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Justice Committee Comataidh a' Cheartais

Legislative Consent Memorandum - Terrorist Offenders (Restriction of Early Release) Bill



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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.



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Introduction

1. The [Terrorist Offenders \(Restriction of Early Release\) Bill](#) is a UK Government Bill which had its 1st Reading in the House of Commons on 11 February 2020. The Bill is currently subject to an expedited timetable in the UK Parliament.
2. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass bills that contain relevant provisions relating to devolved matters without first obtaining the consent of the Scottish Parliament. This Bill contains such provisions (see [below](#)) and as such, the Scottish Parliament is required to give its consent through consideration of this Committee's report and a legislative consent motion debated in the Chamber.

About the Bill

3. The Bill makes provision about the release on licence of offenders convicted of terrorist offences or offences with a terrorist connection. The Bill completed its House of Commons stages on 12 February 2020.
4. The operation of the Bill is split into England and Wales and separately Scotland. This reflects different law applying in the area of early release in these countries. However, the policy intent of the Bill as a whole applies to Scotland as it does in England and Wales in respect of ending automatic early release for terrorism offences and terrorism-related offences, and introducing discretionary early release from the two-thirds point of sentence for such offences. This applies to all determinate length sentenced prisoners and applies to both new sentences and existing sentences at the time of commencement of the legislation. There are three areas in the Bill that alter the Scottish Ministers' executive competence and therefore require an [Legislative Consent Memorandum](#) (LCM) to be lodged. These are as follows—
 - *Clause 3* of the Bill alters the Scottish Ministers' executive competence by providing that the Scottish Ministers must refer a relevant prisoner to the Parole Board at the two-thirds points of sentence and, by providing that, the Scottish Ministers must release a prisoner if the Parole Board recommends this course of action;
 - *Clause 4* of the Bill alters the Scottish Ministers' executive competence by disapplying existing powers resting with the Scottish Ministers in respect of the early release of relevant prisoners; and
 - *Clause 8* of the Bill alters the Scottish Ministers' executive competence by making transitional provision relating to the operation of supervised released orders. In doing so it also makes provision for the circumstances where the Scottish Ministers must release a prisoner if the Parole Board recommends this course of action.
5. On that basis, the legislative consent of the Scottish Parliament is being sought, and an LCM was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 13 February 2020, which set out the Scottish Government's views on the Bill (see [Annex A](#)).
6. The LCM states that the Scottish Government “has reservations about the pace with which this Bill has been developed” and also that “clarity in the area of law of enforcement of terrorist sentencing is important.”¹
7. The Scottish Government concludes “with some reluctance” that it is “preferable for the UK Government to legislate in one overall Bill to minimise the risk of creating gaps in Scottish devolved law”. The Scottish Government states that, in promoting this legislative consent motion, it is “not offering a view on the substantive policy contained within the Bill and instead is promoting the legislative consent motion on the basis that relevant law will not be workable if relevant changes to law that affect executive competence of the Scottish Ministers are not made”.¹

Consideration by the Justice Committee

8. The Justice Committee considered the Bill and LCM on 18 February (see [Annex B](#), taking evidence from the Cabinet Secretary for Justice and his officials. A number of issues were raised by members of the Committee.
9. Members of the Committee asked whether the Bill would have retrospective effect and whether the Scottish Government could be subject to legal challenge as a result of this legislation. The Cabinet Secretary and his officials indicated that, as the legislation was a UK Government Bill, the risk of legal challenge lay with the UK Government. He also stated that the Bill did not change the length of a sentence but altered potential release dates.
10. The Cabinet Secretary also indicated that he had considered alternatives to consenting to this legislation but that the issue of the sentencing of terrorist offenders was reserved. He also stated that he did not wish to see any potential for confusion and uncertainty by having different regimes in Scotland compared to England and Wales. He expressed his deep reservations about the proposed Bill.
11. The Cabinet Secretary gave a view on how he would have preferred to approach issues of deradicalisation other than through a sentencing and prison-based approach, indicating also that he had expressed a view to the UK Government that more time for scrutiny would have been preferable as well as more detailed information.
12. Finally, the Cabinet Secretary drew a comparison between the types of terrorist offenders held in England and those in Scotland, suggesting that the former has more prevalence of 'ISIS-inspired' offenders whereas, in Scotland, the offences relate more to a 'far-right ideology' or paramilitary activity. The Cabinet Secretary indicated that there were 5 offenders currently held in Scotland to whom this Bill applied.

Conclusion and recommendation

13. After deliberation, the Justice Committee agreed with the recommendation of the Scottish Government that the Scottish Parliament should give its consent to the relevant provisions in the Terrorist Offenders (Restriction of Early Release) Bill. John Finnie MSP indicated his dissent to this recommendation.

Annex A

LEGISLATIVE CONSENT MEMORANDUM

TERRORIST OFFENDERS (RESTRICTION OF EARLY RELEASE) BILL

Background

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 Terrorist Offenders (Restriction of Early Release) Bill was introduced in the House of Commons on 11 February 2020. The Bill can be found at:

<https://services.parliament.uk/Bills/2019-20/terroristoffendersrestrictionofearlyrelease.html>

Content of the Terrorist Offenders (Restriction of Early Release) Bill

The Bill ends the automatic early release from custody of anyone convicted of terrorism offences and terrorism related offences. Alongside this would be the introduction of the possibility of anyone convicted of such offences being able to be considered for Parole Board discretionary early release at the two-thirds point of their sentence. The Bill applies to all relevant offences where a determinate sentence (either long-term or short-term) has been imposed and applies to future sentences as well as existing sentences.

