

Delegated Powers and Law Reform Committee
Tuesday, 10th December 2024
35th Meeting, 2024 (Session 6)

Instrument Responses

Electronic Monitoring (Use of Devices and Information) (Scotland) Regulations 2025 (SSI 2025/Draft)

On Wednesday 27th November 2024, the Committee asked the Scottish Government:

1. In regulation 1(2) of the draft Regulations, “RF approved device” is defined as the types of electronic devices listed in regulation 2(2) and 4(a), (c) and (d) of the Electronic Monitoring (Approved Devices) (Scotland) Regulations 2020. The devices listed in regulation 2(2) (as amended by SSI 2024/354) are: a home monitoring unit; a RF personal identification device; and a fitting and installation tool. The devices listed in regulation 4(a)(c) and (d) (as amended) are the same three devices, in a different order. Is it the intention that the definition refers to the same three devices twice, and, if so, could the definition be clearer?
2. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 3rd December 2024, the Scottish Government responded:

Question 1

The intention behind listing the devices listed in regulation 2(2) of the Electronic Monitoring (Approved Devices) (Scotland) Regulations 2020 (as amended) (“the 2020 Regulations”) as well as those to be listed in regulation 4(a), (c) and (d) was to ensure clarity in the draft Regulations.

Once amended, regulation 2 of the 2020 Regulations will prescribe the approved devices for use with electronic monitoring requirements imposed by a court under section 1(1) of the Management of Offenders (Scotland) Act 2019 (“the 2019 Act”). Regulation 4 of the 2020 Regulations will prescribe the approved devices for use with electronic monitoring requirements imposed by Ministers on an offender’s release from custody under section 5(1) of the 2019 Act.

We considered that referring only to the devices listed in regulation 2(2) (or regulation 4(a), (c) and (d)) of the 2020 Regulations might cause confusion about the read across from those Regulations to these draft Regulations. Regulation 3 of the draft Regulations provides that an RF approved device can be used in respect of court disposals or conditions of release. We considered that if the definition of “RF approved device” only referred to the approved devices in regulation 2 of the 2020 Regulations (i.e. the regulation which approves devices for the purposes of court disposals) that could have caused unnecessary confusion for a reader of their use in respect of conditions of release.

We accept that the draft Regulations could have worked as intended without reference to both regulation 2(2) and 4(a), (c) and (d) of the 2020 Regulations. But we consider that the drafting approach taken meets the policy intention and ensures that the draft Regulations are as clear as possible to a reader.

Question 2

No corrective action is proposed.

Electronic Monitoring (Approved Devices) (Scotland) Amendment Regulations 2024 (SSI 2024/354)

On Wednesday 27th November 2024, the Committee asked the Scottish Government:

1. Regulation 4 of this instrument prescribes additional electronic devices as “approved devices”, approved for use in the electronic monitoring of persons who are subject to certain court orders or licence conditions. The enabling power is in section 8(1) of the Management of Offenders (Scotland) Act 2019. Section 8 distinguishes between:
 - devices for monitoring a person’s whereabouts/drug consumption (as indicated in sub-section (2)), and
 - apparatus to be linked to these devices (sub-section (3)).

Sub-section (3) provides that regulations under sub-section (1) “may include provision as to any apparatus to be linked to a device as well as prescribing the device itself”. Reading section 8 as a whole, it appears that while provision can be made in relation to apparatus to be linked to a device, the apparatus is not itself to be prescribed. This interpretation would appear to be consistent with section 12 of the parent Act (which sets out the standard obligations on monitored persons, including not to tamper with the device), in which references to a prescribed device “include any apparatus linked to the device as well as meaning the device itself” (section 8(5)).

Two of the electronic devices prescribed by this instrument are chargers: a mains charger and a portable charger. Could an explanation be given as to why the Scottish Ministers consider it appropriate to prescribe these chargers, as opposed to treating them as apparatus for which provision (other than prescribing) can be made by virtue of section 8(3)?

2. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 3rd December 2024, the Scottish Government responded:

Question 1

Section 8(1) of Management of Offenders (Scotland) Act 2019 (“the 2019 Act”) provides that the Scottish Ministers can prescribe an electronic device as an approved device for the purposes of sections 1(1) and 5(1) of the 2019 Act. It does not limit what electronic devices can be prescribed. Section 8(2) provides a non-exhaustive list of the types of device which can be prescribed when the Scottish Ministers exercise the power in subsection (1). Section 8(3) provides that Ministers may make provision on apparatus linked to an approved device when prescribing the device.

As noted in question 1, the chargers listed at regulation 2(4)(e) and (f) of the Electronic Monitoring (Approved Devices) (Scotland) Regulations 2020 (as inserted by these Regulations) are electronic devices. It is therefore open to the Scottish Ministers to prescribe them under the power in section 8(1) of the 2019 Act. We also consider that that is the only provision which could have been made in respect of them. Subsection (3) only allows provision under subsection (1) to be made as to any apparatus to be linked to a device as well as prescribing the device itself. Therefore we are required to fallback to what the power in subsection (1) allows. The only power available to the Scottish Ministers in section 8(1) is to prescribe electronic devices.

We note that subsection (3) was added to section 8 of the 2019 Act at stage 2 of the Bill that became the 2019 Act’s passage through Parliament (amendment 88). The then Cabinet Secretary for Justice stated at the Justice Committee on 2 April 2019,

“Amendment 88 will add a subsection to section 8, to provide that any apparatus that is linked to the approved device can also be prescribed as an approved device under section 8(1). That will ensure that there can be no doubt as to the legitimacy of using a radio frequency box, for example, alongside an electronic tag.”

We consider that the intention behind the addition of subsection (3) to section 8 of the 2019 Act was to allow apparatus to be prescribed rather than having provision other than prescription made in respect of it.

We also note that the 2020 Regulations already prescribe a “fitting and installation tool” as an approved device despite it similarly being apparatus ancillary to the personal identification device and home monitoring unit also prescribed.

Question 2

No corrective action is proposed.