

Terrorist Offenders (Restriction of Early Release) Bill A Rule of Law Analysis EXECUTIVE SUMMARY



Executive Summary

This Report sets out the Bingham Centre's Rule of Law analysis of the **Terrorist Offenders (Restriction of Early Release) Bill**, to inform the House of Commons' consideration of the Bill on **Wednesday 12th February**. The Bill has been introduced as "fast-track legislation" (ie. an emergency Bill) and will complete all its Commons stages in a single day.

The Bill is the Government's response to the recent terrorist attacks at Fishmongers' Hall and in Streatham, both committed by individuals recently released from prison under the current law on automatic early release, following their conviction for terrorism offences. The purpose of the Bill is to ensure that terrorist offenders are not automatically released before the end of their custodial term without the Parole Board's agreement. The Bill also changes the release point for such offenders from the halfway point and refers them to the Parole Board at the two-thirds point of their sentence. **These changes will apply to offenders who are currently serving a custodial sentence but have not yet been released.**

The Report analyses the Bill from the perspective of Rule of Law principles, as recognised at common law and in relevant international standards which are in part based on the UK's common law tradition and by which the UK has chosen to be bound. It identifies the most significant Rule of Law issues raised by the Bill and analyses those issues in the light of the relevant Rule of Law standards.

The Rule of Law requires adequate legal protection of fundamental rights, including where threats to those rights come not from the State but from other individuals such as people plotting terrorist attacks. In the wake of two terrorism-inspired knife attacks by recently released offenders, the Government is therefore right to have considered the adequacy of the current legal framework protecting the life and safety of members of the public from individuals who are known to pose a terrorist threat, and to bring forward legislation to improve that legal protection to the extent that it is found wanting. That legislation must itself be compatible with the Rule of Law.

(1) Retrospectivity

Ending automatic early release at the halfway point for **future offenders** convicted of a terrorist offence, and introducing a requirement of Parole Board review for such future offenders prior to release, does not raise any Rule of Law issues. However, the application of the changes to **serving offenders**, who have already been sentenced under the current law, does raise a significant Rule of Law issue: **is it consistent with the long established general principle against the retrospectivity of criminal laws and, specifically, the prohibition on imposing a heavier penalty than the one applicable at the time the offence was committed?**

The answer to this question is not straightforward. The Report considers the legal arguments both for and against. On the one hand, the Government is correct that there is an established body of case-law, both in the UK and Strasbourg, to the effect that changes to early release provisions concern the "administration" of a sentence and do not amount to an additional penalty, or an increase of the scope of the penalty, for the purposes of Article 7 ECHR. On the other hand, there is a significant decision of the European Court of Human Rights, *Del Rio Prada v Spain*, in which the Court found a breach of Article 7(1) because new rules for calculating remission were considered to affect the scope of the penalty, not merely its administration. Central to the Court's reasoning was the reasonable foreseeability of the change in the sentencing regime, and the legitimate expectation of the offender. These are also strong considerations in the context of the current Bill. The Government in its ECHR Memorandum acknowledges that the changes introduced by the Bill will interfere with expectations relating to release, and that these will be particularly strong in serving offenders close to release, but the Memorandum does not seek to explain why the *Del Rio Prada* reasoning does not apply.

The reasoning of the Court in *Del Rio Prada* suggests that moving the release date for serving offenders from half to two thirds of the way through their sentence is arguably a

retrospective increase in penalty. This could be considered incompatible with the principle against retrospective criminal laws, because it results in a direct increase in time spent in custody for a whole class of offenders, contrary to the reasonable expectation each of them will have held since the date of their sentence. It is also a blanket and automatic increase for all affected offenders, regardless of whether they are dangerous to the public. By effectively overturning judicial decisions about sentencing the Bill also comes uncomfortably close to legislative interference with the judicial function.

Introducing a requirement of Parole Board review for serving offenders, however, is more in the nature of a change in the way the sentence is administered, rather than a change in the scope of the penalty. Such a change could also be considered to be reasonably foreseeable to offenders at the time they were sentenced. It allows for individuated consideration of risk to the public. It is therefore not inconsistent with the prohibition on retrospectivity.

The Report therefore recommends that, to avoid the risk of Parliament legislating in breach of Rule of Law principles, the Bill should be amended so that the provisions extending from halfway to two thirds the period in custody before an offender is eligible for release do not apply to serving offenders. This prospective approach was the approach recently taken in a Statutory Instrument amending the automatic release point from half-way to two-thirds of the sentence for those convicted of a relevant violent or sexual offence and sentenced to a standard determinate sentence of 7 years or more. The Report sees no reason in principle why the approach should be prospective in one context and retrospective in the other.

The new Parole Board requirement for serving offenders can remain, which in any event is sufficient to serve the Government's purpose of protecting the public against known terrorist threats.

(2) Justification for fast-track legislation

The other significant Rule of Law issue considered by the Report is **whether the Government has demonstrated sufficient justification for fast-tracking this legislation.** This is a Rule of Law matter because the quality of democratic law-making procedures ultimately determine whether Parliament is supreme over the Executive, as the Rule of Law requires, or vice versa.

The Government asserts that the legislation is needed urgently to put appropriate safeguards in place before further terrorist offenders are released from prison. Parliament will wish to test the Government's assertion by probing the claim that the risk to public safety is so great that it could not be managed for the length of time it would take for a prioritised Bill to complete its passage on a timetable which provides a proper opportunity for meaningful parliamentary scrutiny and debate.

The need for such an opportunity is all the more important at a time when none of the relevant parliamentary committees that would normally scrutinise the Bill (the Joint Committee on Human Rights, the Home Affairs Committee, the Justice Committee and the Intelligence Security Committee) have yet been set up in the new Parliament.

**BINGHAM
CENTRE FOR
THE
RULE
OF
LAW**

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

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