

Criminal Justice Committee

2nd Meeting, 2021 (Session 6), Wednesday, 1 September 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:
 - [Police, Crime, Sentencing and Courts Bill](#)
2. The Police, Crime, Sentencing and Courts Bill was introduced in the House of Commons on 9 March 2021. It is currently awaiting its 2nd Reading in the House of Lords.

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. The provisions that apply to Scotland which the UK Government have requested legislative consent are in relation to the Crime (Overseas Production Orders) Act 2019; Sexual Offences Act 2003 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016; Summary Jurisdiction (Process) Act 1881; section 60 of the Police Act 1996 (regulations for Police Federations); the extraction of information from digital devices of witnesses, victims and others and amendments tabled to the Bill relating to the police covenant.
9. Further details of these provisions can be found in paragraphs 8 to 26 of the Annex.

Scottish Government Legislative Consent Memorandum

10. An LCM was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 6 August 2021. The LCM can be found in the Annex.
11. The Cabinet Secretary for Justice and Veterans and officials are due to attend the Committee meeting on 1 September 2021 to answer any questions members may have on the LCM.
12. In considering whether to support the 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. The Scottish Government recommends consent for amendments to the Crime (Overseas Production Orders) Act 2019; orders under the Sexual Offences Act 2003 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016; extension of the Summary Jurisdiction (Process) Act 1881; amendment of section 60 of the Police Act 1996; and the amendment to extend the annual reporting duty for the

Police Covenant to cover British Transport Police and National Crime Agency. The Scottish Government do not currently recommend consent for the power to extract information from digital devices of witnesses, victims and others until the matters set out above are clarified.”

13. **Members will want to note that the Scottish Government is not as yet recommending consent for all the relevant aspects of the Bill that require consent.**
14. If, at some point in the future, the Scottish Government decided it wished to recommend consent for the remaining sections of the Bill, it could lodge a further LCM with an updated motion.
15. The LCM sets out the Scottish Government’s draft motion (Annex, paragraph 30).

Action

11. **Members are invited to consider whether to agree with the recommendation of the Scottish Government that the legislative consent motion for the Police, Crime, Sentencing and Courts Bill should be agreed by the Scottish Parliament and also that consent should not yet be given to the power to extract information from digital devices of witnesses, victims and others until the matters set out above are clarified.**
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
August 2021

LEGISLATIVE CONSENT MEMORANDUM POLICE, CRIME, SENTENCING AND COURTS BILL

Background

1. This Memorandum 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. 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, Explanatory Notes and other supporting documents can be found at: <https://bills.parliament.uk/bills/2839>.

Content of the Bill

2. The principal objective of the Police, Crime, Courts and Sentencing Bill, is to increase trust, transparency and efficiency across the criminal justice system by bring together the Sentencing Bill, Serious Violence Bill and Police Powers and Protections Bill as outlined in The Queen's Speech in December 2019 into one Bill. The continuation of the Bill was confirmed in The Queen's Speech on 11 May 2021.

3. The UK Government's stated policy aim for the Bill is to enhance the democratic accountability of police forces, and fire and rescue services, improve the efficiency and effectiveness of emergency services through closer collaboration and build public confidence in policing. Measures in the Bill include provisions to:

- protect the police and other emergency workers and enhance the wellbeing of police officers and staff;
- protect the public by giving the police the tools needed to tackle crime and disorder, and by addressing the root causes of serious violent crime using multi-agency approaches to prevention;
- ensure that the most serious violent and sexual offenders spend time in prison that matches the severity of their crimes, protects victims and gives the public confidence;
- tackle repeat and prolific offenders through robust community sentences which punish and also address offenders' needs; and
- modernise the delivery of criminal justice by overhauling existing court processes to provide better services for all court users.

4. The Bill is currently at the House of Lords Stage. The first reading at the House of Lords took place on 6 July 2021 and a date for the second reading is still to be scheduled.

5. 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. A number of the provisions relating to Scotland require the consent of the Scottish Parliament under the legislative consent procedure as explained in the following sections.

6. As well as the provisions that require an LCM, the Bill deals with a number of reserved matters in Scotland including:

- Police Driving Standards (Road Traffic Act 1988);
- Power to issue Fixed Penalty Notices (Road Traffic Offenders Act (RTOA) 1988);
- Removal of the obligation on drivers to surrender their driving licence (RTOA 1988/Road Traffic (New Drivers) Act 1995);
- National Driver Offender Retraining Scheme;
- Increased penalties for driving offences;
- Discretionary disqualification periods;
- Immigration;
- Management of terrorist offenders;
- Interception of communications; and
- Court and tribunal measures.

