

**LEGISLATIVE CONSENT MEMORANDUM**  
**COUNTER-TERRORISM AND 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 Counter-Terrorism and Sentencing Bill was introduced in the House of Commons on 20 May 2020. The Bill can be found at:

<https://services.parliament.uk/Bills/2019-21/counterterrorismandsentencing/documents.html>

**Content of the Counter-Terrorism and Sentencing Bill**

2. The Bill currently makes provision in the following areas:

Sentencing

- Introduces a new sentence for terrorist offenders; the “serious terrorism sentence”, made up of a minimum of 14 years in custody and a 7 to 25 year period of extended licence. Courts would be required to impose the sentence for specified offences where certain conditions are met unless exceptional circumstances apply.
- Increases from 10 to 14 years the maximum sentence available for the offences of: membership of a proscribed organisation, inviting or expressing support for a proscribed organisation and attendance at a place used for terrorist training.
- Allows for any non-terrorist offence with a maximum sentence of over 2 years to be found to have a terrorist connection.
- Expands the list of offences which can result in an extended sentence and increases the maximum period of the extended licence for certain terrorist offenders from 8 to 10 years in England, Wales and Northern Ireland (it is already 10 years in Scotland).
- Expands the list of offences that can result in a Sentence for Offenders of Particular Concern (SOPC) and create new sentences, the equivalent of a SOPC, for Scotland and Northern Ireland and for under 18s UK wide.

Enforcement of sentencing

- Removes the possibility of release at the two thirds point of the custodial part of an extended sentence for relevant terrorist offenders and provides that offenders serving a serious terrorism sentence cannot be released until the end of the custodial part of their sentence.
- Provides for polygraph testing of certain terrorist offenders when released on licence.
- Makes provision for Scotland relating to where more than one sentence is imposed and at least one of those sentences relates to non-terrorist offending

### Civil measures relating to those suspected of involvement in terrorist activity

- Revises the scheme for imposing Terrorism Prevention and Investigation Measures (TPIMs) on those suspected of involvement in terrorism, by lowering the standard of proof required; expanding the range of measures available; and removing the two year time limit.
- Enables the police to apply for Serious Crime Prevention Orders (SCPOs) in terrorism cases.
- Removes the statutory deadline for conducting an independent review of the Prevent Strategy.

### **Provisions Which Relate to Scotland requiring an LCM**

3. The operation of the Bill is split into England and Wales and separately for Scotland and Northern Ireland. This reflects different law applying in the area of the Bill in these countries. However, the policy intent of the Bill as a whole applies to Scotland as it does in England and Wales and Northern Ireland.

4. The area of law covered by the Bill is a mix of reserved and devolved matters. The content of the Bill relating to Scotland that requires an LCM is as follows:

#### **Part 1 – Sentencing of Terrorist and Certain Other Offenders**

- **No provisions require an LCM.**

#### **Part 2 – Release of Terrorist Offenders**

- **Clause 28 – Removal of early release for dangerous terrorist prisoners: Scotland**
  - This clause alters the Scottish Ministers' executive competence by dis-applying early release obligations falling on the Scottish Ministers for certain terrorist prisoners and providing for different release obligations to be conferred on Scottish Ministers in relation to those prisoners. Accordingly, this clause will require an LCM.
- **Clause 29 – Further provision about release of terrorist prisoners: Scotland**
  - This clause makes further provision in relation to the new serious terrorism sentence which sets out different release provisions for prisoners serving these sentences. This alters the executive competence of the Scottish Ministers as Ministers are being required to release these prisoners from prison at a specified point in their sentence.
- **Clause 33 - Polygraph licence conditions for terrorist offenders: Scotland**
  - This clause alters the Scottish Ministers' executive competence by conferring a power on the Scottish Ministers to impose a specific form of licence condition both with and without Parole Board recommendation. This clause will therefore require an LCM.

