



## Background

The Law Society of Scotland is the professional body for over 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 has considered the Extradition (Provisional Arrest) Bill (the Bill) whose Committee Stage is on Thursday, 5 March 2020. As well as outlining what the Bill proposes to amend, the provisions of the Bill are highly significant with regard to the UK following its exit from the EU as highlighted below. Extradition is reserved to the UK Parliament under Schedule 5 Section B.11 of the Scotland Act 1998.

## Purpose of the Bill

Extradition is the formal legal process by which a person accused or convicted of a crime is surrendered from one country to another. The Bill, which is in two parts, seeks to amend the Extradition Act 2003 (2003 Act) which currently governs extradition in the UK by creating a new power of arrest for extradition purposes.

The 2003 Act is in two parts:

- Part 1 relates to the current arrangements relating to arrest warrants such as the European Arrest Warrant (EAW).
- Part 2 relates to countries where the UK has formal extradition arrangements based on extradition requests between governments.

The power of arrest which is being created in the Bill will enable law enforcement officers to arrest individuals without a warrant of arrest from a UK court for certain cases that fall within Part 2 of the 2003 Act. This power of arrest will only affect six countries meantime. These countries, described as category 2 territories are specified in Schedule A1<sup>1</sup> and include Australia, Canada, Liechtenstein, New Zealand, Switzerland and the USA.

No operational justification such as any specific case has been set out with regard to bringing forward the Bill at this time other than “enabl[ing] wanted persons who fall into scope of [the Bill] to be brought into extradition proceedings more efficiently in order to manage the risk that they might otherwise be at liberty in the UK and able to abscond or offend.”<sup>2</sup> The UK Government’s Impact Assessment<sup>3</sup> specifies that it is “resource intensive to capture an individual who may abscond after being identified. This gap in law enforcement capability requires primary legislation to create the power for UK police to arrest immediately if an individual is wanted by a trusted partner.”

The justification why these countries have been selected according to the Bill because “the UK has a high level of confidence in them as extradition partners in their criminal justice systems and the use of extradition.”<sup>4</sup> Exactly how and on what exact criteria these countries were selected is not at all clear.

This is significant when considering the extension of these provisions regarding the power to arrest to other countries where the Bill has provisions to increase the number of these countries by the use of secondary

---

<sup>1</sup> Paragraph 63 of the Bill’s Explanatory Notes

<sup>2</sup> Paragraph 11 of the Bill’s Explanatory Notes

<sup>3</sup> <https://www.gov.uk/government/publications/extradition-provisional-arrest-bill-impact-assessment>

<sup>4</sup> Paragraph 7 of the Explanatory Notes to the Bill



legislation or subordinate regulations, albeit by use of the affirmative parliamentary procedure which would provide a degree of parliamentary scrutiny.<sup>5</sup>

We would suggest that more information is sought on exactly how these criteria would be applied when considering permitting other countries to operate in this scheme.

Furthermore, the UK Government Impact Assessment recognises that there may be “a limited risk that countries not being placed on the “trusted countries” list could affect diplomatic relations between the UK and that country, with a resulting impact on trade and investment.”<sup>6</sup> Though it indicates that this scenario is not expected to be likely, it is uncertain and that risk cannot be quantified.

**EU:** Within the EU Member States, the EAW currently operates to allow any UK police force, prosecution service and the National Crime Agency to apply for an EAW to effect a fast extradition of a suspect from any EU Member State with similar reciprocal arrangements operating for the EU Member States. The advantages with the EAW were that it allowed for faster and simpler surrender procedures and an end to political involvement in extradition procedures.

As the UK has signalled its intention under paragraph 51 of *The Future Relationship with the EU The UK's Approach to Negotiation*<sup>7</sup> not to participate further in the EAW, the Bill would provide the mechanism for implementing the arrangements which will then be required. Paragraph 7 of the Explanatory Notes to the Bill specifies “should the UK lose access to the EAW, a statutory instrument may be made to extend this arrest power to some or all of the EU Member States.” (The underlining is our emphasis). It is clear from the EU Negotiation Directives<sup>8</sup> that the EAW is not part of the negotiations which is in the EU statements over the pre-exit period.