Provisions which relate to Scotland and require legislative consent

7. The Bill contains provisions that apply to Scotland and the UK Government have requested legislative consent in relation to the Crime (Overseas Production Orders) Act 2019; Sexual Offences Act 2003 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016; Summary Jurisdiction (Process) Act 1881; section 60 of the Police Act 1996 (regulations for Police Federations); the extraction of information from digital devices of witnesses, victims and others and amendments tabled to the Bill relating to the police covenant.

Crime (Overseas Production Orders) Act 2019

8. Schedule 5 contains amendments to the Crime (Overseas Production Orders) Act 2019. The proposed amendments enable both the Secretary of State and the Lord Advocate to delegate functions conferred on them by that Act. This will provide greater flexibility to adjust the way the Act works to take account of differing provisions in international agreements which may be negotiated in future. There has been a high level of stakeholder engagement on these amendments and the former Lord Advocate and the Crown Office engaged directly with the Home Office for their interests and they were satisfied that the provisions were proportionate. These amendments confer functions on the Lord Advocate, in that they relate to his function in serving overseas production orders made in Scotland, and thus alter the executive competence of the Scottish Ministers. The Scottish Government recommends consent for these provisions. The Scottish Parliament was content to pass an LCM for original provisions of the 2019 Act, and these amendments are seen by the Home Office as refining amendments to address implementation gaps.

Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and Sexual Offences Act 2003

9. With regard to the amendments relating to the orders under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and Sexual Offences Act 2003, the new measures will firstly allow Scotland to commence and use the new orders introduced in the 2016 Act, namely Sexual Harm Prevention Orders (SHPOs) and Sexual Risk Orders (SROs), by making these enforceable within other UK jurisdictions. Those provisions do not need an LCM, but are essential from a Scottish policy perspective. The provisions in Schedule 17 also provide for courts throughout the UK to vary or discharge such an order in respect of an offender in their jurisdiction regardless of where the order originated. This will address any confusion around the different orders and operational and reputational risks for forces

within UK jurisdictions, by virtue of a shared understanding of the terms of the SHPO and SRO regime. The move would limit the possible risk of movement of offenders to other UK jurisdictions arising from a lack of ability of the courts in those jurisdictions to scrutinise and adapt these orders. To the extent that these provisions confer power on the Scottish courts to vary or discharge orders made in other parts of the UK, they require an LCM as they make provision which would be within the legislative competence of the Scottish Parliament.

10. The Bill contains provision enabling England and Wales SHPOs and SROs to contain positive obligations as well as prohibitions (this is already the case for the new Scottish orders under the 2016 Act). These provisions do not extend to Scotland and therefore do not require an LCM but as a consequence of these provisions, the criminal offence contained in the 2016 Act of breaching an equivalent order from another part of the UK will be expanded to include breach of a positive obligation. This criminal offence makes provision for devolved purposes in Scotland, as it is creating a new criminal offence in Scots law in an area which is devolved. It therefore falls within the legislative competence of the Scottish Parliament and requires an LCM. While managing potential breaches of positive obligations associated with England and Wales SHPOs and SROs is an additional duty for Police Scotland to undertake, it is estimated that the number of breaches will be very low as the current number of breaches of such orders with restrictive conditions is believed to be very low. Moreover no new systems are needed to enforce Orders made in England and Wales with positive obligations as they will be managed through existing IT platforms.

11. The Scottish Government recommends consent for the provision in paragraphs 9 and 10 to enable a Scottish court to vary or discharge an equivalent order from another part of the UK and to expand the 2016 Act to include breach of a positive obligation in an equivalent order from another part of the UK within the offence contained in section 37 of that Act so that managing the breach of any positive risk management obligation deemed appropriate by a court in England and Wales can be undertaken lawfully by police in Scotland. This step thereby helps ensure a comparable regime in terms of this aspect of public protection within each jurisdiction.

Extraction of data from digital devices

12. A stated aim of the Bill is to provide a clear statutory basis for the police (including Police Scotland) and other law enforcement agencies to extract data from digital devices for purposes including the investigation of crime and where agreement has been given by the device owner or user (or in other limited circumstances for example, where the device owner or user is a child, is incapacitated, is missing or is deceased).

13. The provision in the Bill makes it clear that law enforcement agencies do not commit the offence of unlawful interception when they extract data from mobile devices. Their stated intention is not to enable greater powers for extraction, but to ensure the current practice undertaken by the police and other law enforcement agencies is lawful.

14. This follows publication (June 2020) by the Office of the Information Commissioner (ICO) of a report¹ into police practice around the extraction and analysis of data from mobile phones and other electronic communication devices of complainants, witnesses and suspects during the course of a criminal investigation.

