be under the direction and control of one of its officers, to be known as the Director General of the NCA. The NCA is specifically to have the function ("the crime – reduction function") of securing that efficient and effective activities to combat organised crime and serious crime are carried out. This section also imposes a function on the NCA to discharge its crime reduction function by securing improvements in co-operation between persons who carry out activities to combat organised crime or serious crime and by securing improvements in the co-ordination of activities – which will include Scottish law enforcement agencies. Although the NCA will be a UK organisation, provision has been made to ensure that it can operate alongside and in support of the Police Service of Scotland, as well as preserving the unique role of the Lord Advocate in relation to the investigation and prosecution of crime in Scotland. NCA officers will only be permitted to carry out activities in Scotland in relation to an offence which it suspects has been committed (or is being committed) with the agreement of the Lord Advocate. Finally, this section makes provision for the NCA to charge for any goods or services it provides. There is no statutory requirement for Scottish Ministers to provide a financial contribution towards the annual funding grant paid to the NCA - any such grant contribution would be the subject of separate discussion and agreement between the Home Office, the NCA and the Scottish Government. Given that the majority of the functions of investigating, preventing and combating crime are devolved to the Scottish Parliament, the provisions in section 1 which confer on the NCA functions of combating crime are, to the extent that the crime which they are tasked with combating is "devolved", a matter which the Scottish Parliament has legislative competence in respect of. As a result, legislative consent will be required.

- Clause 2, along with Schedule 16 provides the circumstances under which the Secretary of State can bring forward an order to modify or amend the functions that the NCA can perform. This section specifically provides that it would be possible in the future for the NCA to take on counter terrorism functions if a relevant order was made. In such circumstances the Secretary of State would be required undertake a consultation on any such proposals.

- Clause 3 sets out the arrangements for setting the strategic priorities of the NCA and requires the Secretary of State to determine strategic priorities for
the NCA in consultation with Scottish Ministers. This will ensure that Scottish Ministers are able to influence the priorities of the NCA as they relate to the organisations activities in Scotland. The imposition of a function on a UK Minister to consult Scottish Ministers, altering Scottish Ministers executive competence, will therefore require the legislative consent of the Scottish Parliament.

- Clause 4, along with Schedule 2 concentrates on the operational responsibilities of the Director General of the NCA and on specifying timescales and consultation arrangements as regards producing an annual plan, an annual report and a framework document for the NCA. This section requires that the annual plan, which the NCA must issue, must set out how it intends to exercise its functions in Scotland. In addition, the arrangements provide that the Secretary of State must consult (and where appropriate obtain consent of) Scottish Ministers before these documents are issued (as they relate to Scotland) and thereafter Scottish Ministers must lay a copy of the Annual Report and Framework Document before the Scottish Parliament. As this will confer new functions on Scottish Ministers, altering Scottish Ministers executive competence, this clause will require the consent of the Scottish Parliament.

Clauses 5 to 10 – Other functions etc.

- Clause 5, along with Schedule 3 sets out the relationships between the NCA and other agencies that it will work with and along side. This section provides that the Director General of the NCA may perform a task if a chief officer of a UK police force (or UK law enforcement agency) requests the DG to perform it. Accordingly, this section also allows a chief officer of a UK police force (including the Chief Constable of the Police Service of Scotland) or a UK Law Enforcement Agency to perform a task if the Director General of the NCA requests them to do so. This is essentially replicating the existing voluntary assistance arrangements that are in place between SOCA and the police forces in Scotland. In addition, this section imposes a general duty on Scottish Constables to co-operate with NCA officers; a reciprocal duty between the NCA and UK police forces on the exchange of information; provides powers for Scottish Ministers to direct the DG of the NCA to assist the Police Service of Scotland (with the UK Government’s consent); and empowers Scottish Ministers to direct the Chief Constable of the Police Service of Scotland to provide specified assistance to the NCA if it appears to be appropriate for the NCA to receive directed assistance from a Scottish Chief Constable. So far as this clause provides for co-operation and voluntary assistance between bodies for investigating and combating devolved crime, in or as regards Scotland, it is for a purpose within the Scottish Parliament's competence. As this clause also confers on Scottish Ministers powers of direction, which alters Scottish Ministers executive competence, this requires the consent of the Scottish Parliament.

- Clause 6, along with Schedule 7 provides a statutory duty for the Director General of the NCA to publish information in relation to its functions and other NCA matters (including performance information). The exact types of
information that will be published will be set out in more detail in the NCA’s Framework Document, which itself will be laid before the Scottish Parliament. The intention behind these provisions is that the NCA should be an open and transparent organisation and that the public should have access to a wide range of information about what the NCA is doing, how it is performing, its internal procedures and its current assessment of the threat from serious and organised crime. In so far as the NCA is exercising functions which are, or could be devolved, a duty to publish information about those – devolved” NCA functions is within the legislative competence of the Scottish Parliament and will require the consent of the Parliament.

• Clause 7, along with Schedule 7, sets out the arrangements for information gateways to facilitate the sharing of information with the NCA and also covers the restrictions that will be in place on the disclosure of certain types of information. These proposals will allow certain information to be disclosed to the NCA, if the disclosure is made for the purposes of the exercise by the NCA of any of its functions. This clause will enable a person to disclose information to the NCA in relation to its – devolved” functions. It would be competent for the Scottish Parliament to create an entitlement for a person to provide information to a law enforcement agency for the purposes of a devolved function conferred on such an agency, and accordingly the Scottish Parliament’s consent will be required in this area.

• Clause 8, along with Schedule 4 modifies various aspects of the law in England and Wales and allows the Director General of the NCA to provide assistance to overseas Governments. In addition, this section creates new offences of assaulting or obstructing a member of an NCA-led international joint investigation team. In Scotland, the penalty for committing such an offence would be up to a maximum of 12 months imprisonment and/or a fine (not exceeding level 5 for assault and not exceeding level 3 for obstruction). Creating such offences would be within the Scottish Parliament’s legislative competence in so far as it applies to any member exercising functions in relation to devolved crime, in or as regards Scotland. The consent of the Scottish Parliament will therefore be required for this provision.

• Clause 9, along with Schedule 5 provides the Director General of the NCA, in relation to any customs matter, the same powers as the Commissioners of HM Revenue and Customs and allows the Secretary of State to designate the Director General of the NCA as a person having the powers and privileges of a constable (in England and Wales), the powers and privileges of an officer of Revenue and Customs and the powers and privileges of an immigration officer. The consent of Scottish Ministers is not required before these powers can be designated because these relate to legislation which is reserved to the UK Parliament. However, under Schedule 5 of the Bill, all NCA officers (including the Director General) will, where appropriate, be subject to the role of the Lord Advocate and the procurator fiscal in the same way that the police in Scotland are. The Bill does not allow for the Director General of the NCA to be given the powers of a constable in Scotland (or in Northern Ireland) as there appeared to be no sound operational rationale for the DG to have these powers in the devolved administrations. The powers of a Revenue and
Customs Officer and an immigration officer are to be exercised in relation to reserved matters and therefore will not require the consent of the Scottish Parliament.

- Clause 10, along with Schedule 5 sets out the arrangements that cover the operational powers of NCA officers. This section permits the Director General of the NCA to designate any other NCA officer as a person having police powers and privileges of a constable - in Scotland this will provide them with all the powers and privileges of a Scottish constable. As policing is devolved in Scotland, before such powers can be conferred upon a member of the NCA, certain conditions must be met. These arrangements have been carefully constructed to ensure that the powers and privileges of a Scottish constable are only exercisable by NCA officers if a —Scottish general authorisation” or a —Scottish operational authorisation” is in force. A —Scottish general authorisation” requires agreement between Scottish Ministers and the Director General about the exercise of the powers and privileges of Scottish constables by NCA officers and a —Scottish operational authorisation” requires agreement between a Scottish constable above the rank of Assistant Chief Constable and the DG about the exercise of the powers and privileges of Scottish constables in relation to a specific operation. In addition, this section also sets out that any NCA officer with the powers of a constable in Scotland must comply with any instructions given by the Lord Advocate or a Procurator Fiscal in relation to the investigation of offences. Finally, a range of new offences are also contained within this section to create offences of impersonating an NCA officer; resisting or wilfully obstructing an NCA officer; and assaulting an NCA officer. The Bill proposes that as a consequence of committing such an offence in Scotland would be that the person would be liable for a sentence of up to 12 months and/or a fine (up to level 3 for obstructing and up to level 5 for assault or impersonation). The authorisation provisions confer functions on Scottish Ministers (and the Police Service of Scotland). This alters Scottish Ministers’ executive competence and will require the consent of the Scottish Parliament. Also, the offences provisions above would be within the Scottish Parliament’s legislative competence in so far as they apply to any member exercising functions in relation to devolved crime, in or as regards Scotland. The consent of the Scottish Parliament will therefore be required for these provisions.

Clause 11 to 16 – General

- Clause 11, along with Schedule 6 covers the inspection and complaints arrangements for the NCA. This section provides that before requesting any inspection into the NCA that would fall to be carried out wholly or partly in Scotland, the Secretary of State must consult Scottish Ministers and thereafter HM Inspectorate of Constabulary must consult HM Inspectorate of Constabulary for Scotland to decide whether or not to carry out such an inspection jointly with Scottish inspectors. Following any inspections of this type, the Secretary of State must provide Scottish Ministers with a copy of the published report and a copy of the response that the Director General produces to any such reports must also be provided to Scottish Ministers. As these provisions impose a function on a UK Minister to consult Scottish
Ministers, which alters the Scottish Ministers’ executive competence. They will therefore require the legislative consent of the Scottish Parliament.

- Clause 12, along with Schedule 7 contains a range of detailed provisions relating to the restrictions on disclosure of information by NCA officers – including information obtained from HM Revenue and Customs, personal customs information, personal revenue information, social security information and intelligence service information. These provisions also cover the interaction between NCA officers and Scottish Ministers, and NCA officers and the Lord Advocate in relation to information connected to Part 3, 5 and 6 of the Proceeds of Crime Act 2002. The section also sets out the circumstances under which information disclosed by an NCA officer to the Lord Advocate can be further disclosed. The section also proposed that an offence of wrongful disclosure of information which breaches a list of duties outlined in Schedule 7 would be liable for punishment of a sentence of up to 12 months and/or a fine (not exceeding the statutory maximum) in Scotland. As this provision could relate to information concerning devolved matters (e.g. proceeds of crime relating to devolved crime), these provisions are within the Scottish Parliament’s legislative competence and will therefore require the consent of the Scottish Parliament.

- Clause 15, along with Schedule 8 abolishes the existing UK Serious Organised Crime Agency (SOCA) and the National Police Improvement Agency – as the majority of the functions of these organisations will either transfer into the NCA or be taken on by other existing UK Government bodies. As a result of abolishing these two bodies, a number of consequential amendments to Scottish legislation are being proposed, largely to replace the names of the abolished bodies with terminology to cover the new National Crime Agency. The amendments also seek to add NCA officers to the list of individuals that are excused from jury duty in Scotland. These transitional/consequential amendments are within the Scottish Parliament’s legislative competence to the extent that they apply to devolved matters and the consent of the Scottish Parliament will therefore be required for these provisions.

Part 3 – Miscellaneous and general

6. **Policy Intent:** To provide new powers to immigration officers across the UK and to create a new proposed drug-driving offence for driving or being in charge of a motor vehicle with the concentration of a controlled drug above the specified limit.

7. **Background:** The Bill will seek to strengthen the enforcement powers of immigration officers of the UK Border Agency (UKBA) – these specific matters will be reserved and therefore are the responsibility of the UK Government. As a consequence of these proposals, an amendment to the Legal Aid (Scotland) Act 1986 is being proposed. This amendment will ensure that those people detained by immigration officers in Scotland can access legal advice on the same terms as those detained by police officers following the Cadder judgement and the subsequent Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. A Section 104 Order taken forward in 2011 has already
extended these rights in Scotland in respect of HMRC detentions and UKBA detentions carried out by customs officials.

8. The Bill also seeks to introduce a new —drug driving— offence which will cover Scotland as well as England and Wales. It is currently an offence to drive while being impaired due to drugs, but this requires prosecutors to demonstrate impairment of the driver to prove the offence. The purpose of the new offence is to enable effective action to be taken without the need to prove impairment on a case by case basis. The Bill will confer on Scottish Ministers executive competence to make regulations in an area where legislative competence continues to be reserved. The Scotland Bill has devolved the power for the Scottish Ministers to set the drink driving limit while leaving all other aspects of the drink driving offence (e.g. penalties for the offence) still within the responsibility of the UK Government - the new drug driving offence is proposed to operate in exactly the same way. Scottish Ministers will carefully consider how we will take forward plans to establish drug driving limits in Scotland, and will wish to consider the report and recommendations on drug-driving of the UK Government’s expert panel that has been established to look at the detail of this proposal.

9. The provisions: Part Three of the Crime and Courts Bill deals with matters relating to immigration, border control and drug-driving in four clauses. The relevant clauses are as follows:

Clauses 24 to 26 – Border control

- Clause 26, along with Schedule 14 provides for the extension of the powers of UKBA immigration officers to bring their powers into line with UKBA customs officers. This section sets out the new powers which will allow immigration officers: to undertake intrusive covert investigations; to undertake proceeds of crime investigations into immigration crimes; to detain suspects and obtain common law search warrants in Scotland; and to have cross-border powers of arrest. These proposals relate to reserved matters, since the powers are only exercisable in relation to immigration/nationality offences. However, the consequential amendments to the Legal Aid (Scotland) Act 1986 alter the Scottish Ministers’ executive competence (in relation to their regulation making power under that Act) and will therefore require the consent of the Scottish Parliament.

Clause 27 – Drugs and Driving

- Clause 27, along with Schedule 15 sets out a new offence of driving, or being in a charge of, a motor vehicle with concentrations of specified controlled substances in excess of specified levels. This section provides Scottish Ministers with the power to make regulations that will both specify the controlled substances the new offence is to apply to, and set the applicable limit for each. Scottish Ministers will carefully consider the report and recommendations of the UK Government’s expert panel that has been established to look at this matter before making any final decisions in this area. Any resulting regulations from these proposals will have to be brought before the Scottish Parliament for scrutiny and debate. As this provision will
confer new functions on Scottish Ministers it will require the legislative consent of the Scottish Parliament.
Annexe 2

Written submissions on the LCM

Response from the Scottish Police Federation

Thank you for the opportunity to comment on the above.

The SPF agrees with the proposed changes in the Law relative to the National Crime Agency; Scottish Ministers setting limits for and specifying controlled substances that will trigger a new drug-driving offence, and the amendments relating to the UKBA.

The SPF further agrees that it is appropriate that aspects of NCA are legislated upon by the UK Parliament and that Scottish Ministers be given new powers to set parameters of the new drug-driving offence.

Calum Steele
General Secretary
12 June 2012

Response from the Scottish Legal Aid Board

The Scottish Legal Aid Board (the Board) was set up in 1987 to manage legal aid in Scotland. Legal aid allows people who would not be able to afford it to obtain help for their legal problems. The Board is an independent non-departmental public body responsible to the Scottish Government. The Board’s general functions are to secure the availability of legal aid and advice and assistance, to manage the Legal Aid Fund, and to monitor the availability and accessibility of legal services in Scotland.

The Board welcomes the opportunity to comment on the Legislative Consent Memorandum on the UK Crime and Courts Bill, as one of the consequential amendments associated with the extension of the powers of UKBA Immigration officers may have a marginal impact on legal aid.

Advice and assistance can be provided to suspects who are detained for questioning in a Scottish police station. The Board has responsibility for ensuring that a suspect detained for questioning in a police station has access to legal advice when required. In order to satisfy this responsibility we have set up a police station duty scheme, and run a Solicitor Contact Line which provides continual 24 hour a day, 7 days a week cover to provide legal advice to suspects being questioned in police custody. Advice to suspects is currently being given by telephone or by a personal attendance where this is requested by the suspect. At present, the average cost of providing legal advice to suspects is around £60. Where a personal attendance is required, the average cost to the Board is around £200.

We understand that this new legislation will amend the Legal Aid (Scotland) Act 1986, and the associated regulations, to ensure that people who are detained by immigration officers in Scotland have the same right to advice and access to a solicitor as those detained by police officers. We expect that this will only have a minimal impact on legal aid, as we understand that previously the police detained
suspects on behalf of immigration officers in these situations. The new arrangements
do not appear to change the substantive procedures for which advice and assistance
and legal aid are available.

When immigration officers have the power to detain suspects themselves, there may
be added costs to the Board depending on where the person is detained if these
locations differ from police stations, for example airports or sea ports. This may add
to the travelling costs associated with solicitors attending with suspects in these
locations, where requested to do so. One way of trying to reduce these costs would
be to take account of these changes in the development of video conferencing
facilities for the provision of legal advice in these cases.

The Board has no specific comments to make on the setting up of a National Crime
Agency or whether it would be appropriate for these provisions in the Crime and
Courts Bill to be legislated upon by the Scottish Parliament as opposed to the UK
Parliament.

Similarly, the Board has no specific comments to make on whether it would be
appropriate for Scottish Ministers to be given new powers to set the parameters of
any new drug driving offence.

14 June 2012

Response from the Association of Chief Police Officers in Scotland

I refer to your correspondence dated Wednesday 30 May 2012, requesting comment
on the Legislative Consent Motion (LCM) lodged by the Cabinet Secretary for Justice
in relation to the UK Crime and Courts Bill and can confirm that this has been
considered by Crime and Roads Policing Business Areas and can offer the following
by way of comment.

Within your correspondence three aspects of the UK Crime & Courts Bill have been
highlighted as presenting significant impact for Scotland, these are; the overall
creation of the National Crime Agency (NCA), provisions for the creation of a new
drug-driving offence and provisions to allow persons detained in Scotland by
Immigration officers to be able to access legal advice on the same terms as those
detained by police officers. Each of these will be considered separately.

National Crime Agency

The provisions contained within the UK Crime & Courts Bill, in so far as they relate to
the relationships between the Police Service of Scotland and the NCA present no
significant issues. ACPOS believe that the development of the UK Crime & Courts
Bill and the establishment of the NCA should be viewed as an enabler through which
to enhance the capability and capacity of law enforcement in Scotland. However,
appropriate governance should be considered by the UK Parliament for the relevant
provisions that fall within the legislative competence of the Scottish Parliament.

The National Police Reform Team Crime Project is currently engaging closely with
the newly appointed head of the NCA, Chief Constable Keith Bristow, as well as
attending related workshops and seminars, to ensure future close operating links with the Specialist Crime Directorate of the new Police Service of Scotland.

**Drug driving offences**

ACPOS would be supportive of a change to the law which will make the enforcement of drug driving easier than the current practice we presently utilise. The current law requires that drivers need to be considered as unfit to drive through drug use. This is a very subjective offence and open to interpretation by individual officers which undoubtedly means that some impaired drivers may slip through the net. By making defined limits in terms of the amount and types of drugs which may be ingested officers will be permitted to test drivers on mere suspicion alone in a similar vein to the current drink driving procedures.

ACPOS is aware of many instances where officers have been convinced a driver has been impaired but by the time a police surgeon has come to examine that person they are no longer impaired and therefore the offence is incomplete. If officers were given the opportunity to test these persons through hand held devices and thereafter station devices there would not be these delays and resultant loss of cases.

To the best of ACPOS knowledge there is no device on the market at this moment in time which will test the amount of drugs taken, they only test for the type of drug which has been taken. A reliable device is required which can carry out both the identification and levels of a drug present in a person’s system. Until this device is made it may be the case that a piece of legislation is introduced which the police are not able to use immediately.

In terms of finance, at present most Scottish Police Forces pay police surgeons to attend at police offices to examine drug drivers prior to obtaining a specimen of blood if thought appropriate. There is a considerable cost involved in this. If Scottish Police were able to obtain a HOTA drug testing device which was able to tell the type of drug and measure the amount of same in their bloodstream there would be a significant cost saving. The initial investment would be substantial in the purchase of the devices and training of officers but this initial investment would be recouped in time through a drop in police surgeon call outs and subsequent examinations.

By giving Scottish Ministers the power to set the parameters for the offence it would be an excellent example of forward thinking and would allow the Scottish Ministers to give police officers the technical support they require to detect and report drug drivers.

