

Written evidence submitted by the Law Society of Scotland (PCSCB02)

Police, Crime, Sentencing and Courts Bill 2021

Briefing

Background

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

Our Criminal Law Committee and Employment Law subcommittee has considered the Police, Crime, Sentencing and Courts Bill 2021 (the Bill) which was introduced to Parliament on 9 March 2021.¹

The Bill had its second reading on 15 March and is a carry-over from the previous session. Its committee stage begins on 18 May.

Purpose of the Bill

The purpose of the Bill with 13 parts and 16 schedules is wide ranging. It has correctly been described as a very significant Bill given that length and its potential effect though many of the provisions do not affect Scotland. We suggest that it is vital that it receives effective and robust scrutiny from Parliament, given the potential ramification of some of the provisions.²

Various provisions have already attracted significant media attention such as those related to public order and the right to protest.³ These have arisen in the wake of events at Clapham Common relating to the murder of Sarah Everard (though these provisions only apply to England and Wales.)

In acknowledging the context to the Bill, under paragraph 3 of the Bill's Factsheet, the Government has committed to various objectives. These include to "protect and empower the police by enshrining "the Police Covenant into law", "passing the Police Protection Bill", introducing new powers to "tackle unauthorised traveller camps" and introducing "a new court order to target known knife carriers, making it easier for officers to stop and search those convicted of knife crime."⁴

Much of the Bill relates to sentencing and the release, prevention, investigation and prosecution of crime,⁵ community sentences and youth justice⁶ and procedures in courts and tribunals⁷ where again most provisions would not apply to Scotland.

¹ <https://publications.parliament.uk/pa/bills/cbill/58-01/0268/200268.pdf>

² <https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/03/Libertys-Briefing-on-the-Police-Crime-Sentencing-and-Courts-Bill-HoC-2nd-reading-March-2021-1.pdf>

³ Part 3 of the Bill

⁴ <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-overarching-factsheet>

⁵ Part 2 of the Bill

⁶ Part 7 of the Bill

⁷ Part 12 of the Bill

Territorial Extent

Clause 174 of the Bill deals with territorial extent of the Bill.⁸

As highlighted above, many of the Bill's provisions relate to policing, the prevention, detection and investigation of crime, sentencing and the operation of the criminal courts which subject to exceptions are matters within the legislative competence of the Scottish Parliament.

The Bill also contains measures which are Scotland-specific and relate to certain reserved matters which include defence, special powers and other provisions for dealing with terrorism, the interception of communications, the Road Traffic Act 1988 (RTA 1988), the Road Traffic Offenders Act 1988 (RTOA 1988) and Road Traffic (New Drivers) Act 1995 and certain matters relating to the operation of reserved tribunals such as employment outlined below.

Paragraphs 215, 216 and 219 and Annex C of the Bill's Explanatory Notes refer to the need for a Legislative Competence Motion in the Scottish Parliament for certain provisions within its legislative competence.⁹ We discuss the detail of a number of the Bill's provisions below but for completeness we confirm that a Legislative Consent Motion in the Scottish Parliament will be required in respect of clauses 3, 36-42, 47, 51, 150, 153, 155, 156 and schedules 3, 5 and 17.

Content

This briefing focuses on those provisions that apply to Scotland. The significant provisions affecting Scotland have been divided into three parts:

1. Road Traffic which includes Standard of Driving and the Police, increase in Road traffic penalties-sentencing, the creation of a new Road Traffic offence, the introduction of courses, surrender of licences, the imposition of fixed penalties and extensions of driving periods of disqualification.
2. Extraction of information from electronic devices
3. Miscellaneous -Management of offenders – terrorist and sexual offence and remote hearings

There are other provisions in the Bill affecting Scotland which we have detailed in the table included in the attached Annex for reference.