¹ <https://ico.org.uk/about-the-ico/what-we-do/mobile-phone-data-extraction-by-police-forces-in-england-and-wales/>

15. The ICO questioned whether the use of common law powers and consent from the holder of the device would, in themselves, constitute lawful authority for interception of communications to take place under the Investigatory Powers Act 2016, and recommended that the legislative framework should be strengthened to ensure clarity for victims, witnesses and offenders, to address inconsistencies between forces and to clarify the lawful basis for data extraction.

16. 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 extent to which the technical process of police examination of digital devices constitutes “interception of communications” remains unsettled, and these provisions cover the extraction not just of communications but of information more generally. The UK and Scottish Government have agreed that these provisions require the consent of the Scottish Parliament. We are not yet in a position to recommend consent, but given this intermingling of powers, once the position around investigation of deaths is resolved satisfactorily the Scottish Government intends to bring forward a supplementary memorandum for these provisions in order to ensure a consistent approach that takes account of Scotland’s distinct position.

Extension of powers to other bodies

17. The draft Bill also contains a provision for UK Ministers to extend the use of the data extraction powers to other bodies. Home Office officials have previously been in discussion with Food Standards Scotland who would welcome such a power. The Scottish Government’s position is that there are other bodies in Scotland such as SEPA and local authorities who might also benefit from this. The Scottish Government intends to press for the legislation to contain a statutory duty to consult Scottish Ministers if there are plans to add powers to or remove powers from devolved bodies.

18. Much of the practical detail in relation to the data extraction clauses is not included in the Bill but is to be the subject of a separate Code of Practice. The Bill includes a statutory duty to consult Scottish Ministers in relation to the proposed Code of Practice. The Scottish Government is working with the UK Government to prepare a Scotland-specific Annex to the Code.

19. UK Ministers have been asked by the Scottish Government to consider the provisions covering extraction of data from a device for the purpose of the investigation of deaths where the clauses as currently drafted only allow for extraction of data from a device belonging to the deceased. The Crown Office and Police Scotland have confirmed that it is not possible in Scotland to categorically exclude the possibility that forensic extraction of data from a device belonging to another party would be required for the purpose of the investigation of deaths. An official level request for amendment from the Crown Office requesting that consideration be given to allowing any device, provided with the agreement of the witness to have information extracted from it, where it is proportionate and necessary for the purpose of the investigation of deaths was turned down by the Home Office on the grounds that they didn’t believe it was required. The former Lord Advocate’s asked the Home Office to reconsider that decision and to make similar provision for the investigation of death as is proposed for the investigation of crime given that the Scottish system for the investigation of deaths operates on quite different principles from those which apply in England & Wales. The Scottish Government do not currently recommend consent for these provisions. An update will be provided once a decision has been made as to whether or not the identified

risk is sufficiently material to prevent the Scottish Government recommending that the Scottish Parliament consent to these provisions.

Amendment of section 60 of the Police Act 1996

20. Home Office and Scottish Government officials corresponded on the drafting of clause 3 ('Special constables and Police Federations: amendments to the Police Act 1996'). In England and Wales, membership of the Police Federation is currently confined to 'members' of police forces and this (in England and Wales) does not include special constables. The primary purpose of clause 3 is to amend the Police Act 1996 to enable the Police Federation to represent special constables in England and Wales. The same amendments are not required for Scotland as, in Scotland, special constables are considered to be 'members' of the Police Service of Scotland and therefore already fall under the scope of the current provisions in the Police Act 1996 and can be represented by the Scottish Police Federation. The amendment of section 51 of the Police Act 1996 does not require consent as section 51 does not extend to Scotland. Although section 59 does extend to Scotland and relates to devolved matters, the amendments to that section which relate to Scotland do not result in a substantive change to the law of Scotland and are as a consequence of the changes being made for England and Wales (which do not require to be made for Scotland) to include references to special constables. A drafting approach was adopted which avoids creating parallel texts for those provisions relating to England and Wales on the one hand and Scotland on the other.

