

Final Business and Regulatory Impact Assessment

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Title of Proposal

The Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2013

Purpose and intended effect

- **Background**

Translation and interpretation are currently offered by police and the Courts to persons who are unable to communicate in English. While this is not an express requirement of Scots law it is implied by Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, guaranteeing a fair trial, and of Article 48 of the Charter guaranteeing respect for the right of defence.

Directive 2010/64/EU¹ of the European Parliament and of the Council (“the Directive”) was adopted on 10 October 2010. It sets out a requirement for an express right to “interpretation during criminal proceedings before investigative and judicial authorities”, and to “written translation of all documents which are essential to ensure [suspected or accused persons] are able to exercise their right of defence and to safeguard the fairness of the proceedings”.

- **Objective**

The Scottish Government’s objective is to transpose the requirements of the Directive into Scots law, in so far as this may be done within legislative competence. (For example, the requirements of Articles 2(7) and 3(6) relating to European arrest warrants are outwith legislative competence.) In doing so it will meet its duties under section 57(2) of the Scotland Act 1998 to ensure that legislation or other acts is compatible both with the rights under the European Convention, and with Community law.

It is also in keeping with the Scottish Government’s general policies of (1) promoting human rights, in this case by helping to ensure the fairness of trials in Scotland, and (2) demonstrating that Scotland is a reliable partner at European level.

It is not, however, the Scottish Government’s objective to transpose the requirements in such a way as to require services beyond those essential to meet our obligations under the Directive and under the Convention.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>

- **Rationale for Government intervention**

The Directive is addressed to Member States. Justice is, with some exceptions (for example extradition as noted above) a devolved competence, so it falls to Scottish Ministers to transpose most of the Directive into law in Scotland. If Scotland does not transpose the Directive adequately the Scottish Government will be in breach of its obligations under the Scotland Act 1998 not to act except in accordance with law of the European Union. It will also be in breach of the UK's requirement to transpose the Directive and would share in any infraction proceedings against UK, including any financial penalty imposed. It may also suffer reputational damage.

While practice is believed to be largely compliant with the Directive, and thus that there will be relatively low regulatory impact, it is necessary to set out an unequivocal right to interpretation and translation in law to comply with its terms.

Consultation

- **Within Government**

Within Government consultation has taken place with the Ministry of Justice and the Home Office in the UK Government, and with officials in the Scottish Government dealing with the courts, the police, Legal Aid, equality and procurement.

- **Public Consultation**

Practice is believed to be largely compliant with the Directive, in that interpretation is already offered to suspected or accused persons, and some translations have already been prepared. Moreover the provisions of the Directive affect only suspected and accused persons, and the organisations which secure interpretation and translation to them – essentially the police, the courts, the Scottish Legal Aid Board and the Crown. These organisations are represented on a Working Group, together with the Skills for Justice, the Scottish Association of Sign Language Interpreters and the Law Society of Scotland. In addition to attending at Working Group meetings these organisations have also provided their expertise in the development of policy.

In these circumstances it is not considered that a formal public consultation is necessary.

- **Business**

The Regulations do not create regulatory requirements on business. Nevertheless, as described above, the Law Society of Scotland is represented on the Working Group.

Options

- (1) Do nothing – fail to transpose the Directive
- (2) Transpose the Directive, taking advantage of opportunities to lessen impact
- (3) Transpose the Directive without applying such exceptions – for example requiring the translation of **all** documents.

- **Sectors and groups affected**

Whichever option is chosen, the sectors affected will be the accused or suspected person who benefits from interpretation and/or translation on the one hand, and on the other hand those organisations who secure or provide these services. These are the police, the Crown and the courts. Legal aid is provided for interpretation of consultations with solicitors and translation of documents. It is believed that current practice is largely compliant with the Directive. In the case of at least the first two options, therefore, the foregoing groups would be relatively little affected. In the case of the third, there would be more interpretation and translation carried out than is currently the case. This would affect the providing sectors, but it is not certain it would have a great effect on the suspect/accused: anything necessary to provide for a fair trial is likely to be provided already as article 6 of the European Convention on Human Rights applies to court proceedings etc already and is justiciable under arrangements provided for in the Scotland Acts 1998 and 2012.

