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Justice Committee Comataidh a' Cheartais

Counter Terrorism and Border Security Bill: Legislative Consent Memorandum considered by the Justice Committee



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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



justicecommittee@parliament.scot



0131 348 5047

Committee Membership



Convener
Margaret Mitchell
Scottish Conservative
and Unionist Party



Deputy Convener
Rona Mackay
Scottish National Party



John Finnie
Scottish Green Party



Jenny Gilruth
Scottish National Party



Daniel Johnson
Scottish Labour



Liam Kerr
Scottish Conservative
and Unionist Party



Fulton MacGregor
Scottish National Party



Liam McArthur
Scottish Liberal
Democrats



Shona Robison
Scottish National Party

Background

1. The [Counter Terrorism and Border Security Bill](#) had its first reading in the House of Commons on 6 June 2018.
2. The Bill contains provisions which are intended to have effect in Scotland (either in full or in part) which would either alter or affect the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers. As such, it is a “relevant Bill” under Chapter 9B of the Standing Orders and consequently one requiring the consent of the Scottish Parliament.
3. Accordingly the Cabinet Secretary for Justice, under Rule 9B.3.1(a) of the Parliament's Standing Orders, lodged a [Legislative Consent Memorandum](#) (LCM) on the Bill on 1 November 2018.

Outline of the UK Bill

4. The Bill follows the [UK] Government's reviews of its counter-terrorism strategy and of counter terrorism legislation. Part 1 of the Bill would bring in the legislative changes arising from those reviews. Amongst other changes, it would:
- Make it an offence to express an opinion or belief that is supportive of a proscribed organisation in certain circumstances (clause 1)
 - Criminalise the publication of certain images which would arouse reasonable suspicion that the offender was a member or supporter of a proscribed organisation (clause 2)
 - Strengthen the existing offence of downloading terrorist material and extend it to streaming such material, where this is done on three or more occasions (clause 3)
 - Strengthen existing offences of encouragement of terrorism and dissemination of terrorist publications (clause 4)
 - Increase maximum sentences for certain terrorist offences (clause 6)
 - Add to the list of offences for which extended sentences can be given in certain circumstances (clause 8)
 - Make changes to the notification requirements for registered terrorist offenders, and introduce a new police power to enter and search their homes (clauses 11 and 12)
 - Add certain terrorist offences to the list of offences for which a Serious Crime Prevention Order can be given (clause 13)
 - Allow local authorities (as well as the police) to refer people who are considered vulnerable to being drawn into terrorism to the multi-agency panels which assess them and provide support (clause 18)

Part 2 of the Bill is in response to the poisoning of Sergei and Yulia Skripal in Salisbury on 4 March 2018 with a nerve agent. Clause 20 and schedule 3 would bring in powers to stop, question, search and detain people at ports and borders to determine whether they appear to be (or have been) engaged in hostile activity.

Provisions which relate to Scotland

5. The Bill's territorial extent is complex. The Scottish Government has set out which provisions in the Bill it believes are subject to consent in its Legislative Consent Memorandum. The following paragraphs are an extract from the LCM.
6. Clause 15 of the Bill amends provisions in the Road Traffic Regulation Act 1984 concerning ATTROs. These are temporary traffic regulation orders specifically made to prevent or mitigate the impact of vehicle-borne terrorist attacks at a relevant site or event. The amendments provide the relevant traffic authority with new powers to impose a charge on relevant persons in connection with the making,

or notification, of an ATTRO. The Scotland Act 1998 (Consequential Amendments) Order 2001 amended the Road Traffic Regulations Act 1984 to provide that, in Scotland, the traffic authority is the roads authority as defined in section 151(1) of the Roads (Scotland) Act 1984.

