



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

8th Meeting, 2021 (Session 5)

Tuesday 23 February 2021

The Committee will meet at 9.45 am in a virtual meeting and be broadcast on www.scottishparliament.tv.

1. **Decision on taking business in private:** The Committee will decide whether to take item 10 in private.
2. **Financial Services Bill and Counter-Terrorism and Sentencing Bill (UK Parliament legislation):** The Committee will consider the legislative consent memorandums lodged by Humza Yousaf (LCM(S5)51) and (LCM(S5)52) .
3. **Domestic Abuse (Protection) (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).
4. **Subordinate legislation:** The Committee will take evidence on the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] from—

Humza Yousaf, Cabinet Secretary for Justice, Zak Tuck, Victims and Witnesses Team Leader, John Wallace, Policy Officer, Victims and Witnesses, and Nicholas Duffy, Solicitor, Scottish Government Legal Directorate, Scottish Government.

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

S5M-23986—That the Justice Committee recommends that the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] be approved.

6. **Subordinate legislation:** The Committee will take evidence on the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] from—

Humza Yousaf, Cabinet Secretary for Justice, David Doris, Community Interventions Team Leader, and Nicholas Duffy, Solicitor, Scottish Government Legal Directorate, Scottish Government.

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

S5M-24033—That the Justice Committee recommends that the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] be approved.

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

The Restorative Justice (Prescribed Persons) (Scotland) Order 2021 (SSI 2021/40)

9. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting held on 15 February 2021.

10. **Malicious prosecutions and the Crown Office and Procurator Fiscal Service:** The Committee will consider a note from the clerk.

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The papers for this meeting are as follows—

Agenda item 2

Note by the Clerk J/S5/21/8/1

Agenda item 3

Letter from Police Scotland J/S5/21/8/2

Agenda items 4 and 6

Note by the Clerk J/S5/21/8/3

Agenda item 6

Letters from Howard League Scotland and Dr Hannah Graham J/S5/21/8/4

Agenda item 8

Note by the Clerk J/S5/21/8/5

Agenda item 9

Note by the Clerk J/S5/21/8/6

Agenda item 10

Note by the Clerk J/S5/21/8/7

Justice Committee

8th Meeting, 2021 (Session 5), Tuesday 23 February 2021

Legislative Consent Memorandums

Note by the Clerk

Introduction

1. This paper invites the Committee to consider Legislative Consent Memorandums (LCMs) in relation to the following UK Government Bills:
 - [Financial Services Bill 2019-21](#)
 - [Counter-Terrorism and Sentencing Bill 2019-21](#)
2. The Financial Services Bill was introduced in the House of Commons on 21 October 2020. The Bill is currently at Committee stage in the House of Lords. This is scheduled to begin on 22 February 2021.
3. The Counter-Terrorism and Sentencing Bill was introduced in the House of Commons on 20 May 2020. The Bill is currently at Report stage in the House of Lords. This is scheduled for 3 March 2021.

Legislative consent process

4. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of a LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:
 - change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or
 - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
5. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass Bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the basis of a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it

was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

6. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament's Standing Orders.

Financial Services Bill 2019-21

9. The principal objective of the Bill is to ensure the UK's regulatory framework continues to function effectively after leaving the EU. The Bill will enhance the UK's prudential standards and promote financial stability by enabling the implementation of the full set of Basel III standards, a new prudential regime for investment firms, and giving the Financial Conduct Authority (FCA) the powers it needs to oversee an orderly transition away from the LIBOR benchmark.
10. The Bill contains provisions that apply to Scotland and which amend powers relating to freezing and forfeiture of recoverable property. In particular, the amendments extend the types of account in respect of which those powers can be exercised. Those powers are exercisable in relation to the proceeds of unlawful conduct in connection with both devolved and reserved offences. The amendments also alter the executive competence of the Scottish Ministers by means of extending the types of account to which Scottish Ministers can apply to the sheriff for a forfeiture order, both in relation to specific types of terrorist property and to money that is the proceeds of unlawful conduct.
11. The provisions amend Part 4B of Schedule 1 to the Anti-terrorism, Crime and Security Act 2001 (ATCSA) and Chapter 3B of Part 5 of the Proceeds of Crime Act 2002 (POCA), so that provisions for the forfeiture of terrorist money and money that is the proceeds of unlawful conduct apply to money held in accounts maintained with electronic money institutions (EMIs) and payment institutions (PIs).

Scottish Government Legislative Consent Memorandum

15. A legislative consent memorandum was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 20 January 2021, following amendments tabled by UK Government on 6 January. The LCM can be found in **Annex A**.
16. **Paragraphs 9 to 13** of the LCM set out the Scottish Government's reasons for seeking a Legislative Consent Motion.
17. The LCM states that it is the view of the Scottish Government that extending and applying the relevant provisions of the Bill to Scotland will help the Scottish Government meet its aim of maximising the tools available in Scotland so as to enable an efficient and effective law enforcement response to serious organized crime. The Scottish Government recognises that such crime has no respect for borders or boundaries and, so, must be tackled across multiple jurisdictions. The proposals in the Bill seek both to provide additional means to disrupt and combat this kind of criminality by making it less profitable. It will further ensure that

Scotland, and the UK as a whole, is a more hostile place for those seeking to move, hide, use or re-invest the proceeds of crime or terrorism.

21. **Paragraph 20** of the LCM sets out the Scottish Government's draft motion.

Counter-Terrorism and Sentencing Bill 2019-21

22. The Bill currently makes provision about the sentencing of offenders convicted of terrorism offences, of offences with a terrorist connection or of certain other offences; to make other provision in relation to terrorism; and for connected purposes.

23. The operation of the Bill is split into England and Wales and separately for Scotland and Northern Ireland. This reflects different law applying in the area of the Bill in these countries. However, the policy intent of the Bill as a whole applies to Scotland as it does in England and Wales and Northern Ireland.

24. The area of law covered by the Bill is a mix of reserved and devolved matters. The content of the Bill relating to Scotland that requires an LCM can be found in **paragraph 4** of the LCM (attached in **Annex B**).

Scottish Government Legislative Consent Memorandum

25. A [legislative consent memorandum](#) was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 29 January 2021. The LCM can be found in **Annex B**.

26. One area of the Bill that would have required an LCM were clauses that would introduce a new approach into the Scottish justice system; namely use of polygraph testing as a condition of release from a prison sentence (in this case a terrorist offence prison sentence).

27. The Scottish Government considered that new radical policy approaches for use within the Scottish criminal justice system such as the introduction of polygraph testing should usually only be introduced into Scots law through the normal process of scrutiny of devolved legislation in the Scottish Parliament. This reflects that the operation of the criminal justice system is devolved and so acknowledges that it should be for those with powers in that area to decide whether such measures are introduced into a devolved area.

28. Second and specific to the issue of polygraph testing, the Scottish Government does not consider that the evidence supporting the use of polygraphs justifies the immediate use of polygraph testing in the manner provided for in the Bill.

29. As a result of these concerns, the Scottish Government engaged with the UK Government. Following this, **the UK Government agreed to remove these clauses from the Bill at the next amending stage and promotion of this LCM does not include what are currently clauses 33 and 35 as the UK Government has indicated these clauses should not stand part of the Bill at the House of Lords Committee stage.**

30. The LCM states that while the Scottish Government is not convinced that changing the law so that terrorist offenders receive longer sentences, spend more of these sentences in custody and are supervised for longer upon release will, in isolation, provide definite answers to the important issue of how to respond to terrorist offending, the Scottish Government is promoting the LCM for these matters which are, to a large extent, consequential to the overall policy intent sought by the UK Government in the area of enforcement of sentencing. Not to do so would likely be counter-productive as it may run the risk of error and confusion in the operation of the relevant law in some areas.
31. The Scottish Government considers that it is preferable in terms of good governance that to the extent that the relevant provisions that alter Scottish Ministers' functions in relation to the release and management of terrorist offenders, they should be considered by the UK Parliament.
32. **Paragraph 16** of the LCM sets out the Scottish Government's draft motion.

Action

33. **Members are invited to consider whether to agree with the recommendation of the Scottish Government that the legislative consent motions for the Financial Services Bill and the Counter-Terrorism and Sentencing Bill should be agreed by the Scottish Parliament.**
34. **Members are also asked to agree that the Convener should arrange for the publication of a short, factual report on the outcome of the Committee's deliberations.**

Justice Committee Clerks
February 2021

LEGISLATIVE CONSENT MEMORANDUM

FINANCIAL SERVICES BILL

Background

1. This memorandum has been lodged by Humza Yousaf, MSP, Cabinet Secretary for Justice, under Rule 9B.3.1(c)(ii) of the Parliament's Standing Orders, following amendments tabled by UK Government on 6 January. The Financial Services Bill ("the Bill") was introduced in the House of Commons on 21 October 2020. The latest version of the Bill can be found at:

<https://publications.parliament.uk/pa/bills/lbill/58-01/162/5801162.pdf>

Content of the Bill

2. The principal objective of the Bill is to ensure the UK's regulatory framework continues to function effectively after leaving the EU. The Bill will enhance the UK's prudential standards and promote financial stability by enabling the implementation of the full set of Basel III standards, a new prudential regime for investment firms, and giving the Financial Conduct Authority (FCA) the powers it needs to oversee an orderly transition away from the LIBOR benchmark.

3. The Bill will also promote openness between the UK and international markets by introducing a new mechanism to simplify the process whereby overseas investment funds can be marketed in the UK and delivers a Ministerial commitment to provide long-term access between the UK and Gibraltar for financial services firms.

4. Finally, the Bill will introduce a number of measures to maintain the effectiveness of the financial services' regulatory framework and sound capital markets.

5. The Bill contains provisions which extend to Scotland, but relate to matters that are reserved to the UK Parliament by virtue of Schedule 5 of the Scotland Act 1998, and make no alteration to the executive competence of the Scottish Ministers or the legislative competence of the Scottish Parliament, such as provisions on financial services and, money laundering and terrorism.

6. The Bill contains provisions that apply to Scotland and which amend powers relating to freezing and forfeiture of recoverable property. In particular, the amendments extend the types of account in respect of which those powers can be exercised. Those powers are exercisable in relation to the proceeds of unlawful conduct in connection with both devolved and reserved offences. The amendments also alter the executive competence of the Scottish Ministers by means of extending the types of account to which Scottish Ministers can apply to the sheriff for a forfeiture order, both in relation to specific types of terrorist property and to money that is the proceeds of unlawful conduct.

7. The provisions amend Part 4B of Schedule 1 to the Anti-terrorism, Crime and Security Act 2001 (ATCSA) and Chapter 3B of Part 5 of the Proceeds of Crime Act 2002 (POCA), so that provisions for the forfeiture of terrorist money and money that is the proceeds of unlawful conduct apply to money held in accounts maintained with electronic money institutions (EMIs) and payment institutions (PIs).

8. An explanation of the provisions is set out in the Annex.

Reasons for seeking a Legislative Consent Motion

9. The Bill makes provision applying to Scotland for certain purposes which are within the legislative competence of the Scottish Parliament. It also makes provision which alters the executive competence of the Scottish Ministers. This makes it a “relevant” Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently requires the consent of the Scottish Parliament.

10. The Scottish Government believes that legislative consent is required in relation to Clause 32 and Schedule 12 of the Bill covering the amendments to provisions in both the ATCSA and in POCA. However, the UK Government has set out a view that the provisions in the Bill amending Part 4 of Schedule 1 to ATCSA do not require legislative consent as there is considered to be no alteration of executive competence. The UK Government considers that consent is required only insofar as the amendments make provision within the legislative competence of the Scottish Parliament.

11. The Scottish Government does not share this view and believes that the amendments to the ATCSA alter the executive competence of Scottish Ministers, and has therefore included these provisions within the draft legislative consent motion to the extent that they alter executive competence of the Scottish Ministers.

Legislative Competence: Proceeds of Crime

12. The Scottish Government has undertaken to further strengthen proceeds of crime legislation in this Parliament. It therefore recommends that the Scottish Parliament gives consent for the UK Parliament to consider the proposed amendments to ATCSA and POCA that extend and apply to Scotland. The proposed changes are aimed at improving the civil recovery of terrorist and criminal money and, since POCA is a UK-wide regime, they can be most efficiently and effectively made on a UK basis by this Bill.

13. Although the criminal and civil law are generally devolved, POCA provides for the confiscation and civil recovery of the proceeds of reserved crime (e.g. drug trafficking and money laundering the proceeds of drug trafficking) as well as devolved crime. As POCA concerns a complex mix of both reserved and devolved matters, it is appropriate for the proposed amendments to be made through the UK Parliament. However, to the extent that the proposed amendments make provision in relation to the civil recovery of the proceeds of devolved crime, they are within the Scottish Parliament’s legislative competence and require its consent.

