



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

23rd Meeting, 2020 (Session 5)

Tuesday 29 September 2020

The Committee will meet at 10.00 am in a virtual meeting and be broadcast on www.scottishparliament.tv.

1. **Post-mortem Examinations (Defence Time Limit) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Gil Paterson MSP;

Liz Anderson, Assistant Clerk, Non-Government Bills Unit, Claudia Bennett, Solicitor, and Andrew Mylne, Clerk Team Leader, Non-Government Bills Unit, Scottish Parliament.

2. **Sentencing Bill (UK Parliament legislation):** The Committee will consider the legislative consent memorandum lodged by Humza Yousaf (Cabinet Secretary for Justice) (LCM(S5)45).

3. **Subordinate legislation:** The Committee will consider the following negative instrument—

The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No. 2) Rules 2020 (SSI 2020/264)

4. **Defamation and Malicious Publication (Scotland) Bill (in private):** The Committee will consider key issues for a draft Stage 1 report.

Stephen Imrie
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5195
Email: justiceCommittee@parliament.scot

The papers for this meeting are as follows—

Agenda item 1

Note by the Clerk

J/S5/20/23/1

PRIVATE PAPER

J/S5/20/23/2 (P)

Agenda item 2

Note by the Clerk

J/S5/20/23/3

Agenda item 3

Note by the Clerk

J/S5/20/23/4

Agenda item 4

PRIVATE PAPER

J/S5/20/23/5 (P)

Justice Committee

23rd Meeting, 2020 (Session 5), Tuesday, 29 September 2020

Post-mortem Examinations (Defence Time Limit) (Scotland) Bill

Paper from the Clerk

Introduction

1. The Post-mortem Examinations (Defence Time Limit) (Scotland) Bill (“the Bill”) was introduced by Gil Paterson on 21 May 2020. It is a Member’s Bill. The Bill and accompanying documents can be accessed [here](#).

2. Guidance issued by the Crown Office and Procurator Fiscal Service states that a post mortem examination (PME) will always be required where a death has occurred in suspicious circumstances. It is normal practice for PME’s to take place as soon as possible after the report of a death to the Procurator Fiscal. If someone is charged in connection with the death however, the accused person’s solicitor can ask pathologists to carry out a further PME. This is known as a “defence PME”. There is no timeframe in which to make this request.

3. The purpose of the Bill is, in cases where the accused has been charged with causing or contributing to a death, to make the right of the defence to instruct a further PME subject to a 14 day time limit. The Bill also provides that a defence solicitor may apply to the courts for an extension to the time limit. There is no limit to the number of applications for extension that can be made.

4. The Member was prompted to pursue this legislation following the high-profile murder in his constituency of 15-year-old Paige Doherty in March 2016. Despite an arrest being made within a week of Paige’s murder, a delay in the defence PME meant her family had to wait over a month to hold a funeral service and were unable to have an open-casket funeral as was their cultural tradition.

5. According to the [policy memorandum](#) which accompanies the Bill the overarching policy objection of the Bill is to encourage the defence to act more quickly, leading to a general reduction in delay. The Members hopes it will also increase transparency in the system, helping families to understand what is happening, reducing distress and giving them more advance certainty about the timescales within which funeral arrangements can be made.

Approach to Stage 1 consideration

6. At its business planning meeting in August 2020, the Committee agreed to hear from Gil Paterson MSP at a future meeting as to the reasons why he considers the Bill is necessary.

Oral evidence

7. At its meeting on 29 September, the Committee will hear from

Gil Paterson MSP

Mr Paterson will be accompanied by

Andrew Mylne and **Liz Anderson**, Non- Government Bills Unit and

Claudia Bennett, Solicitor, Scottish Parliament Solicitors' Office.

8. This evidence session will be a virtual meeting, with all Members and witnesses participating via live video conferencing. The session will explore the aims of the legislation and why Mr Paterson considers the legislation is necessary.

