EXPLANATORY MEMORANDUM TO

THE CRIMINAL JUSTICE (SENTENCING) (LICENCE CONDITIONS) (AMENDMENT) ORDER 2022

2022 No. 459

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Criminal Justice (Sentencing) (Licence Conditions) Order 2015 ("the 2015 Order"), which applies to offenders subject to determinate custodial sentences who have been released from custody into the community on licence. Section 250 of the Criminal Justice Act 2003 ("the 2003 Act") gives the Secretary of State powers to prescribe licence conditions for these offenders. The purpose of this instrument is to prescribe an additional type of condition that may be included on a terrorist offender's licence in order to manage the offender in the community. The condition will require such offenders to submit to a personal search as conducted by the police under the powers conferred to them through the Police, Crime, Sentencing and Courts Act 2022 ("the PCSC Act").

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 There is no territorial application of this instrument.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

5.2 The proportionality of the search condition measure was scrutinised by the Joint Committee on Human Rights as part of the PCSC Act - JCHRfinalMEMO.pdf (parliament.uk) see paragraphs 253 to 261. It is considered that Article 7 is not engaged by the policy, as licence conditions are not a punitive measure and changes to licence conditions are an alteration to the administration of the existing sentence imposed by the Court, rather than a new penalty.

6. Legislative Context

6.1 When preparing for the release of a determinate sentenced offender, supervising officers, or the Parole Board where relevant, will consider what licence conditions are required to manage any risk that offender may pose in the community. A licence consists of the mandatory standard conditions, as well as any additional conditions

considered necessary and proportionate to ensure the offender's successful integration into the community, prevent re-offending or to ensure the protection of the public.

6.2 The 2015 Order sets out the licence conditions and types of licence conditions to which an offender must or may be subject by the Secretary of State. In particular, article 7(2) prescribes the kinds of additional conditions that may be included in an offender's licence on a case-by-case basis, pursuant to the Secretary of State's power to prescribe additional conditions contained in section 250(4)(b)(ii) of the 2003 Act. This instrument amends this list to provide for the inclusion of a search condition in the licences of released terrorist offenders.

6.3 As part of the Government's response to the terrorist attacks at Fishmonger's Hall in 2019 and Streatham in 2020, offenders sentenced to a determinate sentence for particular terrorism offences are now all referred to the Parole Board at the two-thirds point of their sentence, by virtue of the restricted release regime provided for in section 247A of the 2003 Act. This regime includes those convicted of terrorism offences where the maximum penalty is over two years' imprisonment, or where the Court determines an offence had a terrorism connection.

6.4 As a result of this Order, offenders subject to this restricted release regime will now be eligible for a search condition, where the Secretary of State (or Parole Board, where relevant) determines it should be imposed on their licence. Any search conducted pursuant to this condition will be undertaken by the police, under the new search power in section 43C of the Terrorism Act 2000 (as inserted by section 183 of the PCSC Act), and must be for purposes connected with the protection of the public from a risk of terrorism. The search power cannot be utilised without the licence condition in place in the offender's licence.

6.5 The condition will also be able to be applied where an eligible terrorist offender subject to the restricted release regime was sentenced in another part of the United Kingdom, but subsequently transferred on an unrestricted basis to serve their licence period in England and Wales. The condition will be able to be applied to those already sentenced and those who are already released on licence.

6.6 The timing of the making of this instrument is, as far as possible, being aligned with the proposed coming into force date of the search provision. It may be the case that the instrument comes into force before the search power. Additional conditions must be imposed only after an assessment by Her Majesty's Prison and Probation Service Public Protection Casework Section or, where required, the Parole Board. To enable identified eligible offenders to be made subject to the search condition as soon as possible, in light of the Independent Review recommendations (see below), and to ensure the instrument is in force when section 183 comes into force two months after Royal Assent of the PCSC Act, it has been considered necessary to lay the instrument as close to the coming into force date as possible. The licence condition itself does not grant the power to search the offender and, until section 183 of the PCSC Act is in force, searches will not be able to be conducted under the new regime.

7. Policy background

What is being done and why?

