

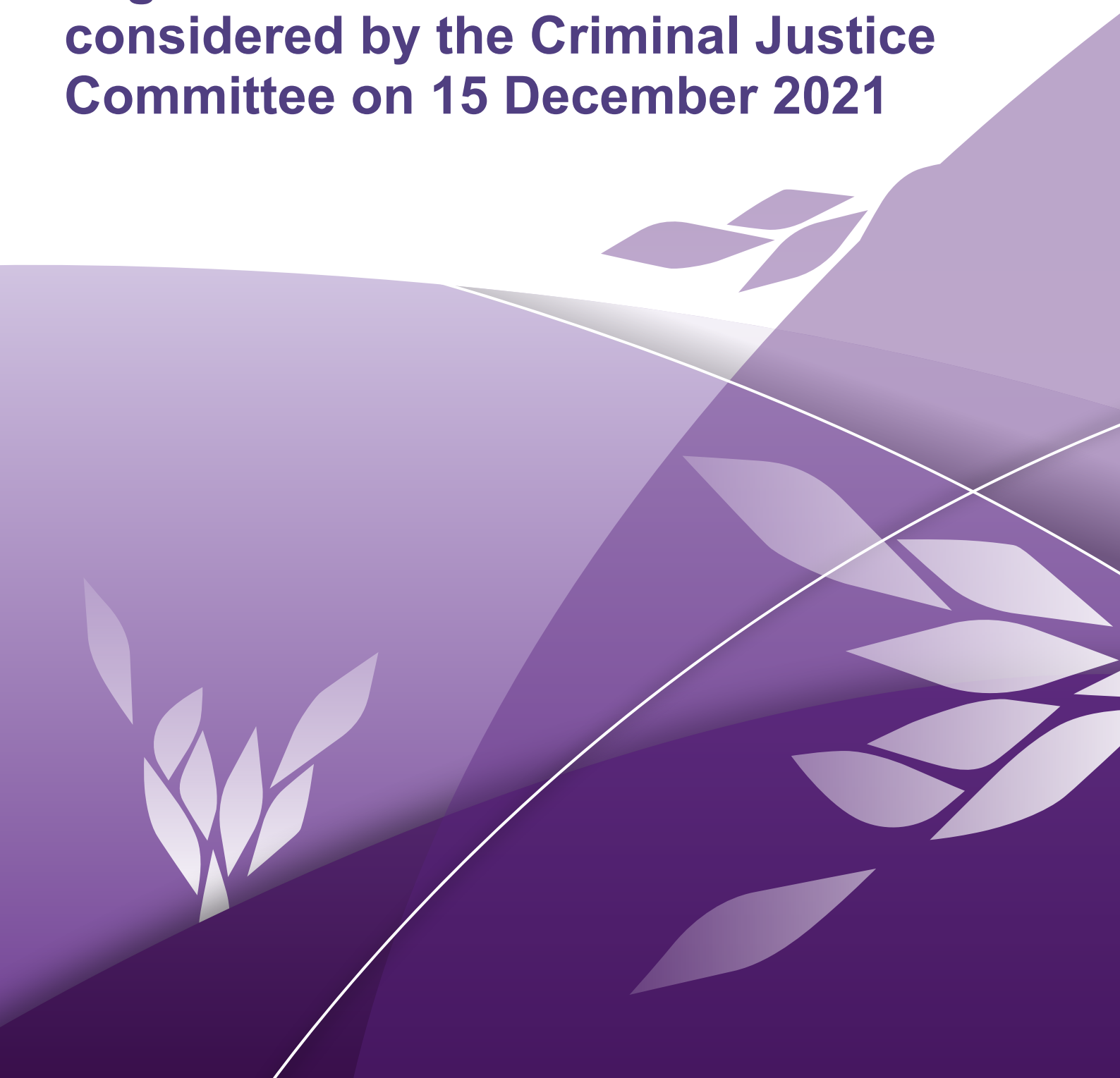


The Scottish Parliament
Pàrlamaid na h-Alba

Published 17 December 2021
SP Paper 71
4th Report, 2021 (Session 6)

Criminal Justice Committee

Legislative Consent Memorandums considered by the Criminal Justice Committee on 15 December 2021



Published in Scotland by the Scottish Parliamentary Corporate Body.

