

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

### Jonathan Hall QC Independent Reviewer of Terrorism Legislation

#### Introduction

1. This Note on the Counter-Terrorism and Sentencing Bill, which received its second reading on 9 May 2020, concerns the effect of the proposed sentencing changes in **Scotland** and **Northern Ireland**<sup>1</sup>.
2. Scotland and Northern Ireland have very different histories and experiences of terrorism. Scotland has seen isolated arrests and prosecutions in the last few years<sup>2</sup>. The position could not be more different in Northern Ireland<sup>3</sup>. The current threat level to Scotland (as with England and Wales) is substantial; in Northern Ireland it is severe<sup>4</sup>. The latest ‘Police Recorded Security Situation Statistics’ show that in Northern Ireland during 1 June 2019 to 31 May 2020 there were 19 bombing incidents, compared to 14 in the previous year and 42 shooting incidents, compared to 38 in the previous year<sup>5</sup>.
3. The government has stated that its policy is that the new legislation will apply UK-wide for two reasons: to reflect the reserved nature of counter-terrorism and to ensure equal provision of counter-terrorist measures across the United Kingdom<sup>6</sup>.
4. The purpose of this Note is to draw out some of the legal and administrative differences between the constituent parts of the United Kingdom in order to explain the regional significance of some of the changes. Some of these differences challenge the government’s ambition to reform the sentencing landscape in a regionally consistent manner.
5. Given that the devolved authorities have a significant measure of legislative and executive competence in the field of sentencing and release generally<sup>7</sup>, the government is seeking legislative consent motions for some aspects of the changes from the Scottish Parliament and the Northern Ireland Assembly<sup>8</sup>.

#### Serious Terrorism Sentences

---

<sup>1</sup> I am grateful for comments on drafts of this note from Professor Clive Walker QC, Krista Johnston (Scotland), and Aly Kilpatrick BL (Northern Ireland).

<sup>2</sup> Although there are generally a significant number of offences of failing to cooperate with obligations under Schedule 7 Terrorism Act 2000 at Cairnryan Ferry Port.

<sup>3</sup> Chapter 9 of the Terrorism Acts in 2018 Report, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/03/Terrorism-Acts-in-2018-Report.pdf>, concerns Northern Ireland. Annual security reports are produced by the Independent Reviewer Justice and Security (Northern Ireland) Act 2007, David Seymour CB, whose eleventh report is at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786456/Eleventh\\_Report\\_of\\_the\\_Independent\\_Reviewer\\_of\\_Justice\\_and\\_Security.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786456/Eleventh_Report_of_the_Independent_Reviewer_of_Justice_and_Security.pdf).

<sup>4</sup> <https://www.mi5.gov.uk/threat-levels>.

<sup>5</sup> <https://www.psnipolice.uk/globalassets/inside-the-psni/our-statistics/security-situation-statistics/2020/may/security-situation-statistics-to-may-2020.pdf>, published 5 June 2020.

<sup>6</sup> Explanatory Note, <https://publications.parliament.uk/pa/bills/cbill/58-01/0129/en/20129en.pdf>, at paragraph 9.

<sup>7</sup> Initially reserved under the Good Friday/ Belfast Peace Agreement, policing and justice powers were devolved to the Northern Ireland Assembly in 2010.

<sup>8</sup> As listed in the Explanatory Note at Annex A.

