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Justice Committee Comataidh a' Cheartais

Legislative Consent Memorandum - Private International Law (Implementation of Agreements) Bill [HL] 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 [Private International Law \(Implementation of Agreements\) Bill \[HL\] 2019-21](#) is a UK Government Bill introduced in the House of Lords on 27 February 2020. The Bill is currently at the Committee stage in that House.

About the Bill

2. The principal legislative measures of the Bill are described by the UK Government as follows:
 - providing a clear approach to the domestic implementation of three international agreements drawn up under the auspices of the Hague Conference on Private International Law; and
 - creating a delegated power which allows the Scottish Ministers, or the Secretary of State with the consent of the Scottish Ministers, to implement international agreements on Private International Law in domestic law in future via secondary legislation.
3. The Bill implements in domestic law the Hague Conventions of 1996, 2005 and 2007. A summary of each of the conventions can be found in the LCM (see Annex A).
4. The second main provision of the Bill provides, in relation to Scotland, the Scottish Ministers (or the Secretary of State with the consent of the Scottish Ministers) with a subordinate legislation making power to domestically implement international conventions or agreements in private international law. This part of the Bill can be used for any future international conventions in the area of private international law (“PIL”) the UK enters and ratifies, both with the EU and other international partners.
5. For example, this power would be used to implement the Lugano Convention if the UK Government can successfully negotiate with the EU to re-join the convention. The Lugano Convention is the only substantial fall back for the EU regulation “Brussels Ia” (which provides rules for jurisdiction and recognition and enforcement of judgments in civil and commercial matters). The UK will cease to participate in Brussels Ia at the end of the implementation period. Lugano is an agreement between the EU and Norway, Switzerland and Iceland and the UK Government intends to accede to the Convention in 2020.
6. Provisions within the Bill which extend to Scotland relate to private international law which is within the legislative competence of the Scottish Parliament. The Bill also alters the executive competence of the Scottish Ministers. A summary of clauses in the Bill that require legislative consent can be found in the LCM (see Annex A).
7. A [legislative consent memorandum](#) was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 30 March 2020. The LCM can be found in Annex A.
8. The LCM states that the Bill is primarily being brought forward due to EU exit. The EU had taken competence to enter certain private international law agreements on behalf of Member States and the domestic implementation of the UK’s obligations under such conventions as an EU Member State was achieved by virtue of section 2(1) of and by Regulations made under the powers of section 2(2) of the European Communities Act 1972. EU Exit also means the loss of participation in the EU Regulations on civil judicial co-operation. This creates a need to enter into new international agreements with the EU and other states in this area.

9. Negotiating and joining international agreements on private international law is reserved, but implementing them in domestic law is devolved. The Bill provides that the Scottish Ministers may exercise the power to implement them in domestic law in relation to Scotland. However, the Secretary of State may also exercise the power in relation to Scotland, with the Scottish Ministers' consent.
10. In considering whether to support the Bill the Scottish Government reached the following conclusions:
 - The provisions within this Bill must be brought forward for Scotland or, as a separate jurisdiction, Scotland would be placed in a prejudicial position and Scottish citizens and businesses could be negatively impacted: in particular the Scottish Government would want to provide reassurance to those affected by the cross-border family support and custody mechanisms.
 - Clause 1 and schedule 5 of the Bill relate to legislation already brought forward at a UK level (with the Scottish Ministers' consent approved by the Scottish Parliament) to simplify the post Brexit implementation by means of primary legislation. The implementation approach in the Bill is simpler and clearer for users.
 - The Bill is drafted to respect the devolution position: the Scottish Ministers make provision for implementation in Scotland with UK Ministers only being able to do so with the consent of the Scottish Ministers. Legislation in this area has in the past been taken forward on a UK basis and it may be convenient for it to be so in the future so the Scottish Government recommends this approach.
 - It is the Scottish Government's view that the most expeditious way to provide legal and financial certainty in Scotland is for the UK Government to put in place the necessary legislative cover across the UK.

