

COUNTER-TERRORISM AND SENTENCING BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

What these notes do

- 1 These Explanatory Notes relate to the Lords Amendments to the Counter-Terrorism and Sentencing Bill as brought from the House of Lords on 12 March 2021 (Bill 274).
- 2 These Explanatory Notes have been prepared by the Ministry of Justice and the Home Office in order to assist the reader of the Bill and the Lords amendments, and to help inform debate on the Lords amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Lords amendments themselves, refer to HL Bill 129, the Bill as first printed for the Lords.
- 4 These Explanatory Notes need to be read in conjunction with the Lords amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Lords amendments.
- 5 Lords Amendments 1 to 17 and 19 to 77 were tabled in the name of the Minister.
- 6 Lords Amendment 18 was tabled by Lord Anderson of Ipswich, and was opposed by the Government.
- 7 In the following Commentary, an asterisk(*) appears in the heading of any paragraph that deals with a non-Government amendment.

Commentary on Lords amendments

Lords Amendments to Clause 23: Terrorism sentence with fixed licence period: Scotland

Lords Amendments 1 and 2

- 8 Lords Amendments 1 and 2 would ensure that the new terrorism sentence with fixed licence period that is introduced to the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") as new section 205ZC by clause 23 of this Bill functions as intended.
- 9 Lords Amendment 1 would amend clause 23 to ensure that new section 205ZC does not apply where an offender aged under 18 is sentenced to detention without limit of time.
- 10 Lords Amendment 2 would remove an old reference to subsection (6) that is no longer relevant following an amendment at Report stage in the House of Commons to ensure that the new terrorism sentence with fixed licence period would only be available to cases in which there is a conviction on indictment.

Lords Amendments to Clause 29: Further provision about release of terrorist prisoners: Scotland

- 11 Amendments to clause 29, and many of the amendments to part 7 of schedule 13 are proposed in order to provide clarity over when an offender sentenced to consecutive sentences is eligible for release, where one or more of the sentences is imposed for a terrorism offence. These amendments would ensure the bespoke release regime for terrorist offenders set out in this Bill and in the Terrorist Offenders (Restriction of Early Release) Act 2020 can be appropriately accounted for in Scotland where a prisoner is subject to consecutive sentences for multiple offences. Consecutive sentences in Scotland are served differently from that in England and Wales as they operate a single terming process. This has required a new section 1B to be inserted into the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") (Lords Amendment 63) to provide for single terming to be preserved in respect of sentences for non-terrorism offences, and for the appropriate release provisions for terrorism offences to apply. This has in turn required a number of consequential and technical changes to other parts of the legislation and these are set out in Lords Amendments 3 - 11, 61 - 68, and 70 - 77.

Lords Amendments 3, 8 and 11

- 12 Lords Amendments 3, 8 and 11 would place the release provisions in Scotland of sentences for terrorism offences in only one section of the legislation, section 26ZA of the 1993 Act.

Lords Amendment 4

- 13 Lords Amendment 4 is a technical amendment which would ensure terminology which applies to a sentence or term of imprisonment does not apply for the purposes of custodial terms where it would not be relevant. It would do so by excluding sections 1A, new section 1B and 1AB from section 26ZA(3) of the 1993 Act.

Lords Amendment 5

- 14 Lords Amendment 5 would ensure that an offender in Scotland who received multiple

sentences for terrorist offences and therefore multiple licence periods, would only serve one, aggregated, licence period. It does so by making release on licence as set out in section 26ZA of the 1993 Act for terrorist sentences subject to new section 1B(11).

Lords Amendments 6 and 7

- 15 Lords Amendments 6 and 7 are tidying amendments which would ensure that the definition of 'appropriate custodial term' in clause 26ZA of the 1993 Act reads correctly.

Lords Amendments 9 and 10

- 16 Lords Amendments 9 and 10 are minor, tidying amendments which would clarify where reference is made to sections 205ZA and 205ZC, that is a reference to the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

Lords Amendments to Clauses 32 to 35: Polygraph licence conditions for terrorist offenders

Lords Amendments 12 to 16

- 17 Lords Amendments 12 to 16 would remove the explicit provisions for polygraph testing to be used in a licence condition in Northern Ireland and Scotland. This was as a result of assurances provided by both administrations that should they wish to use polygraph testing in a licence condition, such legislative authority already exists and was a key commitment to securing legislative consent from Scotland.
- 18 Lords Amendment 14 and 15 would remove clauses 33 and 34 from the Bill, which set out explicit provision for polygraph testing as a licence condition for an offender in Scotland and Northern Ireland respectively.
- 19 Lords Amendment 16 would remove Clause 35, which sets out supplementary provision for introducing polygraph testing as a licence condition for this cohort of offenders across the UK. If polygraph is not applied to Scotland and Northern Ireland, existing provision under the Offender Management Act 2007 will provide the power to make regulations relating to the conduct and use of polygraph testing as a licence condition in England and Wales.
- 20 Lords Amendment 12 and 13 would remove reference to regulations from clause 32, which would be consequential on Lords Amendment 16.

