

COUNTER-TERRORISM ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – Prosecution and Punishment of Terrorist Offences

Jurisdiction

Section 28 – Jurisdiction to try offences committed in the UK

84. *Section 28* provides for UK-wide jurisdiction for specified terrorism offences, regardless of where in the UK the offence took place. The purpose of this section is to remove the need to have separate trials for connected terrorist offences which occur in different jurisdictions within the UK. The common law currently provides that a significant part of an offence must take place within the part of the UK in which the court trying the offence is located. *Subsection (2)* sets out the offences to which this provision is to apply. These are the offence under section 113 of the Anti-Terrorism, Crime and Security Act 2001 and all offences under the 2000 and 2006 Terrorism Acts (other than those with an extra-territorial element and those that do not have UK-wide extent). This provision will also apply to the ancillary offences associated with the offences listed in *subsection (2)* by virtue of the general law which provides that jurisdiction for an ancillary offence follows that for the substantive offence.
85. *Subsections (3) and (4)* allow the Secretary of State to amend the list of terrorism offences in *subsection (2)* by order (subject to the affirmative resolution procedure), and *subsection (5)* provides that an offence may only be added in this way if it appears to the Secretary of State necessary to do so for the purpose of dealing with terrorism. This means that where an offence under the general criminal law is added to this section by order, the jurisdiction provided by the section will only apply where such an offence is being used in a terrorism case. At report stage in the House of Commons the then Minister of State for policing, crime and security in the Home Office, Mr Tony McNulty, said that this section and any offences added under the order-making power will apply only in relation to offences committed on or after the coming into force of the relevant provision (Hansard, 10 June 2008: Column 226 – 227).
86. *Subsection (6)* inserts a new *subsection (6A)* into section 1 of the Justice and Security (Northern Ireland) Act 2007. Section 1 of that Act allows for a non-jury trial in Northern Ireland where certain conditions are met. This new subsection precludes the Director of Public Prosecutions for Northern Ireland from issuing a certificate for a non-jury trial where the proceedings are only taking place in Northern Ireland as a result of the jurisdiction provided by section 28 and the only condition which would enable a non-jury trial to take place is the fourth condition of section 1 of the 2007 Act. This means a prosecution in Northern Ireland arising from the jurisdiction provided by section 28 could only be by way of a non-jury trial where the offence had a connection to a proscribed terrorist organisation whose activities are connected with the affairs of Northern Ireland (in the ways set out in conditions 1 to 3 in section 1 of the 2007 Act) and the Director of Public Prosecutions for Northern Ireland was satisfied that in view

of this there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

Consent to prosecution

Section 29 – Consent to prosecution of offence committed outside UK

87. This section amends section 117(2A) of the Terrorism Act 2000 (the 2000 Act) and section 19(2) of the Terrorism Act 2006 so that the consent of the Attorney General or the Advocate General for Northern Ireland (or prior to the coming into force of section 27(1) of the Justice (Northern Ireland) Act 2002, the Attorney General for Northern Ireland) is required before the Director of Public Prosecutions or Director of Public Prosecutions for Northern Ireland may consent to the prosecution of the offences to which those provisions apply, if it appears to the latter that the offence was committed outside the UK. The offences which require such consent are any offence under the 2000 Act other than those listed in section 117(1) of the 2000 Act or any offence under Part 1 of the 2006 Act. This amendment is based on recommendation 15 of Lord Carlile’s January 2007 report on the definition of terrorism.

Sentencing

Section 30 – Sentences for offences with a terrorist connection: England and Wales

88. **Section 30** is included in response to recommendation 8 of Lord Carlile’s January 2007 report on the definition of terrorism, that a terrorist connection should be considered to be an aggravating factor in sentencing. This is important where persons are convicted of offences other than those under the terrorism legislation but where the offence is connected with terrorism (for example an explosives-related offence).
89. Under *subsections (1) to (3)* a court in England and Wales considering a person’s sentence for an offence listed in Schedule 2 must, if it appears that there was or may have been a terrorist connection, make a determination (on the criminal standard of proof) as to whether there was such a connection. The court will make this determination on the basis of the usual information before it for the purposes of sentencing, that is the trial evidence or evidence heard at a *Newton* hearing (if necessary) following a guilty plea, and taking account of any representations by the prosecution or defence. A *Newton* hearing is where the judge hears evidence from both the prosecution and defence and comes to his or her own conclusion on the facts, applying the criminal standard of proof. If the court determines that there was a terrorist connection, it must treat that as an aggravating factor when sentencing the offender (*subsection (4)*). The meaning of an offence having a “terrorist connection” is defined in section 93 as being where the offence is or takes place in the course of an act of terrorism or is committed for the purposes of terrorism. *Subsection (6)* provides that this statutory aggravating factor in sentencing will apply only in relation to offences committed on or after commencement.

