Justice Committee

8th Report, 2012 (Session 4)

Legislative Consent Memorandum on the Crime and Court Bill (LCM (S4) 11.1)

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Justice Committee

Remit and membership

Remit:

To consider and report on:
a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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11.1)

The Committee reports to the Parliament as follows—

BACKGROUND

The UK Bill

1. The UK Crime and Courts Bill¹ was introduced to the House of Lords on 10 May 2012. The Bill proposes a number of changes to the law in relation to criminal justice, the courts system, and immigration, many of which have application in relation to Scotland.²

Legislative Consent Memorandum and Motion

2. The Scottish Government considers that elements of the Bill require the consent of the Scottish Parliament and accordingly lodged a Legislative Consent Memorandum (LCM)³ on 23 May, in the name of the Cabinet Secretary for Justice, in terms of Rule 9.B.3.1(a) of Standing Orders.

3. The LCM includes a draft legislative consent motion in the following terms:

“That the Parliament agrees that the relevant provisions of the Crime and Courts Bill, introduced in the House of Lords on 10 May 2012, relating to the establishment of the National Crime Agency; provisions for a new drug-driving offence; and to allow those detained in Scotland by immigration

¹ Available at: http://services.parliament.uk/bills/2012-13/crimeandcourts.html [Accessed June 2012]
³ Available at: http://www.scottish.parliament.uk/LegislativeConsentMemoranda/ CrimeandCourtsBillLCM.pdf [Accessed June 2012]
officers to be able to access legal advice on the same terms as those detained by police officers; 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."

Outline of Committee consideration

4. Following its introduction, the LCM was referred by the Parliamentary Bureau to the Justice Committee for consideration. The Committee considered its approach to the LCM on 29 May, agreeing to take oral evidence from the Cabinet Secretary, and to issue a targeted call for views to a small number of stakeholders, to help inform that evidence session. Three organisations responded with submissions: the Scottish Police Federation (the SPF); the Scottish Legal Aid Board (SLAB); and the Association of Chief Police Officers in Scotland (ACPOS).4

5. The Subordinate Legislation Committee also considered and reported to the Justice Committee on relevant delegated powers in the UK Bill.5 The Committee indicated that, from its perspective, it was satisfied with the relevant devolved powers set out in the UK Bill but that the LCM could have set out and discussed two of these powers in a clearer way. This point was acknowledged and accepted by the Minister for Community Safety and Legal Affairs when she gave evidence to the Justice Committee on 19 June.6

ISSUES ARISING FROM EVIDENCE-TAKING

6. The Committee notes that the purpose of a report to the Scottish Parliament on an LCM is to help the Parliament come to an informed view on whether to agree to the forthcoming legislative consent motion. Accordingly this report focusses on scrutiny of the provisions falling into the three areas referenced in the draft motion. Other matters are, however, discussed briefly.

Establishment of the National Crime Agency (NCA)

7. The UK Bill will establish a National Crime Agency, replacing the Serious Organised Crime Agency (SOCA) and the National Policing Improvement Agency. The NCA will be “an operational crime fighting agency that will tackle organised crime, strengthen the UK’s borders, fight fraud and cyber-crime, and protect children and young people.”7

8. The NCA will have some UK functions and some functions limited to England and Wales only. The LCM states that—

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“From a Scottish perspective, the proposals to establish the NCA will largely replicate the role and operational arrangements of SOCA that currently exist in Scotland. As organised crime does not respect borders and boundaries, the Bill will provide the flexibility to allow NCA officers to have an operational role in Scotland.”

9. The LCM also explains that the Bill—

“seeks to clarify the interfaces between the National Crime Agency, and both the Police Service of Scotland and Crown Office and Procurator Fiscal Service. Crime prevention and detection is devolved in Scotland, as is the investigation and prosecution of crime in Scotland, which is carried out under the direction of the Lord Advocate. It would not make sense for the devolved aspects of these interfaces to remain undefined pending legislation in the Scottish Parliament. Further, the proposed provisions relating to devolved matters in Scotland must be part and parcel of the legislation required to set up the National Crime Agency to ensure an effective response to serious and organised crime, economic crime, and child exploitation throughout the United Kingdom. Therefore, it is vital that these devolved provisions are put in place seamlessly in accordance with establishment of the NCA.”

10. The annexe to the LCM goes on to list these “interfaces” in greater detail. Some provisions seek to provide for an appropriate role for the Scottish Government in the running of the NCA, for instance by requiring that the Scottish Ministers be consulted in relation to the preparation of strategic priorities, annual reports, and framework documents of the NCA. Others seek to take appropriate account of the Scottish criminal justice system, for instance by specifying that any NCA officer operating north of the border is subject to the direction of the Lord Advocate or Procurator Fiscal in relation to the investigation and prosecution of crime.

11. Consent is therefore being sought from the Scottish Parliament in respect both of provisions that fall within the competence of the Scottish Parliament and of provisions that alter the executive functions of the Scottish Ministers.

