OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 30 April 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 30 April 2025

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CRIMINAL JUSTICE COMMITTEE
14th Meeting 2025, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Liam Kerr (North East Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Sharon Dowey (South Scotland) (Con)
Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
Pauline McNeill (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Angela Constance (Cabinet Secretary for Justice and Home Affairs)
Professor Gemma Davies (Durham University)
Professor Helena Farrand Carrapico (Northumbria University)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 30 April 2025

[The Convener opened the meeting at 10:01]

Subordinate Legislation

Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Saving Provisions) Regulations 2025 (SSI 2025/101)

The Convener (Audrey Nicoll): Good morning, and welcome to the 14th meeting in 2025 of the Criminal Justice Committee. We have received apologies from Pauline McNeill and Fulton MacGregor, and Sharon Dowey joins us online.

Our first item of business is an opportunity to put questions to the Scottish Government on a negative instrument that is scheduled to come into force on 30 November this year. I refer members to paper 1, which sets out the purpose of the instrument.

We are joined this morning by Angela Constance, Cabinet Secretary for Justice and Home Affairs, and Patrick Down, criminal law and procedure team leader at the Scottish Government. Welcome to you both, and thank you for joining us. I invite the cabinet secretary to say a few words about the purpose of the Scottish statutory instrument.

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): Thank you, convener, and good morning to colleagues. I will say just a few words.

The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Saving Provisions) Regulations 2025 are intended to ensure an orderly transition back to the pre-pandemic criminal procedure time limits that apply in solemn criminal cases. The regulations implement the recommendation, which this committee made in its stage 1 report on the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill, to put in place saving provisions for the criminal procedure time limit extension provisions that will expire on 30 November this year.

Two time limit extension provisions remain in effect. The first is the time within which a solemn trial must commence when an accused has been remanded in custody, which was extended from 140 days to 320 days. The second is the time within which a trial must commence after an accused first appears on petition—that is, the bail time limit—which was extended from 12 months to 18 months.

The order preserves the extended time limits for any case in which an accused first appeared on petition, or was first fully committed, before the extended time limits expire on 30 November. It will avoid a situation in which the Crown Office and Procurator Fiscal Service is required either to indict a large number of cases or to seek to extend, case by case, the time limits for cases that would otherwise all become time barred on 30 November this year. The consequence of that would be the diversion of resources away from managing other court business. The order will also allow the reversion to the pre-pandemic time limits to be managed over a period of months.

The approach has been agreed with the Crown Office and the Scottish Courts and Tribunals Service, and it is in line with the approach that was taken when the extended time limits for certain summary-only offences were expired on 30 November last year.

The Convener: Thank you. Before I open up questioning to members, I will come in on the final point that you made with regard to the Crown Office and the Scottish Courts and Tribunals Service. We are aware that the approach has been developed with their involvement. Will you expand a little on their views on the SSI and whether it will meet their needs? Obviously, it will, but what about beyond the timescale that we are looking at today?

Angela Constance: That is my understanding. When I last met the Lord President and the Lord Justice Clerk, we discussed this matter, and the chief executive of the Scottish Courts and Tribunals Service was part of that discussion. The Crown Office has been transparent in its views and has made a number of representations to the committee, and my officials have engaged closely with the Crown Office.

The approach that we are taking to ensure an orderly transition is not novel. It is one that we have used for other time limits to ensure that, as we revert to pre-pandemic time limits, we do so in an orderly fashion, avoid a cliff edge, avoid cases becoming time barred and avoid the Crown Office either having to proceed with a high volume of cases at once or, as we have discussed a lot in this committee, having to seek time extensions case by case, which would involve a massive drain on resources. I am confident that stakeholders and our partners are supportive of and comfortable with the proposed approach and that it is a pragmatic and sensible way to ensure an orderly transition.

The Convener: Thank you.

Liam Kerr (North East Scotland) (Con): I am absolutely comfortable with the SSI. However, the committee has heard from the Scottish Solicitors Bar Association, the SCTS and the Law Society of Scotland that the courts will not be ready to return to pre-pandemic time limits. Does the Scottish Government accept that? If so, cabinet secretary, how will you support the return to those time limits? Do you think that the courts will be ready by November?

Angela Constance: The majority of the coronavirus time limits have been expired, and we are now left with the two solemn time limits. The SSI that is in front of us today deals with the remaining two of the original seven time limits, so that journey has already commenced. I am acutely conscious that, every time that I have come to the committee to seek an extension to the coronavirus regulations, the area on which the committee has pressed me most is the remaining time limits. Of course, we have all known that the coronavirus legislation would come to an end.

The progress that has been made with the court backlog in the number of scheduled cases has reached a milestone in that fewer than 20,000 such cases remain. The committee will remember that, at its peak, the number of outstanding scheduled cases was in excess of 40,000, so the court backlog has been reduced by more than 50 per cent. Progress has been made and stakeholders—both the SCTS and the Crown Office, with which we have had extensive engagement—are content that the system will manage with that approach.

Liam Kerr: I think that that final point was the answer to my question. I am concerned, because the committee has heard from those three separate agencies that they are concerned that the court system will not be ready. However, I think that what I heard in your final sentence was that engagement has been happening and that the information that the committee received is perhaps now out of date. Is that roughly where we are? Will the courts be ready?

Angela Constance: I cannot comment on what evidence the committee has received. I can only tell you about the evidence that I have received from the Scottish Courts and Tribunals Service and the Crown Office, through direct engagement with me and my officials. I have not had any red flags raised with me, and I am confident that the Crown Office and the Scottish Courts and Tribunals Service would not be shy about doing that.

Liam Kerr: Thank you.

Katy Clark (West Scotland) (Lab): I warmly welcome the regulations that the cabinet secretary has set out today. She has our strong support in aiming to ensure that we get back to the old time limits. She seems to be saying that the advice that she has been given is that this is all achievable. However, I am sure that it is not without its challenges. Will she keep the committee advised of any difficulties and how they can be addressed, to ensure that we meet the deadline and that we are able to deliver on what we are likely to vote for today?

Angela Constance: The short answer is yes.