9. Members of the public can watch the evidence session live on the Scottish Parliament TV website from 10:00 am on Tuesday 29 September: <https://www.scottishparliament.tv/>

Next steps

10. As the lead Committee at Stage 1 it falls to the Committee to gather evidence and information on the Bill and to report to the Parliament on whether to agree to the general principles of the Bill. Following this evidence session, the Committee will consider its approach to this and a separate Member's Bill. Details of the next steps will be announced in due course.

Justice Clerks
24 September 2020

Justice Committee

23rd Meeting, 2019 (Session 5), Tuesday 29 September 2020

Legislative Consent Memorandum

Note by the Clerk

Introduction

1. This paper invites the Committee to consider a Legislative Consent Memorandum (LCM) in relation to the following UK Government Bill:

- **Sentencing Bill**

2. The Sentencing Bill was introduced in the House of Lords on 5 March 2020. The Bill can be found at:

<https://services.parliament.uk/bills/2017-19/sentencingpreconsolidationamendments.html>

3. The Bill is currently awaiting 2nd Reading in the Commons and, therefore, time is tight before it reaches its final stage of consideration in the UK Parliament. It is envisaged, therefore, that Members will need to complete their consideration at today's meeting.

Legislative consent process

4. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of a LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as "relevant provisions". These provisions could:

- change the law on a "devolved matter" (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or
- alter the "legislative competence" of the Scottish Parliament (its powers to make laws) or the "executive competence" of Scottish Ministers (their powers to govern).

5. Under an agreement formerly known as the "Sewel Convention", the UK Parliament will not normally pass Bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the basis of a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in

the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

6. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament's Standing Orders.

Sentencing Bill

7. The Bill is a consolidation of legislation governing sentencing procedures in England and Wales with the purpose of ensuring that the law in this area is comprehensible and operates within a clear framework. As a consolidation, the Bill does not make any changes to existing offences and penalties, nor does it introduce any new substantive law or sentencing disposals

Scottish Government Legislative Consent Memorandum

8. An LCM was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 22 September 2020. The LCM can be found in **Annex A**.
9. In considering whether to support the Bill the Scottish Government reached the following conclusion:

“The Bill applies almost entirely to England and Wales only. Although it would be possible to legislate for the devolved areas through a Bill in the Scottish Parliament, the amendments made in this Bill are very minor technical amendments to allow for the consolidation of existing law on sentencing procedure in England and Wales. The Scottish Government considers it preferable to legislate in one overall Bill so as to eliminate the need to identify a Scottish legislative vehicle at a time of particular pressure on the justice legislative programme especially when there are no policy issues arising”

10. The LCM (Annex A, paragraph 12) sets out the Scottish Government's draft motion.

Action

11. **Members are invited to consider whether to agree with the recommendation of the Scottish Government that the legislative consent motion for the Sentencing Bill should be agreed by the Scottish Parliament.**
12. **Members are also asked to agree that the Convener should arrange for the publication of a short, factual report on the outcome of the Committee's deliberations.**

Justice Committee Clerks
September 2020

LEGISLATIVE CONSENT MEMORANDUM

SENTENCING BILL

Background

1. 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 Sentencing Bill was introduced in the House of Lords on 5 March 2020. The Bill can be found at:

<https://services.parliament.uk/bills/2017-19/sentencingpreconsolidationamendments.html>

Content of the Sentencing Bill

2. In 2014, as part of its 12th Programme of Law Reform, the Law Commission for England and Wales undertook a project designed to consolidate and codify the law relating to sentencing procedures. The Law Commission published its final report in November 2018 alongside a draft Sentencing (Pre-Consolidation Amendments) Bill and a draft Sentencing Code Bill¹.
3. The Sentencing Bill, which amounts to over 600 pages, is the second of the draft Bills prepared by the Law Commission and which the UK Government has introduced in the UK Parliament. It is a consolidation of legislation governing sentencing procedures in England and Wales with the purpose of ensuring that the law in this area is comprehensible and operates within a clear framework. As a consolidation, the Bill does not make any changes to existing offences and penalties, nor does it introduce any new substantive law or sentencing disposals.

