

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



## About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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# 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 Lords consideration of the Bill on **Monday 24<sup>th</sup> February**. The Bill has been introduced as "fast-track legislation" (ie. an emergency Bill) and will complete all its Lords 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 purely from the perspective of Rule of Law principles recognised at common law. It does not consider the Bill's compatibility with international standards on the Rule of Law such as those contained in Article 7 ECHR. The case-law on that question is complex and the Bill's fast tracked timetable does not allow time for its proper consideration. The Report therefore focuses on the relevant common law standards, which, in the Bingham Centre's view, provide a clear answer to the most significant Rule of Law issue raised by the Bill, its retrospective effect.

The Bill itself has a Rule of Law purpose. 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. Legislation promoting the Rule of Law 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 common law principle against the retrospectivity of criminal laws and, specifically, what has been described by the Judicial Committee of the House of Lords as "the longstanding principle that existing prisoners should not be adversely affected by changes in the sentencing regime after their conviction"?**

The common law has long recognised a strong presumption against the retrospective effect of legislation, a presumption which is of particular strength in the criminal context. The reason for the presumption is what could be considered to be the quintessentially British idea that fairness demands that people ought to be able to rely on the law as it stands. They should not be punished retrospectively for conduct which was not criminal at the time, nor should they be subjected to a penalty which is greater than that which applied at the time of their offence. It is a value rooted in the common law's love of liberty, and it is of particular force where liberty itself is at stake.

The Government accepts that the Bill has two distinct retrospective effects. First, it introduces for serving offenders a new requirement that their release must be approved by the Parole Board. Second, it moves the point at which serving offenders become eligible for such release from the half way to the two thirds point in their sentence.

The common law principle is a presumption, not an absolute prohibition. As far as the common law is concerned, Parliament can pass laws intended to have retrospective effect provided it is satisfied that there is an overwhelming public interest justifying such an exceptional course of action, and demonstrates its satisfaction by making absolutely clear in the language of the Bill that this is Parliament's intention. When the Government wants legislation to have retrospective effect, it is the role of the Attorney General to consider whether the public interest relied on outweighs the presumption against retrospectivity and to advise the Government accordingly.

The Government's justification for the Bill's retrospective effects is the overwhelming public interest in protecting members of the public against the risk of terrorist attack. This is the reason clearly stated by the Lord Chancellor when introducing the Bill in the Commons; in the Government's ECHR Memorandum; and in Lord Keen's letter dated 13 February 2020 to all peers. That this is the justification relied on by the Government was also made clear by former Attorney General, Rt Hon Geoffrey Cox QC MP, speaking at the Institute for Government on 11 February. He said that by making the Bill retrospective, the Government is responding to a "legitimate and powerful public interest in ensuring that those who may well be a risk will from now on be subjected to a risk analysis before they are released."

The Government's reliance on the public interest in being protected from the risk of terrorist attack clearly justifies the retrospective introduction of the requirement of a Parole Board review for serving offenders. That measure will ensure that no serving offender is automatically released until the Parole Board is satisfied that they do not pose a danger to the public.

However, it cannot justify moving the release date of serving offenders from half way to two thirds of the way through their sentence. The Government's legitimate purpose of protecting the public is achieved by the introduction of the Parole Board requirement for serving offenders: that ensures that dangerous offenders will not be released before the end of their sentence. It is not necessary also to move the release date of serving offenders to later in their sentence. In addition to that being unnecessary to achieve the Government's legitimate aim, its effect is disproportionate to that aim: it will result in offenders who pose no danger to the public spending longer in custody before they are eligible for release.

The Report therefore concludes that while the Government has provided an adequate justification for retrospectively requiring serving offenders to satisfy the Parole Board before release, it has failed to provide the additional justification required to warrant the retrospective change to the release date for all serving offenders, which is a departure from the longstanding common law principle that existing prisoners should not be adversely affected by changes in the sentencing regime after their conviction.

**The Report therefore recommends a simple and modest amendment to the Bill, preserving the new Parole Board requirement for serving offenders, but giving only prospective effect to the provisions extending from halfway to two thirds the period in custody before an offender is eligible for consideration for release by the Parole Board. The amendment would leave entirely intact the Government's legitimate aim of protecting the public against known terrorist threats, but remove the unjustified retrospective effect which is not necessary to achieve that purpose.**

## **(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 and Security Committee) have yet been set up in the new Parliament.

Examples of the sorts of issues that require detailed scrutiny are set out in the Annex to the Report.

# Introduction

## Background

The Terrorist Offenders (Restriction of Early Release) Bill, which ends the automatic early release of terrorist offenders, was introduced in the House of Commons as an emergency Bill on 11 February 2020.<sup>1</sup> It passed all its stages in the Commons on 12 February 2020 and was introduced in the House of Lords on 13 February.<sup>2</sup> The Bill is scheduled to go through all its stages in the Lords on Monday 24<sup>th</sup> February.

The factual background is well known. In separate incidents, at Streatham and Fishmongers' Hall, there were serious terrorist attacks on the public. It subsequently transpired that the perpetrators had been convicted of terrorist offences and sentenced to prison. They were automatically released after half their sentence. The attacks were perpetrated shortly after their automatic early release.

The Bill is the Government's response to these terrorist attacks.

