

Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (1)

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Introduction

1. This is the first of a number of Notes that I intend to publish on the Counter-Terrorism and Sentencing Bill¹ introduced into Parliament on 20 May 2020, in the hope that it assists public debate on and understanding of the proposed legislative changes.
2. There are two stand-out aspects to the sentencing reforms contained in the Counter-Terrorism and Sentencing Bill, although their significance is not immediately apparent from the contents and cross-headings.
3. Firstly, the Bill creates a special sentence (called a “serious terrorism sentence”) for the handful of dangerous adult offenders whose acts are “very likely” to have caused or contributed to multiple deaths. The effect is a mandatory minimum custodial term of 14 years and a further mandatory minimum licence period of 7 years (with maximum licence of 25 years).
4. Secondly, the role of the Parole Board is removed for certain dangerous terrorist offenders (including children) so that release is automatic but only at the expiry of the custodial part of the sentence.
5. The animating principle behind each of these reforms appears to be a pessimistic one: that terrorist risk for the most serious offenders is enduring, and real changes to risk are difficult to identify or can be simulated. Hence public protection can only be served by increasing periods in custody, with no possibility of early release if the Parole Board considers that the risk has sufficiently abated.
6. The effect of the Bill is intended to be UK-wide, and the Bill amends the respective sentencing legislation of England and Wales (including the Sentencing Code which is yet to come into force), Scotland and Northern Ireland.

Serious Terrorism Sentence (clauses 4 to 14)

7. The form this sentence takes is similar to an extended determinate sentence², that is to say it comprises a custodial period and an additional licence period. However, the proposed serious terrorism sentence comprises a *minimum 14-year custodial term* and a *minimum 7-year (and maximum 25-year) licence period*.
8. In most cases of conviction following trial, the requirement of a 14-year minimum custodial term for the most serious offences³ where multiple deaths are very likely should not make

¹ <https://publications.parliament.uk/pa/bills/cbill/58-01/0129/20129.pdf>.

² Sections 226A and B Criminal Justice Act 2003.

³ Called “serious terrorism offences” and contained in Schedule 17A Criminal Justice Act 2003 as inserted by clause 2 and Schedule 2 to the Bill.

much difference in practice. Current sentencing guidelines for attack-planners⁴, which the new provisions clearly draw upon, already provide for a starting point of at least 15 years in these cases. Corresponding changes are made to those sentenced to indeterminate sentences, so that a minimum term of 14 years is imposed. The more limited credit for guilty pleas resulting in serious terrorism sentences (no more than 20%⁵ as opposed to 33% as now) may be relevant to the willingness of defendants to plead guilty.

9. Courts will now have to determine *as a statutory threshold* whether the serious terrorism offence, alone or in association with other offences, was “...very likely to result in or contribute to (whether directly or indirectly)” multiple deaths; and whether the offender “...was, or ought to have been, aware of that likelihood”⁶. Causation and actual or constructive knowledge in the context of incomplete attacks are not straightforward, and it remains to be seen how sentencing judges approach this statutory threshold in contrast to the more flexible approach available under the sentencing guidelines (which refer among other things to the viability of attack plans and the extent to which the preparations were advanced by the time of apprehension).
10. The requirement of a minimum mandatory sentence for all adult offenders, however young, puts in doubt whether judges can properly reflect the fact that an adult of 18 years and one month may not be any more mature than a child of 17 years and 11 months⁷ (for whom these sentences are not available). Age may or may not result in “exceptional circumstances” being found, which is the only basis on which the 14-year minimum can be avoided⁸.
11. The new 7-year minimum licence period post-release, capable of extending to 25 years, probably reflects the view that the most serious offenders pose an enduring risk which is unlikely to negate the need for post-release monitoring for many years.
12. It is unclear from the Explanatory Notes why the 14-year custodial and 7-year licence minimum periods have been chosen as suitable periods for terrorists. There will be some cases where the custodial sentence will be more than under the current sentencing guidelines, for example offences by young adults playing an accessory role who have pleaded guilty, begging the question as to whether this Bill reflects a perception that current sentences are too low in those cases.
13. The concept of enduring risk, with the possibility of the most serious offenders becoming more rather than less dangerous during their time in custody, or at least the impossibility of predicting when their risk might have sufficiently reduced, might have led logically to a return to sentences of Imprisonment for Public Protection (IPPs) for this cohort of offenders, with release only when safe to do so, and the possibility of monitoring for life. Conversely, determining whether a 7-year, 15-year or 25-year licence is appropriate at the point of sentencing for dangerous individuals who have committed the most serious offences may be asking courts to engage in guesswork.

⁴ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/preparation-of-terrorist-acts/>.

⁵ Clause 8.

⁶ Section 282B(3) Criminal Justice Act 2003 as inserted by clause 5. References are the changes in England and Wales. I will consider the impact on amending legislation in Scotland and Northern Ireland separately.

⁷ See *R v Clarke (Morgan)* [2018] EWCA Crim 185 at paragraph 5.

⁸ Section 268B(2) Criminal Justice Act 2003 inserted by clause 4.

14. If a 25-year licence period is imposed this is not so different from a licence for life. However, whereas licences for life imposed on IPP prisoners were capable of being terminated in appropriate cases⁹, that does not apply to serious terrorism sentences. This might be not just a matter of fairness to genuinely reformed individuals but also a means of easing future administrative burden. In those cases, coupled with the 30-year notification period under the Counter-Terrorism Act 2008¹⁰, there is the prospect of storing up administrative burden for the future with limited flexibility.

Removal of Parole Board's role (clauses 27 to 31)

15. The proposal is to remove the Parole Board's power to direct early release of certain dangerous terrorist offenders¹¹. This does not just apply to those convicted of serious terrorism sentences but to any terrorist offender found dangerous by the sentencing court where the offence carries a maximum of life imprisonment. So it applies to the most serious terrorism offences such as attack-planning, directing a terrorist organisation, or giving or receiving terrorist training¹², and to offences such as manslaughter, kidnap and possession of explosive which have been found by the Court to be connected to terrorism¹³.

16. Given the current role of the Parole Board in the initial release of all dangerous offenders, this is a profound change. Even when the role of the Parole Board was more limited (between 2012 and 2015), the release of offenders sentenced to over 10 years or for specified terrorism offences was still considered by the Parole Board¹⁴. There are three immediate consequences.

17. Firstly, to the extent that the possibility of early release acted as a spur to good behaviour and reform for offenders who are going to spend the longest time in custody, that has now gone.

18. Secondly, the opportunity to understand current and future risk at Parole Board hearings has also been removed.

19. Thirdly, child terrorist offenders, whose risk may be considered most susceptible to change as they mature into adults, have lost the opportunity for early release.

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⁹ Section 31A Crime (Sentences Act) 1997.

¹⁰ Again, there is no possibility of termination. I have recommended that there should be: Terrorism Acts in 2018 Report at 7.56.

¹¹ These offenders would be released on licence and the Parole Board would still have a role on release following recall to prison.

¹² Offences specified in Part 1 of Schedule 19ZA Criminal Justice Act 2003 as substituted by such as clause 27(3) and Schedule 9 of the Bill.

¹³ Offences specified in Part 3 of Schedule 19ZA found to have a terrorist connection under section 30 Counter-Terrorism Act 2008.

¹⁴ Section 246A Criminal Justice Act 2003 as inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Parole Board's role was extended to all dangerous offenders by the Criminal Justice and Courts Act 2015.