- **Clause 36 and Schedule 11: Release on licence of terrorist prisoners repatriated to the UK**
  - This clause alters the executive competence of the Scottish Ministers in introducing Schedule 11 of the Bill, insofar as it applies to Scotland, and applying the release arrangements for terrorist prisoners sentenced in Scotland to those who are convicted of terrorism offences in another country and repatriated to Scotland.

### **Part 3 – Prevention and Investigation of Terrorism**

- **No provisions require an LCM.**

### **Part 4 – General**

- **Clause 48 and Schedule 13 (Part 6): Consequential and related amendments**
  - Paragraph 46 alters the executive competence of the Scottish Ministers in relation to powers to vary the sentence of a terrorist prisoner being repatriated out of the UK.
  - Paragraph 47 amends section 39(7B) of the Prisons (Scotland) Act 1989 to include terrorist prisoners in the Scottish Ministers' power to add additional days to a prisoner's sentence. This alters executive competence.
  - Paragraph 48(2) alters the executive competence of the Scottish Ministers in relation to their powers in respect of release in section 1AB of the Prisoners and Criminal Proceedings (Scotland) Act 1993.
  - Paragraph 48(3) and (7) alter the executive competence of the Scottish Ministers by making provision which restricts the Scottish Ministers' ability to release prisoners who are serving mixed terrorism and non-terrorism sentences.
  - Paragraph 48(4) and (5) alters the executive competence of the Scottish Ministers by changing the point at which a life prisoner, who is also serving a sentence for a terrorism or terrorism-related offence, can require the Scottish Ministers to refer their case to the Parole Board.
  - Paragraph 48(6) and (9) and paragraph 56 alter the executive competence of the Scottish Ministers by repealing amendments made to section 5 and section 9 of the 1993 Act by Terrorist Offenders (Restriction on Early Release) Act 2020.
  - Paragraph 48(7) and (8) alters the executive competence of Ministers in relation to the release of children and young offenders under Part 1 of the 1993 Act where the child or young offender is serving a sentence for a terrorism or terrorism-related offence.
  - Paragraph 48(10) alters the executive competence of the Scottish Ministers by dis-applying the rules on single-terming, which in turn determine release dates, in relation to sentences imposed for a terrorism or terrorism-related offence.
  - Paragraph 48(11) alters the executive competence of the Scottish Ministers by repealing Part 2 of Schedule 1A of the 1993 Act which contains the list of offences which the Scottish Ministers must treat as having a terrorist connection for the purposes of their early release duties in section 1AB of the Act.

- Paragraph 50 alters the executive competence of the Scottish Ministers by providing that for the purposes of a restricted transfer of a prisoner from Scotland to England & Wales or Northern Ireland, section 1AB of the 1993 Act will continue to apply to that prisoner.
  - Paragraph 51 alters the executive competence of the Scottish Ministers by dis-applying certain provisions on sentence management in Scotland relating to section 1AB of the 1993 Act contained within the International Criminal Court (Scotland) Act 2001.
  - Paragraph 52 alters the executive competence of the Scottish Ministers by adding section 1AB to the list of release provisions that apply in respect of relevant provisions in the Extradition Act 2003 for the release of extradited persons who return to the UK following their extradition.
  - Paragraph 54 alters the executive competence of the Scottish Ministers by adjusting the release provisions in section 9B of the 1993 Act (for short-term prisoners eligible or liable for removal from the UK) through a new subsection (specifically dis-applying that section to persons to whom section 1AB of the 1993 Act applies).
- **Clause 50 – power to make further consequential provision**
    - This clause alters the executive competence of the Scottish Ministers by providing a secondary legislative power on the Secretary of State to make further provision in consequence of the Act including those provisions which alter the executive competence of the Scottish Ministers.

### **Reasons for seeking a legislative consent motion**

5. The Scottish Government has considered the UK Government’s request for a relevant LCM carefully. While clarity in the area of law enforcement of terrorist sentencing is important, one area of the Bill that would have required an LCM were clauses that would introduce a new approach into the Scottish justice system; namely use of polygraph testing as a condition of release from a prison sentence (in this case a terrorist offence prison sentence).

6. The Scottish Government had two separate concerns as regards this area of the Bill as introduced and the need for an LCM.

