SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Health and Wellbeing, is:

“That the Parliament agrees that the relevant provisions of the Anti-social Behaviour, Crime and Policing Bill, introduced in the House of Commons on 9 May 2013, relating to the criminalisation of forcing a person to marry, cross-border application of the new Sexual Harm Prevention and Sexual Risk Orders and in respect of a new firearms offence, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the functions of Scottish Ministers, should be considered by the UK Parliament.”

Background

2. This is a supplementary Legislative Consent Memorandum (LCM) for the Anti-social Behaviour, Crime and Policing Bill (“the Bill”). The Parliament passed a previous motion for the Bill on 8 October 2013 for provisions which related to the abolition of the Police Negotiating Board, dangerous dogs law and witness protection law.

3. This supplementary memorandum has been lodged by Alex Neil, Cabinet Secretary for Health and Wellbeing, under Rule 9.B.3.1(c) (i) of the Parliament’s Standing Orders. The Bill was introduced in the House of Commons on 9 May 2013 and amendments tabled October 2013. The latest version of the Bill can be found at:

http://services.parliament.uk/bills/2013-14/antisocialbehaviourcrimeandpolicingbill.html

Content of the Bill

4. The provisions of the Bill do not generally extend to Scotland, such as the reforms to anti-social behaviour policy. However, as outlined above, some parts of the Bill do now extend to Scotland by means of the previous LCM for the abolition of the Police Negotiating Board, elements of dangerous dogs and witness protection law, and in reserved areas such as firearms.

5. The main elements of the Bill include:

- Making a criminal offence of forcing a person into marriage
- A range of antisocial behaviour measures such as replacing, amongst other things, ASBOs through the creation of criminal behaviour orders, new powers to seek injunctions to prevent nuisance and annoyance and the creation of public space protection orders,
- Changes to dangerous dogs law,
- Changes to firearms law,
- Creation of new offences relating to forced marriage,
- Reforms to policing,
- Changes to civil prevention orders under the Sexual Offences Act 2003, and
changes to extradition law.

**Provisions which relate to Scotland**

6. The following paragraphs describe the specific provisions, for which consent is sought in terms of the Legislative Consent Motion, and provide background on their application in Scotland.

*Clause 104 of the Bill - Civil Preventative Orders*

7. Clause 104 of and Schedule 5 to the Bill amend Part 2 of the Sexual Offences Act 2003 ("the 2003 Act"), by establishing two new civil preventative orders in England and Wales. The Sexual Harm Prevention Order (SHPO) will replace Sexual Offences Prevention Orders and Foreign Travel Orders and will be available in relation to a person with a relevant sexual conviction. The Sexual Risk Order (SRO) will replace Risk of Sexual Harm Orders, and will be available in relation to a person without a relevant conviction. These new orders, which are designed to protect any person in the United Kingdom from the risk of sexual harm (and children under 18 or vulnerable adults elsewhere in the world), will only be imposed by the courts in England and Wales, but it will be an offence in Scotland to fail to comply with them.

8. Similar to a Sexual Offences Prevention Order, which it replaces, the SHPO will be made in England and Wales where an offender has been convicted of a relevant sexual or violent offence and prohibitions are necessary to protect the public. A SHPO will also prohibit the offender from doing anything described in the order, and can include foreign travel restrictions.

9. The court may only make a SHPO if it is satisfied that this step is necessary to protect the public or any particular members of the public in the United Kingdom from sexual harm from the person who is the subject of the order. This replaces the test of "serious sexual harm" in existing provision in the 2003 Act. An SHPO can also be granted in order to protect children under 18 and vulnerable adults abroad.

10. Similar to those subject to Risk of Sexual Harm Orders, which the SRO replaces, it will not be necessary for those subject to a SRO to have a conviction for a sexual (or any) offence. A SRO will also prohibit the subject of the order from doing anything described in it. Similar to those on the "Sex Offenders' Register", a person made the subject of a SRO will be required to provide certain information to the police within 3 days of the order being served.

11. The SRO may be made in relation to any person and the prohibitions which may be imposed in it are those which are necessary for the purpose of protecting any person or persons generally from physical or psychological harm caused by the person concerned in the United Kingdom, or for protecting any person or persons generally aged under 18 years or who are vulnerable adults from physical or psychological harm caused by the person concerned outside the United Kingdom. As with the SHPO, an SRO may include a prohibition on foreign travel.

12. While much of Part 2 of the 2003 Act extends to Scotland, the measures in this Bill are considered to be devolved as they relate to the criminal law in Scotland. Scotland's Sexual Offences Prevention Order (SOPO), and Risk of Sexual Harm Order (RSHO) legislative provisions are slightly different and, in fact, there is an
entirely separate statutory basis for Scottish RSHOs, namely Sections 2 - 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

13. It will be a criminal offence (punishable by up to five years' imprisonment) for an individual subject to a SHPO or SRO to fail to comply with any of the prohibitions, restrictions or conditions in the Order, or to fail to comply with the relevant notification requirements contained therein.

