

# 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://bills.parliament.uk/bills/2717>

### Content of the Sentencing Bill

2. In 2014, as part of its 12<sup>th</sup> 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 Bill<sup>1</sup>.

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 LCM<sup>2</sup> 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 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.

---

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

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

## 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**

*This Legislative Consent Memorandum relates to the Sentencing Bill (UK legislation)  
and was lodged with the Scottish Parliament on 22 September 2020*

# **SENTENCING BILL – LEGISLATIVE CONSENT MEMORANDUM**

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -  
[www.parliament.scot](http://www.parliament.scot)

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:  
[www.parliament.scot/documents](http://www.parliament.scot/documents)