

SEWEL MEMORANDUM

THE ANTI-TERRORISM, CRIME & SECURITY BILL

Purpose

1. This memorandum sets out the proposed handling of the provisions within the UK Anti-Terrorism, Crime & Security Bill that are within the competence of the Scottish Parliament.

Background

2. The Anti-Terrorism, Crime & Security Bill was introduced in the House of Commons on 12 November. The Bill is a package of measures designed to enhance the UK's anti-terrorism capability and security following the events of 11 September.

3. The Bill is the result of an extensive review of existing legislation. The review of terrorism legislation which preceded the introduction of The Terrorism Act 2000 means that many of the powers needed to protect UK citizens are already in place. However, this Bill extends those powers to take account of the changed threat and to address global terrorism more effectively. The Bill will ensure greater safety and security for UK citizens at home and abroad.

4. The Bill's main provisions include:

- measures tackling terrorist finance;
- measures streamlining relevant immigration procedures;
- provisions against inciting religious hatred or violence;
- new offences on Weapons of Mass Destruction (WMD);
- better security in dealing with pathogens;
- improving civil nuclear security;
- better security at airports and nuclear sites;
- extension of police powers;
- extension of the jurisdiction of the British Transport Police and Ministry of Defence Police,
- intelligence measures including data retention and data gateways;
- an enabling power to implement by secondary legislation EU agreements on Justice and Home Affairs (JHA);
- amendments to the Terrorism Act 2000; and
- provisions to strengthen the law on international corruption.

Devolved provisions

5. There are a number of provisions within the Bill that are within the devolved competence of the Scottish Parliament. The Executive proposes that some of these provisions should be extended to Scotland by means of the Sewel convention. There are others where we prefer to proceed by means of separate Scottish legislation.

6. The devolved elements fall under the following headings:

- new Religious Hatred and Religious Aggravated Offences;
- new international corruption offences;
- power to implement EU JHA measures;
- data gateways;
- new powers relating to the security of premises holding harmful substances;
- extension of Criminal Law Act 1977 to cover biological, chemical and other hoaxes;
- police power to access information about passengers;
- extension of powers for Ministry of Defence Police and British Transport Police;
- fingerprints and DNA samples taken under Terrorism Act powers; and
- police powers to remove face coverings.

7. Our proposals for handling these measures are dealt with in turn below. In each case where it is appropriate that the measure should apply to Scotland, then there are sound reasons to consider using the Sewel mechanism. Clearly there is a pressing need for urgency: the proposals deal with measures to enhance security and anti-terrorist capability. The Executive takes the view that it would not be in the interest of the Scottish public if we were to delay implementation while time is found to consider these measures in this Parliament. There are also in many cases arguments in favour of seamless UK-wide implementation of these measures.

Devolved aspects not being extended to Scotland by the Westminster Bill

8. There are some provisions that are devolved and will be pursued separately in Scotland.

Religious hatred and religious aggravated offences

9. Except in Scotland, the Bill will extend existing offences relating to incitement to racial hatred to cover religious hatred. It will also extend the racially aggravated offences of assault, public order, criminal damage and harassment to cover attacks aggravated by religious hostility.

10. The Scottish Executive is determined to protect the people of Scotland from all forms of religious or racial hatred. The common law already provides protection to religious groups in Scotland. The law in this area is more flexible and widely used than in England. It can be, and is already, used to take account of any religious motivation in offences. Against that background, the Executive considers that the differences in Scottish law and circumstances make it essential for us to produce separate proposals in this area that will work in Scotland. We will bring forward proposals by the end of February 2002.

New international corruption offences

11. Except for Scotland, the Bill will clarify the criminal law to ensure that it covers the bribery and corruption of foreign public bodies and officials, and that the UK has jurisdiction over bribery and corruption offences committed by UK nationals and companies abroad. It is

important to maintain consistency across the UK in this area, particularly in relation to international obligations. However, there are differences between the relevant rules of evidence and procedure in the Scottish and English jurisdictions and the common law is different. The Scottish Executive proposes therefore to include equivalent provisions in the forthcoming Criminal Justice (Scotland) Bill.

