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Justice Committee Comataidh a' Cheartais

Legislative Consent Memorandum - Domestic Abuse Bill 2019-21



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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and 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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Introduction

1. The [Domestic Abuse Bill](#) is a UK Government Bill introduced to the House of Commons on 3 March 2020. The Bill was debated at second reading on Tuesday 28 April 2020 and has now been sent to a Public Bill Committee.

About the Bill

2. The UK Government describes the principal legislative measures of the Bill as follows:
 - **Part 1** provides for a statutory definition of domestic abuse which underpins other provisions in the Bill.
 - **Part 2** creates the office of Domestic Abuse Commissioner, sets out the functions and powers of the Commissioner and imposes a duty on specified public authorities to cooperate with the Commissioner.
 - **Part 3** provides for a new civil preventative order regime - the Domestic Abuse Protection Notice (“DAPN”) and Domestic Abuse Protection Order (“DAPO”).
 - **Part 4** places new duties on tier one local authorities in England in respect of the provision of support to domestic abuse victims and their children in refuges and other safe accommodation.
 - **Part 5** confers on victims of domestic abuse automatic eligibility for special measures in the criminal courts; and prohibits perpetrators of certain offences from cross-examining their victims in person in the family courts in England and Wales (and vice versa) and gives family courts the power, in certain circumstances, to appoint a legal representative to conduct the cross examination on behalf of the prohibited person.
 - **Part 6** extends the extraterritorial jurisdiction of the criminal courts in England and Wales, Scotland and Northern Ireland to further violent and sexual offences.
 - **Part 7** makes miscellaneous and general provision. In particular, this Part enables domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody; places the guidance supporting the Domestic Violence Disclosure Scheme on a statutory footing; ensures that persons with secure or assured lifetime tenancies are granted a secure lifetime tenancy where the new tenancy is being granted by a local authority for reasons connected to domestic abuse; and confers a power on the Secretary of State to issue statutory guidance to practitioners in England and Wales about tackling domestic abuse.
3. The majority of provisions contained in the Bill apply to England and Wales only. However, Part 6 of the Bill makes provision for the whole of the UK, including Scotland, to provide courts with what is called ‘extra-territorial jurisdiction’ over relevant offences as required by the Council of Europe Convention on preventing and combating violence against women and domestic violence (commonly known as the Istanbul Convention).
4. A summary of the clauses in the Bill that require legislative consent is as follows (clause numbers relate to the print of the Bill on introduction):

Amendments relating to offences committed outside the UK

Clause 62(2) and Part 2 of Schedule 2

This clause introduces Schedule 2, which legislates for devolved purposes, by making provision for the Scottish courts to take extraterritorial jurisdiction over certain offences under the law of Scotland and making relevant amendments to Scots law to facilitate this.

Commencement

Clause 72(3)

This clause confers certain commencement-related powers on the Scottish Ministers so as to alter their executive competence.

5. On that basis legislative consent of the Scottish Parliament is being sought and a [legislative consent memorandum](#) was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 16 March 2020 (see Annex).
6. The LCM sets out that, while the Bill largely applies to England and Wales, it makes provision for the whole of the UK, including Scotland, for extra-territorial jurisdiction over relevant offences, as required by the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). The UK became a signatory to the Convention on 8 June 2012, however, formal ratification remains pending. The measures in the UK Domestic Abuse Bill would allow for formal ratification by providing for extra-territorial jurisdiction over the offences covered by the Convention.
7. Giving effect to the extra-territorial jurisdiction requirements of the Convention will allow relevant offending behaviour to be prosecuted in Scottish courts when the behaviour occurs wholly or partly outside of the UK and when the offender is habitually resident in Scotland or is a UK national.
8. The Scottish Government considers that it is preferable to legislate for extra-territorial jurisdiction through the UK Bill to ensure that the UK is in a position to formally ratify the Istanbul Convention without undue delay.

Consideration by the Committee and recommendation

9. The Committee considered the LCM at its meeting on 2 June 2020. The Committee raised no issues of concern.

10. The Committee agreed with the recommendation of the Scottish Government that the Scottish Parliament should give its consent to the relevant provisions in the Domestic Abuse Bill 2019-21.

Annex

LEGISLATIVE CONSENT MEMORANDUM

DOMESTIC ABUSE BILL

Background

This memorandum has been lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, under Rule 9.B.3.1(a) of the Parliament's standing orders. The Domestic Abuse Bill was introduced in the House of Commons on 3 March 2020. The Bill can be found at:

<https://services.parliament.uk/Bills/2019-21/domesticabuse/documents.html>

Content of the Domestic Abuse Bill

The majority of the provisions contained in the Bill apply to England and Wales only. The Explanatory Notes accompanying the Bill set out the UK Government's view of its purpose and main functionsⁱ. The UK Government describes the principal legislative measures of the Bill as follows:

- **Part 1** provides for a statutory definition of domestic abuse which underpins other provisions in the Bill.
- **Part 2** creates the office of Domestic Abuse Commissioner, sets out the functions and powers of the Commissioner and imposes a duty on specified public authorities to cooperate with the Commissioner.
- **Part 3** provides for a new civil preventative order regime - the Domestic Abuse Protection Notice ("DAPN") and Domestic Abuse Protection Order ("DAPO").
- **Part 4** places new duties on tier one local authorities in England in respect of the provision of support to domestic abuse victims and their children in refuges and other safe accommodation.
- **Part 5** confers on victims of domestic abuse automatic eligibility for special measures in the criminal courts; and prohibits perpetrators of certain offences from cross-examining their victims in person in the family courts in England and Wales (and vice versa) and gives family courts the power, in certain circumstances, to appoint a legal representative to conduct the cross examination on behalf of the prohibited person.
- **Part 6** extends the extraterritorial jurisdiction of the criminal courts in England and Wales, Scotland and Northern Ireland to further violent and sexual offences.
- **Part 7** makes miscellaneous and general provision. In particular, this Part enables domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody; places the guidance supporting the Domestic Violence Disclosure Scheme on a statutory footing; ensures that persons with secure or assured lifetime tenancies are granted a secure lifetime tenancy where the new tenancy is being granted by a local authority for reasons connected to

ⁱ <https://publications.parliament.uk/pa/bills/cbill/58-01/0096/20096.pdf>

domestic abuse; and confers a power on the Secretary of State to issue statutory guidance to practitioners in England and Wales about tackling domestic abuse.

Part 6 of the Bill makes provision for the whole of the UK, including Scotland, to provide courts with what is called 'extra-territorial jurisdiction' over relevant offences as required by the Council of Europe Convention on preventing and combating violence against women and domestic violence (commonly known as the Istanbul Convention).

The Istanbul Convention is focussed on preventing violence against women, protecting victims and prosecuting accused offenders. The Convention opened for signature on 11 May 2011. The United Kingdom became a signatory to the Convention on 8 June 2012, however, formal ratification remains pending.

The Convention establishes a series of offences characterised as violence against women, which can be found at Articles 33 – 41. While the aim of the Convention is to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence, the offences within Articles 33 – 41 are gender neutral.

Article 44 of the Convention requires States which ratify the Convention to take 'extra-territorial jurisdiction' ("ETJ") over these offences, to enable prosecution of its nationals and those habitually resident in the state when they commit one of these offences anywhere in the world. ETJ refers to the extension of a country's criminal law to conduct which takes place outside that country and is the exception to the general principle the criminal law usually has effect with respect to the jurisdiction within which a crime is committed. The measures in the UK Domestic Abuse Bill allow for formal ratification of the Convention by providing for such ETJ in England, Wales, Scotland and Northern Ireland.

Giving effect to the ETJ requirements of the Convention will allow relevant offending behaviour to be prosecuted in our domestic courts when it occurs wholly or partly outside the United Kingdom when the offender is habitually resident in Scotland or a UK national.

The Scottish courts currently have ETJ with regards offences concerning forced marriage, female genital mutilation, murder, culpable homicide and the new domestic abuse offence. The Bill prescribes those further offences Scotland wishes to take ETJ over in order to comply with the Convention, contained in Part 2 of Schedule 2 to the Bill, namely: common law assault; stalking under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010; and the offences contained in sections 1 – 4 of the Sexual Offences (Scotland) Act 2009 (rape; sexual assault by penetration; sexual assault; and sexual coercion).

Relevant Provisions Which Relate to Scotland

A summary of the clauses in the Bill that require legislative consent is as follows (clause numbers relate to the print of the Bill on introduction):

Amendments relating to offences committed outside the UK

Clause 62(2) and Part 2 of Schedule 2

This clause introduces Schedule 2, which legislates for devolved purposes, by making provision for the Scottish courts to take extraterritorial jurisdiction over certain offences under the law of Scotland and making relevant amendments to Scots law to facilitate this.

Commencement

Clause 72(3)

This clause confers certain commencement-related powers on the Scottish Ministers so as to alter their executive competence.

Reasons for seeking legislative consent

The Bill applies largely to England and Wales. The Bill also provides Scottish courts with extra-territorial jurisdiction (ETJ) over offences covered by the Council of Europe Convention on preventing and combating violence against women and domestic violence, commonly known as the “Istanbul Convention”. The Bill is a “relevant Bill” for the purposes of Chapter 9B.3(3)(b)(i) and (ii) of the Standing Orders of the Scottish Parliament, in that it makes provision applying to Scotland for a purpose within the legislative competence of the Parliament as well as altering the executive competence of the Scottish Ministers. Although it would be possible to legislate for the devolved ETJ areas through a Bill in the Scottish Parliament, legislating through this UK Bill will ensure that the UK is in a position to formally ratify the Istanbul Convention quickly.

Consultation

The UK Government consulted on proposals for the draft Bill in March 2018. The consultation response can be found at the following link: <https://www.gov.uk/government/publications/domestic-abuse-consultationresponse-and-draft-bill>

Financial Implications

An estimate of the financial implications of the ETJ provisions of the Bill which extend to Scotland is contained in the accompanying Annex.