The Lord Chancellor and Secretary of State for Justice, Rt Hon Robert Buckland QC MP, announced in the House of Commons on 3 February 2020 that the Government would be introducing emergency legislation to make several changes to the law concerning the release from prison of persons convicted of terrorist offences.<sup>3</sup>

We will therefore introduce emergency legislation to ensure an end to terrorist offenders being released automatically, having served half their sentence, with no check or review. The underlying principle has to be that offenders will no longer be released early automatically and that any release before the end of their sentence will be dependent on risk assessment by the Parole Board ... The earliest point at which these offenders will now be considered for release will be once they have served two-thirds of their sentence and, crucially, we will introduce a requirement that no terrorist offender will be released before the end of the full custodial term unless the Parole Board agrees.

The Lord Chancellor also made clear that the Government intended its new law to apply to serving prisoners:

We face an unprecedented situation of severe gravity and, as such, it demands that the Government response immediately, and that this legislation will therefore also apply to serving prisoners. The earliest point at which these offenders will now be considered for release will be once they have served two thirds of their sentence, and crucially, we will introduce a requirement that no terrorist offender will be released before the end of their full custodial term unless the Parole Board agrees.

## The Bill

The Bill works by establishing a new legal category of prisoner "terrorist prisoners".<sup>4</sup> A terrorist prisoner is a person who has been convicted of one of a long list of terrorist offences, all of which are set out in the Bill.

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<sup>1</sup> HC Bill 88.

<sup>2</sup> HL Bill 99.

<sup>3</sup> HC Deb 3 Feb 2020. The Lord Chancellor's statement was repeated in the House of Lords by Lord Keen, Hansard Vol. 801 3 February 2020 col 1685.

<sup>4</sup> In England and Wales by amending the Criminal Justice Act 2003 (clauses 1 and 2 of the Bill); in Scotland by amending the Prisoners and Criminal Proceedings (Scotland) Act 1993 (clauses 3 and 4 of the Bill).

A terrorist prisoner must be referred to the Parole Board after they have served the “requisite custodial period”. The requisite custodial period is essentially two-thirds of the term imposed by the judge.

The Board has the power to direct that the prisoner should be released if it “is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined”.<sup>5</sup> If the Board gives this direction, then the Secretary of State must release the prisoner.<sup>6</sup>

## The effect of the Bill

The Bill will end the current automatic halfway release of terrorist offenders who receive standard determinate sentences for offences such as training for terrorism, membership of a proscribed organisation and the dissemination of terrorist publications. Instead, they will be forced to spend two-thirds of their sentence in prison before being referred to the Parole Board for review. 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.

According to the Government, the Bill means that around 50 terrorist prisoners already serving affected sentences will see their automatic release halted.<sup>7</sup>

The proposed change is therefore:

- Old law: Automatic release after 1/2 sentence
- New law: Possible release, after 2/3 sentence, subject to decision of Parole Board.

## The Relevance of the Rule of Law

### The Bill's Rule of Law Purpose

Although the Government does not say so in terms, the Bill has a clear Rule of Law purpose.

As Lord Bingham's account of the concept makes clear, the Rule of Law requires adequate legal protection of fundamental rights.<sup>8</sup> Adequate legal protection is required even where threats to those rights come not from the State but from other individuals such as people plotting terrorist attacks. As the House of Lords pointed out in 2004, the right to life in Article 2 of the European Convention on Human Rights has been interpreted as imposing “a substantive obligation to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.”<sup>9</sup>

In the wake of two terrorism-inspired knife attacks by recently released offenders, the Government is therefore right, from a Rule of Law perspective, 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. It is also, arguably, under an obligation to bring forward legislation to improve that legal protection to the extent that the current legal framework protecting life and limb is found wanting.

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<sup>55</sup> New s. 247A(5)(b) Criminal Justice Act 2003, as inserted by clause 1(2) of the Bill).

<sup>6</sup> New s. 247A(4) Criminal Justice Act 2003.

<sup>7</sup> <https://www.gov.uk/government/news/end-to-automatic-early-release-of-terrorists>

<sup>8</sup> See Lord Bingham's Principle (5) in his account of the Rule of Law: “The law must afford adequate protection of fundamental human rights”, *The Rule of Law*, Penguin Books (2010), chapter 7, pp. 66-84.

<sup>9</sup> Lord Bingham, *ibid.*, p. 69, citing the House of Lords in *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, para. 2.

The Bill's Rule of Law purpose is clear from the test that the Parole Board must apply before directing the release of a terrorist prisoner – is it “no longer necessary for the protection of the public that the prisoner should be confined”.<sup>10</sup>

### Counter-terrorism law and the Rule of Law

Even counter-terrorism laws must themselves comply with the Rule of Law. The Lord Chancellor, who is under a statutory duty to uphold the Rule of Law,<sup>11</sup> explicitly recognised this when announcing the proposed measures in the Commons:<sup>12</sup>

It is important to remember that we in this country stand for the rule of law and due process. That is what marks us out as different from those who rely on the bullet and the bomb—those who use indiscriminate and arbitrary means and methods to impose their will on us. If we stand for nothing else, we have to stand for the rule of law. That makes us better than them, it makes us different and it means that we have something worth defending.