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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

Police, Crime, Sentencing and Courts Bill

1. The [Police, Crime, Sentencing and Courts 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.
2. The principal objective of the 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.
3. 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.
4. The Scottish Government lodged the [original LCM](#) for the Bill on 5 August 2021. The Bill has since been amended, and on 6 December 2021, Keith Brown MSP, Cabinet Secretary for Justice and Veterans, lodged a [Supplementary LCM](#) for the Bill
5. The 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).
6. 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*].”

Judicial Review and Courts Bill

7. The [Judicial Review and Courts Bill](#) was introduced in the House of Commons on 21 July 2021. It is currently awaiting Report Stage in the House of Commons.
8. 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.
9. The Bill applies largely to England and Wales only.
10. 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.
11. A [LCM](#) was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 17 November 2021.
12. 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”

Consideration by the Delegated Powers and Law Reform Committee

13. The Delegated Powers and Law Reform Committee ("the DPLR Committee") considered the Supplementary LCM for the Police, Crime, Sentencing and Courts Bill at its meeting on 14 December 2021.
14. The DPLR Committee agreed to draw to the Criminal Justice Committee's attention its recommendations on the Bill as amended (and in light of relevant proposed amendments by the Minister of State for Home Affairs in the House of Lords).
15. In its [original report](#), the DPLR Committee highlighted clauses 40 to 42, which include provision conferring three powers on UK Ministers in partially devolved areas regarding the extraction of information from digital devices. In particular:
 - Clause 40(1) - Duty to issue Code of Practice regarding use of information extraction powers and bring it into force by regulations
 - Clause 41(1) - Duty to make regulations about the extraction of confidential information
 - Clause 42(4) - Power to amend the list of persons authorised to exercise the powers to extract information from a digital device
16. The Committee noted in its report that there was no requirement for UK Ministers to obtain the consent of Scottish Ministers when exercising these powers in devolved areas. The Committee further noted that clauses 40 to 42 were police powers which did not appear to have been formerly within EU competence before the UK fully withdrew from the EU and therefore would not be covered by SI Protocol 2 (which only applies to regulations made by UK Ministers within devolved competence in areas formerly within EU competence).
17. Amendments have now either been agreed or proposed to these clauses (which are now clauses 41 to 43 of the Bill respectively). The DPLR Committee agreed to draw the Committee's attention to the following:
 - To note that amendments have been lodged by the Minister of State for Home Affairs in the House of Lords to remove the power in clause 42(1) (originally clause 41(1)) regarding the extraction of confidential information and replace it with further detail on the face of the Bill.
 - To note that the power in clause 43 (originally clause 42) to amend the list of authorised persons has been amended to insert a requirement on the UK Minister when making the regulations in devolved areas to consult the Scottish Ministers, but to note further that this is not a consent requirement.
18. The DPLR Committee also agreed to draw the Committee's attention to the recommendations that it has made in relation to other LCMs concerning Bills conferring powers on UK Ministers in devolved areas. These recommendations would apply equally to the powers in clauses 41 to 43, although would not apply to the power in clause 42(1) if the amendment to remove that power is agreed at

Report Stage in the House of Lords, and are that:

- the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;
 - the relevant powers, when exercisable within devolved competence, are conferred on the Secretary of State, and not on the Scottish Ministers;
 - where the powers are exercised by the Secretary of State in devolved areas, there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament; and
 - the powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
19. Likewise, the Committee noted that it remains the position that the process set out in SI Protocol 2 would not apply to the exercise of those powers of the Bill (as amended or in light of the proposed amendments referred to above) by the Secretary of State in devolved areas. Again, this is on the basis that they do not relate to an area formerly within EU competence before the UK fully withdrew from the EU.
20. The full letter from the DPLR Committee can be found in the Annex.