**Immigration provisions**

With regards to the immigration provisions contained within the UK Crime & Courts Bill, ACPOS acknowledge and support the proposals to extend the powers afforded to immigration officers across the UK in connection with their role of investigating serious and organised immigration crime. The new powers will allow immigration officers to undertake intrusive covert investigations, proceeds of crime investigations into immigration crimes, detain suspects; in terms of Section 24 of the Criminal Law (Consolidation) (Scotland) Act 1995, obtain common law search warrants in Scotland and have cross-border powers of arrest.
The extension of immigration powers will provide for a more consistent and transparent approach to be taken in relation to the investigation of immigration crime throughout the UK however, notwithstanding the clear benefits that will be borne from these enhancements, robust local multi agency coordination will be required to minimise the potential for conflicts of interest between multi agency investigations.

ACPOS also acknowledge that the implementation of these provisions will require amendments to be made the Legal Aid (Scotland) Act 1986. In general terms and in the interests of legal and moral fairness the amendment of the Legal Aid (Scotland) Act 1986 to allow for the proposed provisions of the Crime & Courts Bill would be the correct course of action. However, ACPOS also believe that this is a matter that should be left to Scottish Government to decide upon.

To conclude, whilst there are some aspects of the provisions contained within the UK Crime & Courts Bill that will have an impact upon some devolved administration legislation, overall ACPOS believe it can been seen to provide additional support to Scotland to continue to address the threats posed by serious crime.

Extending the relevant provisions in the UK Crime & Courts Bill to apply in Scotland will also ensure that an efficient and effective law enforcement response to serious organised crime, economic crime, child exploitation and immigration crime can be employed throughout the United Kingdom.

I trust that the foregoing information is of assistance however, should you require any further information please do not hesitate to contact me.

Ruaraidh Nicolson QPM
Assistant Chief Constable
Secretary Crime Business Area
14 June 2012
Annexe 3

Subordinate Legislation Committee’s report on the Legislative Consent Memorandum on the Crime and Courts Bill (35th Report 2012)

The Committee reports to the Parliament as follows—

1. At its meeting on 12 June 2012, the Committee considered the provisions in the Crime and Courts Bill3 (“the Bill”) that confer on the Scottish Ministers powers to make subordinate legislation.

2. A Legislative Consent Memorandum (“LCM”)4 has been lodged in relation to the Bill. The draft of the motion lodged by the Cabinet Secretary for Justice is:

   —that the Parliament agrees that the relevant provisions of the Crime and Courts Bill, introduced in the House of Lords on 10 May 2012, relating to the establishment of the National Crime Agency; provisions for a new drug-driving offence; and to allow those detained in Scotland by immigration officers to be able to access legal advice on the same terms as those detained by police officers; so far as these matters fall within the legislative competence of the Scottish Parliament or alter the functions of Scottish Ministers, should be considered by the UK Parliament.”

3. Under rule 9B.3.6 of Standing Orders, where the Bill that is the subject of an LCM contains provisions that confer on the Scottish Ministers powers to make subordinate legislation, the Subordinate Legislation Committee shall consider and may report to the lead committee on those provisions.

4. As with bills passed by the Scottish Parliament, the Committee considered whether it is appropriate in principle for the power to be delegated to the Scottish Ministers, whether the terms of the power are appropriately drawn and whether the level of scrutiny applied to the exercise of the power is appropriate.

5. A Delegated Powers Memorandum for the full Bill is also available on the United Kingdom Parliament website5.

Crime and Courts Bill

6. The Crime and Courts Bill is a substantial Bill of 31 sections and 16 detailed Schedules. It provides for the establishment of the National Crime Agency (“NCA”) as a replacement for the Serious Organised Crime Agency and the National Policing Improvement Agency, and their consequent abolition. It also makes provision for the restructuring of the county courts, the establishment of a family court and the deployment of the judiciary in England and Wales. It further makes miscellaneous

3 The latest version of the Bill is available at: http://services.parliament.uk/bills/2012-13/crimeandcourts.html
4 LCM on the Crime and Courts Bill. Available at: http://www.scottish.parliament.uk/LegislativeConsentMemoranda/CrimeandCourtsBillLCM.pdf
provision about immigration, and creates a new offence in relation to driving after having consumed controlled drugs.

7. The Bill delegates three powers to the Scottish Ministers.

8. Clause 27 inserts a new section 5A into the Road Traffic Act 1988 (the 1988 Act), and section 5A(8) enables the Scottish Ministers – in relation to Scotland – to specify the limits for and the controlled drugs which will trigger the new offence. The equivalent power for England and Wales is conferred on the Secretary of State.

9. Secondly, paragraph 27 of Schedule 5 confers a power on the Scottish Ministers to make further provision in consequence of the Director General of the NCA having the same powers in relation to customs matters as the Commissioners for Her Majesty’s Revenue and Customs have, or in consequence of designated NCA officers having operational powers (including the powers and privileges of a constable).

10. Finally, paragraph 28 of Schedule 5 confers a further power on the Scottish Ministers, in this case to provide for the functions of third parties towards constables, police forces, officers of Revenue and Customs, the HMRC Commissioners or immigration officers to be extended to the NCA.

11. Although the power in clause 27 is dealt with in the LCM, the two powers in Schedule 5 are not. The Committee notes that the DPM provided by the Home Office and the Ministry of Justice to the UK Parliament provides further information on these powers, but considers that it would have been helpful if the LCM had addressed these provisions, in particular in relation to their exercise in the devolved context.

Powers to make subordinate legislation

Clause 27: Drugs and driving (inserts new section 5A of the Road Traffic Act 1988)

12. Clause 27 inserts a new section 5A (Driving or being in charge of a motor vehicle with concentration of specified controlled drug above specified limit) into the 1988 Act. Section 5A creates offences of driving or attempting to drive a motor vehicle, or being in charge of a motor vehicle while having in one’s body a specified controlled drug in excess of the specified limit for that drug. “Controlled drug” has the same meaning as in the Misuse of Drugs Act 1971. The offences only apply to specified controlled drugs, and then only when the proportion of that drug in blood or urine exceeds the specified limit for that drug.

13. Section 5A(8) contains a definition of “specified”. It means specified in regulations which are made by the Secretary of State (in England and Wales), and by the Scottish Ministers (in Scotland). Accordingly, section 5A of the 1988 Act, as inserted by clause 27, confers power on the Scottish Ministers to specify the controlled drugs to which the section 5A offences will apply in Scotland, and to specify the limits for each drug so specified.

14. The Committee observes that the offence created in section 5A is analogous to the drink-driving offences presently contained in the 1988 Act. It observes that this provision appears to be intended to give the Scottish Ministers similar powers in
relation to drug-driving offences as they will have in relation to drink-driving offences when section 20 of the Scotland Act 2012 is brought into force. The Committee considers delegation of this power to be acceptable in principle.

15. The Committee also takes the view that regulations made under this power are of a substantive and significant nature, as they will specify the controlled drugs to which these new offences applies, and the limits in relation to each of those drugs. It accordingly agrees that the affirmative procedure is appropriate.

16. The Committee therefore reports that it considers this power to be acceptable in principle, and that it is content that it is subject to the affirmative procedure.

Schedule 5, paragraph 27: Power to make further provision

17. Paragraph 27 of Schedule 5 confers a power on the “relevant national authority” to make such further provision as it considers appropriate in consequence of the director general of the NCA having the same powers in relation to customs matters as the Commissioners for Her Majesty’s Revenue and Customs (“the HMRC Commissioners”) have, or in consequence of designated NCA officers having operational powers (including the powers and privileges of constable).

18. Paragraph 30 defines the “relevant national authority” as being the Scottish Ministers in relation to Scottish devolved provision, and “Scottish devolved provision” is defined as provision that would be within the legislative competence of the Scottish Parliament. There is, however, an exception in relation to provision providing for a class of NCA officers to be treated as the equivalent to one or more ranks, grades or pay scales in a UK police force, the Revenue and Customs or immigration officers. Accordingly, the Scottish Ministers may not make provision under paragraph 27 for those purposes, even if the matter would otherwise be within devolved competence.

19. The Scottish Ministers have failed to address this power specifically in their LCM. Schedule 5 in general is discussed on page 9, but that discussion does not appear to touch on this power. On the whole, it appears to the Committee that Schedule 5 provides for the extension of the powers of other law enforcement agencies to the NCA (for example, the powers in relation to customs matters enjoyed by the HMRC Commissioners). An “operational power” is any power or privilege of a constable, a power of an officer of Revenue and Customs, or a power of an immigration officer.

20. If these powers are to be extended to NCA officers or its director general, the Committee can in principle see why it might be necessary to make consequential provision as to how that extension is to work. As an example, the Home Office and the Ministry of Justice, in the Delegated Powers Memorandum which they provided to the UK Parliament, refer to the need for certain forms of surveillance under the Regulation of Investigatory Powers Act 2000 to be authorised by a police officer of at least the rank of superintendent. They indicate that this provision would need to be modified so that NCA officers of equivalent seniority could also provide authorisation. The Committee can envisage similar consequential provision being required within devolved competence, particularly should NCA officers have conferred on them any power or privilege of a Scottish constable.
21. The Committee considers that it would have aided its scrutiny had the Scottish Ministers explained why they considered it appropriate to take the power within that devolved context, and that it would have been helpful had the Ministers indicated how they might use it. However, it takes the view that the power itself is not exceptionable, and it appears to be reasonable to take such a power to make consequential provision when it is not clear (and may not be for some time) exactly which operational powers are to be extended to NCA officers. The Committee considers that, were the power not granted, there would be a risk that existing powers could not be extended to NCA officers without some form of adjustment which would then require further primary legislation. The Committee accordingly finds this power acceptable in principle.

22. An order made by the Scottish Ministers under this power is to be subject to the affirmative procedure if it amends or repeals any provision of primary legislation, and is otherwise subject to the negative procedure. The Committee notes that this reflects the fact that this power enables the Ministers, within devolved competence, to amend primary legislation including Acts of Parliament and Acts of the Scottish Parliament.

23. The Committee therefore reports that it considers this power to be acceptable in principle, and that it is content that it is subject to the affirmative procedure when used to amend or repeal primary legislation, and otherwise to the negative procedure.

Schedule 5, paragraph 28: Functions of third parties relating to constables etc: extension to NCA

24. Paragraph 28 of Schedule 5 confers a further power on the relevant national authority, in this case to provide for the functions of third parties towards constables, police forces, officers of Revenue and Customs, the HMRC Commissioners or immigration officers to be extended to the NCA too. As before, the Scottish Ministers are the relevant national authority in relation to Scottish devolved provision.

25. Again, this power is not addressed in the LCM. As before, it appears to be connected to the general extension of powers to the NCA, although the emphasis here is different as this concerns the functions of third parties exercisable in relation to one of the specified law enforcement agencies. The Committee has been able to derive some assistance on the purpose of this power from the DPM prepared by the Home Office and the Ministry of Justice. It indicates that third parties may have functions as regards the HMRC Commissioners, constables, officers of Revenue and Customs or immigration officers, and that these functions are distinct from the powers dealt with by paragraph 27. By way of example, the DPM cites section 106(1) of the Postal Services Act 2000, which allows a postal operator to detain a postal packet suspected of containing contraband and to forward it to the HMRC Commissioners (who may then exercise various powers of their own in relation to it).

26. The Committee can see that circumstances could arise where it would be desirable that functions of a third party should be exercisable as regards the NCA in the same way that they are currently exercisable as regards other law enforcement agencies. Were an order-making power not taken, it appears that further primary legislation would be required and this is not considered to be a good use of
parliamentary resources, particularly as the intention appears to be that the extension of functions should be exercised on a case-by-case basis.

27. The Committee considers that it would have aided its scrutiny had the Scottish Ministers explained why they considered it appropriate to take the power within a devolved context, and that it would have been helpful had the Ministers indicated how they might use it. However, on the information available via the DPM provided to the UK Parliament, the Committee considers that similar considerations might apply in the devolved context. The Committee accordingly finds this power acceptable in principle.

28. An order made by the Scottish Ministers under this power is to be subject to the affirmative procedure if it amends or repeals any provision of primary legislation, and is otherwise subject to the negative procedure. Again, the Committee is content that this is appropriate.

29. **The Committee therefore reports that it considers this power to be acceptable in principle, and that it is content that it is subject to the affirmative procedure when used to amend or repeal primary legislation, and otherwise to the negative procedure.**

30. **As the Committee has noted, the LCM contains no information regarding the powers delegated to the Scottish Ministers by paragraphs 27 and 28 of Schedule 5. It considers that its scrutiny would have been aided had the Scottish Ministers addressed these powers in their LCM. Accordingly, it draws this matter to the attention of the lead committee.**
Introduction

The Crime and Courts Bill was introduced in the House of Lords on 10 May 2012. The second reading debate on the Bill was held on 28 May. Committee stage within the House of Lords is scheduled for 18 June.

A House of Lords Library Note (May 2012) on the Bill indicates that:

“The Crime and Courts Bill 2012–13 is wide-ranging in scope and application. Part 1 of the Bill makes provision for a new organisation to be established to fight organised crime, the National Crime Agency, which will also take a leading role on economic crime, border security, cyber crime and the protection of children. Part 2 provides for reform of the system of judicial appointments, for the streamlining of the courts system, and for the broadcasting of court proceedings from the Court of Appeal. Part 3 contains provisions for strengthening attempts to combat drug driving, enhancing the powers of immigration officers and the reform of some aspects of the immigration appeals system, and on community sentencing.” (p 1)

The relevant Scottish Government Legislative Consent Memorandum (May 2012) identifies three areas where the Bill deals with devolved matters or seeks to confer functions on the Scottish Ministers:

- provisions establishing the National Crime Agency (Part 1 of the Bill)
- provisions extending the powers of the Scottish Ministers in relation to the availability of criminal legal assistance to reflect proposed new powers of UK Border Agency immigration officers (Part 3 of the Bill)
- provisions conferring powers on the Scottish Ministers in relation to a new drug-driving offence (Part 3 of the Bill)

The above areas are considered further below.

The Explanatory Notes published along with the Bill provide further information on what aspects of the Bill do, or do not, deal with devolved issues:
“With the exception of certain provisions in Part 2 which extend to England and Wales only and clause 27 and Schedule 15 (drugs and driving) which extend to Great Britain, the Bill extends to the whole of the United Kingdom. In relation to Wales the provisions relate to non-devolved matters. In relation to Scotland and Northern Ireland the Bill addresses both devolved and non-devolved matters.

The following provisions in the Bill which extend to Scotland relate to matters which are reserved or otherwise not within the legislative competence of the Scottish Parliament:

- The amendments to the Constitutional Reform Act 2005 providing for a maximum full-time equivalent number of Supreme Court judges rather than a fixed number (clause 18 and Part 1 of Schedule 12);
- The amendments to the Constitutional Reform Act 2005 in respect of the procedure for judicial appointments (clause 18 and Part 4 of Schedule 12);
- The provisions in respect of the flexible deployment of judges and members of tribunals (clause 19 and Schedule 13);
- The creation of an information gateway (clause 21);
- The removal of appeal rights in respect of applicants for family visit visas (clause 24);
- The removal of the in-country right of appeal in exclusion cases (clause 25);
- The extension of the enforcement powers of immigration officers (clause 26 and Schedule 14);
- The creation of a specific offence of drug driving (clause 27 and Schedule 15); and
- Consequential amendments of references to the courts of England and Wales (Schedules 9 to 11).

In addition, the provisions in Part 1 of the Bill relate to a mix of reserved and devolved matters.” (paras 45-47)

National Crime Agency

Part 1 (clauses 1 to 16) of the Bill (as introduced) seeks to establish a new National Crime Agency (NCA). Pages 1 to 11 of the House of Lords Library Note provide relevant information. The note states that:

“The preamble to the Home Office strategy document „The National Crime Agency: A Plan for the creation of a national crime-fighting capability“ (June 2011) (hereafter referred to as the „NCA national plan“) argues that the current approach to tackling organised crime in the UK has been both „patchy“ and „fragmented“. It contends that no single body has effective oversight of the national and cross police force threats from serious and organised criminality, or how operational assets to counter those threats are being deployed. There is also no national body with a sufficiently
strong focus on operational crime-fighting, or able to resolve differing priorities and determine how best to deploy resources.

Consequently, as announced in the Home Office publication „Policing the 21st Century“ in 2010, the Government plans to close the Serious Organised Crime Agency (SOCA). In its place, a new National Crime Agency (NCA) will be created, tasked with dealing with the threat of organised crime, providing national tasking and co-ordination of police assets, and strengthening border policing and enhancing national security.” (p 1-2)

The note goes on to provide information on the NCA’s role in relation to the following areas (each led by a separate unit or command within the NCA):

- organised crime – it will be responsible for a unified national response on organised crime; leading relevant operations and coordinating resources from a range of forces and national agencies
- border policing – it will seek to address cross-border criminal activity; “driven by a „single, coherent“ border strategy based on a multi-agency assessment of border related threats” (p 4)
- economic crime – it will be responsible for ensuring a coherent approach to tackling such crime across a range of agencies
- child exploitation and online protection – “The Child Exploitation and Online Protection Centre (CEOP) was established in 2006. Tasked with the protection of children from sexual abuse, it is currently an affiliated unit with operational independence from SOCA, but accountable to the Board of the Agency through a committee. (…) The Crime and Courts Bill would see CEOP brought within the auspices of the National Crime Agency. The Government argue that this move will allow CEOP to co-ordinate with the other Commands to ensure that children are better protected from a range of potential threats.” (p 5)
- cyber-crime – it will house the national cyber-crime unit, which the UK Government sees as “support[ing] the work of the entire NCA, whilst focusing on organised crime groups operating online” (p 6)

In its Legislative Consent Memorandum, the Scottish Government argues that:

“It is essential that provisions about the way in which NCA officers can operate in Scotland come into force at the same time as the National Crime Agency is created. The Crime and Courts Bill seeks to clarify the interfaces between the National Crime Agency, and both the Police Service of Scotland and Crown Office and Procurator Fiscal Service. Crime prevention and detection is devolved in Scotland, as is the investigation and prosecution of crime in Scotland, which is carried out under the direction of the Lord Advocate. It would not make sense for the devolved aspects of these interfaces to remain undefined pending legislation in the Scottish Parliament. Further, the proposed provisions relating to devolved matters in Scotland must be part and parcel of the legislation required to set up the National Crime Agency to ensure an
effective response to serious and organised crime, economic crime, and child exploitation throughout the United Kingdom. Therefore, it is vital that these devolved provisions are put in place seamlessly in accordance with establishment of the NCA.

As crime prevention and detection and the investigation and prosecution of crime is devolved, these provisions fall within the legislative competence of the Scottish Parliament and therefore require the consent of the Scottish Parliament. These provisions also confer new functions on Scottish Ministers.” (p 2)

**Immigration Officers**

Clause 26 of the Bill (as introduced) seeks to strengthen the investigatory powers of customs officials and immigration officers within the UK Border Agency. The relevant UK Government [Impact Assessment](April 2012) provides the following information:

“Investigatory powers of immigration officers

The UK Border Agency has evolved significantly as an independent law enforcement agency. There are a number of areas that need legislative amendments to equalise the powers available to customs officials and immigration officers within the UK Border Agency crime teams that this Bill will deliver. Following the Supreme Court in Cadder v HMA, fast-track legislation was passed in Scotland in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. These provisions have been incorporated into customs detention but this Bill will make the equivalent provision in respect of immigration detention.

**Rationale**

The amendments will enable the UKBA to act as an independent law enforcement agency and also to ensure that the UKBA can act across jurisdiction and align its powers in Scotland to their criminal justice system. The UK Border Agency needs to be in a position where it is not reliant on other law enforcement agencies to provide assistance due to a lack of relevant powers.

There are four key areas that we are requiring legislative amendments:

1. **RIPA/Police Act**
   The Bill will extend access to the more intrusive covert investigative techniques under RIPA\(^1\) and Part 3 of the Police Act 1997 to those within UK Border Agency responsible for the investigation of serious and/or organised immigration crime.

2. **Cross Border Powers of Arrest**
   The Bill will provide for cross border powers of enforcement contained within the Criminal Justice and Public Order Act 1994 [to be] available to immigration officers. This will ensure that they can deal independently with suspects wanted for offences in different jurisdictions across the

United Kingdom, without over reliance on other law enforcement agencies.

