



Counter-Terrorism and Sentencing Bill 2019-21

Briefing

Background

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

Our Criminal Law Committee has considered the Counter-Terrorism and Sentencing Bill 2019-21 (the Bill) which was introduced to Parliament on 20 May 2020. The Bill has implications for Scotland. A Legislative Consent Motion will be required.¹

The Committee stage of the Bill is scheduled for 25 June 2020. The debate is timely given the recent tragic events at Reading this week which culminated the deaths of three men by the suspect Khairi Saadallah which incident is now designated a terrorist attack.

Background to the Bill

This Bill's introduction was signalled as a response to the terrorists' incident at Fishmongers' Hall in November 2019 where a shakeup of the response to terrorism was called. This was said to require the introduction of longer and tougher sentences.² Before this Bill could be introduced, the terrorist attack in February 2020 in Streatham occurred which culminated in an immediate Government response. Emergency legislation was deployed to fast-track the now Terrorist Offenders (Restriction of Early Release) Act 2020 (2020 Act). That Act put an end to the automatic release of terrorist offenders.

Purpose of the Bill

The purpose of the Bill is allied to the 2020 Act (though the Bill now supplements the 2020 Act) as it strengthens "the approach taken to the sentencing and release of terrorist offenders and..enhances the management of terrorist risk through civil powers."³ Parts 1 – 3 of the Bill reflect the criminal process, dealing respectively with sentencing, release and the prevention and investigation of terrorism. Though terrorism is reserved (paragraph B8 of Schedule 5 to the Scotland Act 1998), prisons and sentencing (including release provisions) are devolved. Accordingly, the Bill under sentencing and release have specific clauses to be applied where such cases arise in Scotland.

Justification for the Bill relates to these two incidents which were committed by offenders who had been released early from their sentences. Longer prison sentences are said to allow more time for reflection of the seriousness of their offences, better protection of the public and time to be spent in engaging in activities designed at disengagement and rehabilitation channelled through a range of interventions while in prison.

The Impact Assessment for the Bill⁵ refers to ensuring more "effective" sentencing. This is said to be achieved by terrorist offenders spending longer in prison, to reduce the threat they pose and time to be

¹ Paragraph 59 of the Bill's Explanatory Notes

² Queen's Speech December 2019

³ Paragraph 1 of the Bill's Explanatory Notes

⁴ Schedule 4 of the Bill substitutes Schedule 5ZA in the Criminal Procedure (Scotland) Act 1995 in connection the definition of serious terrorism offences.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740981/CTBS_Bill_Impact_Assessment_Lords_Introduction.pdf



spent to support disengagement and rehabilitation through a range of tailored interventions. It is appreciated that the number of incidents of terrorist offending cannot be ascertained with precision. However, it is important to monitor the effectiveness of the Bill in preventing terrorism. Presumably this monitoring is to be carried out by the post- legislative scrutiny of the Bill due in 2023-2025.

Exactly how effectiveness can be demonstrated, for instance, is unclear, given the lack of substantial detail on any tailored intervention and how these are to operate. It is also important to ascertain exactly what investment is to be made in creating, developing and managing appropriate and relevant prison programmes for such offenders and thereafter in monitoring their effect on these offenders on release in supporting them to avoid reoffending.

The purpose of sentencing crucially includes both deterrence and rehabilitation. That seems vital to ensure that the measures in the Bill are successful and importantly, that the use of extending prison sentences is made purposeful for the offender, while still securing the ongoing protection of the public. That is endorsed by Ian Acheson, former Prison Governor who stated that there is a need to:

“assertively engage and challenge violent extremists from day one in custody where we have the best chance of reducing their dangerousness and supporting a better identity to emerge. We must tailor the response to the individual offenders extremist pathology, including theological deformities; not ‘sheep dip’ generic solutions.”⁶

The Bill does not state exactly how ongoing monitoring management of risk is to be adopted. There is a need for sentencing across all jurisdictions of the UK to be consistent. This is to “ensure provision across the jurisdictions to address the terrorist threat.”⁷ Consistently omitted from the Bill’s Impact Assessment⁸ is account being taken of the Scottish position in that:

- Reference is only made to HM Prison and Probation Service and not to the Scottish Prison Service and the Parole Board of Scotland.
- Whether the model of 50 prisoners to which the Impact Assessment⁹ refers includes Scotland.
- The calculations of those potentially affected in the inclusion of polygraphs to licence conditions

The Impact Assessment recognises that modelling is inevitably “highly uncertain as that depends on future terrorism crimes committed and on sentencing behaviour.”¹⁰

As far as Scotland is concerned, there is acknowledgement that “any impact on the devolved custodial estates or youth estate are expected to be negligible”¹¹ indicating that “volumes in Scotland and Northern Ireland are negligible ... though...included in the modelling.” Just how that has been factored in should be explained. It is unclear if relevant discussions have place with the Scottish organisations within the devolved administrations.