Consideration by the Delegated Powers and Law Reform Committee

11. The Delegated Powers and Law Reform Committee considered the LCM at its meeting on 12 May 2020 and agreed to write to Scottish Government. The Committee considered the Scottish Government's response at its meeting on 19 May 2020. The issues explored with the Scottish Government, and the Committee's views on the response received, are set out in the letter attached in Annex B.

Conclusion and recommendation

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

13. **The Committee agreed with the recommendation of the Scottish Government that the Scottish Parliament should give its consent to the relevant provisions in the Private International Law (Implementation of Agreements) Bill [HL] 2019-21.**

Annex A

LEGISLATIVE CONSENT MEMORANDUM

PRIVATE INTERNATIONAL LAW (IMPLEMENTATION OF AGREEMENTS) BILL

Introduction

The Private International Law (Implementation of Agreements) Bill was introduced in the House of Lords on 27 February 2020. The Scottish Government considers that this is a relevant Bill under Rule 9B.1 of the Parliamentary Standing Orders. This memorandum has been lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, under Rule 9.B.3.1(a).

The Bill and supporting documents can be found at:

<https://services.parliament.uk/Bills/201921/privateinternationallawimplementationofagreements/documents.html>

This memorandum relates to the Private International Law (Implementation of Agreements) Bill as introduced.

The Bill is necessary as a result of the UK's withdrawal from the EU. The Scottish Government deeply regrets the withdrawal of Scotland, as part of the UK, from the EU on 31 January 2020. This action was taken with no democratic mandate for withdrawal in Scotland.

However, the Scottish Government accepts the need to make preparations for the circumstances which arise as a result of that withdrawal and to ensure that Scottish citizens, families and businesses are not adversely affected by the impact of EU Exit on the UK's private international law arrangements with other states including our nearest neighbours in the EU.

While the introduction of this Bill has been triggered by the UK leaving the EU, there are aspects of the Bill which go beyond EU exit. The Bill is also about the future strategy for international relations on private international law within the UK. That strategy is a continuation of the UK's longstanding commitment to international cooperation on private international law, and the agreements it implements are multinational agreements not limited to EU nations. These agreements also support the legal services sector by allowing the UK (including Scotland as a separate jurisdiction) to participate in private international law developments internationally.

Content of the Private International Law (Implementation of Agreements) Bill

The Explanatory Notesⁱ accompanying the Bill set out the UK Government's view of its purpose and main functions. The UK Government describes the principal legislative measures of the Bill as follows:

ⁱ <https://publications.parliament.uk/pa/bills/lbill/58-01/101/5801101en.pdf>

- providing a clear approach to the domestic implementation of three international agreements drawn up under the auspices of the Hague Conference on Private International Law; and
- creating a delegated power which allows the Scottish Ministers, or the Secretary of State with the consent of the Scottish Ministers, to implement international agreements on Private International Law in domestic law in future via secondary legislation.

The Bill implements in domestic law the following three key international agreements on private international law (or ‘Hague Conventions’):

The 2005 Hague Convention on Choice of Court Agreements (“the 2005 Convention”):

- A multilateral treaty aimed at ensuring the effectiveness of exclusive choice of court agreements between parties to international commercial transactions. Exclusive choice of court clauses are common in high value commercial contracts.
- The convention adds more legal certainty for parties to cross-border commercial contracts and maintains UK jurisdictions as an attractive choice for resolving disputes in commercial contracts.
- The convention provides legal certainty for resolving disputes relating to crossborder contracts.

The 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance (“the 2007 Convention”):

- A multilateral treaty aimed at providing rules for the international recovery of child support and other forms of family maintenance, and for administrative cooperation between contracting States.
- The convention provides rules for recognition and enforcement of maintenance decisions across borders and for administrative cooperation between relevant countries on the processing of maintenance claims.
- The convention puts in place a framework for maintenance matters which can help reduce the financial hardship for the children of Scottish resident parents.