Section 31 – Sentences for offences with a terrorist connection: Scotland

90. **Section 31** provides that in Scotland the sentencing court must treat a terrorist connection (as defined in section 93), proved to the trial court, as an aggravating factor when sentencing for an offence specified in Schedule 2 to the Act (offences where terrorist connection to be considered). *Subsection (3)* requires a court imposing an aggravated sentence for an offence with a terrorist connection to state the extent and reasons for the difference between the sentence it imposed and that it would have imposed if the offence had not had a terrorist connection. *Subsection (4)* provides that evidence from a single source is sufficient to prove this aggravating factor – which is different from the usual position under the law in Scotland where corroboration is required. *Subsection (5)* provides that this new aggravating factor will only apply in relation to offences committed on or after commencement.

Section 32 – Sentences for offences with a terrorist connection: armed forces

134. This section makes corresponding provision to that in section 30 for service courts considering for the purposes of sentence the seriousness of a service offence as respects which the corresponding civil offence is an offence specified in Schedule 2. Corresponding civil offence is defined in section 95(4).

Section 33 – Power to amend list of offences where terrorist connection to be considered

91. This section provides the Secretary of State with a power to amend (by order subject to the affirmative resolution procedure) the list of offences in Schedule 2 in relation to which the court must consider whether there is a terrorist connection.

Schedule 2 – Offences where terrorist connection to be considered

92. **Schedule 2** sets out the list of offences under the general criminal law (as opposed to the terrorism legislation) in relation to which the court must consider whether there is a terrorist connection for the purposes of aggravated sentencing (sections 30 to 33). These are the offences most frequently used to prosecute terrorist cases or which are most likely to be used to prosecute such cases. The list of offences in Schedule 2 and determination of terrorist connection are also relevant to the forfeiture provisions in the Act (see section 35 which inserts new section 23A(4) into the 2000 Act) and the notification requirements of Part 4 of the Act (see section 42).

Forfeiture

Section 34 – Forfeiture: terrorist property offences

93. **Section 34** replaces section 23 of the 2000 Act (forfeiture: terrorist property offences), which deals with the power of a court to order the forfeiture of money or other property from a person convicted of offences under sections 15 to 18 of that Act (“terrorist finance” offences). The principal change made to section 23 is that the court may make a forfeiture order in respect of money or other property which had been used for the purposes of terrorism. So, for example, the court could order the forfeiture of a flat which was used for making bombs.

Section 35 – Forfeiture: other terrorism offences and offences with a terrorist connection

94. **Section 35** inserts a new section 23A into the 2000 Act. This allows the court which convicts a person of certain offences to order the forfeiture of money or other property in the possession or under the control of the convicted person at the time of the offence and which either had been used for the purposes of terrorism or was intended by that person to be used for those purposes, or which the court believes will be used for the purposes of terrorism unless forfeited. The offences in respect of which this power of forfeiture is available are certain offences under the 2000 Act and the Terrorism Act 2006 (but not the terrorist finance offences, which are covered by new section 23), and, in England and Wales and in Scotland (but not in Northern Ireland) offences falling within Schedule 2 which the court determines have a terrorist connection (as defined in section 93) under section 30 or 31.
95. Section 23A(5) allows the Secretary of State to amend the list of offences to which the provision applies by order, subject to affirmative resolution (see *subsection (2)* of section 35 which amends section 123 of the 2000 Act which specifies the instruments made under that Act which are subject to the affirmative resolution procedure).