The Convener: As there are no further questions, we move to our next item of business, which is formal consideration of the negative instrument that we have discussed. Are members content to make no recommendations in relation to the instrument and for it to come into force?

Members *indicated agreement.*

The Convener: I thank the cabinet secretary and Mr Down for their attendance. We will have a brief pause while we have a changeover of witnesses.

10:11

Meeting suspended.

10:15

On resuming—

Law Enforcement and Judicial Co-operation (European Union)

The Convener: Following the signing of the trade and co-operation agreement between the United Kingdom and the European Union in 2020, the committee asked our colleagues in the Scottish Parliament information centre and the Scottish Parliament academic fellowship programme to undertake a piece of research, the aim of which was to assess the impact of Brexit on Scotland's criminal justice system and our co-ordination and co-operation with EU member states.

Two members of the academic fellowship undertook that research and published their findings in September 2024. I am very pleased that they are here today to give us an overview of the evidence from that work and to highlight the areas that they believe the Scottish Parliament and Scottish Government should work on with the UK Government to improve the way that the Scottish criminal justice system and policing interact with the EU under the trade and co-operation agreement. I refer members to paper 2, which sets out the findings and recommendations of the research and contains links to the main research report and the slide presentation that we will receive this morning.

I warmly welcome Gemma Davies, associate professor in criminal law at Durham University, and Helena Farrand Carrapico, professor of international relations and European politics at Northumbria University. Without any further ado, I invite Gemma and Helena to give a presentation on their research work, after which I will open up the meeting to questions from committee members.

Professor Helena Farrand Carrapico (Northumbria University): Good morning, and thank you to the Criminal Justice Committee for commissioning the report and for the opportunity to present oral evidence. It is a real pleasure and honour to be present today.

As the convener mentioned, the report was commissioned through the Scottish Parliament information centre in the format of a fellowship that aimed to explore the impact on the Scottish criminal justice system of the implementation of the TCA. As you might have read, the data in the report is based on 23 interviews that were conducted with Scottish criminal justice practitioners and on a round table with 14 practitioners. Today's presentation will therefore focus on how co-operation has continued to take place and what operational challenges have emerged since the TCA came into force. Overall, the purpose of the presentation is to provide the Scottish Parliament with the knowledge that is necessary to better shape outcomes for Scottish criminal justice.

Specifically, the presentation will focus on three elements—access to EU agencies, access to EU databases, and surrender and extradition—and will conclude by offering recommendations and discussing the outlook for the reset of UK-EU relations. Although the report focuses on the Scottish reality, the operational deficit applies also to the rest of the UK, so we highlight recommendations for both the UK Government and Scottish officials.

We start by outlining the pre-Brexit situation. We will go very quickly through this section, given that we have limited time. We will just mention that, during its membership, the UK relied very heavily on EU policing and judicial co-operation instruments, on a selective basis—a series of opt-ins and opt-outs that were part of EU treaties—and that that selective regime was particularly aligned with the UK's national interest. The TCA has provided an important degree of continuity. However, some notable losses in capability have emerged.

The next slides that we will present will focus on understanding what those losses have been and how they can be remedied, starting with access to EU agencies. The TCA provides continued access to Europol and Eurojust, which our interviewees have unanimously recognised as being crucial to their work. However, there has been a noticeable reduction in strategic influence as well as in access to critical information.

Given our time limit, we will focus specifically on Europol. Since the TCA came into force, the UK has established the largest third-country liaison bureau at Europol; it supersedes even that of the United States. That has been considered necessary for robust co-operation to continue. However, there has been a loss of operational capacity—the UK has no participation in the management board, so it has no capacity to shape the development of future EU instruments or Europol's strategic work. No British police officers serve in Europol's operational and analysis centre, so we have lost not only the knowledge that goes from the UK into those Europol operational centres but the knowledge that would come back to the UK at a later stage.

We no longer have direct access to Europol's information system, which, in practice, means that access is indirect. When specific information that could be relevant to on-going police operations is

contained in that system, UK officials must request it from Europol, which then provides—or does not provide—that information.

We are no longer allowed to lead a Europol operational task force, so we need a supportive member state, which understands the UK's priorities, to initiate a task force for the UK to take part in.

Overall, relations with Europol continue to be absolutely excellent, but access is reduced and is more resource intensive, because of the numbers of police officers that it requires and the time and processes that are involved.

We highlight only a couple of recommendations in this slide—obviously, the report provides a lot more recommendations. These two recommendations are about access to further justice and home affairs agencies. As we mentioned, through the TCA, we have access to Europol and Eurojust, but many more justice and home affairs agencies could be of interest to the UK, particularly to Scotland. That is the case, for instance, for the European Union Drugs Agency and the European Union Agency for Cybersecurity—ENISA.

The European Union Drugs Agency is more of a scientific agency, which collects information on the circulation and emergence of new drugs on the markets. Specifically for Scottish priorities in relation to the drugs markets, access to the European Union Drugs Agency would be very helpful.

The cybersecurity agency's remit goes beyond justice and home affairs to other areas, such as foreign affairs, but access to it would still be relevant to co-ordinating cybersecurity positions and highlighting new cybersecurity threats that have emerged. Part 4 of the TCA allows for a future agreement with ENISA, but such an agreement does not exist at the moment.

The second policy recommendation for that area relates to the fact that, despite the signing of the TCA, some EU member states still have domestic legislative impediments to police-to-police co-operation—for instance, in relation to the sharing of evidence—so a lot could be done by working with those EU member states to identify and address those domestic impediments.

The TCA provides quite a lot of access to EU databases that contain data on, for example, DNA, fingerprints, vehicle registration, passenger name records and criminal records. It very much mirrors what we had access to previously through the Prüm convention. However, there has been a noticeable reduction in access to some critical information, and we have highlighted four areas where that has happened.

The first area is access to the Schengen information system II, which is still considered to be the largest EU law enforcement database. Not only has the UK lost access to it in its entirety, but the data that the UK used to hold from the Schengen information system had to be deleted, and the UK is no longer able to benefit from any future enhancement to the system.