It is unclear exactly what criteria would be applied to the Member States but would presumably be with reference to confidence as above and the use of extradition. This will not of course provide any comfort with regard to mutual recognition of judicial systems by EU Member States of any warrants issued by the UK.

## Numbers of persons affected

There was no information available from the Home Office at this stage as to the numbers of persons to whom this Bill is expected to apply with regard to territory 2 countries though the Impact Assessment suggested that “the policy is expected to result in 6 individuals entering the [Criminal Justice System] more quickly than would otherwise have been the case.” They indicated that there are 4000 Interpol red notices from the countries specified within the Bill but just how many would apply to persons within the UK and how that cross-refers to six is not known.

- The UK Government’s Impact Assessment<sup>9</sup> refers to 5,540 requests that were made under the EAW process in 2018/19. In that same year, 1,412 arrests were related to EAWs, and 919 to surrenders.
- In Scotland, though extradition is a reserved matter, Scotland has of course a specific interest as far as arrest of these wanted that are found within Scotland. Extradition operates through the auspices of Crown Office and Procurator Fiscal Service (COPFS). It may be useful to provide an indication of

<sup>5</sup> Paragraph 24 of the amendments to the 2003 Act inserts a new paragraph 6A under section 223 of the 2003 Act.

<sup>6</sup> Paragraph 37 of the Bills’ Impact Assessment

<sup>7</sup> <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

<sup>8</sup> <https://ec.europa.eu/info/sites/info/files/communication-annex-negotiating-directives.pdf>

<sup>9</sup> <https://www.gov.uk/government/publications/extradition-provisional-arrest-bill-impact-assessment>



the scale of the use made of the EAW in Scotland. COPFS issued 15/16 EAWs respectively in 2015/2016. In 2015/2016, the number of EAWs sent to Scotland were 176/116 respectively.<sup>10</sup>

The Impact Assessment indicates that unlike the UK at present, many countries already have the power of arrest on an Interpol Red Notice and will be able to rely on that power for UK extradition cases as the UK is intending to cease operating the EAW. Paragraph 7 of the Impact Assessment recognises “Additionally, if the EAW ceases to operate in the UK as a result of Brexit this existing risk [ that the police do not have the power to arrest but would first need to apply for a domestic warrant] will substantially increase. In a ‘no deal’ scenario or in the event of a Future Security Partnership which does not support the retention of EU Member States in Part 1 of the Extradition Act, the current capability gap would extend to EU Member States.”

15,540 requests were made under the EAW process in 2018/19. In that same year, 1,412 arrests were related to EAWs, and 919 to surrenders

As outlined above, as some countries can only use that power of EAW reciprocally, paragraph 9 of the Impact Assessment indicates that there is “an additional risk to the success of UK requests for extradition in the absence of this new power.”

Incorporating parliamentary monitoring and reporting of the numbers of cases in which the power of arrest has been used within a set period of the powers of arrest becoming operational could be considered. That may provide some monitoring and relevant scrutiny.

There seems to be a mechanism for that method of reporting as the designated authority discussed below will monitor the use of the power or arrest, gathering data on the number of arrests, alerts, certifications and the number of arrests. Paragraph 39 of the Impact Assessment<sup>11</sup> recognises that “the data will be collated and analysed to indicate the impact of any legislation.”

## What the Bill does

This Bill will provide for the relevant UK law enforcement authorities to arrest an individual on the basis of an Interpol alert seeking the arrest of wanted persons. There will be no need as at present, to seek a warrant from a judge before that person is arrested.