Executive Competence and Delegated Powers

14. The Bill extends the functions of the Scottish Ministers in relation to the types of account to which the Scottish Ministers can apply to a sheriff for a forfeiture order under ATCSA and POCA. As this alters the executive competence of the Scottish Ministers, the provisions require the consent of the Scottish Parliament in order to be considered by the UK Parliament.

Consultation

15. Scottish Government has considered the legal and policy implications of the Bill, and have sought the views of the Civil Recovery Unit. The Civil Recovery Unit has indicated that it welcomes the amendments.

Financial Implications

16. No significant additional costs to the Scottish Government, nor any significant additional direct costs to the Scottish Criminal Justice sector, are envisaged as a result of the provisions within the Bill.

17. In relation to the amendments to the civil recovery regimes under ATCSA and POCA, there is potential that these could result in a net benefit of POCA receipts which return to the Scottish Consolidated Fund.

Conclusion

18. Extending and applying the relevant provisions of the Bill to Scotland will help meet the Scottish Government's aim of maximising the tools available in Scotland so as to enable an efficient and effective law enforcement response to serious organized crime. The Scottish Government recognises that such crime has no respect for borders or boundaries and, so, must be tackled across multiple jurisdictions. The proposals in the Bill seek both to provide additional means to disrupt and combat this kind of criminality by making it less profitable. It will further ensure that Scotland, and the UK as a whole, is a more hostile place for those seeking to move, hide, use or re-invest the proceeds of crime or terrorism.

19. It is the view of the Scottish Government, therefore, that the relevant provisions of the Bill, as outlined above, will help to achieve its objective of reducing the harm caused by serious organized crime and making Scotland a safer, fairer and more prosperous country.

Draft Legislative Consent Motion

20. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:
"That the Parliament agrees that the relevant provisions of the Financial Services Bill, introduced in the House of Commons on 21 October 2020, relating to amendments to the Anti-terrorism, Crime and Security Act 2001 and the Proceeds of Crime Act 2002, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament."

Scottish Government
January 2021

ANNEX

FINANCIAL SERVICES BILL: FURTHER INFORMATION

Provisions which relate to Scotland

1. The following paragraphs describe the specific provisions which apply to Scotland and for which consent is sought in terms of the Legislative Consent Motion. Clause numbers refer to clauses in the Bill following the Report Stage in the House of Commons on 13 January 2021.

2. The provisions of the Bill amend Part 4B of Schedule 1 to the Anti-terrorism, Crime and Security Act 2001 (ATCSA) and Chapter 3B of Part 5 of the Proceeds of Crime Act 2002 (POCA), so that provisions for the freezing and forfeiture of terrorist money and money that is the proceeds of unlawful conduct apply to money held in accounts maintained with electronic money institutions (EMIs) and payment institutions (PIs).

3. The Civil Recovery Unit, which exercises these powers on behalf of Scottish Ministers, have seen and are content with the amendments.

4. The draft LCM and CSCL submission are enclosed alongside this submission as a separate document.

Key Clauses in the Bill

5. Clause 32 provides for a new Schedule 12 to the Bill to amend provisions in ATCSA and POCA about the forfeiture of money so that they apply to money held in accounts maintained with EMIs and PIs.

6. Section 303Z1 (1A) of POCA, and Paragraph 10Q to Schedule 1 of ATCSA are amended to define a “relevant financial institution as:

(a) a bank, (b) a building society, (c) an electronic money institution, or (d) a payment institution.

7. Section 303Z14(7)(a) of POCA, and paragraph 10Z2(7)(a) of ATCSA are amended to substitute “financial relevant institutions” for “bank or building society.”

8. Schedule 12 to the Bill amends both the ATCSA and POCA to the effect that the forfeiture of money regimes included therein apply to accounts maintained by EMIs and PIs in addition to bank and building society accounts and sets out definitions of what constitutes an EMI and a PI.

9. Sub-section 6 of Section 303Z1 of POCA, and sub-paragraph (7) of Paragraph 10Q to Schedule 1 of ATCSA are also amended to insert the following definitions of EMIs and PIs:

“electronic money institution” has the same meaning as in the Electronic Money Regulations 2011 (S.I. 2011/99) (see regulation 2 of those Regulations);”, and ““payment institution” means an authorised payment institution or a small payment institution (each as defined in regulation 2 of the Payment Services Regulations 2017 (S.I.2017/752))”

Proceeds of Crime

10. Paragraphs 10 through 21 of Schedule 12 of the Bill amend Chapter 3B of POCA to amend the types of account within the asset freezing and forfeiture regime provided in that Chapter, and in relation to which Scottish Ministers can apply to the sheriff for a forfeiture order in respect of money that is the proceeds of unlawful conduct, to include EMIs and PIs.

11. They extend the powers of Scottish Ministers to apply to the sheriff for a forfeiture order under section 303Z14(2) of POCA and therefore require the Scottish Parliament’s consent in so far as they confer functions on the Scottish Ministers so as to alter their executive competence.

12. Further, these amendments also amend provisions more generally in relation to asset freezing and forfeiture. These powers are exercisable in both relation to the proceeds of offences which are devolved, as well as those which are reserved (e.g. drug trafficking and money laundering the proceeds of drug trafficking). To the extent that the provisions relate to the civil asset recovery regime in respect of devolved offences, they would be within the legislative competence of the Scottish Parliament. The provisions therefore also require the Scottish Parliament’s consent on that basis.

Terrorist Property

13. Paragraph 8 of Schedule 12 to the Bill amends paragraph 10Z2(7)(a) of Schedule 1 to the ATCSA to amend the types of account to which Scottish Ministers can apply to the sheriff for a forfeiture order in respect of specific types of terrorist property to include EMIs and PIs. This is where such property or money is intended to be used for the purposes of terrorism, consists of resources of a proscribed organisation, or is (or represents) property obtained through terrorism.

14. Although these provisions are considered to relate to a reserved matter (terrorism), they extend the powers of Scottish Ministers to apply to the sheriff for a forfeiture order under paragraph 10Z2(7)(a) of Schedule 1 to ATCSA and therefore require the Scottish Parliament’s consent in so far as they confer functions on the Scottish Ministers so as to alter their executive competence.

Annex B

LEGISLATIVE CONSENT MEMORANDUM
COUNTER-TERRORISM AND SENTENCING BILL

Background

1. This memorandum has been lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, under Rule 9.B.3.1(a) of the Parliament's standing orders. The CounterTerrorism and Sentencing Bill was introduced in the House of Commons on 20 May 2020. The Bill can be found at:

<https://services.parliament.uk/Bills/201921/counterterrorismandsentencing/documents.html>

Content of the Counter-Terrorism and Sentencing Bill

2. The Bill currently makes provision in the following areas:

Sentencing

- Introduces a new sentence for terrorist offenders; the “serious terrorism sentence”, made up of a minimum of 14 years in custody and a 7 to 25 year period of extended licence. Courts would be required to impose the sentence for specified offences where certain conditions are met unless exceptional circumstances apply.
- Increases from 10 to 14 years the maximum sentence available for the offences of: membership of a proscribed organisation, inviting or expressing support for a proscribed organisation and attendance at a place used for terrorist training.
- Allows for any non-terrorist offence with a maximum sentence of over 2 years to be found to have a terrorist connection.
- Expands the list of offences which can result in an extended sentence and increases the maximum period of the extended licence for certain terrorist offenders from 8 to 10 years in England, Wales and Northern Ireland (it is already 10 years in Scotland).
- Expands the list of offences that can result in a Sentence for Offenders of Particular Concern (SOPC) and create new sentences, the equivalent of a SOPC, for Scotland and Northern Ireland and for under 18s UK wide.

Enforcement of sentencing

- Removes the possibility of release at the two thirds point of the custodial part of an extended sentence for relevant terrorist offenders and provides that offenders serving a serious terrorism sentence cannot be released until the end of the custodial part of their sentence.

- Provides for polygraph testing of certain terrorist offenders when released on licence.
- Makes provision for Scotland relating to where more than one sentence is imposed and at least one of those sentences relates to non-terrorist offending

Civil measures relating to those suspected of involvement in terrorist activity

- Revises the scheme for imposing Terrorism Prevention and Investigation Measures (TPIMs) on those suspected of involvement in terrorism, by lowering the standard of proof required; expanding the range of measures available; and removing the two year time limit.
- Enables the police to apply for Serious Crime Prevention Orders (SCPOs) in terrorism cases.
- Removes the statutory deadline for conducting an independent review of the Prevent Strategy.

Provisions Which Relate to Scotland requiring an LCM

3. The operation of the Bill is split into England and Wales and separately for Scotland and Northern Ireland. This reflects different law applying in the area of the Bill in these countries. However, the policy intent of the Bill as a whole applies to Scotland as it does in England and Wales and Northern Ireland.

4. The area of law covered by the Bill is a mix of reserved and devolved matters. The content of the Bill relating to Scotland that requires an LCM is as follows:

Part 1 – Sentencing of Terrorist and Certain Other Offenders

- No provisions require an LCM.

Part 2 – Release of Terrorist Offenders

• Clause 28 – Removal of early release for dangerous terrorist prisoners: Scotland

This clause alters the Scottish Ministers' executive competence by disapplying early release obligations falling on the Scottish Ministers for certain terrorist prisoners and providing for different release obligations to be conferred on Scottish Ministers in relation to those prisoners. Accordingly, this clause will require an LCM.

• Clause 29 – Further provision about release of terrorist prisoners: Scotland

This clause makes further provision in relation to the new serious terrorism sentence which sets out different release provisions for prisoners serving these sentences. This alters the executive competence of the Scottish Ministers as Ministers are being required to release these prisoners from prison at a specified point in their sentence.

• Clause 33 - Polygraph licence conditions for terrorist offenders: Scotland

This clause alters the Scottish Ministers' executive competence by conferring a power on the Scottish Ministers to impose a specific form of licence condition both with and without Parole Board recommendation. This clause will therefore require an LCM.

• **Clause 36 and Schedule 11: Release on licence of terrorist prisoners repatriated to the UK**

This clause alters the executive competence of the Scottish Ministers in introducing Schedule 11 of the Bill, insofar as it applies to Scotland, and applying the release arrangements for terrorist prisoners sentenced in Scotland to those who are convicted of terrorism offences in another country and repatriated to Scotland.

Part 3 – Prevention and Investigation of Terrorism

- No provisions require an LCM.

Part 4 – General

• **Clause 48 and Schedule 13 (Part 6): Consequential and related amendments**

- Paragraph 46 alters the executive competence of the Scottish Ministers in relation to powers to vary the sentence of a terrorist prisoner being repatriated out of the UK.
- Paragraph 47 amends section 39(7B) of the Prisons (Scotland) Act 1989 to include terrorist prisoners in the Scottish Ministers' power to add additional days to a prisoner's sentence. This alters executive competence.
- Paragraph 48(2) alters the executive competence of the Scottish Ministers in relation to their powers in respect of release in section 1AB of the Prisoners and Criminal Proceedings (Scotland) Act 1993.
- Paragraph 48(3) and (7) alter the executive competence of the Scottish Ministers by making provision which restricts the Scottish Ministers' ability to release prisoners who are serving mixed terrorism and non-terrorism sentences.
- Paragraph 48(4) and (5) alters the executive competence of the Scottish Ministers by changing the point at which a life prisoner, who is also serving a sentence for a terrorism or terrorism-related offence, can require the Scottish Ministers to refer their case to the Parole Board.
- Paragraph 48(6) and (9) and paragraph 56 alter the executive competence of the Scottish Ministers by repealing amendments made to section 5 and section 9 of the 1993 Act by Terrorist Offenders (Restriction on Early Release) Act 2020.
- Paragraph 48(7) and (8) alters the executive competence of Ministers in relation to the release of children and young offenders under Part 1 of the 1993 Act where the child or young offender is serving a sentence for a terrorism or terrorism-related offence.
- Paragraph 48(10) alters the executive competence of the Scottish Ministers by dis-applying the rules on single-terming, which in turn determine release dates, in relation to sentences imposed for a terrorism or terrorism-related offence.