The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (“the 1996 Convention”):

- A multilateral treaty aimed at improving the protection of children in crossborder disputes.
- The convention provides a framework for the resolution of issues such as residence of, and contact with, children where parents live in different countries, and establishes co-operation between national authorities involved in caring for children.
- The convention provides legal certainty that decisions relating to children (e.g. access arrangements) made in one country will be respected in others, so that people do not have to incur the expense and trouble of taking fresh proceedings in another country.

All three conventions constituted EU Treaties under section 1 of the European Communities Act 1972. For the 2005 and 2007 Conventions the UK's participation was through the EU as the contracting party. The UK has now taken steps to re-join these conventions in its own right. The UK is already the contracting party to the 1996 Convention. Domestic implementation of the three conventions was achieved primarily through reliance on EU law, mainly on section 2(1) of the European Communities Act 1972 and the principle of direct effect of EU law (together with accompanying regulations made under section 2(2) of the 1972 Act). During the transition or implementation period (IP), provisions in the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020 continue this means of implementation. It has however to be re-considered for the end of the IP. In 2018, the Scottish Ministers (with the approval of the Scottish Parliament) consented to two UK statutory instrumentsⁱⁱ (SIs) including devolved material relating to the 2005 and 2007 Hague Conventions. These SIs were made under powers in the EU (Withdrawal) Act 2018 and made legislative provision to adjust the existing domestic implementation of the conventions on UK ratification in its own right. No SI was made in relation to the 1996 Convention, relying instead on provisions in the EU (Withdrawal) Act 2018 which save directly effective treaty rights.

The Bill provides for a new, simpler approach to domestic implementation of the three Conventions to ensure that they continue to operate effectively at the end of the IP in a way that is more transparent and clearer for users. Clause 1(2) of the Bill inserts provisions into the Civil Jurisdiction and Judgments Act 1982 to give the force of law to the 1996, 2005 and 2007 Hague Conventions.

The second main provision of the Bill provides, in relation to Scotland, the Scottish Ministers (or the Secretary of State with the consent of the Scottish Ministers) with a subordinate legislation making power to domestically implement international conventions or agreements in private international law. This part of the Bill can be used for any future international conventions in the area of private international law ("PIL") the UK enters and ratifies, both with the EU and other international partners. For example, this power would be used to implement the Lugano Convention if the UK Government can successfully negotiate with the EU to re-join the convention. The Lugano Convention is the only substantial fall back for the EU regulation "Brussels Ia" (which provides rules for jurisdiction and recognition and enforcement of judgments in civil and commercial matters). The UK will cease to participate in Brussels Ia at the end of the implementation period. Lugano is an agreement between the EU and Norway, Switzerland and Iceland and the UK Government intends to accede to the Convention in 2020.

Provisions which relate to Scotland

Provisions within the Bill which extend to Scotland relate to private international law which is within the legislative competence of the Scottish Parliament. The Bill also alters the executive competence of the Scottish Ministers. Legislative consent from the Scottish Parliament is therefore required. 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):

Clause 1

ii [The Civil Jurisdiction and Judgments \(Hague Convention on Choice of Court Agreements 2005\) \(EU Exit\) Regulations 2018](#) and [The International Recovery of Maintenance \(Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007\) \(EU Exit\) Regulations 2018](#)

Clause 1 provides for the implementation of the three Hague conventions. This is achieved by amending the Civil Jurisdiction and Judgments Act 1982 (“the 1982 Act”).

Clause 1(1) inserts a definition of the 1996 Hague Convention into section 1(1) of the 1982 Act, which is the section dealing with interpretation of references to Conventions in that Act. The 1982 Act already contains definitions of the 2005 and 2007 Hague Conventions.

Clause 1(2) inserts new sections 3C, 3D and 3E into the 1982 Act, providing for the 1996, 2005 and 2007 Hague Conventions respectively to have the force of law in the UK, subject to any reservations and declarations made by the UK. The UK made the declarations to the 1996 Hague Convention which are referred to in new section 3C(2) when it joined that Convention in 2012. The UK intends to accede to and ratify the 2005 and 2007 Hague Conventions during Autumn 2020 and will make declarations and a reservation to those Conventions in the form already approved by the UK Parliament when those Conventions were laid in the UK Parliament for scrutiny under the Constitutional Reform and Governance Act 2010 in 2018.