Provisions Which Relate to Scotland

4. The Sentencing Bill applies largely to England and Wales only. However, and as with the previous Sentencing (Pre-Consolidation Amendments) Bill for which an LCM² was promoted, there are a small number of provisions in the Bill which extend and apply to Scotland which trigger the requirement for an LCM.
5. The Scottish Government should wish to note that the UK Government does not consider that any provisions in the Sentencing Bill trigger a requirement for seeking the consent of the Scottish Parliament. That view appears to be on the basis that the Bill is consolidatory in nature and does not in itself make substantive changes to Scots law, or which alter the legislative competence of

¹ <https://www.lawcom.gov.uk/document/sentencing-code-final-report/>

² <https://digitalpublications.parliament.scot/Committees/Report/J/2020/3/5/Legislative-Consent-Memorandum---Sentencing--Pre-consolidation-Amendments--Bill#Introduction>

the Parliament or the executive competence of the Scottish Ministers. However, the Scottish Government is acting on the basis of its own interpretation of Rule 9B of Standing Orders under which there is no exception for provision that is classed as consolidatory in nature.

Requirement for LCM

6. The content of the Bill relating to Scotland that requires an LCM is as follows:

Transfer of community orders to Scotland or Northern Ireland

- **Clause 219 and Schedule 11**
 - These clauses provide for powers for how community orders imposed by an English or Welsh court should operate where an offender is resident in Scotland or likely to be resident in Scotland. Community orders are broadly similar to community payback orders which operate in Scotland. Scottish courts are provided with the same powers over such orders as they have in respect of corresponding Scottish community payback orders. Although this Bill merely restates powers that exist rather than creating any new powers or adjusting any existing powers, the operation of powers for local authorities and courts in Scotland over community orders imposed by a court in England or Wales is a devolved matter which requires the LCM.

Transfer to Scotland or Northern Ireland of suspended sentence orders which impose community requirements

- **Clause 304 and Schedule 17**
 - These clauses provide for powers for how suspended sentence orders which impose community requirements which are imposed by an English or Welsh court should operate where an offender is resident in Scotland or likely to be resident in Scotland. Although this Bill merely restates powers that exist rather than creating any new powers or adjusting any existing powers, the operation of powers for local authorities and courts in Scotland over suspended sentence orders which impose community requirements imposed in a court in England or Wales is a devolved matter which requires the LCM.

Making of sexual harm prevention order: effect on other orders and offences

- **Clause 349(2)**
 - Clause 349(2) provides that where an English and Welsh court makes a sexual harm prevention order under the Sentencing Code in relation to an offender who is already subject to a sexual offences prevention order or a foreign travel order, the earlier order ceases to have effect. This applies to the earlier order whichever part of the UK it was made in. For further information, paragraph 214 of Schedule 24 provides for this in respect of a Scottish court making an order nullifying an earlier order imposed elsewhere in the UK outwith Scotland. Paragraph 209 of Schedule 24 modifies the offence of breach of a sexual harm prevention order made so it applies to such orders made under the Bill.

Schedule 24 is discussed more generally below. Although this Bill merely restates powers that exist rather than creating any new powers or adjusting any existing powers, the operation of certain consequences arising as a result of decisions made in courts in Scotland and operation of criminal laws associated with sexual harm prevention orders/sexual offences prevention orders is a devolved matter which requires the LCM.

Effect of derogatory assertion orders

- **Clause 38, 40 and 41**

- These clauses relate to derogatory assertion orders. These are orders under clause 39 (which does not extend to Scotland). These are orders relating to assertions made in pleas in mitigation or in respect of sentencing where there are substantial grounds for believing that assertion is derogatory to a person's character and the assertion is false/ or the facts asserted are irrelevant to the sentence. Orders under clause 39 can only be made by English and Welsh courts. However, it is an offence to breach an order in Scotland – by publishing the assertion in a written publication available to the public or including the assertion in a relevant programme (i.e. a programme included in a programme service within the meaning of the Broadcasting Act 1990). These correspond to existing provision in the Criminal Procedure and Investigations Act 1996. The purpose of the provisions is the creation of an offence to better ensure compliance with orders which are a form of reporting restriction. Such orders and the related offence appear to be general matters of sentencing. That is, the order would be available regardless as to whether the offence is a matter of criminal law which would be reserved or which would be devolved had it been committed in Scotland. Sentencing policy is generally a devolved matter, in that Scots criminal law is generally devolved. Although the Bill merely restates existing provision in this area, the purpose is to legislate as to the general criminal law of Scotland and so an LCM is required.