3. Scotland
Provisions will create the necessary legislative change that is required to enable immigration officers to investigate crime effectively in the context of the Scottish criminal justice system and to facilitate lawful and efficient joint working between the relevant law enforcement agencies that operate within it. The Bill will provide immigration officers with the power of detention, access to common law warrants and alignment of powers to the Scottish criminal justice system.

4. POCA\(^2\) – The Bill will enable immigration officers to:
   a) exercise freestanding money laundering, confiscation and cash detention investigations;
   b) seize, detain and seek the forfeiture of cash just as customs officers can currently;
   c) take advantage of the provisions to be inserted into POCA in due course by Part 5 of the Policing and Crime Act 2009 (which strengthened the powers to seize and confiscate the proceeds of crime).” (p 6-7)

In its Legislative Consent Memorandum, the Scottish Government indicates that the Bill:

   “provides for the extension of the powers of UKBA immigration officers to bring their powers into line with UKBA customs officers. [It] will allow immigration officers: to undertake intrusive covert investigations; to undertake proceeds of crime investigations into immigration crimes; to detain suspects and obtain common law search warrants in Scotland; and to have cross-border powers of arrest.” (p 12)

It states that the proposals “relate to reserved matters, since the powers are only exercisable in relation to immigration/nationality offences” (p 3), but goes on to note that:

   “As a consequence of these proposals, a change to the Legal Aid (Scotland) Act 1986 is also being proposed. This change will ensure that those people detained by immigration officers in Scotland will have the same right to legal advice and access to the police station duty scheme run by the Scottish Legal Aid Board as those detained by police officers following the Cadder judgement. The result of the changes to the legal aid legislation is to alter the powers of the Scottish Ministers and will require the legislative consent of the Scottish Parliament.” (p 3)

The relevant provisions are set out in paragraph 50 of Schedule 14 of the Bill (consequential amendments relating to legal aid in Scotland).

Drug Driving Offence

Clause 27 of the Bill (as introduced) seeks to insert a new section 5A into the Road Traffic Act 1988. The section would create an offence of driving or being in charge of a motor vehicle with a concentration of a specified controlled drug above a specified limit.

The new offence, which would extend to Scotland, deals with a reserved matter. However, in relation to Scotland, the Scottish Ministers would be given the power to specify in regulations both the controlled drugs covered by the offence and the limits above which an offence is committed. It is in relation to this extension of the powers of the Scottish Ministers that the consent of the Scottish Parliament is sought (not the creation of the actual offence).

Pages 23 to 27 of the House of Lords Library Note provide information relevant to the proposal for a new offence. The note indicates that:

“It is already an offence (under section 4 of the Road Traffic Act 1988) to drive whilst impaired by drugs (or alcohol). However, unlike the existing offence, the new provision in the Crime and Courts Bill (to be inserted alongside the existing offence in the 1988 Act) will not require proof of impairment. The Explanatory Notes to the Bill suggest that it is similar in this way to the offence in Section 5 of the 1988 Act of driving or being in charge of a motor vehicle with an alcohol concentration above the prescribed limit. Penalties for this new offence would be the same as those for section 5 of the 1988 Act.

The Government envisages that the presence of drugs in excess of prescribed limits will be ascertained through the use of „drugalyser“ monitoring equipment, which it hopes to have available in police stations and at the roadside by the end of the year.” (p 23)

Frazer McCallum
Senior Researcher
Justice & Social Affairs Research Unit
13 June 2012
Justice Committee

21st Meeting, 2012 (Session 4), Tuesday 19 June 2012

SSI cover note

SSI title and number: Licensed Legal Services (Specification of Regulated Professions) (Scotland) Regulations 2012 [draft]

Type of Instrument: Affirmative

Justice Committee deadline to report on the SSI 24 June 2012

SSI drawn to Parliament's attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to set out a list of professions which are to be regarded as regulated professions for the purposes of section 49 of the Legal Services (Scotland) Act 2010 and to describe the individuals who are to be regarded as being members of such professions. More details on the purpose of the instrument can be found in the Executive Note (see Annexe).

2. An electronic copy of the instrument can be found at:

   http://www.legislation.gov.uk/sdsi/2012/9780111017128/contents

Affirmative Instrument – Procedure

3. The draft Order was laid on 16 May 2012 and referred to the Justice Committee. The Order is subject to affirmative procedure (Rule 10.6). It is for the Justice Committee to recommend to the Parliament whether the Order should be approved. The Minister for Community Safety and Legal Affairs has, by motion S4M-3156 (set out in the agenda), proposed that the Committee recommends the approval of the Order. The Minister will attend this meeting to answer any questions on the Order and then speak to and move the motion. The subsequent debate may last for up to 90 minutes.

4. At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly, by 22 June 2012 (the 24th is the formal deadline but is a Sunday). As the Committee will not meet again before that date, members are asked to delegate to the Convener authority to approve the report for publication.
Annexe

Executive Note

The Licensed Legal Services (Specification of Regulated Professions) (Scotland) Regulations 2012 SSI 2012/draft

The above instrument, if approved, will be made in exercise of the powers conferred on by section 49(4) of the Legal Services (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to the affirmative procedure.

Background

The 2010 Act allows solicitors who offer legal services in Scotland to operate using certain business models which were previously prohibited. It removes restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and creates a regulatory framework in which the new types of business will operate. The new types of business are called licensed legal services providers (“licensed providers”) and will be licensed and regulated by approved regulators which in turn will be approved, authorised, and regulated by the Scottish Ministers.

Section 49 of the 2010 Act requires that at least 51% of the total ownership or control of any licensed provider must lie with qualifying investors (namely solicitor investors and investors who are members of other regulated professions). The Scottish Ministers are required to set out, by regulations, what is (or is not) to be regarded as a “regulated profession”, and may also specify what is to be regarded as a professional association, professional activities, or membership of a profession.

The specification is for the purposes of the 2010 Act only, and applies no further than in connection with the ownership criteria for licensed providers. It does not prevent persons who are not part of a regulated profession from possessing an interest in a licensed provider but it does mean that they will not be regarded as qualifying investors. Non-solicitors who are regarded as members of regulated professions are still subject to the fitness for involvement test set out in section 62 of the 2010 Act.

Policy objectives

The Scottish Government’s general approach is to maintain flexibility in terms of the business structures which will be permitted, in order to maximise opportunities for innovative new approaches to the provision of legal services.

However, it recognises the uncertainty inherent in establishing any new regulatory regime, and considers an incremental approach to non-solicitor ownership and control of licensed providers to be prudent. Therefore, the Scottish Government intends to specify a limited list of professions to be set out in the first instance, with the possibility of adding to this list at a later date, should this be considered.

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1 Solicitor investors are defined in section 67 of the 2010 Act as those who are entitled to practise as a solicitor, a firm of solicitors or an incorporated practice; a solicitor in England and Wales or Northern Ireland; or as a registered European or foreign lawyer.
appropriate. The situation will be monitored as the regulatory framework develops and, as with other aspects of the system, adjustments can be made in future if necessary or appropriate.

The regulations, therefore, set out a list of professions which are to be regarded as regulated professions for the purposes of section 49 of the 2010 Act, and describes the individuals who are to be regarded as being members of such professions. All of the professions listed are considered to meet the criteria set out in the Scottish Government’s consultation paper as being necessary for inclusion – in particular, that they are:

- subject to a robust system of regulation, including a code of conduct, entry requirements (relating to training and/or qualifications) and disciplinary procedures; and
- reasonably likely to enter into a business arrangement with solicitors, and so take advantage of the new business structures permitted by the 2010 Act.

Consultation

There is a statutory requirement in section 49(5)(a) of the 2010 Act for the Scottish Ministers to obtain the agreement of the Lord President before making regulations. The Lord President has been consulted, and has given his agreement to the content and form of these regulations.

There is a statutory requirement in section 49(5)(b) of the 2010 Act for the Scottish Ministers to consult various bodies prior to making regulations (namely, the Law Society of Scotland; every approved regulator; the OFT and such other organisations representing the consumer interest as is considered appropriate; and such other persons or bodies as considered appropriate). There is also a general requirement under section 5 of the 2010 Act for the Scottish Ministers to consult, where considered appropriate, such persons and bodies as appear to have a significant interest in the subject matter in question.

To satisfy these consultation requirements, a public consultation exercise was held in 2011. The responses to the consultation, which included suggestions of which professions should be designated as regulated professions for the purposes of the 2010 Act, were taken into account during the development of the regulations. Furthermore, the responses will continue to inform further examination of professions which may be so designated in the future.

Impact Assessments

An Equality Impact Assessment was prepared for the Legal Services (Scotland) Bill, and which found no evidence of differential impact in respect of disability, gender, sexual orientation, race/ethnicity, or religion/belief. This assessment has been completed.

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2 The following documents relating to the consultation exercise are available online:

- Consultation paper: http://www.scotland.gov.uk/Publications/2011/02/09105855/0
- Consultation analysis: http://scotland.gov.uk/Publications/2012/01/06073359/0
- A consultation report will also be published on the Scottish Government website in June 2012.
reconsidered given the new policy introduced by this instrument and, as before, it was concluded that there would be no differential impact. An updated version of the Equality Impact Assessment will be published in due course.

The Scottish Government also considered whether an environmental impact assessment was required. However, as it considers that the instrument has no environmental impact, no assessment was considered necessary.

A Regulatory Impact Assessment was carried out for the Legal Services (Scotland) Bill. A Business and Regulatory Impact Assessment is not considered necessary for this instrument, as it will have no further significant impact on the Scottish Government, local government or on business.

Financial Effects

This instrument does not have any new financial effects that were not anticipated when the enabling legislation was enacted. A Financial Memorandum was produced which set out the financial implications of the Legal Services (Scotland) Bill.

Scottish Government
Justice Directorate
18 May 2012

3 The regulatory impact assessment for the Legal Services (Scotland) Bill can be viewed at: www.scotland.gov.uk/Resource/Doc/980/0087717.pdf
4 See: http://www.scottish.parliament.uk/S3_Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-introd-en.pdf, pages 34ff
Justice Committee

21st Meeting, 2012 (Session 4), Tuesday 19 June 2012

SSI cover note

SSI title and number: Legal Services (Scotland) Act 2010 (Ancillary Provision) Regulations 2012 [draft]

Type of Instrument: Affirmative

Justice Committee deadline to report on the SSI 24 June 2012

SSI drawn to Parliament’s attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to make minor amendments to (a) the Solicitors (Scotland) Act 1980 in respect of registered foreign lawyers; (b) the Legal Aid (Scotland) Act 1986 in respect of the provision of legal aid; and (c) the Legal Profession and Legal Aid (Scotland) Act 2007 in respect of the ancillary provision in that Act. More details on the purpose of the instrument can be found in the Executive Note (see Annexe).

2. An electronic copy of the instrument can be found at:

   http://www.legislation.gov.uk/sdsi/2012/9780111017111/contents

Affirmative Instrument – Procedure

3. The draft Order was laid on 16 May 2012 and referred to the Justice Committee. The Order is subject to affirmative procedure (Rule 10.6). It is for the Justice Committee to recommend to the Parliament whether the Order should be approved. The Minister for Community Safety and Legal Affairs has, by motion S4M-3159 (set out in the agenda), proposed that the Committee recommends the approval of the Order. The Minister will attend this meeting to answer any questions on the Order and then speak to and move the motion. The subsequent debate may last for up to 90 minutes.

4. At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly, by 22 June 2012 (the 24th is the formal deadline but is a Sunday). As the Committee will not meet again before that date, members are asked to delegate to the Convener authority to approve the report for publication.
Annexe

Executive Note

The Legal Services (Scotland) Act 2010 (Ancillary Provision) Regulations 2012 SSI 2012/Draft

The above instrument, if approved, will be made in exercise of the powers conferred by section 148(1) of the Legal Services (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to the affirmative procedure.

Background

The 2010 Act allows solicitors who offer legal services in Scotland to operate using certain business models which were previously prohibited. It removes restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and creates a regulatory framework in which the new types of business will operate. The new types of business are called licensed legal services providers (“licensed providers”) and will be licensed and regulated by approved regulators which in turn will be approved, authorised, and regulated by the Scottish Ministers.

This instrument makes minor amendments to three pieces of primary legislation:
- the Solicitors (Scotland) Act 1980 (“the 1980 Act”) in respect of registered foreign lawyers;
- the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) in respect of the provision of legal aid; and
- the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) in respect of the ancillary provision in that Act.

Amendment of the Solicitors (Scotland) Act 1980

Section 60A of the 1980 Act makes provision for foreign lawyers to be registered with the Law Society of Scotland for the purposes of entering into multi-national practices (“MNPs”) with solicitors or incorporated practices. The 2010 Act contains provision relating to these registered foreign lawyers (“RFLs”). Specifically, section 67 of the 2010 Act provides that RFLs are to be classed as solicitor investors and so be able to own a majority share in licensed providers and be exempt from certain requirements applying to non-solicitor investors. The policy intention was to allow RFLs to work within licensed providers as solicitor investors.

Section 60A(4) of the 1980 Act, however, provides that foreign lawyers can only be registered for the purposes of entering into MNPs. Whilst this does not prevent existing RFLs from working within licensed providers, or from investing in such entities, it does prevent foreign lawyers from being registered as such for the purposes of becoming a solicitor investor in a licensed provider.

Policy objectives

Given the clear intention to allow RFLs to work within licensed providers as solicitor investors, it is inconsistent to only allow such individuals to do so if they are
registered for the separate purpose of involvement in MNPs. The policy intention behind this instrument is to allow foreign lawyers to be registered not only for the purposes of entering into an MNP, but also for the purpose of becoming a solicitor investor in a licensed provider under the 2010 Act. This is achieved by the consequential amendments made to the 1980 Act by regulation 2.

**Amendment of the Legal Aid (Scotland) Act 1986**

The 2010 Act creates a new type of legal services provider (the licensed provider), and these firms are likely to undertake legal aid work. However, licensed providers are not currently referred to in various provisions within the 1986 Act. If amendments are not made to the 1986 Act, this is likely to present some issues if licensed providers wish to carry out legal aid work.

*Policy objective*

The policy objective is to ensure that licensed providers are referred to where appropriate in the 1986 Act, to allow them to carry out legal aid work in the same way that current law firms can. A number of consequential amendments are made to this end in regulation 3.

**Amendment of the Legal Profession and Legal Aid (Scotland) Act 2007**

Section 145 of the 2010 Act amends section 78 of the 2007 Act, to provide that the Scottish Ministers may make further provision under that section even in areas altered by the Legal Services Act 2007. However, no reference is made to the mechanism by which such further provision can be made.

*Policy objective*

The policy objective is to clarify that the power to make further provision is exercisable by order. This is achieved by regulation 4, which amends section 78(1A) of the 2007 Act.

**Consultation**

Informal consultation has taken place:
- with the Lord President, the Law Society of Scotland and the Institute of Chartered Accountants of Scotland, in respect of the amendment to the 1980 Act; and
- with the Scottish Legal Aid Board in respect of the amendments to the 1986 Act.

Any comments were taken into consideration when developing these regulations. No consultation was carried out in relation to the amendment to the 2007 Act, given that it simply corrects a minor drafting error.

**Impact Assessments**

An Equality Impact Assessment was prepared for the Legal Services (Scotland) Bill, which found no evidence of differential impact in respect of disability, gender, sexual orientation, race/ethnicity, or religion/belief. A further assessment was considered,
but as these regulations do not introduce new policy but provide for the administration of the policy introduced by the 2010 Act, it was considered that this was unnecessary.

The Scottish Government also considered whether an environmental impact assessment was required. However, as it considers that the instrument has no environmental impact, no assessment was considered necessary.

A Regulatory Impact Assessment was carried out for the Legal Services (Scotland) Bill\(^1\). A Business and Regulatory Impact Assessment is not considered necessary for this instrument, as it does not introduce substantive new policy and has no further significant impact on the Scottish Government, local government or on business.

**Financial Effects**

This instrument does not have any new financial effects that were not anticipated when the enabling legislation was enacted. A Financial Memorandum was produced which set out the financial implications of the Bill.\(^2\)

Scottish Government
Justice Directorate
May 2012

\(^1\) The regulatory impact assessment for the Legal Services (Scotland) Bill can be viewed at [www.scotland.gov.uk/Resource/Doc/980/0087717.pdf](http://www.scotland.gov.uk/Resource/Doc/980/0087717.pdf)

\(^2\) See [http://www.scottish.parliament.uk/S3_Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-introd-en.pdf](http://www.scottish.parliament.uk/S3_Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-introd-en.pdf), pages 34ff
Justice Committee

21st Meeting, 2011 (Session 4), Tuesday 19 June 2012

SSI cover note

SSI title and number: Fire and Rescue Service (Framework) (Scotland) Order 2012 (SSI 2012/146)

Type of Instrument: Negative

Coming into force: 29 June 2012

Justice Committee deadline to consider SSI: 19 June 2012

Motion for annulment lodged: No

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes (see Annexe A)

Purpose of Instrument:

1. The purpose of the instrument is to give effect to the Transitional Fire and Rescue Framework for Scotland 2012, which provides guidance and support to Fire and Rescue Authorities (FRAs) and sets out Scottish Ministers’ expectations of FRAs in contributing to the fire reform agenda in relation to the proposed new Fire and Rescue Service. More details on the purpose of the instrument can be found in the Executive Note (see Annexe B).

2. An electronic copy of the instrument can be found at:

   http://www.legislation.gov.uk/ssi/2012/146/contents/made

Justice Committee consideration:

3. The instrument was laid on 18 May 2012 and the Justice Committee has been designated as lead committee.

   Previous consideration
   4. The Justice Committee first considered the instrument at its meeting on 12 June 2012. Concerns were raised by members in relation to the Order and the Committee agreed to invite the Minister for Community Safety and Legal Affairs to give evidence at its next meeting. The Minister has subsequently agreed to attend.

   Procedure
   5. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Subordinate Legislation Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). 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. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament. If that is also agreed to, Scottish Ministers must revoke the instrument.

6. Each negative instrument appears on a committee agenda at the first opportunity after the Subordinate Legislation 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 correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Annexe A

Extract from the Subordinate Legislation Committee’s 30th Report 2012

Fire and Rescue Services (Framework) (Scotland) Order 2012 (SSI 2012/146) (Justice Committee)

1. This Order is intended to bring into effect the Transitional Fire and Rescue Framework for Scotland 2012 on 29 June 2012. Under section 40 of the Fire (Scotland) Act 2005, a framework document prepared by the Scottish Ministers setting out priorities and objectives for fire authorities only has effect when it is brought into force by them by order. Such an order is subject to the negative procedure, offering the Parliament the opportunity to reject the framework proposed if it chooses to do so.

2. This Order was made by the Scottish Ministers on 16 May and laid before the Parliament on 18 May. It comes into force on 29 June and brings the framework document into effect on that date. Separately, the Scottish Ministers published the framework document on their website on 18 May.

3. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in the Appendix.


5. The Scottish Ministers contend that the words “which was published in June 2012“ are “otiose, and can in our view be ignored as having no effect or statutory purpose“. However, the Committee does not agree with the Scottish Ministers’ view that these words are otiose. It appears to the Committee that they serve an important function in identifying the external document to which reference is made and to which the statutory requirements of sections 41 and 42 of the 2005 Act are to apply. The entire purpose of this Order is to give effect to that document. It is accordingly necessary that it be properly identified.

6. On the face of it, this Order purports to give effect to a document with a particular name which was published in June 2012. In the Committee’s view, no such document exists at present. If the Order is intended to give effect to the framework
document published by the Scottish Ministers on 18 May 2012, then the Committee
does not consider that it properly identifies or refers to that document. Accordingly,
the instrument appears to be defectively drafted for two reasons: first, it purports to
bring into effect a document which does not exist, and, secondly, it does not properly
identify the framework document which has been published.

7. The Committee does not consider that the Scottish Ministers” intention to “re-
publish” in June in order to assist persons to find the document resolves the
problem. It is concerned that the Scottish Ministers” proposed remedy involves the
Parliament scrutinising this instrument when the framework document which it
purports to give effect to has not yet been published (but will be at some point during
June after the Parliament has scrutinised the instrument). As it is by scrutiny of this
instrument that the Parliament is enabled to scrutinise the framework document itself
(which is not otherwise laid or subject to any parliamentary procedure), proceeding in
this manner would appear to render that scrutiny ineffective.