21. However, the amendment of section 60 of the Police Act 1996 in clause 3(8) will broaden the regulation-making power in that section and the Scottish Government is of the view that the consent of the Scottish Parliament is required for this. The amendment to section 60 would enable any provision to be made about the pay, pension or allowances and other conditions of service for secretaries and officers of the Police Federation and this includes the modification of any existing regulations, whereas the current version of section 60(2) enables the modification of specific regulations, albeit subsection (2) is without prejudice to the generality of subsection (1). The Scottish Government considers this amendment to be desirable for Scotland as it provides slightly greater flexibility in the regulations which may be made by Scottish Ministers about the pay, pension or allowances and other conditions of service for secretaries or officers of the Police Federation and the regulation-making power is not specifically tied to modifying specific existing regulations. This puts it beyond doubt that, in the future, Scottish Ministers could apply with modifications other regulations which are not currently listed in section 60(2) but which regulate the pay, pension or allowances or other conditions of service of police officers (for example regulations made under the Public Service Pensions Act 2013 for Federation officers who fall under that scheme).

22. The functions under section 60 (in or as regards Scotland) were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998. The Scottish Government take the view that this amendment will alter the executive competence of the Scottish Ministers and will make provision for purposes which are within the legislative competence of the Scottish Parliament. The Scottish Government recommends consent for these provisions.

Summary Jurisdiction (Process) Act 1881

23. On the application of section 4 of the Summary Jurisdiction (Process) Act 1881, this extends provision for the execution of process of English courts in Scotland to the provisions

in the Bill enabling a judge in England and Wales to make an order authorising the police to obtain information about the location of human remains outside of a criminal investigation. Scottish Government consider that the provision about cross-border enforcement of an English order which would extend to Scotland will require consent of the Scottish Parliament as the subject matter of the order is within devolved competence of the Parliament. The Scottish Government recommends consent for these provisions as there is a legitimate purpose in allowing enforcement of these provisions within Scotland.

Amendment to extend the annual reporting duty for the Police Covenant to cover non-Home Office forces

24. During Committee Stage of the Police, Crime, Sentencing and Courts Bill, the Shadow Policing Minister, Sarah Jones MP, tabled an amendment to extend the annual reporting duty in legislation for the Police Covenant to cover non-Home Office forces (British Transport Police, Civil Nuclear Constabulary, Ministry of Defence Police and the National Crime Agency). The plan prior to the introduction of the Bill was that the UK government expected those forces to sign up to the sentiment of the Covenant and engage in the reporting process, with an MoU detailing the administrative processes.

25. As the Bill had originally provided for the Police Covenant to extend to territorial police forces in England and Wales only, this would not previously have triggered the LCM process. However, given that UK Government have tabled provisions extending the reporting duty in legislation to cover non-HO forces, they will now do so in so far as they relate to reporting with regard to members of the British Transport Police based in Scotland, and insofar as the reporting requirement relates to non-reserved functions of the NCA operating in Scotland, consent of the Scottish Parliament is required. Civil Nuclear Constabulary and Ministry of Defence Police are reserved forces, so those aspects do not require consent even as regards Scottish functions.

26. The amendments will ensure the Scottish Ministers have the opportunity to engage, along with relevant UK Government departments, in preparing the report insofar as it relates to members of the BTP and NCA workforce in Scotland. The detail of how this will work in practice will be set out in an MoU which is still to be developed and agreed, however the principle that Scottish Ministers have some limited input into reporting on UK wide forces operating in Scotland is sound and will provide a proportionate mechanism for Scottish Ministers to feed in any views. The Scottish Government therefore recommends consent for these provisions.

Consultation

27. The Scottish Government officials have consulted widely with key stakeholders regarding provisions, including the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service and Police Scotland. These stakeholders are broadly supportive, although the consultation has identified one area (in relation to the power to extract information from digital devices of witnesses, victims and others) that requires to be resolved before the Scottish Government is able to recommend consent for that provision.

Financial Implications

28. No significant additional costs to the Scottish Government or any significant additional direct costs to the Scottish Criminal Justice Sector are envisaged as a result of the provisions within the Police, Crime, Sentencing and Courts Bill.

Conclusion

29. 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. The Scottish Government recommends consent for amendments to the Crime (Overseas Production Orders) Act 2019; orders under the Sexual Offences Act 2003 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016; extension of the Summary Jurisdiction (Process) Act 1881; amendment of section 60 of the Police Act 1996; and the amendment to extend the annual reporting duty for the Police Covenant to cover British Transport Police and National Crime Agency. The Scottish Government do not currently recommend consent for the power to extract information from digital devices of witnesses, victims and others until the matters set out above are clarified.

Draft Legislative Consent Motion

30. 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 amendments to the Crime (Overseas Production Orders) Act 2019; orders under the Sexual Offences Act 2003 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016; amendment of section 60 of the Police Act 1996; extension of the Summary Jurisdiction (Process) Act 1881; and the amendment to extend the annual reporting duty for the Police Covenant to cover British Transport Police and National Crime Agency so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers should be considered by the UK Parliament.”

Scottish Government
August 2021