Police powers to remove face covering

12. The police currently have powers to remove facemasks or other items being worn to disguise identity if they believe there might be incidents involving serious violence or that knives are being carried in any area. The Bill proposes that the powers to remove facemasks can come into effect if the police believe that an offence may be committed in the area. This lower test than "serious violence" is to cover the now widespread use of face masks at demonstrations and gatherings which might not amount to serious violence but where offences might nevertheless be committed.

13. Having sought views from the Association of Chief Police Officers in Scotland, it does not appear to Scottish Ministers that there would be any substantial gain from seeking to extend this provision to Scotland. In the light of these considerations, Scottish Ministers have decided that these particular provisions should not extend to Scotland. This is not reflected in the Bill as introduced, and the aim is now to amend the Bill accordingly.

Devolved aspects covered by the Sewel motion

14. The following are the items that are devolved and on which the Executive is recommending agreement by means of this Sewel motion.

Power to implement EU JHA measures

15. The Bill contains provisions which allow measures adopted under Title VI of the Treaty of the European Union (Police and Judicial Co-operation in Criminal Matters) to be implemented by secondary legislation. The European Union's objective in adopting measures under Title VI is to "provide citizens with a high level of safety within an area of freedom, security and justice" by "preventing and combating crime.... in particular terrorism,.... illicit drug trafficking and illicit arms trafficking" (Article 29 of Title VI).

16. At present, measures on police and criminal judicial co-operation agreed by the JHA Council of the European Union can only be implemented in the UK by primary legislation. This will not always allow the UK to respond promptly on an EU-wide basis to terrorist related offences. In particular, EU leaders have recently agreed a number of ambitious measures on police and judicial co-operation to help fight global terrorism. These include urgent progress on plans for joint investigative teams; on measures to simplify seizing the assets of terrorists across Europe and on measures to speed up extradition arrangements between Member States. The provisions in the Bill will allow measures such as these to be implemented rapidly with due parliamentary process but without the need for primary legislation.

17. Measures on police and judicial co-operation are likely to relate to both reserved and devolved matters. In relation to reserved matters, the Bill provides an enabling power for the Secretary of State to implement the measures in question on a UK-wide basis. In relation to

devolved matters, the Bill provides for the power to be exercised by Scottish Ministers. Any secondary legislation made by the Scottish Ministers will be subject to the approval of the Scottish Parliament.

Dangerous substances (including hoaxes)

18. The Bill will make it an offence for a person to use a nuclear, biological, chemical, radiological or any other noxious substance with the intention of endangering human life or creating a serious risk to human health. It will also be an offence to induce in any person a fear that an action involving such a substance is likely to endanger human life or create a serious risk to human health. The maximum penalty for this offence will be fourteen years. The Scottish Executive believes that this provision should apply in Scotland.

19. The current provisions on bomb hoaxes in the Criminal Law Act 1977 do not cover hoaxes where the device involved is not alleged to be explosive or ignitable – such as recent cases where packages purporting to contain anthrax have been sent through the post. The Bill will extend the present law to cover hoaxes such as sending harmless materials through the post with a note stating that the material is a noxious substance such as anthrax. The Bill will also make it an offence to threaten a person that action will be taken by means of a noxious substance that is likely to endanger a person's life, create a serious risk to a person's health or safety or create a serious risk to the health or safety of the public. The maximum penalty for these offences will be seven years.

20. Although such hoaxes could be covered in Scotland by the common law offence of breach of the peace, the Executive believes that a previously UK wide provision in the 1977 Criminal Law Act should continue to be UK wide in application after it is extended. Having both the statutory offence and the common law offence would increase flexibility for prosecutors.

Disclosure of information for the purposes of criminal investigations and proceedings

21. The Bill will better enable Government departments and certain other public authorities to disclose information for the purposes of criminal investigations or criminal proceedings (partly by harmonising the wording of a number of existing information disclosure provisions). In addition, it will create new statutory provisions for the Inland Revenue, Customs and Excise, and intelligence services. Disclosed information cannot be further disclosed by the recipient except for the purposes permitted for the original disclosures and with the consent of the relevant Commissioners.

