LEGISLATIVE CONSENT MEMORANDUM

Borders, Citizenship and Immigration Bill

Draft Legislative Consent Motion

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

“That the Parliament agrees that the relevant provisions of the Borders, Citizenship and Immigration Bill, introduced in the House of Lords on 14 January 2009, relating to the power of detention for individuals subject to an outstanding arrest warrant and their enforcement, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament."

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Borders, Citizenship and Immigration Bill (“the Bill”) was introduced in the House of Lords on 14 January 2009. The Bill can be found at:

http://services.parliament.uk/bills/2008-09/borderscitizenshipandimmigration.html

Content of the Bill

3. The Bill provides for customs functions exercisable by the Secretary of State, the Director of Border Revenue and officials designated by them. It makes provision on: the use and disclosure of customs information for and in connection with the exercise of customs functions and functions relating to immigration, asylum or nationality; about citizenship and other nationality matters; and, makes further provision about immigration and asylum and for connected purposes.

Power of Detention

4. Part 3 of the Bill proposes extending legislation governing the power of detention for immigration officers for non immigration offences to Scotland.

5. Sections 1 – 4 of the UK Borders Act 2007 introduced a power of detention for designated immigration officers for non immigration offences. This provision did not extend to Scotland as it was not considered necessary at that time on the basis that there is normally a police presence at all Scottish ports and airports that could attend to detain individuals either who had committed an offence at the airport or who were subject to an outstanding warrant of arrest.

6. The Scottish Government has subsequently considered further with the Association of Chief Police Officers in Scotland (ACPOS) and the UK Borders Agency (UKBA). This has confirmed that a general power of detention for immigration officers is not necessary in Scotland. There is however a potential loophole in the current arrangements. Normally advance notification of passenger data would mean UKBA would alert the police to the fact an individual subject to a warrant of arrest was entering or leaving the country allowing the police to detain the person at the port. However, should the individual present at immigration before that information has been passed to
the police the immigration officer would be aware of the outstanding warrant but would be unable to hold the individual pending the arrival of a police officer. In order to ensure Scotland’s border remains as secure as elsewhere in the UK and that Scots and others subject to arrest warrants are not able to enter or leave the country unhindered the Scottish Government considers this loophole should be closed.

7. The Bill includes at section 49 provisions to close that loophole. It also makes provision to ensure that the designated Immigration officer can enforce the detention and provides for the following offences-

- absconding from or assaulting an immigration officer which could result in a custodial sentence of up to 12 months, a fine not exceeding level 5 on the standard scale, or both on summary prosecution;

- obstructing an immigration officer which could result in the same custodial sentence, a fine not exceeding level 3 on the standard scale, or both.

8. The proposals in the Bill are welcomed by the police as they will ensure Scotland’s borders remain as secure as those elsewhere in the UK and will help the police to more effectively enforce outstanding warrants.

9. Provision is also being included in the Bill that will require the agreement of the Scottish Ministers prior to the new powers for detention being commenced.

**Issues subject to the consent of the Scottish Parliament: Power of Detention**

10. Application to Scotland of a power for designated immigration officers to detain for a maximum of 3 hours individuals subject to an outstanding warrant of arrest - This will allow police time to attend the port to detain and execute the warrant. As this power of detention relates to non immigration offences it falls in a devolved subject area and the consent of the Scottish Parliament to legislate on this point is required.

**Provisions relating to enforcement**

11. Maximum custodial penalties - The maximum custodial penalty for absconding from, or assaulting or obstructing, an immigration officer is a custodial sentence of not more than 12 months. As these offences fall in a devolved subject area, the consent of the Scottish Parliament to legislate on this point is required.

**Reasons for seeking a legislative consent motion**

12. UK Parliament legislation is required for the reserved provisions of the Bill. It would be possible to bring forward legislation in the Scottish Parliament for the provisions which fall within devolved competence. However, introducing a short Bill purely for these minor and consequential provisions would not be a proportionate or effective use of Scottish Parliamentary time or resources. In addition, making provision in separate Bills in the two Parliaments would run the risk of the loopholes remaining in Scotland for longer than is necessary. Using UK legislation will also ensure that legislation with regards to the UK Borders Agency is kept together as a coherent package. Furthermore should legislation be made in the Scottish Parliament a section 104 Order under the Scotland Act might be required as the Scottish Parliament would be placing an obligation on a UK body exercising reserved functions only (i.e. the UK
Borders Agency) to detain individuals for a devolved purpose. This would add to the time taken to bring the provisions into force. In these circumstances, the Scottish Government considers that agreement by the Scottish Parliament to legislation by the UK Parliament on these matters presents the best option for closing this legislative gap.

Financial implications

13. We expect this provision to be used only in exceptional circumstances where it has not been possible to inform the police in advance that an individual subject to an outstanding warrant of arrest is expected to pass through immigration at a Scottish port. As a result we do not anticipate any significant financial implications from the provisions of the Bill, most of which would in any event fall to the UKBA.

Conclusion

14. The view of the Scottish Government is that it is in the interests of public safety that designated immigration officers be given a power of detention where an individual subject to an outstanding arrest warrant comes to their attention at the border. The proposals of the Bill achieve this and should be supported.

Scottish Government
January 2009