



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 19 March 2019**

**Session 5**



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**JUSTICE COMMITTEE**  
**10<sup>th</sup> Meeting 2019, Session 5**

**CONVENER**

\*Margaret Mitchell (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

\*John Finnie (Highlands and Islands) (Green)  
Jenny Gilruth (Mid Fife and Glenrothes) (SNP)  
\*Daniel Johnson (Edinburgh Southern) (Lab)  
\*Liam Kerr (North East Scotland) (Con)  
\*Fulton MacGregor (Coatbridge and Chryston) (SNP)  
\*Liam McArthur (Orkney Islands) (LD)  
\*Shona Robison (Dundee City East) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Ash Denham (Minister for Community Safety)  
Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



## Scottish Parliament

### Justice Committee

*Tuesday 19 March 2019*

*[The Convener opened the meeting at 11:00]*

#### Interests

**The Convener (Margaret Mitchell):** Welcome to the 10th meeting in 2019 of the Justice Committee. We have apologies from Jenny Gilruth. I welcome to the committee Bill Kidd, who is substituting for Jenny today, and I invite him to declare any relevant interests.

**Bill Kidd (Glasgow Anniesland) (SNP):** Thank you, convener. I do not have any relevant interests to declare.

#### Decision on Taking Business in Private

11:00

**The Convener:** Agenda item 1 is a decision on whether to take in private agenda item 5, which is consideration of a draft letter. Are we agreed to take item 5 in private?

**Members indicated agreement.**

## Subordinate Legislation

### Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc) Regulations 2019 [Draft]

11:00

**The Convener:** Agenda item 2 is an evidence session on an affirmative instrument. I welcome Ash Denham, the Minister for Community Safety, and her officials Denise Swanson and Emma Stevenson from the Scottish Government's directorate of legal services.

Item 2 provides members with the opportunity to seek clarification from the minister and her officials of any points before we formally dispose of the motion on the instrument.

I refer members to paper 1, which is a note by the clerk. The paper contains a written submission on the instrument from the Law Society of Scotland.

Minister, do you wish to make a short opening statement?

**The Minister for Community Safety (Ash Denham):** I do, as it might be helpful if I set out the context in which this Scottish statutory instrument has been laid.

The draft Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc) Regulations 2019 have been developed to prepare for a no-deal Brexit. The instrument mirrors the approach that has been taken in England, Wales and Northern Ireland.

Currently, European Union directives set out the rights of lawyers to provide legal services in EU and European Free Trade Association states. The application of those directives allows specified lawyers to provide regulated services in a member state other than the one in which they qualified—termed the “host state”—without the need to register with the host state regulator. Lawyers provide services under their existing professional title, which is termed their “home state professional title”. The directives clarify the applicable regulatory rules and the conditions for providing those services in a host state. The services are commonly known as fly-in, fly-out services.

The lawyers establishment directive allows specified lawyers in one member state to practise reserved legal activities on a permanent basis in another member state under their home state professional title, and sets out the conditions for doing so. It allows lawyers who are practising in another member state to be admitted to the profession in that state after three years of

practice in the law of that state without having to go through the usual qualification routes. European lawyers practising in Scotland under the establishment directive must be registered with a Scottish regulator as registered European lawyers. As such, they have the right to own legal businesses without a United Kingdom-qualified lawyer.

The purpose of the draft regulations is to end the preferential practising rights of EU and EFTA lawyers in Scotland to provide legal services on a permanent or temporary basis. In the event of a no-deal Brexit, the reciprocal arrangements that are enjoyed by member states of the EU and EFTA will no longer be available to the UK. EU and EFTA-qualified lawyers who have already successfully transferred to the Scottish qualification will be able to retain their qualification and practising rights, but arrangements will be different in future.

In the event that the UK leaves the EU without a deal, our services trading relationship with the EU will be governed by World Trade Organization rules. The general agreement on trade in services prohibits signatory states from giving preferential market access to any other signatory state in the absence of a comprehensive free trade or recognition agreement between them.

Therefore, we need to fix the deficiencies in the relevant retained EU law caused by the lack of reciprocal arrangements with the EU, while also meeting our international obligations. As such, we will revoke the legislation that currently implements the EU framework, and EU and EFTA lawyers will be treated in the same way as other third-country lawyers.

