

Criminal Justice Committee

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

Supplementary Legislative Consent Memorandum

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider a [supplementary Legislative Consent Memorandum](#) (LCM) in relation to the following UK Government Bill:
 - [Police, Crime, Sentencing and Courts Bill](#)
2. The Police, Crime, Sentencing and Courts Bill (the Bill) was introduced in the House of Commons on 9 March 2021. It is currently awaiting Report Stage in the House of Lords and is nearing the end of its consideration in the UK Parliament.

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.

Police, Crime, Sentencing and Courts Bill

6. The principal objective of the Police, Crime, Courts and Sentencing Bill, is, according to the UK Government, to increase trust, transparency and efficiency across the criminal justice system by bringing together the Sentencing Bill, Serious Violence Bill and Police Powers and Protections Bill.
7. As justice is devolved in Scotland, the majority of the provisions in the Bill apply to England and Wales only, for example, the proposed legislative changes to the Public Order Act 1986 as it relates to public assembly. There are, however, a number of other provisions that apply to Scotland and Northern Ireland. The provisions in the Bill relate to a mixture of devolved and reserved or excepted matters in Scotland, Wales and Northern Ireland.
8. This [supplementary LCM](#) relates to the power in the Bill to extract information from digital devices of witnesses, victims and others to the extent that these provisions are not covered by the reservation in the Scotland Act 1998 in relation to the interception of communications. These provisions are detailed in full in paragraphs 12 to 16 of the [original LCM](#) (LCM-S6-4).

Scottish Government supplementary Legislative Consent Memorandum

9. A supplementary LCM was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 6 December 2021. The supplementary 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:

“The Scottish Government recognises that crime has no respect for borders or boundaries and, as such, must be tackled across multiple jurisdictions. Applying the relevant provisions of the Bill to Scotland will help meet the Scottish Government’s commitment to further modernising and reforming the justice system in Scotland and to improving the efficiency of the Court system, thus making Scotland a safer and fairer and more transparent country.

Originally while the Scottish Government agreed in principle with the data extraction measures we had expected the finalised Code of Practice to issue before royal assent for the Bill. It is now clear that the Code of Practice will not be finalised until after a full public consultation once the Bill has received Royal assent. The Scottish Government is working with the UK Government on the terms of the draft Code and following representations from the Northern Ireland Executive and the Scottish Government, the UK Government has agreed not to commence the data extraction provisions in Scotland and Northern Ireland until the Code has been finalised., **The Scottish Government therefore recommends consent for the power to extract information from digital devices of witnesses, victims and others** [*our emphasis*].”

12. The LCM sets out the Scottish Government’s draft motion (Annex, paragraph 9).

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 Police, Crime, Sentencing and Courts Bill, introduced in the House of Commons on 9 March 2021, relating to the power to extract information from digital devices of witnesses, victims and others 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

Police, Crime, Sentencing and Courts Bill

Background

1. This supplementary Legislative Consent Memorandum (LCM) has been lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, under Rule 9B.3.1(a) of the Parliament's Standing Orders. This supplementary LCM augments the original LCM (LCM-S6-41) on the Police, Crime, Sentencing and Courts Bill which was lodged on 5 August 2021. That LCM identified a number of provisions contained within the Bill that alter the executive competence of the Scottish Ministers or which fall within the legislative competence of the Scottish Parliament for which the Scottish Ministers sought the Scottish Parliament's consent.

2. The original LCM indicated the Scottish Government did not, at that point, recommend consent for the power to extract information from digital devices. It stated that once the position around investigation of deaths was resolved satisfactorily the Scottish Government intended to bring forward a supplementary memorandum for these provisions in order to ensure a consistent approach that takes account of Scotland's distinct position. The UK Government has confirmed that the issue will be kept under review, once the data extraction provisions are in force. The Scottish Government has now concluded that the identified risk is not sufficiently material to prevent the Scottish Government recommending that the Scottish Parliament consent to these provisions.

3. The Police, Crime, Sentencing and Courts Bill ("the Bill") was introduced in the House of Commons on 9 March 2021. The latest version of the Bill can be accessed at: <https://bills.parliament.uk/bills/2839/publications> .

Need for a Supplementary LCM

4. The Scottish and UK Government have been working together to refine the draft Code of Practice for the data extraction provisions to account for Scotland's interests. Since lodging the previous LCM the UK Government have confirmed that the draft Code of Practice will not be finalised until sometime after the Bill attains Royal Assent, and completion of a full public consultation, to ensure it is fit for purpose. The UK Government has also confirmed that the data extraction provisions will not be commenced in Scotland until the Code of Practice has been finalised.

5. The provisions which will require a supplementary LCM are:

- **Power to extract information from digital devices** of witnesses, victims and others to the extent that these provisions are not covered by the reservation in the Scotland Act 1998 in relation to the interception of communications. These provisions are detailed in full in paragraphs 12 to 16 of the original LCM (LCM-S6-4). While interception of communications is reserved under head B8 of schedule 5 of the Scotland Act 1998, police powers and the criminal law

generally are not reserved. The UK Government have accepted our view that the provisions require an LCM. This is both because the powers go wider than communications, to include information more generally, and because it is questionable whether extracting information from a device which has been isolated from the network (which is the standard practice of Police Scotland amongst others) actually amounts to interception of communications at all.

Financial implications

6. This supplementary LCM will have no impact on the financial implications set out in the previous LCM.

Conclusion

7. The Scottish Government recognises that crime has no respect for borders or boundaries and, as such, must be tackled across multiple jurisdictions. Applying the relevant provisions of the Bill to Scotland will help meet the Scottish Government's commitment to further modernising and reforming the justice system in Scotland and to improving the efficiency of the Court system, thus making Scotland a safer and fairer and more transparent country.

8. Originally while the Scottish Government agreed in principle with the data extraction measures we had expected the finalised Code of Practice to issue before royal assent for the Bill. It is now clear that the Code of Practice will not be finalised until after a full public consultation once the Bill has received Royal assent. The Scottish Government is working with the UK Government on the terms of the draft Code and following representations from the Northern Ireland Executive and the Scottish Government, the UK Government has agreed not to commence the data extraction provisions in Scotland and Northern Ireland until the Code has been finalised., The Scottish Government therefore recommends consent for the power to extract information from digital devices of witnesses, victims and others.

Draft Legislative Consent Motion

9. 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 Police, Crime, Sentencing and Courts Bill, introduced in the House of Commons on 9 March 2021, relating to the power to extract information from digital devices of witnesses, victims and others so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

**Scottish Government
December 2021**