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.

Membership:

Christian Allard
Roderick Campbell
John Finnie
Christine Grahame (Convener)
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
John Pentland
Sandra White

Committee Clerking Team:

Irene Fleming
Joanne Clinton
Ned Sharratt
Christine Lambourne
The Committee reports to the Parliament as follows—

LEGISLATIVE CONSENT MEMORANDUM AND MOTION

1. The Cabinet Secretary for Health and Wellbeing, Alex Neil MSP, lodged a legislative consent memorandum\(^1\) LCM(S4) 22.2 in the Scottish Parliament on the Anti-social Behaviour, Crime and Policing Bill\(^2\) (“the Bill”) on 11 November 2013.

2. A previous legislative consent memorandum (“LCM”) for this Bill was lodged on 29 May 2013 relating to the abolition of the Police Negotiating Board, dangerous dogs law and witness protection law. That LCM was considered by the Committee which reported on 19 September 2013. The Scottish Parliament agreed to the associated motion (S4M-07847) on 8 October 2013.

3. A supplementary LCM is required due to amendments to the Bill introducing provisions which: create a specific offence of forced marriage in Scotland; allow cross-border application of the new Sexual Harm Prevention and Sexual Risk Orders; and confer powers to Scottish Ministers in respect of a new firearms offence.

Civil Preventative Orders

4. The Bill seeks to replace three civil orders, used in England and Wales prescribing the activities of sexual offenders, with two new ones. The Sexual Harm Prevention Order (SHPO) will replace Sexual Offences Prevention Orders and Foreign Travel Orders and will be available in relation to a person with a relevant sexual conviction. The Sexual Risk Order (SRO) will replace Risk of Sexual Harm Orders, and will be available in relation to a person without a relevant conviction.

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These orders are designed to protect people from harm and although they are imposed by courts in England and Wales, an LCM is required to ensure that any breach of these orders will be an offence in Scotland.

**Functions of Scottish Ministers under Firearms Acts**

5. Section 5 of the Firearms Act 1968 deals with the prohibition of certain weapons and, on devolution, the Secretary of State’s functions under section 5 were transferred to the Scottish Ministers by the Scotland Act 1998. The Bill contains provisions for a new firearms offence of possession for sale or transfer of any prohibited weapon. Additional functions under section 5 need to be transferred to Scottish Ministers in relation to the new offences and the relevant provisions in the Bill will transfer afresh all of the Secretary of State’s functions under this section, as amended, to Scottish Ministers in or as regards Scotland.

**Forced Marriage**

6. The Bill introduces a new offence of forced marriage in England and Wales and creates an equivalent new offence of forced marriage under the law in Scotland. The Bill makes it a criminal offence, among other things, for a person to use violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage without their free and full consent.

7. The LCM states that these provisions will ensure that the Scottish Government meets its international obligations under the Council of Europe Convention on preventing and combating violence against women and domestic violence (“the Istanbul Convention”) and ensure that there is consistency in the legislation across the UK in respect of forced marriage.4

8. Currently in Scotland, there is no specific offence of forced marriage; however breach of a forced marriage protection order (FMPO) is a criminal offence under the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 (“the 2011 Act”).

**Draft legislative consent motion**

9. The LCM included a draft legislative consent motion in the following terms:

   “That the Parliament agrees that the relevant provisions of the Anti-social Behaviour, Crime and Policing Bill, introduced in the House of Commons on 9 May 2013, relating to the criminalisation of forcing a person to marry, cross-border application of the new Sexual Harm Prevention and Sexual Risk Orders and in respect of a new firearms offence, 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.”

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4 Legislative Consent Memorandum, paragraph 20.
10. The Parliamentary Bureau referred the LCM to the Justice Committee on 19 November 2013.

11. The relevant provisions referred to in the LCM do not confer any powers on the Scottish Ministers to make subordinate legislation and, therefore, do not engage the remit of the Delegated Powers and Law Reform Committee.

