Draft legislative consent motion

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

“That the Parliament agrees that the relevant provisions of the Offender Rehabilitation Bill, introduced in the House of Lords on 9 May 2013, which enable persons convicted in England and Wales and who will be subject to the new supervision requirements contained in the Bill to continue to be subject to those requirements in the event that they are subsequently transferred to Scotland under the Crime (Sentences) Act 1997, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice under Rule 9.B.3.1(c)(i) of the Parliament’s standing orders. The Offender Rehabilitation Bill was introduced in the House of Lords on 9 May 2013 and relevant amendments made on 25 November 2013. The Bill can be found at:

http://services.parliament.uk/bills/2013-14/offenderrehabilitation.html

Content of the Offender Rehabilitation Bill

3. The purpose of the Bill is to reform the release and supervision arrangements of offenders. Most of the provisions of the Bill consist of amendments to existing legislation which apply to England & Wales only. The Bill makes a number of amendments to the Criminal Justice Act 2003 to include:

- new supervision arrangements for offenders released from fixed-term custodial sentences of less than 2 years so that all offenders are supervised in the community for at least 12 months;
- new arrangements for release under license for offenders serving fixed-term custodial sentence of more than 1 day but less than 12 months;
- creating a new court process and sanction for breach of supervision requirements for offenders serving fixed-term custodial sentences of less than 2 years; and
- creating new rehabilitation activity requirements for community orders and suspended sentence orders.

4. Although not part of the Bill on introduction, a non-Government amendment added to the Bill during the Committee stage in the House of Lords will also require any change to the structure of the probation service in England and Wales to be approved by both Houses of Parliament.

Provisions which relate to Scotland

5. The Bill did not extend to Scotland on introduction. However, amendments were lodged on 25 November 2013 which aim to ensure that the new forms of post-release supervision in England and Wales can apply in Scotland where an offender is
transferred on a restricted basis, under paragraph 1 or 4 of Schedule 1 of the Crime (Sentences) Act 1997 (“the 1997 Act”). This will maintain the current cross-border arrangements once the legislation is enacted.

6. Schedule 1 to the 1997 Act currently provides for the transfer of offenders within the UK. Part 1 sets out the powers to transfer offender and allows the UK Government and the Scottish Government to transfer offender to different parts of the UK. There is no express requirement for any agreement between the UK Government and the devolved administrations, but the convention is that both the sending and receiving jurisdiction must agree prior to a transfer taking place based on set criteria.

7. The amendments are therefore required because, as matters stand, Schedule 1 of the 1997 Act would not cover the new post-release supervision and license conditions to be transferred to Scotland. There may however be some circumstances in which an offender has legitimate reasons for wanting to transfer their supervision such as: close family or residential ties; the offender intends to reside in Scotland following completion of the supervisions; or there are other strong compassionate or compelling grounds to support the request.

8. The changes to the arrangements on release for certain offenders in England and Wales are set out in the following clauses and schedules of the Bill:

- **Clause 2.** This amends section 243A of the Criminal Justice Act 2003 to provide that offenders sentenced to more than 1 day but less than 12 months in custody would be released on licence at the halfway point in their sentence to service the remainder of their sentence in the community. The exceptions are where the offender is given a sentence of a single day, the offender is under 18 at the point of release, or where the offender’s crime was committed before the provision is commenced.

- **Clause 3.** This creates a new section 256AA of the Criminal Justice Act 2003. This provides for a new “top-up” supervision period to follow after licence, for any sentence of less than 2 years. The aggregate length of the top-up period and licence together is 12 months: for example a 6 month sentence would mean 3 months spent in prison, 3 months on licence, and then 9 months of top-up supervision.

- **Schedule 1.** This inserts sections 256AB, 256D and 256E into the Criminal Justice Act 2003. Between them they create 10 requirements that an offender can be subject to while under top-up supervision.