Provisions Which Relate to Scotland

The operation of the Bill is split into England and Wales and separately Scotland. This reflects different law applying in the area of early release in these countries. However, the policy intent of the Bill as a whole applies to Scotland as it does in England and Wales in respect of ending automatic early release for terrorism offences and terrorism-related offences, and introducing discretionary early release from the two-thirds point of sentence for such offences. This applies to all determinate length sentenced prisoners and applies to both new sentences and existing sentences at the time of commencement of the legislation.

The content of the Bill relating to Scotland that requires an LCM is as follows:

Clause 3 – Eligibility for release on licence of terrorist prisoners: Scotland

This clause alters the Scottish Ministers' executive competence in (clause 3(3)) by providing that the Scottish Ministers must refer a relevant prisoner to the Parole Board at the two-thirds points of sentence and in (clause 3(4)) by providing that the Scottish Ministers must release a prisoner if the Parole Board recommends this course of action.

Clause 4 – Disapplication of existing release provisions: Scotland

This clause alters the Scottish Ministers' executive competence by dis-applying existing powers resting with the Scottish Ministers in respect of the early release of relevant prisoners.

Clause 8 – Transitional provision for terrorist prisoners subject to supervised release orders: Scotland

This clause alters the Scottish Ministers' executive competence by making transitional provision relating to the operation of supervised released orders. In doing so it also makes provision for the circumstances where the Scottish Ministers must release a prisoner if the Parole Board recommends this course of action.

Reasons for seeking a legislative consent motion

The Scottish Government has reservations about the pace with which this Bill has been developed. It is noted that a period of just over one week has elapsed between an announcement by the UK Government of this legislation and a Bill being introduced into the House of Commons. The Scottish Government was only informed the Bill would extend to Scotland four days prior to the introduction of the Bill.

Within this context, the Scottish Government has considered the UK Government's request for a relevant Legislative Consent Motion. The Scottish Government is clear that clarity in the area of law of enforcement of terrorist sentencing is important. In order for the UK Government to achieve its policy intent, the Scottish Government notes that this would necessitate changes to the law which affect the executive competence of the Scottish Ministers.

Not to promote an LCM for matters which are, to a large extent, consequential to the overall policy intent sought by the UK Government would run the risk of error and confusion in the operation of the relevant law. This prospect of error and confusion arising would depend on decisions made by the UK Government.

The Scottish Government therefore with some reluctance considers it preferable for the UK Government to legislate in one overall Bill to minimise the risk of creating gaps in Scottish devolved law. In promoting this legislative consent motion, the Scottish Government is not offering a view on the substantive policy contained within the Bill and instead is promoting the legislative consent motion on the basis that relevant law will not be workable if relevant changes to law that affect executive competence of the Scottish Ministers are not made.

Consultation

There has been no consultation by the UK Government on the Bill.

Financial Implications

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

Conclusion

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 fall within the legislative competence of the Scottish Parliament and alter Scottish Ministers' functions in relation to the release and management of terrorist offenders, they should be considered by the UK Parliament in order to ensure that the UK Government's reforms to the system of enforcement of custodial sentences for terrorism offences and terrorism related offences are workable in order to minimise the risk of error and confusion in the operation of relevant laws.

Draft Legislative Consent Motion

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

“That the Parliament agrees that the relevant provisions of the Terrorist Offenders (Restriction of Early Release) Bill, introduced in the House of Commons on 11 February 2020, relating to Scottish Ministers’ power to refer prisoners to the Parole Board, Scottish Ministers’ power to release prisoners when recommended to do so by the Parole Board and disapplication of certain powers held by Scottish Ministers’ in respect of the early release of prisoners, so far as these matters alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

SCOTTISH GOVERNMENT

February 2020

Annex B

Extract from the Minute of the Meeting of the Justice Committee of 18 February 2020

6th Meeting, 2020 (Session 5)

Present: John Finnie, James Kelly, Liam Kerr, Fulton MacGregor, Rona Mackay (Deputy Convener), Liam McArthur and Shona Robison

Apologies were received from Jenny Gilruth and Margaret Mitchell (Convener).

The meeting opened at 11.00 am.

1. Terrorist Offenders (Restriction of Early Release) Bill (UK Parliament legislation):

The Committee took evidence on legislative consent memorandum LCM(S5)33 from—

Humza Yousaf, Cabinet Secretary for Justice, and Philip Lamont, Head of Criminal Law, Practice and Licensing Unit, Scottish Government.

2. Terrorist Offenders (Restriction of Early Release) Bill (UK Parliament legislation):

The Committee considered the legislative consent memorandum lodged by Humza Yousaf (Cabinet Secretary for Justice) (LCM(S5)33) and agreed that the Scottish Parliament should give its consent to the relevant provisions in the Terrorist Offenders (Restriction of Early Release) Bill. John Finnie recorded his dissent to this recommendation.

The meeting closed at 11.24 am.

Justice Committee

Legislative Consent Memorandum - Terrorist Offenders (Restriction of Early Release) Bill, 2nd Report, 2020 (Session 5)

- [1] Scottish Government. (2020, February). Legislative consent memorandum - Terrorist Offenders (Restriction of Early Release) Bill.