- **Benefits**

(1) This represents the “no change” option and thus has no benefits to offer over the current arrangements. In terms of reduced burdens it would appear to have few benefits over option (2), either, in view of the fact that interpretation and (to some extent) translation are already offered. It would, however, represent a lesser burden than (3) for the bodies providing interpretation and translation, to the extent that that option required interpretation or translation in circumstances where they are not currently provided. However, any such benefits would be ephemeral as infraction proceedings and continued fines would force us to abandon this option.

(2) While practice is believed to be largely compliant this option represents the benefit of providing assurance that it is so (and in the process, possibly improving the availability of interpretation and translation at the margins). Its great benefit compared with (1), however, is that it avoids the risk of infraction proceedings and the costs and reputational damage they would entail. This option would also provide the benefit of avoiding further regulation following such infraction proceedings to bring Scots law into line with the requirements.

(3) This option would offer benefits to accused and suspected persons of greater availability of interpretation and translation, to an extent dependent on the additional services offered. It would not offer benefits to those organisations which secure and the availability of these services to accused and suspected persons.

- **Costs**

(1) If Scotland does not transpose the Directive adequately the Scottish Government will be in breach of the Scotland Act 1998 and share in any infraction proceedings against UK. While the size of any fines is difficult to predict it is worth noting that any fines levied in infraction proceedings would be on the basis of the co-efficients applicable in the case of the UK as a Member State. Thus if an infraction arose because Scotland alone in the UK failed to transpose adequately, the fines would be calculated on the size of the UK but payable entirely from the Scottish block. Moreover fines would continue until Scots law were brought into compliance with the Directive’s requirements. Fines may

exceed €200,000 *per diem*, with the specified minimum lump sum currently set at €9,299,000 for the UK.

In the event of failure to transpose Scotland would also suffer reputational damage, both in terms of the EU, and within the UK.

(2) Since interpretation is currently offered, it is unlikely that the costs of this option would be dramatically different from those of the *status quo*, though a spike in demand generated by a new statutory right, and by the possible attendant publicity that may be expected. The cost of the relatively few translations required, which are not currently provided, will also be new. Police Scotland estimates that there may be some greater staff time taken by dealing with the review procedure the Regulations establish. Scottish Court Service has already translated a selection of ten documents into six languages at a cost of £2,000: this cost has therefore already been absorbed, but the cost of translating documents into other languages would use this as a starting point. For example, the Service envisages spending another £2,000 on a further six languages. In terms of ongoing expenditure, it also expects costs to arise for translation of appeal court opinions, together with the preceding sentence. It estimates these costs at £20,000 pa. It does not expect additional costs for interpretation as a result of the Regulations.

For the Crown Office, estimates are that providing a citation kit including the charges and a summary of evidence would cost about £360 to provide a framework in each language. Thus the cost of providing a framework citation kit in 30 languages would be about £10,800. There would also be a cost of £40,000 for sending out docquets to all accused persons of advising them that they could contact the language line and request a translation.

The pages unique to each individual accused would then need translated, at a cost of about £85 per person. The Crown Office estimates that 3,200 accused persons per annum are flagged as having interpretation needs.

$£85 \times 3,200 = £272,000$.

This would be a maximum for the cost of such kits as the take-up is unlikely to be 100%. By means of spending the £40,000 above, it is hoped that some potential recipients would state they did not need the translation. The cost would also reduce over time as the framework citation kits can be stored, and only the personal information and details of the charge would need translated in the future. There are occasional calls for translation at present: these current costs would be comprehended in the £272,000 cost of full take-up.

There would also be labour costs for processing translation requests, which the Crown Office estimates at £42,000 a year in the case of a 100% take-up.

The higher costs involved in (3) would be avoided.

(3) Costs would be dependent on the *additional* services offered. The current rate for interpretation offered by the Scottish Legal Aid Board is £30 an hour. However, given that interpretation is already offered, further costs are most likely to arise in the form of additional translation. The Regulations list only seven kinds of document as essential, and thus requiring translation. If other documents were to be translated, this would result in the respective costs.

The cost on SCS of translating ten documents into six languages has already been stated above at £2,000.

Police Scotland estimates the cost of any additional documents for them at 8 pence per word, with a minimum cost per document of £35.

Costs on the Crown Office would be the £10,800 alluded to above, and the full £272,000 of translations in 100% of applicable cases, as well as the full £42,000 cost of processing. There would also be the additional cost of translating any further documents.

