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RESPONSE FROM THE SCOTTISH GOVERNMENT TO THE JUSTICE COMMITTEE REPORT: THE IMPACT OF BREXIT ON THE CIVIL AND CRIMINAL JUSTICE SYSTEMS AND POLICING IN SCOTLAND

I would like to thank the Justice Committee for its report. I welcome the findings of the report which clearly demonstrate why remaining within the European Union is in the best interests of Scotland, and also the UK. I share the Committee's frustration that even now, less than 75 days until the UK is set to leave the EU, there is still no clarity from the UK Government as to what the future relationship with the EU will look like.

Scotland voted overwhelmingly to remain within the European Union. The decision about EU exit must now be put back to the people. If such a referendum is held, the Scottish Government will argue strongly that the UK should remain in the EU. It is concerning that the UK Government has not ruled out leaving the European Union without a deal on 31 October. As the First Minister has made clear to the Prime Minister, the effects of a 'no deal' exit will be catastrophic for all parts of the UK. In addition to the impact on our economy and jobs, a 'no deal' EU exit will have a detrimental impact on justice and policing. As highlighted by the Committee's report, this comes sharply into focus in relation to the costs incurred by Police Scotland on EU exit to date. These costs currently stand at £7.2 million and are anticipated to be in the region of £17 million by the end of this financial year. The Scottish Government has been clear that leaving the EU is not our choice and Scotland's public finances should not suffer detriment as a result of this. The UK Government must ensure all EU exit costs are covered in full.

As was set out in our publication, Scotland's Place In Europe: security, judicial cooperation and law enforcement, and recognised by the Committee, in a 'no deal' exit, Police Scotland and the Crown Office will lose access to key security and law enforcement co-operation measures used on a daily basis to fight crime. For example, the loss of SIS II will present challenges for Police Scotland in being able to respond quickly to apprehend suspects. This system provides real time alerts to officers, including if there is a European Arrest Warrant in place. This has facilitated the apprehension of high profile suspects, even as quickly as within 5 hours of the warrant being issued. Retaining access to Europol and sharing of intelligence

is a high priority for Police Scotland, who have a liaison officer posted there. Disclosure Scotland use ECRIS for vital vetting and barring checks for those who are seeking employment in Scotland with children and the most vulnerable in our communities. Any dilution of these security and law enforcement measures can only benefit criminals. Whilst in most cases there are fallback measures available, these are much slower and more cumbersome than the existing EU framework. On civil and commercial law matters, the EU rules for cross border jurisdiction and mutual recognition of court judgments provide businesses and individuals with certainty about what laws apply across EU borders and how these will be recognised. The loss of this framework will remove that stability.

The Committee raised points in its conclusions which I would like to address.

131. Similarly, we recommend that the Scottish Government provides the Committee with additional information generated from its Sub-Board on Justice, which has been meeting to discuss Brexit preparedness in Scotland. We ask the Cabinet Secretary to consider sharing copies of agendas, minutes and key planning papers with the Committee. We make a similar request to the UK Government to share more information on Brexit preparedness, as it relates to Scotland, with the Committee.

The Justice EU Sub Board meets on a monthly basis to share information and good practice so that each organisation can prepare for EU exit, so far as is possible. When information has been provided to the Scottish Government, and can be shared, my officials have provided updates on what preparations the UK Government has been engaged in, in relation to justice and security matters. My officials have provided regular reports to all Board Members on the legislative changes needed for justice and security matters for exit date and information on migration and the EU Settlement Scheme (devised by the UK Government) to help our Justice partners provide support to EU citizens, who carry our invaluable roles in their workforces. As the UK Government making extensive preparations for the possibility of a 'no deal' exit, the focus of the Justice Sub Board will be on preparations for this scenario. Going forward, I will write and provide the Committee with regular updates regarding the work of the Justice Board EU sub-group.

132. Furthermore, we call on the Cabinet Secretary for Justice to provide information on his discussions with UK Government ministers on Brexit matters in line with commitments made in the Agreement between the Scottish Parliament and Scottish Government covering the provision of information on intergovernmental discussions.

The Inter-Governmental Relations Written Agreement Between the Scottish Parliament and the Scottish Government captures the participation of Scottish Ministers in formal, inter-governmental structures. The next annual report will be published in due course. However, the Committee may find it helpful to have a note of the informal engagement that has taken place. As the Committee is aware, I wrote to the then Home Secretary in relation to EU exit matters in September of last year. I did not receive a response. I have recently written to the new Home Secretary to set out my concerns about the impact of leaving the EU without a deal on policing and justice matters in Scotland and the need for both administrations to work closely on EU exit preparations. This is particularly important to ensure the separate criminal justice system in Scotland, the role and functions of the Lord Advocate in his capacity as head of the Crown Office and Procurator Fiscal Service, and the priorities of our operational partners are factored into all UK wide planning. Since appearing before the Committee, I have written to UK Government Ministers on four separate occasions in respect of Justice and Home Affairs EU measures, reiterating that it is vital that operational partners in Scotland have access to the full range of EU tools and databases to rapidly and effectively fight cross border crime.