- Paragraph 48(11) alters the executive competence of the Scottish Ministers by repealing Part 2 of Schedule 1A of the 1993 Act which contains the list of offences which the Scottish Ministers must treat as having a terrorist connection for the purposes of their early release duties in section 1AB of the Act.
- Paragraph 50 alters the executive competence of the Scottish Ministers by providing that for the purposes of a restricted transfer of a prisoner from Scotland to England & Wales or Northern Ireland, section 1AB of the 1993 Act will continue to apply to that prisoner.
- Paragraph 51 alters the executive competence of the Scottish Ministers by dis-applying certain provisions on sentence management in Scotland relating to section 1AB of the 1993 Act contained within the International Criminal Court (Scotland) Act 2001.
- Paragraph 52 alters the executive competence of the Scottish Ministers by adding section 1AB to the list of release provisions that apply in respect of relevant provisions in the Extradition Act 2003 for the release of extradited persons who return to the UK following their extradition.
- Paragraph 54 alters the executive competence of the Scottish Ministers by adjusting the release provisions in section 9B of the 1993 Act (for short-term prisoners eligible or liable for removal from the UK) through a new subsection (specifically dis-applying that section to persons to whom section 1AB of the 1993 Act applies).

• **Clause 50 – power to make further consequential provision**

- This clause alters the executive competence of the Scottish Ministers by providing a secondary legislative power on the Secretary of State to make further provision in consequence of the Act including those provisions which alter the executive competence of the Scottish Ministers.

Reasons for seeking a legislative consent motion

5. The Scottish Government has considered the UK Government's request for a relevant LCM carefully. While clarity in the area of law enforcement of terrorist sentencing is important, one area of the Bill that would have required an LCM were clauses that would introduce a new approach into the Scottish justice system; namely use of polygraph testing as a condition of release from a prison sentence (in this case a terrorist offence prison sentence).

6. The Scottish Government had two separate concerns as regards this area of the Bill as introduced and the need for an LCM.

7. First, on a point of principle, the Scottish Government considered that new radical policy approaches for use within the Scottish criminal justice system such as the introduction of polygraph testing should usually only be introduced into Scots law

through the normal process of scrutiny of devolved legislation in the Scottish Parliament. This reflects that the operation of the criminal justice system is devolved and so acknowledges that it should be for those with powers in that area to decide whether such measures are introduced into a devolved area.

8. Second and specific to the issue of polygraph testing, the Scottish Government does not consider that the evidence supporting the use of polygraphs justifies the immediate use of polygraph testing in the manner provided for in the Bill.

9. As a result of these concerns, the Scottish Government engaged with the UK Government. Following that dialogue, the UK Government agreed to remove these clauses from the Bill at the next amending stage and promotion of this LCM does not include what are currently clauses 33 and 35 as the UK Government has indicated these clauses should not stand part of the Bill¹ at the House of Lords Committee stage.

10. The need for the LCM for areas of the Bill all relate to changes to the executive competence of the Scottish Ministers as regards imposition of licence conditions and release from custody of terrorist offenders.

11. There has been dialogue with the UK Government over how the Bill provides for calculation of release dates for those convicted of a mix of terrorism and nonterrorism related sentences. As release provisions for those receiving sentences for terrorism offences will be different to those receiving sentences for those receiving non-terrorism offences, policy has had to be developed to address the situation when a person receives sentences for both terrorism sentences and non-terrorism sentences. An agreed approach which respects the policy intent of the UK Government to have bespoke release arrangements for terrorism sentences and maintains the integrity of Scottish release policy has been achieved with amendments lodged in this area² which are being considered by the House of Lords Committee stage.

12. While the Scottish Government is not convinced that changing the law so that terrorist offenders receive longer sentences, spend more of these sentences in custody and are supervised for longer upon release will, in isolation, provide definite answers to the important issue of how to respond to terrorist offending, the Scottish Government is promoting the LCM for these matters which are, to a large extent, consequential to the overall policy intent sought by the UK Government in the area of enforcement of sentencing. Not to do so would likely be counter-productive as it may run the risk of error and confusion in the operation of the relevant law in some areas. In addition, the Scottish Government accepts that while such changes will not solve the wide-array of issues relating to how the UK deals with terrorism offending including the crucial issue of effective deradicalisation, the changes in the area of enforcement of sentencing and that trigger a requirement for an LCM may have a part to play.

Consultation

¹ Between amendments 19* and 20 5801129-I.pdf (parliament.uk)

² Amendments 66 and 67 5801129-I.pdf (parliament.uk)

13. There has been no formal consultation by the UK Government on the Bill. The Scottish Government has discussed the content of the Bill including those areas affecting executive competence with a number of stakeholders, but there has been no formal consultation. There has been considerable engagement between the Scottish Government and the UK Government in respect of the Bill.

Financial Implications

14. There are no significant financial implications from the content of the Bill. The number of prisoners involved now and in the future is likely to be very small as the special enforcement of sentence provisions only apply to a range of relevant offences which are committed very infrequently in Scotland.

Conclusion

15. It is the view of the Scottish Government that it is preferable in terms of good governance that to the extent that the relevant provisions that alter Scottish Ministers' functions in relation to the release and management of terrorist offenders, they should be considered by the UK Parliament.

Draft Legislative Consent Motion

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

"That the Parliament agrees that the relevant provisions of the Counter-Terrorism and Sentencing Bill, introduced in the House of Commons on 20 May 2020, relating to Scottish Ministers' executive competence with regard to the release of terrorism offenders from custodial sentences, should be considered by the UK Parliament."

SCOTTISH GOVERNMENT

January 2021

Justice Committee

8th Meeting, 2021 (Session 5), Tuesday 23 February 2021

Domestic Abuse (Protection) (Scotland) Bill – Letter from Police Scotland

Background

1. This paper consists of a response from Police Scotland (see Annex) to a request from the Committee for an update on its views on the Domestic Abuse (Protection) (Scotland) Bill and the practical implementation of its provisions.

Action

2. **Members are asked to take the correspondence into account during their deliberations.**

**Clerks to the Committee
February 2021**

Annex

Dear Convener

Domestic Abuse (Protection) (Scotland) Bill

I write in response to correspondence dated 14 January 2021, received at the office of the Chief Constable, whereby you sought confirmation that Police Scotland had received assurances from the Scottish Government (SG), that concerns in respect of the proposed Domestic Abuse (Protection) (Scotland) Bill were noted. Furthermore, you requested detail of steps taken to address the concerns raised by Police Scotland.

As Assistant Chief Constable with executive responsibility for the relevant business area, please accept the foregoing response on behalf of the Chief Constable.

I can confirm that following the meeting of the Justice Committee on Tuesday 12 January 2021, attended by the Cabinet Secretary for Justice, Police Scotland were contacted by representatives from the Criminal Law & Practice Team, Criminal Justice Division of Scottish Government. A meeting took place on Tuesday 19 January 2021 where the concerns of Police Scotland, potential options and requested amendments to the Bill were discussed at length. Thereafter, Police Scotland engaged with Scottish Womens Aid (SWA) and provided additional detail around our concerns in respect of operational delivery. It is understood SWA also engaged with the Scottish Government and provided feedback in respect of any proposed amendments.

On Monday 08 February 2021, a further meeting took place between Police Scotland and representatives of the Scottish Government where requested amendments were discussed and, as suggested in your letter, I can confirm this dialogue is ongoing as we move towards Stage 2 of the Bill's progress.

I hope the information contained in this response provides reassurance that Police Scotland is committed to the safe, lawful and proportionate implementation of the Bill.

I trust the foregoing is of some assistance.

Yours sincerely,

Judi Heaton
Assistant Chief Constable
Major Crime, Public Protection & Local Crime

Justice Committee

8th Meeting, 2021 (Session 5), Tuesday 23 February 2021

Subordinate legislation

Note by the clerk

Purpose

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

- [The Criminal Justice \(Scotland\) Act 2003 \(Supplemental Provisions\) Order 2021 \[draft\]](#)
- [The Community Orders \(Coronavirus\) \(Scotland\) Regulations 2021 \[draft\]](#)

The Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft]

2. The Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] is made in exercise of the powers conferred by section 84(1) of the Criminal Justice (Scotland) Act 2003(a)

3. This Order will allow the three powers relating to victim statements contained in Section 14 of the 2003 Act: the power to prescribe courts; the power to prescribe offences; and the power to prescribe the form and manner of victim statements, to be used flexibly to make different provisions for different purposes.

4. This will enable the Scottish Ministers to use the powers in section 14 to pilot changes to the current victim statement scheme to provide more victims with the opportunity to make a victim statement. It will also enable the Scottish Ministers to explore different ways for victim statements to be made (e.g. recorded) and thereafter bring more permanent changes into force following any pilot scheme introduced under these powers.

The Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft]

5. The Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] is made in exercise of the powers conferred by paragraph 15(1), Schedule 4, Part 6, of the Coronavirus (Scotland) Act 2020.

6. The Regulations vary all unpaid work (UPW) or other activity requirements in Community Payback Orders (CPOs), reducing the number of hours imposed in each order by 35%. These regulations apply to all CPOs imposed prior to the regulations coming into force with an unpaid work or other activity requirement where hours are outstanding. The only exceptions are those CPOs imposed either entirely or partially for domestic abuse, sexual offences or stalking.

7. The regulations are intended to reduce the pressure faced by justice social work (JSW) services within local authorities, increasing available capacity to help ensure that existing orders can be completed within timescales expected by courts and any new orders that are imposed can commence promptly.

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

9. Members attention is drawn to letters received from the Howard League Scotland and Dr Hannah Graham about this SSI (**see Paper 3**).

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

8. The Delegated Powers and Law Reform Committee (the 'DPLR Committee') considered both of the instruments at its meeting on 16 February 2021.

10. The DPLR Committee agreed to draw the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] to the attention of the Parliament on reporting ground (g) as it has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute.

11. The DPLR Committee also agreed to draw the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] to the attention of the Parliament on the general reporting ground on the basis that there are drafting errors in regulation 4 of the instrument. The Committee noted the Scottish Government's commitment to amend these errors by way of a correction slip.

12. The relevant extracts from the [Delegated Powers and Law Reform Committee's report](#) are attached in **Annexe B**.

JUSTICE COMMITTEE CONSIDERATION

12. The Committee is required to report to the Parliament on the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 by **6 March 2021**. The Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] requires to be reported on by **9 March 2021**.

13. Motions S5M-23986 and S5M-24033 have been lodged proposing that the Committee recommends approval of the instruments. The Cabinet Secretary for Justice is due to attend the meeting on 23 February to answer any questions on the instruments and to move the motions for approval.

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

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

Annexe A

POLICY NOTE

The Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) (Scotland) Order 2021

SSI 2021/XXX

Summary Box

Section 14 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) provides that victims of prescribed offences are to be given the opportunity, in criminal proceedings in a prescribed court, to make a victim statement about how the offence has affected and, as the case may be, continues to affect them. The Scottish Ministers have a power to prescribe the courts in which statements can be made (section 14(1)) and a separate power to prescribe the offences in relation to which statements can be made (section 14(2)).

Section 14 does not provide that different provision can be made under these powers for different purposes. As a result, the Scottish Ministers cannot use these powers to prescribe courts by reference to certain offences triable in those courts and cannot use these powers to prescribe offences by reference to the courts they are triable in.

Section 14(13) of the 2003 Act enables the Scottish Ministers to prescribe the form and manner in which victim statements may be made. Subsections (13) to (16) of section 14 were inserted by section 23(7) of the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”).

This Order will allow the three powers relating to victim statements contained in Section 14 of the 2003 Act: the power to prescribe courts; the power to prescribe offences; and the power to prescribe the form and manner of victim statements, to be used flexibly to make different provisions for different purposes.

This will enable the Scottish Ministers to use the powers in section 14 to pilot changes to the current victim statement scheme to provide more victims with the opportunity to make a victim statement. It will also enable the Scottish Ministers to explore different ways for victim statements to be made (e.g. recorded) and thereafter bring more permanent changes into force following any pilot scheme introduced under these powers.

Policy Objectives

The Victims and Witnesses (Scotland) Act 2014 (Commencement No. 7 and Transitional Provisions) Order 2020 will commence section 23(7) and (14) of the 2014 Act on 10th February 2021. Section 23(7) of the 2014 Act inserts subsections (13) to (16) into section 14 of the 2003 Act which empower the Scottish Ministers to prescribe the form and manner of victim statements. By the time the Supplemental

Provisions Order comes into force section 23(7) and (14) will be in force and section 14 will have been amended accordingly.

Section 14 of the 2003 Act provides for victims of prescribed offences to be given the opportunity to make a statement to the court as to how the offence has affected them. This only applies to a prescribed court. The Scottish Ministers are given powers in section 14(1) and 14(2) respectively to prescribe the courts in which a victim statement may be made and the offences in relation to which a victim statement may be made. The Scottish Ministers are also given powers in section 14(13) to prescribe the form and manner in which a victim statement may be made.