Scottish Firms Impact Test

The Scottish Government felt it would be disproportionate to carry out individual business interviews as the proposals have no regulatory or negative financial impact on the private sector.

- **Competition Assessment**

Since the proposals will have no regulatory effect on business there will be no effect on competition.

- **Test run of business forms**

No new business forms are proposed.

Legal Aid Impact Test

Access to Justice team is aware of these proposals. It advises that legal aid is already offered for interpretation and translation in connexion with consultations with legal representatives. These services are regarded as part of solicitors' reclaimable outlays. It is not expected that the Regulations will affect this position.

Enforcement, sanctions and monitoring

The duty to ensure that interpretation and translation services are provided will fall on the police, the Crown and the courts. Interpretation and translation are already provided and in any case it is anticipated that these bodies will comply with the duty. A review mechanism is provided in the Regulations, but no sanctions are proposed. However, if a suspected or accused person feels that the service he or she is being offered is inadequate for the purpose of achieving a fair trial, even after using the review provisions in the Regulations, he or she may make use of existing appeal provisions (for example, by raising an issue of compatibility with Convention rights or Community law provided by s288ZB of the Criminal Procedure (Scotland) Act 1995). Failure to provide interpretation or translation services could also be a matter for judicial review.

The task of monitoring the effect of the regulations would devolve on those who ensure the provision of these services – the police, the Crown and the courts. These bodies already monitor the use of interpretation and translation services. The Regulations contain provisions for recording use of interpretation and translation services: this is a requirement in the Directive.

Implementation and delivery plan

If option (2) is chosen, implementation should be very largely in place. The organisations which ensure the provision of these services have, in any case, a bank of providers whom they may call on for interpretation and translation services. Where implementation might require the provision of interpretation and/or translation where that service is not currently provided, the relevant body among the police, the Crown and the courts would merely invite a provider to provide it. This would represent a commercial opportunity to the providers. The bodies in question – and the other members of the Working Group - are aware of their duties under the Regulations and have been actively preparing for some time.

The terms of the Directive do not, in any case, permit of a transitional period.

- **Post-implementation review**

A formal review is not under consideration. This would be a misapplication of resources. As long as the Directive is in force, transposing legislation is required. Any changes to the Directive are not a matter for the Scottish Government.

In the mean time the practical application of the requirements of the Regulations by bodies such as the police and the courts is a matter for them.

Summary and recommendation

Option (2) is being recommended. This fulfils our duty to transpose the Directive without entailing additional, unquantifiable costs.

- **Summary costs and benefits table**

Option	Cost	Benefit
Option 1 – do nothing	<p>This position is not tenable and would be brought to an end by either judicial review/compatibility proceedings within Scotland or infraction proceedings, both of which Scotland would lose, with concomitant expense.</p> <p>In the event of infraction proceedings, fines of a lump sum (specified minimum €9,299,000) and daily amounts possibly exceeding €200,000.</p>	No additional expenditure on interpretation and translation, until such time as Scotland is forced to comply with the Directive.
Option 2 – implement the Directive without adding requirements	Cost for police/courts for further translation of documents deemed essential, but unlikely to exceed £10,000 in initial costs and £20,000 pa in ongoing ones.	<p>Avoids lost cases and potential fines.</p> <p>Restricts potential cost of interpretation and translation work to similar to those at present.</p>

	<p>For Crown Office:- £10,800 in translation costs £40,000 in despatch and publicity <£42,000 pa processing labour <£272,000 pa cost of kits</p>	
<p>Option 3 – implement adding requirements to those in the Directive</p>	<p>Crown Office estimates some 3,200 persons a year require interpretation/translation.</p> <p><u>Cost of further interpretation beyond that offered in the Regulations:-</u></p> <p>£30 per hour per consultation.</p> <p><u>Cost of further work on translations:-</u></p> <p>For police and courts, £10,000 upwards depending on documentation for initial translations, and ongoing costs in excess of £20,000 pa. These are without upper limit.</p> <p>For Crown Office</p> <p>£10,800 in translation costs £40,000 in despatch and publicity £42,000 processing labour £272,000 cost of kits</p> <p>- together with cost of any further translations, which again do not have an upper limit.</p>	<p>No financial benefit other than to providers of interpretation/translation services.</p>

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:**Date:****Cabinet Secretary for Justice****Scottish Government Contact point:**

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