



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 18 February 2020**

**Session 5**



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**JUSTICE COMMITTEE**  
**6<sup>th</sup> Meeting 2020, Session 5**

**CONVENER**

Margaret Mitchell (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

\*John Finnie (Highlands and Islands) (Green)

Jenny Gilruth (Mid Fife and Glenrothes) (SNP)

\*James Kelly (Glasgow) (Lab)

\*Liam Kerr (North East Scotland) (Con)

\*Fulton MacGregor (Coatbridge and Chryston) (SNP)

\*Liam McArthur (Orkney Islands) (LD)

\*Shona Robison (Dundee City East) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Philip Lamont (Scottish Government)

Humza Yousaf (Cabinet Secretary for Justice)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



# Scottish Parliament

## Justice Committee

*Tuesday 18 February 2020*

*[The Deputy Convener opened the meeting at 11:00]*

### Terrorist Offenders (Restriction of Early Release) Bill

**The Deputy Convener (Rona Mackay):** Welcome to the Justice Committee's sixth meeting in 2020. We have received apologies from the convener, Margaret Mitchell, and from Jenny Gilruth.

Agenda item 1 is an evidence session on a legislative consent memorandum on the Terrorist Offenders (Restriction of Early Release) Bill, which is United Kingdom Parliament legislation. The bill touches on devolved matters, and the Scottish Government recommends that the Scottish Parliament give its consent to the UK Parliament to make the relevant provisions in the bill.

I welcome the Cabinet Secretary for Justice, Humza Yousaf, and his Scottish Government officials. Nicholas Duffy is branch head of the criminal justice, police and fire division, and Philip Lamont is head of the criminal law, practice and licensing unit.

I refer members to paper 1, which is a note by the clerk, and invite the cabinet secretary to make a short opening statement on the LCM. Following the statement, there will be an opportunity for members to ask questions.

**The Cabinet Secretary for Justice (Humza Yousaf):** Thank you for inviting me to give evidence on the Scottish Government's legislative consent memorandum in respect of the UK Government's Terrorist Offenders (Restriction of Early Release) Bill.

I appreciate that the convener and the committee have been able to prioritise consideration of the LCM in light of the timescales at Westminster for consideration of the bill. The bill has been developed in the space of a few days; the UK Government introduced it into the House of Commons just over a week after it was announced. I understand that there is occasionally a need to legislate with such speed, but there are, of course, risks in doing so, especially in the area of the enforcement of sentencing, which the bill relates to and which is, as many members of the committee have said in the past, extremely complex.

As members are aware, the bill will end the automatic early release of individuals who have received determinate lengths of sentences for convictions for terrorism-specific offences or terrorism-related offences. The bill provides a new process for consideration of discretionary early release at the two-thirds point of the sentence, and it will affect all those who receive fixed lengths of sentences—long-term sentences of four years or more and short-term sentences of less than four years.

In the Scottish Parliament, through the Prisoners (Control of Release) (Scotland) Act 2015, we abolished automatic early release for the most dangerous categories of long-term prisoner and severely restricted the availability of automatic early release for other categories of long-term prisoner. The effect of the Terrorist Offenders (Restriction of Early Release) Bill on long-term terrorist prisoners would therefore be limited. The main effect would be to adjust the point of the sentence at which parole can be considered, from the halfway point to the two-thirds point.

The effect would be more significant for those who receive sentences of less than four years. Automatic early release would be ended, and a new right to be considered for parole would be introduced. That is UK Government policy. Our proposal to lodge an LCM should not be seen as support for UK Government policy. I have reservations about the effectiveness of that policy, particularly in relation to deradicalisation, but in order to implement the policy, the bill needs to make some changes that affect the executive competence of the Scottish ministers. That is why a legislative consent motion is required.

It is important for the committee to note that the Scottish Government could not legislate for the sentencing of terrorism offences, because that is a reserved matter.

The functions that are affected by the bill, which require the LCM, relate to powers of the Scottish ministers to release prisoners on home detention curfew or on licence. It should be noted that, in the latter category, the function to release is used only if the independent Parole Board for Scotland has recommended release and no change is proposed to that relationship.

The overall effect of the UK Government bill would therefore be that new arrangements for release would be put in place for terrorist offenders. That requires adjusting the functions of the Scottish ministers in the area of the release of prisoners, as listed in the memorandum. To minimise the risk of error and confusion in the law arising, the Scottish Government LCM has been lodged so that necessary adjustments can be made in the UK Government bill.