Section 14 does not enable the powers in section 14(1) and (2) to be used in conjunction in order to prescribe offences insofar as they are charged in a specific court or to allow courts to be prescribed for specific offences only. If we prescribe a court then a victim statement may be made for every prescribed offence charged in that court. If we prescribe an offence then a victim statement may be made for that offence in every prescribed court.

Similarly, the power in section 14(13) of the 2003 Act to prescribe the form and manner of a victim statement cannot be used to make different provision for different circumstances. If the Scottish Ministers prescribe that victim statements can be made orally, then that would apply to every offence in relation to which a victim statement can be made. The introduction of pilot projects for victim statements would not be possible under section 14 in its current form.

This Order will address these issues by allowing the three powers in section 14 of the 2003 Act – the power to prescribe courts, the power to prescribe offences and the power to prescribe the form and manner of victim statements – to be used flexibly. For example, Scottish Ministers would be able to use the powers in section 14(1) and (2) in conjunction so as to prescribe a court for the purposes of certain offences triable in that court, or prescribe an offence insofar as it is triable in a certain court. It will also enable the Scottish Ministers to prescribe the form and manner of victim statements made for specific offences.

The intention behind the Supplemental Provisions Order is to enable the powers in section 14 of the 2003 Act to be used more flexibly so as to enable victim statements to be made in relation to specific offences being tried in a specific court. This added flexibility will also enable the Scottish Ministers to use the powers in section 14 of the 2003 Act to trial victim statements in a specific prescribed court for a specific prescribed offence and in a specific prescribed manner.

Consultation

A full 12 week public consultation on widening the scope of the current victim statement scheme, ran from 1 September 2019 until 29 November 2019.

A public consultation workshop was held on 1 November 2019. The workshop was attended by representatives from, amongst others, the Scottish Government, COPFS, Victim Support Scotland (VSS) the Law Society, Police Scotland, Children 1st, Petal, The Manda Centre, Scottish Women's Aid as well as people with lived

experience of the scheme. Individual meetings were also held with Victim Support Scotland staff and volunteers and Community Justice Scotland.

No further specific consultation has taken place on this Supplemental Provisions Order but we will engage with key stakeholders and victims' organisations in advance of using the powers that they enable.

Impact Assessments

An Equality Impact Assessment has been completed on the draft SSIs and [is attached](#). There are no equality impact issues.

Financial Effects

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

Scottish Government
Justice Directorate
January 2021

POLICY NOTE

The Community Orders (Coronavirus) (Scotland) Regulations 2021

SSI 2020/XXX

The above instrument was made in exercise of the powers conferred by paragraph 15(1), Schedule 4, Part 6, of the Coronavirus (Scotland) Act 2020. The instrument is subject to affirmative procedure.

Purpose of instrument. To vary the unpaid work or other activity requirements of existing Community Payback Orders (except those imposed for domestic abuse, sexual offences, or stalking) to reduce the overall volume of hours to be delivered and ensure that the community justice system can continue to operate effectively.

Policy Objectives

1. These regulations vary all unpaid work (UPW) or other activity requirements in Community Payback Orders (CPOs), reducing the number of hours imposed in each order by 35%. These regulations apply to all CPOs imposed prior to the regulations coming into force with an unpaid work or other activity requirement where hours are outstanding. The only exceptions are those CPOs imposed either entirely or partially for domestic abuse, sexual offences or stalking. The regulations are intended to reduce the pressure faced by justice social work (JSW) services within local authorities, increasing available capacity to help ensure that existing orders can be completed within timescales expected by courts and any new orders that are imposed can commence promptly.

2. The exclusion of domestic abuse, sexual offences, and stalking is intended to mitigate risks arising from the particular barriers that exist in relation to the reporting of those offences (and which are not found to the same extent with other offence types), and which the Scottish Government and other justice organisations have taken steps to reduce in recent years. These include action under Equally Safe, our national strategy to take action against all forms of violence against women and girls, ground-breaking domestic abuse legislation, investment in training and support, and campaigns. Specifically, this exclusion recognises that reducing UPW hours associated with those offences may, while only applying to existing orders, risk reducing future reporting rates. It is therefore considered appropriate to exclude orders involving domestic abuse, sexual offences and stalking to avoid any adverse effect on the reporting of those offences by victims.

3. These regulations are considered necessary in response to the effect of coronavirus on local authorities and to ensure that the justice system (in particular community justice services) can continue to operate effectively. Further background information and detail in relation to the regulations, including with regard to the exclusions mentioned, is provided below.

Policy context and scenario modelling

4. CPOs are administered by local authorities, through JSW. In particular, JSW services carry out supervision of individuals on orders; organise and oversee unpaid work; and report back to the courts on progress and any potential breaches. As a result of coronavirus, local authority JSW services have experienced significant difficulties in continuing to implement community orders. Capacity to deliver CPOs has been significantly affected by measures required to protect the health and wellbeing of staff and individuals on orders, including compliance with guidance on physical distancing and self isolation in particular. The effects of coronavirus have had a particular impact on the delivery of UPW, as this is typically delivered in groups.

5. To help alleviate the pressure on JSW services, the Coronavirus (Scotland) Act 2020 (the 2020 Act) extended all UPW and other activity requirements by 12 months, and required any new orders imposed by the courts to last for at least that long. This enabled JSW services to suspend all UPW programmes during the first national lockdown without this resulting in any orders being inadvertently breached as a result.

6. This immediate step of extending all UPW and other activity requirements was successful in ensuring that JSW could continue to function effectively in the short to medium term. However, capacity within JSW services to deliver UPW has remained substantively reduced, primarily due to physical distancing measures and other measures to keep individuals on orders and staff safe as well as varying local and national restrictions. In addition, there was an increase in court business and new community order disposals from summer (as restrictions began to ease) to January 2021, when the majority of summary court business was adjourned and UPW programmes were largely suspended again due to the increased level of public health risk associated with coronavirus and to align with national restrictions.

7. It is anticipated that the volume of outstanding UPW will grow significantly once the current national restrictions are eased (made up of existing orders; untried cases accruing in the court system since the start of the pandemic; and new cases arising from recent or future offences). This will increase pressure on JSW services and result in an inability to deliver relevant orders within reasonable timescales. This also creates a higher likelihood of orders being breached inadvertently which creates further pressure on the justice system.

8. The risk that JSW services becomes overwhelmed has been examined and highlighted by Social Work Scotland (SWS), the professional leadership body for social work and social care professions. Its concerns are set out in a position paper, 'Reducing the backlog of Unpaid Work hours: Coronavirus (Scotland) Act 2020'¹,

¹ Reducing the backlog of Unpaid Work hours: Coronavirus (Scotland) Act 2020 - Social Work Scotland

which was published on 15 July 2020. SWS estimated that 700,000 hours of UPW were outstanding at that time and called for 450,000 hours to be removed due to concerns that orders could not be delivered. Similar concerns about the deliverability of hours have been outlined by Community Justice Scotland. Additionally, the Scottish Association of Social Work, in correspondence to the Cabinet Secretary for Justice on 19 November 2020, called for action to be taken to reduce outstanding UPW hours.

9. Despite most local authorities having re-started UPW during the summer, estimates from SWS have shown that as UPW resumed, the ratio of UPW supervisors to individuals was in some cases reduced to one supervisor supervising one individual (prior to the pandemic, one supervisor could supervise up to five individuals). Before the most recent lockdown, areas were still primarily operating around a 1:2 or 1:3 supervisor ratio (based on information provided by local authorities to Social Work Scotland) with significant barriers preventing areas operating at full capacity. This was due to a combination of practical issues impacting on capacity (such as travel, facilities, and safety measures to keep staff and individuals on orders safe) and concerns from individuals regarding the risks of contracting coronavirus associated with travelling and working with others. In addition, constraints have been placed on the number of individual work placements available as providers restructure spaces to be COVID-19 compliant.

10. SWS's view is that taking no action will result in JSW services becoming overwhelmed, as individual orders will likely not be completed within court-imposed timescales and the overall number of outstanding hours will continue to accumulate, once national restrictions are eased. Difficulties will become particularly acute if capacity for court business outstrips JSW capacity, as new orders will not be able to commence promptly. This could potentially undermine both public and judicial confidence in the credibility of community orders, should individuals be required to wait for significant periods of time before commencing their sentence.

11. While there are limits to the data available and considerable uncertainty around how the situation will develop as the pandemic progresses, some analysis has been carried out to illustrate the likely scale of the issue. In April 2020, the size of the backlog was estimated to be 690,000 hours² and by November 2020, the overall backlog had reached 740,000 hours. While the increase was relatively small over this period, this will have been influenced by reduced capacity within courts and the nature of court business which could be dealt with.

12. The table below looks at three different scenarios for growth once court business resumes. In the absence of other quantitative evidence and the uncertainty of what lockdown will do to court capacity and JSW capacity, the analysis uses the number of hours outstanding in November as an estimate for the size of the backlog at the end of March 2021. In the absence of being able to predict when and how lockdown restrictions will ease, it then assumes that courts re-open at this point, with some

² It should be noted that there are always outstanding hours within the system, as orders are carried out over a considerable length of time, and the April 2020 figure is likely to represent the approximate level under normal circumstances.

illustrative scenarios for court and JSW capacity to produce an estimate of backlog growth through four months while JSW remain constrained (given the likelihood that at least some physical distancing and other restrictions will remain in place for some time, resulting in a disparity between court capacity and JSW capacity). The bottom row shows the results of this analysis: outstanding backlogs with and without a reduction applied:

	Scenario 0: No growth	Scenario 1: Lower growth	Scenario 2: Central Growth	Scenario 3: Higher growth
Hours outstanding at March 2021 ¹	740,000			
Estimated hours removed by a 35% reduction ² (DA/SC/stalking crimes not eligible)	290,000			
Hours outstanding after 35% reduction	450,000			
Court capacity: UPW hours imposed from Mar-21, relative to 2019-2020 average	Under the “no growth” scenario, the rate at which courts issue new orders matches JSW capacity to deliver orders (as should be the case ordinarily)	86%	100%	145%
JSW capacity to deliver UPW: UPW hours delivered from Mar-21, relative to 2019-2020 average ³		50%	35%	30%
Estimated Hours Outstanding – July 2021	450,000 (740,000 in absence of reduction)	630,000 (920,000 in absence of reduction)	780,000 (1,070,000 in absence of reduction)	1,030,000 (1,360,000 in absence of reduction)

¹ Based on estimate as at November 2020, in absence of data, and likely lack of activity in months where strict lockdown measures are in place.

² It should be noted that the proposed reduction is to the number of hours imposed in orders, not the number of hours outstanding, so the reduction in the latter is slightly more than 35%.

³ For this estimate it was assumed that hours delivered had kept pace with hours imposed in 2019-2020.

13. While the scenarios above are illustrative and intended to demonstrate the potential effects of a disparity between court capacity and JSW capacity to deliver UPW, it may be useful to note that immediately prior to the national lockdown imposed in January 2021, the volume of CPOs being imposed was close to normal levels. If the amount of hours being issued on these CPOs is also at typical levels, and JSW capacity to deliver hours remains constrained (which available local data suggests is the case), this could lead to significant growth of the backlog.
14. In relation to concerns around the length of time to complete UPW orders (rather than the size of the backlog alone), in the period from April to November 2020 around 2,000 UPW orders were completed, with an initial 8,700 orders outstanding in April 2020. This represents around 300 orders completed each month, compared to the 2018-19 average of 690 orders each month. This slow rate of delivering orders means that the time for completion will be high for UPW orders currently outstanding and any UPW orders imposed while social work capacity remains suppressed.
15. While the recent announcement of a COVID-19 vaccine rollout is a welcome development, this will not solve the capacity issues in delivering the backlog of outstanding UPW hours, nor remove the need for these regulations. The vaccine rollout will take place in a gradual way and some restrictions are likely to be in place until all population groups have received this. More importantly, the backlog of UPW will continue to grow as scope to deliver hours will remain limited while restrictions are in place and there is significant volume of court cases pending which will add to the existing number of hours outstanding. This means that taking no action in the hope that the system will soon return to normal is not a viable option; even if this were the case, a significant and unmanageable backlog would still remain.
16. Similarly, simply increasing funding to JSW services or increasing staffing levels will not solve the immediate problem of the accumulated outstanding hours which are currently undeliverable, given the most recent national restrictions. In addition, even setting aside the cost implications – which would be challenging in the current financial situation – increasing staffing is not a quick or simple solution. Recruiting UPW staff typically takes around 4 months and any new staff would then require induction and training, further complicated in the current environment. As some of these contracts may, by necessity, need to be short-term, this would impact on the ease with which new staff can be hired and the quality of appointments.
17. Taking all of this into account, it is considered necessary to take action to

prevent the system being overwhelmed. Specifically, a reduction in the overall volume of outstanding UPW hours is considered to be a proportionate and appropriate response. While this will not address the underlying issues caused by physical distancing and other measures, it does create additional capacity within the system, allowing more time for the easing of restrictions, for alternative means of delivery to be developed if possible, and for the usual modes of UPW delivery to resume in due course.

