LEGISLATIVE CONSENT MEMORANDUM

UK LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS 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 UK Legal Aid, Sentencing and Punishment of Offenders Bill, introduced in the House of Commons on 21 June 2011, relating to Council Framework Decision 2008/909/JHA on prisoner transfer, 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(c)(i) of the Parliament’s standing orders. The Legal Aid, Sentencing and Punishment of Offenders Bill was introduced in the House of Commons on 21 June 2011. The latest version of the Bill can be found at:


Content of the Legal Aid, Sentencing and Punishment of Offenders Bill

3. The Bill covers a wide range of issues. It comprises four parts and sixteen schedules. Part One makes provisions on legal aid, Part Two deals with litigation funding and costs and Part Three covers sentencing and the punishment of offenders (Part Four contains Final Provisions and Schedules).

4. The Bill relates primarily to matters relevant to England and Wales and did not require legislative consent on Introduction. However, an amendment tabled on 5 October 2011 relating to the implementation of sections 16 and 18 of the EU Framework Decision on prisoner transfers (20081909/JHA) has now made the Bill a relevant Bill under the Standing Orders of the Scottish Parliament.

Provisions which relate to Scotland

5. The purpose of this Legislative Consent Motion (LCM) is therefore to allow the implementation of the sections 16 and 18 of the EU Framework Decision relating to prisoner transfers (20081909/JHA). The Framework Decision allows for offenders to be transferred to serve the remainder of their sentence in another Member State. Implementation of article 16 and 18 (which cover Transit and Speciality) in relation to the transfer of prisoners would fall within the legislative competence of the Scottish Parliament. Under the Sewel Convention, the legislative consent of the Scottish Parliament is therefore required to ensure that the United Kingdom (“UK”) complies with its obligations under the Framework Decision.
The Framework Decision

6. Under the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 ("the Convention"), offenders may be transferred to serve the remainder of their sentence in another state under certain circumstances. The UK and all other Member States have ratified the Convention. The UK implemented its obligations under the Convention in domestic law by virtue of the Repatriation of Prisoners Act 1984. Under the Convention, offenders may only be transferred to their state of nationality with their consent and that of the states involved, though the Additional Protocol of 18 December 1997 to the Convention permits in some cases the transfer of an offender without their consent.

7. Like the Convention, the Framework Decision allows for offenders to be transferred to serve the remainder of their sentence in another Member State, under specified circumstances. The Framework Decision replicates the effect of the Convention and Additional Protocol but makes it a duty for Member States to accept prisoners when the conditions set out in the Framework Decision are met, rather than just a power to do so.

8. The Framework Decision essentially replicates the effect of the Convention and Additional Protocol but makes it a duty for Member States to accept prisoners when the conditions set out in the Framework Decision are met, rather than just a power to do so. The Member States have to implement the necessary measures to comply with the provisions of this Framework Decision by 5 December 2011.

9. The UK does not currently permit prisoners being transferred from one state to another to transit through the territory of the UK. The main obstacle to such transit is the inability of the domestic authorities to appoint a person with the powers of a constable to ensure the secure transit of such a prisoner. There is also an issue with the states between which the prisoner is being transferred being unable to ensure that the UK will not detain or prosecute a prisoner transiting its territory in respect of crimes committed in this jurisdiction.

10. Due to the ready availability of direct flights within the EU, the issue of transit through the territory of the UK arises only infrequently, so the fact that the UK does not permit such transit has not caused many problems in practice. It is considered however, that in the event of sustained disruption to air travel in Europe, due to for example terrorist actions, extreme weather or volcanic ash, it is possible that one or more prisoners may need to transit through the territory of the UK, necessitating a transit provision. It is also considered that the transfer of prisoners between continental Europe and the Republic of Ireland may be facilitated by transit through the UK. It is hoped that a transit provision will also facilitate prisoner transfer agreements with states outside the European Union. Existing bilateral prisoner transfer agreements and the Convention already provide for transit but individual requests are routinely refused because of the lack of a domestic legal framework in which to grant requests. The new provisions will enable the UK Government to grant transit where requested under existing and future agreements.

11. The purpose of a speciality provision is to ensure that states do not attempt to circumvent the extradition process in respect of individuals who are serving a sentence in one state and wanted for crimes in another state. Such a provision prohibits the prosecution or detention of a prisoner by a state to which that prisoner is being...
transferred, for any offence committed prior to that prisoner’s transfer (other than the offence for which they have been transferred), other than in certain limited circumstances. In particular, a speciality provision requires that following a prisoner’s release from custody by the state to which he or she has been transferred, that state must wait at least 45 days before bringing any further criminal proceedings against that prisoner for any offence committed prior to his or her transfer. During that 45 day period, the released prisoner is free to leave that state’s jurisdiction. It is also hoped that a speciality provision will facilitate prisoner transfer agreements with states outside the European Union, as the UK would then be capable of including speciality provisions in such agreements.

Reasons for seeking a legislative consent motion

12. As discussed above, sections 16 and 18 of the EU Framework Decision relating to prisoner transfers (2008/1909/JHA) falls within the legislative competence of the Scottish Parliament. Legislative consent is therefore required to ensure implementation of the Framework Decision can be undertaken on a UK wide basis. Given the timescales involved for implementation and the requisite resource implications, the Scottish Government is content that the legislative consent route is the most suitable legislative vehicle to implement sections 16 and 18 of the Framework Decision.

Consultation

13. Officials in Scottish Government have worked closely with colleagues in the Ministry of Justice to agree amendments necessary for the LCM to proceed.

Financial Implications

14. There are no financial implications.

Conclusion

15. The view of the Scottish Government is that in the interests of good governance and clear legislation that the Framework Decision be implemented on a UK wide basis.

Scottish Government
October 2011