The draft regulations will helpfully provide a transition period to allow registered European lawyers from EU and EFTA states time to comply with the new regulatory position. That period will run from exit day to 31 December 2020, and it will allow registered European lawyers and those in the process of achieving registered European lawyer status by exit day to practise as they do now, but with time to adjust. In making these amendments, the instrument recognises the terms of the agreement between the UK Government and the Swiss Confederation on citizens' rights following the UK's withdrawal from the EU, and provision is made for reciprocal practising rights within the terms of that agreement.

This is a no-deal Scottish statutory instrument, but obviously no deal is not the Scottish Government's preferred position. We regret the decision to leave the EU and will not support a no-deal Brexit, but it is incumbent on us to prepare for all potential outcomes, and we have to consider the best approach in this area, should the UK leave the EU without a deal.

Officials have kept in close contact with the relevant representative organisations. As a result, the Law Society of Scotland and the Faculty of Advocates are aware of the instrument and have contributed to the business and regulatory impact assessment. It is thought that the terms of the instrument will have little impact on the current landscape for delivering legal services.

I am grateful to have this opportunity to provide some context to the SSI, and I am happy to take questions from the committee.

**The Convener:** Thank you very much for those comprehensive remarks, minister.

**Liam McArthur (Orkney Islands) (LD):** Thank you, minister, for that helpful clarification of the position in which we find ourselves. We have all at various stages rehearsed the arguments with regard to our wish not to be in this position, but I welcome the fact that there will be a period to allow affairs to be reorganised. It is a sensible move. However, the move away from a system of mutual recognition is just a further example of how unnecessarily bad the situation is.

I also want to put on record my gratitude to the Law Society for its helpful note. It is worth pointing out that, in its submission, the Law Society says:

"We fully intend whatever the future relationship with the EU after exit to keep open, accessible yet robust routes to requalification for lawyers from any jurisdiction which allow them to practise within Scotland whilst also reassuring clients of their competence."

That assurance is very welcome indeed. As I have said, it is highly regrettable that we find ourselves in this position, but the instrument appears to discharge the responsibilities that need to be discharged, and I will support it.

**The Convener:** If members have no more comments or questions, we move to agenda item 3, which is formal consideration of motion S5M-16239. The Delegated Powers and Law Reform Committee considered and reported on the instrument, and made no comments on it.

*Motion moved,*

That the Justice Committee recommends that the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] be approved.—[Ash Denham]

*Motion agreed to.*

**The Convener:** Is the committee content to delegate authority to me as convener to clear the final draft of our report on the instrument?

**Members indicated agreement.**

**The Convener:** I thank the minister and her officials for attending, and I suspend the meeting briefly to allow them to leave.

11:08

*Meeting suspended.*

11:09

*On resuming—*

**Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/68)**

**Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75)**

**Legal Aid and Advice and Assistance (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/78)**

**The Convener:** Agenda item 4 is consideration of three negative instruments. The Delegated Powers and Law Reform Committee has considered and reported on all three instruments and has made no comments.

**John Finnie (Highlands and Islands) (Green):** I refer members to my entry in the register of members' interests. I am in receipt of a police pension, which is relevant to this agenda item.

**The Convener:** That is duly noted.

I refer members to paper 2, which is a note by the clerk. Members may wish to note that, in relation to SSI 2019/78, which is on legal aid, we have received written submissions from the Law Society of Scotland and the Edinburgh Bar Association, which are reproduced in that paper.

Do members have any comments on the instruments?

**Liam Kerr (North East Scotland) (Con):** I have questions on the first and third instruments. I will deal with the one on police pensions first and then perhaps I could come back in after Daniel Johnson, who has indicated that he also wants to comment.

From our papers, I understand that there will be an increase in the employer contribution to police pensions, the estimated cost of which is £40 million. The chancellor's spring statement was supposed to confirm whether the UK Treasury would cover that increase. Do we know whether it did so?

**The Convener:** Do we have confirmation?

**Stephen Imrie (Clerk):** I do not have that information to hand. However, I will see whether the clerks can find that out while the committee is considering the other instruments.

**Liam Kerr:** I would be very grateful.

**Daniel Johnson (Edinburgh Southern) (Lab):**

The two submissions that we have received from the Edinburgh Bar Association and the Law Society of Scotland on SSI 2019/78, which is on legal aid, were quite strong. It is worth noting that it is unusual for us to receive submissions on negative instruments such as those that we are considering. Might it be worth our writing to the minister to ask for the Government's comments on the points that those bodies make regarding the current position on legal aid? I am thinking in particular of the Edinburgh Bar Association's comment that, since 2011, there has been a total reduction of 31 per cent in the funding that is available to criminal legal aid solicitors. Likewise, the Law Society of Scotland has called for a full needs-based review as part of the future structures that might come out of the Scottish Government's legal aid review. It is worth noting those points, among others, and thinking about whether we want to act on them.