12. The written submissions of the SPF and ACPOS indicated that they were broadly satisfied with the provisions in the Bill relating to the NCA.

13. In evidence to the Committee, the Minister said that the Scottish Government’s aim had been to ensure that the legislative safeguards that currently existed in relation to SOCA’s operation in Scotland would be replicated in the setting-up of the NCA. She considered that this aim had been met in the Bill.

14. The Minister was asked whether preparations were underway between the UK Government and the Scottish Crime and Drug Enforcement Agency in anticipation of the NCA coming into being. She replied that officials had been working closely with their counterparts south of the border, and that she did not

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8 LCM annexe, paragraph 3.
9 Paragraph 11.
anticipate any significant changes in working relationships once the NCA was set up, given that arrangements would largely replicate those currently existing with SOCA.\(^{11}\)

15. In response to a question on the role of the director general of the NCA in Scotland, the Minister said she understood that it would be the director general’s role to co-operate across the whole of the UK to secure the aims of the NCA but that the director general would have no power to instruct officers in Scotland. A Scottish Government official assisting the Minister further explained that the operational independence of chief constables in Scotland would be maintained by the Bill.\(^{12}\)

16. The Minister also clarified that any complaints oversight in relation to an NCA officer would rest with the new Police Investigations and Review Commissioner.\(^{13}\)

**Recommendation**

17. **In relation to the setting up of the National Crime Agency, the Committee is satisfied that it is appropriate for the UK Parliament to legislate in areas within the competence of the Scottish Parliament or which affect the functions of the Scottish Ministers.**

**Powers of immigration officers / legal aid**

18. The Bill will give new powers to immigration officers in connection with their role of investigating serious and organised crime. For the most part, these relate to reserved matters. The LCM states that these proposals “will in effect bring the powers of UKBA\(^{14}\) immigration officers ... into line with UK customs officers and in certain cases into line with the criminal justice system in Scotland.”\(^{15}\) The LCM further notes that these proposals relate to reserved matters, since they relate only to immigration/nationality offences, but that it “appears sensible to allow these proposals to proceed to ensure a consistent and efficient approach is taken to the investigation of immigration criminality across the UK.”\(^{16}\)

**Enhanced powers of UKBA immigration officers**

19. During evidence-taking with the Minister, questions were raised as to the new powers of immigration officers. The Minister’s attention was drawn to ACPOS’ submission to the Committee stating that robust coordination would be required to minimise the potential for conflicts between different bodies during multi-agency investigations. Reference was also made to the carrying out by UKBA officers of detentions involving children, “dawn raids”, and raids on restaurant premises.

20. In relation to all these matters, the Minister pointed out that it was no secret that the Scottish Government had sometimes disagreed with the approach taken

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\(^{14}\) The UK Border Agency.

\(^{15}\) Paragraph 13

\(^{16}\) Paragraph 13. The Committee is not clear what is meant by “allow” in this context.
by the UKBA. However, the Scottish Ministers had no control over UKBA immigration officers and it was therefore difficult to provide the assurances some Members were looking for. An official assisting the Minister sought to assure the Committee that relations between the Cabinet Secretary and UKBA were now much better than in the past, and that there was now a “very good foundation” to take matters forward in a manner more acceptable to the Scottish Parliament.\(^7\)

21. The Minister also undertook to provide more information in relation to a query as to whether and how data would be collected in future as to the number of people detained in Scotland by UKBA officers using their new powers.\(^8\)

22. The Committee recognises that the issues discussed in the preceding three paragraphs do not directly relate to the legislative consent motion the Parliament will shortly be asked to agree to, but draws the discussion to the Parliament’s attention.

**Extension of legal aid**

23. In relation to the powers of immigration officers, the Bill intrudes into devolved powers in relation to one relatively small area, by making a change to the Legal Aid (Scotland) Act 1986. The LCM explains that the purpose of the change is to ensure—

“that those people detained by immigration officers in Scotland will have the same right to legal advice and access to the police station duty scheme run by the Scottish Legal Aid Board as those detained by police officers following the Cadder\(^9\) judgement. The result of the changes to the legal aid legislation is to alter the powers of the Scottish Ministers and will require the legislative consent of the Scottish Parliament.”\(^10\)

24. In written evidence, ACPOS and the SPF affirmed that they were content with provision being made in this way. SLAB did not express a clear view on whether it agreed or disagreed with the UK Parliament legislating in this way, but stated that the impact on legal aid would be “marginal.” The Board added that what costs there might be could be reduced by developing video conferencing facilities for the provision of legal aid, where detention takes place in locations that might add to solicitors’ travel costs. The Scottish Government may wish to take note of this suggestion.

25. In evidence-taking with the Minister, no specific questions arose in relation to the legal aid changes.

**Recommendation**

26. The Committee is satisfied that it is appropriate for the UK Parliament to legislate so as to enable persons detained by immigration officers in

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\(^9\) In the Cadder case, the UK Supreme Court determined that it was a breach of a suspect’s human rights that he had not been offered access to legal advice whilst being detained by police officers.