22. A Sewel Motion in respect of similar provisions, contained in the Criminal Justice and Police Bill, was considered and passed by the Scottish Parliament earlier this year. Those provisions were ultimately dropped from the Bill during its passage through the Westminster Parliament. The current provisions are slightly narrower. The principle differences are that they cover only public authorities and only activities which would amount to a crime in the United Kingdom; that elements relating to competition legislation have been removed; and that a gateway has been included in respect of the intelligence services.

New powers relating to the security of premises holding harmful substances

23. In the light of concerns about the possibility of terrorists deliberately spreading diseases through the community, the Bill contains proposed new measures to ensure greater security arrangements at laboratories which hold stocks of potentially dangerous substances, such as viruses, bacteria and toxins. It is proposed that the specific chemical or biological substances to be caught by the controls would be the subject of secondary legislation. The controls would also cover the following:

- offence of failing to notify holdings of any controlled substances to the appropriate authority;
- power to supply the police or other authorities with information relating to location of controlled substances;
- requirements on managers to comply with reasonable instructions as to security;
- requirement to supply information on persons with access to controlled substances;
- power to carry out checks; and
- power to direct that access to controlled substances be denied.

Police power to access information about passengers

24. Under the Terrorism Act 2000 the police, immigration or customs officers can request information about the passengers, crew and any vehicles on a ship or aircraft travelling between UK mainland, Northern Ireland and the Republic of Ireland. The Bill proposes the widening of these powers to cover ships and aircraft arriving in any seaport or airport in any part of the UK from any other country (including trains arriving in the UK through the channel tunnel), and to cover goods as well as people and vehicles. It is also proposed to allow information to be exchanged for the other purposes than terrorism or immigration, such as detection of crime by the police.

Extension of powers for Ministry of Defence Police and British Transport Police

25. Measures to extend the jurisdiction of the Ministry of Defence Police (MDP) and British Transport Police (BTP) are part of the Bill. These measures would enable members of the BTP and MDP, where requested to do so, to assist constables of a local police force in the execution of their duties in relation to a particular incident, investigation or operation by giving MDP and BTP officers the same powers and privileges as constables of the requesting force.

26. Similar proposals for the MDP were originally included in the Bill considered by the UK Parliament during the last Westminster session (which subsequently became the Armed Forces Act 2001). These proposals were approved by the Scottish Parliament on a Sewel motion in February 2001, but were subsequently dropped from the Bill prior to the dissolution of the UK Parliament before the General Election. The Terrorism, Crime and Security Bill now reinstates these provisions.

27. The Scottish Police Service would aim to agree protocols on joint working arrangements with both the Ministry of Defence Police and the British Transport Police.

Fingerprints and DNA samples taken under Terrorism Act powers

28. In Scotland, fingerprints and DNA samples taken under normal police powers must be destroyed if there is no conviction. Exceptions are prints and samples taken under the powers in the Terrorism Act 2000, which can be retained in the absence of a conviction. But at present these samples can, in Scotland, only be used for terrorist investigations. In England and Wales, they can be used for prevention and detection of **all** crime, following changes in the law to allow prints and samples taken under any police powers to be retained even if there is no conviction. The current position leaves the Scottish Police at a disadvantage in combating terrorism. It is possible that certain criminal investigations have a terrorist link (for example, a break-in at certain types of premises, or the theft of a vehicle) but this will not be established because the records of terrorist suspects will not be searched during the criminal investigation. It is therefore proposed further to amend the Terrorism Act to ease this restriction on the use of prints and samples taken under the powers in that Act.

Conclusion

29. The Executive believes that it is appropriate to agree to Westminster legislation as set out in this memorandum, because of the value of a coherent, quick and seamless UK approach to the problem of global terrorism. The Executive has decided not to proceed on this basis on those elements (religious incitement, corruption, and facemasks) where particular Scottish circumstances (legal or other differences) suggest that the Scottish Executive and Scottish Parliament should address the issues.