It is an important part of Parliament's constitutional role to scrutinise legislation to ensure that the Lord Chancellor's noble aspiration, to pass laws that not only vindicate but are themselves consistent with the Rule of Law, is fulfilled in practice. This Report is intended to assist Parliament to perform that important constitutional function.

### The Rule of Law issues raised by the Bill

There are two significant Rule of Law issues raised by the Bill:

- (1) Are the Bill's retrospective effects on serving prisoners justified by an overwhelming public interest which makes departure from the common law's aversion to retrospective laws both necessary and proportionate?
- (2) Has the Government justified its use of the fast-track procedure for this proposed legislation?

### Our Report

The Report has been drafted by Dr. Ronan Cormacain, Consultant Legislative Counsel and Senior Research Fellow in Rule of Law Monitoring of Legislation at the Bingham Centre, with input from Murray Hunt, Director of the Bingham Centre.

Dr. Cormacain is leading a new project at the Bingham Centre, the Rule of Law Monitoring of Legislation Project, which aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications, to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. This Report is the second report of the Project. The first was on the EU (Withdrawal Agreement) Bill.<sup>13</sup>

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<sup>10</sup> S. 247A(5)(b) of the Criminal Justice Act 2003, as inserted by clause 1 of the Bill.

<sup>11</sup> Constitutional Reform Act 2005.

<sup>12</sup> HC Deb 3 Feb 2020.

<sup>13</sup> <https://binghamcentre.biicl.org/publications/the-european-union-withdrawal-agreement-bill-and-the-rule-of-law>

# Retrospectivity

## The Rule of Law issue

The first Rule of Law issue raised by the Bill is its retrospectivity: is the Bill consistent with the long established common law principle against the retrospectivity of criminal laws and, specifically, what has been described by the Judicial Committee of the House of Lords as “the longstanding principle that existing prisoners should not be adversely affected by changes in the sentencing regime after their conviction”?

Law is “retrospective” if it applies to things which took place before the law came into force. So if X was lawful yesterday, a retrospective law passed today would go back in time to say that X was actually unlawful yesterday.

### Example of Retroactive Legislation

A person committed an offence under the Firearms Act (Northern Ireland) 1969. When it came to sentencing, that legislation had been repealed and replaced by the Firearms (Amendment) (Northern Ireland) Order 1976. The 1976 Order allowed for a higher maximum penalty and the person was sentenced under that Order. The Northern Ireland Court of Criminal Appeal held that this was contrary to law and the penalty would be reduced to the maximum prevailing at the time the offence was committed.

*R v Deery* [1977] Crim LR 550

The Government accepted when it announced its plans to legislate that ‘there will be a retrospective element in the proposed legislation’.<sup>14</sup> The language of the Bill is admirably clear in this respect: the changes apply to terrorist prisoners serving a fixed term sentence imposed “whether before or after this section comes into force.”<sup>15</sup>

The issue is whether this degree of retrospectivity is compatible with the Rule of Law standards to which the UK is proud to adhere.

### The Common Law’s Presumption against Retrospectivity

This Report analyses the Bill purely from the perspective of Rule of Law principles recognised **at common law**. It does not consider the Bill’s compatibility with international standards on the Rule of Law such as those contained in Article 7 ECHR. The question of the Bill’s compatibility or otherwise with Article 7 ECHR has so far dominated discussion about the Bill’s retrospectivity, which, paradoxically, **has got in the way of a more rigorous analysis of the Government’s justification for the Bill’s retrospective effect, on ordinary common law principles**. The case-law on the Article 7 ECHR question is complex and the Bill’s fast -tracked timetable does not allow time for its proper consideration. This Report therefore focuses on the relevant common law standards, which, in the Bingham Centre’s view, provide a clear answer to the extent to which the Bill’s retrospective effect is justified, and whether it needs a modest amendment to the extent that it is not.

The UK courts have for centuries resisted retroactive legislation as it is ‘contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when

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<sup>14</sup> Hansard Vol. 801 3 February 2020 col 1688.

<sup>15</sup> New s. 247A(1)(a) of the Criminal Justice Act 2003.

introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'.<sup>16</sup> This objection stretches back into antiquity.<sup>17</sup> The objection is strongest when it comes to retroactive criminal law and the UK has two long standing principles against it. It is perhaps a mark of their longevity that they were originally coined in Latin. These are *nullem crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law). Underpinned, by these principles, the UK courts have developed presumptions against retroactive operation of statutes.<sup>18</sup> In the context of this Bill, the *nulla poena* principle is most relevant. This means that no-one may be given a heavier punishment for a crime than the punishment that existed when they committed that crime.

Tom Bingham, in his magisterial account of *The Rule of Law*, said that law must be, so far as possible, predictable.<sup>19</sup> He took this to mean that laws must, in general, apply in the future.<sup>20</sup> In particular, criminal law must not be applied retrospectively. However, it is not enough to simply say that the Rule of Law abhors retrospectivity, and to assume that this automatically ends the argument. The Rule of Law is not dogma: merely calling it in aid does not conclusively settle a point. In each generation, the common law's dislike of retrospectivity needs to be articulated, explained and justified.