⁶ “Tougher terrorism laws are popular. But will they actually work.” The Spectator 20 May 2020.

⁷ Paragraph 9 of the Bill’s Explanatory Notes

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740981/CTBS_Bill_Impact_Assessment_Lords_Introduction.pdf

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¹¹ Paragraph 45 of the Bill’s E Cost and Benefit Analysis



An estimate of 4.2 million for additional prison placed over a 10-year period has been specified.¹² What proportion of that application includes Scotland?

What does the Bill do?

The changes to sentencing for Scotland included in the Bill are:

- Clause 1 (6) of the Bill widens the offences which can be subject to a finding or determination of a terrorist connection where the offence is punishable with a maximum sentence of more than two years. Interestingly, in Scotland, where offences are prosecuted on indictment, custodial sentences can be imposed in excess of 1 year whereas on summary complaint such sentences are restricted to 1 year or less. Not all indictment cases will attract a sentence of over 2 years so the number of offences that will fall into this widened category are both hard to determine and are subject to the vagaries of sentencing from the judge.
- Clause 6 of the Bill refers to the creation of a new Serious Terrorist Sentence (STS) of a minimum sentence of 14 years with an extended licence from 7 to 25 years. There is no possibility of early release. The offender must be deemed to be dangerous and the sentencing judge finds that there was a risk of multiple deaths of which the offender should have been aware. This reduces the judicial discretion in sentencing.
- Clause 9 of the Bill allows for a reduction in a sentence for a plea of guilty. The reduction of a sentence at 20% is higher than the usual discount afforded in early pleas which can amount to up to a third off a sentence but not affect the punishment part.¹³
- Clause 12 of the Bill creates a minimum 14-year custodial sentence as a punishment part of the sentence for a serious terrorist offender given a life sentence.
- Clause 19 of the Bill sets out a number of offences which will attract an extended sentence in Scotland including terrorist offences and where offences are found to have a terrorist connection by the court.
- Clause 23 of the Bill creates a new terrorism sentence with a custodial term and a fixed licence period of one year.
- Clause 28 and 29 of the Bill so that early release is removed for prisoners serving extended sentences falling within the criteria of section 2A¹⁴ where such prisoners will serve the whole of their custodial sentence and a licence remaining in force until the end of an extension period.

The implications on sentencing for Scotland¹⁵ are discussed fully by Jonathan Hall QC Independent Reviewer of Terrorism Legislation (IRTL). Paragraphs 8 and 9 discuss the implications for Scottish sentencing on Orders for Lifelong Restriction.

Licence Conditions – Polygraph

Clause 33 of the Bill inserts section 12AC into the Prisoners and Criminal Proceedings (Scotland) Act 1993 (1993 Act) to allow for the imposition of a polygraph condition as a licence for terrorist offenders. Criteria apply including being over 18 and serving a sentence of at least over 12 months for an offence falling within section 1A of the 1993 Act or an offence that was found to have a terrorist connection within the “new” definition in section 1AB(5A) of the 1993 Act.

¹² Paragraph 290 of the Bill’s Explanatory Notes

¹³ Reductions are not normally more than one-third of what a sentence would have been otherwise and are often less than that. Scottish Sentencing Council <https://www.scottishsentencingcouncil.org.uk/about-sentencing/sentencing-factors/>

¹⁴ Where a terrorist offender is sentenced to a serious terrorism sentence for an offence with a maximum penalty of life imprisonment, they will not be referred to the Parole Board but will be released at the end of their custodial term.

¹⁵ <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/Note-3-on-Sentencing-Reforms.pdf>



A polygraph condition requires the person to participate in polygraph sessions with instructions from an appropriate officer and to comply with such instructions which include:

- Monitoring the person's compliance with conditions of the licence or
- Improving the way in which the person is managed during the person's release on licence.

Clause 35(1) of the Bill permits the wide use of secondary regulations to amend polygraph conditions in licences in terrorist cases including approval of the type of equipment.¹⁶ There may be questions about the delegation of such provisions to secondary regulations and the level of appropriate scrutiny.