In practice, the UK is fully dependent on EU member states to upload law enforcement notices or important information to the Schengen information system II. Those member states have to double-key that information into the Interpol global database I-24/7, so they have to do double the work to enable the UK to benefit from that.

There are three further areas to mention. With regard to vehicle registration data, we will highlight just the areas in which there are deficits. The co-operation system for vehicle data is still not in place, which simply has to do with a lack of technical preparation on the part of the UK.

We have access to criminal records, but we will not have access to an instrument that is coming very soon: the European criminal records information system for third-country nationals, or ECRIS-TCN. If a third-country national in the EU commits a crime, gains a criminal record in an EU state and then moves to the UK, we will not have access to that person's criminal record.

We have access to passenger name records, but the UK is now required to delete that information once the passenger leaves the UK. That obviously has an important impact on any future police operations that might require that information.

On policy recommendations for the UK Government, we really recommend that the necessary technical capabilities be developed to share vehicle registration data with EU member states and that we negotiate access to the ECRIS-TCN system. Our final recommendation, which is on interoperability, is particularly relevant. There are quite a number of current proposals on how databases in the EU work; it is not just about an expansion of the data that is collected but about how that data is shared and interconnected. Those proposals will require important discussions in the UK about how certain aspects of the data sharing will impact on devolved areas. For instance, changes relating to access to DNA or, very soon, access to facial recognition data through Prüm II, which is currently in the process of being implemented, will involve discussions with the Scottish Biometrics Commissioner.

I will give the floor to my colleague to focus on surrender and extradition.

Professor Gemma Davies (Durham University): Thank you. First, in relation to the

use of the terms “surrender” and “extradition”, I note that they refer to the same process. In the European arrest warrant, which is a streamlined version of extradition, it is referred to as a process of surrender. However, it means the same thing.

The UK significantly benefited, as did Scotland, from participation in the European arrest warrant, which is perhaps the most well-known of all the EU co-operation tools. On the face of it, the provisions of the TCA that provide for surrender appear to replicate the features of the European arrest warrant quite closely. However, there are a number of important differences and, on the slide headed “Surrender/Extradition”, I have highlighted four key differences.

The first difference relates to the ability of a member state to issue a declaration that they will refuse to extradite people for non-violent offences that they consider to be political, related to political offences or inspired by a political motive. Twelve member states have chosen to sign that declaration. That provision is not available in the European arrest warrant, but it is in the TCA. However, to date and to my knowledge, there has not been an example of an individual that the UK has sought to surrender from an EU member state that has been refused on that ground.

The second difference, which has had a much bigger impact, is the ability to provide for conditions whereby a state could refuse to extradite its own nationals, either completely or under certain conditions. Thirteen member states have stipulated a form of condition that would amount, in effect, to a nationality bar. Germany has done that, so, if the UK seeks surrender of a German national, Germany will not surrender that national to the UK.

10:30

In addition, there is case law from the Court of Justice of the European Union that means that, even if a German citizen were to move to France, for example, and the UK issued the warrant to France, France would first get in contact with Germany to give Germany the opportunity to issue a European arrest warrant. Only if Germany did not do so would France respond to the UK warrant as a third country.

The third difference is the requirement to ensure that there is dual criminality. In the European arrest warrant, there was a list of offences for which dual criminality was assumed—there were certain types of conduct where it was assumed that there would be dual criminality. The same list appears in the TCA and 12 EU member states issued a notification to say that they would apply that list as it is in the European arrest warrant, but the UK has chosen not to do so. Because the requirement of dual criminality has to be reciprocal, that means that even though those 12 member states said that they would apply the list, that cannot happen. In all cases between the UK and EU member states, dual criminality must be established. In the majority of cases, that does not cause a problem, and usually dual criminality—where something is a crime in the UK and in the other state—is not a problem. However, the fact that dual criminality has to be assessed is an additional legal hurdle and it might delay proceedings while the courts consider it.

Finally, the fourth difference is on human rights. There is a principle of mutual trust and recognition among EU member states. The Court of Justice of the European Union has made it clear that the UK does not benefit from mutual trust. That means that, because the UK is no longer a member state, when dealing with requests from the UK, the judicial authorities in EU member states must carry out their own independent assessment of the UK’s compliance with the EU charter of fundamental rights, which is very similar to the European convention on human rights. That has resulted in an increase in the number of requests from EU member states’ judicial authorities for assurances from the UK and Scotland, particularly in relation to prison conditions.

I will highlight a few policy recommendations. It has been possible for the UK Government to negotiate with other states to deal with or eliminate some of those bars. A good example of where that has occurred is with Poland, where there was initially a nationality bar that prevented the UK from extraditing Polish citizens from Poland. There has now been an agreement between the two, and changes have been made to Poland’s domestic law. That demonstrates that it is possible for negotiations to achieve some benefit.

However, that is not possible with all states, because there might, for example, be a constitutional bar that prevents such an agreement. One of our recommendations is that the UK continue to negotiate to see where it may be possible to eliminate bars bilaterally.

We recommend that the UK reconsiders its position on dual criminality. Dual criminality would provide some form of protection to those from the UK who are sought for extradition to EU member states. We think that there are very few cases where dual criminality prevents surrender or extradition, but it might be causing unnecessary delay because of its complexity and it is an example of where we could streamline our processes to ensure that we make full use of the TCA provisions.

On prison conditions, we recommend that there is a clear process for who in Scotland would be issuing the assurances to ensure that it happens

as swiftly as possible, and that the prison estate meets the European convention on human rights standards and minimises the risk of refusal on that basis.

We also recommend that there be a negotiation on the transfer of proceedings. There are a couple of options or workarounds that can happen in cases where the UK or Scotland is unable to surrender from an EU member state. One is that you can issue a warrant to other states, in the hope that the individual will move; the other is that you can formally transfer your proceedings to that state for the individual to be prosecuted there. At the time of the interviews, there were a small number of cases where there was an attempt to conduct that process, but it is time-consuming and costly, so an agreement between the EU and the UK setting out some of the boundaries of when that might happen, who would pay for certain aspects, what translation is required and what the evidential requirements are could help to smooth that process.