Part 1- Road Traffic

There are various provisions affecting Road Traffic matters. These have been grouped under headings as follows:

The Standard of Driving and the Police

Clauses 4- 6 of the Bill seek to amend the sections 2A and 3ZA of the 1988 Act which relate respectively to (i) dangerous driving and (ii) driving without due care and attention in so far as police officers are concerned.

In the event of an incident, police drivers would no longer be compared to regular drivers who are assessed under the standards of experienced and skilful driver.¹⁰ Trained police drivers would be compared to what is expected of a trained police driver when deciding if they had committed a relevant offence and any prosecution should result. Different standards would apply to them as drivers compared to the public.

⁸ The following provisions extend to England and Wales, Scotland and Northern Ireland— (a) sections 36 to 42 (and Schedule 3); (b) section 51(2); (c) this Part, other than section 171 (and Schedule 20). (3) Sections 67(3) to (7), 116 and 118 extend to England and Wales and Scotland.

⁹ <https://publications.parliament.uk/pa/bills/cbill/58-01/0268/en/200268en.pdf> These Explanatory Notes relate to the Police, Crime, Sentencing and Courts Bill as introduced in the House of Commons on 9 March 2021 (Bill 268)

¹⁰ *Nettleship v Weston* [1971] 2 QB 691

It is important to acknowledge that no policy consultation has been carried out regarding the proposed introduction of these changes in Scotland. The Briefing paper on the Bill: Protection of the police specifically recognises this.¹¹

This is regrettable since the policy justification is based on the Crown Prosecution Service and the Independent Office of Police Complaints, neither of which apply in Scotland. The principal basis for change is couched in terms of a need to clarify existing caselaw relating to *R v Bannister*¹²¹³ which does not necessarily apply in Scotland, having merely at best persuasive authority.

Though we understand that driving standards for Police Scotland, set by the Scottish Police Authority, are similar to England and Wales, there is not reference to any consultation with them. There has similarly no additional consideration made under Scots criminal law that any such change is justified or indeed any clarity of the law is required. We recognise that there should not be a difference in driving assessment for police officers across the UK but would consider that the Scottish dimension should be considered before change is brought forward.

The decision and discretion as to any criminal prosecution in Scotland lies with the Crown Office and Procurator Fiscal Service (COPFS) as the sole prosecuting authority. Prosecutions will be initiated in the name of the Lord Advocate, provided sufficient admissible evidence exists. That is assessed in accordance with Scottish criminal evidential rules such as corroboration and requires justification of prosecution in the public interest. Factors to be assessed in the “public interest” are set out in Chapter 6 of the COPFS Prosecution Code.¹⁴ That affords discretion where an incident occurs which seems to us to be a better approach than the imposition of what comprises a different standard of driving for police officers. What about other emergency workers such as ambulance or fire-brigade. They too respond to emergency situations so should they not be considered similarly.

There are concerns too where any prosecution is to be initiated that that depends on evidence to be provided by the police themselves. They would be the expert as to what are the standards of police driving. That does not appear to provide robustness as to attaining the necessary independent scrutiny or for an effective objective assessment to be made.

In Scotland, any complaint about the police will be reviewed by the Police Investigations and Review Commissioner.¹⁵ Police complaints in Scotland have been the subject of the recent Report by Dame Elish Angiolini QC¹⁶ “Policing - complaints handling, investigations and misconduct issues: Independent Review” Given the proposed implementation of a number of the recommendations, there is a need to consider how these changes would interact.

, the police officer must be driving for “police purposes” which are not undefined. We assume that includes the driving of off duty officers if responding to something that has arisen. This should be made clearer.

Increase in penalties for certain Road Traffic offences

Clause 64 provides for increases in Road Traffic sentencing penalties. It amends the table at Part 1 of Schedule 2 to RTOA1988 by increasing the maximum penalties for the offences of causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs.

It changes from 14 years’ imprisonment to imprisonment for life. The increase in the maximum penalties for these offences does not apply to offences committed before these provisions are commenced.