Conclusion

It is the view of the Scottish Government that it is preferable in terms of good governance that the relevant provisions which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament in order to ensure that the UK is in a position to ratify the Istanbul Convention without undue delay.

Draft Legislative Consent Motion

The draft motion, which will be lodged by the Cabinet Secretary for Justice, is: “That the Parliament agrees that the relevant provisions of the Domestic Abuse Bill, introduced in the House of Commons on 3 March 2020, relating to amendments to the law of Scotland concerning extra-territorial jurisdiction over certain offences committed outside the UK by a UK national or habitual resident of Scotland in order to ratify the Council of Europe Convention on preventing violence against women and combating violence and domestic violence, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

SCOTTISH GOVERNMENT

March 2020

ANNEX A

Likely impacts of extending ETJ – Scottish Impact Assessment

Due to a lack of relevant data, it is not possible to definitively estimate the impact on the Scottish justice system of providing the courts with ETJ in respect of the offences covered by the Convention.

The UK Government has used data from the Foreign and Commonwealth Office on arrests/detentions of UK nationals where consular assistance was requested and from the charity 'Prisoners Abroad' to estimate the number of additional cases where ETJ could be exercised. They estimate that there would be approximately 200 additional cases per year at a total cost of £6.8m. Proceeding on the assumption that approximately 10% of these cases would involve an offender who is resident in Scotland, the cost to the Scottish criminal justice system would be approximately £680,000 per annum resulting from 20 additional cases per year.

It should be noted these estimates do not take into account those offences which are not reported to foreign authorities but are instead reported to the home jurisdiction upon return e.g. when the complainer returns home from a holiday abroad. The numbers could therefore be greater than as estimated. However, while there may be up to 200 cases where ETJ could be exercised in the UK, and up to 20 cases where ETJ could be exercised in Scotland, only the most serious cases are likely to be prosecuted in the UK courts and therefore the actual number of cases and costs are likely to be lower.

Additional costs will fall on the Crown Office and Procurator Fiscal Service (COPFS), Scottish Courts and Tribunals Service (SCTS) and Scottish Legal Aid Board (SLAB) as a result of these additional cases. It is anticipated that the costs for the SCTS and SLAB will be in line with the cost of trials relating to offences committed in Scotland. However, for COPFS, there will also be additional costs as a result of: a) training (minimal); b) obtaining evidence from abroad; c) seeking concurrence from foreign authorities; d) transporting witnesses from abroad.

The average costs of a court case to COPFS, (excluding costs specifically associated with offences committed abroad), SCTS and SLAB are as follows ⁱⁱ:

- Sheriff Summary: £1,45
- Sheriff & Jury: £8,086
- High Court: £93,071

Fewer than 1% of all cases heard in the Scottish Courts in 2017/18 were tried in the High Court. However, the cost of any additional High Court cases arising from the extension of ETJ is disproportionately higher and some of the offences over which ETJ is being taken, including rape and sexual assault by penetration, either must be tried in the High Court or are more likely to be. For illustrative purposes, if the extension of ETJ were to result in an additional 5 High Court cases per annum, the cost to the COPFS, SCTS and SLAB is estimated at £292,730 per year ⁱⁱⁱ. If there were also to be an additional 5 cases heard in the Sheriff Court before a jury, the estimated cost to the COPFS, SCTS and SLAB is £40,430. If it then assumed that the remaining 10 additional cases capable of being prosecuted as a result of the extension of ETJ would, had they been committed in

ii Taken from <https://www2.gov.scot/Topics/Statistics/Browse/CrimeJustice/Publications/costcrimjustscot/costcrimjustdataset>

iii This does not take into account other costs which would be likely to arise as a result of an offence occurring in a foreign jurisdiction, e.g. obtaining evidence from abroad.

Scotland, been tried under summary procedure, then given that it is anticipated only the most serious cases committed outwith Scotland would be tried in Scotland's courts, these would not be prosecuted. The total additional cost to COPFS, SCTS and SLAB is therefore estimated at £333,160 per annum.

There are also likely to be additional costs for the Scottish Prison Service (SPS) arising out of the extension of ETJ to those offences covered by the Convention. It is difficult to accurately estimate what these costs will be. The average notional 'unit' cost of a prison place in Scotland in 2017/18 was £38,9034^{iv}. The additional cost to the SPS will depend on the number of additional cases tried in the Scottish Courts, the proportion of those resulting in the conviction of the accused, and the proportion of those cases in which the courts impose a custodial sentence. The UK Government estimate that the average cost of additional prison places in England and Wales will be £4m per annum. In the absence of available data, we consider an estimate of £400,000 per annum in additional costs to the SPS is reasonable, though in the first years after the provisions are commenced, that cost is likely to be lower^v.

In view of the considerable uncertainty, monitoring the number of additional cases that arise after the extraterritorial provisions of the Bill come into effect will be prudent to accurately assess the financial impacts.

iv See SPS Annual Report and Accounts 2017/18 <http://www.sps.gov.uk/Corporate/Publications/Publication-6017.aspx>

v Making the reasonable assumption that a proportion of the custodial sentences imposed are of more than 12 months duration.

