



RESPONSE FOR THE FACULTY OF ADVOCATES

to the Consultation
on the Legislative Consent Memorandum
in respect of the

POLICING AND CRIME BILL

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1. The Faculty of Advocates approves of the Legislative Consent Memorandum in respect of the Policing and Crime Bill. Two of the areas identified relate to law enforcement across more than one jurisdiction, where there are clear benefits to legislating in a single UK statute. A third, firearms licensing, has similar potential UK-wide implications, and in any event requires UK legislation in order to empower the Scottish Ministers to charge a fee.
 2. The Faculty notes that the fourth area, powers to counter littering, lacks cross-border significance, but is designed to reinstate provisions originally in UK legislation. A Memorandum is therefore considered appropriate, though not as imperative as in the other cases.
 3. The Faculty also makes certain other observations, detailed below, concerning the content and structure of the Bill, which it is hoped may be a useful contribution to its passage.

Police Maritime Powers

4. The Faculty observes that the purpose of clauses 82 to 104 of the Bill is the extension of investigation powers over offences committed at sea. The regime in respect of England and Wales (to clause 93) is mirrored, with appropriate modifications, by provisions in respect of Scotland (from clause 94).
5. The Faculty considers a Legislative Consent Memorandum to be appropriate in respect of these provisions. In particular, the provisions on hot pursuit (clauses 84, 85, 96 and 97) address law enforcement on vessels moving between waters under Scottish, Northern Irish, and English and Welsh jurisdiction. The Faculty agrees that it is desirable that those provisions be substantively identical and, so far as possible, contained within the same legislation. To that end the Faculty anticipates that, so far as not already in place, parallel legislation should be in contemplation as regards Northern Ireland.

6. As regards the substantive provisions of the legislation, the Faculty is of the view that the restrictions at clauses 95 and 96 on the exercise of enforcement powers is an appropriate method of respecting the comity of nations; while noting in particular, in respect of the latter, that Article 27 of the United Nations Convention on the Law of the Sea provides a broad authority for the exercise of such powers where the effects of the activity under investigation are felt in the United Kingdom. The Faculty envisages that that authority should not be interpreted unnecessarily restrictively.
7. The Faculty observes that clauses 96(1) and 97(1)¹ employ different wording for the waters in which the right of hot pursuit may be exercised. The wording used at 96(1) corresponds with the defined term at clause 104(1). It appears that the clauses are intended to refer to the same waters; consequently the Faculty is concerned that an unintentional ambiguity may result from the use of different wording, and questions whether the defined term should be used in both clauses.
8. The Faculty observes that, in contrast to the provisions for England and Wales², law enforcement officers in Scotland are given no power to require the provision of information about items found on board ship.
9. The Faculty further observes that these provisions contain no express exclusion of criminal and civil liability of law enforcement officers in Scotland, in respect of things done by them reasonably and in good faith³. It is unclear why the Scottish provisions contain no such exclusion. The Faculty is keen to ensure that this has been considered in the Bill's passage.

Cross-Border Powers of Arrest

10. The Faculty agrees that it is appropriate for the gap identified to be addressed in the way proposed by the legislation. An urgent and serious investigation within the United Kingdom ought not to be compromised by the presence of a suspect in a jurisdiction different from that of the investigating force.
11. Given the importance, and particularly the complexity of the relationships involved, which by definition involve the enforcement of justice across the United Kingdom, the Faculty considers it essential that these provisions be contained within UK legislation.
12. With regard to the substance of the legislation, urgency is provided for at new section 137C. The Faculty observes, however, that key to the proposed scheme is the method of defining those offences to which it applies. As drafted, those depend on specification in secondary legislation, with appropriate devolved consents, and are subject to affirmative resolution procedure. Only indictable offences may be specified.

1 And in clauses 84(1) and 85(1) in respect of England and Wales.

2 At clause 87(3).

3 The exclusion for England and Wales is at clause 90(5).

13. The Faculty observes that many such offences exist in Scotland only at common law, which is not necessarily the case for England and Wales. It is anticipated that care will be taken to ensure that this be properly taken into account when specification comes to be made.
14. The Faculty considers that the interaction between new sections 137A(8), 137B(2) and 137B(3) creates a potential ambiguity as to whether an offence may be specified in respect of one jurisdiction alone, or whether by specification it becomes specified in all three jurisdictions. The consent provision at new section 137B(4) suggests that the latter is intended to be the case. However, the Faculty observes that this creates a risk of a divergent law and order policy within one jurisdiction hindering specification, and thereby compromising the introduction of a desired application of cross-border arrest between the other two. This may need to be refined in course of the Bill's passage.
15. In a similar vein, it appears (despite the absence of a conjunctive 'and' within the new section 137B(3)) that an offence may be specified only if indictable within all three jurisdictions. Again, this creates a risk that divergence in the law on indictment in one jurisdiction may frustrate a desired application of cross-border arrest between the other two.
16. It does not appear to be envisaged that the cross-border Entry and Search powers at clause 106 be extended to Scotland. As formed they make comprehensive provision for the exercise of powers where the jurisdictions concerned are Northern Ireland and England & Wales. The Faculty raises the question whether they should be extended to cover scenarios involving Scotland.

Littering powers

17. These provisions are intended to re-enact powers, repealed accidentally, of local authorities to take certain measures to combat littering.
18. The Faculty expresses no view on the policy behind those provisions, other than to agree that it is desirable that behaviour considered anti-social should not escape attention simply by virtue of unrelated errors within a legislative process.
19. The Faculty does note, however, that environmental matters are within competence of the Scottish Parliament; and that the powers and behaviour addressed by these provisions, being entirely local in nature, do not inherently merit the attention of UK legislation. The Faculty does not consider such a course to be inappropriate, but does observe that no broader principle is raised thereby.

Firearms

20. The Faculty considers the control of firearms to be an important function of government. Furthermore, as the control of their use and movement raises concerns common across the jurisdictions, it is appropriate that that control not be exercised divergently without cause.

21. Where this requires the issue of licences, and the imposition of fees therefor, it is necessary for powers to be put in place allowing common policies to be pursued. As a matter of policy, the Faculty therefore considers these provisions to be appropriate.
22. In any event, it is noted that the fee regime envisaged by the Bill covers licensing powers already devolved to Scotland. In the view of the Faculty, these provisions are thus not only appropriate but necessary.