The Rule of Law requires certainty and predictability in law. Those to whom the law applies, both individuals and corporations, must know the legal consequences of their actions by reference to what the law actually says when they carry out their actions. They need to be able to rely upon what the law says as holding true in order for it to be a reliable guide for their behaviour. They should not be surprised by the law producing a different effect from the effect stated in the statute books. This respects the human capacity for rational planning, it provides for certainty in the arrangement of their affairs, and it reflects basic fairness that the rules of the game aren't changed after the game has been played.

Retrospective legislation undermines all of this. A citizen cannot plan for the future, if the basis of those plans is undermined by a change in the law which goes back in time. There is no certainty in law if today's law can be retrospectively changed by tomorrow's law. And there is no fairness if a person or corporation abides by the rules, but then those rules are changed without them having the chance to make the corresponding change in their behaviour.

**The common law has therefore long recognised a strong presumption against the retrospective effect of legislation, a presumption which is of particular strength in the criminal context. The reason for the presumption is what could be considered to be the quintessentially British idea that fairness demands that people ought to be able to rely on the law as it stands. They should not be punished retrospectively for conduct which was not criminal at the time, nor should they be subjected to a penalty which is greater than that which applied at the time of their offence. It is a value rooted in the common law's love of liberty, and it is of particular force where liberty itself is at stake.**

The common law principle of non-retrospectivity is also recognised in the Venice Commission's Rule of Law Checklist.<sup>21</sup> It states that retroactive criminal law ought to be prohibited, and that retroactive law, in other fields, ought to be avoided as a general rule. The principles of no crime and no penalty without law are explained by the Checklist as

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<sup>16</sup> *Phillips v Eyre* (1870) LR 6 QB 1, 23.

<sup>17</sup> Aly Mokhtar 'Nullem Crimen, Nulla Poena Sine Lege' (2005) 26 Statute Law Review 41

<sup>18</sup> See Bailey and Norbury *Bennion on Statutory Interpretation* (7<sup>th</sup> edition, LexisNexis 2017), in particular page 188.

<sup>19</sup> Tom Bingham, *The Rule of Law*, Penguin Books (2010), page 37.

<sup>20</sup> Bingham, page 8

<sup>21</sup> European Commission for Democracy Through Law (Venice Commission) *Rule of Law Checklist* (2016).

being underpinned by the principle of foreseeability: people must be informed in advance of the consequences of their behaviour. These are all manifestations of the general principle of legal certainty, which also finds expression in the principle of legitimate expectations: that those who act in good faith on the basis of the law as it is, or on the basis of other promises or conduct by public authorities, should not have their legitimate expectations frustrated.

## Analysis

How does the Bill measure up when assessed against the common law's strong presumption against retrospectivity?

The Government accepts that the Bill has two distinct retrospective effects. First, it introduces for serving offenders a new requirement that their release must be approved by the Parole Board. Second, it moves the point at which serving offenders become eligible for such release from the half way to the two thirds point in their sentence.

It is important to pause to consider both the nature and the effect of the Bill's retrospective effects. The State, when it sentenced currently serving offenders, made it quite clear, in the statute law which applied at the time of the sentence and in the explanation of that sentence given to them by the sentencing judge, that they will serve half that time in prison. The prisoner clearly knows this and plans accordingly. If the Bill becomes law in its present form, then, subsequent to this, and for reasons entirely unconnected with what the prisoner has done, that period of incarceration will increase. If the prisoner has been guilty of some sort of bad faith (breach of prison rules, refusal to engage with probation or prisoner services, further radicalisation, etc.) then they can hardly complain. But if they have complied with the rules imposed by the state, and then the state unilaterally changes those rules, they would clearly feel a sense of unfairness.

### Hypothetical scenario as a result of the Bill

TO1 convicted of terrorism offence on **1 September 2015** and sentenced to a standard determinate sentence of 9 years.

Told by sentencing judge that his release date will be **1 March 2020** – halfway through sentence.

TO1 engages positively in deradicalization programme during early custodial period

TO1 engages in rehabilitation and increasing family contact during 2019, preparing for release and resettlement in anticipation of 1 March 2020 release date.

No one has any concerns about TO1 being a danger to the public on release.

**27 Feb 2020** – Terrorist Offenders (Restriction of Early Release) Bill receives Royal Assent and comes into force.

28 Feb 2020 - TO1's release date of 1 March 2020 scrapped and replaced by **1 September 2021** as date on which eligible to be referred to Parole Board – two-thirds of way through sentence.

TO1 spends at least **1 and a half years' more in prison** beyond his expected release date of 1 March 2020, despite presenting no danger to the public.

Such unfairness gives rise to a risk that this part of the Bill could even be counter-productive. It risks feeding a narrative that British justice can't be trusted, that it is rigged against them. A prisoner whose prison time is automatically increased from what they were told it would be would not gain much comfort from arguments that only the administration of their sentence

was being changed, not its scope. Regardless of the legal arguments to explain it away, they will still be spending more actual time in an actual prison.

However, the common law principle is a presumption, not an absolute prohibition. As far as the common law is concerned, Parliament can pass laws intended to have retrospective effect provided it is satisfied that there is an overwhelming public interest justifying such an exceptional course of action, and demonstrates its satisfaction by making absolutely clear in the language of the Bill that this is Parliament's intention. When the Government wants legislation to have retrospective effect, it is the role of the Attorney General to consider whether the public interest relied on outweighs the presumption against retrospectivity and to advise the Government accordingly.