Lords Amendment to Clause 37: TPIMs: condition as to involvement in terrorism-related activity

Lords Amendment 17

- 21 Lords amendment 17 amends section 3(1) of the Terrorism Prevention and Investigation Measures Act 2011 ("TPIMA 2011") to lower the standard of proof for imposing a TPIM from "balance of probabilities" to "reasonable belief". The Secretary of State must therefore reasonably believe that an individual is, or has been, involved in terrorism-related activity before imposing a TPIM notice. "Reasonable belief" is a higher standard of proof than "reasonable grounds for suspecting", as originally proposed by the Bill.

Lords Amendment to Clause 38: TPIMs: extension of time limit

Lords Amendment 18*

- 22 Lords amendment 18* tabled by Lord Anderson of Ipswich would amend Clause 38 of the Bill (and section 5 of TPIMA 2011) to implement a four-year limit on the length of time a TPIM can be imposed. As originally proposed by the Bill, Clause 38 would remove the current two-year limit on the length of time a TPIM can be imposed, the effect being that a TPIM notice would last for one year at a time but be capable of indefinite renewal (provided the conditions in section 3 of TPIMA 2011 continue to be met).

Lords Amendment to after Clause 43: TPIMs annual review

Lords Amendment 19

- 23 Lords amendment 19 inserts new clause 44 into the Bill which amends section 20 of the TPIMA 2011 to require an annual review of that act by the Independent Reviewer of Terrorism Legislation (“IRTL”) for a period of five years beginning with 2022 (with reviews at the discretion of the reviewer after that period). The effect of the amendment is to require the IRTL to produce an annual report on the operation of the TPIMA 2011 and the Secretary of State to lay that report before Parliament.

Lords Amendments to Clause 51: Extent

Lords Amendment 20

- 24 Lords Amendment 20 would firstly ensure that where provisions of the Bill are applied by the Armed Forces Act 2006 (“the 2006 Act”) for the purposes of sentencing in the service courts they have the same extent as that Act (which extends to the UK as a whole). Secondly, it would ensure that provisions of the Bill applied by the 2006 Act, or which amend, modify or repeal provisions of the 2006 Act or other legislation that amends or is applied by the 2006 Act have the same extent outside the UK as the 2006 Act: the 2006 Act can be extended to the Crown Dependencies by Order in Council (with modifications) and extends to the Ilse of Man and British overseas territories (other than Gibraltar) (subject to modifications that can be made by Order in Council). This would ensure that the same version of the 2006 Act would be in force in all the jurisdictions that Act extends to.

Lords Amendments to Clause 52: Commencement provisions

Lords Amendments 21, 24 and 26

- 25 Lords Amendment 21, 24 and 26 would insert new sub-paragraphs (ha) and (hb) to subsection (3) of clause 52 and would make consequential amendments to subsections (1) and (2) of that clause. These would allow consequential changes in the Bill relating to clause 1 and 21 to be brought into force by commencement regulations, insofar as they affect the service courts.

Lords Amendment 22

- 26 This would include a consequential amendment to clause 52 subsection (1) that would provide for commencement on Royal Assent. This would ensure that Lords Amendment 56 would commence at the same time as the substantive clause to which it relates, clause 23 (which sets out the new terrorism sentence with a fixed licence period in Scotland).

Lords Amendments 23 and 25

- 27 Lords Amendment 23 would change the commencement provision for clause 32 (polygraph licence conditions for terrorist offenders: England and Wales) from appointment by regulations to two months after Royal Assent by inserting reference to clause 32 in clause 52, subsection 2. This would be consequential on Amendment 16.
- 28 Lords Amendment 25 would remove the commencement provision for all clauses that related to polygraph licence conditions for terrorist offenders across the UK from Clause 52, subsection 3, that provided for commencement of said provisions by regulations.

Lords Amendments to Schedule 2: Serious Terrorism Offences: England and Wales

Lords Amendment 27

- 29 Lords Amendment 27 would amend Schedule 2 to remove references to offences in the Space Industry Act 2018 ("the 2018 Act") from Schedule 17A (serious terrorism offences) of the Sentencing Act 2020 ("the 2020 Act") and instead would include these in Schedule 22 of the 2020 Act, in recognition of the fact that the 2018 Act is not yet in force.

