

LEGISLATIVE CONSENT MEMORANDUM

POLICING AND CRIME BILL

Background

1. This memorandum has been lodged by Michael Matheson MSP, Cabinet Secretary for Justice. The Policing and Crime Bill was introduced in the House of Commons on 10 February 2016. The Scottish Government is currently seeking further amendments and assurances about the content of the Bill in relation to cross-border powers of arrest and has lodged a draft Legislative Consent Motion while this is ongoing. If the Scottish Ministers are satisfied with the outcome of discussions with the UK Government a supplementary motion will be lodged.

2. The Bill can be found at:

<http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0055/17055.pdf>

Content of the Policing and Crime Bill

3. The purpose of the Policing and Crime Bill as stated by the UK Government is to:

- Further improve the efficiency and effectiveness of police forces, including through closer collaboration with other emergency services.
- Enhance the democratic accountability of police forces and fire and rescue services.
- Build public confidence in policing.
- Strengthen the protections for persons under investigation by, or whom come into contact with, the police.
- Ensure that the police and other law enforcement agencies have the powers they need to prevent, detect and investigate crime.
- Further safeguard children and young people from sexual exploitation.

4. The Bill makes provision in a number of areas which extend mainly to England, or England and Wales only. The Speaker has therefore certified various provisions within the Bill under EVEL (English Votes for English Laws).

Provisions which relate to Scotland

5. As noted above, whilst a significant number of provisions contained within the Bill extend solely to England, or England and Wales, there are aspects of the Bill which are intended to have effect in Scotland (either in full or in part) or which affect/alter the legislative competence of the Scottish Parliament:

Police maritime powers

Policy intent

6. In general, chapter 6 of Part 4 of the Bill aims to extend police powers to investigate offences committed on vessels operating at sea.

7. Clause 82 gives English and Wales law enforcement officers powers to board a United Kingdom (UK) ship in England and Wales waters, foreign waters or international waters, a ship without nationality in England and Wales waters or international waters, a foreign ship in England and Wales waters and a ship registered under the laws of a relevant territory in England and Wales waters. The powers are set out in clause 86 (to stop, divert and detain), clause 87 (search and obtain information) and clause 88 (powers of arrest and seizure) and are exercisable for the purpose of preventing, detecting, investigating and prosecuting an offence under the law of England and Wales.

8. Clause 83 restricts the exercise of these powers. The Secretary of State must give authority before the powers are used on a UK ship in foreign waters, or a foreign ship in England and Wales waters.

9. Clause 84 gives England and Wales law enforcement officers powers to pursue a vessel into Scotland and Northern Ireland waters if the vessel is pursued there from England and Wales waters or international waters (subject to the restrictions in clause 85 which requires authority from the Secretary of State in relation to foreign ships and ships registered under the law of a relevant territory). Again, the powers are exercisable for the purpose of preventing, detecting, investigating and prosecuting an offence under the law of England and Wales.

10. It is considered desirable that Scottish law enforcement officers should be given similar powers for the purpose of preventing and investigating an offence committed on vessels operating at sea under the law of Scotland. Chapter 6 therefore makes reciprocal provisions with regard to Scotland.

11. Law enforcement officers for the purposes of this Chapter are defined to include constables of the Police Service of Scotland, British Transport Police Force constables, designated customs officials, National Crime Agency officers with the powers of a constable in Scotland and any other person specified in regulations by the Secretary of State. Those regulations may not make devolved provision without the consent of the Scottish Ministers.

12. Clause 94 gives Scottish law enforcement officers specified maritime enforcement powers in relation to a UK ship in Scotland waters, foreign waters or international waters, a ship without nationality in Scotland waters or international waters, a foreign ship in Scotland waters or international waters and a ship registered under the laws of a relevant territory in Scotland waters or international waters. The enforcement powers are set out in clause 98 (to stop, divert and detain), clause 99 (search and obtain information), clause 100 (powers of arrest and seizure) and clause 101 (protective searches) and are exercisable for the purpose of preventing, detecting or investigating an offence under the law of Scotland.