I am, of course, happy to take questions.

**The Deputy Convener:** Thank you, cabinet secretary. Do members have any questions?

**Liam McArthur (Orkney Islands) (LD):** Thank you for those helpful opening remarks, cabinet secretary. Nobody would dispute the need to avoid a situation in which people who have been convicted of terrorism offences are subject to automatic early release, but I share some of your misgivings about the speed with which the bill has been brought through and the fact that it does not appear to address deradicalisation.

My substantive point is on the retrospective application of the bill. Would that expose the Scottish Government to legal challenge from people who might see the provisions as an infringement of their human rights?

**Humza Yousaf:** I thank Liam McArthur for his helpful comments.

I have watched the debate in the House of Commons, and I associate myself with many of the remarks that were made by a number of Scottish MPs, including Alistair Carmichael, whose consideration of the bill was very thoughtful. He questioned the speed and the need for that speed in the consideration of the bill. I have such reservations, which I have already put on the public record.

I look to my Scottish Government colleagues on my left and right to keep me right, but I am pretty sure that the legal challenge risk lies with the UK Government—it is a UK Government bill—despite the fact that we lodged the LCM. The reason why the UK Government is confident—it has said as much on the public record—is that the bill will change when the release of a terrorist offender can happen, whether that be for long-term or short-term prisoners, and not the length of sentences. The sentence length will not change, but the enforcement of the sentence will change.

There might well be a legal challenge. The UK Government has acknowledged that, but it is firm in the belief that the bill aligns with and is compatible with European convention on human rights requirements and, in particular, article 7.

I want to be absolutely sure that the legal risk with the legislation will lie with the UK Government, so I turn to my colleague Philip Lamont.

**Philip Lamont (Scottish Government):** Yes. Ultimately, it will be Westminster legislation, so that is where any legal challenge would lie.

**Liam McArthur:** Have you taken separate legal advice on that point? I know that there are protocols about admitting such things, but legal challenge has been one aspect of the debate on

the bill. It would be prudent to explore that, even if the risk lies with the UK Government rather than the Scottish Government.

**Humza Yousaf:** That would be prudent. Liam McArthur knows that I cannot comment on even seeking legal advice, let alone on whether legal advice has been given by the law officers. He is right in his assumption that it would be prudent to look at the legal effects of the bill but, as a member of the Government, and as protocol dictates, I cannot confirm whether we have received legal advice.

**John Finnie (Highlands and Islands) (Green):** Why are you pandering to a racist UK Prime Minister?

**Humza Yousaf:** As somebody who has been at the forefront of racist abuse—I suspect more so than John Finnie has ever been in his life—I take enormous exception to that. He might want to ask that question again in another way or format.

This is not pandering, and it is ridiculous to suggest that it is. The view that we should promote the LCM is a considered one that we did not rush into, although the timescales were against us. I took that view because I do not want there to be error or confusion in the law.

I will give an example. If we did not lodge an LCM or if the LCM was rejected by the Parliament and the UK Government decided to continue with the bill—which it has told us that it will—the law would say that a long-term prisoner who had been convicted of terrorism offences would be considered for parole at the two-thirds point in their sentence. Am I right in saying that?

**Philip Lamont:** Yes. In the bill, the UK Government is proposing that a long-term terrorist offender can be considered for parole at the two-thirds point. However, in Scotland, a long-term prisoner who has been convicted of any offence can currently be considered for parole at the halfway point.

**Humza Yousaf:** There would be confusion in the law about when a prisoner in Scotland who had been convicted of a terrorism offence would end up going in front of the Parole Board. Would that be at the halfway point or the two-thirds point? If we do not agree to the LCM, there will potentially be error and, at the very least, confusion.

If the argument that is coming back to me is “Why don’t you just legislate yourself?”, I think that John Finnie is aware that the sentencing of terrorism offences is reserved to the UK Government.

I ask two things of John Finnie. First, please do not suggest to me that I am pandering to racism or to a racist Prime Minister. I am somebody who has been on the other side of that, and I suspect that

John Finnie has probably very rarely been on the other side of it.

Secondly, on understanding and supporting the LCM, John Finnie has, of course, every right to oppose it, and I suspect that he will. However, do not take the Scottish Government's lodging of an LCM as support for the UK Government's policy. That policy probably just kicks the problem down the road, and I have deep reservations about that. If we want to tackle deradicalisation, it is much better to look at our work in the prevent programme in Scotland as opposed to keeping people in prison for longer. However, that is another policy discussion.

