

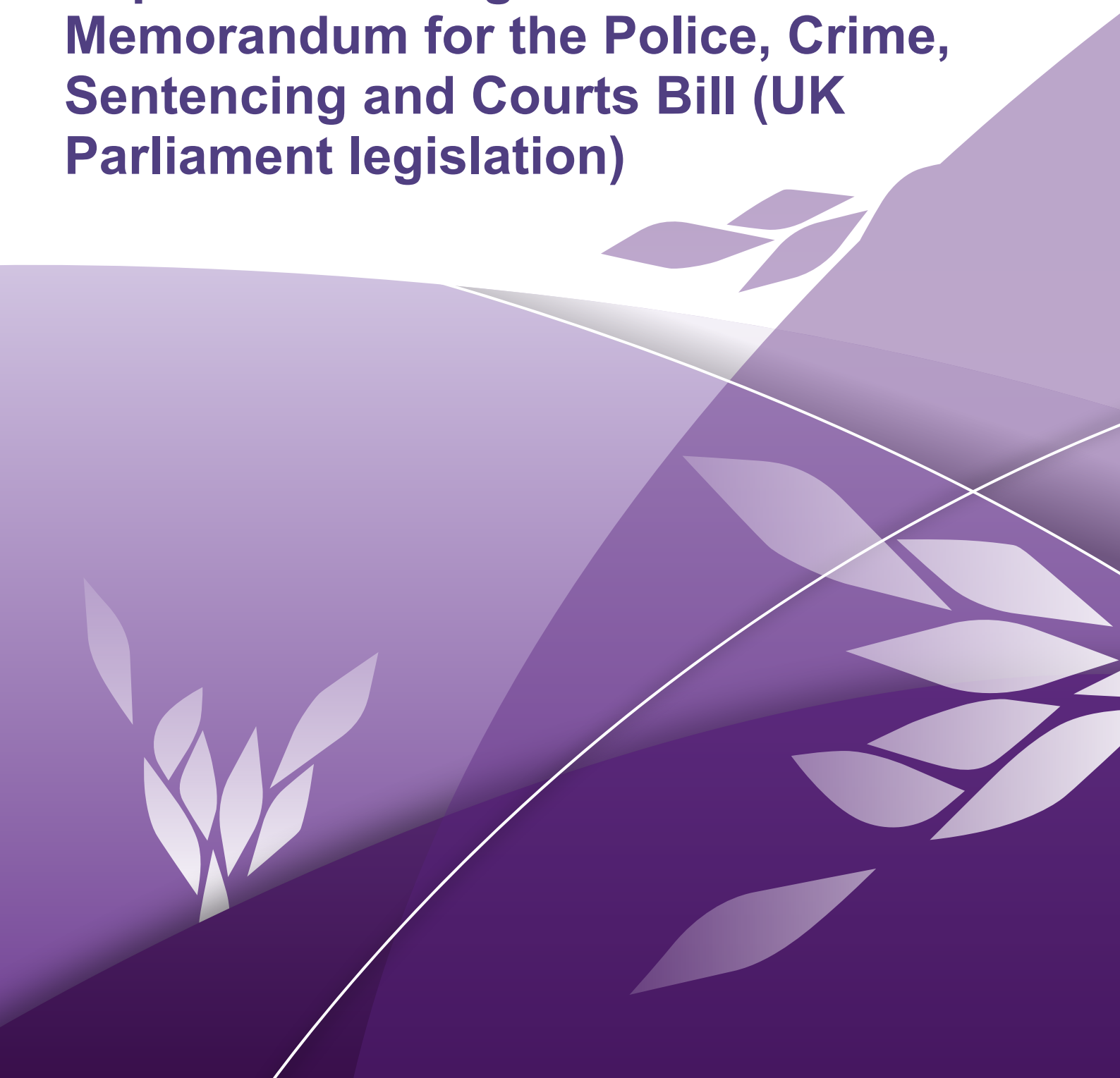


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Criminal Justice Committee

Report on the Legislative Consent Memorandum for the Police, Crime, Sentencing and Courts Bill (UK Parliament legislation)



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Criminal Justice Committee

To consider and report on matters relating to criminal justice falling within the responsibility of the Cabinet Secretary for Justice and Veterans, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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Introduction

1. At its meetings on 1 September and 6 October, Members considered a Legislative Consent Memorandum from the Scottish Government on the Police, Crime, Sentencing and Courts Bill (UK Parliament). The LCM can be found [here](#).
2. The Official Report for this session can be found on the Committee's [webpage](#).