The power of arrest is not restricted to Interpol red notices and would apply to any international request for arrest provided that it complies with the requirements in the Bill regarding:

- Certification under section 74B<sup>12</sup> by the designated authority which is expected to be the National Crime Agency which is the UK National Central Bureau for Interpol.<sup>13</sup> Exactly how that arrangement will work in the future will need to be developed given that the UK International Crime Bureau (UKICB) provides the UK National Central Bureau for Interpol, the UK Europol National Unit<sup>14</sup> and

<sup>10</sup> <https://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/46-responses2017/1544-european-arrest-warrants-r015983>

<sup>11</sup> <https://www.gov.uk/government/publications/extradition-provisional-arrest-bill-impact-assessment>

<sup>12</sup> Clause 2 of the Schedule of the Bill

<sup>13</sup> The delegated authority is to be designated by the Secretary of State by way of regulations and there may be more than one and different for each part of the UK. Section 74B(4) and (5) (Clause 2 of the Bill)

<sup>14</sup> Paragraph 49 of the *The Future Relationship with the EU The UK's Approach to Negotiation* the UK is not seeking continued membership with Europol.



the UK Sirene Bureau (the network which supports cooperation and coordination between law enforcement agencies in the EU member states).<sup>15</sup>

That certification will follow a request made by an authority from a category 2 territory. A warrant for that person's arrest must have been issued and it is satisfied that the person is said to be unlawfully at large after conviction of an offence in that category 2 country. They have reasonable grounds for believing that the offence is a serious extradition offence and the seriousness of the conduct makes it appropriate to issue the certificate.

- Constituting a serious offence means a custodial sentence of three years or more and the conduct in relation to the offence must be sufficiently serious to make it appropriate to issue the certificate. For Scotland, the equivalent would mean an offence triable on indictment.

Paragraph 9 of the Explanatory Notes to the Bill indicate that “the designated authority will also be responsible for ensuring that requests in respect of which a certificate is issued are clearly identifiable on the databases available to officers for making sure that the information is up to date and accurate.” This is very important to avoid wrongful arrests and also out of date information. Seeking reassurance on how this is to be achieved would seem to be relevant at this stage of the Bill's passage.

Post arrest, the person must be brought before a judge within 24 hours of the arrest. If a judge decides that a warrant would be issued the process continues in the same way as before. The safeguards under Part 2 of the 2003 Act remain in relation to any decision to extradite where there are issues relating to breach of their human rights or the request is politically motivated or if the extradition is permitted, it cannot be where there is a death penalty unless the Home Secretary received credible assurance that the death penalty will not be imposed or if imposed will not be carried out. Given the USA is a category 2 country, this would seem important though of course not all States have the death penalty.

Adjournments may be granted only for up to a maximum of 72 hours in cases where more evidence or information is required.

## **Impact on education and training**

We are surprised to note the suggestion that there would be “no familiarisation costs associated with this piece of legislation given that there are no new training or informational requirements.” This represents a significant change with regard initially to the category 2 countries which procedure is also likely to replace the EAW. There would be training implications for involved in the criminal justice system from judges, solicitors, and operational officers.

It would be good to hear the steps in raising awareness in due course when the commencement of the Bill is to take place. What has been indicated is that the policy represents that individuals will enter the Criminal Justice System “more quickly and efficiently, rather than genuinely additional volumes for the Criminal Justice System to process.”<sup>16</sup>

---

<sup>15</sup> <https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/international-network>

<sup>16</sup> <https://www.gov.uk/government/publications/extradition-provisional-arrest-bill-impact-assessment>



## Scotland's Position

The Government has existing structures to seek continuous feedback from UK authorities involved in extradition, including the Devolved Administrations. We note the assurance that the Department will continue to engage throughout the passage of the Bill and beyond implementation.<sup>17</sup>

We look forward to further information being provided especially when considering what looks like early commencement given the intention with regard to the end of the EAW.

---

<sup>17</sup> Paragraph 40 of the Bill's Impact Assessment