Clause 1(3) inserts into the 1982 Act the Schedules set out in **Schedules 1 to 4** to this Bill, which comprise the text of the three Hague Conventions, and of the declarations which the UK made in 2012 in relation to the 1996 Hague Convention. The UK Government intends to use the power in clause 2 of the Bill to amend the 1982 Act to insert schedules containing the text of the reservation and declarations the UK will make for the 2005 and 2007 Hague Conventions, once it has submitted its instruments of accession and ratification to those Conventions, in Autumn 2020.

Clause 1(4) introduces Schedule 5 which contains provisions consequential on clause 1 of the Bill.

Schedule 5

Paragraph 1 adds the 1996 Hague Convention to the list of Conventions in relation to which the existing rule-making power in section 48 of the 1982 Act may be exercised, as a consequence of the 1982 Act being amended by the Bill to insert provisions implementing that Convention. This power already applies in relation to the 2005 and 2007 Hague Conventions.

Paragraph 2 provides for section 4 of the European Union (Withdrawal) Act 2018 to cease to apply to directly effective rights etc. derived from the 1996, 2005 and 2007 Hague Conventions. It will not be necessary to rely on these directly effective rights, saved by section 4 of the 2018 Act, once the provisions of clause 1(2) of the Bill have provided for those Conventions to have the force of law. This is subject to the savings for “section 4 rights” in the EU Exit Regulations referred to in subparagraph (2). These are the UK SIs referenced in paragraph 4 of this Memorandum.

Paragraphs 3 and 4 make consequential amendments to the EU Exit Regulations made in exercise of the powers in section 8 of the European Union (Withdrawal) Act 2018 in relation to the directly effective treaty rights derived from the 2005 and 2007 Hague Conventions. This reflects the new approach to implementation of the Conventions by the Bill rather than provision in the SIs operating on retained EU law. Only the provision in the SIs for transitional cases is retained.

Paragraph 5 makes minor consequential amendments to provision made in respect of headings in the 1982 Act.

Paragraph 6 revokes the Council Decision, adopted by the EU, authorising Member States to join the 1996 Hague Convention. This Council Decision will otherwise be saved in domestic law by section 3 of the European Union (Withdrawal) Act 2018, but is redundant.

Clause 2

Clause 2 provides a power to Ministers to implement by way of subordinate legislation future international PIL agreements.

Clause 2(1) gives an “appropriate national authority” the power to make regulations (secondary legislation) to implement international agreements on PIL. The power can also be used to amend existing domestic provisions implementing a PIL agreement if any changes to its implementation are required.

Clause 2(2) provides that regulations may also be made to implement an international PIL agreement for application between England & Wales, Scotland and Northern Ireland, so the rules can be applied in cases raising cross-border issues between the three different legal jurisdictions in the UK, even if that is not a requirement of the international agreement itself.

Clause 2(3) provides that regulations may be made to give effect in UK domestic law for any arrangements for applying a relevant international agreement on PIL (with or without modifications), entered into between the UK and the government of a “relevant territory”, defined in clause 2(7) to mean the Crown Dependencies and Overseas Territories.

Clause 2(4) and (5) make further provisions about the sorts of provisions regulations made under clause 2(1) may include. Clause 2(5) makes clear that regulations may implement obligations in a PIL agreement which relate to the provision of legal aid or provisions which concern the sharing of information between courts or competent authorities dealing with cross border disputes. Clause 2(5) also makes clear that regulations may include enforcement provisions, but these will be subject to the restrictions in paragraph 1 of Schedule 6.

Clause 2(6) introduces Schedule 6 which sets out restrictions on the use of the power in clause 2 and the legislative procedure to be followed when making regulations under clause 2.

Clause 2(7) provides definitions of various terms used in clause 2. The effect of the definition of “appropriate national authority” is that the power in clause 2(1) could be exercised by the Scottish Ministers in relation to Scotland. The Secretary of State may also make regulations in relation to Scotland but only with the consent of the Scottish Ministers.