We believe that an agreement to facilitate the transfer of prisoners could also help. Such an agreement might allow states to surrender individuals temporarily. That can happen, and we can transfer prisoners, but, without a formal agreement, that process becomes far more cumbersome.

In relation to surrender, one of the primary differences comes from the ways in which warrants are issued and circulated, which is important because you can have a warrant, but if it is not executed, it serves no purpose.

There are two significant differences between the European arrest warrant and a warrant under the TCA. When the UK issued a European arrest warrant, it would be issued to all EU member states at the same time and any warrant issued by an EU country, such as France, would also be issued to the UK. The process now is that when EU member states issue a European arrest warrant, a warrant is not also issued under the TCA, so they have to issue a TCA warrant in addition. Many EU countries will do that only if there is a clear connection to the UK. Frequently, an EAW will be issued but there will be no TCA warrant. That is the first difference.

The second difference is that, previously, European arrest warrants were circulated via the second-generation Schengen information system—SIS II—which all front-line officers have access to. Now, the notice that someone is wanted can be uploaded to i24/7, but front-line officers in EU member states do not have access to that.

The consequences of those two differences are that, if someone is wanted in Scotland, it is much harder for them to be identified unless Police Scotland has developed high-quality intelligence, knows where the person is and can work with the police in France or wherever. The issuing of a warrant itself is far less likely to result in surrender than it previously was. We have given some worked examples on pages 29 and 30 of the report of how that might operate.

Our recommendations are that, first, the UK could negotiate an amendment to the TCA, so that TCA warrants could be issued at the same time as a European arrest warrant. Secondly, we recommend that a TCA warrant issued by the UK could be uploaded to SIS II by Europol. That cannot be done directly, because we do not have direct access to SIS II, but it could be done indirectly and would mean that those warrants would be available to front-line officers and could provide an immediate power of arrest.

Finally, we have talked about recommendations that are about negotiation with the EU and are therefore for the UK Government, but we also address issues in the report that can be dealt with by Scottish bodies or officers and I will deal with some of those.

We recommend ensuring that Police Scotland, COPFS and the international co-operation units have the personnel, funding and training that is required to keep the public safe. It is clear that, post-Brexit, there are processes that are much more manual and time-consuming, so it is important that those units are able to develop the intelligence that is needed to ensure that Scotland is kept safe.

Next, at the time of the interviews, there was a backlog of extradition cases. Cases are only heard at Edinburgh sheriff court.

We have talked about transfer of proceedings. Although there could be an EU-UK agreement on transfer of proceedings, there could also be a clearer domestic framework for how and when we seek to transfer cases, to ensure that decisions are made fairly, that resources are available when it is appropriate to transfer and that that is done consistently across different cases. For example, how would dealing with possible vulnerable witnesses impact on a decision to transfer proceedings?

We mentioned ensuring that the prison estate meets ECHR standards.

We have talked about the enhancement of HM Government's consultation with Scottish bodies when negotiating bilateral and multilateral agreements, including perhaps enhancement of the Scottish Parliament's scrutiny of the partnership council decisions. The partnership council is the body that manages the TCA and oversees the specialised committees, which, in

this case, would include the specialised committee on law enforcement and judicial co-operation. There is no formal co-operative mechanism for scrutinising that work. There is also the EU-UK Parliamentary Partnership Assembly, which currently has no Scottish representation.

Our report highlights examples of where Scotland was not consulted in the development of bilateral agreements, which are agreements with other member states that pave the way for further treaties that might be able to enhance police and judicial co-operation with those states. Since 2021, there have been 24 bilateral agreements, which are in different stages of development. Although the legislation is national, the approach to extradition and mutual legal assistance, and the way in which evidence is obtained from overseas, is distinct in Scotland, so it is important that Scotland ensures that it is represented in the discussion.

Professor Farrand Carrapico: As a conclusion to the presentation, we would like to discuss the outlook for the reset of UK-EU relations.

The TCA provides for a first review of its legal text, which is to take place in 2026. That would offer a good opportunity to ensure that some of these recommendations are operationalised and that seamless co-operation is improved.

On the positive side, there is clear political willingness on both sides to develop closer co-operation. The December 2024 report from the presidency of the Council of the EU highlights that it wishes to improve co-operation in areas such as counter-terrorism, human trafficking, surveillance and cross-border co-operation. The Labour manifesto refers to closer law enforcement co-operation. The Minister for the Constitution and European Union Relations has also confirmed that the second of the three pillars for the reset of UK-EU relations focuses on the safety of citizens, and that covers criminal justice co-operation. To cite Nick Thomas-Symonds MP, one of the objectives is to share data

"in real time with Europol, which is designed to ensure that there is no place on the continent for criminals to hide."

The quote is from January 2025.

Another positive thing is that, as Gemma Davies said, 24 bilateral declarations have been signed directly with EU member states since 2021, and they are particularly ambitious in the area of law enforcement, going beyond what the TCA currently stipulates. The UK-EU summit on 19 May 2025 is set to provide a clear milestone for delivery.

10:45

There are, however, a number of challenges that we will highlight. First, despite being quite positive, the EU has stressed the importance of full UK implementation of not only the existing TCA but of the withdrawal agreement, particularly in relation to the rights of EU citizens in the UK.

There is a recent history of political mistrust. Things have definitely improved since Prime Minister Sunak's administration but that continues to create hurdles, as the Commission recently highlighted.

There are also a number of EU red lines in this field, which have been highlighted by the presidency, namely that there will be no foreseeable access to the Schengen information system II, nor any foreseeable access to leading joint investigation teams, both of which are EU-funded instruments. There is limited interest in large changes to the TCA that would involve reopening the treaty negotiations, as opposed to a smaller review of the treaty.

In addition to those points, progress towards transforming the bilateral declarations that we spoke about into legally binding agreements has been slow. For example, an agreement with Belgium that was announced in January 2024 is still waiting to be signed and to enter into force.

Finally, given the geopolitical situation, a lot of focus is on defence, so we will probably see the UK-EU summit on 19 May discussing defence issues much more than law enforcement. That draws the political focus away from justice and home affairs issues.