¹¹ Note 139 - the Bill- Part 1- Protection of the Police House of Commons briefing paper Number 9162 12 March 2021
<https://researchbriefings.files.parliament.uk/documents/CBP-9162/CBP-9162.pdf>

¹² [2009]153

¹³ [2009]153

¹⁴ The Court of Appeal concluded that a police officer’s special skills were irrelevant when deciding if they had been driving dangerously. The case centred on an officer who had been driving in response to an emergency call in dark and wet conditions. He was driving at 113mph when he slid off the road, colliding with a tree, destroying his vehicle and causing minor injuries to himself. He was charged and found guilty of dangerous driving.

¹⁵ https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

¹⁶ <https://pirc.scot/>

¹⁷ <https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/>

It is important to remember that sentencing is for the judge and the sentence that is imposed needs to be commensurate with the circumstances of the offence.

There are currently no Scottish Sentencing Guidelines on Road Traffic cases for Scotland. Certainly, there has been research undertaken by the Scottish Sentencing Council (SSC) published in February 2021 that there is inconsistency in Road Traffic sentencing stating:

“overall [that] participants did not have a clear understanding of the full range of causing death by driving offences. For example, the distinction between dangerous and careless driving was not always well understood by participants.”¹⁷

While not necessarily disagreeing with the changes to sentencing that are being proposed, on their own, they cannot achieve the policy objective. There has been no suggestion in Scotland that the current sentencing provisions have proved to be inadequate.

We suggest that there is a need for public awareness as to the likely sentencing for any Road Traffic offence so that those affected including relatives can understand and be advised accordingly. They need to be aware of the realistic outcome as to the likely sentence to be imposed as that depends on a range of factors.

Publishing Scottish Sentencing Guidelines to apply to Road Traffic offences, especially serious offences, would be a good approach and a useful outcome.

Creation of a new Road Traffic offence

Clause 65 provides for a new offence of causing serious injury by careless, or inconsiderate, driving. It adds a new section 2C to the RTOA 1988. The offence is committed if a person causes serious injury by driving a car or other mechanically propelled vehicle on a road or other public place without due care and attention or without reasonable consideration for other road users.

We have significant concerns over the creation of this new offence. The SSC publication outlined that “participants tended to associate careless driving with a lack of intent whereas dangerous driving was associated with more deliberate intent.”¹⁸ That is correct in that the intent in relation to careless driving is less serious than that in respect of dangerous driving. In sentencing in criminal law, the penalties ought to reflect this less serious fault though we can understand that one careless mistake in driving may have grave consequences. One serious mistake in driving may have a minimum effect.

The aim of the Government is that “the penalties available to the courts for such offences are proportionate and reflect the seriousness of the offences committed.”¹⁹ We suggest that this misses the point and conflates civil and criminal liability in stating that “the government also wants to close a gap in the law relating to serious injury.”²⁰

There is a need to understand that under Road traffic law, many crimes are strict liability in their nature crimes, and are crimes which require no proof of mens rea (guilty mind) in relation to one or more aspects of the actus reus (action of driving). However, the level of criminality is the same irrespective of the outcome such as having caused serious injury. The law requires a person to take the victim and, in this case, the injured party, as they find them.²¹ However, to create what is a strict liability offence without the requirement to show the necessary criminal intent and then provide the potential for the imposition of a custodial penalty cannot be proportionate. The driving should be assessed by the level of criminality involved. There has been fault but the fault irrespective of the level of injury is the same.

The civil action -negligence - will allow for compensation to be considered which will fully reflect the seriousness of the injury and that outcome.