The definition of “international agreement” covers a convention, treaty or agreement to which the UK has already become a contracting party or to which it intends to become a contracting party (for example, it may have signed but not ratified the agreement). This ensures that it will be possible to exercise the power in clause 2(1) to make implementing regulations before an agreement is ratified. It is normal practice to ensure that domestic implementing legislation is in place before the UK formally becomes bound by an international obligation, so that it is able to comply with it immediately.

The definition of ‘private international law’ provides examples of the sorts of issues typically covered by international agreements in this field of law. The definition means that the power could be used, for example, to implement the 2007 Lugano Convention on

Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the 2019 Singapore Agreement on Enforcement of Mediated Settlement Agreements, and the 2019 Hague Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters should the UK join these in future.

Clause 2(8) provides for the implementation of model laws relating to PIL adopted by an international organisation of which the UK is a member. It provides that the regulation making power in clause 2(1) may be used to “give effect to” – rather than “implement” – a model law, because the text of a model law is not binding in the way that an international agreement is, and states may adapt a model law when giving effect to it.

Schedule 6

Paragraph 1(1)(a) provides that regulations made under clause 2 may not themselves confer a new power to legislate, other than a power to make procedural rules for courts or tribunals, but can modify or extend an existing power. **Paragraph 1(1)(b)** imposes limits on making regulations which create an offence subject to a term of imprisonment.

Paragraphs 2 to 6 (paragraph 5 does not relate to Scotland) deal with the procedure and Parliamentary scrutiny for making regulations under clause 2. Paragraph 3 deals with the procedure for regulations made by the Secretary of State. Paragraph 4 deals with the procedure for regulations made by the Scottish Ministers. In each case, the affirmative procedure will be triggered if the regulations:

- are implementing a new international agreement on PIL for the first time in domestic law, or a new arrangement entered into between different jurisdictions in the UK, or between the UK and an Overseas Territory or Crown Dependency to apply an arrangement based on an international agreement (suitably modified) between them.
- create, extend or increase the penalty for a criminal offence.
- amend primary legislation (defined by paragraph 6 to include an Act of the Scottish Parliament). Reasons for seeking legislative consent

This Bill is primarily being brought forward due to EU exit. The EU had taken competence to enter certain private international law agreements on behalf of Member States and the domestic implementation of the UK’s obligations under such conventions as an EU Member State was achieved by virtue of section 2(1) of and by Regulations made under the powers of section 2(2) of the European Communities Act 1972. EU Exit also means the loss of participation in the EU Regulations on civil judicial co-operation. This creates a need to enter into new international agreements with the EU and other states in this area.

Negotiating and joining international agreements on private international law is reserved, but implementing them in domestic law is devolved. The Bill provides that the Scottish Ministers may exercise the power to implement them in domestic law in relation to Scotland. However, the Secretary of State may also exercise the power in relation to Scotland, with the Scottish Ministers’ consent.

Consultation

No formal consultation was carried out on the Bill. As indicated above, the Bill is primarily being brought forward due to EU exit. EU exit creates a need to enter into new international agreements with the EU and other states. Since the Bill’s introduction, the UK

Government has engaged with stakeholders on the Bill's provisions including the Law Society of Scotland.

Financial Implications

The UK Government provided the following analysis of financial implications, which the Scottish Government agrees with:

Clause 1 means that the provisions of three Hague Conventions, which were directly applicable in UK law during the transition period, continue to have legal effect in UK law after the end of the transition period. No substantive changes are being made to the Hague Convention provisions being implemented under the Bill and clause 1 is therefore not expected to have any financial implications.

Clause 2 creates the delegated power which will be used to implement a range of international agreements on private international law which could have financial implications for UK businesses, individuals and families. However, each use of this power will require separate financial analysis with the implications depending on the agreement being implemented. The creation of the power has no financial effect in and of itself.

Clause 3 and Clause 4 have no financial impact.