The Government's justification for the Bill's retrospective effects is the overwhelming public interest in protecting members of the public against the risk of terrorist attack. This is the reason clearly stated by the Lord Chancellor when introducing the Bill in the Commons; in the Government's ECHR Memorandum; and in Lord Keen's letter dated 13 February 2020 to all peers. That this is the justification relied on by the Government was also made clear by former Attorney General, Rt Hon Geoffrey Cox QC MP, speaking at the Institute for Government on 11 February. He said that by making the Bill retrospective, the Government is responding to a "legitimate and powerful public interest in ensuring that those who may well be a risk will from now on be subjected to a risk analysis before they are released."

The Government's reliance on the public interest in being protected from the risk of terrorist attack clearly justifies the retrospective introduction of the requirement of a Parole Board review for serving offenders. That measure will ensure that no serving offender is automatically released until the Parole Board is satisfied that they do not pose a danger to the public.

However, it cannot justify moving the release date of serving offenders from half way to two thirds of the way through their sentence. The Government's legitimate purpose of protecting the public is achieved by the introduction of the Parole Board requirement for serving offenders: that ensures that dangerous offenders will not be released before the end of their sentence. It is not necessary also to move the release date of serving offenders to later in their sentence. In addition to that being unnecessary to achieve the Government's legitimate aim, its effect is disproportionate to that aim: it will result in offenders who pose no danger to the public spending longer in custody before they are eligible for release.

**We therefore conclude that while the Government has provided an adequate justification for retrospectively requiring serving offenders to satisfy the Parole Board before release, it has failed to provide the additional justification required to warrant the retrospective change to the release date for all serving offenders, which is a departure from the longstanding common law principle that existing prisoners should not be adversely affected by changes in the sentencing regime after their conviction.**

## Recommended amendment to Bill

As explained earlier in this Report, the Rule of Law requires the Government to protect the public from known terrorists. The fact that the Streattham perpetrator was being followed by covert police officers shows the quality and reliability of the intelligence that he remained a serious risk. If the legal system automatically released him halfway through his sentence, despite this risk, it clearly failed.

In our view, the Government's legitimate Rule of Law aim of protecting the public from attack by individuals known to present a threat could be achieved by a simple amendment to the Bill. The amendment would remove the change in the review point for serving offenders, but retain the introduction of the requirement of a Parole Board review.

We therefore recommend a simple and modest amendment to the Bill, preserving the new Parole Board requirement for serving offenders, but giving only prospective effect to the provisions extending from halfway to two thirds the period in custody before an offender is

eligible for consideration for release by the Parole Board. We note that this was the approach recently taken in the SI 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.<sup>22</sup> We see no distinction in principle between the two categories of offender capable of justifying such a radically different approach.

The amendment would leave entirely intact the Government's legitimate aim of protecting the public against known terrorist threats, but remove the unjustified retrospective effect which is not necessary to achieve that purpose.

Crucially, it retains the duty of the Parole Board to make a determination, in each individual case, whether a person ought to be released, and the Bill therefore achieves the Government's aim of public protection.

**We recommend that the Bill be amended so that the provisions extending the period in custody before an offender is referred to the Parole Board for consideration for release do not apply to serving offenders.**

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<sup>22</sup> Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020, Article 5 (making the change prospective only by disapplying the change in relation to any sentence imposed before the date on which the Order comes into force).

# Emergency legislation

## The Bill's timetable

The Government is introducing the Bill as fast-track legislation.

It asserts that the legislation is needed urgently to put appropriate safeguards in place before further terrorist offenders are released from prison.

## The Relevant Rule of Law standards

The quality of democratic law-making procedures is a Rule of Law matter because they determine the extent of the Executive's accountability to the legislature for the content of legislation and therefore whether the supremacy of the legislature over the Executive is ensured in a meaningful sense.

Emergency legislation which is rushed through Parliament with little opportunity for meaningful scrutiny is problematic from a Rule of Law perspective because the more compressed the timetable for legislative scrutiny the closer the legislation is to unaccountable executive law-making. Emergency procedures for making law should only be resorted to in cases of genuine urgency when there is an overriding imperative that the legislation be enacted at the earliest opportunity.

This dimension of the Rule of Law is recognized by the Venice Commission Rule of Law Checklist which states that the process for enacting law ought to be transparent, accountable, inclusive and democratic.<sup>23</sup> The Venice Commission goes on to accept that there may be exceptions in emergency situations, but that there should be parliamentary control and judicial scrutiny of these exceptions.<sup>24</sup>

The House of Lords Constitution Committee carried out a very detailed investigation into fast-track legislation and published its report in 2009.<sup>25</sup> Most of the analysis in this section follows the framework that the Constitution Committee laid out.

Fast-track legislation (the term preferred by the Committee) simply means that a Bill has expedited passage through Parliament – it will travel through all the stages, but will do so quickly. The period between each stage of the Bill will be considerably shortened.