13. Similar to the position in relation to England and Wales, enforcement officers under clause 83, the Secretary of State must give authority before the powers are used on a UK ship in foreign waters, or a foreign ship or a ship registered in a relevant territory in Scotland waters. It is considered appropriate for the Secretary of State to have this function given that this is a matter of the international law of the sea and international

relations and mirrors the position in relation to similar maritime enforcement powers elsewhere (for example, under the Modern Slavery Act 2015).

14. Clause 96 gives Scottish law enforcement officers powers to pursue a vessel into England and Wales and Northern Ireland waters if the vessel is pursued there from Scotland waters or international waters. This is again subject to the restrictions in clause 97 which require authority from the Secretary of State in relation to a foreign ship or ship registered in a relevant territory. The powers may be exercised for the prevention, detection or investigation of an offence under the law of Scotland.

15. Clause 102 contains supplementary provisions and clause 103 provides that it is an offence to obstruct or fail to comply with a requirement imposed by a law enforcement officer under Chapter 6 or to knowingly or recklessly provide false information or to fail to disclose information.

Background

16. At present, police jurisdiction is limited to the territorial waters, which extends to 12 nautical miles from the shore¹. This can hamper the effective disruption of criminal activity in the maritime context, as Scottish law enforcement agencies may not always be able to act when a crime has taken place on ships around the UK or on the high seas.

17. The maritime enforcement provisions do not raise any significant or sensitive policy issues. The provisions in relation to maritime cross-border pursuit are consistent with the position regarding cross-border pursuit powers on land. They are also consistent with the reciprocal cross-border maritime enforcement powers in the Modern Slavery Act 2015, for which the Scottish Parliament passed a Legislative Consent Motion on 15 January 2015².

18. Scottish Government officials have discussed these provisions with Police Scotland, who have raised no issues.

Reasons for seeking a legislative consent motion

19. The Bill makes provisions relating to Scottish law enforcement officers and the policing of Scotland waters which relate to devolved matters. In particular, the provisions in Chapter 6 of Part 4 which relate to Scotland and clause 84 which provides power to England and Wales law enforcement officers to pursue vessels into Scotland waters.

¹ In Scotland, the Police and Fire Reform (Scotland) Act 2012 empowers the Police to carry out the 'policing of Scotland' and that phrase is defined as "carrying out police functions in or as regards Scotland". 'Scotland' is defined for the 2012 Act by reference to the Scotland Act 1998 at section 126(1) - which provides that Scotland includes the territorial sea of the United Kingdom which is adjacent to Scotland. In effect then these definitions work together to limit police jurisdiction to these waters.

²<http://www.parliament.scot/LegislativeConsentMemoranda/ModernSlaveryBillLCM.pdf>

Cross-border powers of arrest

Policy Intent

20. Clause 105 of the Bill was inserted into the Bill at Report Stage in the House of Commons to fill a gap in cross-border arrest powers. This clause inserts new sections into the Criminal Justice and Public Order Act 1994 (“the 1994 Act”).

21. The provisions will allow people suspected of serious offences in Scotland to be arrested in other parts of the UK by police from those jurisdictions. Police Scotland will have a role in authorising the holding of these suspects elsewhere in the UK until they can be re-arrested, with a view to interviewing, charging and ultimately bringing them to trial in Scotland. The provisions will also allow people suspected of serious offences in England, Wales and Northern Ireland to be arrested and held in Scotland by Police Scotland. In those cases Police Scotland will have responsibilities towards the suspects arrested until police from the investigating jurisdiction can come and re-arrest them with a view to interviewing, charging and bringing them to trial in England, Wales or Northern Ireland. The provisions which will apply to Scotland are as follows:

