

Terrorist Offenders (Restriction of Early Release) Bill 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 Lords consideration of the Bill on **Monday 24th 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.

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