The imposition of polygraph conditions on licences already exist regarding offenders in England and Wales and are currently under consideration in domestic abuse cases.

The imposition of such conditions is now to be extended to Scotland in the Bill. Though paragraphs 40-42 of the Bill's Explanatory Notes headed "Licence Conditions and Polygraphs" refer, Scotland does not appear to have been consulted to discuss:

- the appropriateness of the use of polygraphs in Scotland
- how this is to be implemented in Scotland.
- Whose responsibility this will be and who will arrange this.

These are significant issues for Scotland as we do not currently use polygraphs in any form of criminal law or monitoring of offenders. Since this represents a significant step, there should be discussion as to their appropriateness for Scotland.

We recognise that there is a need for consistency of sentencing in terrorist cases across all jurisdictions. However, given the implications for Scotland of the introduction of the use of polygraphs which are wider than merely in relation to terrorist offences, whether they should be introduced must be fully debated and considered. Additionally, there is a need for the responsibility, organisation, funding, monitoring and training involved to be addressed as part of the Bill if polygraphs are to be introduced. It cannot be left to a nebulous comment of being "minimal"¹⁷ regarding its effect on Scotland. How are arrangements proposed to be made?

If polygraphs are to be used, their reliability is of pivotal importance. Reference should be made as to the monitoring of their use in England and Wales establishing that there is a proven and sufficiently reliable scientific basis for their use. Considerable advances had been made in neuroscientific technologies such as the use of polygraphs but views on their use vary extensively. Care needs to be taken to ensure that their use and any future use is appropriate in the light of potential legislative changes being made at a time of less robust parliamentary scrutiny. Issues have arisen elsewhere such as the US case of *Frye*¹⁸ where "the opinion of an expert, based on a scientific technique, would be inadmissible unless the test "[has been] sufficiently established to have gained the general acceptance in the particular field in which it belongs."¹⁹ That evidence base must be demonstrated satisfactory for the benefit of the Scottish criminal justice system.

¹⁶ Clause 35(7) of the Bill

¹⁷ Paragraph 65 Page 13

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740981/CTBS_Bill_Impact_Assessment_Lords_Introduction.pdf

¹⁸ *Frye v United States*, 54 App. D.C. (1923)

¹⁹ <http://webjcli.org/article/view/485/649> Johnston Ed: Brain Scanning and Lie Detectors: The Implications for Fundamental Defence Rights Vol 22 No 2 2016



Concerns with polygraphs have been highlighted as recently as arising from the high profile Jeremy Kyle television show which was the subject of a Select Committee parliamentary Inquiry.²⁰ Polygraphs have been labelled as “irresponsible” after admitting that lie detector tests used on the show were “not 100% accurate.”²¹ Though a polygraph test is described as a “lie detector,” that is not entirely correct. It does not measure lies but measures “the physiological changes associated with the central nervous system; something which is largely outside the conscious control of the subject.”²²

There are considerable concerns about the introduction of polygraphs. The law does need to keep pace with science. However, any changes to allow the introduction of polygraphs must be supported by independent research which must show that they are effective and maintain the interests of justice in fairness and transparency of process.

We echo the concerns outlined by the IRTL at paragraph 26 that “the use of polygraphs for the purpose of administering licences requires clear and public guidance as to the use to which testing is to be put, and careful thought given to when a polygraph condition should be included.”²³

Terrorism Prevention and Investigation Measures (TPIMS)

Part 3 of the Bill amends the Terrorism Prevention Investigation Measures Act 2011. Principally, it is seeking to change the standard of proof on which the Home Secretary believes that individuals have been involved in some terrorist activity from on the balance of probabilities. Proposed changes include:

- the standard of proof reduced to “reasonable grounds for suspecting.”²⁴
- Removal of the two-year limit on the length of time a TPIM can be imposed. It is now capable of indefinite renewal and no subsequent judicial review.²⁵
- Variation of the relocation measures if the Secretary of State considers necessary for resource reasons.²⁶ This will allow a terrorist to be relocated which seem mainly to be related to police resources as acknowledged in paragraph 228 of the Bill’s Explanatory Measures where it states that this may be required where police resources are “stretched” or “more specialist resources are available.”
- Extension of residence measures²⁷
- Polygraph measures²⁸ in that a person subject to TPIM would be required to take a polygraph test. Our observations above apply to the use of polygraphs in Scotland. The polygraph would be used to ascertain if the person subject to the TPIM was complying with the terms of the TPIM notice.
- Drug testing measure²⁹
- Information provision³⁰ allows the Secretary of State to require the provision of additional information. This extends to electronic communication devices belonging to other persons in the TPIMs persons residence, details of their address and of disclosure address information.
- Additional offences³¹

