

Criminal Justice Committee

**14th Meeting, 2021 (Session 6),
Wednesday, 15 December 2021**

Legislative Consent Memorandum

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider a legislative consent memorandum (LCM) in relation to the following UK Government Bill:
 - [Judicial Review and Courts Bill](#)
2. The Judicial Review and Courts Bill (the Bill) was introduced in the House of Commons on 21 July 2021. It is currently awaiting Report Stage in the House of Commons.

Legislative consent process

3. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of an LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:
 - change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or
 - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
4. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass Bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the

basis of a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

5. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament's Standing Orders.

Judicial Review and Courts Bill

6. The Bill makes provisions relating to criminal courts procedure and non-criminal courts and tribunal procedure (including the use of written and electronic procedures), Coroners and judicial review.
7. The Bill applies largely to England and Wales only.
8. However, certain provisions apply to Scotland. These relate to the transfer to Scotland or Northern Ireland for enforcement of fines imposed through the online justice procedure. The effect of the change proposed is to enable a penalty arising from a conviction received through the online justice procedure as being capable of being enforced in Scotland through the same process as if it has been imposed in a court room.

Scottish Government Legislative Consent Memorandum

9. An LCM was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 17 November 2021. The LCM can be found in the **Annex**.
10. The Cabinet Secretary for Justice and Veterans and officials are due to attend the Committee meeting on 15 December 2021 to answer any questions members may have on the LCM.
11. In considering whether to support the relevant provisions in Bill the Scottish Government reached the following conclusion:

“14. The UK Government does not consider any provision in the Bill requires the consent of the Scottish Parliament. In particular, the UK Government does not consider Schedule 2, Paragraph 1(4) of the Bill as requiring consent as it would not be within the competence of the Scottish Parliament to make such amendments as contained in this provision to the 1980 Act.

15. The Scottish Government considers that Schedule 2, Paragraph 1(4) requires the consent of the Scottish Parliament. The Scottish Government considers this to be the case as the purpose of the provision is to enforce a criminal financial penalty in Scotland, which is a matter of criminal procedure and fines enforcement which are devolved.

16. It is the view of the Scottish Government that it is preferable in terms of good governance that the relevant provisions which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament in order to ensure that required changes to allow for the transfer and enforcement of orders arising from the new online justice procedure in England and Wales operate where an offender resides or moves to Scotland”

12. The LCM sets out the Scottish Government’s draft motion (Annex, paragraph 17).

Action

11. Members are invited to consider whether to agree with the recommendation of the Scottish Government that the Parliament agrees that the relevant provisions of the Judicial Review and Courts Bill, introduced in the House of Commons on 21 July 2021, relating to the transfer and enforcement of orders imposed through online justice procedures in England and Wales to Scotland, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

12. Members are also asked to agree that the Convener should arrange for the publication of a short, factual report on the outcome of the Committee’s deliberations.

**Clerks to the Committee
December 2021**

Supplementary Legislative Consent Memorandum

Judicial Review and Courts Bill

Background

1. This memorandum has been lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, under Rule 9.B.3.1(a) of the Parliament's standing orders. The Judicial Review and Courts Bill was introduced in the House of Commons on 21 July 2021. The Judicial Review and Courts Bill ("the Bill") can be found at:

[Judicial Review and Courts Bill](#)

Content of the Judicial Review and Courts Bill

2. The Bill makes provision relating to criminal courts procedure and noncriminal courts and tribunal procedure (including the use of written and electronic procedures), Coroners and judicial review.

3. In more detail, the Bill includes provision relating to the following areas:

- Criminal procedure measures intended to improve efficiency in the courts by:
 - expediting the pre-trial processes in the magistrates' court;
 - eliminating the need for some pre-trial procedures to enable preliminary proceedings to be conducted in writing if the defendant so wishes;
 - enabling efficient transfer of cases between courts where appropriate;
 - introducing a procedure to enable defendants to plead guilty to minor offences and accept a financial penalty online without a requirement for a court hearing in a traditional court setting;
 - abolishing local justice areas.
- Provision for an Online Procedure Rule Committee that will be able to make Online Procedure Rules in relation to civil, tribunal (including employment tribunals and the Employment Appeal Tribunal) and family proceedings.
- A range of reforms to the coroner system aimed at providing greater consistency of approach to the operation of other courts and tribunals and improving the efficiency of the coroner system.
- Amendments to judicial review practice and procedure to:
 - Remove the ability to apply for judicial review of a decision of the Upper Tribunal to refuse permission to appeal from the First-tier Tribunal;
 - Create two new powers available to the court in Judicial Review proceedings in respect of quashing orders.