12. The Committee issued a call for evidence on 13 November 2013 and received 18 responses, the majority of which focused on the forced marriage provisions. It also heard oral evidence on the proposals to criminalise forced marriage from stakeholders on 26 November 2013 and from Shona Robison MSP, Minister for Commonwealth Games and Sport, on 10 December 2013.

**Civil Preventative Orders**

13. The Committee is content for the provisions regarding Civil Preventative Orders as outlined in the LCM to be extended to Scotland.

**Functions of the Scottish Ministers under Firearms Acts**

14. The Committee is content for the provisions regarding firearms as outlined in the LCM to be extended to Scotland.

**Forced Marriage**

15. In consideration of the LCM, the Committee is clear that it was looking at forced marriage and not arranged marriage, the key difference being the consent of all parties to the marriage.

16. The Committee gathered evidence from a number of stakeholders and heard a variety of views. The Committee received evidence expressing support and concern about the policy of criminalising forced marriage and the legislative process.

**International obligations**

17. The LCM states that—

   “By agreeing to extend the forced marriage provisions to Scotland we can ensure that we will be in the position to meet our international obligations on forced marriage. The UK Government became a signatory to the Istanbul Convention which requires forced marriage to be a criminal offence but the existing legislation in Scotland does not wholly meet the requirements of Article 37 of the Istanbul Convention.”

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5 Written responses can be found here: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/70307.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/70307.aspx)

6 Legislative Consent Memorandum, paragraph 21.
18. The Committee received differing views from stakeholders on whether the current legal framework in Scotland meets the requirements of the Istanbul Convention. Lily Greenan from Scottish Women’s Aid argued that—

“there is legislation or common law in Scotland that means that all the behaviours and patterns of behaviours that are involved [in forcing someone to marry] contain offences. There are points in that process that are offences, and we have legislation or common law that meets article 37.”

19. Others agreed with the Scottish Government that specific legislation criminalising forced marriage is required to comply with the Istanbul Convention. Catriona Dalrymple from the Crown Office and Procurator Fiscal Service (“COPFS”) argued that while elements of forced marriage are covered by existing offences, she said—

“I am concerned that they do not cover the full spectrum of the behaviours involved in forced marriage. There are, for example, psychological, emotional, financial, community and honour pressures that do not necessarily involve force, violence or abuse but still put individuals under intense pressure.”

20. In its written submission, the Law Society of Scotland stated that it is “of the view that despite our reservations on the criminalisation of the act of forcing someone to marry, the Scottish Government is now obliged to take steps to ensure that we comply with [article 37 of the Istanbul Convention].”

21. The Committee agrees that, in order to ratify the Istanbul Convention, a specific offence of forced marriage is required in Scotland.

Consistency across the UK
22. The Scottish Government believes that there would be a problem with perception if there was a different regime in respect to criminalisation of forced marriage. The Minister said—

“It would be fair to say that if we had decided not to go down the route of criminalising forced marriage and to have a different and what might be perceived to be a weaker law on forced marriage than in the rest of the UK and other European countries, we might well have been criticised for that.”

23. In its written submission, NHS Lanarkshire Ending Violence and Abuse Services argued that “it would seem inequitable that a woman living in East Kilbride could not seek the same policing response for this matter as a woman from Manchester.”

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9 The Law Society of Scotland. Written submission (29 November 2013).
24. However, Lily Greenan noted that there are many areas where the law differs across the UK; she added “I do not see that being an issue, in itself.”

25. Originally, the Scottish Government suggested that the maximum sentence for committing an offence of forced marriage should carry with it a maximum sentence of two years, which, it was argued in the LCM as originally lodged, was consistent with the maximum sentence for similar offences in Scots law.

26. The Minister wrote to the Committee on 6 December 2013 advising that the Scottish Government is now proposing that the maximum sentence should be seven years, in line with the proposals for England and Wales. This was after the Committee’s deadline for its call for evidence had passed and after it had taken oral evidence from stakeholders. In her letter, the Minister said—

“The reasoning behind this decision is that, if we are providing consistency across the UK by criminalisation, we should seek to extend that same consistency (and deterrent to those who would seek to perpetrate forced marriages) by applying the same penalties upon indictment.”