6. These new sentences carrying a minimum 14-year custodial term are intended to apply to dangerous offenders convicted of terrorism or terrorism-connected offences carrying a maximum of life imprisonment where the offence was very likely to cause or contribute to the deaths of at least 2 people (the multiple deaths criterion).
7. Such sentences must be passed unless the offender is sentenced to life imprisonment or, in Northern Ireland, life imprisonment or an indeterminate custodial sentence<sup>9</sup>. Where those types of indeterminate sentences are passed, a minimum 14 year custodial term must be imposed.
8. This raises the question of how serious terrorism sentences relate to Orders for Lifelong Restriction in Scotland. This type of sentence is unique to Scotland and is imposed among other things for serious violent offences if certain risk criteria are met: that is, where the offender would otherwise seriously endanger the lives, or physical or psychological well-being, of members of the public at large<sup>10</sup>. It was designed to deal with those considered to pose an enduring risk<sup>11</sup>. No such order can be made without a formal risk assessment by Scotland's respected Risk Management Authority. An Order for Lifelong Restriction is an indeterminate sentence<sup>12</sup> comprising a stated period of detention or imprisonment (called a punishment part) during which the offender cannot be considered for release, followed by the continued incarceration of the offender unless and until the Parole Board for Scotland is satisfied that the offender no longer fulfils the risk criteria and can be released on licence. It is possible that an offender subject to an OLR will never be released from custody due to the risks they pose. If release is authorised, the offender is supervised by a criminal justice social worker (the equivalent to a probation worker<sup>13</sup>) under supervision by the Risk Management Authority.
9. Certain offenders who commit terrorism and terrorism-connected offences could qualify for an Order for Lifelong Restriction, but the apparent effect of clause 6 of the Bill is that a serious terrorism sentence would have to be passed in priority<sup>14</sup>. This means that, even where the criteria would ordinarily be made out for lifelong supervision, paradoxically a determinate sentence, potentially of shorter duration, must be imposed. It is not clear why this is so. It would be preferable if Clause 6 was disapplied where an Order for Lifelong Restriction is passed. This also raises the question of whether a more flexible indeterminate sentence, such as the Order for Lifelong Restriction, is not preferable generally to the inflexibility of a serious terrorism sentence<sup>15</sup>.

---

<sup>9</sup> Indeterminate custodial sentences are passed where an extended determinate sentence would not be sufficient to protect the public: Article 13 Criminal Justice (Northern Ireland) Order 2008 (SI 2008/1216). Article 13A(2)(e) as inserted by Clause 7 provides that these may be passed in priority to a serious terrorism sentence.

<sup>10</sup> Sections 210B et seq Criminal Procedure (Scotland) Act 1995.

<sup>11</sup> The history and nature of the Order is explained by the Appeal Court in *Ferguson and others v HM Advocate* [2014] HCJAC 19.

<sup>12</sup> Section 210F.

<sup>13</sup> There is no probation service as such in Scotland. Criminal justice social workers are part of local authorities' social work departments.

<sup>14</sup> As conceded by the Crown in *Johnstone v Her Majesty's Advocate* [2012] JC 79.

<sup>15</sup> See also, Note 1 on Sentencing Reforms at paragraph 13:

<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/Note-1-on-Sentencing-Reforms-1.pdf>.

10. Requiring minimum custodial terms for terrorism offences in Northern Ireland may challenge the expectation that sentences for terrorism offences are generally lower in Northern Ireland than in the rest of the United Kingdom<sup>16</sup>. The more widespread use of firearms and improvised explosive devices might suggest that the multiple deaths criterion will be capable of being satisfied in a significant number of cases.
11. However, there are two aspects of sentencing in Northern Ireland which call into question whether serious terrorism sentences will be passed as frequently as they might, were the same conduct to occur in Great Britain.
- Firstly, a serious terrorism sentence requires the judge to make a determination of dangerousness. Historically, the Probation Service of Northern Ireland has not carried out risk assessments in cases of terrorist or politically-motivated offending. The reasons provided for this stance are that the risk assessment tool used by the Probation Service is not validated for this category of offending; and the Probation Service does not have access to intelligence materials without which any assessment would be incomplete<sup>17</sup>. A finding of dangerousness therefore depends on the sentencing judge making that inference from the facts of the offence and other matters referred to in court about the offender.
  - Secondly, offences under non-terrorism legislation will qualify for serious terrorism sentences only if the offence is found to be terrorism-connected under the Counter-Terrorism Act 2008. This may be easier to determine where the offence is an explosives or firearms offence. But where a drugs or extortion offence is carried out for the benefit of a proscribed organisation, it may be argued that this is not carried out for the purposes of terrorism but for other purposes. The blurred edge between what is terrorism and ‘paramilitary activity’ or organised crime is a particular feature of the security situation in Northern Ireland<sup>18</sup>. This makes the task of the sentencing judge particularly difficult in a context where determining whether an offence is terrorism-connected could make the difference between a serious terrorism sentence or other disposal, or whether early release is available (see further below).
12. More generally, Northern Ireland is the only part of the United Kingdom<sup>19</sup> which lacks a Sentencing Council with the facility to encourage consistency in sentencing by the promulgation of detailed guidelines<sup>20</sup>.