7. In effect, for the purposes of trunk roads and special roads in Scotland, the relevant traffic authority is the Scottish Ministers. Therefore, in providing a charging ability for the ATTROs, the new clause would confer a new function on the Scottish Ministers, thereby altering their executive competence.
8. The Scottish Government requested that the Bill make consequential changes to the Legal Aid (Scotland) Act 1986 and the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011. The changes will extend the rights of a person detained under Schedule 3 to the Bill (and to persons detained under section 41 and Schedule 7 of the Terrorism Act 2000) to obtain criminal advice and assistance without means testing. Without these amendments the availability of such advice and assistance would be dependent on financial eligibility, and this would not be consistent with the rights of persons detained in Scotland for the purposes of other criminal investigations. The Scottish Government is of the view that the changes are within the legislative competence of the Scottish Parliament; however, in its view, there is no appropriate vehicle to introduce the required amendments prior to the intended commencement of the detention provisions in the Bill.
9. Clause 18 and Schedule 2, and clause 21 and Schedule 3, will enable biometric material retained, subject to a National Security Determination (NSD), to be kept longer (for a maximum of five years as opposed to the current two-year maximum retention period). The biometric material can be used for devolved purposes (such as the prevention or detection of crime). As such, part of the impact of these provisions is to increase the length of time that biometric material can be kept and used for devolved purposes in certain circumstances.
10. As the provisions in the Bill extend the length of time that the biometric material is available for use for general policing purposes, it would have been open to the Scottish Parliament to enact similar provisions extending the retention periods of biometric data for such devolved purposes.

Consultation

11. The UK Government has not undertaken a consultation on this legislation.

Financial implications

12. The Scottish Government has stated that there are no financial implications in regard to giving legislative consent to this Bill.

Justice Committee consideration

13. The Committee considered the LCM at its meeting on 13 November 2018.

14. The Cabinet Secretary for Justice told the Committee that—

” We consider that three specific areas of the bill require consent. The first is clause 15, which amends the Road Traffic Regulation Act 1984 to enable traffic authorities, including the Scottish ministers, to impose cost recovery charges for making anti-terrorism traffic regulation orders. Secondly, the Scottish Government requested that the bill make amendments to legal aid legislation to ensure that persons who are detained at the border under terrorism legislation have the right to non-means-tested advice and assistance. Those changes are within the legislative competence of the Scottish Parliament, but they were requested as there is no legislative vehicle available within an appropriate timescale that would ensure that consistency is maintained across the United Kingdom.

Thirdly, clauses 18 and 21 and their associated schedules will enable certain biometric material to be kept for longer and potentially to be used for devolved purposes. As the Scottish Parliament could enact similar provisions to extend the retention period for biometric data for devolved purposes, it is considered that those clauses require legislative consent. The safety and security of the people of Scotland is of paramount concern for the Scottish Government, and the bill rightly faces scrutiny in the UK Parliament with regard to whether its impact is appropriate and—importantly—proportionate. We will continue to engage with the UK Government on those matters as the bill progresses. The clauses for which we seek the Committee's support today enable national security legislation to be applied consistently across the UK.

Source: Justice Committee 13 November 2018 [Draft], Humza Yousaf, contrib. 143¹

15. A number of members raised some issues with the Cabinet Secretary during the Committee's deliberations on the LCM at its meeting of [13 November](#). These includes questions around:

- Whether the Lord Advocate will remain charge of investigations under this proposed legislation?
- Whether the extension of the notification requirements to persons who are convicted of terrorism-related offences in the north of Ireland will apply retrospectively?
- Whether the Bill contains appropriate safeguards for civil liberties in relation to the retention of biometric material?
- Where the relevant information will be stored in the context of the Police National Database?
- Whether the Cabinet Secretary would support an independent review of the Prevent Strategy?

- Whether the UK Government has carried out a human rights assessment on the Bill in its entirety and, if not whether the Scottish Government would commit to producing such an assessment?
16. The full detail of the exchange between the members of the Committee and the Cabinet Secretary's response is set out in the [Official Report](#) for our meeting of 13 November.

Recommendation

17. The Committee is supportive of the UK Government legislating in the areas set out in the Legislative Consent Memorandum on the Counter Terrorism and Border Security Bill. The Committee therefore recommends that the Scottish Parliament approves the legislative consent motion on the Counter Terrorism and Border Security Bill , to be lodged by the Scottish Government.ⁱ

ⁱ John Finnie MSP dissented from this paragraph.

Annexe: Draft legislative consent motion

That the Parliament agrees that the relevant provisions of the Counter Terrorism and Border Security Bill, introduced in the House of Commons on 6 June 2018, relating to Anti-Terrorism Traffic Regulation Orders, the retention of Biometric material and legal aid, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.

- [1] Justice Committee 13 November 2018 [Draft], Humza Yousaf, contrib. 143,
<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=11779&c=2128022>