8. The Committee draws the instrument to the attention of the Parliament on
reporting ground (i) as it appears to be defectively drafted. It purports to bring
into effect a document entitled the “Transitional Fire and Rescue Framework
for Scotland 2012” which was published in June 2012 when no such document
exists. It appears to the Committee that the instrument was intended to bring
into effect a document of that name which was instead published on 18 May
2012, but the Order does not properly identify that document. The Committee
considers that, for the Order to have proper effect, it is necessary that it
properly identifies the intended document.

9. The Committee also draws the instrument to the attention of the lead
Committee since it is concerned by the proposal from the Scottish
Government that this issue may be resolved by re-publishing the framework
document in June 2012, as the Parliament would then be required to consider
this instrument (which gives effect to a document to be published in June
2012) without having seen the final published version of the document.

Appendix

Fire and Rescue Services (Framework) (Scotland) Order 2012 (SSI 2012/146)

On 18 May 2012, the Scottish Government was asked:

1. Article 2 of the Order purports to give effect to a document prepared by the
Scottish Ministers under section 40(1) of the Fire (Scotland) Act 2005 entitled
“Transitional Fire and Rescue Framework for Scotland 2012” which was published in
June 2012. The Scottish Ministers made this Order on 16 May 2012. The date of
making the Order accordingly precedes the nominal date of publication of the
document, regardless of when the instrument comes into force. The Scottish
Government is accordingly asked to explain why it is competent to purport to make
an Order giving effect to something which, at the date of making the Order, was not
in existence?

2. Separately, it appears that the “Transitional Fire and Rescue Framework for
Scotland 2012” (which is referred to in a footnote to the Order and in the Explanatory
Note as being published on the Scottish Government’s website) was in fact
published on 18 May 2012. On the reverse of the document, it states “Published by
the Scottish Government, May 2012”. Is that document the one which the Order is intended to refer to? If that is the case, on what basis does the Scottish Government consider that they have correctly designed it in the Order?

The Scottish Government responded as follows:

1. In reply to question 1, we highlight that section 40(4) of the Fire (Scotland) Act 2005 enables the Scottish Ministers to make an order bringing a framework document into effect. In preparing the document, the consultation requirements set out in section 40(5) and (6) must be followed.

2. In this context, as noted in the preamble, the framework document was prepared (and so to adopt your language, existed) and the necessary consultation carried out, in advance of the making of the order on 16 May 2012. The document as duly prepared was published on the Scottish Government’s website on 18 May.

3. In reply to question 2, as you say, the framework document was published on 18 May. This gave fair notice to those likely to be affected by its terms in due course. Strictly speaking, the words in article 2 of the order “which was published in June 2012” are otiose and can in our view be ignored as having no effect or statutory purpose. That said, in order to assist users in finding the framework document, we propose to republish it in June, updating the reverse of the document to refer to publication in “June 2012”.

Annexe B

Executive Note

The Fire and Rescue Services (Framework) (Scotland) Order 2012

SSI 2012/146

The above instrument was made in exercise of the powers contained in section 40(4) of the Fire (Scotland) Act 2005. The instrument is subject to negative resolution procedure. The instrument extends only to Scotland.

Policy Objectives

The purpose of the Transitional Fire and Rescue Framework for Scotland 2012 is to provide guidance and support to Fire & Rescue Authorities (FRAs) (including Joint Fire and Rescue Boards) on the priorities and objectives for the eight Fire & Rescue Services. It sets out Scottish Ministers’ expectations of FRAs in contributing to the fire reform agenda to ensure a smooth introduction for the new Scottish Fire and Rescue Service, whilst maintaining current fire and rescue outcomes. It revokes and replaces in full the Fire and Rescue Framework for Scotland 2005.

Consultation

In line with the requirements of the Fire (Scotland) Act 2005, the Scottish Government consulted all of the FRA and the relevant employee representative organisations. It also wrote to local authorities, the Ministerial Advisory Group and its fire reform sub group and equality and diversity organisations seeking comments on
the draft transitional framework. 14 responses were received and all of them were generally positive about the framework.

**Impact Assessments**

An equality impact assessment (EQIA) has been completed on the Fire and Rescue Services (Framework) (Order) 2012. The EQIA accompanied the framework document during the consultation. While the Order itself has no specific equality impact issues, the framework seeks to address a number of equality matters relating to the fire services and the communities they serve. The EQIA is attached.

**Financial Effects**

A Business and Regulatory Impact assessment (BRIA) has been completed and accompanied the framework during the consultation. The impact of the policy on business is negligible. The BRIA is attached.

Scottish Government
Safer Communities Directorate
April 2012

**Equality Impact Assessment**

This equality impact assessment has been developed to consider impacts on equality from the Transitional Fire and Rescue Framework for Scotland, brought into force by The Fire and Rescue Services (Framework) (Scotland) Order 2012.

The assessment is based on:

- desk based research and evidence review;
- meetings with, and information provided by relevant stakeholders and experts;
- responses to the consultation on the transitional Framework which ran from 10 February 2012 until 23 March 2012; and
- Stakeholder views on a partial EQIA, which was published as part of the consultation process.

The process of developing this EQIA has highlighted that there are a number of issues faced by people in equality groups (i.e.: race, gender, disability, age, sexual orientation, transgender, religion and belief) which are relevant to the Fire & Rescue Services. Public Authorities have duties under equalities legislation to promote equality by identifying and considering these issues; and indeed, such actions are vital to achieving stronger and safer communities.

The equality impact assessment sets out:

- the aims of the Transitional Framework;
- the equality issues faced by people in respect of race, gender, disability, age, sexual orientation, transgender, religion and belief and work which is going on to try to address relevant issues;
- potential impacts of the Framework.

**PART A – Fire and rescue services**

**Define the aims of the policy**

<table>
<thead>
<tr>
<th>Title of policy</th>
<th>Transitional Fire &amp; Rescue Framework for Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strategic Outcomes</td>
<td>Safer and stronger</td>
</tr>
<tr>
<td>Name of Branch or Division</td>
<td>Fire and Rescue Services Division</td>
</tr>
<tr>
<td>Directorate or Agency</td>
<td>Safer Communities</td>
</tr>
</tbody>
</table>

What is the purpose of the proposed policy (or changes to be made to the policy)?

The purpose of the Transitional Fire & Rescue Framework for Scotland is to provide guidance and support to Fire & Rescue Authorities (FRAs) on the priorities and objectives for the services. The framework sets out Scottish Ministers’ expectations of FRAs in contributing to the fire reform agenda to ensure a smooth introduction for the new Scottish Fire and Rescue Service (SFRS), whilst maintaining current fire and rescue outcomes over that period of transition.

Who is affected by the policy or who is intended to benefit from the proposed policy and how?

There are currently two fire and rescue Authorities and six Joint Boards (collectively referred to in this document as the fire and rescue services or the services) in Scotland. They provide services to 5.2 million people across an area of 7.9 million hectares. On the 31 March 2011, the headcount for fire and rescue service staff (including volunteers) in Scotland totalled 9,024.

Employees, volunteers and some retired members of the fire and rescue services will be affected the framework and its impact on workforce and governance.

The people of Scotland will be affected; in relation to fire and rescue service activity.
How have you, or will you, put the policy into practice, and who is or will be responsible for delivering it?

Delivery of the outcomes set out in the framework will be the responsibility of the Fire and Rescue Authorities and the Scottish Government.

How does the policy fit into our wider or related policy initiatives?

Four national outcomes in particular underpin the aims of the framework and our aspirations for reform:

- we live our lives safe from crime, disorder and danger (National Outcome 9);
- we have strong resilient and supportive communities where people take responsibility for their own actions and how they affect others (National Outcome 11);
- our public services are high quality, continually improving, efficient and responsive to local people's needs (National Outcome 16); and
- we live longer, healthier lives (National Outcome 6).

Do you have a set budget for this work? No

**What do you already know about the diverse needs and/or experiences of your target audience?**

<table>
<thead>
<tr>
<th>Do you have information on</th>
<th>Yes</th>
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<th>No</th>
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<tbody>
<tr>
<td>Age</td>
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<td>Disability</td>
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<td>Gender</td>
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<tr>
<td>Lesbian, Gay, Bisexual &amp; Transgender</td>
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<td>Race</td>
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<tr>
<td>Religion and Belief</td>
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**Evidence**

**Communities – age equality issues**

**Older people**

Scotland’s population is ageing, and life expectancy for men and women is expected to increase by around 5 years by 2033. In the 10 years from 1999 to 2009, the ageing of the population was reflected in the number of children under 16 reducing by 8%, and the number of people aged 75 and over increasing by 14%. (The Registrar General's Annual Review of
We know that older people are more at risk from fire incidents. As people get older, it can become more difficult to detect and respond to fires. For example, it can become harder to hear smoke alarms, smell smoke, detect changes in heat and turn off appliances. Anecdotal evidence also suggests that older people may be more likely to possess older appliances, which have a greater potential to be faulty and increase the risk of fire.

Of the 47 fatal casualties in 2010-11, there were 20 in the over 60s age group. The rate of fatal casualties was 16.6 per million population in the over 60s age group, just under double the Scottish rate of 9.0. Throughout the last ten years the over 60s age group has always had the highest rate of fatal casualties per million population. (Fire Statistics Scotland, 2010-11, 26 October 2011.)

In 2010-11, the 30-59 year olds age range had the highest number of non-fatal casualties with 569 (45%), followed by the 60 and over age group with 313 (25 %). (Fire Statistics Scotland, 2010-11, 26 October 2011)

However, age is not necessarily the only factor which contributes to make people more at risk from fire. The Scotland Together report on fire safety in 2008 stated that 90% of older people involved in a Fatal Fire Survey had other contributory factors, such as mobility problems, disability, mental health issues or alcohol involvement. Social deprivation was also highlighted as a key factor related to an increased risk from fire, which may be a particularly important issue in the current financial climate.

In addition, living alone tends to increase the risk of fire injury or death - 53% of accidental fire death incidents occur in single occupancy households and 51% occurring in flatted accommodation. As such, an ageing population, with an increasing number of people living alone, has the potential to lead to an increase in accidental dwelling fire deaths. (Scotland Together)

Fire and rescue services engage with agencies, other organisations and authorities who work with older people, to identify and target those in need of assistance and advice on fire safety. This type of multi-agency targeted approach is particularly
important for older, vulnerable people, who may not be able to obtain information via the usual channels – for example they may not have access to the internet, or understand mainstream fire safety material. Information may need to be provided in accessible formats, such as easy read or large font. There are a number of initiatives, such as installing smoke/heat detectors or linked alarm systems, which also aim to decrease their vulnerability to fire.

Younger people

The other significant age category, in terms of fire related incidents, is young people. 17-29 year olds have the highest rate of non-fatal casualties, at 302.2 casualties per million population. This group of people have had the highest injury rate for the last ten years. (Fire Statistics Scotland, 2010-11, 26 October 2011)

There are also issues in relation to young people and fire related anti-social behaviour, as well as evidence that young people are at a high risk of being involved in a road traffic collision. As such, targeting young people with education is key to promoting community safety and social responsibility.

Fire and rescue services have developed schools programmes and a formal national accreditation qualification for youth engagement programmes to educate young people on fire safety and decrease fire related anti-social behaviour (e.g. attacks on crews, fire hydrant damage). Many of these are delivered through a multi-agency approach. Topics of learning can include a range of issues, such as home fire safety, the dangers of making hoax calls, dangers of deliberate fire setting, road safety, alcohol and drug awareness, first aid and healthy eating. (Scotland Together). Modified versions of courses are delivered to young people with disabilities. In addition, station-based personnel carry out activities with youth groups and schools; and road safety, fire safety and general outreach programmes are also run.

In terms of road traffic collisions, the highest number of male and female casualties are in the 16-22 age range. (Key 2010 Reported Road Casualty Statistics)

Fire and rescue service workforce – age equality issues
42% (3,786) of all fire and rescue service staff are in the 40-49 age range, 29% (2,617) are within the 30-39 age range, 17% (1,507) are in the 50 and over age range and 12% (1,114) are under 30 years old.

The highest proportion of personnel are within the 40-49 age range, and 38% of “other support staff” are 50 years and over. Retained duty system staff have the highest percentage of under 30 year olds, at 16%. Wholetime operational staff have the lowest percentage of staff in the 50 and over age range (9%), due to retirement arrangements for operational staff. (Fire and Rescue Service Statistics Scotland 2010-2011, 7 September 2011)

The evidence indicates that, in respect of the workforce, there may be particular impacts from reform on the following groups of people:

- older members of the fire and rescue service workforce (e.g. in respect of utilising their knowledge and expertise throughout the reform process);
- retired employees who sometimes undertake fire safety visits (e.g. retaining the valuable service they provide);
- young people (e.g. continuing/maintaining youth engagement programmes. These aim to encourage young people to learn about fire safety, get involved, increase their skills and take this back to their communities. They can also prepare them for future employment in the Services).

The implications of reforms in relation to these groups are considered below in the impacts section.

Stakeholder have identified equality Issues affecting an aging workforce, especially in relation to operational firefighters, include maintaining operational fitness. Stakeholders have also identified a recent study carried out on shift workers which found a link between raised cancer rates and shift working amongst an older population.

<table>
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<tr>
<th>Disability</th>
<th>Evidence</th>
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<tr>
<td>Communities – disability equality issues</td>
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<tr>
<td>20% of people in Scotland are disabled according to the definition of the Disability Discrimination Act 1995</td>
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Disabilities can increase the likelihood of an individual accidentally causing a fire and can hinder escape when one occurs. The ONS Life Opportunities Survey (ONS, 2010) found that 12% of adults with impairments experienced difficulty accessing rooms within their home or difficulty getting in or out of their home.

15% of fatal fires involved victims who suffered some form of mental impairment. 30% of fatal fires involved victims with physical impairment, rising to 39% when age related physical impairment is included. (A Consultation on the Future of the Fire and Rescue Service in Scotland, Scottish Government February 2011).

In terms of mental health concerns, of the 177 fire deaths across the Fatal Fire Survey, 16 were recorded as suicide. (Scotland Together).

The term disability covers a wide range of impairment types and conditions and it is important to recognise that disabled people are not a homogenous group and will have a range of needs and experiences. For example, someone who has a physical disability is likely to have very different needs to someone who is Deafblind; and particularly vulnerable people and people with learning difficulties may have difficulty understanding the dangers fire presents to their safety. As such, a variety of fire safety initiatives are necessary to support disabled people and decrease their vulnerability to fire incidents.

Some disabled people (e.g. Deaf and Deafblind people whose first language is British Sign Language (BSL) not English, Deafened people and people with cerebral palsy or multiple sclerosis) may experience difficulties communicating with the fire and rescue service. This may be in relation to contacting the Service, at incidents or in community education and enforcement activities. Similarly, targeted communication is important in relation to reducing road traffic accidents.

Social and economic factors often increase the fire risks for disabled people, particularly where people

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1 http://www.lothian.fire-uk.org/IMAGES/Scotland_Together.pdf
have restricted financial resources. As such, the support required by disabled people varies depending on the relevant social and economic factors which are prevalent in each geographic area. Disabled people in more isolated areas may be especially reliant on public service provision to decrease their isolation and engage in public life.

Fire and rescue services work with other groups, organisations, authorities and agencies to identify disabled people who may be vulnerable, help make their premises safe as well as improve awareness of the fire service and fire safety. For example:

- work undertaken with social care services and health agencies has helped identify mental health patients at risk from fire. Fire and rescue services can then perform a risk assessment and provide specific advice to assist in this respect;
- specialist fire alarms (which use lights and vibrating pads) can be installed to alert people who are deaf to the occurrence of a fire;
- some of the services are working to ensure that heat/smoke detectors are installed in linked alarms (which alert emergency services directly and can be installed in peoples' homes where they may not be able to telephone for help);
- Fire and rescue services place BSL video clips on websites, and provide easy-read and accessible information on fire safety;
- deaf awareness and sign language courses have been run in some of the fire and rescue services over the past two years. More than 100 people attended deaf awareness courses and approximately 60 learners completed sign language courses;
- local voluntary and other organisations work in partnership with the fire and rescue services – for example, to ensure their service users (older and disabled people) have a working fire alarm. Voluntary and other such organisations often have access to people who may feel uncomfortable contacting public bodies or authorities, and are a valuable tool for reaching some of the most vulnerable people within communities;
- fire and rescue services provide general information and advice on fire safety to a wide range of people, for example guidance to businesses about safe emergency evacuation from premises for wheelchair users.
To assist fire and rescue service staff in responding to the needs of disabled people, the Services and the Scottish Fire Services College provide training on equality and diversity. For example control staff are trained to elicit vital information, calm callers and assess circumstances to provide fire crews with as much information as possible. Their training includes considering communication and alternative communication techniques for disabled people. Staff providing community safety advice are also given training on disability issues, given that they may be required to provide information to a wide range of people with different needs.

**Fire and rescue service workforce – disability equality issues**

Overall, 0.7% of Scotland’s Fire & Rescue Service staff are recorded as disabled. The highest proportion is 1.9% in the other support staff category, and the lowest proportion is 0.4% in retained duty system staff. (Fire and Rescue Services Statistics, Scotland 2009-10, 7 September 2010) However, it should be noted that there are some people who may not feel comfortable disclosing that they are disabled to their employers and therefore are not accounted for in these figures.

Where a suitable post is available, fire and rescue services have redeployment procedures in place for operational personnel who become disabled during their career. There are also employee networks to help support disabled people.

<table>
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<tr>
<th>Gender</th>
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**Communities – gender equality issues**

Scotland’s population figure for 2010 has a gender split of 52% females to 48% males.

In terms of fire incidents, males are more likely than females to: be injured in a fire; need to be rescued from a fire; or, die in fires. This has been a consistent trend over the last decade.

From 2000-01 to 2009-10, there have been 716 deaths due to primary fires. Of these, 456 were men (64%). Over this period there have been 17,428 injuries, and the number of men injured was 9,804
(56%) of recorded casualties.

From 2000-01 to 2009-10, there have been 2,441 rescues, where the person was not injured, at primary fire incidents. Of these, 1,352 were men (55%). Source: (FDR1 2000/01 – 2008/09 and IRS 2009/10) NRS (Mid-Year Estimates 2010)

In 2010-11 there were more males than females who were fatal casualties (33 and 14 respectively). In 2010-11, there were 712 males who were non-fatal fire casualties compared with 553 females. (Fire Statistics Scotland 2010-11, 26 October 2011.)

In 2010 there were more males than females who were killed or seriously injured in road traffic collisions. 146 males were killed in comparison with 62 females. 1416 males were seriously injured, 751 females were seriously injured. (Key 2010 Reported Road Casualty Statistics)

In terms of gender equality issues affecting women, the fire and rescue services have found that domestic violence has the potential to be related to a fire incident. Women are more likely to be the victim of domestic violence - one in five women in Scotland experiences domestic abuse at some stage in her life (Scottish Women"s Aid website). To help combat this, fire and rescue services may: work with other groups/organisations regarding violence in the home; raise awareness amongst fire service personnel about violence against women where fire is used as a means of attack and a weapon; and work with local parent groups.

Fire and rescue service workforce – gender equality issues

- 86 % of the Fire & Rescue Service workforce is male and 14 % female.
- Of the 1,218 female staff, the majority, 53 % are working in the other support staff category.
- Of the 7,806 male staff, the majority, 52 % are working as wholetime operational staff.
- The proportion of females is highest in control staffing at 85 % (199 out of 233).
- The proportion of males is highest in wholetime operational staffing at 97 % (4,055 out of 4,201). (Fire and Rescue Services Statistics, Scotland. 2010-11, 7 September 2011).
Women are more likely to have part-time working or flexible working arrangements (by virtue of generally being households’ primary carers). The fire and rescue service has said that 55% of women used flexible working arrangements, compared to 22% of male workers in 2005. Currently 42% of the total female workforce work part-time compared to 11% of the total male workforce.

The Services and Scottish Fire Services College undertake equality and diversity training to help address equality issues, raise awareness and ensure good practice in the workplace. This includes providing information on gender equality and considers (amongst other things) issues affecting women in the workplace such as discrimination, harassment, bullying and equal pay.

The Fire Brigades Union has a specific section of the Union for uniformed female staff, and Unison has a women’s section, where support and advice can be sought.