¹⁷ <https://www.scottishsentencingcouncil.org.uk/media/2088/20210216-perceptions-of-sentencing-for-causing-death-by-driving-final.pdf>

¹⁸ <https://www.scottishsentencingcouncil.org.uk/media/2088/20210216-perceptions-of-sentencing-for-causing-death-by-driving-final.pdf>

¹⁹ <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-road-traffic-offences-factsheet>

²⁰ <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-road-traffic-offences-factsheet>

²¹ Bird v HMA [1952] JC 23

There is also no definition as to what constitutes serious injury. Is this an evaluation to be made by the COPGS in deciding whether to prosecute under this offence. Is a broken bone such as an arm from which someone makes a full recovery designated serious? At what point is that judgement to be made? It could be that it is a relatively minor injury, but the person goes on to experience significant and sustained mental health issues such as post-traumatic stress. Is mental health to be included in what constitutes serious injury. Is this a legal issue or indeed a factual issue for a jury to determine?

At best the terms of the proposed offence are vague which is vital when considering the creation of new criminal offences. There must be certainty as to when the offence is to be constituted. How is serious to be defined? These are all factors which will be assessed fully in any civil action.

The penalty provided is up to 2 years' imprisonment. Our comments on sentencing above apply equally to the proposed creation of this new offence. What this means is a driving error can result in someone being sentenced to a custodial sentence.

We suggest that this raises unrealistic expectations from the person involved and their family who through no fault of their own do not understand the difference between civil and criminal standards and with criminal law looking to level of fault and not necessarily the outcome which can be factored into the circumstances and considered in the sentence to be imposed in any event. Clarity is a matter for the presiding judge and they should explain it clearly – as to ensure that it imposed consistently across the country.

Rather than increasing the sentencing powers, what should perhaps be the focus is to look at the person affected. Rather than the sanctions of imprisonment could greater meaningful use be made of compensation at the sentence as the person cannot be put back in the position that they would have been prior to the accident - but as in tort or delict the remedy lies in financial recompense. There are various means in which this can be achieved - consideration could be given to the greater use of the imposition of a Community Payback Order (CPO) which includes in its menu of options a compensation provision. CPOs are indeed a direct alternative to custody where we would add that under Scots law to impose a sentence of two years would require the case tried before a jury court. It should also be noted that the Presumption against Short Periods of Imprisonment (Scotland) Order 2019²² operates in Scotland where for a custodial sentence to be imposed of twelve months or under, the court must consider that there are no other methods of dealing with the person being appropriate.

We note some basic modelling in the relevant Impact Assessment has been undertaken regarding the implications of the creation of the new offence being very small in relation to Scotland.²³

We tend to agree - but much depends on the attitude regarding the initiation of prosecutions and the views as to when the test of serious is satisfied. Without any definition, that is going to give rise to challenge in courts- and the satisfaction by reference to necessary case law to fill the gap. If few of these cases are to be prosecuted, how does that assist when addressing the potential impact on those who have been seriously injured.

We have real concerns on the creation of this offence raising unrealistic expectations which will not be met either in the standard of serious being met and in the likely sentence. There are in our view other ways of achieving the outcome of proportionate justice which is involving public education as to the purposes and understanding of sentencing and judges imposing and explaining the factors being assessed in sentences. This falls very much in the role of the SSC.

Courses to be offered as an alternative to prosecution

Clause 67 of the Bill provides a statutory footing for the charging of fees for courses offered as an alternative to prosecution for fixed penalty offences. Retraining courses come under the National Driver Offender Retraining Scheme (NDORS), which is a police-operated not-for-profit scheme established in 2010. The police have the discretion to offer an educational course to a motorist who has committed a low-

²² <https://www.legislation.gov.uk/sdsi/2019/9780111042281/contents>

²³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967769/MOJ_Sentencing_IA_-_Driving_Offences.pdf

level driving offence. This is as an alternative to a fixed penalty or prosecution and avoids liability to a criminal conviction, penalty points and higher fine. Courses can be offered anywhere convenient to the motorist but cannot be requested to avoid prosecution in what amount to more serious offences. These types of courses do not currently exist in Scotland.

Subsection (3) of Clause 67 enables the Secretary of State to make corresponding or similar provision for Scotland in relation to fixed penalty offences by affirmative resolution procedure but following consultation with the Lord Advocate²⁴ before doing so.