- **Clause 4.** This creates a new section 256AC of the Criminal Justice Act 2003. This provides for a magistrates’ court to deal with cases of alleged breach of a top-up supervision requirement, and provides various sanctions that such a court can impose for proven breaches- a fine, unpaid work, a curfew, or, ultimately, a return to custody for a period of up to 14 days. This includes a “supervision default order”, which can consist of either an electronically monitored curfew or unpaid work.

- **Schedule 2.** This creates a new Schedule 19A to the Criminal Justice Act 2003, and provides a framework within which magistrates’ courts can deal with breach of a supervision default order, or revoke or amend it.
• **Clause 5.** This amends section 256B of the Criminal Justice Act 2003, to ensure that a group of young offenders who will not be given top-up supervision will continue to be supervised under section 256B on release.

• **Clause 7.** This amends sections 101 and 103 of the Powers of Criminal Courts (Sentencing) Act 2000, and creates a new section 106B, in order that offenders who are given a detention and training order as a juvenile but released as an adult attract top-up supervision.

• **Clause 12.** This amends section 64 of the Criminal Justice and Court Services Act 2000, which currently provides a power to test offenders subject to licence for specified Class A drugs. It amends this to include specified Class B drugs too.

• **Clause 13.** This creates a new section 64A of the Criminal Justice and Court Services Act 2000, to provide for a new drug appointment requirement that can be imposed on offenders subject to licence.

9. The amendments proposed to Schedule 1 to the Crime (Sentences) Act 1997 will provide for the above clauses to apply as part of Scots law (modified for Scottish purposes) when the offender is transferred from England or Wales on a restricted basis.

**Reasons for seeking a legislative consent motion**

10. The Bill, as amended, contains provisions which are within the legislative competence of the Scottish Parliament, making it a “relevant” Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently requiring the consent of the Scottish Parliament.

11. The amendments are limited to allow for the cross-border transfer of the new extension of supervision in England and Wales to Scotland. They will enable the new supervision arrangements and related provisions to operate in Scotland in respect of offenders transferred from England or Wales to Scotland. These are amendments to Scots criminal law, and are therefore within the legislative competence of the Scottish Parliament. It is appropriate to agree that the UK Parliament can legislate in respect of these matters in order that the new regime which is to operate in England and Wales (and which is being created by this Bill) can also apply in respect of persons convicted in England and Wales but who are subsequently transferred to Scotland.

**Consultation**

12. These amendments are late additions and largely technical amendments to the Bill and there has been no formal consultation by the UK Government or Scottish Government.

13. We have informally consulted with criminal justice social work partners and the Scottish Courts Service who raise no substantive issues with the provisions. We will ensure there is on-going engagement with stakeholders on the practical implications of these arrangements.
Financial Implications

14. The transfer of supervision from England and Wales to Scotland is a demand led area and it is difficult to predict how many offenders serving short term sentences in England and Wales would seek to transfer their supervision to Scotland. There may be an increase in the number of transfers as a result of the extension of supervision in England and Wales, however we do not expect this to be a substantial increase. As with the current arrangements for transfer, the jurisdictional discretion to refuse a transfer will remain.

15. We therefore do not expect the financial implications to be significant and will be offset by reciprocal transfer of supervision of offender going from Scotland to England and Wales. We have also agreed with the UK Government that we will monitor the numbers transferring under these new arrangements to Scotland and any potential impact on criminal justice partners for a period of 18 months.

Conclusion

16. The amendments will maintain the existing arrangements for cross-jurisdictional transfer of supervision which work well and are mutually beneficial for reducing reoffending and public safety in all jurisdictions. We wish to maintain the current arrangements, regardless of supervision arrangement reform in England and Wales, as they will allow for the return of an offender to Scotland if appropriate.

17. The new supervision arrangements in the Bill will only apply in England and Wales. We therefore consider it helpful that the amendments to existing legislation that will maintain the status quo and provide for the cross-border transfer of the UK supervision to Scotland should be made within the UK Bill.

18. It is the view of the Scottish Government that it is in the interest of the Scottish people that the relevant amendments made to Schedule 1 of the Crimes (Sentences) Act 1997, as outlined above, which fall with the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Scottish Government
November 2013