The Committee identified 5 constitutional principles

- i. The need to ensure that effective parliamentary scrutiny is maintained in all situations. Can effective scrutiny still be undertaken when the progress of bills is fast-tracked, even to the extent of taking multiple stages in one day?
- ii. The need to maintain "good law"—i.e. to ensure that the technical quality of all legislation is maintained and improved. Is there any evidence that the fast-tracking of legislation has led to "bad law"?
- iii. The importance of providing interested bodies and affected organisations with the opportunity to influence the legislative process. Is Parliament able to take account of the work of campaigners in its scrutiny work when a bill completes its parliamentary passage so quickly?
- iv. The need to ensure that legislation is a proportionate, justified and appropriate response to the matter in hand and that fundamental constitutional rights and principles are not jeopardised.

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<sup>23</sup> Benchmark A5.

<sup>24</sup> Benchmark A6.

<sup>25</sup> House of Lords, Select Committee on the Constitution *Fast-track legislation: Constitutional Implications and Safeguards* (15<sup>th</sup> Report of Session 2008-09)

- v. The need to maintain transparency. To what extent are the transparency of the policy-making process within government and the parliamentary legislative process compromised when bills are fast-tracked?

The Committee identified concerns that fast-track procedures should not be used for something that was predictable or had been flagged at some point, or that it was introduced primarily in response to a public outcry.<sup>26</sup> In particular, it pointed to the risk of rushed legislation being produced in response to a terrorist atrocity.<sup>27</sup>

If a Bill is to be fast-tracked, the Committee made a number of recommendations. The key one is that the Minister responsible for the Bill should make an oral statement to the House of Lords outlining the case for fast-tracking.<sup>28</sup> This Ministerial Statement should address the following principles:<sup>29</sup>

- a) Why is fast-tracking necessary?
- b) What is the justification for fast-tracking each element of the bill?
- c) What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?
- d) To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?
- e) Does the bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?
- f) Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?
- g) Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?
- h) Have relevant parliamentary committees been given the opportunity to scrutinise the legislation?

More recently, the Constitution Committee stated:

We welcome the fact that the Cabinet Office's *Guide to Making Legislation* now requires the justification for fast-tracking to be included in a bill's explanatory notes. We note that the Government has observed it in respect of most recent bills that have been fast-tracked.<sup>30</sup>

## The Government's justification for emergency legislation

The Government offers a single reason for fast-tracking the Bill: the need to put appropriate safeguards in place before further terrorist offenders are released from prison at the end of February.<sup>31</sup> There are said to be prisoners due for release before that date "who fall into this cohort of terrorist offenders who present a particular risk to the public." No more specific details are given of the number of such offenders due to be released, nor of the precise risk they pose to the public.

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.

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<sup>26</sup> Paragraph 24 of the Report.

<sup>27</sup> See paragraph 66 and following paragraphs.

<sup>28</sup> Paragraph 185 of the Report.

<sup>29</sup> Paragraph 186 of the Report.

<sup>30</sup> House of Lords, Select Committee on the Constitution *The Legislative Process: The Passage of Bills through Parliament* (24<sup>th</sup> Report of Session 2017 to 2019).

<sup>31</sup> Explanatory Notes paras 9-18.

The Minister could usefully be asked to address the following points when being asked about the Government's justification for using fast-track legislation:

- i. Why is this an emergency now, when it wasn't thought to be sufficiently urgent to warrant emergency legislation following the attack at Fishmongers' Hall?
- ii. Why is there a pressing need to introduce this legislation in advance of the comprehensive reform which will be contained in the new counter-terrorism (sentencing and release) Bill which the government is also proposing?
- iii. How many terrorist prisoners have been automatically released at the halfway point in their sentence since the original Fishmongers' Hall attack,
- iv. Of those, how many have committed terrorist offences between the release point and the release point if they had been released 2/3 of the way through their sentence?
- v. How many will be released automatically at the halfway point if this Bill were to follow ordinary legislative procedure rather than a fast-track procedure?

The need for a full opportunity for parliamentary scrutiny and debate 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.

## Issues requiring detailed scrutiny

Fast-track legislation reduces the opportunity for Parliament to scrutinise legislation. We set out in the Annex to this Report examples of five important issues which should be properly and fully addressed before the Bill is enacted. These issues are not Rule of Law issues in themselves, but their significance demonstrates why the Rule of Law requires that certain minimum standards of democratic law-making be observed in order to ensure that the Executive is not, in effect, making executive legislation which legislatures (including the devolved Parliaments as well as the Westminster Parliament) have no meaningful opportunity to scrutinise, question and revise.

It may well be that the Government has proper answers to all these questions – but this is the point of scrutiny of the Government's proposed legislation by Parliament, to subject the Bill to questions, and hopefully to be reassured by the answers to these questions. In the course of a normal Bill, there would be time for these to be addressed. In the course of fast-tracked legislation, it is much harder to research and analyse these questions, and harder also for the Government to have time to provide measured responses.

# ANNEX

Can the Government effectively address the following five issues to which close scrutiny of the Bill gives rise:

**(1) The Scope of the Bill - What is the justification for the entries in the list of offences in Schedule 1 to which this Bill applies?**

Schedule 1 sets out a long list of offences which attract the provisions of this Bill. These are essentially terrorist offences, or offences which may be regarded as having a terrorist connection. If the offender is in prison for any of these offences, then the restrictions on early release apply.