Offering an alternative to low level offences such as speeding seems appropriate as it is much about raising driver awareness rather than merely the imposition of mandatory penalty points. The National Speed Awareness Course is a course designed to prevent speeding drivers from reoffending. According to independent research quoted²⁵ it found that targeting the behaviour of motorists through these courses reduced the likelihood of reoffending within six months by up to 23 per cent. It was more effective at reducing speed reoffending than a fine and penalty points. This seems a move to be welcomed provided that the relevant consultation in Scotland is completed.

On the basis therefore that these provisions will affect Scotland in due course, it is worth an observation on fees. As far as fees are concerned, we recommend that these should be set at a level which would exceed the cost of the course and related administrative expenses. Any excess generated by the charge must be used only for the purpose of promoting road safety.

What would be useful to ascertain is when the introduction of such a scheme is envisaged for Scotland which is a matter for Scottish Ministers.

Surrender of Licences

Clauses 69-73 refer to changes being made to the surrender of driving licences and creates various relatively minor offences related to any failure to produce a driving licence.

There is a duty for a person being prosecuted for a driving offence involving either obligatory or discretionary disqualification in line with RTOA 1988 to produce their licence which is included in the citation for court. This should be produced at court, they can deliver it, post it in advance of the hearing or have it with them at the hearing. This allows the court to impose disqualification with immediate effect.

These changes would remove that requirement and are aimed at efficiency and avoid the handling of the physical licence administratively. The intention is where disqualification from driving is involved and the convicted driver is present in court with their licence, the court will collect it there and then. Otherwise, they can pass the issue of collection of the licence over to the DVLA under the new enforcement power in Clause 70 of the Bill.

In effect, the Bill seeks to amend the road traffic legislation so that driving endorsements are no longer recorded on the paper driving licence document, which is no longer issued, but are now recorded on the DVLA's electronic record, making the surrender of a driving licence an unnecessary process.

We generally support these changes which are aimed at greater efficiency.

However, the briefing paper is silent as to how the person finds out that they are disqualified and that is particularly pertinent where they are unrepresented. We are aware while conducting relevant cases during the Covid-19 pandemic that to avoid the person's attendance at court and respecting social distancing that they were advised on pleading guilty remotely to not drive from the date of the court hearing where they may/might be disqualified. Presumably, similar arrangements will apply – but this should be clarified.

The change has been expedited by the absence of in-person hearings possible due to the COVID-19 pandemic and seem to be one of these innovations that is appropriate to retain.

²⁴ Subsection (5)

²⁵ <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-road-traffic-offences-factsheet>

The Explanatory Notes support this in reference to the large number of cases dealt with each year where the driver has to surrender their licence. This seeks to remove unnecessary burdens on the police.²⁶

Power to issue fixed penalty notices (FPN) on-the-spot in Scotland.

Clause 75 refers to the issue of FPNs in Scotland. The police in England and Wales already have powers to issue FPN on the spot to road traffic offenders.

The Bill will allow the Scottish police to have similar powers to issue FPNs. Police Scotland can issue on the spot penalties to road traffic offenders by issuing a conditional offer of fixed penalty notice. The recipient can pay it or dispute it in court. If ignored, prosecution may result. Under this proposal, the penalty becomes a registered fine at one and a half times the original penalty and no prosecution is required.

This change seems proportionate. As the power to issue FPN is reserved, this requires to be part of the Bill.

Extension of driving disqualification where custodial sentence imposed/Increase in driving disqualification periods under certain existing orders

Clause 117 of the Bill amends section 35C of the RTOA 1988 and section 248D of the Criminal Procedure (Scotland) Act 1995. That ensures release provisions in Scotland are accurately reflected in the appropriate extension period required when a driver disqualification is imposed with a custodial sentence.

The measures provide for the appropriate extension period to reflect the earliest potential release point of the relevant sentence.