Lords Amendments to Schedule 3: Offences for the purposes of this Act: Northern Ireland

Lords Amendments 28 and 29

- 30 Lords Amendment 28 and 29 would remove reference to the provision that introduced polygraph testing as a licence condition in Northern Ireland from Schedule 3 and would be consequential on Lords Amendment 15.

Lords Amendments to Schedule 11: Release on licence of repatriated terrorist prisoners

Lords Amendments 30 to 33

- 31 Lords Amendments 30, 31, 32 and 33 would remove reference to the provision that introduced polygraph testing as a licence condition in Scotland from Schedule 11 and would be consequential on Lords Amendment 16.

Lords Amendments 34 and 35

- 32 Lords Amendments 34 and 35 would remove reference to the provision that introduced polygraph testing as a licence condition in Northern Ireland from Schedule 11 and would be consequential on Lords Amendment 15.

Lords Amendments to Schedule 13: Consequential and Related Amendments

Lords Amendments 36 and 37

- 33 Lords amendments 36 and 37 are consequential, technical amendments which are required as

a result of Clause 1 of the Bill (which broadens the scope of offences which the Court must consider whether they were committed with a terrorist connection) and the new Schedule A1 (which lists terrorism offences for which a terrorist connection is not required to be considered). Lords amendment 36 makes a consequential amendment to section 23A of the Terrorism Act 2000 as a result of clause 1 of the Bill. Lords Amendment 37 amends the list of terrorism legislation which is subject to review by the Independent Reviewer of Terrorism Legislation to include the new Schedule A1 inserted into the Sentencing Code by Schedule 1 to the Bill.

Lords Amendments 38 and 39

- 34 Lords Amendment 38 would remove a repeal to Schedule 2 to the Sentencing (Pre-Consolidation Amendments) Act 2020 that has now been made in the 2020 Act.
- 35 Lords Amendment 39 would repeal a prospective amendment made by Schedule 22 to the 2020 Act, which adds the offences contained in Schedule 4 to the 2018 Act to the list of offences where a terrorist connection is to be considered at the point of sentencing, but which has yet to be commenced. As a result of clause 1 of this Bill, this prospective amendment to the 2020 Act is not required.

Lords Amendment 40

- 36 Lords Amendment 40 would remove an unnecessary paragraph from Part 2 of Schedule 13 of the Bill that would be needed in consequence of Lords Amendment 55.

Lords Amendment 41

- 37 Lords Amendment 41 would make consequential amendments to section 255C of the Criminal Justice Act 2003 ("the 2003 Act") to ensure that offenders serving a serious terrorism sentence who have been released from their custodial sentence on licence and are then recalled to prison are not eligible for automatic re-release.

Lords Amendments 42 and 43

- 38 Lords Amendments 42 and 43 would remove unnecessary references to the serious terrorism sentence in the 2020 Act.

Lords Amendment 44

- 39 Lords Amendment 44 is technical in nature and would make amendments to Schedule 22 of the 2020 Act which deals with amendments to that Act. This amendment would set out the commencement of provisions in Schedule 22, which would only be used if the pre-existing power in Section 61 of the Criminal Justice and Courts Act 2000 were used to abolish sentences of detention in a young offender institution. In such an event, the changes in this amendment would be commenced to ensure the provisions of the new serious terrorism sentence equally applies to offenders between the ages of 18 – 20 as it does for those who are 21 or over.

Lords Amendments 45, 46 and 48

- 40 Lords Amendments 45, 46 and 48 are technical amendments which would omit an amendment to the 2020 Act which is consequential on Schedule 8 to the Bill rather than clause 21 and therefore is more appropriately dealt with in Part 5 rather than Part 3 of Schedule 13. The necessary amendment to Part 5 of the Schedule would be made by Amendment 54.

Lords Amendment 47

- 41 Lords Amendment 47 would ensure that the addition of offences set out in Schedule 6 of this

Bill which will attract the special custodial sentence for offenders of particular concern, and will replace Schedule 13 to the 2020 Act, is only applied where a person is convicted of an offence on or after the day on which the section comes into force. It would do this by making paragraph 12(2) of Schedule 13 to this Bill subject to the transitional provision in clause 21(2) of the Bill.

Lords Amendment 49

- 42 Lords Amendment 49 would adjust a consequential amendment to section 264(6A) of the Criminal Justice Act 2003 in order to clarify the insertion of the new youth sentence for terrorist offenders of particular concern aged under 18. This is required to reflect an amendment made to section 264(6A)(a) during the Joint Committee Stage of the 2020 Act, prior to it being given Royal Assent.

