COUNTER-TERRORISM AND BORDER SECURITY BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

The Government has tabled amendments to the Counter-Terrorism and Border Security Bill for Commons Report stage. These include an amendment altering an existing delegated power. This supplementary memorandum explains the reasons for the extension of that power and the justification for the procedure selected.

New paragraph 18A of Schedule 4 – amendment to section 8A of the Legal Aid (Scotland) Act 1986: Power to prescribe circumstances in which criminal advice and assistance is automatically available

Power conferred on: *Scottish Ministers*

Power exercisable by: *Regulations made by Scottish statutory instrument*

Parliamentary procedure: *Affirmative resolution of the Scottish Parliament*

Context and purpose

1. Section 8A of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") allows State funded legal advice and assistance to be made available in such circumstances as the Scottish Ministers may, by regulations, prescribe to any "relevant client". The expression "relevant client" is defined to mean any person who has a right of access to a solicitor under section 32 of the Criminal Justice (Scotland) Act 2016. Thus, in the circumstances which the Scottish Ministers prescribe in regulations, advice and assistance will be available to anyone who is being questioned by the police prior to charge.

2. New paragraph 18A of Schedule 4 to the Bill amends section 8A(2) of the 1986 Act to augment the definition of a "relevant client" for the purpose of the regulation-making power. Under the expanded definition, relevant clients will also include persons detained under the hostile state activity ports power in Schedule 3 to the Bill or the counter-terrorism powers under section 41 of, or Schedule 7 to, the 2000 Act. This will enable regulations under section 8A to be made to provide State funded legal advice and assistance for such persons although, to facilitate early implementation of the provisions in Schedule 3 to the Bill, new paragraph 25A of Schedule 4 to the Bill directly makes the necessary amendment to regulation 8 of the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011.

Justification for taking the power

3. Section 8 of the 1986 Act makes provision for means tested legal aid for advice and assistance. To comply with the ruling of the UK Supreme Court in the case of *Cadder v. Her Majesty's Advocate*, section 8A was inserted into the 1986 Act (by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland)

Act 2010) to ensure comprehensive coverage in the provision of legal advice and assistance for suspects before and during police interview. In introducing section 8A to the 1986 Act, the then Scottish Government's justification for the approach taken was as follows:

> "To allow a degree of flexibility in defining the circumstances in which advice and assistance is to be made available without reference to the financial limits, the Government considers it most appropriate to define those circumstances in subordinate legislation rather than attempt to do so in the Bill."[1]

4. The UK Government, in consultation with the Scottish Government, considers it appropriate for reasons of consistency with the existing approach in section 8A to expand the definition of a relevant client so that eligibility for State funded legal advice and assistance for persons detained under Schedule 3 to the Bill or under the 2000 Act is similarly prescribed in regulations.

Justification for the procedure

5. Regulations made under section 8A are subject to the affirmative procedure in the Scottish Parliament. In 2010, the then Scottish Government argued that "that any change to the eligibility criteria for State funded legal assistance requires thorough Parliamentary scrutiny. The affirmative procedure is therefore considered appropriate". The extension of the regulation-making power does not alter such justification.

Home Office
4 September 2018

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http://www.parliament.scot/S3_Bills/Criminal%20Procedure%20(Legal%20Assistance%20Detention%20and%20Appeals)%20(Scotland)%20Bill/b60s3-introd-dpm.pdf