7. First, on a point of principle, the Scottish Government considered that new radical policy approaches for use within the Scottish criminal justice system such as the introduction of polygraph testing should usually only be introduced into Scots law through the normal process of scrutiny of devolved legislation in the Scottish Parliament. This reflects that the operation of the criminal justice system is devolved and so acknowledges that it should be for those with powers in that area to decide whether such measures are introduced into a devolved area.

8. Second and specific to the issue of polygraph testing, the Scottish Government does not consider that the evidence supporting the use of polygraphs justifies the immediate use of polygraph testing in the manner provided for in the Bill.

9. As a result of these concerns, the Scottish Government engaged with the UK Government. Following that dialogue, the UK Government agreed to remove these clauses from the Bill at the next amending stage and promotion of this LCM does not include what are currently clauses 33 and 35 as the UK Government has indicated these clauses should not stand part of the Bill<sup>1</sup> at the House of Lords Committee stage.

10. The need for the LCM for areas of the Bill all relate to changes to the executive competence of the Scottish Ministers as regards imposition of licence conditions and release from custody of terrorist offenders.

11. There has been dialogue with the UK Government over how the Bill provides for calculation of release dates for those convicted of a mix of terrorism and non-terrorism related sentences. As release provisions for those receiving sentences for terrorism offences will be different to those receiving sentences for those receiving non-terrorism offences, policy has had to be developed to address the situation when a person receives sentences for both terrorism sentences and non-terrorism sentences. An agreed approach which respects the policy intent of the UK Government to have bespoke release arrangements for terrorism sentences and maintains the integrity of Scottish release policy has been achieved with amendments lodged in this area<sup>2</sup> which are being considered by the House of Lords Committee stage.

12. While the Scottish Government is not convinced that changing the law so that terrorist offenders receive longer sentences, spend more of these sentences in custody and are supervised for longer upon release will, in isolation, provide definite answers to the important issue of how to respond to terrorist offending, the Scottish Government is promoting the LCM for these matters which are, to a large extent, consequential to the overall policy intent sought by the UK Government in the area of enforcement of sentencing. Not to do so would likely be counter-productive as it may run the risk of error and confusion in the operation of the relevant law in some areas. In addition, the Scottish Government accepts that while such changes will not solve the wide-array of issues relating to how the UK deals with terrorism offending including the crucial issue of effective deradicalisation, the changes in the area of enforcement of sentencing and that trigger a requirement for an LCM may have a part to play.

## **Consultation**

13. There has been no formal consultation by the UK Government on the Bill. The Scottish Government has discussed the content of the Bill including those areas affecting executive competence with a number of stakeholders, but there has been no formal consultation. There has been considerable engagement between the Scottish Government and the UK Government in respect of the Bill.

## **Financial Implications**

14. There are no significant financial implications from the content of the Bill. The number of prisoners involved now and in the future is likely to be very small as the

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<sup>1</sup> Between amendments 19\* and 20 [5801129-I.pdf \(parliament.uk\)](#)

<sup>2</sup> Amendments 66 and 67 [5801129-I.pdf \(parliament.uk\)](#)

special enforcement of sentence provisions only apply to a range of relevant offences which are committed very infrequently in Scotland.

## **Conclusion**

15. It is the view of the Scottish Government that it is preferable in terms of good governance that to the extent that the relevant provisions that alter Scottish Ministers' functions in relation to the release and management of terrorist offenders, they should be considered by the UK Parliament.

## **Draft Legislative Consent Motion**

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

*“That the Parliament agrees that the relevant provisions of the Counter-Terrorism and Sentencing Bill, introduced in the House of Commons on 20 May 2020, relating to Scottish Ministers’ executive competence with regard to the release of terrorism offenders from custodial sentences, should be considered by the UK Parliament.”*

**SCOTTISH GOVERNMENT**  
**January 2021**



*This Legislative Consent Memorandum relates to the Counter-Terrorism and Sentencing Bill (UK legislation) and was lodged with the Scottish Parliament on 29 January 2021*

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