Effect of order for absolute discharge and order for conditional discharge

- **Clause 82**

- This clause relates to the operation of clauses 79-81. These clauses enable the making of an order for absolute discharge (clause 79), enable the making of an order for conditional discharge (clause 80) and introduces schedule 2, which makes provision that applies where a person subject to an order for conditional discharge commits a further offence (clause 81). Those clauses do not extend to Scotland. The effect of such orders is set out in clause 82, which does extend to Scotland. Subject to exceptions, the conviction for which an order is made is deemed not to be a conviction. The provisions could be said to relate, in a substantive manner, to Scots private law and Scots criminal law generally. This provision affects e.g. what convictions from England and Wales can be placed before a court for the purposes of sentencing. The provision applies across the board i.e. it does not just relate to offences relating to reserved matters. The purpose, therefore,

appears to relate to the general criminal law, and private law, of Scotland and triggers the need for an LCM.

Execution of process between England and Wales and Scotland

- **Clause 396**
 - This clause provides for various processes issued by a magistrates' court. This enables a Scottish court to endorse certain processes originating from a magistrates' court to allow for such processes to be served and executed in Scotland e.g. a summons. Although the Bill merely restates existing powers, as this relates to the devolved matter of criminal procedure, this requires the LCM.

Consequential, repeal and revocations

- **Clause 414(5)**
 - This clause introduces relevant schedule 24 (consequential) and schedule 28 (repeals and revocations). Schedule 24 makes various consequential amendments, mainly adding or substituting references to the Sentencing Code rather than substantive changes. Some of these apply to legislation extending to Scotland and which would be within the legislative competence of the Scottish Parliament. Schedule 28 repeals various enactments, including some with Scottish extent. The origin of the provisions of the Sentencing Code with Scottish extent are repealed. These provisions relate to provisions that are devolved and so which require the LCM.

Reasons for seeking a legislative consent motion

7. The Bill applies almost entirely to England and Wales only. Although it would be possible to legislate for the devolved areas through a Bill in the Scottish Parliament, the amendments made in this Bill are very minor technical amendments to allow for the consolidation of existing law on sentencing procedure in England and Wales. The Scottish Government considers it preferable to legislate in one overall Bill so as to eliminate the need to identify a Scottish legislative vehicle at a time of particular pressure on the justice legislative programme especially when there are no policy issues arising.

Consultation

8. The Scottish Government has consulted with the UK Government about this LCM. No wider consultation was considered necessary given the technical nature of the LCM.
9. The House of Lords Library has prepared the following briefing on the Bill:
<https://lordslibrary.parliament.uk/research-briefings/ln-2020-0084/>.

Financial Implications

10. The provisions of the Bill which extend to Scotland have no significant financial implications. This is because the relevant provisions in the Bill do not introduce any new policy in Scotland.

Conclusion

11. 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 not legislate through the UK Government Bill would defeat one of the purposes of the Bill itself which is to have one single comprehensive piece of sentencing legislation for England and Wales. It would also require separate Scottish justice primary legislation at a time of heavy demands on the legislative programme in the area of justice policy.