We hope that the presentation has given you a good overview of the report. We wanted to highlight only those aspects that we find most relevant. I will give the floor to Gemma to close the presentation.

Professor Davies: A book that we have edited is to be published very shortly. A section of it looks at the implementation of the TCA in specific fields, such as immigration crime, environmental crime and the trafficking of human beings and goes beyond what we were able to do in the report.

Professor Farrand Carrapico: We are more than happy to answer any questions that you might have.

The Convener: Your presentation has been really interesting. I have learned a lot from that and from your report, so thank you very much. There is a lot for us to think about with regard to the impact of our withdrawal from Europe. It is good to hear that there are still good levels of co-operation between the UK and European Union member states under the TCA, although you have outlined that there are still some challenges in the

area of information and intelligence sharing. I was very interested to hear about the issues relating to the timely execution of warrants, which we will come back to.

I will kick off the questions and then open up the floor to members. Helena Farrand Carrapico, you spoke about notable losses in capability with regard to co-operation between Scotland, the UK and the EU on judicial matters and policing. Based on the conversations that you had during the study and the interviews that you conducted, particularly with police officers and prosecutors, will you say more about which of those losses are the most significant? How much of an impact have those losses had on our ability to tackle crime, particularly in the areas that you mentioned, including human trafficking and cybercrime? It is quite a broad question, but I am interested to hear a wee bit more about that.

Professor Farrand Carrapico: On notable losses in capability, if we were to pinpoint one instrument, it would be access to the Schengen information system II. As we mentioned in the presentation, that is the largest database for criminal justice in the EU and probably in the world. Police officers had direct access to that database, which, for instance, allowed them to identify whether someone was being sought in an EU country. Losing access to that data is a significant loss, which, despite mitigations, has not been fully compensated for.

On mitigations, our interviewees have highlighted the importance of other very useful systems. For instance, they all highlighted the importance of the secure information exchange network application—SIENA—system in Europol for the circulation of information. That has been particularly important. Although we do not have complete access—for instance, we do not have access to confidential data—we rely considerably on that system at the moment.

It is really difficult to identify the exact impact of the losses. That is an attempt to calculate an unknown, a negative or an absence. When we asked our interviewees, they had difficulty pinpointing what the loss has been not only because it is difficult to calculate an unknown but because a lot of the police officers who used to have access to the Schengen information system had moved to other posts, so there was also an issue of institutional memory.

Do you want to add anything, Gemma?

Professor Davies: I agree about the loss of SIS II. There is also the issue of the nationality bar. There are no public figures on how many individuals we have been unable to obtain the surrender of and in what type of cases. The Crown Prosecution Service, in evidence to the European Affairs Committee, gave figures for those cases when the CPS had been unable to obtain the surrender of individuals. Inevitably, as a result of the conditions that 13 member states have, there will have been individuals who are wanted for very serious offences whom we have not been able to prosecute.

Professor Farrand Carrapico: The evidence was provided to the House of Lords European Affairs Committee on 11 March. The Crown Prosecution Service mentioned that there had been a reduction in the number of surrenders to the UK, which was often linked to the fact that EU member states now only ask for an individual to be surrendered when they are absolutely certain that the person is located in the UK.

The Convener: I have a quick follow-up question. Schengen is a pivotal system, but we can no longer benefit from it. When it comes to the TCA negotiations, how important is it for us to strive to move closer to the access that we used to have to that particular system? Is that point likely to be included as part of the negotiations? How important is it that that be a priority? That might be a difficult question to answer.

Professor Davies: It is important that we seek to improve access to data, and there have been attempts to do that. We set out in the report the developments of the international law enforcement alerts platform—I-LEAP. There are different progression points in trying to get I-LEAP to a point at which it might replicate some of the features or compensate for the loss of SIS II. We are still fairly far from being able to do that.

That issue should be put strongly at the forefront of discussions. It is important that we have evidence of the impact, so that we can demonstrate where there has been a loss of access to data and the consequences that that has had for both the UK and for EU member states. I think that EU member states have a very strong desire to co-operate on policing as best as they possibly can, but, obviously, things can be more difficult at the political level.

The other thing to remember is that part 3 of the TCA is on law enforcement and police co-operation. I am not aware of any other trade agreement in which such aspects are included.

As we describe in the report, part 3 of the TCA is a snapshot—it takes a picture of what law enforcement and judicial co-operation looked like in December 2020. However, things constantly move on, including technology and organised crime. Systems are constantly developing, and tools are being developed or renegotiated. We need ways of ensuring that we are not left behind, and that the co-operation between the UK and the

EU keeps up with our abilities to share more and more information.

Professor Farrand Carrapico: The example of Prüm II is particularly relevant as it is now in force. It is being implemented from a technical perspective by the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice—eu-LISA. It is not known how that will impact the UK. We know that our interviewees would like to have access to facial recognition technology and data, for instance, but how would that be done from a legal perspective? Would we need to reopen negotiations on the TCA? How much of a change would that involve, and would that be a simple review or a larger change? That still needs to be established.

The Convener: We could ask many follow-up questions on that, but I will leave that for now and open it up to members. I will bring in Liam Kerr then Ben Macpherson.

Liam Kerr: Good morning to you both, and thank you for your presentation. I will put my question to Professor Davies, because it is about something that you spoke to in your presentation. Bullet point 3 on page 8 of your report says that

"poor prison conditions in Scotland have led to requests for assurances in extradition/surrender cases. This is causing delay in Scotland receiving wanted persons from overseas and increases the risk that extradition is refused."

The detail of that is at page 36, where you go on to mention

"the increased frequency of challenges related to prison conditions."

That will be hugely concerning for the committee to read, because I think that you are suggesting that conditions in Scottish prisons are raising human rights issues and challenges to extradition. Will you tell the committee more about exactly what you are getting at? What are the specific issues? How big a problem is it, and what does the Scottish Government need to do, and by when, to address it?

Professor Davies: In the report, we were able to identify at the point of the interviews how many requests for assurances had been received. They were relatively small in number—there were three such requests. Those court cases would be made public. My understanding is that those cases came from other EU member states, and there were then requests for assurances. There might have been refusals to surrender at an earlier stage of proceedings, but ultimately, as happens in the UK, those were appealed and eventually surrender took place. Assurances were able to be dealt with in those cases, and those assurances provided the opportunity to surrender individuals.