Lords Amendment 50

- 43 Lords Amendment 50 would make technical amendments to Schedule 22 of the 2020 Act which are consequential on the provisions of the Bill which introduce, for England and Wales, the new sentence for offenders of particular concern aged under 18 at the time of the offence. Schedule 22 amends the 2020 Act to align with the commencement of s61 of the Criminal Justice and Courts Services Act 2000 which, when it is in force, will abolish sentences of detention in a young offender institution. These amendments ensure Schedule 22 applies in respect of the new sentence for offenders of particular concern aged under 18.

Lords Amendments 51, 52 and 53

- 44 Lords Amendments 51 and 52 make minor drafting changes to paragraph 33 of Schedule 13 to the Bill, which amends section 5 of the Rehabilitation of Offenders Act 1974 ("the 1974 Act") (as it applies in England and Wales) to set the rehabilitation period for the service equivalent of the new youth sentence for offenders of particular concern.
- 45 Lords Amendment 53 would amend section 5 of the 1974 Act as it applies in Scotland to mirror the amendments to section 5 of the version of the 1974 Act that applies in England and Wales.

Lords Amendment 54

- 46 Lords Amendment 54 would make further amendments to the 2020 Act and the 2006 Act which are consequential on the changes the Bill makes to the sentencing powers of the Court Martial.

Lords Amendment 55

- 47 Lords Amendment 55 would amend section 250 of the 2003 Act so that the Parole Board would set the licence conditions for all prisoners to whom section 247A of that Act applies (restricted eligibility for early release) whose release is directed by the Board. This amendment would ensure that the relevant body responsible for the initial release decision would be accountable for setting any relevant bespoke licence conditions and would ensure provision was made for standard determinate sentenced terrorist offenders.

Lords Amendment 56

- 48 Lords Amendment 56 would insert a further consequential amendment to Schedule 13, Part 7 of the Bill. This would amend the Social Work (Scotland) Act 1968 ("the 1968 Act") to enable an inquiry to be held under section 6A of the 1968 Act into the detention of a child under the new terrorism sentence introduced by clause 23 of this Bill.

Lords Amendment 57

- 49 Lords Amendment 57 would amend section 5 of the 1974 Act as it extends to England, Wales and Scotland so that it would deal with the new sentences introduced by clause 6 (Serious terrorism sentence: Scotland) and clause 23 (Terrorism sentence with fixed licence period: Scotland). This would ensure that the rehabilitation periods for the serious terrorism sentence for offenders aged between 18 and 20 and the terrorism sentence with fixed licence period for offenders aged between 12 and 20 are aligned with other sentences of detention available to young adult offenders and children in both England and Wales and Scotland.

Lords Amendments 58 to 60

- 50 Lords Amendment 60 would amend section 40(3)(a) of the Prisons (Scotland) Act 1989 (“the 1989 Act”) so as to make section 40 applicable in relation to children sentenced to detention under the new terrorism sentence introduced by clause 23. This would apply the power of arrest by a constable or prison officer without warrant to a child under the age of 16 who is unlawfully at large following a sentence of detention under the new terrorism sentence in Scotland.
- 51 Lords Amendments 58 and 59 are minor clarifying amendments that reorganise references to the 1989 Act within Schedule 13 of this Bill and would be consequential on Lords Amendment 60.

Lords Amendments 61 and 63

- 52 Lords Amendment 63 would insert new section 1B into the 1993 Act. New section 1B would make provision for sentence calculation for consecutive sentences where at least one sentence is imposed for a terrorism offence in Scotland. This would ensure that it is clear when an offender should be released, and would provide for terrorism sentences to be aggregated, and would preserve the operation of single terming in respect of non-terrorism sentences.
- 53 Lords Amendment 61 would be consequential on the insertion of new section 1B and would ensure that the provisions within new section 1B would apply to the release of short term, long term and life sentence prisoners in Scotland.

Lords Amendment 62

- 54 Lords Amendment 62 would ensure that an offender is not released from custody in respect of one sentence if there is further custodial time to be served on another sentence. It would do so by making section 1AB(4) of the 1993 Act subject to sections 1A and new section 1B (that would be introduced by Lords Amendment 63) of that Act.

Lords Amendment 64

- 55 Lords Amendment 64 would ensure that a prisoner who is serving a life sentence and a sentence for a terrorism offence consecutively cannot apply for referral to the Parole Board until they are eligible for release from both sentences. It would do this by inserting new subparagraph (a) and (b) into subsection (6B) of the 1993 Act.