Provisions which relate to Scotland

4. The Bill applies largely to England and Wales only.

5. The clauses in the Bill that require an LCM are as follows (clause numbers relate to the print of the Bill on introduction):

Transfer to Scotland or Northern Ireland for enforcement of fines imposed through the online justice procedure

- Schedule 2 (Criminal Procedure: Consequential and Related Matters), Paragraph 1(4)
 - Section 90(1) of the Magistrates' Courts Act 1980 ("the 1980 Act") provides for a fine or a collection order to be enforceable by courts in Scotland, when the person lives in Scotland. The effect of section 90(1) is that a magistrates' court or fines officer can declare the order to be enforceable in Scotland. The impact of the use of section 90(1) is that a court in Scotland must oversee the enforcement of the financial penalty. Paragraph 1(4) of Schedule 2 provides that convictions received through the new online justice procedure are added as section 90(4) of the Magistrates' Courts Act 1980, with the effect that a penalty arising from a conviction received through the online justice procedure is capable of being enforced in Scotland through the same process as under section 90(1). As criminal procedure, including enforcement of fines, is devolved in Scotland, the provision applies to Scotland for a devolved purpose and requires an LCM.

Reasons for seeking a legislative consent motion

6. The amendments made in this Bill are minor technical amendments to allow for enforcement in Scotland of penalties imposed in England and Wales through the new online justice procedure. The Scottish Government considers it preferable to legislate in one overall Bill so as to eliminate the need to identify a Scottish legislative vehicle at a time when no obvious justice legislative vehicle exists and there are no policy issues arising.

7. The UK Government does not consider that Schedule 2, Paragraph 1(4) requires the consent of the Scottish Parliament. That view is on the basis that it would not be within the competence of the Scottish Parliament to make such an amendment to the 1980 Act.

8. The Scottish Government would agree that the Scottish Parliament would not be able to enact provision in the same terms as the amendment to 1980 Act in Schedule 2, Paragraph 1(4) of the Bill. This would be outside legislative competence under section 29(2)(a) of the Scotland Act 1998, because the provision partly deals with administrative matters which are internal to the English courts.

9. However, the Scottish Government considers that the purpose of the provision is to require the Scottish courts to enforce a penalty under the new online justice procedure. The transfer is just the administrative mechanism by which the enforcement in Scotland is achieved. The point of the new provision is that orders made through the online justice procedure are added to those which an English court can declare to be enforceable in Scotland. This declaration is effective in Scotland and criminal procedure, and enforcement of criminal penalties, are devolved.

10. The Scottish Parliament could legislate for a fines enforcement measure for persons in Scotland, once fines had been transferred from the magistrates' courts. It could also legislate to provide that these orders are enforceable in Scotland (leaving existing cross-border enforcement mechanisms to be used for the purpose). It would have been possible for the provision to have been drafted in such a way that the transfer and enforceability in Scotland were dealt with separately. This has not happened because the Bill is utilising an existing mechanism which extends throughout the UK and pre-dates devolution. If the UK Government's position was accepted in respect of this provision not requiring the consent of the Scottish Parliament, the Scottish Government considers that almost any similar provision could be drafted in such a manner as to make what is ostensibly a provision with a devolved purpose outside competence under section 29(2)(a). This could be achieved by including a prior obligation on or power on an English or Welsh court before the wording that deals with the actual purpose of the provision, which in this context is the enforceability of financial penalties in Scotland.

11. The Scottish Government considers that provision could be made by the Scottish Parliament to ensure enforcement of the penalties that are disposals of a criminal conviction under the online court procedure. Such provision would be within the legislative competence of the Scottish Parliament. The Cabinet Secretary for Justice and Veterans has written to the UK Government advising the Scottish Government will be lodging this legislative consent memorandum.

Consultation

12. The Scottish Courts and Tribunals Service, who enforce fines in Scotland, has been consulted and advised that the extension of their role to enforce fines to include those imposed through the online justice procedure would not have any undue impact on the operation of their fines enforcement responsibilities. Given the minor nature of the effect of the clause, no further consultation has been considered necessary.

Financial Implications

13. The provisions of the Bill which extend to Scotland have no significant financial implications.

Conclusion

14. The UK Government does not consider any provision in the Bill requires the consent of the Scottish Parliament. In particular, the UK Government does not consider Schedule 2, Paragraph 1(4) of the Bill as requiring consent as it would not

be within the competence of the Scottish Parliament to make such amendments as contained in this provision to the 1980 Act.

15. The Scottish Government considers that Schedule 2, Paragraph 1(4) requires the consent of the Scottish Parliament. The Scottish Government considers this to be the case as the purpose of the provision is to enforce a criminal financial penalty in Scotland, which is a matter of criminal procedure and fines enforcement which are devolved.

16. It is the view of the Scottish Government that it is preferable in terms of good governance that the relevant provisions which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament in order to ensure that required changes to allow for the transfer and enforcement of orders arising from the new online justice procedure in England and Wales operate where an offender resides or moves to Scotland.

Draft Legislative Consent Motion

17. The draft motion, which will be lodged by the Cabinet Secretary for Justice and Veterans, is:

“That the Parliament agrees that the relevant provisions of the Judicial Review and Courts Bill, introduced in the House of Commons on 21 July 2021, relating to the transfer and enforcement of orders imposed through online justice procedures in England and Wales to Scotland, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

**Scottish Government
November 2021**