27. In response to the Committee’s request for more information on sentencing, the Scottish Government, in its letter of 12 December 2013, argued that forced marriage is an exploitative offence and a seven year maximum sentence will: reflect the seriousness of the offence; act as a strong deterrent; and reassure victims that what is happening to them is wrong and serious.

28. After the Committee was informed of the change in maximum sentence, the organisations and individuals who had provided evidence to the Committee were contacted and invited to submit a supplementary submission. Two further responses were received. Scottish Women’s Aid disagreed with the increase of maximum sentencing as it would decrease further the willingness of victims to seek assistance.

29. The Committee notes that the Bill proposes changes to Forced Marriage Protection Orders (“FMPO”) in England and Wales, making the breach of these orders a criminal offence. The proposed maximum sentence proposed for a breach of an FMPO in England and Wales is five years; currently in Scotland, the maximum sentence for breach of an FMPO is two years.

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15 Scottish Women’s Aid. Written submission (9 December 2013).
16 NHS Lanarkshire Ending Violence and Abuse Services. Supplementary written submission (9 December 2013).
Deterrence

30. A major strand of the argument from those who support criminalisation of forced marriage (although not expressed in the LCM) is that it will act as a deterrent and send out a strong public message that forced marriage is unacceptable.

31. Police Scotland argued that the strong message would be heard not only by those who may force someone into marriage but also agencies (e.g. education departments). This may increase awareness of the problem and positively impact on reporting of forced marriage from those agencies.\(^\text{17}\) The Minister said that criminalisation will “send out an extremely strong message that Scotland takes a very hard line on the issue”.\(^\text{18}\)

32. Mridul Wadhwa from Shakti Women’s Aid suggested that the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 sent a message that forced marriage is not acceptable, including to service providers. She said, “I am not quite sure whether we need to criminalise forced marriage to make that message stronger.”\(^\text{19}\)

Changing culture

33. While there were differences of opinion on whether forced marriage ought to be criminalised and the impact criminalisation would have, there was agreement that cultural change is essential to eradicate forced marriage.

34. Barnardo’s Scotland stated that “criminalising the act itself will begin to shift perceptions and start the drive towards cultural change that is needed to stamp out forced marriage in Scotland.”\(^\text{20}\)

35. Catriona Dalrymple said that criminalisation of conduct “can play a part in influencing cultural change”. She suggested that—

“We must make it very clear to everybody when something is potentially criminal. That will play a part in changing attitudes regarding what is acceptable.”\(^\text{21}\)

36. Lily Greenan drew a parallel between forced marriage and domestic abuse. She noted that over the last 30 to 40 years there has been “an enormous shift in public perceptions about domestic abuse”. She argued that a major milestone in the work on domestic abuse was the Matrimonial Homes (Family Protection) (Scotland) Act 1981 which was “in effect, a civil remedy response to domestic abuse at a time when very few domestic abuse cases made it to the police”. Ms Greenan also highlighted the importance of education and awareness raising in supporting “men and women to come forward and acknowledge they are victims

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\(^{17}\) Police Scotland. Written submission (22 November 2013).


\(^{20}\) Barnardo’s Scotland. Written submission (2 December 2013).

of abuse”. She added that “a civil remedy enables the process of education and awareness raising to take place while ensuring that protection is available”.  

37. In its written submission, Hermat Gryffe Women’s Aid said that cultural traditions ought to be respected; however, “those cultural practices and traditions that cause harm or abuse … should be confronted through a programme of awareness raising, education and training” and where legal redress is required FMPOs are sufficient in this context. Hermat Gryffe also noted that “this is an extremely culturally sensitive area for the individual faced with a forced marriage”.  

Willingness to report and the wishes of victims  

38. A major strand of the argument of those people and organisations who oppose criminalisation is that it would further deter reporting of forced marriage.  