Lords Amendment 65

- 56 Lords Amendment 65 would amend section 3A and 3B of the 1993 Act to ensure that, in Scotland, any offender sentenced for a terrorist offence who has been released from custody and who subsequently breaches their licence conditions and is brought back into custody, will be able to obtain annual referrals to the Parole Board.

Lords Amendments 66 and 67

- 57 Lords Amendments 66 and 67 would apply new section 1B, which would be introduced by Lords Amendment 63, to those serving a period in custody for fine default or contempt. They would therefore prevent such offenders from being released if they are serving multiple sentences, where one of these is a sentence for a terrorism offence. They would do so by inserting reference to new section 1B to section 5 of the 1993 Act.

Lords Amendments 68, 70, 71 and 72

- 58 Lords Amendments 68, 70, 71 and 72 are all consequential amendments to section 7 of the 1993 Act which would ensure that the legislation operates as intended for youth offenders in Scotland.
- 59 Lords Amendment 68 would amend section 7(3) of the 1993 Act to add reference to a sentence under section 205ZC of the 1995 Act (terrorism sentence with fixed licence period: Scotland) to ensure that youth offenders serving such a sentence are liable to serve the rest of their licence period in custody if they commit a further offence on licence.
- 60 Lords Amendment 70 is a minor technical amendment to section 7 of the 1993 Act which would ensure that the differing release provisions and terminology for youth offenders are correctly construed in accordance with new section 1B, which would be introduced by Lords Amendment 63.
- 61 Lords Amendment 71 is a consequential amendment which would ensure that the provisions relating to section 7(3) (imprisonment for further offence on licence) of the 1993 Act apply to a terrorism sentence with a fixed licence period in the same way as they do for other sentences.
- 62 Lords Amendment 72 would be consequential on the introduction of new section 1B and would ensure that for youth offenders where there are consecutive sentences which include a sentence for a terrorism offence, the provisions in new section 1B would apply. The amendment would also clarify existing drafting by removing previous amendments which will otherwise be incorporated into Lords Amendments 70 and 71.

Lords Amendment 69

- 63 Lords Amendment 69 would amend section 7(5) of the 1993 Act so as to ensure that sections 3A and 3B of that Act would apply in relation to children who are sentenced to detention under the new terrorism sentence introduced by clause 23.
- 64 This would ensure that offenders in Scotland aged under 16, who were released on licence from a terrorism sentence with fixed licence period, could obtain annual referrals to the Parole Board when they have been recalled to custody following a breach of their licence conditions.

Lords Amendment 73

- 65 Lords Amendment 73 has three distinct purposes. Firstly, the amendment, like Lords Amendments 3, 8 and 11, would place the release provisions in Scotland of sentences for terrorism offences in only one section of the legislation, section 26ZA of the 1993 Act.
- 66 Secondly, the amendment would ensure that the correct terminology applies for the calculation of multiple sentences where at least one is for a terrorism offence. This is achieved by excluding new section 1B from section 26ZA(3) of the 1993 Act.

- 67 Finally, the amendment would ensure that the licence periods of multiple sentences for terrorist offences imposed on an individual were aggregated and therefore served as one licence period through further, minor amendment to section 26A of the 1993 Act.

Lords Amendment 74

- 68 Lords Amendment 74 is consequential on the insertion of new section 1B to the 1993 Act made by Lords Amendment 63 and would make provision so that terrorism sentences to which section 1AB of the 1993 Act apply would not be treated as a single term for the purposes of Part 1 of that Act.

Lords Amendment 75

- 69 Lords Amendment 75 would insert new subsection (5B) into section 27 of the 1993 Act which would ensure that sentences for non-terrorism offences would continue to be calculated as a single term, with terrorism offences excluded from this process.

Lords Amendment 76

- 70 Lords Amendment 76 would be consequential on the introduction of section 1B and 26ZA into the 1993 Act. It would ensure that these provisions could continue to apply to restricted transfers between Scotland and England and Wales and Northern Ireland for the purposes of determining release by making minor amendments to paragraphs 10 and 11 of Schedule 1 to the Crime (Sentences) Act 1997.

Lords Amendment 77

- 71 Lords Amendment 77 is a consequential amendment which would exclude new section 1B of the 1993 Act from being applied to a prisoner held in Scotland on behalf of the International Court by adding section 1B to the exclusion of Scottish release provisions in section 24(c) of the International Criminal Court (Scotland) Act 2001.

Financial Effects of Lords Amendments

- 72 The Department does not consider that any of the Lords Amendments give rise to any significant expenditure.

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