Justice Committee

4th Report, 2015 (Session 4)

Subordinate Legislation

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Justice Committee

Remit and membership

Remit:

To consider and report on:

a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and

b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Christian Allard
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Christine Grahame (Convener)
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
Gil Paterson
John Pentland

Committee Clerking Team:

Joanne Clinton
Neil Stewart
Christine Lambourne
The Committee reports to the Parliament as follows—

BACKGROUND

1. At its meeting on 6 January 2015, the Committee considered the following instruments—

   Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015 [draft];

   Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft];

   Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft];

   Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft];

2. The instruments were referred to the Justice Committee as lead committee and were subject to affirmative procedure. The Minister for Community Safety and Legal Affairs, Paul Wheelhouse, gave evidence on the instruments and also moved the relevant motions recommending approval of the instruments.

   ADVICE AND ASSISTANCE (ASSISTANCE BY WAY OF REPRESENTATION) (SCOTLAND) AMENDMENT REGULATIONS 2015 [DRAFT]

The draft instrument

3. The draft Regulations were laid under section 9 of the Legal Aid (Scotland) Act 1986. The Children and Young People (Scotland) Act 2014 amended the Children’s Hearings (Scotland) Act 2011 to allow a pre-hearing panel or children’s hearing to determine whether an individual previously deemed to be a ‘relevant person’ in relation to a child for the purposes of the 2011 Act should continue to be deemed so.
4. This instrument makes assistance by way of representation (ABWOR) to a child or relevant person for a pre-hearing panel considering whether an individual should continue to be deemed a relevant person, subject to the same criteria usually applied for ABWOR at a children’s hearing.

**Scrutiny by the Delegated Powers and Law Reform Committee**

5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 9 December 2014 and agreed not to draw the attention of the Parliament to it on any grounds within its remit.\(^1\)

**Justice Committee consideration**

6. The draft Regulations were considered by the Justice Committee on 6 January 2015, when it took evidence from Paul Wheelhouse, Minister for Community Safety and Legal Affairs.\(^2\)

7. In his opening remarks, the Minister restated the purpose of the Regulations as set out in paragraphs 3 and 4 above. He indicated that, in ensuring that children and relevant persons have access to assistance by way of representation where a pre-hearing panel is considering whether an individual should continue to be a relevant person, the Regulations “ensure that access to justice is maintained at the right time and for those who need it most”.\(^3\) The Minister also advised that stakeholders, including the Law Society of Scotland, are supportive of the changes.\(^4\)

8. At the conclusion of the evidence session, Mr Wheelhouse moved the motion lodged in the name of the Michael Matheson: S4M-11913—that the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015 [draft] be approved.

9. The motion was agreed to.

10. **The Justice Committee therefore recommends to the Parliament that it approve the draft instrument.**

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11. This draft Order provides for directed surveillance of matters subject to legal privilege to be treated as if it were intrusive surveillance. In introducing these higher level procedures for authorisation of such surveillance, the instrument follows the same approach as taken by the UK Government.

12. This draft Order brings into force a revised Code of Practice relating to covert surveillance authorised under the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A) and interference with property or wireless telegraphy under Part III of the Police Act 1997. The Code also reflects organisational changes, such as the creation of Police Scotland, and the new arrangements for surveillance of matters subject to legal confidentiality.

13. This draft Order brings into force a revised Code of Practice relating to the Covert Human Intelligence Sources (CHIS) authorised under RIP(S)A. The Code has been updated to reflect organisational changes, and new arrangements for authorisation of CHIS on matters subject to legal confidentiality, and for relevant sources (set out in SSI 2014/339).

14. The Delegated Powers and Law Reform Committee considered the three draft Orders at its meeting on 16 December 2014 and agreed not to draw the attention of the Parliament to the instruments on any grounds within its remit.

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5 SSI 2014/339 is the Regulation of Investigatory Powers (Authorisation of Covert Intelligence Sources (Scotland) Order 2014.
Justice Committee consideration

Background

15. The three draft Orders above were considered by the Justice Committee on 6 January 2015 when it took evidence from Paul Wheelhouse, Minister for Community Safety and Legal Affairs. In advance of the evidence session, the Committee received correspondence from the Dean of the Faculty of Advocates expressing concerns regarding the surveillance of lawyer-client discussions arising from two of the draft Orders. In his letter, Mr Wolffe QC stated that the instruments are “a significant improvement on the current state of law and, to that extent, I welcome them”. However, he questioned “whether the SSIs draw the boundaries sufficiently tightly, given the importance of lawyer-client confidentiality”.

16. In his opening remarks, the Minister set out the background to the draft Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015—

“In 2010, the House of Lords, in considering an appeal from the divisional court in Northern Ireland, agreed with that court’s decision that directed surveillance under the Regulation of Investigatory Powers Act 2000 of communications between lawyers and their clients breached article 8 of the ECHR, on the right to respect for private and family life. The Secretary of State did not challenge the divisional court’s decision that the procedures used to authorise directed surveillance were disproportionate to the infringement of an individual’s right to a private consultation with a lawyer, particularly given the lack of a requirement for independent and high-level scrutiny of such authorisations. In Scotland, the authorisation of directed surveillance is mostly regulated by RIPSA, and the relevant provisions of that legislation are for relevant purposes the same as those that have been successfully challenged in the House of Lords. As a result, it is necessary to adjust the authorising regime for directed surveillance of legal consultations under RIPSA.”