We had not seen that before, although it does not relate only to Brexit. It is fair to say that concerns about prison conditions have been on the rise not just in the UK but across all the EU member states. However, there have been requirements to ask for assurances about the size of prison accommodation or other aspects of prison life in Scotland since Brexit.

11:00

One of the reasons for that is that we no longer benefit from mutual trust and the judicial authority must now go through the process of considering aspects of the European convention on human rights every time. Prison conditions are one of those aspects and have been raised in a number of cases. Therefore, it is important that prison conditions meet ECHR requirements because, otherwise, that could cause difficulties with surrender.

Liam Kerr: I will press you on that, because the committee aims to help the Scottish Government do its job. Bullet point 3 on page 8 of your report specifically suggests that we should write to the Cabinet Secretary for Justice and Home Affairs and the Lord Advocate to highlight that

"poor prison conditions in Scotland have led to requests for assurances".

I am trying to understand what specific prison conditions were raised in the three occasions in which requests were made.

Professor Davies: I know that one of those cases was in relation to slopping out. I would prefer to follow that up after the meeting so that I can say exactly what the concerns were in each case, rather than trying to remember something that I read several months ago, which I really should not do.

Liam Kerr: That is perfectly fair. It is really so that the committee can say to the Scottish Government, "Listen, this is what the experts are saying that you need to address."

Professor Davies: That is absolutely right. I should have had the information for you.

Liam Kerr: Do not worry.

Professor Farrand Carrapico: We will double check the information, but, if my recollection is correct, it had to do with the size of prison cells and access to healthcare, particularly mental health care.

Liam Kerr: That would be fascinating to read.

I put a related point to Gemma Davies. Your report refers to human rights issues. Page 36 indicates that

"For outgoing extradition requests ... The Extradition Act 2003 includes an additional ground for challenging extradition: the possibility of contesting the Scottish Ministers' decision ... on the basis that it is incompatible with the European Convention on Human Rights (ECHR). This provision, unique to Scotland, does not exist in England and Wales."

The report goes on to say that the provision adds complexity. Will you help the committee to understand whether it bites? If so, what do you recommend that the committee does? Do we note it but keep it as best practice, or are you recommending that we align with England and Wales on that?

Professor Davies: I would not be able to make that recommendation, because we were not seeking to do that. We recognised that as distinct to the Scottish extradition system and therefore noted it in our report. It does not specifically relate to the UK's exit from the European Union, so we did not seek to consider whether it is an appropriate difference.

One of the reasons why it has been raised is that, post-Brexit, there is greater consideration of human rights in extradition cases because of the loss of mutual trust as a result of the UK being outside the European Union. Therefore, these issues have become more pertinent in extradition/surrender cases.

Liam Kerr: I understand. Thank you.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning, and thank you both for your time in giving evidence and for your submissions.

During the Brexit process, I was the Scottish Government Minister for Europe, Migration and International Development. At that time, the Scottish Government published a number of papers under the heading, "Scotland's Place in Europe." One of those papers, which was published in June 2018, focused on the impact of Brexit on cross-border crime and co-operation. It warned about the negative impact that the Brexit process and the withdrawal agreement—as it was then conceived, and later signed—would have in relation to Europol, the European arrest warrant, the European investigation order, the Schengen information system II, participation in Eurojust and the European protection order.

From what you have said today, it is clear that, latterly, since the withdrawal agreement was signed and the process took place, we are in a worse position. That is what your evidence seems to articulate. Am I interpreting that correctly?

Professor Davies: It would be correct to say that the report highlights operational deficits. That is accepted by everyone that we spoke to. However, that has to be tempered by the fact that there is also recognition that the TCA has played an important role in continuing with co-operation and that it has worked well in many different areas. Without the TCA, many of those consequences would have been manifested.

However, it was not possible to continue co-operation in exactly the same way that we had done before. The question is by how much the operational deficits can be mitigated. There are three ways in which they can be mitigated. First, they can be mitigated internally in the UK by ensuring that we are using the TCA to the fullest extent, by looking at our domestic legislation and domestic frameworks and by ensuring proper resourcing. Secondly, where possible, we can try to negotiate bilateral agreements to deal with some of the operational deficits. Thirdly, we can work with the EU to recognise where some of the operational deficits are occurring and, where possible, try to negotiate improvements to ensure that they have less of an impact.

Professor Farrand Carrapico: When the Brexit negotiations were on-going, it was not foreseeable that the agreement would be so positive in practice for the UK. There was concern that the operational deficit would be much greater. In practice, we believe that the negotiators actually did a fantastic and superb job, given the conditions. It is important to consider that the EU's most important criminal justice relationship is with the UK—it is the closest relationship that the EU has with any third country. It is important to acknowledge the good work that has been done and what has been achieved and to consider what could be done from here onward.

Ben Macpherson: It is fair to say that, despite the political approach of the UK Government at the time, which involved a hard Brexit, the agreement that the civil service negotiated has clearly turned out better than many of us feared might be the case. I appreciate that you do not want to get involved in the political aspects of this, but it is helpful and important for us to recognise that, because of the Brexit outcome, we are in an operational deficit. Like you, I am interested in how we can improve that situation. Your pivot to the point on how we can continue to improve the operational situation was helpful.

Your presentation talked about there being a

"clear political willingness on both sides to develop a closer relationship".

That is a good thing. What measures should the Scottish Government prioritise to improve the way in which police and prosecutors can co-operate with the EU, which do not require changes to the current political agreements and which could be relatively easily agreed between the UK and the EU? Following today's evidence, we will think

about what we recommend to both the Crown Office and the Scottish Government. We may also want to liaise with our counterparts on the UK Justice Committee on how we can play a part in pressing the UK Government to do more. I am interested to hear any further thoughts that you might have in that regard, and then I have one other question.