Consideration by the Committee and recommendation

21. The Committee considered the LCMs at its meeting on 15 December 2021. Keith Brown MSP, Cabinet Secretary for Justice and Veterans gave evidence on each of the LCMs.
22. The Committee raised no issues of concern.
23. **The Committee agreed 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.**
24. **The Committee agreed 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.**

Annex

14 December 2021

Dear Audrey

At its meeting on 14 December 2021, the Delegated Powers and Law Reform Committee considered the Supplementary LCM for the [Police, Crime, Sentencing and Courts Bill](#) (“the Bill”), focusing on the delegated powers that are relevant to Scotland.

As you are aware, the Scottish Government lodged the [original LCM](#) for the Bill on 5 August 2021. The [Committee reported](#) on the delegated powers relevant to Scotland on 4 October 2021. That report related to the last version of the Bill as introduced in the House of Lords dated 6 July 2021. The Bill has since been amended, and on 6 December 2021 the Scottish Government lodged a [Supplementary LCM](#) for the Bill.

Ahead of your consideration of the Bill on 15 December 2021, the Committee agreed to draw to your attention its recommendations on the Bill as amended (and in light of relevant proposed amendments by the Minister of State for Home Affairs in the House of Lords).

In its original report, the Committee highlighted clauses 40 to 42, which include provision conferring three powers on UK Ministers in partially devolved areas regarding the extraction of information from digital devices. In particular:

The Committee noted in its report that there was no requirement for UK Ministers to obtain the consent of Scottish Ministers when exercising these powers in devolved areas. The Committee further noted that clauses 40 to 42 were police powers which did not appear to have been formerly within EU competence before the UK fully withdrew from the EU and therefore would not be covered by SI Protocol 2 (which only applies to regulations made by UK Ministers within devolved competence in areas formerly within EU competence).

Amendments have now either been agreed or proposed to these clauses (which are now clauses 41 to 43 of the Bill respectively). The Committee agreed to draw your Committee’s attention to the following:

The Committee also agreed to draw your Committee’s attention to the recommendations that it has made in relation to other LCMs concerning Bills conferring powers on UK Ministers in devolved areas. These recommendations would apply equally to the powers in clauses 41 to 43, although would not apply to the power in clause 42(1) if the amendment to remove that power is agreed at Report Stage in the House of Lords, and are that:

- the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;
- the relevant powers, when exercisable within devolved competence, are conferred on the Secretary of State, and not on the Scottish Ministers;
- where the powers are exercised by the Secretary of State in devolved areas, there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament; and
- the powers conferred on the Secretary of State should be subject to a requirement for

the Scottish Ministers' consent when exercised within devolved competence.

Likewise, the Committee noted that it remains the position that the process set out in SI Protocol 2 would not apply to the exercise of those powers of the Bill (as amended or in light of the proposed amendments referred to above) by the Secretary of State in devolved areas. Again, this is on the basis that they do not relate to an area formerly within EU competence before the UK fully withdrew from the EU.

The Committee further agreed to bring to your attention the enclosed correspondence between the Committee and the Minister for Parliamentary Business dated 6 and 21 October 2021 in relation to the original LCM for the Bill, and the original LCM for the Health and Care Bill, with regards to options for how the Parliament could best scrutinise the exercise of powers by UK Ministers in devolved areas that are not formerly within EU competence before the UK fully withdrew from the EU.

Finally, the Committee agreed to write to the UK Government and the Scottish Government to draw the respective governments' attention to its recommendations on the Bill. I confirm I will provide you with copies of this correspondence once it has been issued.

I hope you find this information useful in your consideration of the Bill.

Yours sincerely

Stuart McMillan MSP

Convener of the Delegated Powers and Law Reform Committee