Since I appeared at the Committee, I have had discussions with the then Parliamentary Under-Secretary of State for Justice on civil judicial cooperation. I wrote to the newly appointed Secretary of State for Justice, on 25 July, to reiterate the importance of working together to ensure there is continued cooperation with European partners and requesting an early meeting to discuss these issues. The Committee will be aware that the new UK Government recently set up two cabinet sub committees, The XS (strategy) subcommittee chaired by the Prime Minister and The XO (operations) subcommittee which meets daily and is chaired by the Chancellor of the Duchy of Lancaster. Ministers from devolved administrations will be invited to attend the XO Committee 'when the agenda demands' and as is normal there is an expectation of confidentiality placed on those attending.

At the end of January, the Minister for Community Safety also attended a Ministerial Forum on EU Negotiations in Edinburgh, where discussions took place with UK Government Ministers, Welsh Ministers and senior officials from the Northern Ireland Civil Service on the future relationship with the EU on justice and security. The Minister for Parliamentary Business and Veterans wrote to the Conveners of the Culture, Tourism, Europe and External Affairs and Finance and Constitution committees, copied to the convenor of the Justice committee, following this meeting. In relation to internal security, Ms Denham specifically highlighted that the risk of a 'no deal' was very concerning. Losing access to vital EU tools and databases such as the European Arrest Warrant and Europol will result in a loss of operational capability in Scotland. She expressed particular concern about the absence of an express reference to the Schengen Information System II and the European Criminal Records System in the political declaration (negotiated by Theresa May) which suggests the UK will lose access to these vital EU databases in the future. Ms Denham also pointed out the lack of detail on what the future arrangements with Europol and Eurojust will be, which is of concern to operational partners. She questioned whether the stated aspirations of the UK Government are achievable within the constraints of the then UK Government's red lines and approach to negotiations.

On civil judicial cooperation, Ms Denham stated that it will be very important for Scotland to be involved in the future negotiations on this issue in view of our distinct and separate legal system and because civil justice is devolved. She highlighted the importance of ongoing cooperation and the preference to maintain the current EU framework, rather than rely on fall-back options, that may not always be sufficient, as is the case for the recognition and enforcement of judgments in civil and commercial matters.

Since my Committee appearance, my officials have worked hard to improve the relationship with the Home Office and obtain salient information. Along with representatives from the other Devolved Administrations, they now attend key UK wide planning meetings on EU exit as do our operational partners. Whilst the engagement has generally improved, particularly in relation to the planning for a future relationship, some challenges do remain: namely, receiving timeous information, ensuring the Home Office takes full account of the priorities or risks there are in Scotland and fully understands the role and functions of the Lord Advocate in his prosecutorial capacity.

The relationship between officials in the Ministry of Justice and my officials remains positive and key information continues to be shared on EU exit preparations.

134. Finally, we give notice that the Committee intends to pay particular attention to the discussions between the two governments on the future legislative and non-legislative common frameworks that will need to be negotiated. These frameworks will define how the UK and Scotland will co-operate on civil and criminal justice matters and policing after Brexit. We ask both governments now for an update on the progress of their discussions so far and a detailed statement on what priorities both governments see in

relation to each of the common frameworks that will need to be put in place in the justice portfolio.

As Scotland's separate legal system predates both EU membership and devolution, there are already well established links between the justice agencies in Scotland and the rest of the UK. There are 24 policy areas led by the Home Office and 13 areas led by Ministry of Justice that intersect with devolved areas in Scotland, where the UK Government initially indicated that a common framework may be required. Eurodac, a fingerprint database used for asylum claims is considered by UK Government to be a reserved matter, subject to discussions with devolved administrations. Scottish Government officials continue to work with both UK Government departments to establish whether a common framework is needed beyond current working arrangements. Progress on frameworks will be undertaken in line with the [principles for common frameworks](#) agreed by JMC(EN) in October 2017. At present, it is not anticipated by officials of both the Scottish Government and the UK Government that a common framework is needed for any of these 37 policy areas but this could change.

Annex A to this letter describes the frameworks process in more detail. I will write to the Committee with updates as the frameworks are further developed.

As we face the unfathomable and chaotic prospect of a 'no deal' exit, I want to assure the Committee that the Scottish Government will do everything it can, so far as it possible, to ensure the impacts of a no deal' EU exit on justice and security issues in Scotland are mitigated. However, whilst we will collectively do everything we can to prepare, we will not be able to mitigate all of the impacts of a "no deal" Brexit. The Scottish Government remains fully committed to continue working closely with Police Scotland, the Crown Office and all our justice partners, who are to be commended for the professionalism which each one has demonstrated in preparations taking place within their own organisations for EU exit.

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Annex A : Common Frameworks Process

The Scottish Government remains committed to working collaboratively with the UK government and other Devolved Administrations to develop common frameworks, where required, after EU Exit, in specific policy areas. This work is being developed in line with the framework principles agreed by the Joint Ministerial Committee (EU Negotiations) (JMC(EN)) in October 2017. The Scottish Government is clear that these arrangements, in whatever form they take, will not alter or constrain devolution in any way and will not prevent the Scottish Parliament from making alternative arrangements in these areas should they judge that to be necessary in the future.