Professor Davies: I talked about the three areas in which we could seek to address the issues. The first was to look at our domestic situation to ensure that we are using the TCA to its fullest. For example, on sharing vehicle registration data, we should look again at the dual criminality requirement—that is an area in which it is possible to improve some aspects of co-operation in the current TCA.

As I have mentioned before, it is also important to ensure that international co-operation units are properly resourced. Historically, international co-operation has been a siloed area of the criminal justice system. However, increasingly, more cases have a transnational element to them and require the use of such tools. So, it is an important area and we need to make sure that it is properly funded and staffed.

The second area is working bilaterally: Scotland certainly does that—it does it very well, in fact. We heard repeatedly that Scotland goes out and meets other EU member states to discuss problems in practice. That is an important way to ensure, or to improve, bilateral co-operation without having to seek amendment to the TCA.

Professor Farrand Carrapico: I have three points to add to that. First, the Scottish Parliament could discuss with the Scottish Government what action the Scottish Government is taking to ensure that it is consulted when bilateral agreements are negotiated and signed, so that Scottish interests are taken into account.

Ben Macpherson: Do you have any evidence that that is not happening enough?

Professor Farrand Carrapico: There is evidence from some of the interviewees that Scottish involvement has been insufficient.

Ben Macpherson: That does not surprise me.

Professor Farrand Carrapico: We would welcome any further evidence that you collect on the matter.

Ben Macpherson: Thank you.

Professor Farrand Carrapico: My second point is that the Scottish Parliament should be able to scrutinise partnership council decisions made under the TCA, to ensure that they align with Scottish interests. Thirdly, there should be appropriate representation of the Scottish Parliament in the EU-UK Parliamentary Partnership Assembly—we were not able to verify fully the current extent of that, but we would welcome any further evidence that you find on it—to ensure that Scottish interests are represented in parliamentary relations.

The Convener: Can you speak about the partnership council? That body is a new one on me and I am interested to hear more about it. It may be that it is outlined in the report and I have overlooked it. What is the partnership council and how do we link with it?

Professor Farrand Carrapico: The partnership council was created by the trade and co-operation agreement and it ensures the correct implementation of the agreement. It is responsible for the specialised committees in the TCA, one of which manages justice and home affairs. It is responsible for identifying problems with implementation and trying to address them within the provisions of the TCA.

The Convener: Thank you. I have just looked at my notes and I see that you did include it in your presentation—that was my oversight.

Ben Macpherson, do you want to come back in? Then I will bring in Rona Mackay.

Ben Macpherson: Professors, I apologise if this question is broader than your remit but I am interested to hear your insights on it. You may be aware that, particularly in central Scotland at the moment, there are some challenges that Police Scotland is working hard to address—successfully, in recent weeks—in relation to organised crime and its connections with the United Arab Emirates.

I know, based on further research that I have undertaken—it was not academic research as yours was—that organised crime is an issue that is being faced on the European continent as well as here in the UK. How does our criminal justice system seek to address organised criminals that are operating out of the United Arab Emirates? Does the research that you have brought to us and elaborated on today cover that wider dimension, particularly in relation to surrender and extradition?

11:15

Professor Davies: In the report, we highlight that international co-operation is always a moving feast. Different states are important to co-operate with at different times, but that can change very rapidly and cause difficulties, because relationships might not yet be fully established with a particular state. However, that is where Europol can also be very helpful. Often, if the UK is dealing with a particular non-EU state, other EU states will

be experiencing the same difficulties. Therefore, being able to use Europol can help with co-operation, even with the United Arab Emirates or other states.

That is the extent to which our research addresses that point. I know that it is indirect, but co-operation with Europe is also very important, even for organised crime links that are outside the EU.

Professor Farrand Carrapico: Relevant to that question, we uncovered an additional element: the EU signs agreements with third countries, for instance, to address organised crime, and there are multiple examples of that. The UK no longer has access to those agreements, so it no longer benefits from the relationship between the EU and third country. As Gemma mentioned, that is always an indirect relationship in the sense that Europol has access to some of the data, whereas we have access to Europol data.

Ben Macpherson: That is very interesting. If you have anything further to follow up on the point about third countries—

Professor Farrand Carrapico: We would be happy to provide that to the committee.

Ben Macpherson: I would be really interested in it, and I am sure that the rest of the committee would be as well.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. Thank you for coming and for such a detailed and informative report. It has an awful lot in it. I am just processing it all. Ben Macpherson's point and your response were really interesting. Any more information on that front would be good.

A whole bureaucratic morass seems to have opened up since Brexit, but steps are being taken to improve the situation and make the best of what we have. I get that there is no such thing as a typical case, but do you have any indication or data on how much longer it has been taking to process a case since Brexit?

Professor Davies: That is a really good question, which we wish was easy to answer. As we have alluded to, it is quite difficult to prove a negative. It is quite difficult to say, "Well, we should have had this information, but we haven't and the consequences of that are this." It is more for operational agencies to answer that, because such data is not available to the public or academics. However, data really should be made available on, for example, how long extradition cases are taking and how many refusals there are. That would help to—

Rona Mackay: Complete the picture.

Professor Davies: Yes.

Rona Mackay: That data would be really useful, but you are right that those questions are probably better directed at those that use the system operationally.

One of the many interesting things that you said was about Germany. If the UK issues a warrant and Germany does not reply, we get the chance—is that more or less what you said?

Professor Davies: Germany has a nationality bar, but we can issue warrants to other EU countries. In my example, if that German national were to be on holiday in France, they could be picked up on a TCA warrant issued by the UK. France would deal with that, but it would first reach out to Germany to ask whether it wanted to issue a European arrest warrant. If Germany did so, that would take priority over the UK's TCA warrant.

Rona Mackay: Is there any reason why Germany is an outlier in that in Europe?

Professor Davies: Well, there are 13 EU member states with similar nationality bars. That comes from a historical common law versus civil law difference. Civil law jurisdictions have traditionally had a protective approach to extradition, in that they will not extradite their own citizens but have far-reaching laws that allow them to prosecute them in their own state, whereas the UK's position has always been that we will extradite even our own nationals to other states, and we are much more conservative in the way in which we prosecute conduct that has happened outside of the UK's territorial boundaries.