**John Finnie:** I apologise unreservedly to the cabinet secretary for my clumsy framing of the question. I know the principled stance that he takes on all matters of equality, including racism. No offence was intended.

Cabinet Secretary, why are we here? This is the Justice Committee of the Scottish Parliament. We consider a lot of detailed proposals. There are three sheets of paper in front of me, but no assessments. I understand what the perceived problem is. What problem are we seeking to address, and what other routes were considered?

**Humza Yousaf:** I say again that this is a UK Government policy. The member is right. I said as much to the UK Government justice secretary: my preference would be for him to take his time and introduce a considered bill. His argument—and I must accept his judgment—is that the legislation is needed because of the potential imminent release of some terrorist offenders across the United Kingdom.

If there was more time, we would be able—or rather, since I cannot legislate on this, the UK Government would be able—to have consultation, further discussion with stakeholders and so on.

I agree that this is not the most favourable approach. However, it is the approach that the UK Government is taking; therefore I have a very fine judgment call to make about whether not supporting it could lead to error and confusion within the law, which would be in absolutely nobody's interest.

**John Finnie:** Is the concern about shortcomings regarding supervision, rehabilitation and risk assessment, which in themselves would not necessarily require a legislative change but would require robust examination and steps to address them? Instead, we are rushing to turn three bits of paper into law in a matter of days, when the cabinet secretary knows that we pore for months over issues of sentencing policy.

**Humza Yousaf:** I do not disagree with the member's principal objection to the speed of

legislation. I share those reservations and have communicated as much to the UK Government.

I go back to my earlier point. If we want to tackle radicalisation, numerous research reports show that prison is a place where people are further radicalised, not deradicalised. I point the committee to remarks by David Merritt, whose son Jack Merritt was killed in the London Bridge attack. His remarks on the bill are food for thought for us all.

I want to make the point as forcefully as I can, on the record, that I have deep reservations and misgivings about the approach. However, the fine judgment that I have to make is, on balance, that if I do not promote the LCM there will be errors and confusion in the law on how terrorist offenders are dealt with, and there will be no obvious way to deal with that. We give one example, in terms of what the law would say about parole for long-term terrorist offenders, and what Scottish Ministers' competency would be: would a long-term offender be eligible for parole at the halfway point or at the two-thirds point? There would be no clarity on that. It is better to have clarity. We are talking about relatively small numbers; there are five individuals in Scotland whom the bill potentially affects. However, I share a number of John Finnie's reservations.

11:15

**James Kelly (Glasgow) (Lab):** The cabinet secretary and members are right to express concern about the speed with which the legislation is being pursued. However, I accept that the cabinet secretary has taken a prudent approach to the issue. I do not think that we would want there to be inconsistency between Scotland and the rest of the UK on the release of terrorist prisoners. A sensible approach is being taken here.

The cabinet secretary has said that five prisoners in Scotland will be affected. Without giving specific examples, can he give a bit more detail about the types of prisoner that will be covered?

**Humza Yousaf:** I welcome James Kelly's remarks on the approach that we are taking. It is interesting that he used the word "inconsistency". When I first discussed this issue, I used the same word. There might be a slight nuance here, but "inconsistency" is probably not the correct word. I have reflected on it, and I would not mind if there was a slightly different approach in Scotland from that in England and Wales. What worries me is not necessarily that there could be an inconsistency or difference in approach but that there could be error and complete confusion about the regime overall.

Mr Kelly is right to say that it is difficult for me to go into detail. I think that this is widely understood anyway, but my general point is that where the problem in England and Wales lies in what we might call ISIS-inspired terrorism—what is often, in shorthand, called jihadist or Islamist ideology—it is fair to say that in Scotland we do not have that problem at the same level. Mr Kelly will know that terrorism-related offences are often related to the far right and, in some cases, to paramilitary activity. These are public cases, so I can refer to them, although you will understand the sensitivity around my going into any detail. Whereas in England and Wales the legislation has been introduced largely to deal with ISIS-inspired terrorism, I am pleased to say that our approach in Scotland, through the prevent work that successive Administrations and political parties have signed up to means—touch wood—that we do not have the same problem. That is not to be complacent, though, because it could be a problem in future.

**The Deputy Convener:** If there are no further questions, I will suspend the meeting briefly to allow the cabinet secretary to depart.

