POLICY NOTE

THE EUROPEAN PROTECTION ORDER (SCOTLAND) REGULATIONS 2015

SSI 2015/DRAFT

The above order is made by the Scottish Ministers in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and all other powers enabling them to do so.

The instrument, which will make amendments to primary legislation, is subject to the affirmative procedure.

Background

The European Protection Order (Scotland) Regulations 2015 ("the Regulations"), in part, implement Directive 2011/99/EU ("the Directive") of the European Parliament and of the Council of the 13 December 2011 on the European Protection Order. The Directive will also be implemented by court rules.

On 18 May 2011, the European Commission proposed a package of measures to ensure a minimum level of rights, support and protection for victims across the EU, no matter where they come from or live. This Directive forms part of those measures.

The Directive relates solely to criminal matters. There is a parallel Regulation on civil matters (EU Regulation 606/2013) ("the EU Regulation") and the Scottish Government has transposed the terms of this Regulation by virtue of the Civil Jurisdiction and Judgments (Protection Measures) (Scotland) Regulations 2014, which came into force on 11 January 2015.

The general objective of the Directive is to provide mutual recognition across the EU of criminal protection measures. Recital 5 of the Directive states that "a mechanism should be created to ensure mutual recognition among Member States of decisions concerning protection measures for victims of crime."

The Directive seeks to allow measures which have been imposed in order to protect an individual – for example, a restriction on the movement of someone who has sought to harm that person – to be extended to another Member State in which the individual decides to stay. Practically this means that protection measures issued in one EU country can be recognised across the entire EU. In this way, the protection will travel with the individual.

This will be achieved through a system of European Protection Orders ("EPOs"), which will be issued, on request, by the Member State in which the protection measure is originally adopted. Upon receipt of the EPO by the receiving member state, and subject to various conditions, a similar measure available under domestic law is to be imposed.

Policy Objective

The policy objective is to transpose into domestic law the requirements of the Directive, allowing individuals to apply for an EPO where they benefit from a protection measure and intend to move elsewhere in the EU, and to extend protection to those in a similar situation who are moving to Scotland. In order to achieve this in part, the Regulations insert five new sections into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). The remaining administrative and procedural requirements of the Directive will be transposed through court rules.

The Regulations define an EPO as a "decision in relation to a protection measure taken by a competent authority in a Member State of the European Union ("the issuing state") and on the basis of which the competent authority of another Member State of the European Union ("the executing state") may take any appropriate measure or measures under its own national law with a view to continuing the protection of protected persons."

In Scotland the competent authority will be the Scottish courts. New section 254B to be inserted into the 1995 Act therefore confers upon the court the power to issue EPOs in relation to individuals who have had an order made for their protection and who wish to reside or stay in the executing state, taking account of the matters set out at section 254B(3). Once the court is satisfied that an EPO can be issued it must transmit the EPO to the competent authority of the executing state.

The power of the court to recognise an incoming EPO is provided for in new section 254C. The court must recognise the EPO unless one or more of the grounds set out at section 254C(3) applies; if one or more of those grounds does apply the court has the power under new section 254C(2) to refuse to recognise the EPO. Where an EPO is recognised, the court must make a non-harassment order (NHO) requiring the offender to refrain from specified conduct in relation to the protected person. An NHO imposed under section 254D(1) may only contain such requirements as to the offender's conduct as may constitute protection measures and which correspond to the protection imposed in the issuing state. NHOs are considered sufficiently flexible to continue the protection given to a protected person in the issuing state.

Certain provisions of section 234A of the 1995 Act are applied to NHOs imposed under section 254D(1) as they apply to domestic NHOs. This ensures, amongst other things, that breach of a section 254D NHO is an offence with resulting penalties. The maximum penalties applicable to breach of a section 254D NHO have been restricted from five to two years in order to ensure compliance with paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972.

New section 254E provides for the modification and revocation of NHOs made under section 254D. Modification or revocation may only take place in certain circumstances, such as where the prohibitions and restrictions imposed by the issuing state and contained in the EPO have been modified or revoked. In addition to being able to act when notified of such changes by the competent authority of the issuing state, the court can also modify or revoke a section 254D NHO on the application of the offender. While the grounds on which the NHO can be modified or revoked are limited, it was considered useful to provide a mechanism by which the court can be asked to re-consider an order imposed (for example, if circumstances have changed but the court has not yet been notified by the competent authority).
New 254A contains a list of definitions for the terms used in 254A-254E.

In summary, the Regulations amend the 1995 Act by:-

- conferring upon the court (the competent authority) the power to recognise and implement incoming EPOs;
- conferring upon the court (the competent authority) the power to issue outgoing EPOs;
- setting out the circumstances in which an EPO can be issued by the court;
- setting out the grounds on which the court can refuse to recognise an EPO;
- providing a power to modify or revoke a section 254D NHO; and
- including the definitions referred to in Article 2 of the Directive.

While the Regulations implement the Directive in part, criminal court rules will also be required. These will set out the administrative and procedural aspects for issuing and implementing EPOs. In summary, court rules will:-

- set out which forms are to be used for the application process, for issuing EPOs and for the NHOs used to implement EPOs
- set out what the transmission procedure may be for sending EPOs to other Member States
- set out the procedure for some of the notifications required in the Directive.
- set out the procedure for dealing with incomplete applications.
- set out the procedure in relation to modifications of NHOs.
- ensure compliance with the Directive in terms of translation.
- ensure compliance with the Directive in terms of costs.

Consultation

The Scottish Government has consulted with the UK Government throughout the development of the Regulations.

The Regulations have been considered by the Scottish Court Service which will be responsible for the administration of European Protection Orders. The Scottish Government has also consulted other key stakeholders, including the Lord President's office, the Criminal Courts Rules Council, the Crown Office and Procurator Fiscal Service and Police Scotland.

The Scottish Government will continue to engage with stakeholders to monitor the introduction of EPOs into domestic law and will seek feedback, particularly in relation to how the system of EPOs operates in practice.

Business and Regulatory Impact Assessment

The Regulations are in consequence of provisions contained within the EU Directive and do not affect businesses therefore no Business Regulatory Impact Assessment has been carried out.

Equality Impact Assessment

An Equality Impact Assessment, covering both this Directive and the EU Regulation, has been published on the Scottish Government's website. It highlights that the main impact of both is expected to be around domestic abuse. The Scottish Government publishes statistics on domestic abuse recorded by the police[1]. These statistics show that incidents with a female victim and a male perpetrator represented 80% of all incidents of domestic abuse in 2012-13. Therefore, in relation to the Equality Act 2010 protected characteristic of sex, the Directive and the Regulations will have particular benefits for women, given that most victims of domestic abuse are women.

Financial Implications

The Scottish Court Service will be responsible for the administration and procedural aspects of dealing with European Protection Orders. As this is a new type of protection for victims, it is extremely difficult to ascertain likely volumes. Initial views are that volumes will be low. As such, there should be no significant financial implications for the Scottish Court Service. The Scottish Government has liaised closely with the Scottish Court Service throughout the development of the Regulations, and will continue to monitor how the EPO regime operates in practice following transposition.

Directorate for Justice
February 2015

[1] The 2012-13 statistics on Domestic Abuse Recorded by the Police in Scotland are at: http://www.scotland.gov.uk/Publications/2013/10/2411