- Section 137A will allow police officers to arrest someone on suspicion of having committed an offence in another UK jurisdiction. Provisions have been included to ensure that the power will not be used to detain people unnecessarily. These restrict the power of arrest so it can only be used in urgent cases and in relation to serious offences. Following arrest, officers from both jurisdictions will need to authorise keeping the person in custody . Scottish Government officials have been working closely with UK government colleagues to try to ensure that these amendments strike the right balance.
- Section 137B allows for serious offences to be specified in regulations. Discussions are ongoing between Scottish Government and the Home Office about the appropriate mechanism for making those regulations.
- Section 137C allows police from the arresting jurisdiction to hold the arrested person until they can be collected by officers from the investigating jurisdiction. This is subject to strict time limits and requirements for authorisation by senior officers from both the arresting and investigating forces.
- Section 137D protects the rights of persons arrested under section 137A. These include rights to be given certain information as well as rights to have others informed about their arrest and to have access to legal advice. The rights for Scottish suspects are based on rights they would have if arrested in Scotland, as set out in the Criminal Justice (Scotland) Act 2016.

Background

22. There are already provisions about cross-border arrest in the 1994 Act. These allow people suspected of an offence in Scotland to be arrested in England, Wales or Northern Ireland. They can be detained without warrant by Police Scotland or arrested under warrant by police from England, Wales or Northern Ireland. There are symmetrical provisions which allow suspects from England, Wales and Northern Ireland to be arrested in Scotland, either without warrant by police from the investigating jurisdiction or under warrant by Police Scotland.

23. There are currently no powers of arrest available in urgent investigations where an individual commits a serious offence in one jurisdiction, no arrest warrant has been issued and the suspect turns up unexpectedly in another UK jurisdiction. Even if there are strong arguments for arresting and holding the suspect, the local police lack clear power to do so.

24. The aim of the cross-border arrest provisions in the Bill is to provide a power of arrest to local police in the circumstances outlined above. These provisions were prepared and inserted into the Bill at relatively short notice. They are complex cross-jurisdictional provisions which will apply to and affect Scotland in a number of different ways. The provisions about arresting Scottish suspects will extend to England, Wales and Northern Ireland but Police Scotland will have a role in authorising the detention of those suspects and in coming to re-arrest them. The provisions about suspects from other UK jurisdictions will be relied on to arrest and detain people in Scotland. It is likely that the provisions will be refined by amendment in the House of Lords.

25. It is intended that these new arrest powers will only be used in the small number of serious and urgent cases where it is not possible to wait until the person can be arrested under warrant or by police from the investigating jurisdiction.

Reasons for seeking a Legislative Consent Motion

26. The aim of the cross-border arrest provisions is to provide a new power of arrest to local police where there is an urgent need to detain someone who is suspected of committing a serious offence in another UK jurisdiction. This recognises that criminals do not respect the internal boundaries between UK jurisdictions. It would not be possible for a Scottish Parliament Bill to deliver the policy required. Elements of the provisions about cross-border arrest are clearly devolved but they would not work on their own. Instead the devolved provisions need to be woven into a set of complex cross-jurisdictional powers which cannot be easily divided along reserved/devolved lines. The only meaningful way to deliver the powers necessary to deliver the policy aim is by making provision in a UK Bill.

Restoring littering powers of Scottish local authorities under sections 92, 93 and 94 of the Environmental Protection Act 1990

Policy intent

27. The policy intent is to restore, on a like-for-like basis, certain powers in relation to litter contained within the Environmental Protection Act 1990 ("the 1990 Act"), which were accidentally repealed in Scotland by the UK Government by the Anti-social Behaviour, Crime and Policing Act 2014. This repeal has left a gap in the powers available in Scotland to tackle littering. New clause 146 (Powers of Scottish litter authorities) therefore re-enacts sections 92, 93 and 94 of the 1990 Act in Scotland and so re-enacts the powers for Scottish local authorities to issue litter abatement notices and street litter control notices. The policy intent is simply to re-enact the following sections that existed under the 1990 Act:

- Section 92, which provides Scottish local authorities' with a power to issue **Litter Abatement Notices**. These are used when organisations with a responsibility to keep their land clear of litter are not fulfilling their duty.

- Section 93, which enables Scottish local authorities to issue **Street Litter Control Notices**. These are used to instruct businesses to keep the street or land near their premises clear of litter.
- Section 94 covers **Street litter supplementary provisions**. These contain powers for the Scottish Ministers to describe the types of commercial or retail premises and land for which Street Litter Control Notices may be issued. It also covers the litter and refuse clearing considerations which may be contained within such notices, requirements in relation to serving the notices, appealing them, compliance and the penalty for failing to comply. It also provides that such notices are in place before the repeal is revived.