39. In the joint submission from Scottish Women’s Aid, Shakti Women’s Aid and Hermat Gryffe Women’s Aid, it was argued that victims are reluctant to report their families to the police or to use the existing civil FMPOs. The submission continues—

“They often need to be reassured that the protection they seek can be obtained in the family courts, and, thus, that their families will not be prosecuted, before they will make a formal statement. Criminalisation of forced marriage may therefore further deter vulnerable persons from coming forward and may negatively impact on the use of the existing civil legislation. The symbolic value of any criminal law on forced marriage will be greatly diminished if perpetrators know that it will not be used.”  

40. Ms Wadhwa said that in her experience women who come forward are not seeking to prosecute their families but “just want the marriage to end”. She went on to say that many victims would like, in the long term, to reconnect with their families and that hope would be diminished if forced marriage is criminalised.  

41. In its written submission, Amina Muslim Women’s Resource Centre raised concerns that victims would be less likely to seek annulments to forced marriage if disclosing that they had been forced to marry “could result in their family members facing criminal charges”.  

42. DCS Gillian Imery from Police Scotland explained that there have only been seven FMPOs and the majority had come to light through child protection procedures. She added that those cases “would still come to us through the same route and we would still have the option of using a forced marriage protection order”. DCS Imery also argued that, given the very low reporting of forced marriage, the impact of possible further deterrence to victims reporting would be

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23 Hermat Gryffe Women’s Aid. Written submission (29 November 2013).  
24 Scottish Women’s Aid, Shakti Women’s Aid and Hermat Gryffe Women’s Aid. Written submission.  
26 Amina Muslim Women’s Resource Centre. Written submission (29 November 2013).  
slight. However, Ms Wadhwa drew the distinction between victims asking for help from support organisations and forced marriage being reported to the police.

43. Others believe that criminalisation could increase reporting. In its written submission, Saheliya argued that—

“Individuals at risk will have a better understanding that forced marriage is wrong, and therefore be more empowered to challenge forced marriage themselves and to seek support at an early stage.”

44. The Minister for Commonwealth Games and Sport stated that her reading of evidence from other countries is that when forced marriage is made a criminal offence “reporting of it – not necessarily by the victim – has increased”. She added that in Scotland “no one has come forward to annul a marriage in the last two years”. The Minister wrote to the Committee on 9 January 2014 with more details on the evidence of reporting forced marriage in Denmark; however, the Committee was unable to draw any firm conclusions from the additional information.

45. The Minister argued that, while it is difficult for children to report their own family, forced marriage should be treated in the same way as other domestic crimes, such as domestic abuse and sexual abuse.

46. The Committee recognises that this is a complex and sensitive issue. The Committee believes that more research is required on the best way to effect cultural change and eradicate forced marriage in Scotland.

How criminalisation will work in practice

47. Ms Wadhwa said that forced marriage is a process that can take many years and not an event. She questioned how the law could be practically applied, asking “what exactly are you going to criminalise in that process?”

48. The LCM states that the Scottish Government will work with stakeholders “to develop and produce all relevant guidance for statutory bodies and support organisations etc and to carry out an awareness raising campaign”.

49. Lesley Irving from the Scottish Government said that they are keen to conduct further research on the effects of the criminalisation of forced marriage. She said “at this stage of our knowledge, we do not know what the effect of the legislation would be”. The Minister added that more understanding and research

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30 Saheliya. Written submission (12 December 2013).
32 Scottish Parliament, Letter from the Minister for Commonwealth Games and Sport to the Convener (9 January 2014) Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20140109_SG_to.CG.pdf
35 Legislative consent memorandum (LCM(S4) 22.2). Paragraph 26.
is needed around reporting and the use of civil legislation, she said “it is prudent to have that research in place alongside the legislation”.  

50. The Minister suggested that the FMPOs would still be available if forced marriage is criminalised. She said—

“In essence, the person will be able to choose whether to use a civil remedy. If prosecutors wanted to use criminal law for reasons of public interest, it would be up to them. We do not need the victim’s consent to go down that route, but the civil remedies will still be available to the victim.”  

