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 provision of the Criminal Justice and Courts Bill, introduced to the House of Commons on 5 February 2014, relating to the amendment of the Rehabilitation of Offenders Act 1974, so far as this matter alters the executive competence of Scottish Ministers, and relating to the activities of officers of the National Crime Agency when those officers are operating in Scotland, 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(c)(ii) of the Parliament’s Standing Orders. The latest version of the Criminal Justice and Courts Bill can be found at:

http://services.parliament.uk/bills/2014-15/criminaljusticeandcourts.html

Content of the Criminal Justice and Courts Bill

3. The Bill makes provision about how offenders are dealt with before and after conviction; amends the offence of possession of extreme pornographic images; the proceedings and powers of courts and tribunals; judicial review; and connected purposes.

Provision which relates to Scotland

Rehabilitation of Offenders

4. The Bill contains an amendment to the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) which will resolve a legislative competence issue.

5. In the course of implementation of the Children’s Hearings (Scotland) Act 2011 (the 2011 Act) the Scottish Government encountered a difficulty with part of the package of reforms around treatment of children for the purposes of rehabilitation of offenders and disclosure. The difficulty stemmed from Scottish Ministers’ lack of competence to make an Order under Schedule 3 to the 1974 Act, setting out exclusions and exceptions to the general rule that spent Alternatives to Prosecution (ATPs) from children’s hearings do not need to be disclosed. This Order will specify the types of employment and proceedings that are excluded from the protection afforded by the 1974 Act and, therefore, where disclosure of spent ATPs is required. Some of the types of employment (for example a registered teacher or a doctor) and some proceedings (such as certain proceedings under the Firearms Act 1968 or the Proceeds of Crime Act 2002) fall within reserved areas. While the Scottish Ministers have the power to legislate for the disclosure of spent convictions which impact on reserved areas they do not have the
same power in relation to ATPs which impact on reserved areas. This resulted in the implementation being put on hold, pending resolution of this competence issue.

6. The issue stems from Schedule 3 to the 1974 Act having been inserted by an Act of the Scottish Parliament – the Criminal Justice & Licensing (Scotland) Act 2010. This means that the enabling powers in Schedule 3 are subject to the limitations of devolved competence as provided for by sections 29(2)(b) and (c) of, and Schedule 4 to, the Scotland Act 1998 (the 1998 Act). Section 29(2)(b) of the 1998 Act provides that a provision is outside the legislative competence of the Scottish Parliament if it relates to reserved matters and section 29(2)(c) of the 1998 Act provides that a provision is outside the legislative competence of the Scottish Parliament if it is in breach of the restrictions in Schedule 4 to the 1998 Act (Schedule 4 to the 1998 Act imposes various restrictions preventing the Scottish Parliament from modifying various enactments or rules of law, such as the law on reserved matters).

7. The solution to this issue is to insert (see Clause 18 of the Bill) a new paragraph into Schedule 3 to the 1974 Act which states that the Scottish Ministers can exercise the powers in paragraph 6 and section 7(4), as applied by paragraph 8, without the restrictions in section 29 of the 1998 Act.

Offence of police corruption

8. Clause 25 (Corrupt or other improper exercise of police powers and privileges) of the Bill, only apply in England and Wales to:
   - officers of English & Welsh police forces;
   - the British Transport Police (BTP);
   - The Civil Nuclear Constabulary (CNC);
   - Ministry of Defence Police (MoD); and
   - National Crime Agency (NCA) officers (designated by the Director General as having the powers/privileges of a constable).

9. The provisions relate only to Police Officers of English and Welsh forces and to those with a UK wide remit – they do not extend to police staff.

10. The Home Office has advised that the relevant UKG Ministers are strongly in favour of this offence being extended to those forces with a UK-wide remit (BTP, CNC, MoD and NCA) when they are operating in Scotland, and the UK Government has tabled amendments to the Bill to achieve that policy effect.

11. The majority of the functions of the BTP, CNC and MoD police are connected, either directly or indirectly, with the reserved matters for which each force was established. On that basis, the Home Secretary can determine whether officers of these forces in Scotland are covered by this offence. In contrast, NCA officers are engaged in activities in Scotland which are substantially devolved. For example, they exercise the powers of Scottish constables, they carry out general policing functions as well as their specialist functions, they report offences to the Procurator Fiscal and any offences committed in Scotland would be tried in Scottish courts.
Reasons for seeking a legislative consent motion

Rehabilitation of Offenders

12. Primary legislation is the most direct comprehensive mechanism for conferring full executive competence on the Scottish Ministers. Although there are secondary legislative powers in the Scotland Act 1998, these processes can be lengthy and do not, in this instance, provide wholly appropriate solutions.

13. The amendment to the Criminal Justice and Courts Bill adjusts the executive competence of the Scottish Ministers and therefore requires the consent of the Parliament. The amendment to the UK Bill addresses a legislative competence gap which currently presents an obstacle to implementation of Scottish Government policy in the predominantly devolved area of rehabilitation of offenders.

Offence of Police corruption

14. Officers of Police Scotland are already covered by a statutory offence under section 22 of the Police and Fire Reform (Scotland) Act 2012 regarding neglect or violation of duty by a constable of the PSoS, which the Government regard as including negative and positive acts in breach of any of a constable’s duties. The offence is punishable by a maximum period of 2 years’ imprisonment and an unlimited fine. This offence doesn’t however apply to NCA officers operating in Scotland - so not extending the proposed offence to them means that they could only be tried in Scotland under the common law offence of wilful neglect of duty.

15. The Government therefore considers it both sensible and appropriate for provision to be included in the Bill to extend the proposed offence to cover NCA officers operating in Scotland.

Consultation

16. The amendment is a technical measure so has not been the subject of public consultation. However, the Scottish Government has informed relevant stakeholders of the policy and it has previously been considered as part of the Criminal Justice and Licencing Act 2010.

17. As regards the new offence of police corruption, the Scottish Government has informed relevant stakeholders and they are content.

Conclusion

18. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the provisions outlined above should be considered by the UK Parliament.

Scottish Government
August 2014