Draft Legislative Consent Motion

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

“That the Parliament agrees that the relevant provisions of the Sentencing Bill, introduced in the House of Lords on 3 March 2020, relating to transfer of community orders to Scotland or Northern Ireland, transfer to Scotland or Northern Ireland of suspended sentence orders which impose community requirements, making of sexual harm prevention order: effect on other orders and offences, effect of derogatory assertion orders, effect of order for absolute discharge and order for conditional discharge, execution of process between England and Wales and Scotland and consequential, repeal and revocations so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

SCOTTISH GOVERNMENT
September 2020

Justice Committee

23rd Meeting, 2020 (Session 5), Tuesday 29 September 2020

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:
 - [The Prisons and Young Offenders Institutions \(Coronavirus\) \(Scotland\) Amendment \(No.2\) Rules 2020](#) [see page 3];
2. If the Committee agrees to report to the Parliament on the instrument, it is required to do so by 5 October 2020.

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 8 September 2020 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

Procedure for negative instruments

4. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
5. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
6. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
7. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

8. Each negative instrument appears on the Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
9. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

10. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

Recommendation

11. **The Committee is invited to consider the instrument.**

POLICY NOTE**THE PRISONS AND YOUNG OFFENDERS INSTITUTIONS (CORONAVIRUS)
(SCOTLAND) AMENDMENT (NO. 2) RULES 2020****SSI 2020/264**

1. The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No. 2) Rules 2020 (“the Amendment Rules”) were made in the exercise of the powers conferred by section 39 of the Prisons (Scotland) Act 1989. These Rules amend The Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the Prison Rules”) and they are subject to negative procedure.

Policy Objective

2. The Prison Rules set out provisions relating to the regulation and management of Prisons and Young Offenders Institutions and various matters concerning those who are required to be detained in these institutions (such as their classification, treatment, discipline, employment and control).
3. These amendments extend the application of amendments made by the Prisoners and Young Offenders Institution (Scotland) Amendment Rules 2020 to the Prison Rules which came into force in April 2020. These amendments are designed to continue to support the Scottish Prison Service’s (SPS) response to the exceptional pressures facing prisons during the current Coronavirus outbreak and the impact that staff shortages within prisons may have as prison staff require to self-isolate to prevent the spread of the virus. The amendments generally provide Governors with flexibility in regards to compliance with timescales and the provision of those services, which although important, are not critical to the security and health of SPS and NHS staff and those in our care. The amendments will only be in force until 31 March 2021.
4. Given the current uncertainty around further local and national ‘lockdowns’ as a result of the Coronavirus and the risks of further outbreaks, SPS considers it necessary to retain some of the flexibility afforded by the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020, to ensure that we are prepared and able to focus on the immediate priorities arising from such outbreaks. Having reviewed the use of the flexibility afforded by the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020, we have determined that three of the provisions are no longer required, Rule 33A (Provision of clothing to prisoners – Coronavirus), Rule 34A (Personal hygiene – Coronavirus) and 35A (Prisoners food and drink – Coronavirus).
5. During this outbreak of Coronavirus, SPS has been able to provide catering and laundry services in compliance with the requirements of Rule 33 (Provision of clothing to prisoners and Rule 35 (Prisoners food and drink) and prisoners have been provided with an opportunity to bathe or shower every day or at least every other day as required by Rule 34 (Personal hygiene).

Impact Assessment

6. An Equality and Human Rights Impact Assessment was carried out which determined that without these measures the Article 3 rights (Prohibition of torture, or of inhumane or degrading treatment or punishment) of the prisoners in the care of SPS could be engaged. The assessment also recognised that the changes will engage the article 8 rights (the right to respect for private and family life, home and correspondence) of prisoners. SPS consider that these rule amendments are necessary for the protection of the health, safety and security of SPS staff, NHS staff and prisoners during this current Coronavirus outbreak. It remains the view of the SPS that the amendment rules can be applied in a proportionate way to have the least impact possible upon prisoners' article 8 rights.

Consultation

7. There has been consultation with operational managers and policy colleagues within the SPS and Scottish Government. SPS also advised NHS colleagues and HM Inspectorate of Prisons for Scotland and the Scottish Human Rights Commission of the intention to take forward these changes.

Financial Effect

8. The Cabinet Secretary for Justice confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

**SCOTTISH PRISON SERVICE
AUGUST 2020**