18. Assessing exactly what reduction is necessary in order to alleviate pressure on JSW services requires careful judgement, taking account of existing demand and capacity, anticipated increases in demand, and the potential effect on confidence in the community justice system (in general, and with particular regard to certain offence types). The Scottish Government's intention is to achieve an appropriate balance in preserving the integrity of the original sentence imposed while creating sufficient additional capacity for JSW services.
19. In its position paper, SWS requested that UPW hours be reduced by 450,000 (out of the 700,000 total, which was the approximate total number of outstanding UPW hours in June 2020) in order to alleviate the pressure on JSW services, based on its assessment of likely capacity and demand over the coming months. In order to achieve this, the Scottish Government estimates that all relevant requirements imposed in existing CPOs would need to be reduced by around 50%.
20. While SWS's expertise and experience is recognised and its proposal has been given careful consideration, such a large reduction in sentences imposed is considered likely to have an adverse effect on public and judicial confidence in community sentencing.
21. Therefore, the Scottish Government is proposing to reduce the amount of UPW hours originally imposed by 35%. Noting the caveats outlined earlier regarding forecasting difficulties at this time of uncertainty, it is estimated that this reduction would result in approximately 290,000 hours being removed from the system when the regulations come into force. It is estimated, based on unit level data from April 2020, that up to 15% of outstanding orders will be automatically completed once the proposed regulations come into force.

PROPOSED APPROACH AND APPLICABILITY

22. A reduction of 35% (with exclusions for domestic abuse, sexual offending, and stalking) is considered to strike an appropriate balance between removing enough hours to assist JSW services in the short to medium term, and ensuring that individuals complete the majority of their UPW hours, thus maintaining confidence in the community justice system. This approach also reflects the fact that these are extraordinary powers, intended to be used only as absolutely necessary, and given the effect on sentences imposed by the

courts the Scottish Government wishes to ensure that any action is as limited, but effective and proportionate, as possible.

23. This approach is considered to be reasonable and proportionate drawing on available data and modelling, and taking account of views sought from justice partners (including victim organisations in considering exclusions). As mentioned above, notwithstanding the prospect of the impact of coronavirus easing as the proposed vaccination programme commences, significant uncertainty remains and it is anticipated that capacity in the justice system will be impacted for a considerable time. Significant work is taking place as part of the Recover, Renew, Transform programme to help ensure the justice system can operate effectively and sustainably and the proposed use of this power compliments that work.

24. In relation to applicability, the reduction in UPW hours imposed will be applied to all existing CPOs, except in circumstances where the CPO was imposed for domestic abuse, sexual offences, or stalking. Research shows that there are particular barriers to reporting of domestic abuse and sexual offences. For example, the Whole Lives Survivor Survey³ from Safe Lives found that, on average, survivors experienced four years of domestic abuse before telling someone. A wide range of action has been taken to help remove those barriers and increase protection from abuse, including through the Domestic Abuse (Scotland) Act 2018, investment in training and support, campaigns including 16 Days of Activism against Gender-Based Violence and other measures such as the Domestic Abuse Protection (Scotland) Bill.

25. Taking into consideration the particular barriers to reporting which exist for these offence types that may not be found with other offences, it is considered that reducing UPW hours may have an effect on the current or future victims of domestic abuse, sexual offences, and stalking which is not replicated in other offence types. These offences are therefore being excluded from the proposed variation to UPW requirements to mitigate the risk of exacerbating existing issues around low levels of reporting of these offences.

26. This risk to reporting may also be relevant in the context of the Scottish Government's positive obligations under Articles 3 and 8 ECHR and under the Istanbul Convention⁴, to maintain an effective system for the investigation and prosecution of gender based crime.

27. The exclusion of these offences is also set in the context of an increase in reports of domestic abuse during the lockdown imposed as a result of the pandemic. While UPW does not have a direct function in risk management or

³ [Whole Lives Survivor Survey.pdf \(safelives.org.uk\)](https://safelives.org.uk/whole-lives-survivor-survey/)

⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence; CETS No. 210.

public protection, excluding these offences will have an additional effect of sending a strong message of societal condemnation about those offences and the particularly serious, lasting impact on victims and others that they can have. Excluding such offences demonstrates that the full set of requirements imposed by the court is expected to be served in relation to domestic abuse, sexual offences and stalking despite the impact of coronavirus.

28. Taking all this into account, the Scottish Government considers that targeted exclusion of domestic abuse, sexual offences, and stalking from these regulations is an appropriate and effective way of addressing existing issues around under-reporting of these offences. The exclusion of these offences has been informed by engagement with Police Scotland and victims organisations with specialist knowledge and insight on barriers to reporting of crime in relation to particular offences.
29. In addition to the overall approach and percentage reduction to be applied to UPW and other activity requirements, a number of aspects of the regulations should be noted, particularly in relation to their applicability; provision to ensure compliance with the statutory minimum number of UPW hours; completion of certain orders as soon as the regulations come into force; interaction with statutory requirements around 'other activity'; and provision to avoid interference with ongoing breach proceedings.
30. In order to ensure compliance with the minimum number of UPW hours specified in section 227I(4)(a) of the Criminal Procedure (Scotland) Act 1995, where the reduction in hours specified in the original requirement would result in an individual's hours dropping below 20, the number of hours will be reduced to 20 only (for example, an individual who originally received 23 hours UPW and still has these hours outstanding will only receive a reduction of 3 hours).
31. Where the reduction in the number of hours specified in the relevant UPW requirement would result in the individual having no more hours of UPW to complete, the requirement is taken to be completed when the regulations come into force.
32. Under section 227K(2) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) 'other activity' may comprise 30% of the hours specified in the UPW requirement (or 30 hours – whichever is lower). These regulations specify that in circumstances where the reduction in hours results in an individual exceeding the limit on other activity hours already allocated, the responsible officer must reduce the number of hours allocated to other activity and allocate instead to UPW. Where the number of other activity hours already undertaken by an individual before the regulations come into force mean that the responsible officer cannot comply with the statutory limit on other activity then the statutory limit is disapplied and all hours yet to be completed by the individual must be allocated to unpaid work.

33. In circumstances where the percentage reduction applied to UPW and other activity requirements would result in the immediate completion of that requirement (i.e. as a result of the individual in question already having completed 65% or more of the hours specified), provision is made specifically for those CPOs where breach proceedings have been initiated, with a citation or warrant having been issued by the court under s227ZC of the 1995 Act. In these circumstances the reduction in hours would not apply on the day the regulations come into force. Instead the court would consider the potential breach in the usual way and, following the court's determination, the percentage reduction would be applied, if an unpaid work or other activity requirement remains part of the existing CPO (which may have been varied). If the court imposes a new CPO with UPW requirements (which is one of the possible outcomes following breach proceedings) the reduction in outstanding hours would not apply to the new order. This provision avoids any uncertainty should breach proceedings be underway when the regulations come into force, and ensures that the reduction in hours only takes place once the court has concluded its consideration of any potential breach.

CONSULTATION

In developing these proposals, informal consultation and engagement took place with a number of key stakeholders including Social Work Scotland (SWS), Community Justice Scotland (CJS), COSLA, the Scottish Courts and Tribunals Service, the Scottish Sentencing Council secretariat, and victims organisations.

34. Regular contact has been maintained with SWS which has kept the Scottish Government informed of challenges and capacity levels from the outset of the pandemic through the different phases of the easing of restrictions. In a submission to the Justice Committee in June, SWS expressed concerns that completion of the outstanding hours of UPW, in addition to new orders would prove extremely challenging. Subsequently, in written correspondence to the Cabinet Secretary for Justice and in a position paper published on 16 July, SWS requested that the Scottish Government consider invoking the powers in the Coronavirus (Scotland) Act 2020 to vary the requirement on orders with UPW requirements so that the overall volume of outstanding hours be reduced by 450,000. This position has remained unchanged.
35. Engagement with Police Scotland and victims organisations including Victim Support Scotland, Scottish Women's Aid, Rape Crisis Scotland and ASSIST informed consideration of the risk of reduced reporting of offences around particular offences and potential exceptions to the regulations.

IMPACT ASSESSMENTS

36. An [Equality Impact Assessment \(EQIA\)](#), a [Child Rights and Wellbeing Impact Assessment \(CRWIA\)](#) and an [Islands Communities Impact](#)

[Assessment](#) have been completed for this SSI. After careful consideration, it was decided that some of the impact assessments were not required for these proposals. These are: A Fairer Scotland Duty assessment; a Strategic Environmental Assessment (SEA); and a Data Protection Impact Assessment (DPIA).

37. The Fairer Scotland Duty is intended to reduce the inequalities of outcome caused by socioeconomic disadvantage. Varying the amount of outstanding UPW hours that have been given as part of a CPO does not have a direct effect on those living on a low income or those who have little or no accumulated wealth, and will not have any impact on material or area deprivation. In addition, it is advised that if a policy is not strategic, there is no formal requirement for a Fairer Scotland assessment. The SSI proposes a short term intervention to avoid the potential for justice social work services to be overwhelmed post-crisis, rather than outlining a long term, strategic objective. It was therefore decided that a Fairer Scotland Duty assessment was not required.
38. A SEA is normally undertaken when a policy is likely to have significant environmental effects, with the primary aim of the assessment being to offer greater protection to the environment by ensuring public bodies and those organisations consider and address these effects. This assessment is also necessary when there is a risk of the policy decision causing significant environmental damage, such as; flooding; impacts on landscape or loss of important habitat. Varying the number of hours imposed on a CPO does not have any obvious environmental impacts as described above and therefore does not warrant a SEA being carried out.
39. The provisions being taken forward in this legislation will have no impact to the processing of data for the individuals who will be affected by the policy changes involved. If an individual's UPW hours were varied, this would be processed on local information systems by business services or UPW staff in the same way that has already been established for data processing. As this is no different to how information is normally processed, it was concluded that a DPIA was not required.

FINANCIAL EFFECTS

40. [A Business and Regulatory Impact Assessment \(BRIA\)](#) has been completed for this SSI. No significant costs are expected and, in reducing UPW or other activity requirements, this eases financial pressure on local authorities who deliver CPOs. However, there will be some marginal administration costs for local authorities in fulfilling notification requirements associated with the regulations. The Scottish Government will not be reducing existing funding of local authorities as a result of these regulations.

Directorate for Justice
January 2021

Annexe B

EXTRACT FROM THE DPLR COMMITTEE'S REPORT ON THE INSTRUMENTS**Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 (SSI 2021/ draft)**

9. Section 14 of the Criminal Justice (Scotland) Act 2003 confers regulation-making powers on the Scottish Ministers to prescribe the courts in which victim statements can be made (section 14(1)), the offences in respect of which statements can be made (section 14(2)), and the form and manner in which victim statements may be made (section 14(13)).
10. Section 23(7) of the Victims and Witnesses (Scotland) Act 2014, which inserts section 14(13) to (16) into the 2003 Act, was commenced on 10 February 2021 (by SSI 2020/405). New subsections (14) to (16) of section 14 of the 2003 Act allow the delegated power in section 14(13) to include ancillary provision, to modify an enactment (including the 2003 Act), and to have effect in specified areas for a specified period of time.
11. This instrument uses the delegated power in section 84(1) of the 2003 Act to make supplemental provision by substituting section 14(15) and (16) of the 2003 Act as amended by the 2014 Act. The instrument allows Scottish Ministers to combine exercise of the delegated powers in section 14(1), (2) and (13) to make different provision for different purposes. The Policy Note accompanying the instrument indicates that the intention is to allow the existing delegated powers to be used more flexibly to allow victim statements to be piloted in relation to specific offences being tried in a specific court and in a prescribed manner.
12. The Committee is content that the instrument appears to be within vires (i.e. that the Scottish Government has the power to make this instrument). Nevertheless, it has been made by what appears to be an unusual or unexpected use of the power conferred on Scottish Ministers to make supplemental provision in section 84(1) of the 2003 Act, by expanding the scope of the powers delegated to Scottish Ministers in section 14(1), (2) and (13) of that Act (as amended by the 2014 Act). This approach may be something the lead committee wishes to raise with the relevant minister when taking evidence on the instrument.
- 13. The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (g) as it has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute.**

Community Orders (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/draft)

14. The purpose of this instrument is to reduce the overall number of hours that an offender is required to work (or spend doing another specified activity) under certain Community Payback Orders by 35%.
15. Drafting errors have been identified in regulation 4(1)(b) and (c) of the

instrument. In both instances, the reference to “relevant unpaid work or other requirement” should be to “relevant unpaid work or other activity requirement” as defined in regulation 1.