Background

3. The Police, Crime, Sentencing and Courts Bill was introduced in the House of Commons on 9 March 2021. It is currently awaiting its Second Reading in the House of Lords.
4. The Bill makes provision for matters which are within the legislative competence of the Scottish Parliament. It also makes provision to alter the executive competence of the Scottish Ministers. As such, it is a relevant Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently one requiring the consent of the Scottish Parliament in relation to those provisions.
5. Accordingly Keith Brown MSP, the Cabinet Secretary for Justice and Veterans, under Rule 9B.3.1(a) of the Parliament's Standing Orders, lodged a Legislative Consent Memorandum (LCM) on the Bill on 6 August 2021. Although the Scottish Government has reservations about one aspect of the UK Bill, it is the Scottish Government's position that the Scottish Parliament should consent to the UK Parliament legislating in respect of the relevant provisions in the Bill. The draft of a motion to this effect (a legislative consent motion, in terms of rule 9.B.2 of Standing Orders) was therefore included in the LCM.

Outline of the UK 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. 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.
8. Measures in the Bill include provisions to:
 - protect the police and other emergency workers and enhance the well-being 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.
9. 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.

Provisions relating to Scotland

10. The provisions that apply to Scotland for 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.

Crime (Overseas Production Orders) Act 2019

11. Schedule 5 contains amendments to the Crime (Overseas Production Orders) Act

2019. The proposed amendments enable both the Secretary of State for Scotland 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. These amendments confer functions on the Lord Advocate, in that they relate to her function in serving overseas production orders made in Scotland, and thus alter the executive competence of the Scottish Ministers. The Scottish Government believes these amendments will address implementation gaps.

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

12. The new measures will 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 is to address any confusion around the SHPO and SRO orders. It will also 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. The Scottish Government supports these provisions, as they will confer power on the Scottish courts to vary or discharge orders made in other parts of the UK.
13. The Bill also 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). 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 creates a new criminal offence in Scots law in an area which is devolved. The Scottish Government recommends consent for these provisions to help ensure a comparable regime in terms of this aspect of public protection within each jurisdiction.

Amendment of section 60 of the Police Act 1996

14. 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 special constables already fall under the scope of the current provisions in the Police Act 1996 and can be represented by the Scottish Police Federation.
15. The amendment of section 60 of the Police Act 1996 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.

Summary Jurisdiction (Process) Act 1881

16. 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. These provisions will enable cross-border enforcement of an English order.

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

17. This amendment extends 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 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 memorandum of understanding, which is still to be developed and agreed. However, the Scottish Government believes that 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.

Extraction of data from digital devices and the extension of powers to other bodies

18. The Bill intends 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). The 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.
19. The draft Bill also contains a provision for UK Ministers to extend the use of the data extraction powers to other bodies. The Scottish Government's position is that there are other bodies in Scotland, such as SEPA and local authorities which might also benefit from these powers, and they intend 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.

20. 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. The Scottish Government have asked UK Ministers 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, given that the Scottish system for the investigation of deaths operates on quite different principles from those which apply in England & Wales.
21. The Scottish Government do not currently recommend consent for these provisions and will provide an update once a decision has been made.
22. The LCM indicates that the Scottish Government is not yet in a position to recommend consent to the data extraction provisions, and as such, they are not included in the legislative consent motion. The Committee took evidence from the Cabinet Secretary for Justice and Veterans on the reasons for this exclusion and for a progress update.

Criminal Justice Committee scrutiny

23. The Committee considered the LCM at its meeting on 1 September 2021. Members asked the Cabinet Secretary for Justice and Veterans, Keith Brown, to explain the Scottish Government's rationale for not including consent for the provisions to extract information from digital devices of witnesses, victims and others, and to extend the use of the data extraction powers to other bodies.
 24. The Cabinet Secretary explained that, at the time of lodging the LCM, the Lord Advocate had asked UK ministers to consider the case for extending the provisions on the extraction of information from devices to allow for the extraction of information from devices used by persons other than the deceased. This extension was not agreed to. However, UK ministers have committed to keeping the provisions under review, once they are in force. That will allow the issue to be returned to, should operational difficulties be identified.
 25. Mr Brown advised the Committee that the Scottish Government would not begin the formal LCM process on the provisions to extract information from digital devices until the draft Code of Practice is finalised. That is to allow the Scottish Parliament the opportunity to carry out proper scrutiny of the provisions before consenting to them.
 26. The Code of Practice is to be considered by the House of Lords in October, and at that point, a new version should be tabled. Once the Scottish Government is content with the final version of the Code of Practice, it will lodge a supplementary legislative consent memorandum for consideration by the Committee in relation to those provisions.
27. **The Committee recommends that the Parliament approves the legislative consent motion on the Police, Crime, Sentencing and Courts Bill, to be lodged by the Scottish Government.**

Delegated Powers and Law Reform Committee consideration

28. The Delegated Powers and Law Reform Committee considered the LCM at its meeting on 28 September 2021. The Committee agreed to write to the Scottish Government to seek clarity on provisions within the LCM which confer powers on UK Ministers in devolved areas (or partially devolved areas) where the Scottish Government is not currently recommending that consent is given.
29. The Committee notes that the Delegated Powers and Law Reform Committee has written to the Scottish Government to ask:
 - whether the three powers conferred on the Secretary of State by clauses 40 to 42, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU; and
 - how, where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 does not apply, the Parliament is to scrutinise the exercise of these three delegated powers conferred on UK Ministers in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.”