Background

28. The powers are intended to provide flexibility, at local level, to tackle litter problems. These powers are currently unavailable to Scottish local authorities due to their repeal by the Anti-Social Behaviour, Crime and Policing Act 2014. This accidental repeal has only recently come to light and the Scottish Ministers are supportive of the restoration of these powers.

29. It should be noted that the repeal of sections 92 to 94 by the Anti-Social Behaviour, Crime and Policing Act 2014 did not affect notices issued before the date of the coming into force of those repeals. This means that Scottish notices issued before those repeals are still valid and can be enforced against accordingly. This is on the basis that section 16 of the Interpretation Act 1978 applies in respect of existing notices. Local authorities will be able to use the re-enacted provisions to issue new notices.

Reasons for seeking a Legislative Consent Motion

30. The environment is a devolved matter. However, when the UK government's Anti-Social Behaviour, Crime and Policing Act 2014 repealed sections of the Environmental Protection Act for England and Wales it did so for Scotland too. As these powers were erroneously repealed by a UK Act it is appropriate that they are restored as soon as possible through UK legislation, rather than an act of the Scottish Parliament. Legislative consent is required to allow the UK Parliament and Government to use the Policing and Crime Bill to do so.

Part 6 - Firearms

Policy intent

31. The provisions in Part 6 of the Bill stem largely from a 2014 report into firearms legislation by the Law Commission for England and Wales. While the Law Commission's report recommends that there should be a fundamental "codification" of firearms legislation, the provisions in the Bill only seek to address a number of immediate or urgent issues identified by the Home Office and the police.

32. In summary, the provisions in Part 6 seek to clarify the meaning of "firearm" for the purposes of the legislation; specifically define the meaning of "antique firearm"; set out a new offence with regard to the possession of articles intended to convert imitation firearms into firearms; set out controls on deactivated weapons; make provision for the charging of

fees in certain circumstances; and provide for the issue of statutory guidance to the police in connection with the firearms legislation.

Background

33. The majority of firearms legislation remains reserved to the UK Government and applies throughout Great Britain. Northern Ireland has its own firearms legislation. The exception to this is for air weapons licensing, which was devolved under the Scotland Act 2012 and is being introduced under Part 1 of the Air Weapons and Licensing (Scotland) Act 2015 (“the 2015 Act”).

<http://www.legislation.gov.uk/asp/2015/10/contents/enacted>

34. The Scottish Ministers are supportive of the provisions in the Bill in principle, but there are a few areas of detail which have yet to be finalised. In particular, the Scottish Ministers have sought to ensure that any amendments to the definitions of “firearm” and “lethal barrelled weapon” at clause 111 do not adversely impact the “meaning of air weapon” as set out in section 1 of the 2015 Act. This is founded in the definition of “firearm” at section 57(1) of the Firearms Act 1968.

<http://www.legislation.gov.uk/ukpga/1968/27/contents>

Reasons for seeking a Legislative Consent Motion

35. Clause 115 requires the legislative consent of the Scottish Parliament as it alters the executive competence of the Scottish Ministers. Specifically, it provides for the Scottish Ministers to charge a fee for the grant, variation or renewal of an authority given under section 5 of the Firearms Act 1968. Such an authority allows a person to possess, purchase, acquire, manufacture, sell or transfer certain weapons which are otherwise subject to a general prohibition. Section 5 authorities are already granted or refused by the Scottish Ministers, on the advice of the Police Service of Scotland. However, there is no provision for a fee to be charged within the current legislation.

36. Clause 115 also amends the fee provisions in relation to the granting, variation or renewal of club approvals under section 15 of the Firearms (Amendment) Act 1988, and of museum firearms licences under the Schedule to that Act. These functions are executively devolved (by virtue of SI 1999/1750). The Scottish Parliament’s consent will therefore be required in so far as clause 115 alters the Scottish Ministers’ existing fee-charging functions in respect of club approvals and museum firearms licences.