The JMC (EN) has agreed that work to develop and establish common frameworks should follow five broad phases, set out in the [UK Government's update on progress on common frameworks](#) published last month. The first phase took place between October 2017 and March 2018 and focused on determining whether common frameworks may be required in different policy areas and the high level purposes using the principles agreed by JMC (EN).

The focus to date has been on the 24 priority policy areas where the original analysis undertaken by the UK Government suggested that primary legislation would be required. The majority of those frameworks are currently in phase 2 of their development, with work focussing on policy development at official level. Attention is now starting to turn to the remaining 78 policy areas. The overarching planning assumption across all administrations has been that any required common frameworks would be in place by the end of any transition period, if a deal and a transition period is agreed.

The timings set out for the phased approach to frameworks development are indicative. The intention is to provide sufficient flexibility for different policy areas to move through Phases 2 – 5 at different speeds, depending on the dependencies and circumstances of particular policy areas. While the process is being managed through clear and agreed project management disciplines, in reality the development of frameworks is emerging as a complex ongoing intergovernmental process with significant impacts and interdependencies, including the outcome of negotiations between the UK Government and the EU.

Officials from all four administrations have been working together to develop proposals for joint engagement with a range of stakeholders. The intention is for this plan to be rolled out over the next few months as frameworks start to move into phase 3 of the development process. The plan will inform stakeholders about frameworks, what these are for, to enable them to input into the development process and increase transparency.

Engagement is proposed on 3 levels:

- to raise general awareness with umbrella organisations whose members will have an interest in the process and progress of frameworks;
- proactive parliamentary engagement at Westminster and the devolved legislatures to inform both clerks and elected representatives about frameworks, including key milestones and the progress being made; and
- technical engagement by policy teams with sector specific stakeholders, including parliamentary committees, on the detail of individual frameworks.

As set out in our response to the Finance and Constitution Committee's report on Common Frameworks, the Scottish Government recognises the crucial role parliamentary scrutiny will play in the development, implementation and oversight of any future Common Frameworks.

The Scottish Government is committed to working with the Parliament to develop a suitable scrutiny procedure. Scottish Government officials are currently in discussion with committee clerks from the Scottish Parliament to explore possible options, drawing on our joint experience of the current agreed processes, such as:

- the protocol agreed between the Scottish Government and the Scottish Parliament to ensure adequate scrutiny of the large number of statutory instruments required to ensure a functioning statute book on EU exit¹;
- the written agreement between the Scottish Parliament and Scottish Government on inter-governmental relations²; and
- existing processes for parliamentary scrutiny of concordats, MOUs and similar agreements.

Update on frameworks progress in justice and policing

In the latest [UK Government frameworks analysis](#), of the 160 areas of EU law that intersect with devolved competence, there are 24 policy areas led by the Home Office and 13 areas led by Ministry of Justice. As Scotland has always had a separate legal system to England and Wales, there are longstanding agreements about how bodies such as the police and court services interact. At present it is considered by officials in both the Scottish Government, the Home Office and the Ministry of Justice that there is no need for new justice frameworks in consequence of EU exit in any of the areas listed below, however this assessment continues to be reviewed.

Ministry of Justice framework areas

Civil judicial co-operation

- applicable law in contracts and non-contractual obligations
- cross border mediation (Mediation Directive)
- jurisdiction and recognition and enforcement of judgments in civil and commercial matters
- jurisdiction and recognition and enforcement of judgments: instruments in family law
- legal aid in cross border cases
- service of documents and taking of evidence
- uniform fast track procedures for certain civil and commercial claims

Minimum standards measures

- Criminal offences
- Procedural rights (criminal cases)
- Victims' rights measures in criminal cases (Victims' Rights Directive)

Other areas

- Mutual recognition of criminal court judgments measures and cross border cooperation
- Provision of legal services (temporary and permanent basis)
- Sentencing - taking convictions into account

Home Office framework areas - Police and criminal justice cooperation

Practical cooperation

¹ http://www.parliament.scot/S5_Delegated_Powers/20180911CabSec.pdf

² http://www.parliament.scot/20160309_IGR_Agreement3.pdf

- European Judicial Network
- Joint Action on Organised Crime
- Mutual legal assistance
- Asset recovery offices
- Basic cooperation legislation on child sexual exploitation
- Convention Implementing the Schengen Agreement (law enforcement cooperation)
- European Investigation Order
- Joint investigation teams
- Mutual recognition of confiscation orders
- Mutual recognition of asset freezing orders
- Swedish initiative
- Cooperation on football disorder

Data sharing

- False and Authentic Documents Online (FADO)
- European Criminal Records Information System (ECRIS)
- Prüm framework
- Schengen Information System (SIS II)
- Passenger name records (PNR)

Agencies

- EU-LISA
- Eurojust
- Europol
- CEPOL

Minimum standards legislation

- Human trafficking
- Cybercrime

Other areas

- Accreditation of Forensic Service Providers (FSP) and mutual recognition of results of FSPs - Prüm Framework