### **Abolition of Early Release**

13. The Bill proposes to end the possibility of early release, and thereby abolish the role of the Parole Board prior to release, for dangerous offenders convicted of serious terrorism offences.

---

<sup>16</sup> See Terrorism Acts in 2018 Report, at 9.100 to 9.103.

<sup>17</sup> *Nash’s (Thomas) Application* [2015] NICA 18 <https://www.bailii.org/nie/cases/NICA/2015/18.html>, at paragraphs 19 to 21.

<sup>18</sup> Terrorism Acts in 2018 Report at 9.25 to 9.38.

<sup>19</sup> The Scottish Sentencing Council has existed since 2015, although there is only one approved guideline at present, and 5 others (not including terrorism) in development.

<sup>20</sup> Certain judgments are identified as guideline judgments: see <https://judiciaryni.uk/judiciary-decision-types/terrorist-offences>. The most recent terrorist judgments identified in this way are two from 2014.

14. Longer custodial terms in Northern Ireland will stand in significant contrast to the accelerated release under the Northern Ireland (Sentences) Act 1998, of offenders who committed terrorist offences prior to 10 April 1998. The logic of that unique dispensation does not apply to current offending, and does not provide a basis for distinguishing between the treatment of terrorist offences in Northern Ireland and the rest of the United Kingdom. However, the speed with which some convicted terrorist offenders embraced peaceful politics following the Good Friday/ Belfast Peace Agreement is inconsistent with sentences which offer no hope for reform leading to early release.

### **Additional Licence Periods**

15. The custodial part of serious terrorism sentences must be followed by long licence periods, from a minimum of 7 to a maximum of 25 years' duration. For serious terrorism offenders who do not receive serious terrorism sentences, the maximum extended licence period is increased from 8 to 10 years<sup>21</sup>. Certain terrorism offences are to carry additional fixed licence periods even when the offender is not dangerous<sup>22</sup>.

16. The purpose of these additional licence periods is to ensure greater and longer opportunity for the authorities to manage the risk posed by released terrorist offenders.

17. England and Wales have a well-developed<sup>23</sup> multi-agency system for managing offenders on licence who pose a risk of serious harm to the public, involving prisons, probation and police, together with other agencies (Multi-Agency Public Protection Arrangements, or MAPPA).

18. Although Scotland has less experience of managing terrorist offenders on licence, it has similar experience of managing, in the community, offenders who are deemed to pose additional risk of harm following their release. Specifically there are those on Supervised Release Orders<sup>24</sup>, who are subject to additional licence requirements imposed in order to protect the public from serious harm; and those offenders who are sentenced to extended sentences<sup>25</sup>, where the period of extension is a period of prolonged managed licence in the community. In the case of terrorism offences this period of extension is already up to a maximum of 10 years, meaning that no amendment is needed (as in England, Wales and Northern Ireland) to increase the maximum period from 8 years to 10 years, in cases where a serious terrorism sentence is not passed. MAPPA arrangements have existed in Scotland since 2007<sup>26</sup>.

19. The position in Northern Ireland is different as it relates to terrorist offenders.

- a. The Probation Service of Northern Ireland, whose officers must have a social work qualification<sup>27</sup>, adopted a neutral stance during the Troubles and

---

<sup>21</sup> Clauses 16 to 20.

<sup>22</sup> Clauses 21 to 24.

<sup>23</sup> But needing improvement. My independent MAPPA has been delivered to the government.