Similar provisions are made under Clause 118 of the Bill for certain terrorist offenders whose appropriate extension period does not align with the release provision of their sentence.

Part 2- Extraction of information from electronic devices

Clauses 36- 42 of the Bill deal with the increase in the use of electronic devices. These provisions regulate how information is extracted from such devices in criminal investigations and death investigations.

The policy justification is based on the Information Commissioner who conducted a review in 2020 that concluded that a new approach was needed to “improve privacy protection whilst achieving legitimate criminal justice objectives.”²⁷ However, it outlined that clarification of the principles would allow those with a justified interest such as law enforcement officers, prosecutors and the defence as to have clarity. That would include what the provisions are in upholding a fair trial while ensuring that a balance is maintained between the accused rights under Article 6 of the European Convention of Human Rights (ECHR) – a right to a fair trial and Article 8 of the ECHR – a right to family life.

Clause 40 of the Bill envisages that a Code of Practice should be issued to regulate such matters. Its development requires consultation with Scottish Ministers.

²⁶ The Explanatory Notes refer to around 940,000 cases are dealt with each year which presumably refers to England and Wales but there will be a similar issue in the Scottish courts too.

²⁷ Commons Library Briefing, 12 March 2021

We suggest that there needs to be wider consultation to include all relevant bodies and that the Bill should specify with whom and include to a period for consultation to take place. There should also be a period in terms of which any Code of Practice should be revised rather than left as open ended as envisaged by subsection (6).

Part 3 Miscellaneous

Chapter 2 Management of Offenders - Sexual Offences

Several changes are made regarding sex offenders and those who pose a risk of sexual harm.

Clause 143 of the Bill includes provisions which allow Scottish Sexual Harm Prevention Orders and Sexual Risk Orders to be fully enforceable in England and Wales and that orders made in one jurisdiction (either England and Wales, Scotland or Northern Ireland) can be varied, renewed or discharged in another.

There is precedent if Community Payback Orders are considered.²⁸ which allow a relatively straightforward means of transferring community orders including Scottish Community Payback Orders and English Community Orders and Suspended Sentence Orders which could not previously be easily transferred owing to the absence of equivalent legislation.

Chapter 3 Management of offenders - Terrorist Offences

Clauses 157-160 of the Bill relates to terrorism where the Bill provides for closer monitoring of offenders released from prison to allow the police to manage the risks posed by terrorist offenders.

These provisions include the power to carry out a search by warrant of premises of a person who is released on a licence for a terrorist offence, and this extends to checking their compliance with their licence. Similar provisions apply to a personal search. The police can arrest a terrorist offender who is likely to be recalled to custody due to a breach of their licence conditions which does not require a warrant.²⁹

Remote observation and recording of court and tribunal proceedings

Clause 166 and schedule 19, Part 1 make provisions regarding remote observation and recording of court and tribunal proceedings.

These provisions primarily apply to court proceedings in England and Wales only. However, they do have some application in Scotland in relation to reserved tribunals, specifically the Employment Tribunal, Employment Appeal Tribunal and the Competition Appeal Tribunal.

Paragraph 2 of Schedule 19, Part 1 inserts new sections 12ZA and 32A into the Employment Tribunals Act 1996. These sections make provision for the remote observation of court and tribunal proceedings using audio and/or audio-visual live links.

We welcome these steps to preserve the principle of open justice in the Employment Tribunal and Employment Appeals Tribunal. The Coronavirus pandemic has necessitated significant changes in the operation of the Employment Tribunal and Employment Appeal Tribunal in Scotland, including the use of video hearings. It is appropriate that measures are in place to ensure that those who may have sought to observe a tribunal hearing held in the normal way prior to the pandemic are not excluded from doing so in

²⁸ The Criminal Justice Act 2003, Criminal Justice Act 1982, and s.14 of the Criminal Justice & Licensing (Scotland) Act 2010 inserted new provisions (sections 227A to 227ZO) and Schedule 13 into the Criminal Procedure (Scotland) Act 1995 which facilitates the transfer of Community Court Orders within Scotland as well as to and from Scotland, England, Wales & Northern Ireland.

