

DELEGATED POWERS AND LAW REFORM COMMITTEE

3rd Meeting, 2021 (Session 6)

Tuesday 7 September 2021

Instrument Responses

Coronavirus (Extension and Expiry) (Scotland) Act 2021 (Evidence) (Saving Provision) Regulations 2021 (SSI 2021/280)

On 24 August 2021, the Scottish Government was asked:

Schedule 4 of the Coronavirus (Scotland) Act 2020 contains temporary modifications to the criminal justice system. Paragraph 11 modifies section 259 of the Criminal Procedure (Scotland) Act 1995 to introduce additional exceptions to the inadmissibility of hearsay evidence in criminal court proceedings where oral evidence from the person who made the statement in question cannot be taken for a reason related to coronavirus. Section 2(4)(a) of the Coronavirus (Extension and Expiry) (Scotland) Act 2021 provides that paragraph 11 of Schedule 4 expires on 30 September 2021.

Regulation 2 of this instrument provides that, despite the expiry of paragraph 11 on 30 September 2021, evidence of a hearsay statement which has been introduced in court proceedings before that date shall remain admissible for the purposes of those proceedings. This means that a person who has already given a statement in evidence before 30 September 2021 will not thereafter be required to go to court to give their evidence directly if the case is not concluded by that date. However the expiry of paragraph 11 means that irrespective of whether physical attendance at a trial would involve a particular risk to a witness because of COVID-19 or there is a risk that person may transmit the virus to others and the person cannot give the evidence directly to the court in any other way, after 30 September that person will be required to come to court.

The instrument was laid before the Parliament without a policy note. The explanatory note to the instrument states that regulation 2 “makes clear that the rules contained in section 259, as modified, continue to apply in proceedings where a statement has been introduced in evidence prior to the expiry of the relevant modifications”. However the Coronavirus (Extension and Expiry) (Scotland) Act 2021 made explicit provision for the expiry of these rules in paragraph 11 and also made transitional and saving provisions in the Schedule which did not include saving provision for paragraph 11. In the absence of a policy note setting out why it is necessary to continue to apply the rules contained in section 259, as modified, after their expiry, please explain why this saving provision is introduced now, and why a distinction is made between witnesses who cannot give evidence directly for a reason related to coronavirus before and after 30 September 2021.

On 31 August 2021, the Scottish Government responds as follows:

In order to provide some context with regard to the timing of this instrument and why the saving provision was not contained in the Coronavirus (Extension and Expiry) (Scotland) Act 2021, the provision in section 2(4)(a) of that Act was inserted by way of a non-Government amendment at stage 2. The Scottish Government opposed the amendment, but Parliament decided to support the amendment. In light of this development, which was unexpected from the perspective of the Scottish Government, we wished to take some limited time to consider the full ramifications of the expiry of the provision. With the deadline for Stage 3 amendments being within hours of the end of Stage 2, a decision was taken to rely on the power at section 10(1) of the Act, if required, in order to allow for full consideration of the ramifications of expiry, including consideration of whether any saving provision was required. This approach was determined to be the prudent approach that would minimise the risk of any error or confusion in law being created with development of a rushed Stage 3 amendment.

Following the passage of the Bill, the Government continued to give consideration to the effect of the expiry of paragraph 11 of schedule 4 of the Coronavirus (Scotland) Act 2020 which modifies section 259 of the Criminal Procedure (Scotland) Act 1995. When a judge permits the admission of evidence by statement under section 259, the making of the statement still requires to be proved by direct evidence during the course of the trial. It is our view that, even in the absence of a saving provision, a statement which is admitted in evidence (by which we mean led/introduced in evidence rather than the point at which the judge makes a decision to grant the section 259 application and permit the admission of the statement) before the end of 30 September 2021 would remain admitted in evidence. Our interpretation is aided by section 15 of the Interpretation and Legislative Reform (Scotland) Act 2010 which provides that repeal or revocation does not affect the validity, invalidity, effect or consequences of anything done under the repealed Act or revoked instrument. For that reason, if a statement is admitted in evidence prior to the end of 30 September 2021 then we are of the view that the judge would not need to subsequently disregard that evidence or direct the jury to disregard that evidence. It would be evidence which was lawfully admitted at the time it was admitted and therefore would not need to later be disregarded solely by virtue of the subsequent expiry of the modifications to section 259. However, the judge (as in any case where evidence is admitted under section 259) will still be under a continuing duty to consider the evidence in the context of the overall fairness of the trial as it progresses and so may ultimately have to disregard the evidence or direct the jury to disregard it if it becomes clear that the evidence is unfair to the party against whom it is led.

Although we are of the view that the expiry of the modifications will not affect the validity or effect of evidence led prior to the end of 30 September, we also considered the other rules which flow from the admission of evidence of a statement under section 259(2A). Section 259 contains rules which explain what should happen in consequence of evidence of a statement being admitted. We are of the view that it is important to clarify that these rules (as modified) continue to operate after 30 September where evidence of a statement is admitted prior to the end of 30 September in order to ensure that section 259 continues to work in its entirety, with all of the relevant safeguards. By way of example, paragraph 11 of schedule 4 of the Coronavirus (Scotland) Act 2020 modifies section 259(4) of the Criminal Procedure (Scotland) Act 1995 which makes provision about what other evidence may be led as a consequence of evidence admitted under subsection (2A). This allows, for instance, the other party to lead any evidence which is relevant to the credibility of the witness

whose statement was led in evidence. We wished to provide clarity that this rule would continue to apply after 30 September (if the trial is still ongoing and evidence of a statement was led under section 259(2A) before the expiry of the provision).

In the view of the Scottish Government, it is not new policy in the instrument, but rather provision which clarifies that section 259 will continue to operate in its entirety where evidence of a statement has been lawfully admitted prior to the date of expiry. The inclusion of explicit provision will aid understanding and reduce the risk of error or confusion arising in any given relevant criminal proceedings.