



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

6th Meeting, 2020 (Session 5)

Tuesday 18 February 2020

The Committee will meet at 11.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Terrorist Offenders (Restriction of Early Release) Bill (UK Parliament legislation):** The Committee will take evidence on legislative consent memorandum LCM(S5)33 from—

Humza Yousaf, Cabinet Secretary for Justice, Nicholas Duffy, Branch Head, Criminal Justice, Police and Fire Division, 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 will consider the legislative consent memorandum lodged by Humza Yousaf (Cabinet Secretary for Justice) (LCM(S5)33).

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The papers for this meeting are as follows—

Agenda item 1

Paper by the Clerk

J/S5/20/6/1

Justice Sub-Committee on Policing

6th Meeting, 2020 (Session 5), Tuesday 18 February 2020

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

Note by the Clerk

Introduction

1. The [Terrorist Offenders \(Restriction of Early Release\) Bill](#) is a UK Government Bill introduced in the House of Commons on 11 February 2020. The Bill is currently subject to an expedited timetable. The Bill has now completed its passage in the House of Commons. It is understood that the UK Government intends the Bill to have its 2nd Reading in the House of Lords on 24 February, with Royal Assent proposed by the end of the month. As such, the Scottish Parliament needs to take a view on legislative consent before the Bill has reached its last amending stage.

Legislative consent process

2. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of a Legislative Consent Memorandum (LCM). This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:

- change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998);
or
- alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).

3. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass Bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the basis of a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

4. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament’s Standing Orders.

Terrorist Offenders (Restriction of Early Release) Bill

5. 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.
6. 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 LCM. 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.
7. On that basis legislative consent of the Scottish Parliament is being sought, and a legislative consent memorandum was lodged by Humza Yousaf MSP, Cabinet Secretary for Justice, on 13 February 2020.

Scottish Government Legislative Consent Memorandum

8. On 13 February, the Scottish Government lodged an LCM in relation to this Bill. The LCM can be accessed in the Annex to this paper.
9. 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.”
10. 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”.

11. The LCM (Annex, paragraph 12) sets out the Scottish Government’s draft motion.

Action

12. **The Cabinet Secretary for Justice is attending today’s meeting to set out the views from the Scottish Government on the Bill and the issue of consent, as well as to take questions from members.**

13. **Members will then be invited to consider whether to agree with the recommendation of the Scottish Government that the legislative consent motion should be agreed by the Scottish Parliament.**

14. **Members are also asked to agree that the Convener should arrange for the publication of a short, factual report on the outcome of the Committee’s deliberations.**

LEGISLATIVE CONSENT MEMORANDUM TERRORIST OFFENDERS (RESTRICTION OF EARLY RELEASE) 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 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

2. 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

3. 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.

4. 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 disapplying 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

5. 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.

6. 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.

7. 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.

8. 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

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

Financial Implications

10. 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

11. 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

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 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
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