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<thead>
<tr>
<th>Lesbian, Gay, Bisexual &amp; Transgender</th>
<th>Evidence</th>
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<tr>
<td><strong>Communities – LGBT equality issues</strong></td>
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<tr>
<td>It is difficult to obtain accurate data on this equality group; however it is generally accepted that LGBT people make up around 5% of the population of Scotland. (Cited in Scottish Government - Challenging Prejudice: Changing Attitudes towards Lesbian, Gay, Bisexual and Transgender People in Scotland – 2008.) Stonewall estimates that around 200,000 gay people live in Scotland.</td>
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Anecdotal evidence from Stonewall suggests that people identifying as LGBT are less likely to approach uniformed emergency services due to the image of emergency services as being “unwelcoming” - although the LGBT community is very diverse in itself and the experiences of individuals can differ from area to area. Some examples of good practice in helping break down these barriers, and encouraging community engagement, include fire and rescue services: becoming members of Stonewall’s Equality Champions programme; participating in Edinburgh and Glasgow Pride; engaging with local groups/organisations; and ensuring that community
safety messages are inclusive and widely distributed. There is some evidence that LGBT people from more rural areas often relocate to one of the large cities as they reach adulthood. Moving is not generally an option for those young people still in school or those with limited social mobility. Issues affecting people outside large metropolitan areas can be different to those within, therefore engagement to address needs has to occur at a local level. An example of good practice in this respect is partnership working between LGBT Youth and the fire and rescue service in reaching young people in smaller communities to address their concerns.

**Fire and rescue service workforce – LGBT equality issues**

It is difficult to obtain reliable information on the numbers of LGBT individuals employed in the workforce, particularly given that some LGBT people may not wish to disclose this information.

The Services and the Scottish Fire Services College equality and diversity training aims to raise awareness and help ensure good practice in the workplace. It includes information on the issues faced by LGBT people.

The Fire Brigades Union has a specific section of the Union for uniformed LGBT members, where support and advice can be sought. There are also Service based LGBT employee networks.

### Race

**Evidence**

**Communities – race equality issues**

According to the 2001 Census, the size of the ethnic minority population was 2 % of the total population of Scotland showing an increase from 1.3 % in 1991.

Some parts of Scotland have reasonably large numbers of people from ethnic minority groups living in them. There are significant regional variations in this respect, with Glasgow having the most ethnically diverse population in Scotland and some rural areas having very low ethnic minority profiles.

Some of the largest ethnic minority populations in Scotland are comprised of long established and well
integrated communities; while some newer communities are less integrated, smaller, more dispersed and can retain some customs that may present as a fire risk (e.g. methods of cooking). Established communities often have a significant profile at regional and national levels, with long-standing relationships with fire and rescue services. Newer communities are less likely to be aware of public services in general and are more likely to move residence. This poses specific issues in supporting them and keeping their properties safe from fire. Ethnic minority communities may often also require targeted communications, particularly where English is not their first language.

Gypsy/Traveller communities, whether in permanent and static or non-static or semi-static residences, often have reduced access to services, may be vulnerable to fire risk and may experience isolation from the broader population. Therefore establishing trust with individual local communities and building personal relationships is particularly important.

Fire and rescue services work with communities and organisations such as the Scottish Refugee Council, regional equality councils and local organisations to target, protect and educate ethnic minority communities. This includes providing information on how to access the fire and rescue services in the event of an emergency, as well as general fire and road safety advice. For example, a recent station open day was targeted at Polish people, given that there is an increasing Polish community in its area. The Services also participate at events such as the annual Mela in Edinburgh and Glasgow.

Some examples of good practice taken by fire and rescue services to provide targeted communications for people who don’t speak English as their first language, at incidents, in community education (including preventing road traffic accidents), and in enforcement activities, includes:

- the use of pictorial phrase booklets where language barriers have been identified as a particular regional issue;
- translation of enforcement and education materials;
- use of translation services, such as Happy to Translate and Languageline, as well as local services and partner organisations specialising in community languages specific to certain regional areas; and
working with fire services from other countries and using these links to assist work with Scotland’s local communities.

The Services and the Scottish Fire Services College equality and diversity training includes specific information to help address race equality issues.

**Fire and rescue service workforce – race equality issues**

Of Scotland’s fire and rescue service staff, 0.6% are recorded as belonging to an ethnic minority group.

The highest proportion of ethnic minority staff are in other support staff roles (1.1%) and the lowest proportion of ethnic minority staff are in retained duty system and volunteer role (0.2%). (Fire and Rescue Service Statistics 2010-2011, 7 September 2011)

The Fire Brigades Union has a specific section of the Union for uniformed staff who are from an ethnic minority background, where support and advice can be sought.

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**Religion and Belief**

**Evidence**

There is some evidence that certain religious practices and cooking habits (e.g. frying at high temperatures, deep fat cooking) may increase the risk of domestic fires. For example an ODPM report in October of 2002, on Establishing Fire Safety Issues Among Older People, found that Hindu respondents conceded that religious rituals and festivals could increase fire risks. However, all said they took particular care to not leave incense burning unattended or to light too many candles at Diwali. This suggests it may be useful to target fire safety advice to religious groups especially around the time of festivals or other events.

Sectarianism also remains an issue to varying degrees within Scotland. One fire service has been working closely with the charity Nil By Mouth to raise awareness amongst the workforce of the issues surrounding sectarianism. Associating itself publicly with the charity sends an important community message.

Fire and rescue services have found that working
with faith groups can, in addition to identifying religion/faith issues, provide access to other equality groups e.g. women, people of different age groups and ethnic minority communities. Some examples provided by the Services of good practice working with faith organisations includes:

- engaging with local faith and women’s groups as part of an awareness raising campaign about the impact of “honour based” violence that may involve fire activity;
- working closely at a local level with faith groups and their centres of worship; and
- working with Faith in the Community to reach diverse faith organisation’s in a collaborative approach to identifying needs.

Do you have enough information to help you understand the diverse needs and/or experiences of your target audience? If not, what else do you need to know?

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<tr>
<th>Age</th>
<th>Do you have enough information to proceed?</th>
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<tr>
<td></td>
<td>Yes. Information has been collected via the consultation process, desk research, engagement with stakeholders and work undertaken by Fire and Police Reform colleagues with equality stakeholders and equality and diversity leads from the fire and rescue service.</td>
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<th>Disability</th>
<th>Do you have enough information to proceed?</th>
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<td>Yes – refer to information in Age section.</td>
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<th>Gender (including pregnancy and maternity)</th>
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<th>Lesbian, gay, bisexual and transgender</th>
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<th>Religion and Belief</th>
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What does the information you have tell you about how this policy might impact positively or negatively on the different groups within the target audience?

Summary of potential impacts of Transitional Framework

In itself, the Transitional Fire & Rescue Framework does not appear to adversely affect people in equality groups, particularly given that its primary function is to maintain current fire and rescue outcomes and ensure a smooth introduction for the new Scottish Fire and Rescue Service.

The Framework will have a positive impact on equality as it provides specifically for the improvement of performance across all equality strands at the core of FRA business objectives. The Framework requires services to build on work already done to recruit, retain and progress individuals from underrepresented groups from across all areas of Scotland and at all levels.

However, it will be important to:

- Maintain current good practice;
- Continue to ensure that equality and diversity is prioritised throughout the transition period by providing equality in access to and delivery of training and development initiatives;
- Continue to prioritise FRAs corporate social responsibilities in the execution of the procurement function and in line with Public Sector Equality Duty (specific duties) requirements;
- Continue to meet statutory obligations to provide aids, adaptations and support to employees requiring additional support in the use of ICT due to disability;
- Continued compliance with equality legislation, including taking the necessary steps to prepare existing FRAs and the future Scottish Fire and Rescue Service for the introduction of the Public Sector Equality Duty „specific duties”; and
- Continue to monitor equality performance in line with statutory responsibilities.

Age

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<th>Communities – age equality impacts</th>
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<tr>
<td>As described above, there is a lot of good work taking place to help protect older vulnerable people from fire and educate youths. Currently this largely occurs at a local level, to identify and address local needs through close working relationships with other groups, authorities and agencies. The Framework requires that Services must ensure an holistic and multi-agency approach to Community Fire Safety based on effective evaluation; reduced duplication; sharing of best practice and resources targeted at those individuals and communities most at risk.</td>
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<tr>
<td><strong>Fire and rescue services workforce – impacts</strong></td>
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<tr>
<td>The Framework requires that all staff feel well informed on progress on reform and that any significant workforce changes, including in relation to retirements and voluntary severance arrangements are considered in light of the single service and within existing negotiation arrangements. One of the outcomes set out in the Framework is for services to continue to demonstrate a commitment to equality and diversity throughout the transition period. Services are required by the Framework to continue to fulfil their statutory duties under existing and any subsequent equality and diversity legislation.</td>
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<td>The Framework requires that Fire and Rescue Authorities will continue to fulfil the statutory duties placed on them by ALL current relevant legislation, using risk management planning to ensure resources are targeted effectively. In a transparent manner and where based on an assessment of local risk, they will also undertake other such discretionary emergency activities as considered necessary to support community safety.</td>
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| **Fire and rescue service workforce - impacts** |
| See entry under Age. |
| Furthermore, services have a continued responsibility for disability legislation throughout the transition period including giving due consideration to the redeployment of individuals who become disabled and are unable to continue to carry out operational fire fighting duties. While the Fire Framework may not in itself directly influence the results of the fire reform process it is noted that some individuals with a disability may feel particularly vulnerable regarding their employment and the importance of communicating accessible, regular and accurate information to this group is recognised and facilitated by the Framework. |

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<tr>
<td>The Framework requires services to continue to use a holistic and multi-agency approach to community fire safety. Examples of this include</td>
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<tr>
<th>Lesbian, Gay, Bisexual &amp; Transgender</th>
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<tbody>
<tr>
<td></td>
<td>The Framework aims to ensure that community safety remains a priority and that Services continue to ensure a holistic and multi agency approach to Community Fire Safety based on effective evaluation; reduced duplication; sharing of best practice and resources targeted at those individuals and communities most at risk.</td>
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<tr>
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<td>Fire and rescue services workforce - impacts</td>
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<tbody>
<tr>
<td></td>
<td>The Framework aims to ensure that the good work to address specific, local race equality issues continues going forward.</td>
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<tr>
<td></td>
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<td>See entry under Age</td>
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<th>Communities – religion and belief equality impacts</th>
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<tr>
<td></td>
<td>As with the other equality areas, it is important to maintain the partnership working and relationships which have been built up with other groups, organisations, agencies and authorities to address religion and belief issues. It is also important to continue local engagement to identify and address local issues.</td>
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<tr>
<td></td>
<td>Fire and rescue services workforce - impacts</td>
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**Will you be making any changes to your policy?**

Are there any changes?
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<th>Yes</th>
<th>No</th>
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<tbody>
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<td>Age</td>
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<td>Yes</td>
<td>No</td>
<td>X</td>
</tr>
<tr>
<td>Religion and Belief</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
</tr>
</tbody>
</table>

**Does your policy provide the opportunity to promote equality of opportunity or good relations by altering the policy or working with others?**

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>X</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
</tr>
<tr>
<td>Disability</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
</tr>
<tr>
<td>Gender (including pregnancy and maternity)</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
</tr>
<tr>
<td>Lesbian, Gay, Bisexual &amp; Transgender</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
</tr>
<tr>
<td>Race</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
</tr>
<tr>
<td>Religion and Belief</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
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</table>

Age
The Transitional Framework provides the opportunity to mainstream equality and diversity throughout the outcomes set out in the document. It provides specifically for a holistic and multi-agency approach to Community Fire Safety and requires Services to work in partnership with all employee representative organisations in the interests of employee relations and effective service delivery.

Disability See entry for Age
Gender (including pregnancy and maternity) See entry for Age
Lesbian, Gay, Bisexual & Transgender See entry for Age
Race See entry for Age
Religion and Belief See entry for Age

**Based on the work you have done - rate the level of relevance of your policy**

*Tick one box for each strand*

<table>
<thead>
<tr>
<th></th>
<th>Age</th>
<th>Disability</th>
<th>Gender (including pregnancy and maternity)</th>
<th>LGBT</th>
<th>Religion and belief</th>
<th>Race</th>
</tr>
</thead>
<tbody>
<tr>
<td>High - There is substantial evidence that people from different groups or communities are (or could</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

23
be) differently affected by the policy (positively or negatively)
- There is substantial public concern about the policy, or concerns have been raised about the policy’s potential impact by relevant bodies
- The policy is relevant to all or part of the respective general duty, in the case of race, disability and gender.

Medium
- There is some evidence that people from different groups or communities are (or could be) differently affected (positively or negatively).
- There is some public concern about the policy.
- The policy is relevant to parts of the respective general duty, in the case of race, disability and gender.

Low
- There is little or no evidence that some people from different groups or communities are (or could be) differently affected (positively or negatively).
- There is little or no evidence of public concern about the policy.
- The policy has little or no relevance to the respective general duty, in the case of race, disability and gender.

Unknown
- No evidence or data has been collected therefore an assessment cannot be made

<table>
<thead>
<tr>
<th>Is a further impact assessment required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
</tr>
<tr>
<td>Disability</td>
</tr>
<tr>
<td>Gender (including pregnancy and maternity)</td>
</tr>
<tr>
<td>Lesbian, Gay, Bisexual &amp; Transgender</td>
</tr>
<tr>
<td>Race</td>
</tr>
</tbody>
</table>
Religion and Belief | Yes | No | x

If you have answered yes please explain why

Please explain how you will monitor and evaluate this policy/function or strategy to measure progress?

Please explain how monitoring will be undertaken, when it will take place and who is responsible for undertaking it.

Once the new Scottish Fire and Rescue Service has been established in April 2013, there will be a requirement to consider a new ongoing framework from Scottish Government. At this time, the transitional Framework will be reviewed in full.

The impact assessment should now be authorised by either the Division or Group Head or equivalent.

<table>
<thead>
<tr>
<th>Policy Title</th>
<th>Transitional Fire &amp; Rescue Framework for Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strategic Outcome</td>
<td>Safer and Stronger</td>
</tr>
<tr>
<td>Name of Branch or Division</td>
<td>Fire and Rescue Services Division</td>
</tr>
<tr>
<td>Directorate or Agency</td>
<td>Learning &amp; Justice</td>
</tr>
</tbody>
</table>

We have completed the equality impact assessment for this policy.

Name: Sara Stewart
Position: Fire Performance Management Team
Date:

Authorisation by Deputy Director or equivalent

Name:
Position:
Date:
Final
Business and Regulatory Impact Assessment

Title of Proposal

Purpose and intended effect

- **Background**
  Fire and rescue services in Scotland currently consist of two fire and rescue Authorities and six Joint Boards. They provide services to 5.2 million people across an area of 7.9 million hectares. On the 31 March 2011, the headcount for fire and rescue service staff (including volunteers) in Scotland totalled 9,024.

  Strategic policies, objectives and guidance for the fire and rescue services are currently set out in the 2005 *Fire and Rescue Framework for Scotland*. The Framework makes clear what Ministers, on behalf of the people of Scotland, expect from the fire and rescue services in Scotland, and the support which the Government will give to ensure that those expectations can be met.

**Fire Reform**
The Scottish Government has announced its intention to establish a single fire and rescue service for Scotland to protect and improve frontline services in communities in the face of reduced budgets. Reform is essential to keep our communities safer and stronger. The Scottish Government also intends to create a clear modern purpose for the Scottish Fire and Rescue Service to reflect the role it plays in 21st Century Scotland.

A full BRIA on the impact of the reform of the service has been carried out and can be accessed here: [www.scotland.gov.uk/Resource/Doc/357527/0120779.pdf](http://www.scotland.gov.uk/Resource/Doc/357527/0120779.pdf)

- **Objective**
The Transitional Fire & Rescue Framework for Scotland sets out Scottish Ministers’ expectations of Fire & Rescue Authorities (FRAs) in contributing to the fire reform agenda to ensure a smooth introduction for the new Scottish Fire and Rescue Service (SFRS), whilst maintaining current fire and rescue outcomes over that period of transition. The objective of the framework is to provide guidance and support to FRAs on the priorities and objectives for the service.

  The main themes for the Framework are:
  - to protect frontline outcomes over the transition period;
  - to ensure that those best placed to participate in the design of the new
arrangements are given support to do so;

- to ensure that any major decisions are made consistently across the eight services and with due regard to future structure; and

- to help protect the people, experience, processes, assets and resources that will underpin the future delivery of world class services.

It also sets out the support which the Scottish Government will give to ensure that these expectations are met.

The central aim of the Framework is to ensure that contributing to and delivering the reform agenda is considered a priority activity for Services over the transition period, while ensuring that decisions around current business, covering for example policy and procedure, capital and revenue investments, workforce planning and organisational development are made with due regard to the single service of the future and support and enable that convergence.

- **Rationale for Government intervention**

  In setting the transitional Framework, the Scottish Government aims to protect the contribution that the Services make to achieving the following outcomes:

  - **we live our lives safe from crime, disorder and danger** *(National Outcome 9)*;
  
  - **we have strong resilient and supportive communities where people take responsibility for their own actions and how they affect others** *(National Outcome 11)*;
  
  - **our public services are high quality, continually improving, efficient and responsive to local people's needs** *(National Outcome 16)*; and

  - **we live longer, healthier lives** *(National Outcome 6)*.

  The government also needs to ensure, as progress is made towards the introduction of a new, effective and efficient, 21\textsuperscript{st} century Scottish Fire and Rescue Service, that the input, knowledge and expertise of those best placed to help design it is maximised, and that the resources on which it will be founded are protected.

  The Framework therefore sets out transitional outcomes and activities that will guide the FRAs in striking the balance between ensuring consistency of operation, with sufficient resource allocated to ongoing activities, and having due regard to the move to a single service.

**Consultation**

- **Within Government**

  Within Government, we have consulted with colleagues within Fire & Rescue Services Division, Police and Fire Reform Division, Scottish Resilience and the Scottish Fire & Rescue Advisory Unit. Justice Analytical Services have also been consulted and provided information on key performance indicators for the outcomes and activities set out in the
framework. We have also taken advice on mainstreaming equality and
diversity throughout the framework.

- **Public Consultation**
  Early informal consultation has taken place with the Fire Reform
  Programme Co-ordinator and work-stream leads from the fire service.
  Furthermore, all employee representative bodies (including the Fire
  Brigades Union) and COSLA also contributed to early discussions.

  A draft of the framework was subsequently circulated to members of the
  Ministerial Advisory Group on Fire and Rescue Services (MAG) for
  comment. As well as Scottish Government members, MAG consists of
  representatives from:

  The Chief Fire Officers Association Scotland
  The Scottish Fire Conveners” Forum
  The Fire Brigades Union
  The Fire Officers” Association
  The Association of Principal Fire Officers
  The Retained Firefighters” Union
  UNISON
  The Scottish Fire Services College
  COSLA

  A targeted formal consultation, as required by the Fire (Scotland) Act 2005
  has been undertaken with relevant stakeholders (i.e. Services and
  representative bodies) between 10 February and 23 March 2012.

- **Business**
  No consultation specific to business has been carried out. The impact
  of the transitional framework falls solely on Fire & Rescue Authorities.

<table>
<thead>
<tr>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Option 1</strong> – Retain the 2005 Fire and Rescue Framework for Scotland.</td>
</tr>
<tr>
<td><strong>Option 2</strong> - Introduce the Transitional Fire &amp; Rescue Framework for Scotland.</td>
</tr>
</tbody>
</table>

- **Sectors and groups affected**
  The impact of the transitional framework is expected to be solely on Fire &
  Rescue Authorities.

- **Benefits**
  **Option 1** – Retention of the existing 2005 Fire and Rescue Framework would
  incur no costs but could risk the financial stability and viability of the new
  single service. This approach runs the risk of leaving the Fire Rescue
  Authorities unprepared for harmonisation into the new Scottish Fire and
  Rescue Service.

  **Option 2** – The introduction of the Transitional Framework will ensure a
  smooth introduction for the new Scottish Fire and Rescue Service (SFRS),
  whilst maintaining current fire and rescue outcomes over the period of
  transition. It will maximise the input, knowledge and expertise of those best
  placed to help design the new service, and protect the resources on which it
  will be founded. It will help to ensure that investment decisions are consistent
with the future of a single service and that the financial stability of the single service is protected.