11:18

*Meeting suspended.*

11:18

*On resuming—*

**The Deputy Convener:** Agenda item 2 is consideration of the legislative consent memorandum and the evidence that we have just received. Do members have any comments?

**John Finnie:** I have a number of comments. To use a phrase that someone on the bench used not long ago, this is mince. It is embarrassing to have a cabinet secretary seeking to put the best possible interpretation on something that is completely unacceptable.

I am looking at the papers in front of me and the guidance that we receive on legislative consent memorandums. The committee undertakes detailed scrutiny of LCMs. This LCM is three pages long. The bill has separate provisions on England and Wales and on Scotland. Clause 4 is about disapplying existing powers, which is something that I would not have thought that someone of the cabinet secretary's political persuasion would bring forward.

According to the LCM,

"The Scottish Government has reservations about the pace with which this Bill has been developed"

and

"is clear that clarity in the area of law of enforcement of terrorist sentencing is important."

I accept that public safety is paramount, and any attempt to spin opposition to the LCM as being motivated by anything other than a desire to have the best possible laws made in the best possible way should be rejected.

Our paper tells us:

"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",

but we have learned from the cabinet secretary that, in fact, the period in question was only a few days.

Furthermore, we are told:

"In promoting this legislative consent motion, the Scottish Government is not offering a view on the substantive policy contained within the Bill".

Scotland's legal system is separate from that of the rest of the UK, and it should not be beyond the wit of man—or woman—for us to operate within that.

We are told that the bill has no significant financial implications, but we do not have before us a financial memorandum. Nor do we have a human rights impact assessment, equality impact assessment or community impact assessment. As committee members know, following consultation, we spend many months making important decisions about such processes.

Public safety is important, but I am keen to understand the problem that the bill seeks to address. The cabinet secretary says that the UK Government is concerned about the imminent release of prisoners, but that gives rise to a number of questions, the first of which is about the rehabilitative programme that is being employed in prisons in England and Wales. What risk assessment has been undertaken in relation to that? What role, if any, is there for the Parole Board for England and Wales? If, as seems to be the case, there are failings in those quarters, I do not understand why, a matter of days after the bill's introduction, we are considering an LCM.

I will not support a racist UK Prime Minister in his far-right endeavours, and I will not support the LCM.

**The Deputy Convener:** Does anyone else have comments?

**Liam McArthur:** I have considerable sympathy with some of the substantive criticisms of the process and the substance of the bill that John Finnie has articulated. However, the bringing forward of an LCM is a separate matter and, to my mind, the cabinet secretary set out a credible



rationale for that, which was to do with the need to avoid uncertainty, confusion and error.

I agree with John Finnie's point about the absence of the likes of a financial memorandum and human rights impact assessment. Although I recognise the shortened timescales involved, I think that it is more than unfortunate that those matters were not covered in the papers that the Scottish Government provided. In many respects, the fault lies with the UK Government for the timetable that it has chosen to adopt for introducing the bill, but it is regrettable that that has been compounded by decisions that the Scottish Government has taken on how it structured the LCM.

I am not minded to go down the route that John Finnie has indicated that he will go down, but I think that it would be entirely appropriate for the committee to register its concerns about the failure to provide substantiating evidence and to follow due process that appears to have occurred in this instance, notwithstanding the tight timeframes.

**The Deputy Convener:** Although I agree with a lot of what Liam McArthur and John Finnie have said, I accept the cabinet secretary's rationale for proceeding with an LCM, which he said was to avoid legal confusion.

Because of the very tight timescale, we have to make a decision today. Do members agree that the Scottish Parliament should give its consent to the relevant provisions in the Terrorist Offenders (Restriction of Early Release) Bill?

**Members indicated agreement.**

**John Finnie:** No.

**The Deputy Convener:** John Finnie dissents from that recommendation.

John, are you content to be recorded as dissenting from that recommendation in our report, or would you like us to go to a vote?

**John Finnie:** I am relaxed about that, as long as my dissent is recorded in some way.

**The Deputy Convener:** That is fine. Is the committee content with that?

**Members indicated agreement.**

**The Deputy Convener:** Excellent. We will ask the clerks to produce a short factual report on the decision in due course.

That concludes the Justice Committee's sixth meeting in 2020. Our next meeting will be on Thursday 20 February at 9 am, when we will take evidence from members of the Scottish judiciary on the Children (Scotland) Bill.

*Meeting closed at 11:24.*



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