<sup>24</sup> Section 209 Criminal Procedure (Scotland) Act 1995.

<sup>25</sup> Section 210A.

<sup>26</sup> Section 10 Management of Offenders etc (Scotland) Act 2005.

<sup>27</sup> Lamont, C. and Glenn, C., Parole and Probation in Northern Ireland: Experiences and Reflections from Practice, Irish Probation Journal, Volume 12, October 2015 p.47 ([https://www.pbni.org.uk/wp-content/uploads/2015/02/IPJ-2015-CherylLamont\\_ChristineGlenn\\_IPJ.pdf](https://www.pbni.org.uk/wp-content/uploads/2015/02/IPJ-2015-CherylLamont_ChristineGlenn_IPJ.pdf)).

supervised offenders involved in ‘politically motivated offending’ on a voluntary basis. The purpose was to enable greater community engagement, and unlike prison and police officers, probation officers were not historically considered legitimate targets of terrorist violence<sup>28</sup>.

- b. However, following credible threats from Dissident Republicans, in 2017 the Probation Service of Northern Ireland stopped directly supervising the licences of convicted terrorists and offenders professing or assessed to be aligned to terrorist groups<sup>29</sup>.
- c. In practice, the role of the Probation Service of Northern Ireland is extremely limited with respect to this cadre of offenders<sup>30</sup>.
- d. Instead, the supervision role is principally undertaken by the Police Service of Northern Ireland pursuant to additional licence conditions approved by the Department of Justice and/or the Secretary of State<sup>31</sup>. The police will already have a role in monitoring compliance with the terrorist notification requirements which will apply to these offenders under the Counter-Terrorism Act 2008.
- e. Police, rather than probation officers, initiate the process of licence revocation on grounds of further terrorist behaviour or offending<sup>32</sup>. Where matters are before the Parole Commissioners of Northern Ireland, the views of the police are articulated by the Department of Justice. This role will be increased by the fact that the emergency legislation passed in March 2020 abolishing the automatic release of most terrorist offenders is to be extended to Northern Ireland<sup>33</sup>.
- f. I understand that in light of a recommendation in the Fresh Start Executive Action Plan on paramilitary activity<sup>34</sup>, the Department of Justice is currently seeking to enhance arrangements for monitoring terrorist-related offenders in the community. This includes developing a multi-agency system of assessment and monitoring, and commissioning a bespoke risk assessment tool.

---

<sup>28</sup> Carr N., *The Criminal Justice System in Northern Ireland* in S. Case, D. Manlow, P. Johnson, R. Smith, & K. Williams (Eds.), *Criminology* (Oxford University Press, 2017).

<sup>29</sup> I refer to terrorist groups rather than proscribed organisations, noting that not all terrorist groups in Northern Ireland are proscribed: see *Terrorism Acts in 2018 Report* at 9.23.

<sup>30</sup> Limited to providing social welfare and resettlement support, such as considering applications to travel or reside outside Northern Ireland.

<sup>31</sup> Under the Criminal Justice (Northern Ireland) Order 2008, the devolved administration and the national government have complementary roles depending on whether or not the decision is based on certain types of sensitive information.

<sup>32</sup> As in *Hegarty v Ministry of Justice and Parole Commissioners for Northern Ireland* [2019] NICA 16, see paragraph 35. In Northern Ireland, save in limited circumstances, recall is dependent on a recommendation from the Parole Commissioners. Where a recommendation is made, the final decision is taken by the Department of Justice.

<sup>33</sup> Clause 30 applies to Northern Ireland the scheme created by the Terrorist Offenders (Restriction of Early Release) Act 2020.

<sup>34</sup> <https://www.northernireland.gov.uk/sites/default/files/publications/newnigov/Executive%20Action%20Plan%20-%20Tackling%20Paramilitary%20Activity.pdf>, at paragraph B11.