Rona Mackay: I understand that. Again, this might be for operational people to answer, but are the new circumstances affecting any particular category of crime more? Is anything beginning to get clogged up because of the situation? I am thinking about child contact cases.

Professor Davies: We have not been told of any one particular area of crime that we can identify as having been impacted significantly more than others. We have looked across different crime areas, and we can identify some for which there has been significant loss of access to a European agency that was considered to be very useful—I think that we have highlighted the areas of cybercrime and drugs as examples. However, we were not able to pinpoint one particular crime area that is much more significantly impacted than others.

Rona Mackay: That is fine—again, I suppose that people who deal with those matters daily will have answers to that. Do you see the situation vastly improving? You have explained that things have been brought in to help us to work together as much as possible, but do you think that there will be much change over the next decade, say?

Professor Davies: There are two contrasting pictures. In the first, police and judicial co-operation gets lost among everything else that is important in the TCA and must also be dealt with—elements to do with trade and other aspects of the agreement. There is an argument to say that things are okay, the wheels are not falling off and part 3 of the TCA is operating, so police and judicial co-operation gets left behind because it is subsumed by other, more important areas.

In the second picture, security is, in fact, highlighted: it is the second of three of the UK's pillars for its UK-EU reset. Inevitably, organised crime will continue to develop and increase the number of new ways of operating transnationally—it does not care about the UK's position inside or outside of the EU, so those operational drivers will continue. I hope, therefore, that we can listen to people in operational positions when they tell us what they need to be able to overcome political difficulties in order to make progress. Whether that happens is obviously well beyond my remit.

Rona Mackay: Internationally, every country would want to work together to combat crime, and there is no reason not to, other than the rules that have been put in place. Every country would always try to be as co-operative as possible within the rules. Are any new openings coming up that might lessen the amount of bureaucracy? People having to go through a third party to get important information sounds so onerous.

Professor Farrand Carrapico: We need to be realistic about what can be achieved politically. The messages from Brussels are clear: there is scope and a margin for some improvements, but the EU would not be able to address all the recommendations that we have brought to the committee today. Whether rhetorical or not, the clear message is that the EU now needs to address its other priorities.

The EU's relationship with the UK continues to be important, as Ursula von der Leyen has recently highlighted. However, there are many other relationships that the EU also considers to be important. It is currently focusing on those relationships, as well—not just on its relationship with the UK. We have to be realistic about what can be achieved. Having said that, there is an opening to improve certain parts of the TCA. It is about identifying what can be achieved through the review in 2026.

Rona Mackay: Thank you—that is really helpful.

Liam Kerr: I have a quick question for Helena Farrand Carrapico. Your presentation said that we need to

"Develop the necessary technical capabilities with a view to sharing vehicle registration data"

with the EU. That is on slide 5. It went on to state that we need to

"Negotiate access to the ECRIS-TCN system".

How challenging would it be to develop those technical capabilities, and would it be challenging and/or costly to negotiate access to that system?

Professor Farrand Carrapico: We were given limited information on the necessary technicalities that would be needed to be able to share vehicle registration data. We were told that it is not happening at the moment and that the UK is working on the necessary technology to be able to do so. However, we were not told what the timeline would be and what the exact technical issues are. I do not know whether Gemma Davies wants to add anything to that point. We would be more than happy to follow up on that issue with the interviewees that we talked to and inquire whether they would be happy to provide further detail.

Liam Kerr: I would be grateful for that—thank you.

The Convener: I have a couple of final questions. We spoke earlier about nationality bars. The National Crime Agency recently told the House of Lords that about 10 per cent of extradition requests are now being refused because of nationality bars and that, before Brexit, those requests would probably have been successful. You mentioned that as one of your key areas of focus. Gemma Davies, what further scrutiny can the Parliament undertake or offer on that particular issue?

Professor Davies: It is important to ensure that the data is being collected. The data does not necessarily have to be public, but it is important to know how many cases we have been unable to extradite and what those types of cases are, so that we can understand the impact. On the one hand, you could argue that, in 90 per cent of cases, we have been able to surrender the individual. On the other hand, that 10 per cent of cases might include individuals who pose a significant risk and who have escaped criminal justice systems as a result of the extradition request being refused.

It is important that we understand that information and that we work towards overcoming the problem. We talked about transfer of proceedings being one way of doing so, and we also talked about the transfer of prisoners and other agreements. We need to ensure that the Parliament is clear that that is a significant operational loss or difficulty, that it will result in impunity for serious offences and that we need to work with our EU partners to ensure prosecution where it is possible to do so, by whatever means.

The Convener: My final question goes back to a point that Helena Farrand Carrapico made towards the end of the presentation on the TCA review and the forthcoming summit that will take place next month. You said that it is likely that the focus will be on defence. That made me think about the importance of the UK-EU co-operation that we have been examining. Ultimately, we are considering public safety and national security, and we are potentially stepping into areas that we would usually think of as sitting in the defence space. Acknowledging the TCA's importance in relation to judicial co-operation and the wider defence and human rights challenges that are being faced across Europe, how important is it that we make as much progress as possible in the TCA review?

11:30

Professor Farrand Carrapico: The agenda for the summit is not yet public; it will be made public a week before the summit. It will be very important to flag up the necessity of putting criminal justice issues on the agenda. There are clearly overlaps between defence and criminal justice areas. From what has been announced about the UK Government's intentions regarding a possible future agreement on security and defence, we know that the issues will include conflict resolution, military operations and access to the EU defence budget. Those aspects would always have an impact on addressing organised crime abroad, and existing EU military operations often have hybrid goals in regard to addressing criminal activity in specific locations. Therefore, there will always be an intersection of those two areas.

We would argue that it is not possible to discuss security and defence in an agreement that is separate from criminal justice, because there will always be implications for the criminal justice dimension. It is important to highlight that, as well as the importance of discussing criminal justice at the summit.

The Convener: Thank you—that was a really interesting answer. As there are no more questions, I thank you both for attending the meeting. It has been a fascinating evidence session. We look forward to receiving your follow-up points, and the committee will consider the next steps that we can take.

Meeting closed at 11:32.

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