- **Costs**
  - **Option 1** – no monetary cost
  - **Option 2** – no monetary cost

**Scottish Firms Impact Test**
No impact test has been carried out. There will be no impact on Scottish firms.

- **Competition Assessment**
  No impact on the competitiveness of any business is anticipated.

- **Test run of business forms**
The proposed framework will not introduce any statutory business forms.

**Legal Aid Impact Test**
The proposals do not create any new criminal sanctions or civil penalties. It is not anticipated that these proposals will have any impact on use of the legal aid fund.

**Enforcement, sanctions and monitoring**
Section 41 of the Fire (Scotland) Act 2005 requires Fire and Rescue Authorities to have regard to the Framework when carrying out their functions. The Scottish Ministers have the power to intervene if they consider that the authorities are failing, or are likely to fail to act in accordance with Framework by setting out, by order, an obligation for an authority to take a particular action or to refrain from taking a particular action, to ensure they act in accordance with the Framework. Before making such an order, the Scottish Ministers must consult the authority.

**Implementation and delivery plan**
The framework will be brought into force by an Order in the Scottish Parliament. We aim to bring the Framework into force before the summer 2012 Parliamentary recess.

- **Post-implementation review**
  Once the new Scottish Fire and Rescue Service has been established, there will be a requirement for a new ongoing framework. At this time the existing framework will be reviewed in full.

**Summary and recommendation**
Option 2 is being recommended because the Scottish Government considers that it is necessary to ensure a smooth introduction for the new Scottish Fire and Rescue Service, whilst maintaining current fire and rescue outcomes over the period of transition.

- **Summary costs and benefits table**

<table>
<thead>
<tr>
<th></th>
<th>Costs</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Option 1</strong></td>
<td>None</td>
<td>Could risk the financial stability and viability of the new single service</td>
</tr>
<tr>
<td><strong>Option 2</strong></td>
<td>None</td>
<td>Will help to ensure the smooth introduction of the new service.</td>
</tr>
</tbody>
</table>
Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Roseanna Cunningham MSP
Minister for Community Safety and Legal Affairs

Scottish Government Contact point:
Sara Stewart
Fire & Rescue Services Division
1W, St Andrews House
Edinburgh
Justice Committee

21st Meeting, 2011 (Session 4), Tuesday 19 June 2012

SSI cover note

SSI title and number: Licensed Legal Services (Interests in Licensed Providers) (Scotland) Regulations 2012 (SSI 2012/154)

Type of Instrument: Negative

Coming into force: 2 July 2012

Justice Committee deadline to consider SSI: 26 June 2012

Motion for annulment lodged: No

SSI drawn to Parliament’s attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to set out who is to be regarded as having an interest in a licensed provider in various circumstances. More details on the purpose of the instrument can be found in the Executive Note (see Annexe).

2. An electronic copy of the instrument can be found at:


Justice Committee consideration:

3. The instrument was laid on 21 May 2012 and the Justice Committee has been designated as lead committee.

Procedure

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. All negative instruments are considered by the Subordinate Legislation Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). 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. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament. If that is also agreed to, Scottish Ministers must revoke the instrument.

5. Each negative instrument appears on a committee agenda at the first opportunity after the Subordinate Legislation 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 correspondence to be entered into or a
Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Annexe

Executive Note

The Licensed Legal Services (Interests in Licensed Providers) (Scotland) Regulations 2012

SSI 2012/154

The above instrument was made in exercise of the powers conferred by sections 67(2)(a) and (4)(c) and (d) and 146(2)(a) of the Legal Services (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to the negative procedure.

Background

The 2010 Act allows solicitors who offer legal services in Scotland to operate using certain business models which were previously prohibited. It removes restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and creates a regulatory framework in which the new types of business will operate. The new types of business are called licensed legal services providers (“licensed providers”) and will be licensed and regulated by approved regulators which in turn will be approved, authorised, and regulated by the Scottish Ministers.

The 2010 Act makes various provisions regarding the ownership and control of licensed providers as well as other entities or bodies. In particular:

- section 49(1) provides that, in order for an entity to be eligible to be a licensed provider, the qualifying investors in it must have at least a 51% stake in the total ownership or control of the entity;
- section 62(1) provides that, before issuing a licence to a licensed provider, or renewing it, an approved regulator must be satisfied that the non-solicitor investors in the body are fit to have such an interest (and must continue to monitor the fitness of such investors as appropriate);
- section 63(4) provides that an investor who has less than a 10% stake in the total ownership of control of a licensed provider is an exemptible investor;
- section 64(4) provides that, where a non-solicitor investor in a licensed provider is a body rather than an individual, the fitness of the persons having ownership or control of the body or any other material interest in it is relevant for the determination of whether the body itself is fit to have an interest in a licensed provider; and
- section 67(6) defines an “investor” in a licensed provider as any person who has ownership or control of the licensed provider or a material interest in it.

1 Under section 63(2), approved regulators need not apply the fitness for involvement test (required under 62(1)) to exemptible investors. However, the approved regulator’s licensing rules must set out the circumstances in which this provision will be used, and may also specify a threshold lower than 10%.
Given the importance of clearly identifying the persons affected by the provisions mentioned above, it is considered necessary to clarify exactly what is meant by these terms.

**Policy objectives**

The policy objective is to set out who is to be regarded as having an interest in a licensed provider in various circumstances, for the following purposes:

- to clarify when qualifying investors are to be regarded as having a majority share in the ownership or control of a licensed provider, for the purposes of section 49 (which requires that at least a 51% stake in licensed providers lie with solicitors or other regulated professionals);
- to enable the clear identification of investors (as defined in section 67(6) of the 2010 Act) who are subject to the fitness for involvement test set out in section 62 of the 2010 Act;
- to clarify the extent to which approved regulators can examine the fitness of those with an interest in non-solicitor investors which are bodies, when assessing the fitness of those bodies (under section 64(4) of the 2010 Act); and
- to ensure that the exemptible investor provisions in section 63 of the 2010 Act cannot be used to avoid the fitness for involvement test through the spreading of a significant interest over several associated persons.

In relation to the majority ownership requirements in section 49, regulation 2 sets out the circumstances in which qualifying investors are to be regarded as having a 51% share in a licensed provider. In particular, the 51% majority ownership is satisfied when the qualifying investors have or control at least 51% of the voting rights, and would be entitled to at least 51% of the income and at least 51% of the assets.

For the purposes of the general definition of “investor” (which determines, among other things, who is to be subject to the fitness for involvement test), regulation 3 sets out that a person has ownership or control or a material interest in a licensed provider if they have or control any voting rights, or if they are entitled to any share of the income or the assets.

Regulation 4 clarifies the extent to which regulators can consider the fitness of those who control corporate investors by setting out what is to be regarded as an interest in a body that is a non-solicitor investor in a licensed provider. It sets out that a person may be regarded as having such an interest if they have or control any voting rights of the body in question, or if they are entitled to any share of its income or assets. This can also be applied to those with such an interest in bodies which have an interest in licensed providers (and so on). However, in order to allow approved regulators to exercise their discretion and apply the fitness test in a proportionate manner, there is no requirement that a person must be regarded as having an interest under regulation 4.

Regulation 5 relates to the exemptible investor provisions in section 63, which allow approved regulators to disapply the fitness for involvement test in relation to those with a small stake in a licensed provider. In order to prevent persons seeking to avoid the fitness test by spreading a significant interest between several individuals
or companies, regulation 5 sets out that a person is only to be considered as having less than a 10% (or other figure as specified) stake if they and their associates, taken together, meet the criteria specified (which are similar to those in regulations 1-4). Finally, the definition of “associate” is provided in regulation 6 (which includes, for example, a spouse or civil partner of an investor).

Consultation

There is a general requirement under section 5 of the 2010 Act for the Scottish Ministers to consult, where considered appropriate, such persons and bodies as appear to have a significant interest in the subject matter in question. In accordance with that section, consultation has taken place with the Lord President, the Law Society of Scotland and the Institute of Chartered Accountants of Scotland. Any comments received were taken into account when the regulations were developed.

Impact Assessments

An Equality Impact Assessment was prepared for the Legal Services (Scotland) Bill, and which found no evidence of differential impact in respect of disability, gender, sexual orientation, race/ethnicity, or religion/belief. A further assessment was considered, but as these regulations do not introduce new policy but provide for the administration of the policy introduced by the 2010 Act, it was considered that this was unnecessary.

The Scottish Government also considered whether an environmental impact assessment was required. However, as it considers that the instrument has no environmental impact, no assessment was considered necessary.

A Regulatory Impact Assessment was carried out for the Legal Services (Scotland) Bill. A Business and Regulatory Impact Assessment is not considered necessary for this instrument, as it does not introduce substantive new policy and has no further significant impact on the Scottish Government, local government or on business.

Financial Effects

This instrument does not have any new financial effects that were not anticipated when the enabling legislation was enacted. A Financial Memorandum was produced which set out the financial implications of the Bill.

Scottish Government
Justice Directorate
18 May 2012

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2 The regulatory impact assessment for the Legal Services (Scotland) Bill can be viewed at www.scotland.gov.uk/Resource/Doc/980/0087717.pdf
3 See: http://www.scottish.parliament.uk/S3_Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-introd-en.pdf, pages 34ff
Justice Committee

21st Meeting, 2011 (Session 4), Tuesday 19 June 2012

SSI cover note

SSI title and number: Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167)

Type of Instrument: Negative

Coming into force: 26 June 2012

Justice Committee deadline to consider SSI: 4 September 2012

Motion for annulment lodged: No

SSI drawn to Parliament's attention by Sub Leg Committee: Yes (see Annexe A)

Purpose of Instrument:

1. The purpose of the instrument is to amend the 2001 Rules to provide the Board with more efficient administrative arrangements, including the use of electronic communication, for the consideration of cases that come before it. More details on the purpose of the instrument can be found in the Executive Note (see Annexe B).

2. An electronic copy of the instrument can be found at:


Justice Committee consideration:

3. The instrument was laid on 28 May 2012 and the Justice Committee has been designated as lead committee.

Procedure

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. All negative instruments are considered by the Subordinate Legislation Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). 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. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament. If that is also agreed to, Scottish Ministers must revoke the instrument.

5. Each negative instrument appears on a committee agenda at the first opportunity after the Subordinate Legislation 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 correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Annexe A

Extract from the Subordinate Legislation Committee’s 32nd Report, 2012

Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167) (Justice Committee)

1. This instrument amends the Parole Board (Scotland) Rules 2001 (“the principal Rules”) in order to change the requirements for the composition of a Board to hear particular types of cases. It also makes provision in relation to the calculation of time periods, electronic communication with the Parole Board for Scotland (“the Board”), and the materials which the Scottish Ministers are required to submit to the Board in certain cases.

2. The instrument is subject to negative parliamentary procedure and comes into force on 26 June 2012.

3. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in the Appendix.

4. The principal Rules set out in detail how the Board operates when considering whether prisoners should be released from prison on licence. These Rules amend the principal Rules in a number of ways, but in particular they alter the composition of the Board.

5. At present, any three members of the Board designated by the chairman may sit to dispose of a particular case under Part III of the principal Rules. If an oral hearing is to take place, a legally qualified Board member must chair it. Separate provisions apply to Part IV cases where the Board is considering the release on life licence of a life sentence prisoner. These Rules are intended to alter the composition of the Board.

6. It appears to the Committee that the Scottish Ministers intended to amend rule 14 of the principal Rules so that the Board could sit with a quorum of two members in Part III cases (unless an oral hearing was required, in which case the quorum would be three). However, it considers that rule 14(2), as amended by these Rules, instead gives the chairman of the Board a discretion to appoint any two (but only two) members of the Board to dispose of a case, in lieu of his current discretion to appoint any three (but only three) members. It appears that, as rule 14 would stand, either the chairman could exercise his discretion (and appoint two members to determine a case) or it could be dealt with by the full Board. In the Committee’s view, this does not achieve the Ministers’ stated policy intention of enabling the Board to sit with two or more members in these cases.

7. In their response to the Committee, the Scottish Ministers accept that rule 7 of these Rules, which amends rule 14 of the principal Rules, does not adequately deliver their intended policy. They indicate that they intend to lay a corrective instrument which will revoke and replace rule 7 with a new rule to take account of the Committee’s concerns.
8. The Committee draws the instrument to the attention of the Parliament on reporting ground (i). Rule 7 of these Rules appears to be defectively drafted. It amends rule 14(2) of the Parole Board (Scotland) Rules 2001 so that the chairman of the Parole Board may appoint any two members of the Board to deal with a case. However, it appears that the Scottish Ministers’ policy intention was to enable the Board to sit with a quorum of two (and hence with more than two members in certain circumstances).

9. The Committee welcomes the Scottish Ministers’ commitment urgently to lay a corrective instrument which will revoke and replace rule 7 to address the issues identified by the Committee.

Appendix

Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167)

On 31 May 2012, the Scottish Government was asked:

1. Rule 7 of these Rules amends rule 14 of the Parole Board (Scotland) Rules 2001 (“the principal Rules”) and, in particular, rule 14(2) is amended so that any case (other than a case to be dealt with by way of an oral hearing under rule 15A) may be dealt with by any 2 members of the Board appointed by the chairman for that purpose. Rule 14(2) accordingly appears to confer a discretion to appoint 2 members of the Board to deal with a case. However, it appears from subsequent provisions (and the Explanatory Note) that the intention is that 2 is the minimum number of members required to deal with a case, but that the Board might be constituted by a greater number of members. Standing the discretionary nature of rule 14(2) (and hence the possibility of the whole Board considering a matter if that discretion is not exercised), the Scottish Government is asked to explain the basis for relying on rule 14(2) to appoint more than 2 members to deal with a case.

2. Rule 14(6) of the principal Rules refers to the appointment under paragraph (2) of Board members for the purposes of a rule 15A hearing. Given the insertion of the words “other than a case that is to be dealt with by way of an oral hearing under rule 15A” into rule 14(2) by rule 7(b)(ii) of these Rules, the Scottish Government is asked to explain how rule 14(2) can be used to appoint members of a Board for the purposes of rule 15A.

3. Rule 14(7) of the principal Rules applies subject to rule 14(8), which is inserted by these Rules. As rule 14(7) appears only to apply in relation to members of the Board who have been appointed under rule 14(2) (and hence where the Board is constituted by 2 members), the Scottish Government is asked to explain how rule 14(7) could ever apply without rule 14(8) being triggered, and what purpose the alternatives in rule 14(7)(a) and (b) then serve as rule 14(8) would appear to override them.

4. Rule 15H of the principal Rules is amended to provide for the situation where the Board appointed for a rule 15A hearing (which would ordinarily have 3 members) has been reduced to 2. As before, rule 14(7) in relation to absent members appears only to apply in relation to members of the Board who have been appointed under rule 14(2). The Scottish Government is accordingly asked to explain how the newly-inserted rule 15H(3) could have effect, and the basis for the Board appointed for a rule 15A hearing reducing from 3 to 2 members.
5. Rule 16 of the principal Rules is substituted in its entirety by rule 13 of these Rules. Rule 16(2) refers to the situation where a Board constituted by 2 members cannot reach a unanimous decision, and obliges the chairman to appoint a third member “in terms of rule 14(2)”. The Scottish Government is asked to explain why rule 14(2) is considered to give a power to appoint a third member.

The Scottish Government responded as follows:

We accept the Committee’s points on this instrument and accept that the drafting of S.S.I. 2012/167, in particular rule 7, does not adequately deliver the intended policy, which is to allow the Board to operate with a quorum of 2 in certain cases. We apologise for that, and are grateful to the Committee for pointing out the issue.

It is our view that the issues raised all flow from the amendments made to rule 14(2) of the principal rules by rule 7 of S.S.I. 2012/167. We propose to address these issues by urgently laying a further set of amendment rules to revoke and replace rule 7 of the present rules with a new rule that takes account of the Committee’s points.

It is anticipated that only a small amount of re-drafting will be required to correct the issues that the Committee have raised. In particular, we will seek to -

- Clarify the relationship between rule 14(2) of the principal rules and other rules (as amended by S.S.I. 2012/167), in particular rules 14(7), 14(8), 15H and 16;
- Make clear in what circumstances and on what basis the Board can appoint further members to deal with a case.
Annexe B

Executive Note

The Parole Board (Scotland) Amendment Rules 2012

(SSI 2012/167)

1. The above instrument is proposed to be made in exercise of the powers conferred by section 20(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993(a). The instrument is subject to negative resolution procedure.

Background

2. The Parole Board (Scotland) Rules 2001 (S.S.I. 2001/315) (“the 2001 Rules”) make provision to allow the Parole Board for Scotland (“the Board”) to consider the release of various categories of prisoner. Under Part III of the 2001 Rules, the Board considers cases using a simplified procedure which is based on a dossier of reports that is considered at a casework meeting. The Board can also conduct a Part III case meeting by means of an oral hearing at which the prisoner is present, should it consider such a hearing to be in the interest of justice. Under Part IV of the 2001 rules, which generally concerns the most serious categories of cases including prisoners sentenced to life imprisonment, cases are dealt with by way of a tribunal at which the prisoner is present.

Policy objective

3. The intention of the present Rules is to amend the 2001 Rules to provide the Board with more efficient administrative arrangements for the consideration of cases that come before it.

4. The use of electronic media to transmit documents securely has increased significantly across a range of public functions since the 2001 Rules came into force. Rule 3 of the present Rules amends rule 2(1) of the 2001 Rules to include a definition of “electronic communication” and rule 5 of the present Rules amends rule 11 of the 2001 Rules to allow the Board and other parties to use electronic communications to transmit and receive documents. The references to electronic communications replace the previous reference to facsimile transactions, which is now regarded as too narrow and outdated, although fax is retained as a method of sending documents to the Board.

5. References to timescales throughout the rules have been changed from “days” to an equivalent number of “working days”. For example, references to 14 days have been changed to 10 working days. Rule 2(1) of the 2001 Rules has also been expanded to include a definition of working days. The purpose of these amendments is to ensure that the parole process can be undertaken in a considered but still timely manner at times of the year when there are a large number of public holidays.

6. Part III cases are presently considered by a quorum of three members of the Board. Rule 7 of the present rules amends rule 14 of the 2001 Rules. Rule 14(1)(a) now retains a quorum of three for Part III oral hearings, while Rule 14(1)(b) reduces...
the quorum to two members for all other Part III cases i.e. those dealt with at a casework meeting in the absence of the person concerned. Should a two-member quorum fail to reach a unanimous decision, rule 16(2) of the 2001 Rules now requires the Chair of the Board to appoint a third member to consider the case. For casework meetings constituted with an even number of members greater than two which fail to reach a unanimous decision, rule 16(3) of the 2001 Rules now allows the chair of the meeting to cast an additional vote to allow a decision to be reached. These amendments provide flexibility in the way in which the Board constitutes panels of members for casework meetings and is intended to allow scope for future savings.

7. Rule 7(1) of the 2001 Rules allows a prisoner to submit written representations, together with any other information in writing or documents, which the prisoner wishes the Board to take into account when considering their case. Rule 15(3)(a) of the 2001 Rules also allows the person concerned to request an interview with a member of the Board prior to their case being considered at a casework meeting, while Rule 15(3)(b) allows the Board to decide to undertake an interview if they consider it to be desirable. In practice, the interview procedure [often] duplicates information contained within the written representation and adds little value to the Board’s decision-making process. Rule 8 of the present Rules removes the person concerned’s right to request an interview with a member of the Board. This is intended to simplify procedures and produce savings for the Board. Prisoners’ rights would continue to be protected through the right to submit written representations and the option of an oral hearing if the Board considered such a hearing to be in the interest of justice.

8. Rules 12(b) and 17(b) of the present rules amend Rule 15H(2)(b) and Rule 28(2)(b) of the 2001 Rules to allow the Chair of the Board to sign decision letters on those occasions when the chair of the casework meeting or tribunal is unavailable for whatever reason. These amendments are intended to allow the Board to inform the prisoner and other parties about the outcome of casework meetings and tribunals as quickly as possible following conclusion of proceedings. This is of particular importance when the decision is taken to instruct the immediate release of the person concerned, thereby avoiding any unnecessary further detention. The amendment also changes Rule 15A references from prisoner to person to ensure consistency with other references to persons in the 2001 Rules.