14. Accordingly, while these Orders are civil in nature they are backed up by heavy criminal penalties. The UK Government are keen to avoid creating any loopholes in the new regime. Consequently it will be important to provide that it will be an offence in Scotland for an individual to breach a condition of a SHPO or SRO in Scotland. The Scottish Government agree that it is prudent to avoid any such legislative loophole, and that in public protection terms it should be an offence in Scotland to fail to comply with the conditions of any SHPO/SRO imposed by the courts in England and Wales. Similar provision is also being made in respect of Northern Ireland. Further amendments to the Bill are anticipated in this regard.

15. Criminal law and sentencing are devolved and therefore fall within the legislative competence of the Scottish Parliament. The consent of Parliament is therefore required to extend the relevant provisions of Section 104 of the Bill to Scotland.

Firearms

16. The new firearms offence in the Bill relates to possession for sale or transfer of any prohibited weapon and is committed where the conduct is undertaken “without the authority of the Secretary of State or the Scottish Ministers”; a similar formula is used for the other firearms offences in section 5 of the Firearms Act 1968. The existing functions of the Secretary of State under section 5 have been transferred to Scottish Ministers by order under section 63 of the Scotland Act 1998 upon devolution. Additional functions under section 5 will need to be transferred to Scottish Ministers in relation to the new offences to be created by the Anti-Social Behaviour, Crime and Policing Bill (ASBCP).

17. This will revoke the previous section 5 functions transferred by S.I 1999/1750 and re-transfer them along with the new functions in relation to the new offences in section 5(2A)(c) and (d). This will also ensure a level of statutory clarity by placing all of the functions transferred to the Scottish Ministers in one place.

18. As this new offence will confer additional powers to Scottish Ministers, the consent of the Scottish Parliament is required.

Forced Marriage

19. Clause 109 of the Anti-Social Behaviour, Crime and Policing Bill will create an offence under Scots law of forcing someone into marriage. The Bill on introduction provided for such an offence under the law of England and Wales only.

20. Currently forcing someone to marry, or taking advantage of their lack of understanding to trick them into taking part in a marriage is not a specific crime in Scotland, however breach of a forced marriage protection order (FMPO) is a criminal offence under the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act
2011. Criminalising forced marriage will ensure that legislation is consistent across the UK and that Scotland is in compliance with the relevant article of the Istanbul Convention which states that:

1. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

2. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.¹

21. By agreeing to extend the forced marriage provisions to Scotland we can ensure that by we will be in the position to meet our international obligations on forced marriage. The UK Government became a signatory to the Istanbul Convention which requires forced marriage to be a criminal offence but the existing legislation in Scotland does not wholly meet the requirements of Article 37 of the Istanbul Convention.

22. Extending the provisions in respect of criminalisation and in sentencing (providing for a maximum penalty upon conviction on indictment to imprisonment for a term not exceeding 7 years to a fine or to both) will ensure that forced marriage legislation, the protection it provides and the sanctions that are available to sentencers for those who perpetrate these acts are consistent across the UK.²

23. It should be noted that there are also a range of serious offences which may be perpetrated by those seeking to force someone into marriage (such as rape or abduction). These would be prosecuted appropriately and would attract the relevant sentence upon conviction. For example, abduction is a common law offence with a maximum sentence of life imprisonment.

24. As criminal law and sentencing is devolved, extending this provision to Scotland falls within the legislative competence of the Scottish Parliament and will therefore require the consent of the Scottish Parliament.

Consultation

25. In respect of the change to the forced marriage legislation, a consultation on whether to criminalise forced marriage was undertaken by the UK Government last year (2012), and it showed that 54% of respondents were in favour of criminalising forced marriage and 37% against. We have not carried out a consultation in Scotland. Whilst we have not consulted, we have had to consider the need to ensure that we are able to meet our international obligations on forced marriage.


² Paragraph 22 was amended following a letter from the Minister for Commonwealth Games and Sport, Shona Robison MSP, to the Convener of the Justice Committee, Christine Grahame MSP, on 6 December 2013. The letter is available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20131206_SG_to_Convener_-_Addendum.pdf
26. It will be for Scottish Ministers to decide when any new legislation will come into effect. It is therefore our intention to facilitate the change to the legislation by working collaboratively with our stakeholders to develop and produce all relevant guidance for statutory bodies and support organisations etc and to carry out an awareness raising campaign to ensure that communities understand the changes which have been made.

27. The firearms amendment is a technical one and therefore no consultation took place.

Financial Implications

There are likely to be minimal financial implications as a result of the firearms and civil order changes. Similarly, in respect of forced Marriage no significant additional costs should arise. In Scotland since the Forced Marriage etc. (protection and Jurisdiction) (Scotland) Act 2011 came into force only 7 FMPOs have been made and none have been breached. We would not anticipate a significant change following the new legislation coming into force.

Conclusion

28. The Scottish Government consider that extending the relevant provisions in the Bill to apply in Scotland is a sensible and appropriate step which will ensure the effective implementation UK-wide of civil penalty orders, forced marriage provisions and firearms policy changes. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the relevant provisions as outlined above which fall within the executive competence of Scottish Ministers or the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Scottish Government
November 2013