16. The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground on the basis that there are drafting errors in regulation 4 of the instrument.

17. The Committee notes the Scottish Government's commitment to amend these errors by way of a correction slip.

Justice Committee

8th Meeting, 2021 (Session 5), Tuesday 23 February 2021

Community Payback Orders SSI – Letters from Howard League Scotland and Dr Hannah Graham

Background

1. This paper consists of letters from Howard League Scotland and Dr Hannah Graham (see **Annex**) to the Community Payback Order SSI being considered at today's meeting. Dr Graham is writing in a personal capacity.

Action

2. **Members are asked to take the correspondence into account during their deliberations.**

**Clerks to the Committee
February 2021**

Annex

Howard League Scotland

12 February 2021

Dear Convener,

Re: The Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft]

In response to the unique pressures of the pandemic, we were pleased to see that the above draft instrument was laid before the Scottish Parliament on 29 January 2021 in exercise of the powers conferred by paragraph 15(1) of Schedule 4 of the Coronavirus (Scotland) Act 2020.

We fully support variation of the unpaid work or other activity requirements of existing Community Payback Orders (CPOs) in order to reduce the overall volume of hours to be delivered, in recognition of the present 'inability to deliver relevant orders within reasonable timescales' and the 'higher likelihood of orders being breached inadvertently' as a result (draft policy note, para 7). We commend the Scottish Government for listening to the concerns of Social Work Scotland (and others) in this regard.

As you will know, it is proposed that the 35% reduction in the overall volume of unpaid work or other activity hours will not apply to existing CPOs imposed, in whole or in part, in respect of domestic abuse, sexual offences, or stalking.

We have some concerns around these exclusions, which we ask the Justice Committee to consider in its scrutiny of the instrument on 23 February 2021.

Lack of fairness and risk to completion rates

We see this as an important piece of secondary legislation, which acknowledges the need to take decisive action in order to ensure that the criminal justice system continues to operate effectively. It must, however, also operate fairly.

We are concerned to note that certain offences have been excluded, apparently with the aim of 'sending a strong message

of societal condemnation about those offences and the particularly serious, lasting impact on victims and others' (draft policy note, para 27). We would argue that these are not appropriate considerations to be taken into account in this context, as a matter of fairness, and that the exclusion of these (or, indeed, any other) offences may have unintended adverse consequences.

Issues about the seriousness of the offence and the appropriateness of the punishment will have been addressed by the court already at the sentencing stage, i.e. the sentencer will have come to the view that a non-custodial sentence was appropriate due to the nature and seriousness of the offence, taking into account any aggravating or mitigating circumstances. In doing so, the sentencer must be assumed to have sent an appropriate message to the offender, victim and members of the wider public, in terms of the generally recognised purposes of sentencing. With that in mind, we consider that it would be inappropriate and unfair to second guess the court's assessment by further penalising certain offenders as exceptionally ineligible for completion of their CPOs within reasonable timescales.

We know that the current completion rate for CPOs is circa 70%, with recent research¹ suggesting that elements of compliance are predicated on legitimacy. Given the obvious comparator with non-excluded offences and the potential for this to seem 'unfair' to those subject to CPOs, we may find ourselves in a position where the exclusion of offences leads to an increased risk of non-completion of CPOs in respect of the excluded offences.

The exclusion of certain offences would also inadvertently create a 'hierarchy of harm', beyond that properly reflected in the sentencing process, and in doing so, would signal to the victims of all other types of offending that the crimes committed against them are less significant and their suffering is not as important as other victims' suffering.

¹ Beth Weaver, Laura Piacentini, Kristina Moodie, Monica Barry, Exploring and Explaining Non-Compliance with Community Supervision, The British Journal of Criminology, 2020, <https://doi.org/10.1093/bjc/azaa078>

No doubt all victims would prefer that 'the full set of requirements imposed by the court is expected to be served...despite the impact of coronavirus' (draft policy note, para 28). Yet it is the fundamental premise of these draft regulations that such an outcome is impossible due to the knock-on effects of the overwhelming public health crisis. In these circumstances, we would argue that there is no rational basis for preferring the interests of one class of victims above another, particularly where the resulting impact on offenders would lead to unfairness.

Barriers/risks to reporting

We are also concerned to note that the exclusion of offences is intended to 'avoid any adverse effect on the reporting of those offences by victims' (draft policy note, para 2). Whilst we do not disagree that there is evidence to show that there are barriers to reporting the excluded offences, we would point out that there is no evidence to suggest that reductions in sentences play any part in low levels of reporting.

Whilst the policy is intended 'to mitigate potential risks to future reporting of these offences' (draft policy note, para 25), it is also acknowledged to be an important feature that 'these provisions do not target supervision, conduct, programme, or any other requirement [that] may be in place for higher risk individuals' (draft equality impact assessment, para 47), which are expressly noted to include requirements imposed in relation to domestic abuse, and that unpaid work 'has no direct function in the management of risk or public protection' (para 35). We would therefore argue that these factors undermine, rather than support, the exclusion of domestic abuse and related offences.

We would argue, again, that no rational basis has been put forward for the suggestion that victims may be deterred from reporting these offences as a result of an exceptional public health response that has no direct risk management or public protection implications.

Consultative process

Whilst the Scottish court system is primarily adversarial in nature, it is acknowledged that, in many cases, the distinction between victim and perpetrator is blurred. For

that reason, and in recognition of the universal application of human rights, it is often unhelpful to see the rights of each group as being part of a zero-sum game. By the same token, the voices of victims and those accused or convicted of crime, should both be heard, without one being seen to cancel out the other.

The decision to seek to exclude certain offences appears to have been informed by Police Scotland and victims' organisations alone (draft policy note, paras 28 and 35), with it being unclear whether the other organisations consulted (para 33) were aware of any proposed exclusions and given the opportunity to comment specifically on them. The consultation process could therefore be described as skewed, inadequate and lacking in transparency.

Whilst we would argue that no offences/CPOs should be excluded from the scope of the regulations, we would equally acknowledge that other organisations might wish to argue for additional exclusions, e.g. crimes targeting the old or the disabled, and might not have been afforded the opportunity to do so. Indeed, the lack of any clear basis to justify the current exclusions would suggest that it may be difficult to resist calls for further exclusions in the event of wider consultation.

This merely demonstrates that the present approach to the exclusion of offences is flawed, and risks defeating the fundamental purpose of the draft regulations.

Breadth of exclusions

We also wish to draw attention to the fact that the effect of the current exclusions, notably including any offence that is aggravated by involving abuse of the partner or ex-partner of the perpetrator (as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and recorded as such under section 1(5) of that Act) is potentially very far-reaching indeed, given that this aggravation could apply to any number of offences.

Perhaps even more significantly, the effect of the exclusions would be to prevent the reduction of unpaid work or other activity requirements under a CPO, even where it has been applied *only in part* due to an excluded offence. This would

have a disproportionately adverse impact upon the completion of CPOs imposed in part (and, perhaps, in the main) in respect of unrelated, non-excluded offences.

If the excluded offences are to remain, contrary to our arguments set out above, we would urge that 'a qualifying community payback order' ought, at least, to be restricted to one not imposed 'wholly or mainly' in respect of the excluded offences - in the latter case, on the basis that a simple majority of hours is attributable to such offences.

In conclusion, we would encourage extension of the regulations to include all offences. Should this not be supported, we urge the Justice Committee to seek further explanation as to why the proposed exclusions are truly justified.

Yours sincerely,

Howard League Scotland Committee

Dr Hannah Graham (writing in a personal capacity)

Dear Convenor,

I am writing in regard to the draft SSI, The Community Orders (Coronavirus) (Scotland) Regulations 2021, which seeks to exercise the powers conferred in paragraph 15(1), schedule 4, [Part 6](#) of the Coronavirus (Scotland) Act 2020. This allows Scottish Ministers to vary requirements imposed in Community Payback Orders (CPOs) and Drug Treatment and Testing Orders (DTTOs) and, in doing so, make different provisions by offence type. This is an extraordinary use of power for a Government to alter the implementation of decisions of the judiciary and court, in direct response to what are extraordinary and disruptive circumstances. The underpinning coronavirus legislation authorises use of these emergency powers ‘in order to respond to the emergency situation caused by the COVID–19 pandemic’, to address ‘a severe and sustained threat to human life in Scotland’ and ‘in order for essential public services to continue to be able to discharge their functions as intended’ⁱ.

The stated policy objectivesⁱⁱ and purposes of The Community Orders (Coronavirus) (Scotland) Regulations 2021 include:

- To reduce the overall volume of unpaid work hours to be delivered;
- To reduce the pressure faced by justice social work (JSW) services within local authorities, increasing available capacity to help ensure that existing orders can be completed within timescales expected by the courts and any new orders imposed can commence promptly;
- To ensure that the justice system (in particular community justice services) can continue to operate effectively.

These policy objectives are coherent with the substantive needs and concerns raised by Social Work Scotland in a position paperⁱⁱⁱ in July 2020, and by the Scottish Association of Social Work in a letter and press releases^{iv} in November and December 2020. The overarching case for this course of action, as articulated by these two groups (SWS and SASW), is principled and cogent. Considerations of safety and public health challenges for justice social workers, unpaid work supervisors and people on a CPO are acknowledged in the accompanying Scottish Government draft policy note, equality impact assessment, and press release^{vi}. I commend the Scottish Government for being willing to act to try to avert acute workforce pressures and the risk of systemic failure. Each of these considerations and rationalisations listed above are, arguably, coherent with the reasoning and intent of the underpinning legislation, the Coronavirus (Scotland) Act 2020. So far, so good.

However, I wish to raise substantive questions about one key aspect of the draft SSI: the exclusions of selected offences from the variation (reduction) of unpaid work hours. It needs clarification and substantiation.

- 1. In exercising discretion under the Coronavirus (Scotland) Act 2020 to vary (reduce) unpaid work hours and exclude some selected offences from that variation, have Scottish Ministers had regard to relevant or irrelevant factors?**
- 2. How do different obligations under the European Convention on Human Rights (ECHR) relate to and justify this draft SSI? Can the Scottish Government provide more detail and substantiation of this in relation to the exclusions by crime type?**

In a letter^{vii} to the Scottish Parliament Justice Committee (28th January 2021) about this draft SSI, the Cabinet Secretary for Justice Humza Yousaf MSP writes:

'In my previous letter, I assured the Committee that the focus of these regulations, if taken forward, would be on UPW [unpaid work] and other activity requirements only, and that there was no intention to consider altering any other aspects of community orders. Upon reaching a final decision on the regulations, this has remained the case and there will be no variation to any element of community orders that manages risk or enhances public protection such as supervision, programme, or conduct requirements. Whilst UPW has no risk management element, excluding domestic abuse, sexual offences and stalking is intended to send a strong message of societal condemnation about those offences and reflect the particular impact on victims and others that they can have' [emphasis added].

The exact same words about 'condemnation' are repeated in paragraph 27 on page 7 of the draft policy note, with an added term about the 'seriousness' of the selected offence types. These pertain to matters taken into account by the independent judiciary and courts. There is an argument to be made that using emergency powers in a public health crisis to adjust requirements of an order is not necessarily an appropriate opportunity for the Government to use as a comms exercise for 'condemnation' and 'sending strong messages' of punitive sentiments about some crimes and not others, when relevant factors and people (including victims) will have been carefully considered by the judiciary in court. How is 'condemnation' relevant to the policy objectives of the draft SSI seeking to address pressures on justice social work teams, and how is it relevant to the underpinning legislation about public health challenge and a virus that does not care to differentiate between people on these grounds?

With respect, it is argued that there needs to be more contextualisation, detail and rationalisation about human rights and obligations to different (potentially or actually affected) parties than a few lines in a draft policy note with the draft SSI. In paragraph 26 of page 7 of the draft policy note, the Scottish Government argues that consideration of risk of under-reporting of certain crimes is relevant to its positive obligations under Articles 3 and 8 of the European Convention on Human Rights (ECHR) and the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence). This one line is offered as a key justification for the exclusions of selected offences from the variation. The term 'gender-based crime' is specifically used here, placing a clear emphasis on women as victims. The exclusions made by the Scottish Government are justified on the grounds of wanting 'to mitigate the risk of exacerbating existing issues around low levels of reporting of these offences'. I would encourage thorough exploration of any evidence the Scottish Government may have that the exclusions of selected offences in the draft SSI can be unambiguously linked or credited with mitigating future risks of low levels of reporting.

