LEGISLATIVE CONSENT MEMORANDUM

IVORY BILL

Background

1. This memorandum has been lodged by Roseanna Cunningham, Cabinet Secretary for Environment, Climate Change and Land Reform, under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Ivory Bill was introduced in the House of Commons on 23 May 2018. The Bill can be found at:

   https://services.parliament.uk/Bills/2017-19/ivory.html

Purpose and content of the Ivory Bill

2. The purpose of the Bill is to prohibit commercial activities concerning ivory in the UK and the import and re-export of ivory for commercial purposes to and from the UK, including intra-EU trade to and from the UK. The Bill extends to Scotland.

3. The aim of the Bill is to help conserve elephant populations, specifically by reducing poaching, through significantly limiting the legal market for ivory in the UK. “Ivory” is defined in the Bill to mean ivory from the tusk or tooth of an elephant, including any item made of ivory or that has ivory in it (clauses 1(5) and 35).

4. Clause 1 of the Bill bans ‘dealing’ in ivory (“the ivory ban”), namely:
   - buying, selling or hiring ivory;
   - offering or arranging to buy, sell or hire ivory;
   - keeping ivory for sale or hire;
   - exporting ivory from the United Kingdom for sale or hire; or
   - importing ivory into the United Kingdom for sale or hire.

5. This is in line with the body of EU law\(^1\) which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”). This body of EU law is referred to in this memorandum as “the EU Wildlife Trade Regulations”. The ivory ban will not affect existing ownership of items made of, or containing ivory, including, inheriting, donating or bequeathing.

6. Clauses 2 and 6 to 9 of the Bill set out exemptions to the prohibition for:
   - items containing only a small proportion of ivory (known as a “de minimis” exemption) comprising less than 10% ivory by volume and produced before 3 March 1947;
   - musical instruments comprising of less than 20% ivory by volume, and produced before 1975;
   - portrait miniatures produced prior to 100 years before the coming into force of this ban;

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\(^1\) https://www.gov.uk/guidance/cites-imports-and-exports#legislation
• items produced 100 years before the coming into force of this ban which are assessed by an independent advisory institution as being the rarest and most important items of their type; and
• sales to, and between, accredited museums.

7. Clauses 3 to 5 and clauses 10 and 11 of the Bill provide for the compliance processes by which a person wishing to engage in the commercial use of an item under one of these exemptions must abide. A certification process is applied to the exemption for the rarest and most important items of their type and a self-registration process is applied to the other four categories. The Animal and Plant Health Authority² (APHA) is the Management Authority in the UK for the EU Wildlife Trade Regulations and will act on behalf of the UK Secretary of State to administer the new registration and certification processes.

8. Clauses 12, 13 and 34 of the Bill provide for a mixed regime of criminal and civil sanctions to be applied to those who have committed an offence under the Bill. In particular, clause 12 makes it an offence to breach the ivory ban, or to cause or facilitate any such breach. Any person who commits this offence is liable, on conviction on indictment, to imprisonment for a term of up to five years and/or an unlimited fine. Clause 34 makes further provision in relation to the liability of corporate officers for any such offence by bodies corporate etc. In addition, clause 13 gives effect to Schedule 1, which provides for a range of civil sanctions.

9. Clauses 14 to 27 make provision for enforcement, including the conferral powers on police, customs officers, and accredited civilian officers to enable them to enforce the ivory ban. Clause 27 makes it an offence to, without reasonable excuse, intentionally obstruct an enforcement officer in the performance of any of the officer’s function under clauses 14 to 24. A person who commits such an offence is liable, on summary conviction in Scotland, to imprisonment for up to six months or a fine not exceeding level five of the standard scale (currently £5000) or both.

10. Clauses 28 to 32 make provision in relation to the retention, disposal and return of seized items, and for forfeiture by court order and appeals against such orders. Clause 33 provides that where an item is, in breach of the ivory ban, brought to a place for exploration, declared for exportation, or exported or imported, the item is also liable to forfeiture under the Customs and Excise Management Act 1979. This clause ensures that customs officers can also use their powers under that Act when they intercept an item being imported or exported in breach of the ivory ban.

11. Clause 34 confers a power on the UK Secretary of State to amend the definition of ‘ivory’ in the Bill so as to include ivory from any other animal or species listed in an Appendix to the CITES Regulations.