There are two categories of offences. Part 1 sets out offences under counter-terrorism legislation. For example we have the offence of encouraging acts of terrorism, set out in section 1 of the Terrorism Act 2006. Part 2 sets out offences which a trial judge may determine have a terrorism connection. For example, we have the offence of kidnapping, which could have a terrorism connection, depending upon the circumstances.

The rationale given by the government for this list is that only the serious terrorist offences have been included. The Lord Chancellor stated:

That will apply to all terrorist and terrorist-related offences where the maximum penalty is above two years, including those offences for which Sudesh Umman was sentenced. Only a very small number of low-level offences, such as failure to comply with a police cordon, are excluded by this threshold, and prosecution and conviction for those offences are rare.<sup>32</sup>

The genesis for the list in Schedule 1 to the Bill is Schedule 2 to the Counter-Terrorism Act 2008. That Act sets out a list of offences where a terrorist connection can be considered.

This table sets out the common law offences in both lists:

<b>Schedule 1, Bill</b>	<b>Schedule 2, Counter-Terrorism Act 2008</b>
	Murder
Manslaughter.	Manslaughter.
Culpable homicide.	Culpable homicide
Kidnapping.	Kidnapping.
Abduction.	Abduction.
Assault by explosive device under the law of Scotland.	Assault by explosive device under the law of Scotland.
Assault to severe injury under the law of Scotland.	Assault to severe injury under the law of Scotland.
Assault and poisoning under the law of Scotland.	Assault and poisoning under the law of Scotland.
Poisoning under the law of Scotland.	Poisoning under the law of Scotland.

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<sup>32</sup> HC Debate 12 February 2020, Vol 671, Col 869.

False imprisonment under the law of Northern Ireland.	False imprisonment under the law of Northern Ireland.
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It can be seen that (bar murder, which is an offence with a mandatory life sentence) this is exactly the same list, even down to the order in which the offences appear. The last 5 offences on the list in the 2008 Act were added by the Counter-Terrorism and Border Security Act 2019. There is nothing wrong with copying an existing list, in many cases it is a sensible way to organise the statute book.

However, when it comes to Part 2 of the list in the Bill (the statutory offences), there is a clear divergence from the 2008 Act. That Act contains the following two offences

An offence under section 20 of the Theft Act (Northern Ireland) 1969 (blackmail).

An offence under section 1 of the Protection of the Person and Property Act (Northern Ireland) 1969 (intimidation)

These were both added by way of amendment via the Counter-Terrorism and Border Security Act 2019. Using the language of the Lord Chancellor, they could not be described as “low-level offences”. These two offences do not appear in the list in the Bill.

#### Questions for the Government

**Q1: Why are blackmail and intimidation under the law of Northern Ireland not on the list in the Bill when they are on the list in the 2008 Act?**

**Q2: Is there a reason why false imprisonment under the law of Northern Ireland was included, but blackmail and intimidation were not?**

#### **(2) Devolved Jurisdiction point 1 – the power to legislate for Scotland and Northern Ireland**

The Explanatory Notes to the Bill state: “Counter-terrorism is a reserved matter, although prisons and sentencing (including release provisions) are devolved to Scotland and Northern Ireland.”

This is not strictly accurate., The Notes go on to explain that counter-terrorism is a “reserved matter” in Scotland and an “excepted matter” in Northern Ireland. (Although somewhat confusingly, the legal effect of both these categories is practically the same for those different jurisdictions).

Schedule 5 to the Scotland Act 1998 sets out what are reserved matters for the purposes of the jurisdiction of the Scottish Parliament. Heading B8 includes an entry for “Special powers, and other special provisions, for dealing with terrorism”.

Schedule 2 to the Northern Ireland Act 1998 sets out excepted matters for the purposes of the jurisdiction of the Northern Ireland Assembly. These include, in paragraph 17 “special powers and other provisions for dealing with terrorism or subversion;”.

“Counter-Terrorism” in itself isn’t a reserved or excepted matter as such, it is only “special powers or other provisions” dealing with terrorism. So, the Scottish Parliament or Northern Ireland Assembly could make laws concerned with terrorism, but couldn’t set out any special powers or special provisions within those laws. “Special powers” aren’t defined in the Scotland Act 1998 or the Northern Ireland Act 1998. The closest analogue is in the various Special Powers Regulations made in Northern Ireland from the formation of the state up until 1972. Those special powers included things like an additional power of arrest, or a power to enter property, a power to prescribe certain groups, a power to ban public processions, a power to prohibit traffic on railways etc.

It is difficult to see how changing the sentencing regime is a special provision, any more than changing the sentencing regime for ordinary prisoners would be a special provision. In fact,

the government has made a point that this is standardising the treatment of terrorist offenders with those of other serious offenders.

#### Questions for the Government

**Q3: What is the basis for the assertion that changing the release dates is a “special power or other provision” for dealing with terrorism? In other words, why is Westminster making this legislation for Scotland, rather than the Scottish Parliament?**

### **(3) Devolved Jurisdiction point 2 - legislating for Scotland, but not Northern Ireland**

If this is a provision where Westminster is entitled to legislate for Scotland, then exactly the same powers apply in relation to Northern Ireland. However, the Bill only makes provision for Scotland, and not Northern Ireland.