\(^10\) Paragraph 14
Scotland to have access to legal advice on a similar basis to those detained by police officers in Scotland.

New offence of drug-driving

27. The Bill will create a new drug-driving offence, covering Scotland as well as England and Wales. The offence would consist of driving or being in charge of a motor vehicle with concentrations of specified controlled substances in excess of specified levels. In evidence to the Committee, the Minister clarified that this new offence would sit alongside the existing offence of driving whilst impaired by drugs, which (unlike the new offence) could be committed by a person taking prescription drugs.\(^{21}\) The LCM indicates that it would not be within the competence of the Scottish Parliament to create such an offence.\(^{22}\)

28. The UK Bill will devolve to the Scottish Ministers the power both to set the new drug-driving limit and to specify the controlled substances to which it would apply. As this extends the executive competence of the Scottish Ministers, the consent of the Scottish Parliament is required.

29. The LCM explains why the Scottish Government considers it appropriate for the UK Parliament to legislate in this way—

“In line with our approach on drink-driving, it may have been preferable to devolve all responsibility relating to the new drug-driving offence, but nonetheless, having the power to set the drug-driving limits is a useful responsibility to have as part of our desire to improve road safety in Scotland.”\(^{23}\)

30. The power would be exercised by way of the affirmative procedure. The Subordinate Legislation Committee considered in its report that this was an appropriate level of scrutiny.

Drug-driving test

31. The key issue to have arisen in relation to scrutiny of the drug-driving offence relates to the practicalities of establishing whether the offence will have been committed. Whilst the main body of the LCM makes clear that the Scottish Government is content to be given the new power, in the annexe to the LCM it is stated that—

“Scottish Ministers will carefully consider the report and recommendations of the UK Government’s expert panel that has been established to look at this matter before making any final decisions in this area.”\(^{24}\)

32. In evidence before the Committee, the Minister elaborated that there were “significant issues in relation to the drug-driving offence, and they are recognised at the UK level which is why the expert panel has been proposed.”\(^{25}\)


\(^{22}\) Paragraph 4

\(^{23}\) Paragraph 15

\(^{24}\) Annexe, paragraph 9.
33. The Minister was also invited to comment on ACPOS' written evidence. ACPOS had expressed support in principle for "a change to the law which will make the enforcement of drug driving easier than the current practice we presently utilise", making reference to the current offence of impaired driving through drug use, which was considered "very subjective" and "open to interpretation". However ACPOS drew attention to a practical difficulty; the apparent absence of any device on the market at present that can identify both the type and the level of drugs present in a person’s system.

34. The Minister indicated that this was one of the reasons why an expert panel had been set up; to apply academic and scientific expertise to consider how such practical issues could be resolved. Officials present with the Minister further explained that there was no one sophisticated testing system that could determine at the roadside whether a particular controlled substance had been taken and, if so, the amount of it that was present in a person’s system. However it was hoped that such a system could be developed in due course. In the meantime, jurisdictions such as Victoria in Australia apply a binary test, with both a roadside and police lab element to help identify the amount and type of the drug present.26

35. The Minister was asked whether not having an appropriately sophisticated test raised the question of whether it was worth creating the new offence in the first place. She replied that—

"we could turn that round the other way. The moment we have a good test, the power will be immediately implementable, which is better than having to wait for a test before going through the legislative process to implement it."

36. In this connection, the Committee notes that notwithstanding their practical reservations, ACPOS approved the Scottish Ministers being given the new power to set the drug-driving limit as “an excellent example of forward thinking”.

37. The Minister was asked whether there were any plans to introduce the new drug-driving limits in tandem with proposed new drink-driving limits. She said she was not aware of any plans to do so, but would get back to Members on that issue.27

Recommendation

38. In respect of the proposed new drug-driving offence in the UK Bill, the Committee notes that the Scottish Ministers are inviting the Scottish Parliament to consent to their being given powers that they do not yet appear to be in a practical position to use, because of the absence of an effective testing mechanism. The Committee also notes that the Minister referred to “significant issues” in relation to the drug driving offence. It is perhaps slightly unusual for the Parliament to be asked to provide its consent under these circumstances.

39. On the other hand, it could be argued that giving the Scottish Ministers the power now, in anticipation of an effective method of testing the type and level of controlled drug in a person’s system being available in future, is a form of “future proofing” that may save Parliamentary time, and ensure that the offence is prosecutable sooner. The Committee also notes that if the Scottish Ministers did decide to exercise the power, it would be subject to affirmative procedure in this Parliament, which would enable evidence to be taken on it.

40. On that basis, the Committee is satisfied that it is appropriate for the UK Parliament to legislate so as to empower the Scottish Ministers to specify the controlled substances to which the new offence of drug-driving would apply, and to set the limits for the offence.

RECOMMENDATION

41. The Committee recommends that the Parliament agree to the Scottish Government’s forthcoming legislative consent motion on the UK Crime and Courts Bill.
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