<http://www.legislation.gov.uk/ukpga/1988/45/contents>

37. It is recommended that the Scottish Parliament consents to the UK Parliament legislating in this area because it provides a consistent framework throughout Great Britain and provides for an appropriate contribution towards the costs of determining applications under the firearms legislation.

Consultation

38. The following aspects of the Bill have been, or are due to be, the subject of consultation activity:

Police maritime powers

39. These provisions do not raise any significant or sensitive policy issues. They are consistent with the position regarding cross-border pursuit powers on land. They are also consistent with the reciprocal cross-border maritime enforcement powers in the Modern Slavery Act 2015, for which the Scottish Parliament passed a Legislative Consent Motion on 15 January 2015. Scottish Government officials have discussed these provisions with Police Scotland, who have raised no issues.

Cross-border powers of arrest

40. The gap in cross-border arrest provisions was raised by Police Scotland. The provisions themselves were prepared and tabled as amendments at short notice so it was not possible to consult on them in advance. Scottish Government officials are now engaging with stakeholders to gather views on the provisions, with a view to raising any issues with UK government before the Bill is considered in the House of Lords.

Restoring littering powers of Scottish local authorities under sections 92, 93 and 94 of the Environmental Protection Act 1990

41. This provision simply restores powers which were repealed in error. Therefore consultation is not necessary.

Firearms

42. The Home Office has not yet consulted on the level of fees to be proposed.

Financial Implications

43. The financial implications associated with the relevant provisions contained within the Bill are as follows:

Police maritime powers

44. These provisions do not have any significant financial implications.

Cross-Border powers of arrest

45. There will be resource implications for Police Scotland in dealing with arrests made under this new power but these should not be significant. It is only intended to be used for a small number of serious, urgent cases. Defining the list of serious offences for which the new power of arrest can be used will determine how small that number is likely to be.

Restoring littering powers of Scottish local authorities under sections 92, 93 and 94 of the Environmental Protection Act 1990

46. As this provision restores the status quo there are no new financial implications.

Firearms

47. The proposal to introduce a new fee for authorities under section 5 of the Firearms Act 1968 is an enabling provision. The level of fees will be set out in regulations made by the Secretary of State. These have yet to be proposed or consulted on. It is therefore not yet possible to assess the costs to individuals or businesses or the contribution which the fee may make towards the cost of processing applications under section 5 of the Firearms Act 1968.

48. The potential costs or benefits of the remaining provisions in Part 6 of the Bill are not known, but are not expected to be significant.

Draft Legislative Consent Motion

49. The Scottish Government continues to undertake detailed scrutiny of the Policing and Crime Bill and is currently seeking further assurances and adjustments in respect of this legislation in relation to cross-border powers of arrest. A number of those adjustments relate to amendments brought forward on 6 June without sufficient opportunity for the Scottish Ministers to consider their content.

50. Any further Legislative Consent Motion will reflect the outcome of further dialogue in respect of these matters and will cover all aspects of the Bill, both financial and non-financial, which require the Scottish Parliament's consent. If the Scottish Ministers are satisfied with UK Government amendments in relation to cross-border powers of arrest it will recommend that the Parliament agrees to give legislative consent. In the meantime, and in line with Standing Orders Rule 9B.3(3)(c), the Scottish Government provides the following draft motion to illustrate its position as set out in this memorandum:

“That the Parliament agrees that the provisions of the Policing and Crime Bill, introduced in the House of Commons on 10 February 2016, so far and as long as they are amended to satisfactorily reflect representations made by the Scottish Ministers, where these matters fall within the legislative competence of the Scottish Parliament or alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”.

Conclusion

51. It is considered that the Policing and Crime Bill has the potential to deliver a number of benefits for Scotland. It is, however, clear that in order for those benefits to be realised, the UK Government must strengthen its efforts to engage with the Scottish Government and Scottish Parliament to agree further improvements.

**Scottish Government
June 2016**

This Legislative Consent Memorandum relates to the Policing and Crime Bill (UK legislation) and was lodged with the Scottish Parliament on 23 June 2016

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