The Minister of Justice in Northern Ireland, Naomi Long, made the following statement in the Northern Ireland Assembly

With respect to the provisions that have been made in Westminster under the emergency legislation, we consulted with the Ministry of Justice and the Northern Ireland Office ..., there was no barrier to the legislation being applied UK-wide. We made it clear that that was our preference. Indeed, in a conversation with the Justice Minister for England and Wales, Robert Buckland, I made it clear that that was my preference, because I was concerned about the risk of a two-tier system of approach being set up in the UK when it comes to the paroling of terrorist prisoners. At the end of the day, the decision was taken by the Ministry of Justice. It is not a decision for the Department of Justice here. The decision was to exclude Northern Ireland from that. Our first sight of that decision was the press release about the legislation that was issued by the Ministry of Justice.<sup>33</sup>

#### Question for the Government

**Q4: On the basis that the same power to legislate for Scotland applies also to Northern Ireland, why does the Bill apply to Scotland and not Northern Ireland?**

**Q5: Was there enough time in the preparation of the Bill to include provision dealing with the law of Northern Ireland?**

### **(4) Devolved Jurisdiction point 3 – Legislative Consent Motions**

Under s. 29 of the Scotland Act 1998

(2)A provision is outside that competence so far as any of the following paragraphs apply—

(b)it relates to reserved matters,

The Explanatory Notes to the Bill state: “A Legislative Consent Motion will be required from the Scottish Parliament on the basis that the Bill alters the executive functions of the Scottish Ministers in relation to release of prisoners.”

If this Bill is a special power relating to terrorism, then it is a reserved matter, and outside the competence of the Scottish Parliament. If this is the case, then it is hard to see how there is a need for a LCM. Does this hark back to the long-disused concept of “double respectation”? That is, that the Bill is in respect of one thing, and also in respect of another thing?

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<sup>33</sup> Northern Ireland Assembly Official Report Monday 17 February 2020 Volume 125, No. 7.

If there is to be a LCM then it would need to be made very quickly, otherwise it would seem to have no practical effect. Specifically, if this Bill is enacted before the LCM is granted, then the idea of asking if the Scottish Parliament consents to a Bill is meaningless if the Bill is enacted before that consent is granted.

Questions for the Government

**Q6: If the subject matter of this Bill is a reserved matter for the Scottish Parliament, then why is there a need for a Legislative Consent Motion?**

**Q7: If there is a need for a Legislative Consent Motion, how will this be possible for the Scottish Parliament before this fast-tracked Bill is enacted?**

**(5) Concurrent sentences**

For a prisoner sentenced in respect of one offence, the time spent in prison is increased from half to two-thirds of the sentence imposed by the judge, as set out in clause 1. However, the definition of “requisite custodial term” in clause 1(8) also refers to consecutive and concurrent sentences. Consecutive sentences are two or more sentences where each sentence is served consecutively, ie after the other. So consecutive 2 and 3 year sentences means that a total of 5 years is spent in prison. Concurrent sentences are served at the same time, so concurrent 2 and 3 year sentences means just 3 years spent in prison.

Clause 1(8) points the reader to section 263(2) and 264(2) of the Criminal Justice Act 2003 for the treatment of concurrent and consecutive sentences. There is no consequential amendment to section 263, which means that for concurrent offences, there is no change to the sentencing regime. Clause 7(7) does make a consequential amendment to section 264. The definition of “custodial period” is changed for consecutive sentences where the provisions of this Bill apply. The change is to increase the custodial period from half to two-thirds of the sentence imposed by the court.

The net effect of all this is set out in the table below.

	Current law	Example	Bill proposal	Example
Single sentence	Release at half way point	9 year sentence: Released in 4.5 years	Possible release at two-thirds	9 years sentence: Possible release after 6 years
Concurrent sentences	Release at half way point of longer sentence	9 year sentence and 6 year sentence: Released after 4.5 years	Possible release at half way point of longer sentence	9 year sentence and 6 year sentence: Possible release after 4.5 years
Consecutive sentences	Release at half way point of aggregate of sentences	9 year sentence and 6 year sentence: Released after 7.5 years	Possible release at two-thirds of aggregate sentence	9 year sentence and 6 year sentence: Possible release after 10 years

The Parliamentary Under-Secretary of State for Justice Chris Philp seemed to indicate that it was the policy of the Bill not to make any change to the calculation of concurrent sentences. At second reading of the Bill he stated

I do not think the Del Río Prada case, in which the Kingdom of Spain was a respondent, is directly germane because it concerns the calculation of concurrent sentences and a change in how concurrent sentences are handled, which is obviously not the matter before the House today.<sup>34</sup>

It seems odd that a prisoner sentenced for a single offence will have their release date moved from half to two-thirds of their sentence, but that a prisoner sentenced to multiple sentences served concurrently will remain eligible for release after half their sentence. The prisoner convicted of multiple offences will be treated more leniently than the prisoner sentenced for just one offence. The Parole Board requirement will still apply in all cases, but the potential release date is earlier for persons serving concurrent sentences

Questions for the Government

**Q8: Does the Bill make no change to the period before eligibility for release for prisoners serving concurrent sentences?**

**Q9: If so, what is the rationale for treating prisoners serving concurrent sentences more favourably than prisoners serving a single sentence?**

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<sup>34</sup> HC Debate 12 February 2020, Vol 671, Col 918.



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