17. The Minister advised that the Order seeks to reclassify the authorising regime for directed surveillance of legal consultations to: (a) narrow the circumstances in which directed surveillance can be used to those in which it is necessary to prevent or detect serious crime; (b) restrict the office-holders who can authorise such surveillance to the Chief Constable of Police Scotland, or any other senior officer designated by him, and to the Police Investigations and Review Commissioner; and (c) require authorisation to be notified to the Office of Surveillance Commissioners and prevent that authorisation from taking effect unless the commissioner approves it on the basis that it is both necessary and

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8 Justice Committee Note by the Clerk. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Meeting%20Papers/Papers20150106.pdf
proportionate. He confirmed that the Order significantly tightens up existing arrangements.\textsuperscript{11}

18. The Minister told the Committee that the other two draft RIP(S)A Orders put in place revised Codes of Practice to reflect a number of changes which have occurred since their publication in 2002.\textsuperscript{12}

19. During questioning, the Minister confirmed that the Orders do not give investigatory authorities any additional powers and said he was confident that they “represent an appropriate approach to tackling the issue that was brought up by the court case in Northern Ireland”, adding the Orders “will make sure that Scottish legislation complies with the ECHR”.\textsuperscript{13}

Use and operation of the legislation

20. Committee members sought assurances that information obtained during surveillance of legal consultations would only be used to counter a threat and not for criminal proceedings. In response, the Minister said that “the Codes of Practice in Scotland require … direct surveillance to be used only in compelling circumstances, such as where there is a threat to life or limb”.\textsuperscript{14} Kevin Gibson, from the Scottish Government’s Directorate for Legal Services, added that “in general, you are not required to disclose privileged information in court proceedings”. He explained that there would be “an arguable breach of someone’s right to remain silent and not to incriminate themselves if their private discussions were recorded without their knowledge and, secondly, the information obtained might be legally privileged”.\textsuperscript{15}

21. When asked whether the Scottish Government envisages more use of the legislation, the Minister responded that “unless there is an increase in the underlying need for such surveillance to take place because of an increase in the prevalence of serious crime … , there will not need to be an increase in the use of surveillance as a result of the legislation”. He went on to state that “I hope that I can give confidence in the wider community that an appropriate approach is being taken to ensure that surveillance techniques and human resources—informants and others—are deployed only where that is necessary and proportionate to the crimes that are believed to be being committed”.\textsuperscript{16}

22. The Minister acknowledged that the Faculty of Advocates raised “important issues” in its correspondence to the Committee and said he accepted “the importance of protecting the trust between a lawyer and their client”. He stated that “in a nutshell, we are doing our best to protect individuals’ rights and the confidentiality of legal advice, except in very unusual circumstances in which a serious crime is being planned or undertaken”. He went on to state that “we are making the best stab at tackling the issue that we can make at this time, but that does not mean that the approach is set in stone”, adding “if it transpires that there

are difficulties, we will listen to and address representations from the legal profession and other stakeholders about the need for modifications.”

Office of Surveillance Commissioners
23. Graeme Waugh, Investigatory Powers Team Leader at the Scottish Government explained that the role of the Office of Surveillance Commissioners was to (a) approve or quash an application for surveillance; and (b) annually inspect relevant bodies, including Police Scotland, which would be obliged to respond to any recommendations set out by the inspectors. He also advised that the Chief Surveillance Commissioner is an ex-High Court Judge and that two commissioners, Lord Bonomy and Lord MacLean, currently provide knowledge of Scots law.

Monitoring
24. When asked to clarify the monitoring arrangements for authorisations under RIP(S)A, the Minister advised that the Scottish Government does not have access to this information. However, he highlighted that “the Office of Surveillance Commissioners has access to knowledge about the extent to which the approach is deployed by all the relevant bodies that can use surveillance, so it is a repository of information about what is happening on the ground and can keep an eye on practice”. He explained that “the Office considers the necessary and proportionate use of surveillance and can keep the data under review so it will understand trends in the deployment of the approach, if trends emerge over time—for example in relation to the groups of people who are affected”.

25. Mr Waugh added that the Office publishes an annual report which includes data on the number of authorisations under RIP(S)A, and is laid before both the Scottish and Westminster Parliaments.

UK operations
26. When asked whether he could give any reassurance that the changes will be adhered to by any UK security and police services, the Minister responded that “in other jurisdictions … , certain procedures have already been established, have had time to bed in and are, we believe, working effectively [and] to our knowledge, no concerns have been raised about bodies outside Scotland abusing them”. He said he was “happy to keep a close eye on how things operate in practice and see whether any concerns arise in due course”.

Motions
27. At the conclusion of the evidence session, Mr Wheelhouse moved the following motions lodged in the name of the Michael Matheson:

S4M-11915—That the Justice Committee recommends that the Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft] be approved.

S4M-11910—That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft] be approved.

S4M-11916—That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft] be approved.

28. The motions were agreed to.

29. The Justice Committee therefore recommends to the Parliament that it approve the draft instruments.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.

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