²⁹ <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-management-of-terrorist-offenders-factsheet>

the future. This may include members of the press, those attending for educational purposes, and others with an interest in the business of the tribunal.

We note that these provisions of the Bill are flexible and are subject to further regulations to be made by the Lord Chancellor with the concurrence of the Senior President of Tribunals. We suggest that there should be consultation on the regulations going forward.

We also note the recent publication “Employment Tribunals: a Road -Map for 2021-22”³⁰ which recognises that “in general terms, justice is best experienced in a face-to-face environment.” It also recognises that “[t]he future will involve more, not less, use of technology” and that “the better approach is to recognise that a mixture of platforms (remote, hybrid and in-person) will subsist.”

The road map also preserves the position that it will be open to an Employment Judge to decide that the default position for the hearing in question should not apply, and that it will be possible for a party to explain why they would like the hearing to be held using a different format.

We welcome this level of flexibility and consider that the provisions of this Bill will assist in supporting consistency and the interests of justice in the operation of the Employment Tribunal and Employment Appeals Tribunal going forward.

Annex - Table of other clauses affecting Scotland.

Clause of the Bill	Content	Comment
Clause 47	Overseas Production Orders refers to Schedule 5 of the Bill	The Crime (Overseas Production Orders) Act 2019 (“COPO Act”) grant law enforcement agencies and prosecuting authorities power to apply for and obtain electronic data directly from service providers to support criminal investigations and prosecutions. Such orders may only be used when permitted under an international co-operation arrangement between the UK and the country where the subject of the order is located. Amendments are required to allow law enforcement officers and prosecutors to seek and receive associated or connected communications data attached to content of communications and to allow the Lord Advocate to delegate the service of an overseas production order where it might be more expedient for an appropriate body to take on this function³¹

³⁰ A road map for 2021-22

³¹ Paragraph 59 and 63 of the Bill’s Explanatory Notes <https://publications.parliament.uk/pa/bills/cbill/58-01/0268/en/200268en.pdf>

Clause 51	Special procedure for access to material relating to human remains- and refers to schedule 6 of the Bill	This allows officers to apply to access excluded material or special procedure material that either constitutes, or relates to the location of, relevant human remains as defined conditions are met. This replicates section 9(2A) of the PACE. A warrant or order issued by a court in England or Wales under these powers and endorsed by a court in Scotland may be executed in Scotland (and vice versa). Schedule 6 gives a judge the power to issue a production order to grant police officers access to excluded or special procedure material. The powers enable a warrant under schedule 6 to be executed on more than one occasion if, on the application, the judge is satisfied that it is necessary. Multiple entries can be authorised in order to achieve the purpose for which the judge issues the warrant. These seem very wide and should in our view be subject to limitation.
Clause 150		Section 37 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2006 is amended to allow for a breach of a positive requirement under a SHPO or SRO to constitute a breach in Scotland.
Clause 153	Enforcement of requirements of orders made in Scotland or Northern Ireland	Amendments are made to sections 103I, 113, 122, 122H and 128 of the 2003 Act allow orders created in Scotland under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 to be enforceable in England and Wales and Northern Ireland. This enables SHPOs or SROs imposed by a Scottish court to be enforced by courts in England and Wales or Northern Ireland when these orders are made following the commencement of the provisions enabling them in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. This amendment will ensure that a

		Scottish SHPO or SRO is enforceable in other jurisdictions. 1120. Section 136ZA is amended to allow Scottish SHPOs and SROs to apply throughout the United Kingdom
Clause 154: Effect of conviction for breach of Scottish order		Amendments to sections 122I and 129 of the 2003 Act make an offender who is convicted of a breach of a Scottish SHPO or SRO subject to notification requirements where they were not already under such requirements.

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