51. In its written submission, Police Scotland voiced some concerns about how civil and criminal remedies will work in practice. It called for the creation of an “operational toolkit for staff to ensure that all legislative provisions for forced marriage are consistently used to best effect to protect vulnerable victims”.  

52. The Committee is aware that if criminal proceedings are initiated on the same or connected circumstances as civil proceedings, the civil case would be suspended. Therefore the Committee questions how the interaction between civil and criminal remedies will work together to promote victims’ best interests.  

53. The Committee is concerned that the Scottish Government is intending to conduct research in this area after it is legislating and is apparently unclear on the effect of this legislation.  

54. The Committee seeks assurances on how criminal justice agencies will work together with other agencies and victims to ensure that the victims’ wishes and needs are central to the state’s response to an incidence of forced marriage.  

Consultation and the use of the LCM procedure  

55. A theme of much of the evidence received by the Committee was the lack of consultation by the Scottish Government and the short timescale for parliamentary scrutiny in Scotland.  

56. The LCM states—

“Whilst we have not consulted, we have had to consider the need to ensure that we are able to meet our international obligations on forced marriage.”  

57. In its written submission, the Law Society of Scotland expressed its “disappointment that it appears that this decision was made by the UK Government following consultation in England and Wales but not in Scotland, thereby failing to take account of our distinctive legal background”.  

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39 Police Scotland. Written submission (22 November 2013).  
40 Legislative consent memorandum (LCM(S4) 22.2). Paragraph 25.  
41 The Law Society of Scotland. Written submission (29 November 2013).
58. This was echoed in the joint written submission from Scottish Women’s Aid, Shakti Women’s Aid and Hermat Gryffe Women’s Aid which said that “this step … has been undertaken with no public consultation or discussion with the expert organisations working to support those at risk”.

59. The Committee heard a mix of views on whether the criminalisation of forced marriage ought to be legislated through the LCM procedure. Largely, those respondents who did not welcome criminalisation felt that the LCM procedure should not be used and those on the other side of the argument believed that the LCM procedure is appropriate in this case.

60. The Minister said that the Scottish Government had considered bringing forward its own legislation. However, while she accepted that the LCM process is accelerated, she stated that she believes that criminalisation is the right thing to do and that there is “a vehicle in the here and now to do that”. Scottish Ministers will have the power to commence the provisions and the Government expects to do so in mid-2014 at the earliest.

61. In her letter to the Committee of 12 December 2013, the Minister expressed her concern that if the Scottish Government was to bring forward its own legislation, there could be a “considerable time lag where protection in Scotland was not at the same level as protection in England and Wales”.

62. The Committee shares the concerns raised by a number of stakeholders that legislation has been brought forward in such a sensitive and complex area without any consultation in Scotland.

**RECOMMENDATION**

63. While the Committee accepts that criminalisation of forced marriage is required to enable the UK to ratify the Istanbul Convention, it is not convinced that Scotland having the same legislation as the rest of the UK in this area is necessary. The Committee notes that the Scottish Parliament legislated in this area recently and that the 2011 Act has not had time to bed in.

64. The Committee does not believe that the Scottish Parliament and civic society in Scotland has had the opportunity to fully explore the proposed forced marriage legislation and its possible effects. The Committee notes particularly that there was a significant shift in policy, regarding the maximum sentence, after the Committee had taken evidence.

65. The Committee asks the Scottish Government whether it would be practicable to introduce its own legislation on forced marriage after a full
consultation with stakeholders and to still comply with the Istanbul Convention in a reasonable timeframe.

66. The Committee therefore makes no recommendation to the Scottish Parliament with regard to the proposals on forced marriage. However, we recommend that the Parliament agrees to the legislative consent motion in respect of the other two parts.
Members who would like a printed copy of this Numbered Report to be forwarded to them should give notice at the Document Supply Centre.