Section 36– Forfeiture: supplementary provisions

96. Section 36 inserts a new section 23B into the 2000 Act which contains supplementary provisions in relation to the court’s power to make a forfeiture order under section 23 or 23A.
97. Section 23B(1) allows a person other than the convicted person who claims to have an interest in anything which can be forfeited to be given an opportunity to be heard by the court before it makes an order.
98. Section 23B(2) requires the court, before making an order, to have regard to the value of the property and the likely effect (financial or otherwise) a forfeiture order will have on the convicted person.
99. Section 23B(3) makes provisions for procedures in Scotland.
100. Section 23B(4) gives effect to Schedule 4 to the 2000 Act which makes further provision in relation to forfeiture orders made under sections 23 and 23A. Schedule 4 is consequentially amended by Schedule 3 to this Act.

Section 37 – Forfeiture: application of proceeds to compensate victims

101. Subsection (1) of section 37 inserts a new paragraph 4A into Part 1 of Schedule 4 to the 2000 Act. Paragraph 4A(1) allows a court making a forfeiture order in a case where the offender has been convicted of an offence which has resulted in another person suffering personal injury, loss or damage, or where any such offence is taken into consideration, to order that an amount is to be paid to that person out of the proceeds of the forfeiture. The court may specify a sum which the amount to be paid may not exceed.
102. Paragraph 4A(2) defines for this purpose the proceeds of forfeiture as being the aggregate amount of any forfeited money plus the proceeds of any sale or disposal of forfeited property, after deduction of the costs of the sale or disposal. This sum will then be reduced by the amount of any payment made under paragraph 2(1)(d) (to a person with an interest in the property) or 3(1) (to a receiver appointed to implement the forfeiture order) of Schedule 4 to the 2000 Act.
103. Paragraph 4A(3) provides that a court may only make an order under this paragraph if it is satisfied that it would have made an order under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (which is the general power under which a court may make a compensation order on conviction) requiring the offender to pay compensation, if it had not been for the inadequacy of the offender’s means.
104. Subsection (2) inserts new paragraph 17A into Part 2 of Schedule 4 to the 2000 Act, making similar provision in Scotland; and subsection (3) inserts new paragraph 32A into Part 3 of Schedule 4, making similar provision for Northern Ireland.

Section 38 – Forfeiture: other amendments

105. Subsection (1) of section 38 substitutes a new section 120A into the 2000 Act.
106. New section 120A(1) sets out some specific items, connected to the offence, which may be forfeited in relation to specific offences in the 2000 Act. For sections 54 and 58, there is no change as to what may already be forfeited under the 2000 Act.
107. New section 120A(2) provides that the court must give an opportunity to be heard to any person other than the convicted person who claims to have an interest in anything which can be forfeited under this section. (This replicates provision to this effect which is currently in sections 54 and 58 of the 2000 Act.)
108. New section 120A(3) provides that a forfeiture order does not come into effect until all possibilities of it being varied or set aside on appeal have been exhausted. (Provision to this effect is currently in sections 54 and 58.)

*These notes refer to the Counter-Terrorism Act 2008
(c.28) which received Royal Assent on 26 November 2008*

109. New section 120A(4) allows the court to make any provision necessary to give effect to the forfeiture, including provisions relating to the retention, handling, disposal or destruction of what is forfeited. Destruction might be ordered for example in relation to articles seized whose continued existence are considered dangerous.
110. *Subsection (3)* of section 38 inserts a new section 11A into the Terrorism Act 2006. New section 11A(1) allows for the forfeiture on conviction for an offence under sections 9 or 10 of the Terrorism Act 2006 of any radioactive device or material, or any nuclear facility made or used in the commission of the offence. New section 11A(2) provides similar powers in relation to an offence committed under section 11 of the Terrorism Act 2006, allowing the forfeiture of certain nuclear materials which were the subject of demands or threats falling within subsections (1) and (3) of that section. There are similar supplementary provisions to those in the new section 120A.

Section 39 – Forfeiture: consequential amendments

111. **Section 39** gives effect to Schedule 3 which makes amendments consequential upon the new provisions concerning forfeiture orders in section 34 - 39.

Schedule 3 – Forfeiture: consequential amendments

112. **Schedule 3** contains amendments consequential on those made by sections 34 to 38. These are mainly to amend Schedule 4 to the 2000 Act, to take account of the extended forfeiture regime. Schedule 4 to the 2000 Act makes supplementary provision concerning forfeiture orders under section 23 of the 2000 Act, for example in relation to restraint orders and how forfeiture orders may be enforced.