20. It follows that, at least under current arrangements, the supervision of licences is significantly different in Northern Ireland from the rest of the United Kingdom. Inevitably the focus of licence supervision may be towards enforcement or disruption rather than rehabilitation<sup>35</sup>. Offenders are likely to perceive the role of the police differently from the role of probation staff when it comes to discussing their offending motivation. The proposed increase to the length of licences in Northern Ireland takes place against this background, and if anything increases the need for a non-police element to parole supervision. Terrorist offenders will include not only long-standing members of terrorist organisations but drug users whose addictions may lead them to being coerced into support roles for terrorist organisations<sup>36</sup>.

### **Children and Young Offenders**

21. Striking features of the proposed legislation concern its application to children and young offenders.

22. The proposed application of the serious terrorism sentence to offenders aged 18 to 21 in Scotland raises starkly the question of whether there is a bright line between offenders above and below the age of 18. This is because the Scottish Sentencing Council is currently consulting on its third draft guideline, ‘Sentencing Young People’<sup>37</sup> and proposes that special sentencing principles should apply to offenders up to the age of 25.

23. Even if the Sentencing Council guideline does not ultimately go as far as 25, the application of the minimum mandatory sentences to those in the 18 to 21 bracket, and even more so the removal of the role of the Parole Board (or in Northern Ireland, the Parole Commissioners) for dangerous serious terrorism offenders for both adults and children, appears inconsistent with the distinct youth criminal justice regimes which have developed in each part of the United Kingdom.

24. The current trend in Scotland is towards a welfarist approach to youth criminal justice, reflected in the Scottish government’s Youth Justice Strategy in June 2015<sup>38</sup>. In Northern Ireland, following a recommendation by the Criminal Justice Review (2000), the Youth Justice Agency was established to administer youth justice in Northern Ireland<sup>39</sup>.

25. There is a risk in Northern Ireland, as elsewhere, that young offenders may be manipulated by terrorist groups or other unscrupulous individuals operating in the real world or online.

26. As part of my role I receive regular briefings on counter-terrorism detention. I am aware of children, including quite young children, being arrested and detained for serious offences. Age does not necessarily inhibit capability (particularly technical capability) and intent. The internet, peer-pressure, and vulnerability are all significant factors in the types of

---

<sup>35</sup> For some offenders, this will continue to be the case whether or not probation officers are involved.

<sup>36</sup> Dealing with general offenders, in 2015 it was estimated that over 40 per cent of offenders managed by the Parole Board of Northern Ireland had addiction issues: Lamont and Glenn, *supra*.

<sup>37</sup> <https://www.scottishsentencingcouncil.org.uk/media/2047/sentencing-young-people-public-consultation-paper.pdf>

<sup>38</sup> Hammond, C., Youth offending and sentencing in Scotland and other jurisdictions Literature review, submitted to the Scottish Sentencing Council in June 2018, April 2019, at page 7.

<sup>39</sup> The Agency’s Framework Document dated December 2012 is at <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/yja-framework-doc-dec-2012.pdf>.

offences committed and ideologies espoused. I question whether children who receive extended sentences for serious terrorist offences are so different from children who commit extended sentences for other serious offences, as to justify removing the Parole Board's role.

## **Polygraphs**

27. The challenges posed in monitoring terrorist offenders are such that polygraph testing is a sensible additional tool<sup>40</sup>. The amendments would not require but empower Scottish Ministers, and the Department of Justice in Northern Ireland, to include polygraph conditions in the licences of certain terrorist offenders.
28. Polygraphs are not currently used for offenders in Scotland or Northern Ireland, which is different from the position in England and Wales where they are employed to assist in monitoring sex offenders on licence. It follows that Scotland and Northern Ireland would need to develop a polygraph infrastructure.
29. 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. This is no more so than in Northern Ireland, where a distinction will need to be drawn between permitted factual questions for the purpose of ensuring compliance with licence conditions, and (what would not be permitted) general intelligence-gathering on associates.

19 June 2020

---

<sup>40</sup> See Note 2 on Sentencing Reforms at paragraphs 22 to 26, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/Note-2-on-Sentencing-Reforms.pdf>.