9. The quorum for Part IV cases remains at three members of the Board for all tribunal hearings under rule 18(1) of the 2001 Rules. However, rule 14 of the present rules amends rule 18(5) of the 2001 Rules, so that, in the event of a member other than the chair of the tribunal becoming unavailable for whatever reason, the requirement for all parties to consent before the tribunal could continue with the two remaining members is removed. Instead, the two remaining members are required to reach a unanimous (majority) verdict. Where the two remaining members fail to reach a unanimous decision, rule 17(a) of the present rules amends rule 28(1) of the 2001 Rules to remove the chair of the tribunal’s casting vote and rule 17(d) of the present rules amends rule 28(3) of the 2001 Rules to require the chairman of the Board to convene a new tribunal with three other members to form a new tribunal to consider the case. These changes protect prisoners’ rights by ensuring that Part IV tribunal decisions are always based upon a majority or unanimous verdict, as at present, while allowing for cases to proceed even where a member of a tribunal becomes unavailable.
10. Paragraph 5(b) of the schedule to the 2001 Rules requires copies of dossiers from previous referrals to be sent to the Parole Board for consideration at the prisoner’s next tribunal. Rule 18 of the present rules replaces this with a narrower definition of papers from previous referrals that need to be provided. The intention is that the volume of papers associated with previous consideration of the case is reduced, while ensuring the Board continues to receive the most relevant documents. Paragraph (e) of Rule 18 allows the Board to request such additional information as they may require, providing an important safeguard should they consider any other information from previous consideration of the case is needed to reach a well-informed decision.

Consultation

11. There is no statutory requirement to consult on this Order; we did not consider that public consultation was necessary. However, we sought the views of the Parole Board for Scotland, the Scottish Prison Service, the Association of Directors of Social Work, the Association of Chief Police Officers in Scotland and the Law Society for Scotland. No objections were raised to our proposals.

Financial Effects

12. A regulatory impact assessment is not considered necessary because the change is expected to have no financial impact on Scottish businesses.

Justice Directorate
May 2012
Justice Committee

21st Meeting, 2012 (Session 4), Tuesday 19 June 2012

SSI cover note

SSI title and number: Act of Sederunt (Summary Cause Rules Amendment) (Personal Injuries Actions) 2012 (SSI 2012/144)

Type of Instrument: Not subject to parliamentary procedure

Coming into force: 1 September 2012

Justice Committee deadline to consider SSI: 26 June 2012

SSI drawn to Parliament's attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to amend the Sheriff Court Summary Cause Rules 2002.

2. An electronic copy of the instrument can be found at:

   http://www.legislation.gov.uk/ssi/2012/144/contents/made

Justice Committee consideration:

3. The instrument was laid on 18 May 2012 and the Justice Committee has been designated as lead committee.

Procedure:

4. Under Rule 10.1.3 of Standing Orders, any instrument laid before the Parliament is to be referred to a lead committee for consideration. This includes instruments laid only but not subject to any parliamentary procedure, which prior to the 2010 Act were not previously considered by lead committees. This requirement is an unintended consequence of the recent rule changes. However, the Standards, Procedures and Public Appointments Committee recently considered this issue and, from 20 August 2012, instruments not subject to parliamentary procedure will no longer require to be considered by a lead committee.

5. While there is still a requirement to consider this instrument, the Committee may feel it is sufficient simply to note the Act of Sederunt. There is however nothing to stop the Committee taking further action (eg writing a letter or report) but there is no formal mechanism to annul or modify the instrument.
Justice Committee

21st Meeting, 2012 (Session 4), Tuesday 19 June 2012

SSI cover note

SSI title and number: Legal Services (Scotland) Act 2010 (Commencement No. 2 and Transitional Provisions) Order 2012 (SSI 2012/152)

Type of Instrument: Not subject to parliamentary procedure

Coming into force: 2 July 2012

Justice Committee deadline to consider SSI: 26 June 2012

SSI drawn to Parliament’s attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to bring into force provisions of the Act that will enable the formation of approved regulators and licensed providers, and the creation of the regulatory framework within which licensed providers will operate. More details on the purpose of the instrument can be found in the Executive Note (see Annexe).

2. An electronic copy of the instrument can be found at:

   http://www.legislation.gov.uk/ssi/2012/152/contents/made

Justice Committee consideration:

3. The instrument was laid on 21 May 2012 and the Justice Committee has been designated as lead committee.

Procedure

4. Under Rule 10.1.3 of Standing Orders, any instrument laid before the Parliament is to be referred to a lead committee for consideration. This includes instruments laid only but not subject to any parliamentary procedure, which prior to the 2010 Act were not previously considered by lead committees. This requirement is an unintended consequence of the recent rule changes. However, the Standards, Procedures and Public Appointments Committee recently considered this issue and, from 20 August 2012, instruments not subject to parliamentary procedure will no longer require to be considered by a lead committee.

5. While there is still a requirement to consider this instrument, the Committee may feel it is sufficient simply to note the Order. There is however nothing to stop the Committee taking further action (eg writing a letter or report) but there is no formal mechanism to annul or modify the instrument.
Annexe

Executive Note

The Legal Services (Scotland) Act 2010 (Commencement No. 2 and Transitional Provisions) Order 2012

SSI 2012/152 (C. 14)

The above instrument was made in exercise of the powers conferred by section 150(2) and (4)(b) of the Legal Services (Scotland) Act 2010 ("the 2010 Act").

Background

The 2010 Act allows solicitors who offer legal services in Scotland to operate using certain business models which were previously prohibited. It removes restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and creates a regulatory framework in which the new types of business will operate. The new types of business are called licensed legal services providers ("licensed providers") and will be licensed and regulated by approved regulators which in turn will be approved, authorised, and regulated by the Scottish Ministers.

Policy objectives

Commencement

This Order brings into force the provisions of Part 2 of, and schedules 1 to 8 to, the 2010 Act in so far as these are not already in force. It also brings into force certain provisions of Part 4 of the Act which are connected with Part 2. The Order will enable the formation of approved regulators and licensed providers, and the creation of the regulatory framework mentioned above, within which licensed providers will operate.

Transitional provision relating to complaints levies payable by licensed providers

Section 81 of the 2010 Act inserts new section 57C into the Legal Profession and Legal Aid (Scotland) Act 2007 ("the 2007 Act"). Subsection (1)(a) requires licensed providers to pay the annual general levy to the Scottish Legal Complaints Commission ("the Commission") and subsection (4) allows the Commission to vary this levy from that applicable to existing practitioners. Subsection (1)(b) requires a licensed provider in certain circumstances to pay a complaints levy to the Commission.

However, the process of setting these levies is tied to the Commission's budgetary cycle, provided for in section 29 of the 2007 Act. This requires consultation on the proposed budget with each professional organisation and its members in January, publication of the responses by 31 March, and laying the budget before Parliament no later than 30 April.
As it is expected that the first approved regulators could be approved towards the end of 2012, transitional arrangements are required to allow the Commission to consult on, and set, both the annual general and the complaints levies for licensed providers outside the usual budgetary cycle. This Order provides for this in article 3 and for the consultation to include those bodies which the Scottish Ministers have advised the Commission as having an interest in applying to become approved regulators. This will ensure that all potentially affected parties are consulted, particularly those bodies which may be in the process of applying to become regulators.

**Transitional provision relating to complaints levies payable by approved regulators**

Section 80 of the 2010 Act requires approved regulators to pay an annual levy and a complaints levy to the Commission. Before setting these levies, the Commission must consult each approved regulator and the Scottish Ministers. However, as the levies may potentially be set before the approved regulators are in place, it is considered appropriate that this consultation process should include those bodies which the Scottish Ministers have advised the Commission as having an interest in applying to become approved regulators. This Order makes such provision in article 4.

**Consultation**

An informal consultation has taken place with the Commission with regard to the transitional provisions in articles 3 and 4. Any comments received were taken into account in the development of this Order.

**Impact Assessments**

An Equality Impact Assessment was prepared for the Legal Services (Scotland) Bill, and which found no evidence of differential impact in respect of disability, gender, sexual orientation, race/ethnicity, or religion/belief. A further assessment was considered, but as this Order does not introduce new policy but simply commences provisions in the 2010 Act (with appropriate transitional arrangements), it was considered that this was unnecessary.

The Scottish Government also considered whether an environmental impact assessment was required. However, as it considers that the instrument has no environmental impact, no assessment was considered necessary.

A Regulatory Impact Assessment was carried out for the Legal Services (Scotland) Bill.¹ A Business and Regulatory Impact Assessment is not considered necessary for this instrument, as it does not introduce substantive new policy and has no further significant impact on the Scottish Government, local government or on business.

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¹ The regulatory impact assessment for the Legal Services (Scotland) Bill can be viewed at www.scotland.gov.uk/Resource/Doc/980/0087717.pdf
Financial Effects
This instrument does not have any new financial effects that were not anticipated when the enabling legislation was enacted. A Financial Memorandum was produced which set out the financial implications of the Bill.²

Scottish Government
Justice Directorate
18 May 2012

² See http://www.scottish.parliament.uk/S3_Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-introd-en.pdf, pages 34ff
SSI cover note

SSI title and number: Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Saving Provisions) Order 2012 (SSI 2012/160)

Type of Instrument: Not subject to parliamentary procedure

Coming into force: 25 June 2012

Justice Committee deadline to consider SSI: 26 June 2012

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes (see Annexe A)

Purpose of Instrument:

1. The purpose of the instrument is to commence provisions contained in the 2010 Act which implement the Scottish Law Commission’s Report on Insanity and Diminished Responsibility, published in 2004. More details on the purpose of the instrument can be found in the Executive Note (see Annexe B).

2. An electronic copy of the instrument can be found at:


Justice Committee consideration:

3. The instrument was laid on 23 May 2012 and the Justice Committee has been designated as lead committee.

Procedure

4. Under Rule 10.1.3 of Standing Orders, any instrument laid before the Parliament is to be referred to a lead committee for consideration. This includes instruments laid only but not subject to any parliamentary procedure, which prior to the 2010 Act were not previously considered by lead committees. This requirement is an unintended consequence of the recent rule changes. However, the Standards, Procedures and Public Appointments Committee recently considered this issue and, from 20 August 2012, instruments not subject to parliamentary procedure will no longer require to be considered by a lead committee.

5. While there is still a requirement to consider this instrument, the Committee may feel it is sufficient simply to note the Order. There is however nothing to stop the Committee taking further action (eg writing a letter or report) but there is no formal mechanism to annul or modify the instrument.
Annexe A

Extract from the Subordinate Legislation Committee’s 32nd Report, 2012

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Saving Provisions) Order 2012 (SSI 2012/160 (C.15)) (Justice Committee)

1. The purpose of this instrument is to commence sections 168 to 171 of, and consequential provisions in Schedule 7 to, the Criminal Justice and Licensing (Scotland) Act 2010 (‘the 2010 Act’). The provisions come into force on 25 June 2012, but by article 3 are applied to criminal proceedings commenced on or after that date, irrespective of the date when an offence was committed.

2. The instrument is not subject to any parliamentary procedure.

3. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in the Appendix.

4. The Committee reports on two matters in relation to this instrument. The Committee accepted the clarification provided in the Government’s response in relation to the questions in paragraphs 4(a) and 4(b) in the Appendix.

The meaning of article 3

5. In relation to section 168 of the 2010 Act (so far as inserting section 51B of the 1995 Act) and section 171 of that Act (so far as abolishing the plea of diminished responsibility) (‘the provisions’), article 3 brings the provisions into force on 25 June 2012, and applies them to proceedings on or after 25 June 2012. It is specifically stated that the new provisions will apply irrespective of when the offence was committed. The provisions are therefore specifically applied to conduct which took place prior to commencement by an ancillary incidental provision.

6. In contrast, article 4(2) provides that, in relation to proceedings on or after 25 June in respect of conduct which took place before that date, the existing common law of diminished responsibility is to continue to apply. The case is to proceed as if the new provisions were not commenced.

7. The Committee therefore sought an explanation why article 3 required to apply those provisions from 25 June 2012 to offences committed prior to that date by additional ancillary provision, rather than article 4(2) alone providing for the saving and incidental application provision. The Committee also asked how this apparent contradiction between the articles is resolved, so that only article 4(2) must be given effect.

8. The Government’s response contends, in essence, that the drafting of article 3 follows a ‘standard’ approach in relation to the commencement of provisions, and then savings. However, article 3 is not a ‘standard’ commencement provision. It adds within the same sentence an incidental application provision which has a significant effect. It is therefore a commencement provision in a relatively unusual form.

9. The plain meaning of article 3 taken alone is that, as noted in paragraph 36, it brings the provisions into force on 25 June 2012, and then applies them to
proceedings on or after 25 June 2012 – regardless of when the offence was committed.

10. The meaning of article 3, in that respect, is in contrast to the clear saving effect of article 4(2). Article 4(2) provides that, in relation to those proceedings and those offences committed before 25 June 2012, the provisions are not commenced, and the common law of diminished responsibility continues to apply.

11. The Committee accepts the Government’s view that considering the instrument as a whole a court would be likely to give effect to the saving provision in article 4(2). Nevertheless, it considers that the meaning of the instrument could be clearer, due to the tension described above, between articles 3 and 4.

The procedure applying to the instrument
12. The Committee’s questions 1 to 3 were directed at the enabling power which the Scottish Government is relying on to make the savings provisions in article 4 of the Order.

13. Section 201(2) of the 2010 Act contains a general ancillary power. This states that any power to make regulations or an order under the 2010 Act includes a power to make —(a) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient”.

14. Section 205(1) of the 2010 Act contains a —tail made” power to make ancillary provisions in commencement orders under the Act. Commencement orders are not subject to parliamentary procedure, but the exercise of the more specific power in section 205(1) is subject to the negative procedure.

15. The Scottish Government has chosen to use the section 201(2) power and not the section 205(1) power to make the savings provisions in article 4 (and has laid the Order together with a covering note explaining to Parliament that it is not subject to procedure.) It is particular to the drafting of the 2010 Act that there is in effect a choice of which powers can be used to make article 4 of the Order, and also the procedure which applies.

16. The Committee accepted that, apart from the citation of the appropriate powers in the preamble, this procedural aspect does not affect the terms of this Order. It is accepted that this does not affect the validity and vires of the Order.

17. However, the Committee’s predecessor in Session 3, in its 69th report of 2010, reported on this aspect in relation to the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2010 (SSI 2010/413). The Committee reported:

-While the Committee accepts this Order is intra vires, in general where an enabling Act provides for a particular power to make transitional or savings provisions in connection with the coming into force of the provisions of the Act (such as in section 205(1)), then the Committee would expect that power to be used to make such provisions, rather than any more general powers (such as in section 201(2)(a)). The Committee notes that, as a result of the Scottish government’s choice of power, there is no Parliamentary scrutiny of the ancillary provisions, when had section 205(1) been used the provisions would have been subject to negative procedure.”
18. The Government has therefore not followed that expectation in making this Order. The Committee reiterates the terms of the earlier report – and the expectation mentioned in it.

19. The Committee draws this instrument to the attention of the Parliament on reporting ground (h) as the meaning of the instrument could be clearer. The plain meaning of article 3 contradicts the saving provision made by article 4(2). Article 3 applies the commencement of sections 168 and 171 of the Criminal Justice and Licensing (Scotland) Act 2010 on 25 June 2012 to criminal proceedings which are commenced on or after that date, in relation to offences committed before that date. Article 4(2) disapplies the commencement of section 168 (so far as inserting section 51B of the Criminal Procedure (Scotland) Act 1995 (diminished responsibility)) and section 171 (so far as abolishing the plea of diminished responsibility) in relation to those proceedings, where the offence was committed before that date.

20. The Committee also draws this instrument to the attention of the Parliament on the general reporting ground. In relation to the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2010, the Committee reported in October 2010 that:

“in general where an enabling Act provides for a particular power to make transitional or savings provisions in connection with the coming into force of the provisions of the Act (such as in section 205(1)), then the Committee would expect that power to be used to make such provisions, rather than any more general powers (such as in section 201(2)(a)). The Committee notes that, as a result of the Scottish Government’s choice of power, there is no Parliamentary scrutiny of the ancillary provisions, when had section 205(1) been used the provisions would have been subject to negative procedure.”

21. While the Committee accepts that this Order is intra vires, it notes that the Scottish Government has not followed the expectation in that report in making this Order. It reiterates those terms of the report.

22. Furthermore, the Committee notes that, again as a result of the Scottish Government’s choice of power, there is no parliamentary scrutiny of the saving provisions in article 4, when, had section 205(1) been used, the provisions would have been subject to negative procedure.

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Appendix

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Saving Provisions) Order 2012 (SSI 2012/160 (C.15))

On 25 May 2012, the Scottish Government was asked:

1. Section 205(1) of the 2010 Act contains the express power to make savings provisions in connection with a commencement order. Would you agree that section 205 is being relied on to make the savings in article 4, and so should have been cited in the preamble? Otherwise, given that a specific power is conferred for this purpose, why is article 4 considered to be a proper and usual exercise of the powers in section 201 and 206?

2. Section 201(3) provides that commencement of provisions under section 206 is not subject to procedure (laid only), but an order using the powers in section 205 is subject to the negative procedure. Assuming you agree that the powers in section 205 are being relied on, would you agree that the whole provisions of this order are made in reliance of the power to combine negative and “laid only” provisions in section 33 of the Interpretation and Legislative Reform (S) Act 2010 (ILRA), and so the instrument is subject to the negative procedure?

3. If it is agreed that section 205 of the 2010 Act and section 33 of ILRA should have been included in the preamble as enabling powers, please explain the effect of the omission, given that the preamble does not include reference to other enabling powers available to make the instrument?

4. Article 3 applies the commencement of provisions to criminal proceedings commenced on or after 25 June 2012, irrespective of the date the offence was committed. However sections 168 and 171 of the 2010 Act provide for new statutory tests in relation to the special defence available to persons who lack criminal responsibility by reason of mental disorder at time of committing the offence; the plea of diminished responsibility; and the abolition of all common law rules on the special defence of insanity and the plea of diminished responsibility. These are substantive matters of criminal responsibility and penalty, rather than procedure. It appears that article 3 would have the effect of altering the substantive rules on criminal liability, in relation to relevant acts or omissions constituting offences committed before 25 June.

a. Could you fully explain why the commencement powers in section 201 and 206 of the 2010 Act permit the application of sections 168 and 171 to acts or omissions constituting offences which were committed before the date this order comes into force, and so in a different manner?

b. Could you explain whether and how, in consequence of the application of sections 168 and 171 to offences committed before 25 June 2012, any persons could be convicted of an offence, or subject to a higher penalty, who would not otherwise have been convicted if applying the law applicable to the relevant acts or omissions when done? If so, could you fully explain why the application provision in article 3 complies with article 7(1) of the European Convention on Human Rights, which prohibits the retrospective application of offences, so as to penalise conduct which was not criminal at the time when the relevant act or omission occurred?
The Scottish Government responded as follows:

1. As cited in its preamble, the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 10 and Savings Provisions) Order 2012 (‘the Order’) is made under the powers conferred by sections 201(1), (2) and 206(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (‘the Act’). In particular, saving provision is competently included in the Order by virtue of the reference in the preamble to section 201(2) of the Act. Section 201(2) enables the Scottish Ministers to make such incidental, supplementary, consequential, transitional, transitory or saving provision’ in an order as they consider necessary or expedient.

As such, we do not agree that it was necessary for section 205 (Transitional provision etc) of the Act to be cited in the preamble of the Order Act to enable the making of saving provision. Indeed, we note that the following commencement orders made under the Act all included transitional or saving provision and none cited section 205 in their preambles: SSI 2010/385 and 413, 2011/157 and 178, 354. In this context, the saving provision made relates directly to the coming into force of the Act. As such in our view it was appropriate to include them in this Order rather than in a separate Order made under section 205(1). In other contexts, citation of section 205(1) may be necessary or appropriate and in particular, when textually amending an enactment.

2 & 3. In light of our reply to question 1, these questions do not require to be answered.

4a. As already explained, the Order has been made under authority of section 201(2) of the Act (amongst other powers). Section 201(2) of the Act enables the Order to contain saving provision. It also confers power to make different for different purposes.