12. Clauses 35 to 42 make ancillary general provision.

² The APHA is an executive agency of the Department for Environment, Food and Rural Affairs.
Consultation

13. The UK Government consulted on banning UK sales of ivory. The consultation ran from 6 October 2017 to 29 December 2017. Over 71,000 responses were received with 88% in favour of a ban on UK sales of ivory. The Scottish Government has not consulted separately in Scotland.


Financial implications for Scotland

14. No financial implications for Scotland have been identified.

Provisions that relate to Scotland

15. All of the provisions of the Bill, as introduced, extend to (and therefore relate to) Scotland, except for clause 19(7) and (8) and Schedule 2 which make provision in relation to search warrants in England, Wales and Northern Ireland.

16. In particular, clause 1(1) provides that ‘dealing’ in ivory is prohibited (“the ivory ban”). For these purposes, clause 1(2) provides that ‘dealing’ in ivory means—

   (a) buying, selling or hiring it,
   (b) offering or arranging to buy, sell or hire it;
   (c) keeping it for sale or hire;
   (d) exporting it from the United Kingdom for sale or hire;
   (e) importing it into the United Kingdom for sale or hire.

17. Clauses 2 and 6 to 9 provide for exemptions from the ivory ban, and the remaining clauses make enforcement and ancillary provision in relation to this ban.

18. The Scottish Government considers that the provisions of the Bill concerning the prohibition and regulation (including enforcement) of the import and export of ivory (originating from an endangered species under CITES) into and from Scotland for sale or hire (i.e. the dealings referred to in paragraphs (d) and (e) of clause 1(2)) relate to matters reserved under section C5 (import and export control) of Part 2 of schedule 5 of the Scotland Act 1998. Those provisions are not therefore matters that could be provided for in an Act of the Scottish Parliament.

19. The Explanatory Notes for the Ivory Bill state “In so far as any provision of the Bill relates to the import or export of ivory items (described at clause 1(2)(d) and (e)), those provisions are a reserved matter. It is still under consideration as to whether any of the other provisions of the Bill are within the legislative competence of the National Assembly for Wales, the Scottish Parliament or the Northern Ireland Assembly”.

20. With the exception of the provisions referred to paragraph 18 (i.e. the provisions concerning the prohibition and regulation, including enforcement, of the dealings referred to paragraphs (d) and (e) of clause 1(2)), the Scottish Government is of the view that the provisions of the Bill (in so far as they extend to Scotland) make provision for purposes within the legislative competence of the Scottish Parliament. This includes, in particular, the provisions of the Bill concerning the
prohibition and regulation (including enforcement) of other dealings (i.e. the dealings referred to in paragraphs (a) to (c) of clause 1(2)) and the various delegated powers conferred by the Bill on the UK Secretary of State to make further provision for such purposes.

21. The Bill, as introduced, does not confer functions on, or modify any functions of, the Scottish Ministers. Accordingly, the Bill does not presently include any provision which would alter the executive competence of the Scottish Ministers.

22. The Scottish Government considers that the Bill is a ‘relevant Bill’ for the purposes of Chapter 9B.3.1(a) of the Standing Orders of the Scottish Parliament and, accordingly, that, as introduced, it contains provisions for which a Legislative Consent Memorandum must be lodged.

The Scottish Government's position on legislative consent

23. It is considered that on, balance, it would not be desirable to seek to legislate separately at this time for those provisions of this Bill which fall within the legislative competence of the Scottish Parliament. This is because these provisions of the Bill will help to deliver the outcomes which the Scottish Government would wish to achieve in this area, and any separate provision is likely to take longer to deliver.

24. However, since no adjustments were made to the Bill, prior to its introduction, to take account of this devolved competence, the Scottish Government envisages that the Scottish and UK Government should now review and, if necessary, agree amendments to the Bill to ensure that devolved interests are protected.

Conclusion

25. The Scottish Ministers support the aims of the Ivory Bill and a legislative consent motion would provide a simple and effective means for this legislation to be extended to Scotland while avoiding separating out the provisions relating to domestic and non-domestic trade.

26. However, whilst the Scottish Government is minded in principle to lodge a legislative consent motion, it would not intend to do so until it is satisfied that devolved interests in relation to matters falling within the legislative competence of the Scottish Parliament have been reviewed and, if necessary, protected by means of amendments to the Bill agreed by the UK Government.

SCOTTISH GOVERNMENT
June 2018
This Legislative Consent Memorandum relates to the Ivory Bill (UK legislation) and was lodged with the Scottish Parliament on 6 June 2018

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