Scottish Government view

The Scottish Government has considered carefully the provisions of this Bill as it legislates for Scotland and whether to seek legislative consent from the Scottish Parliament. In considering whether supporting this Bill would be in Scotland's best interests the following conclusions have been reached:

- The provisions within this Bill must be brought forward for Scotland or, as a separate jurisdiction, Scotland would be placed in a prejudicial position and Scottish citizens and businesses could be negatively impacted: in particular the Scottish Government would want to provide reassurance to those affected by the cross-border family support and custody mechanisms.
- Clause 1 and schedule 5 of the Bill relate to legislation already brought forward at a UK level (with the Scottish Ministers' consent approved by the Scottish Parliament) to simplify the post Brexit implementation by means of primary legislation. The implementation approach in the Bill is simpler and clearer for users.
- The Bill is drafted to respect the devolution position: the Scottish Ministers make provision for implementation in Scotland with UK Ministers only being able to do so with the consent of the Scottish Ministers. Legislation in this area has in the past been taken forward on a UK basis and it may be convenient for it to be so in the future so the Scottish Government recommends this approach.
- It is the Scottish Government's view that the most expeditious way to provide legal and financial certainty in Scotland is for the UK Government to put in place the necessary legislative cover across the UK.

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 to ensure effective domestic implementation of the three Hague Conventions is and that future private international law agreements can be implemented without delay.

Draft Legislative Consent Motion

The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Scottish Parliament agrees that the Private International Law (Implementation of Agreements) Bill, introduced in the House of Lords on 27 February 2020, providing a clear approach to the domestic implementation of the 1996, 2005 and 2007 Hague Conventions at the end of the Implementation Period and providing a power for the Scottish Ministers or the Secretary of State with the consent of the Scottish Ministers to, on the UK entering any international agreement on Private International Law, implement that agreement in order for it to have legal effect in domestic law, in so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

SCOTTISH GOVERNMENT

March 2020

Annex B

Letter from the Convener of the Delegated Powers and Law Reform Committee dated 19 May 2020.

Dear Margaret

At its meeting on 12 May, the Delegated Powers and Law Reform Committee agreed to write to the Scottish Government with questions on the Private International Law (Implementation of Agreements) Bill. The Committee considered the response from the Scottish Government today. The issues explored with the Scottish Government, and the Committee's views on the response received, are set out below for your information. The correspondence on this matter is also attached.

Given the remit of this Committee, the issues explored related to the delegated powers in devolved areas that are contained in this Bill.

Firstly, the Committee asked: "in what circumstances does the Scottish Government consider that it will be appropriate for the power to be exercised by UK Ministers as opposed to by the Scottish Ministers, and vice versa?". The Cabinet Secretary for Justice indicated in his response to the Committee that it may be beneficial for implementation to take place in one set of UK rules in some cases. It indicates that in the past, legislation in this area has been taken forward for the whole of the UK and that this might be appropriate in future. The response explains that circumstances in which the Scottish Government consider that it will be appropriate for the Scottish Ministers to exercise the power would include "where this is more expeditious, or where the different legal systems throughout the UK warrant it due to the procedure and process differences, or where a convention was only going to be implemented in Scotland". The Committee is content with the response on this matter and the indication of the likely use of powers in this area.

The Committee also asked: "where the powers are exercised by UK Ministers with Scottish Ministers' consent, how will the Scottish Government help facilitate scrutiny by the Scottish Parliament?". In response, the Cabinet Secretary referred to the new protocol that is being developed for scrutiny of Scottish Ministers' consent to UK SIs in devolved areas arising from EU withdrawal. The Cabinet Secretary stated:

"It is the Scottish Government's intention that the new protocol should cover all instruments proposed to be made by UK Ministers arising from EU exit and relating to devolved matters. This would include instruments under the UK's Private International Law (Implementation of Agreements) Bill"

The Committee welcomes this commitment and the confirmation that the protocol will extend to this Bill.

I hope this information assists your committee in its consideration of this LCM.

Yours sincerely,

Bill Bowman

Convener of the Delegated Powers and Law Reform Committee