4b. Before addressing the issue you raise, it may be helpful to explain our approach to commencement. In general terms, the provisions commenced by the Order will apply to any criminal proceedings begun on or after 25th June 2012, even if the conduct giving rise to the proceedings occurred before that date (Article 3). We have excepted from that general approach, changes made to the common law of diminished responsibility (Article 4(2)). The common law of diminished responsibility will continue to apply to proceedings commenced on or after 25th June 2012 where the conduct giving rise to the proceedings occurred before that date. In our view, it was necessary to adopt this approach in relation to diminished responsibility as developments in the common law since the Act received Royal Assent gave rise to the possibility that the abolition of the common law rules and the substitution of the provisions to be inserted as section 51B of the Criminal Procedure (Scotland) Act 1995 might have had the effect of making the plea of diminished responsibility unavailable in circumstances where it would otherwise have been available. The effect of Article 4(2) is to ensure that in those cases the common law of diminished responsibility will continue to have effect.

As such, the issue that you have identified arises only in relation to the abolition of the special defence of insanity and the application of section 168 of the Act. The provisions in section 168 that are to be inserted as section 51A of the Criminal Procedure (Scotland) Act 1995 replicate, in all material respects, the terms of the
draft provision proposed by the Scottish Law Commission (‘the Commission’) in its Report on Insanity and Diminished Responsibility published in July 2004. In paragraph 5.66 of that Report, the Commission considers the issue raised. It states that the changes recommended to the special defence of insanity ‘do not have the effect of imposing criminal liability when none existed before, but of potentially removing or reducing such liability’. It went on to recommend that the new law should apply to all cases where proceedings are commenced after the relevant provisions come into force.

The Scottish Government agrees with the Commission’s assessment of the effect of the new provisions. The traditional formulation of the state of mind required to establish the special defence of insanity is that of a ‘total alienation of reason’ in regard to the crime charged. This is already interpreted as requiring the existence of a mental illness, and as excluding states of mind induced through the consumption of drugs or alcohol. However, the new provisions make clear that the availability of the defence is less dependent on the severity of that condition, as implied in the ‘total alienation of reason’ test, than on the impact the condition in question has on the ability to appreciate the wrongfulness of the act.

The Commission also concluded that it was already the case that the condition of psychopathy does not fall within the ambit of the existing special defence. The terms of section 51A(2) would not therefore operate to deprive an accused of a defence that existed previously.

In conclusion, we are content that our approach to commencement will not result in persons being convicted of an offence they could not have been convicted of, or subject to a higher penalty than that which could have been imposed, under the law applying at the time of the relevant acts or omissions.

**On consideration of this response, on 31 May 2012 the Scottish Government was then asked:**

Article 3 of the Order is not stated to be subject to article 4. In relation to section 168 of the 2010 Act (so far as inserting section 51B of the 1995 Act) and section 171 of that Act (so far as abolishing the plea of diminished responsibility) (‘the provisions’), article 3 brings the provisions into force on 25 June 2012, and applies them to proceedings on or after 25 June 2012 – but where an offence was committed before 25 June 2012. Article 4(2) provides that in relation to those proceedings and those offences committed before that date, the provisions are not commenced, and the common law of diminished responsibility continues to apply.

Please explain—
(a) why article 3 required to apply those provisions, from 25 June 2012, to offences committed prior to that date, rather than article 4(2) alone providing for the saving and incidental application provision, and

(b) how this apparent contradiction between the articles is resolved, so that only article 4(2) must be given effect?
The Scottish Government responded as follows:

The explanatory notes to the Order set out in plain English our approach to commencement, namely:-

—The provisions come into force on 25th June 2012 and apply in general to all criminal proceedings commenced on or after that date, irrespective of when the conduct giving rise to the proceedings occurred. There is one exception to this general approach. In the light of developments in the common law of diminished responsibility that have occurred since the Act received Royal Assent, section 168 of the Act (in so far as inserting section 51B in the Criminal Procedure (Scotland) Act 1995) does not apply where the conduct giving rise to the proceedings took place before 25th June 2012, even when the proceedings are commenced after that date. In such cases the common law of diminished responsibility continues to have effect.”

In our view, Article 3 (Commencement of provisions) and Article 4(2) (Savings provision) of the Order clearly give effect to the above approach. In particular, Article 3 deals with commencement more generally (including the abolition of the plea of diminished responsibility) and Article 4(2) ensures that notwithstanding the general approach, the common law of diminished responsibility is preserved in certain cases. In our view, it is clear from the approach taken that Article 3 of the Order is subject to Article 4.

As question (a) infers, there are no doubt various ways in which the Order could have been drafted to deliver the approach set out in the explanatory note. Notwithstanding that, we are content that the interaction between Articles 3 and 4(2), and the overall legal effect of the Order, is clear.

We note that question 5b seems to suggest that the Order should have expressly stated that Article 3 of the Order is subject to Article 4. As already indicated, we disagree. Given the context, we consider the interaction between the provisions self-evident. The very essence of the savings provision (like any other savings provision in a commencement order) is to modify the general approach to commencement.
Annexe B

Executive Note

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Saving Provisions) Order 2012

SSI 2012/160(C.15)

1. The above instrument will be made in exercise of the powers conferred by virtue of sections 201(1), (2) and 206(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (―the 2010 Act‖).

Policy Objectives

2. The purpose of this instrument is to commence provisions contained in the 2010 Act which implement the Scottish Law Commission's Report on Insanity and Diminished Responsibility, published in 2004 (a link to which is attached at the end of this note). The provisions directly reflect the policy of the draft Bill contained in the Commission's Report, with only any changes having been made to reflect the incorporation of the provisions within the larger 2010 Act, to deal with changes to the law since the Commission's 2004 Report, and to correct some minor errors and omissions. The explanatory notes for the mental disorder and unfitness for trial provisions under the 2010 Act may be accessed at: http://www.legislation.gov.uk/asp/2010/13/notes/division/2/7

Section 168 – Criminal responsibility of persons with mental disorder

3. Section 168 provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the committal of the offence with which they are charged. There are two elements, (both of which must be met), for it to be available:

- The presence of a mental disorder at the time the conduct was undertaken which constitutes the offence, and
- The disorder had a specific effect on the accused in so much that the person was unable to appreciate the nature or wrongfulness of the conduct.

4. The special defence will not apply to a person who had a mental disorder which consisted of a psychopathic disorder alone. However, it will be available for all other mental disorders and if the psychopathic disorder co-existed with another mental disorder, including other (non-psychopathic) personality disorders. The special defence can only be raised by the person charged with the offence and not the Crown or the court of its own accord.

5. Section 168 also introduces a statutory version of the plea of diminished responsibility. There are two significant changes to the common law on the plea of diminished responsibility as follows:
• While the common law plea was only available when the accused’s state of mind fell short of the insanity special defence, there is no corresponding restriction on the statutory plea. An accused charged with murder whose condition at the time of the offence satisfies the test for the mental disorder special defence will therefore have the option of advancing either the special defence or the statutory plea.

• The statutory plea no longer excludes the possibility of reliance on a psychopathic disorder to establish the required abnormality of mind.

6. This section also clarifies the effect which the state of intoxication has on the availability of diminished responsibility. It also deals with the burden of proof in relation to a plea of diminished responsibility and is in substance the same as the common law rule, (i.e. the accused has to prove diminished responsibility on the balance of probabilities).

Section 169 – Acquittal involving mental disorder

7. Section 169 provides that where the defence of insanity is raised in a solemn case, a jury will now not be empanelled and directed to return a verdict even when the Crown accepts the plea of insanity. Therefore, the court will have to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. The remaining subsections provide for the situation where the Crown has not accepted a plea.

Section 170 – Unfitness for trial

8. Section 170 replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused. It also repeals the part of section 54(1) of the Criminal Procedure (Scotland) Act 1995, (‘the 1995 Act”) that contains a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of this is that this requirement will not apply to a finding by a court that a person is unfit for trial. The requirement for evidence from such medical practitioners is however retained if the court makes a temporary compulsion order.

9. Section 170 also amends section 54 of the 1995 Act to reflect the new names for the new defence and plea in bar of trial and makes various consequential repeals. The effect of the repeals is to make clear the provisions for recording an acquittal based on the defence apply to proceedings in the justice of the peace courts and that the procedure in summary cases for the giving of notice of a plea of unfitness for trial is governed by the general rules for intimation of pleas in bar.

Section 171 – Abolition of common law rules

10. Section 171 abolishes all common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.
Schedule 7 – Modifications of Enactments

11. Various paragraphs of Schedule 7 of the 2010 Act are also being commenced which make a number of consequential amendments to other legislation necessary as a result of the effect of sections 168 to 171 of the 2010 Act.

Manner of commencement

12. The provisions will apply in all criminal proceedings commenced on or after 25 June.

13. There is one exception to this general approach where there is a question of diminished responsibility and where the conduct in question occurred before 25 June. In such cases the common law plea of diminished responsibility will continue to have effect.

14. The reason for this exception is that the statutory plea can only be invoked in relation to a charge of murder. However, in the case HMA v Kerr in February 2011 the High Court appears to have accepted that the common law plea of diminished responsibility could also be invoked in relation to a charge of attempted murder. In the circumstances, we are commencing in such a manner as to ensure there is no unfairness to an accused by potentially restricting the law for conduct undertaken prior to commencement of the provisions.


Criminal Justice and Sentencing Branch
Law Reform Division
Criminal Justice Directorate
Scottish Government
May 2012
Justice Committee

21st Meeting, 2012 (Session 4), Tuesday 19 June 2012

Statement of reasons on proposed Criminalisation on the Purchase of Sex (Scotland) Bill

Note by the Clerk

1. Rhoda Grant MSP wishes to introduce a Member’s Bill to criminalise the purchase of sex. Rule 9.14 of Standing Orders sets out the rules for Member’s Bills. Rule 9.14.3 explains that (emphasis added)—

“3. A member wishing to introduce a Member’s Bill shall first lodge with the Clerk a draft proposal consisting of the proposed short title of the Bill and a brief explanation of the purposes of the proposed Bill, together with either—
(a) a consultation document prepared as the basis for a public consultation on the policy objectives of the draft proposal to begin on the day on which the draft proposal is printed in the Business Bulletin (or a specified date no more than two weeks later) and to last for a specified period of not less than 12 weeks; or
(b) a written statement of reasons why, in the member’s opinion, a case for the proposed Bill has already been established by reference to specified published material and that consultation on the draft proposal is therefore unnecessary.

2. Rhoda Grant lodged a proposal accompanied by a statement of reasons on 23 May.

3. Rule 9.14.5 further provides that the Parliamentary Bureau must, as soon as reasonably practicable after a proposal is lodged, refer it to the committee within whose remit the subject matter of the proposal falls. The Bureau has referred Rhoda Grant’s proposal to the Justice Committee. Rule 9.14.6 states—

“6. Where a draft proposal accompanied by a statement of reasons is referred to a committee, the committee may, within one month, consider the statement of reasons and decide either—
(a) that it is satisfied with the reasons given by the member for not consulting on the draft proposal; or
(b) that it is not so satisfied.”

4. Rule 9.14.7 goes on to provide that where a Committee rejects the statement of reasons, then the Member must, within 2 months, lodge a consultation document on the Bill proposal. If the Member does not do so, the Member cannot go on to lodge a “final proposal” for the Bill, meaning that the Member cannot then go on to introduce the Bill.

1 NB: If the Committee does not avail itself of the opportunity to consider the statement of reasons within that one month period, this clears the way for the Member to go on to lodge a “final proposal”: see paragraph 4.
5. Rhoda Grant will appear before the Committee, under item 10, to give evidence on her statement of reasons. She will be accompanied by a member of the Non-Executive Bills Unit, which has been assisting her with the Bill. Rhoda Grant will make a short opening statement and then take questions from Members. Under item 11, the Committee will have an opportunity, in private, to decide whether or not it accepts the statement of reasons.

6. It will be appreciated from the above that the main purpose of taking evidence on a statement of reasons is not to examine the merits of the proposed Bill but to ascertain whether the Member is, under the circumstances, justified in not carrying out a consultation on the proposal.

7. Rhoda Grant’s statement of reasons is annexed to this paper. The statement contains a number of hyperlinks, one of which is to a previous consultation carried out by former MSP Trish Godman.\(^2\) The clerks would be happy to provide hard copy of this consultation document to any Member on request in advance of the meeting.

ANNEXE: PROPOSED CRIMINALISATION OF THE PURCHASE OF SEX
(SCOTLAND) BILL

STATEMENT OF REASONS WHY CONSULTATION IS UNNECESSARY

Proposal
1. My draft proposal seeks to make it an offence to pay for sex.

2. In Scotland, it is possible for a consenting adult aged 18 or over to have sex with another consenting adult in return for payment without any offence being committed by either person. However, a range of offences apply to street prostitution, the involvement of young people in prostitution, the running of brothels and those who seek to live off the earnings of a prostitute.3

3. The most recent stand-alone legislation aimed at those who purchase sexual services was the Prostitution (Public Places) Scotland Act 2007 (the 2007 Act). The Act created two offences:

   - Soliciting (i.e. a person solicits another person for the purpose of obtaining the services of someone engaged in prostitution in a relevant place); and
   - Loitering (i.e. where it might be reasonably inferred that the person loitering was doing so for the purpose of obtaining the services of a person engaged in prostitution in a relevant place. “Loitering” can be in a motor vehicle or on public transport).

4. My proposal will make the purchase of sex illegal in Scotland, with the aim of reducing the demand for prostitution. In addition, by strengthening the existing legislative framework against purchasers, Scotland should become an unattractive market for prostitution and therefore other associated serious criminal activities, such as people trafficking for sexual exploitation, would be disrupted.

Procedure
5. Under Rule 9.14.3 of the Parliament’s Standing Orders, a draft proposal should be lodged with either:

   - a consultation document; or
   - a written statement of reasons why, in the member’s opinion, a case for the proposed Bill has already been established by reference to specified published material and that consultation on the draft proposal is therefore unnecessary.

Published Material/Consultation
6. Former MSP Trish Godman lodged amendments in 2010 to the Criminal Justice and Licensing (Scotland) Bill to criminalise the purchase of sex and related activities.

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3 SPICe Briefing, Criminal Justice and Licensing (Scotland) Bill: Stage 3, 4 June 2010, page 18
7. The Justice Committee invited written submissions and held an oral evidence session at Stage 2 to inform its consideration of those amendments. A substantial number of written submissions were received by the Justice Committee, and the Committee heard from 8 witnesses. Other related published material is the SPICe paper which sets out the background law and summarises the Committee consideration of the amendments. Although there was support from within the Justice Committee and externally, the Committee considered that further consultation should be carried out.

8. Trish Godman then lodged a draft proposal on 24 November 2010 and consulted on its terms between 24 November 2010 and 18 February 2011. The paper was issued to 128 MSPs and 146 organisations, including local authorities, all NHS Boards, Special NHS Boards, women’s groups, and equality groups. In addition, the paper was issued to academics, individuals and organisations who had responded to the Justice Committee’s call for evidence on the amendments to the Criminal Justice and Licensing (Scotland) Bill.

9. The proposal consulted on at that time included the following three new offences and the respective penalties for these offences:
   - Engaging in a paid-for sexual activity;
   - Advertising paid-for sexual activities; and
   - Facilitating a paid-for sexual activity.

10. The consultation paper received 122 formal responses from individuals, anti-violence against women organisations, academics, equality/human rights organisation, health boards, local authorities (including the Association of Directors of Social Work), support groups, women’s business organisations, pro-prostitution organisations, criminal justice organisations, religious organisations, a child protection group and a trade union organisation.

11. Almost two thirds (64%) of those who responded supported the proposed Bill either in whole or in part. I am of the view that this clearly demonstrates the need for action to be taken.

12. The majority of respondents responding to the question of who should be criminalised agreed that only the purchaser, and not the seller, should be guilty of committing an offence. The main reasons for this were tackling demand; acknowledgement that prostitutes are victims of abuse; and that the proposed Bill would bring indoor prostitution in line with legislation covering street prostitution.

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4 Justice Committee, Stage 2, Criminal Justice and Licensing (Scotland) Bill, 20 April 2010, Official Report, Col 2918-2938
http://archive.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1301.htm


http://archive.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1101.htm

7 SPICe Briefing, Criminal Justice and Licensing (Scotland) Bill: Stage 3, 4 June 2010, page 20-22
13. In terms of the penalties, the majority of respondents favoured a combination of penalties, although a penalty that exposed the perpetrator’s behaviour to the public would have a better deterrent effect as those who purchase sex mostly do so without the knowledge of their family, friends and work colleagues.

14. With regard to tackling the advertising of brothels and prostitution, there was a degree of agreement that this would be difficult to police, for example, enforcing a prohibition on advertising on the internet would be challenging. There was a suggestion that the effectiveness of the Republic of Ireland legislation should be investigated and that the model used for dealing with child abuse on the internet could also be adopted in relation to prostitution.

15. The question about facilitating the buying of sex did not elicit a high number of responses. Those who did respond foresaw difficulties policing and enforcing this offence without a high level of surveillance/information. Concerns were raised about how facilitation would be defined so as to avoid unintended consequences.

16. Copies of the consultation document and the summary of the responses can be viewed at the Scottish Parliament’s website on the Members’ Bills page (link below):
http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25043.aspx

17. Copies of all responses received were also placed in the Scottish Parliament Information Centre (SPICe).

18. Trish Godman lodged a final proposal on 16 March 2011 and although this secured sufficient support for a Bill to be introduced, the cut-off for introducing Members’ Bills had already passed and the proposal fell at dissolution. Trish Godman did not stand again for election to the current Parliament.

19. I am keen to pursue the issues consulted on by Trish Godman. However, having considered the detail of the responses, I have refocused my proposal on the creation of an offence of purchasing a sexual activity. I am still very supportive of the other strands of Trish Godman’s proposal but consider these would be better pursued at a later time, and in the first instance, debate should be focused on the core aim of the proposal.

Why consultation is unnecessary
20. In relation to the draft proposal for this Bill, I do not consider that further consultation is required for the following reasons.

21. Trish Godman’s consultation took place little over a year ago, on a very similar proposal. In addition, the Justice Committee gathered a substantial amount of evidence on her closely-related Stage 2 amendments earlier in session 3. I therefore believe that the practical, operational, legal, equality and financial considerations have been explored to a sufficient degree to test, develop and refine my specific proposal and enable me to proceed towards the development of a Bill.

22. On 17th January 2011 I met with stakeholders and representatives from a number of organisations who hold an interest in this area to discuss the bill. I have
continued to liaise with organisations on this topic. Views expressed to me so far, as part of my on-going engagement with a number of bodies, the public and others with an interest in this proposal, confirm that the views expressed during the formal consultation process have not changed.

23. I am unaware of any major policy developments or changes in relation to the purchase of sex in Scotland since the consultation period ended. As a result, I consider that any further consultation would duplicate effort already expended on this issue, incur additional and unnecessary costs and be construed by the public as “over consultation” on a process on which views have already been clearly expressed.

Conclusion
24. I therefore request the Committee considers this statement of reasons and indicates whether it is satisfied with the grounds I have set out above to justify the absence of a consultation paper on my draft proposal.

Rhoda Grant MSP
23 May 2012
Justice Committee

21st Meeting, 2012 (Session 4), Tuesday 19 June 2012

Letter from the Scottish Government to the Convener

UK Justice and Security Bill 2012

You will be aware that the UK Government introduced their Justice and Security Bill to the House of Lords on 28 May 2012. You will also be aware that Chapter 9B of the Standing Orders of the Parliament require that the Scottish Government should ‘normally’ lodge a Legislative Consent Motion for any ‘relevant’ UK bill within ten working days of the bills introduction at Westminster.

The Scottish Government are presently continuing discussion with the UK Government and Scottish stakeholders in relation to the provisions of the UK Justice and Security Bill. This letter is therefore to inform the Committee that, whilst the Scottish Government continues to seek clarity on the provisions of the Bill we will not be able to take a decision on whether there is a requirement to take forward a legislative consent motion in the Scottish Parliament.

I believe Standing Orders are drafted in such a way as to recognise the exigencies of legislation by qualifying that the 10 days would ‘normally’ apply but that there will, inevitably, be exceptions.

I can only apologise for any inconvenience this may cause the Committee but I will update you on our considerations as soon as we have concluded discussions and are clear on the requirement, or otherwise, for legislative consent.

Kenny MacAskill MSP
Cabinet Secretary for Justice
13 June 2012