²⁰ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/news/reality-tv-evidence-17-193/>

²¹ <https://www.bbc.co.uk/news/uk-48775614>

²² <http://webjcli.org/article/view/485/649> Johnston Ed: Brain Scanning and Lie Detectors: The Implications for Fundamental Defence Rights Vol 22 No 2 2016

²³ Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (3)

Jonathan Hall QC Independent Reviewer of Terrorism Legislation <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/Note-3-on-Sentencing-Reforms.pdf> Introduction

²⁴ Clause 37 of the Bill

²⁵ Clause 38 of the Bill

²⁶ Clause 39 of the Bill

²⁷ Clause 40 of the Bill

²⁸ Clause 41 of the Bill

²⁹ Clause 42 of the Bill

³⁰ Clause 43 of the Bill

³¹ Clause 44 of the Bill



- Serious Crime Prevention Orders³²
- Review³³

These are significant extensions of the TPIMs provisions affecting significantly the balance of interests between the State and the individual. We recommend that the proposed change of lowering the standard of proof to reasonable grounds should be resisted. Little evidence or justification has been provided for making the change.

What is needed is to tackle the basic causes of these terrorist incidents to ensure that they are stopped.

Implications for Children and Young Offenders

This legislation is also to apply to children. It should be noted that there is a current consultation by the Scottish Sentencing Council on “Sentencing Young People”³⁴ which is considering all under 25-year-olds. It is seeking views on the sentencing of young people which it recognises is “complex and challenging.” It suggests that it requires a more individualistic approach, with a need to take the unique personal circumstances of the young person into account. This introduction of mandatory minimum sentencing gives rise to concerns about the effect on young persons as they are more responsive to the “internet, peer-pressure, and vulnerability [as] significant factors in the types of offences committed and ideologies espoused.”³⁵

Other Issues

Clause 47 relates to the removal of the statutory deadline for the Independent Review of the Prevent (part of the counter-terrorism strategy) which was due to be completed by 12 August 2020. While we recognise the significant impact of COVID-19 on work timescales, this delay seems more due to the need to appoint an independent reviewer which process is underway. The question of timescale should not be left open-ended especially as there is a signalled intent to report by August 2021. This should be included in the legislation as indeed was the commitment made when this review was introduced by section 20 of the Counter-Terrorism and Border Security Act 2019. Being able to tackle radicalisation at source, safeguard and support those at risk and enable those engaged to disengage and rehabilitate is central to avoiding incidents of terrorism arising.

Commencement of the Bill

The Bill is being introduced at a time when much attention is focused elsewhere due to COVID-19 and its effect.³⁶ It is important to note that some of the Bill’s provisions are brought into immediate effect;³⁷ others in 2 months.³⁸

The sentencing provisions that come into force immediately include clause 23 of the Bill. That creates the new terrorism sentence with a fixed licence period for terrorist offenders in Scotland. This has

³² Clause 45 of the Bill

³³ Clause 46 of the Bill

³⁴ <https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/>

³⁵ Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (3)

Jonathan Hall QC Independent Reviewer of Terrorism Legislation <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/Note-3-on-Sentencing-Reforms.pdf>

³⁶ <https://www.libertyhumanrights.org.uk/issue/liberty-counter-terror-bill-is-a-threat-to-civil-liberties/>

³⁷ Paragraph 285 of the Bill’s Explanatory Note

³⁸ Paragraph 286 of the Bill’s Explanatory Notes



retrospective effect in as far as they will apply to offenders who have committed offences pre-commencement of the legislation but not yet been sentenced.

The release measures are also retrospective as they provide for the inclusion of a polygraph testing condition in the licence of a person who has committed a relevant terrorism offence will apply to offenders who have been sentenced before the commencement date.

The commencement in two months includes the significance clauses of the bill including clauses 6,9,12,19,26 and 36. Some prisoners who are currently serving the custodial part of their sentence will now spend longer in prison until they can be considered for release. Offenders currently serving their custodial sentence, or who have already been released on licence, will now be subjected to mandatory polygraph testing as part of their licence conditions.

It is not known how many if any of that number of prisoners may be affected by the Bills provisions. Retrospective legislation is not usually introduced because it does not comply with Article 7 of the European Convention on Human Rights.

The Government has sought to justify their approach in paragraph 27 of the Bill's ECHR Memorandum. Since the position is never clear cut there may be challenges in court in the future.