Within and outwith the context of the pandemic, the positive obligations under Article 3 (prohibition of torture, and inhuman or degrading treatment or punishment) of ECHR are, ostensibly, to *protect* and *investigate* – to practically and effectively protect life and bodily or mental integrity, to protect persons at real and immediate risk and vulnerable persons, and to investigate credible complaints or suspected incidents^{viii}. Indeed, the Scottish Government draft policy note identifies a positive obligation of 'investigation and prosecution of gender-based crime' in paragraph 26, on page 7. I am not a lawyer, and I do not presume to know better than those involved in drafting and scrutinising the regulations, so please take these questions as a request to consider the multi-faceted importance of human rights here. A key issue with the draft SSI warranting discussion and scrutiny is this: why do the Scottish Government consider that these positive obligations only apply to gender-based crime in justifying their choice of three excluded offence categories? If exclusions are going to be made and Articles of ECHR cited, why are other crimes of interpersonal violence and abuse (non-sexual and non-domestic abuse-related) ignored or left out? Sex and gender are not

the only characteristics or circumstances that may be a relevant factor to who is considered a 'vulnerable person' or 'at risk'. In late 2019, the Scottish Government published an academic evidence review^{ix} of violent victimisation in Scotland, which found several factors and inequalities are associated with violent victimisation (for example, intersecting factors which influence significant or high rates of violence against men of certain age groups as victims).

If, as the Scottish Government says, unpaid work has no function relating to risk management or enhancing protection, and that other requirements of Community Payback Orders that do will continue and will not be varied, how does this then relate to Articles 3 and 8 obligations? More detailed substantiation and discussion of this would be helpful and illuminating.

In interaction with these considerations, does Article 14 (non-discrimination on grounds of sex, race, colour, language, religion, national or social origin, and so on) of ECHR affect or relate to Scottish Ministers' use of discretion in making sex and gender-based justifications of exclusions of selected offences, citing Articles 3 and 8 of ECHR? There may well be a sound and clear rationale for how these Articles do or do not relate to one another in this context, hence why further explanation would help to clarify this. Also, it is recognised that the Scottish Government are afforded a margin of appreciation or a margin of state discretion.

- 3. Do the discretionary exclusions of selected offences imply or create a hierarchy of victims and harms?**
- 4. What is the evidence to support the Scottish Government claim that people who are victims of crime types other than those listed in the exclusions do not encounter barriers to reporting or face issues of under-reporting to a far lesser extent?**

In asking these questions, it is not at all my intention to diminish or detract from the importance of the views of victims and survivors, including those within and outwith the selected excluded crime categories. I care about this diverse group of people, for a few reasons, as do Scottish Ministers, Members of Scottish Parliament and other key stakeholders involved. What is currently unclear is whether or not it is wise, proportionate and procedurally just for the Scottish Government to single out and exclude some crimes and not others in this draft SSI and, by implication, seem to have regard for some victims and not others. How directly relevant is this to its stated policy objectives and the impact of the coronavirus pandemic?

In paragraph 25 of page 7 of the policy memorandum accompanying the draft SSI, the Scottish Government makes a claim that warrants scrutiny and further substantiation:

'Taking into consideration the particular barriers to reporting which exist for these offence types that may not be found with other offences, it is considered that reducing unpaid work hours may have an effect on the current or future victims of domestic abuse, sexual offences, and stalking which is not replicated in other offence types.'

What is the evidence for this claim? For example, what is the evidence that victims or survivors of violence and abuse (non-sexual, non-domestic abuse-related) are *not* considered relevant here, but victims or survivors of domestic and sexual violence and abuse *are* considered relevant? Is it fair and credible to group all 'other offences' in this way, given the scope and diversity of offences for which a CPO may be imposed^x?

5. The draft impact assessment recognises a reduction in risk to health (including mental health, disabilities and underlying conditions) because of the variation – how is this not relevant or less relevant to people excluded by selected crime types?

In paragraph 26 of page 6 of the draft equality impact assessment, it says ‘reducing outstanding UPW hours would decrease the continued risk to their health posed by the spread of COVID–19 via person-to-person contact and the group work associated with unpaid work.’ In paragraph 29, the impact assessment indicates that it ‘could also serve to mitigate the risk of exacerbating existing mental health conditions for people who may be experiencing stress and anxiety in relation to the government’s advice and guidance around physical distancing, and concerns they may have had related to their unpaid work.’ I do not wish to cast doubt on these claims. Yet, it is at least plausible that people who are excluded from this variation on the grounds of offence type could contend that their health is a relevant consideration in a pandemic under coronavirus laws, and that they, too, should be able to ‘decrease the continued risks to their health’ posed by unpaid work. These considerations of their health are not irrelevant or separate to broader considerations of human rights. That notwithstanding, I do recognise that this draft SSI is a variation (reduction) not a total cancellation of unpaid work hours, and that local authorities have a duty to protect the health and safety of those involved.

6. Has there been sufficient consideration of the impact of the exclusions on compliance or failure to comply for people in the excluded groups?

Perceptions of fairness and legitimacy by people on community orders and licences matter, in part, because these things can influence compliance or non-compliance. Paragraph 15(4), schedule 4, [Part 6](#) of the Coronavirus (Scotland) Act 2020 states that a variation (reduction of UPW hours) can only be made if Scottish Ministers are satisfied that:

- (a) the variations will not make the orders to which the regulations apply more onerous to comply with, and
- (b) either —
 - (i) if the regulations were not made, it is likely that there will be a failure to comply with a requirement imposed by one or more of the orders to which the regulations apply as a result of coronavirus, or
 - (ii) the making of the regulations is necessary in response to the effect of coronavirus on local authorities or the Scottish Courts and Tribunals Service.

What consideration has been given to onerousness, compliance or failure to comply for those that are excluded from the variation because of their offence type? What might the potential impact and consequences of this be and for whom?

7. Has there been sufficient meaningful consultation on the draft SSI, including and especially the exclusions of selected offences from the UPW variation?

The Scottish Government consultation on the excluded offences aspect of this draft SSI might be characterised as, potentially, selective and narrow in focus. In paragraph 28 on page 7 of the Scottish Government draft policy note, it states that ‘the exclusion of these offences has been informed by engagement with Police Scotland and victims organisations with specialist knowledge and insight on barriers to reporting of crime in relation to particular offences.’ The same information is stated in paragraph 6 of page 2 of the equality impact assessment^{xi}. For the sake of clarity: I do not wish to diminish nor detract from the views of these professionals and groups in consultation about this draft SSI. I wish to question whether one aspect of this policy has been made in a way that is heavily influenced by and reliant on those views, without due regard for consulting the views of relevant others, which

might differ? It has been seven months or so since the first public calls for a variation to unpaid work hours. If human rights and the European Convention on Human Rights are a relevant factor to the making of these regulations, it is reasonable to hope that a wider range of (independent) people with cognate expertise might also be consulted, for example, the Scottish Human Rights Commission, lawyers and legal groups, Howard League Scotland, the Care Inspectorate, among others.

In conclusion, I would encourage more detail and contextualisation of the draft SSI to be forthcoming through the Justice Committee scrutiny process. The *overarching* rationale for a variation (reduction) in unpaid work hours is credible and compelling in my view, to try to meet its stated policy objectives. However, I wish to draw the Convenor and Members' attention to the exclusions of selected offences from the draft SSI as warranting more in-depth discussion.

Dr Hannah Graham

Criminologist, University of Stirling

ⁱ Coronavirus (Scotland) Act 2020 Explanatory Notes

https://www.legislation.gov.uk/asp/2020/7/pdfs/aspen_20200007_en.pdf

ⁱⁱ The Community Orders (Coronavirus) (Scotland) Regulations 2021 Draft Policy Note

https://www.legislation.gov.uk/sdsi/2021/9780111049105/pdfs/sdsipn_9780111049105_en.pdf

ⁱⁱⁱ Social Work Scotland (2020) *Reducing the backlog of unpaid work hours: Coronavirus (Scotland) Act 2020* <https://socialworkscotland.org/briefings/reducing-the-backlog-of-unpaid-work-hours-coronavirus-scotland-act-2020/>

^{iv} Scottish Association of Social Work (2020a) <https://www.basw.co.uk/media/news/2020/nov/scottish-association-social-work-warns-significant-pressure-justice-services>

^v Scottish Association of Social Work (2020b) <https://www.basw.co.uk/media/news/2020/dec/short-term-funding-not-answer-reducing-unpaid-work-backlog-says-scottish>

^{vi} Scottish Government press release (28th January 2021) 'Community Payback Orders' <https://www.gov.scot/news/community-payback-orders/>

^{vii} Letter by the Cabinet Secretary for Justice Humza Yousaf (28th January 2021) https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210128_CSJtoAT_CPOs.pdf

^{viii} Dr Natasa Mavronicola, University of Birmingham (2020) 'Positive Obligations in Crisis' <https://strasbourgothers.com/2020/04/07/positive-obligations-in-crisis/>

^{ix} Batchelor, S., Armstrong, S., and MacLellan, D. (2019) *Taking Stock of Violence in Scotland* Glasgow: Scottish Centre for Crime and Justice Research, University of Glasgow. Available online at: <https://www.sccjr.ac.uk/news-events/news/major-new-report-takes-stock-of-violence-in-scotland/>

^x Justice Analytical Services (2020) *Criminal Proceedings in Scotland, 2018-2019*. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2020/03/criminal-proceedings-scotland-2018-19/documents/crime-justice-criminal-proceedings-scotland-2018-19/crime-justice-criminal-proceedings-scotland-2018-19/govscot%3Adocument/crime-justice-criminal-proceedings-scotland-2018-19.pdf?forceDownload=true>

^{xi} Draft Equality Impact Assessment with the Draft SSI (2021) https://www.legislation.gov.uk/sdsi/2021/9780111049105/pdfs/sdsieqia_9780111049105_en.pdf

Justice Committee

8th Meeting, 2021 (Session 5), Tuesday 23 February 2021

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:
 - [The Restorative Justice \(Prescribed Persons\) \(Scotland\) Order 2021](#) [see page 3];
2. If the Committee agrees to report to the Parliament it is required to do so by **1 March 2021**.

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 2 February 2021. The Committee agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

Procedure for negative instruments

4. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
5. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
6. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
7. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

8. Each negative instrument appears on the Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *a/ways* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
9. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

10. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

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

POLICY NOTE

The Victims and Witnesses (Scotland) Act 2014 (Commencement No 8) Order 2021 (SSI 2021/39 (C. 2); and

The Restorative Justice (Prescribed Persons) (Scotland) Order 2021 (SSI 2021/40)

The Victims and Witnesses (Scotland) Act 2014 (Commencement No 8) Order 2021 (“the Commencement Order”) is required in order to bring section 5 of the Victims and Witnesses (Scotland) Act 2014 (“**the 2014 Act**”) into force.

The Restorative Justice (Prescribed Persons) (Scotland) Order 2021 (“the Prescribed Persons Order”) is made in exercise of the powers conferred by section 5(2) of the 2014 Act. The instrument is subject to negative procedure.

This is being done in accordance with section 4 of the Interpretation and Legislative Reform, (Scotland) Act 2010 (“**the 2010 Act**”) so that both the Commencement Order and the Prescribed Persons Order come into force at the same time.

Summary Box

Section 5 of the 2014 Act relates to the publication of Restorative Justice Guidance by the Scottish Ministers. Section 5(1) enables the Scottish Ministers to issue guidance on the referral of persons to restorative justice and the provision of restorative justice. Section 5(2) enables the Scottish Ministers to prescribe the persons who must have regard to the guidance.

The Commencement Order is required in order to bring section 5 of the 2014 Act into force.

The Prescribed Persons Order is made under section 5(2) of the 2014 Act. The Prescribed Persons Order prescribes persons who must have regard to any restorative justice guidance issued by the Scottish Ministers under section 5(1) of the 2014 Act.

Policy Objectives

Restorative justice is a process of independent, facilitated contact, which supports constructive dialogue between a victim and the person who has caused the harm (whether this be an adult, a child, a young person or a representative of a corporate or other body). The process is entered into voluntarily by both the person harmed and the person who has caused the harm.

The current Restorative Justice Guidance was published in October 2017. The Guidance is for service providers and facilitators. It outlines the key principles of restorative justice and aims to ensure that where restorative justice processes are available, these are delivered in a coherent, consistent, victim-focused manner across Scotland.

These instruments will enable the Scottish Ministers to place this restorative justice guidance on a statutory footing by commencing Section 5 of the 2014 Act. The Prescribed Persons Order places no obligation on any of the persons or organisations listed to deliver, or be involved with, Restorative Justice. However, when and if they become involved in the design or delivery of restorative justice services, the Order provides that they should have regard to the Guidance. This will aid the delivery of a consistent and quality restorative justice service across Scotland.