**Liam McArthur:** I entirely agree with Daniel Johnson that it is unusual for us to receive submissions on negative instruments, although it is probably not wholly surprising in the context of the debate that there has been on legal aid. I think that it would not—and the Edinburgh Bar Association goes as far as saying that it should not—interfere with the approval of the legal aid instrument, but a bit of work needs to be done on the point that Daniel Johnson raised on the drop in the number of legal aid practitioners.

Last week in the chamber, I raised with the Minister for Community Safety the fact that there are now parts of the country where access to legal aid practitioners is a serious problem. I know that, in Orkney, many people have to seek legal representation from lawyers who are based on the Scottish mainland. That often leads to clients and lawyers not having any contact until the day that they appear in court, which does not seem to be desirable at all.

The other point from the Edinburgh Bar Association that leapt out at me referred to the underspend in the money that is allocated for police station work. Members will recall that there was quite a bit of controversy when that came before the committee.

Therefore, there are a number of points that we could usefully follow up with the Scottish Government, and we could use the approval of the instrument as a peg on which to hang those.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** Those are valid and important points, but it is also worth noting that the Faculty of Advocates welcomed the 3 per cent increase, and that, in England and Wales, a 1 per cent increase—for barristers only—has just been announced. Scotland's current legal aid spend per head is the

third highest in the European Union and has the widest scope in terms of eligibility.

I wanted to put those points on the record, for balance.

**John Finnie:** What Rona Mackay said may well be the case, but there are genuine concerns about the wider implications of the issue, particularly in relation to that much-used phrase “access to justice” in the circumstances that my colleague Liam McArthur outlined. The frustration is that this falls not long after a significant review of the process.

At the very least, I would like the committee to write to the Cabinet Secretary for Justice to ask for a response to the specific points that were raised in the two submissions that we have received. Those organisations rightly want matters to proceed—they do not want to stop the process—but issues remain.

11:15

**Liam Kerr:** I declare an interest: I have practising certificates with the Law Society of England and Wales and the Law Society of Scotland.

I endorse the points that have been made; the issues that have been raised are important. In particular, the committee should find out whether the Government concedes the level of hardship and numbers departing the profession that the Edinburgh Bar Association has flagged up—issues that it suggests are gendered in nature. As an MSP who has been in Parliament for only three years, I am also interested to know more about the allegation that a promise made in 2011 to reinstate the funding has been broken—or to hear the Government’s view on that.

**The Convener:** These are good submissions that raise valid points. I note Daniel Johnson’s suggestion that the committee send the submissions with the points raised at committee to the cabinet secretary and the Scottish Government for comment. Do members agree to do that?

*Members indicated agreement.*

**The Convener:** I ask the clerk whether he has a response to Liam Kerr’s question about the spring statement.

**Stephen Imrie:** I can update the member and the committee. We have had a brief look at the chancellor’s spring statement, and there is reference to increased police funding, but that it is for tackling crime in England and Wales. There is no specific reference to police pensions, or to the funding issue that the member raised. Therefore,

the issue does not appear to have been covered in the statement.

The committee might want to be aware that the police pensions instrument comes into force on 1 April 2019, so the committee would not be able to consider it for a second time, given that it is not meeting next week. The legal aid instrument comes into force on 26 April 2019, so there is time to look at that instrument again, but that is a matter for the committee.

**Liam McArthur:** I note that the Law Society also made a number of technical observations on the legal aid instrument. The society indicated that it was due to speak directly to officials. Is it worth getting clarification on whether all the technical observations that it has made are valid, and whether the Government is likely to take those on board? It would be helpful to understand the extent to which there has been a meeting of minds between the Law Society and officials on that.

**The Convener:** Members have raised very valid points. Are members agreed that, although we most certainly want to put the questions and points that we have raised to the cabinet secretary and the Scottish Government, and that we look forward to a response, the committee has no recommendation to make in relation to these instruments?

*Members indicated agreement.*

**The Convener:** That concludes the public part of today’s meeting. There will be no meeting next week. Members of the committee will undertake a fact-finding visit to the Scottish crime campus at Gartcosh in North Lanarkshire. The committee’s next formal meeting will be on Tuesday 2 April, when we expect to begin the process of considering stage 2 amendments to the Management of Offenders (Scotland) Bill.

11:19

*Meeting continued in private until 11:42.*



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