7.1 As part of the Government's response to the terror attack at Fishmonger's Hall in 2019, Jonathan Hall QC, the Independent Reviewer of Terrorism Legislation ("IRTL"), was asked to review the effectiveness of Multi-Agency Public Protection

Arrangements ("MAPPA") when it comes to managing terrorist offenders and other offenders who may pose a terrorist risk. The resultant report recommended a licence condition in appropriate cases, requiring an offender to submit to a personal search to look for weapons or harmful objects, and to grant a power to the police to conduct the search on those with this condition in place.

7.2 The Government accepted this recommendation and has included provisions giving the power to search relevant offenders to the police in the PCSC Act. This instrument creates the licence condition necessary to enable the police to use this power where the offender has a search condition imposed in their licence, and where they consider it is necessary to do so for the purposes of protecting the public from a risk of terrorism.

7.3 Offenders subject to this licence condition will know that they are liable to be searched by police. This could act as a deterrent to doing harm, protecting those in the probation service as well as the public.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 This order does not consolidate any existing requirements since it is amending the 2015 Order.

10. Consultation outcome

10.1 There was no consultation undertaken specifically for this instrument. However, the police power to search a relevant offender is one of the measures contained in the PCSC Act and as such the principle of the search condition has been scrutinised by both Houses.

11. Guidance

11.1 Licence conditions and how they are to be applied in practice by Her Majesty's Prison & Probation Service (HMPPS) are set out in the Licence Conditions Policy Framework (PF). An updated version of this PF will be adopted by practitioners following the making of this instrument and the commencement of the relevant provisions in the PCSC Act. Practitioners in the Prison Service and the Probation Service will be advised of this publication, which can be found at this link: https://www.gov.uk/government/publications/licence-conditions-policy-framework. Prisoners will be able to access it through their prison library.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector, since there will be no significant change in the prison population. The main bodies that will be impacted are HMPPS and Her Majesty's Courts & Tribunals Service (HMCTS).

12.3 A full Impact Assessment has not been prepared for this instrument because it refers to secondary legislation which will not meet the impact threshold of £5 million per year for a full Impact Assessment to be required.

12.4 Breaches of the search condition can result in the offender being recalled to custody on their existing sentence (as well as potential subsequent charges for anything found which could result in a charge). Section 247A of the 2003 Act ended automatic early release for all terrorists serving standard determinate sentences, setting a minimum two-thirds release point and therefore shortening licence periods. Conversely the Counter-Terrorism and Sentencing Act 2021 has increased sentence lengths and consequentially licence periods, increasing the opportunity for personal searches resulting in a recall.

12.5 In the five years to June 2021 there were an average of 40 terrorist prisoners each year released from custody on determinate sentences who could be subject to this new licence condition. Of these, under half (46%) were sentenced to a custodial sentence of less than 4 years.

12.6 In the same period there was an average of 1 terrorist prisoner each year released from custody on an indeterminate sentence. Whether this licence condition is applied to indeterminate releases is for consideration by the Parole Board.

12.7 In the five years to September 2021 an average of 9% of all searches under section 43 of the Terrorism Act 2000 resulted in an arrest, an average of 54 per year. These new powers are intended to be used sparingly, and therefore the additional volume of searches and arrests is assumed to be minimal.

12.8 In the five years to September 2021 there were an average of 9 persons each year recalled to prison after release from custody for a terrorism-related activity. Given the low volume of current recalls and expected increase in personal searches, this condition is anticipated to have an insignificant impact on the prison population.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The new police power to search a terrorist offender with the licence condition created by this instrument will be subject to scrutiny following its introduction, including through the IRTL's routine oversight of the operation of the Terrorism Acts as well as post-legislative scrutiny conducted by the Government, to monitor whether it is being used appropriately and having a disproportionate impact on certain groups. The individual licence condition introduced in this instrument is operationalised via a Policy Framework. Any future amendments/additions are managed through the same route, which requires consultation with practitioners, legal advisors, relevant policy leads, union representatives and other stakeholders as required. These are published via the standard HMPPS Operational Policy Group process which requires agreement from all senior colleagues in the agency. Where a change is seen to be contentious or wide ranging, there will be further consultation with Ministers, who will consider the need for Parliament to be consulted afresh.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Anna Darke at the Ministry of Justice (Telephone: 07591 993804 or email: Anna.Darke1@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Christina Pride, Deputy Director for Bail, Sentencing and Release, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kit Malthouse at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.