The Prescribed Persons Order is being made under section 5 prior to section 5 being commenced via the Commencement Order. This is being done in accordance with section 4 of the 2010 Act which enables a power to make subordinate legislation to be exercised prior to the commencement of the provision of the relevant Act which confers the power. The power can only be exercised in this way if it is necessary or expedient to do so for the purpose of bringing the Act into force or giving full effect to the Act at or after the time when the power comes into force. The subordinate legislation made cannot come into force before the provision conferring the power to make it comes into force.

The Scottish Ministers consider that it is expedient to exercise the power in section 5(2) of the 2014 Act in this way as it will place the prescribed persons under a duty to have regard to the guidance as soon as the statutory power to issue guidance is in force. If the Prescribed Persons Order is not in force at the time section 5 comes into force, any guidance issued by the Scottish Ministers at that time would be issued with nobody under any obligation to consider it. Using the power in section 5 in accordance with section 4 of the 2010 Act is therefore expedient for the purpose of bringing the Act into force as it ensures guidance issued under section 5(1) of the 2014 Act will be considered by the prescribed persons as soon as section 5 comes into force.

Consultation

A public consultation paper, 'Making Justice Work for Victims and Witnesses'¹ was published in July 2012 prior to the introduction of the Victims and Witnesses Bill, which led to the 2014 Act.

Consultation with Restorative Justice stakeholders has been ongoing since the passing of the Victims and Witnesses (Scotland) Act. In particular the Delivery of Restorative Justice in Scotland: Guidance² was developed in close consultation with the Restorative Justice Forum.

A short questionnaire was issued to stakeholders in November 2020 seeking feedback on a draft proposed list of prescribed persons that should have regard to the Guidance. The list of prescribed persons identified in these instruments takes account of the feedback received from the 33 respondents to the survey.

¹ <http://www.gov.scot/Publications/2012/05/8645/0>

² Delivery of restorative justice in Scotland: guidance - gov.scot (www.gov.scot)

Impact Assessments

An Equality Impact Assessment has been completed on the draft SSIs and [is attached](#). There are no equality impact issues.

Financial Effects

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

Scottish Government
Directorate for Justice

January 2021

Justice Sub-Committee on Policing

8th Meeting, 2021 (Session 5), Tuesday 23 February 2021

Note by the Clerk

Feedback paper

Introduction

1. On 15 February, the Justice Sub-Committee on Policing held an evidence session on the Scottish Government and the Crown Office and Procurator Fiscal Service's [joint response](#) to the final report of the Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing.
2. The Sub-Committee heard from the Cabinet Secretary for Justice, Humza Yousaf MSP, and Scottish Government officials.

Scottish Government and Crown Office response

3. The Cabinet Secretary for Justice told the Sub-Committee that the Scottish Government accepted the majority of the recommendations by Dame Elish Angiolini. However, there were some which required an exploration of options of other routes or mechanisms to achieve the desired outcome. The response, therefore, does not include a definitive position on every recommendation, instead it sets out a clear direction of travel.
4. Many of the recommendations require legislation. The Scottish Government intends to take forward as many of these as possible in a single Bill with associated secondary legislation. The Cabinet Secretary indicated that this will take time, as there will need to be a consultation on the issues to covered by the Bill. He explained that this is the preferred approach, despite there being some areas that partners agree on and which could be progressed, as it would not make sense and take longer to put forward three or four small Bills.
5. The Cabinet Secretary also indicated that consideration could also be given to including issues in other planned legislation, such as the recommendations to improve the process for fatal accident inquiries.
6. In her final report, Dame Elish Angiolini raised some serious concerns with regards to discriminatory attitudes and behaviours within Police Scotland and recommended that an independent review on equality matters should be established. The Cabinet Secretary stated that whilst this is a recommendation for Police Scotland to take forward, he welcomed the quick action by the Chief Constable to date and thought it was important for those in the police service to listen to lived experiences in order to understand the issues.
7. The Cabinet Secretary highlighted that there are actions that can be taken now to make the police complaints handling system more transparent and accessible. This included updated websites and information in a format that is easily understood and clearly states what rights people have, as well as improving interactions with the public.

8. To ensure transparency, the Scottish Government will publish on its website progress on implementing the recommendations. He indicated that others, who are taking forward recommendations, should adopt a similar approach.

Next meeting

9. At its next meeting on 1 March, the Sub-Committee will hear from Police Scotland on the impact of Brexit on policing.

Justice Sub-Committee clerks
18 February 2021

Justice Committee

8th Meeting, 2021 (Session 5), Tuesday 23 February 2021

Malicious Prosecution and the COPFS

Note by the clerk

Introduction/background to the case of HMA v Clark and Whitehouse

1. On 14 November 2014, Mr Paul Clark and Mr David Whitehouse were detained and brought to Glasgow in connection with investigations into the purchase of Rangers Football Club plc. They appeared in court on 17 November. After a legal process which spanned a number of years, Crown Counsel withdrew certain charges in February 2016 and, on 22 February 2016, the judge dismissed the remaining charges. On 3 June 2016, Crown Counsel formally advised the court that no further proceedings would be taken against these individuals.
2. In August 2016, Mr Paul Clark and Mr David Whitehouse initiated civil actions against the Lord Advocate. They also made claims against the Chief Constable of Police Scotland. On 20 August 2020, the Lord Advocate admitted liability to Mr Clark and Whitehouse. He concluded that the decisions to place Mr Clark and Mr Whitehouse on petition in September 2015 and to indict them were indefensible in law. He said these decisions were taken without probable cause and in circumstances which met the legal test for malicious prosecution.
3. It is important to note that, during the course of the investigations and proceedings on these cases, the Inner House of the Court of Session, on appeal in October 2019, overturned previous legal authority¹ whereby the Lord Advocate is immune from common law liability.
4. Following a **letter** from the Committee and his **response**, the Lord Advocate told the Scottish Parliament that both Mr Clark and Mr Whitehouse had been paid £10.5 million in damages after mediation and that, to date, over £3 million has been paid to them by way of expenses². The Lord Advocate said the two pursuers were very high-earning professional people and the damages paid reflect a reasonable estimate of the loss that they sustained as a result of being prosecuted³.
5. In his response, the Lord Advocate said that the Chief Constable has also settled the claims against him brought by Mr Clark and Mr Whitehouse, but he is not party to those settlements and unaware of their terms.

¹ Case of Hester v MacDonald, 1961.

² Letter from the Lord Advocate to the Justice Committee, 5th February 2021. Available at: https://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20210205_LAtoAT_Clark_and_Whitehouse_.pdf

³ Official Report, meeting of the Scottish Parliament, 9th February 2021.

6. The Committee also wrote to the Cabinet Secretary for Justice about the possible budgetary implications of the malicious prosecution on other bodies in the justice and policing sector, outwith the Crown Office. In response, the Cabinet Secretary said that:

“The Police Scotland Scheme of Financial Delegation sets out the governance processes required for various financial decisions. This outlines that Scottish Government approval is required for settling legal actions in excess of £250,000. I can confirm that the Scottish Government has not received any such requests for approval.”

He added:

“The Chief Constable confirmed that settlements had been agreed with Mr Clark’s and Mr Whitehouse’s representatives, and that they were within the limit of his delegated financial authority⁴. He also confirmed that a commensurate contribution to legal expenses had been made. Finally, the Chief Constable also confirmed his commitment to Police Scotland contributing to, and co-operating fully with, any inquiry into these matters.”

7. It is not yet clear where the total sums involved in these or other cases are being drawn from within the Scottish Government’s budget although the Lord Advocate has made it clear that this will not be from within existing Crown Office budgets. He said, “arrangements have been made so that the cases will not affect the Crown Office’s resource budget or its operational effectiveness.”⁵
8. Members may wish to note that questions on budgetary implications may be covered in any scrutiny undertaken by Audit Scotland as part of its processes.
9. On 10 February 2021, a debate was held in the Scottish Parliament. This resulted in the following resolution⁶:

“That the Parliament notes the Crown Office and Procurator Fiscal Service’s admission of malicious prosecutions of David Whitehouse and Paul Clark, formerly administrators of Rangers Football Club PLC; notes that £24,086,250 of taxpayers money was paid out to Mr Whitehouse and Mr Clark for compensation and legal fees; notes that this situation is unprecedented in Scottish legal history; further notes that the Lord Advocate and COPFS have committed to supporting public and Parliamentary accountability and notes that legal proceedings are ongoing; agrees that there should be a transparent process of inquiry, once all related legal proceedings are completed; agrees that the precise mechanism of inquiry, which should be led by a judge, should be determined once all related legal proceedings have concluded; understands that further compensation is also to be paid on behalf of the

⁴ This is currently up to £75,000 per individual. Official Report, Public Audit and Post-legislative Scrutiny Committee, 11 February 2021.

⁵ Official Report, meeting of the Scottish Parliament, 9th February 2021.

⁶ Official Report, meeting of the Scottish Parliament, 10th February 2021.

Chief Constable, and believes that the remit of any inquiry should include examination of the role and involvement of Police Scotland.”

10. During that debate, the Lord Advocate said, “there should be a process of inquiry, that that inquiry should be transparent and independent, and that it should be led by a judge” and further stated that “the judge appointed would require to be demonstrably independent and to command confidence in that regard, and it may well be appropriate to appoint a judge from outwith Scotland. However, it would be premature at this time to conclude that, when the time comes to establish the inquiry, there is no Scottish judge that could satisfy that requirement.”⁷
11. The Lord Advocate has also told the Committee that the precognition process has been reinforced, and new arrangements have been established for the management and oversight of large and complex cases to safeguard similar events in the future.⁸ No further detail is as yet available on lessons learnt from these cases of malicious prosecution.

Key issues

12. On the basis of the correspondence between the Committee and the Lord Advocate, the statement made by the latter in the Chamber on 9 February and the debate the following day, a number of issues have emerged that the Committee may wish to consider. These include:
- The details of how the investigations into, and cases against, Mr Clark and Mr Whitehouse led to malicious prosecution including the decisions taken and the accountability of those that took them.
 - Whether there have been, or still are, other cases of potential malicious prosecution and the implication of these⁹.
 - The implications, both financial and reputational, for the Crown Office and Police Scotland.
 - The lessons that need to be learned from these cases and the actions that need to be taken to prevent future malicious prosecutions.
 - The remit, format, timescale and cost of a future judge-led inquiry, including who will chair this.
 - The legal implications of the judgment by the Inner House of the Court of Session to overturn previous legal authority on the Lord Advocate’s immunity from common law liability.
 - The governance and accountability framework for the Lord Advocate and the Crown Office¹⁰.

⁷ Official Report, meeting of the Scottish Parliament, 10th February 2021

⁸ Letter from the Lord Advocate to the Justice Committee, 5th February 2021

⁹ On 9th February, the Lord Advocate told the Parliament that “with other cases pending, the cost to the public purse will increase and the ultimate cost is yet to be seen.”

¹⁰ The Lord Advocate is head of the systems of criminal prosecution and investigation of deaths in Scotland, and is assisted in his work by the Solicitor General for Scotland. They are both members of, and are responsible for providing legal advice to, the Scottish Government (section 44(1) of the Scotland Act 1998).

- Whether decisions of the former Lord Advocate should be scrutinised by Parliament given his current role as a Senator of the College of Justice and the important principle of judicial independence.

13. It should be noted that, as stated in the resolution of Parliament of 10 February 2021, legal proceedings are still ongoing on the specific case of HMA vs Clark and Whitehouse, and other relevant cases. The clerk can provide advice on what limitations this may place on the Committee.

Action/recommendation

14. Members are asked to discuss the above issues and decide what, if any, actions they wish to take.

**Clerks to the Justice Committee
February 2021**

The Scotland Act 1998 provides that the Scottish Law Officers shall be appointed and removed from office by the Queen on the recommendation of the First Minister.⁷ The range of roles performed by the Scottish Law Officers requires them to be free from political interference and independent in taking decisions about criminal prosecutions, but also to act as legal advisers to the Scottish Government.

The Scotland Act 1998 seeks to protect the independence of the Scottish Law Officers in various ways, including:

- providing that any decision made by the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths is taken independently of any other person (and thus not subject to normal rules on collective ministerial decisions) (section 48(5) of the Scotland Act 1998);
- providing that an Act of the Scottish Parliament cannot remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths (section 29(2) of the Scotland Act 1998).

For further information, see: SPICe Briefing The Scottish Criminal Justice System: The Public Prosecution System. Available at: https://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-47_The_Scottish_Criminal_Justice_System_The_Public_Prosecution_System.pdf