The Terrorism (Protection of Premises) Bill – a classic case of reinventing the wheel

Instead of creating a new regulatory body to safeguard against terrorists, **Philip Kolvin KC** asks why Government didn't use the licensing regime to tackle the task?

The draft Terrorism (Protection of Premises) Bill is designed to protect the public from acts of terrorism. This article concerns the question of whether it is necessary to constitute a new regulator for the purpose. It does not concern the substantive content of the Bill. It is confined to the question of the appropriate mechanism for enforcing the obligations contained in the Bill.

The Bill

The Impact Assessment for the Bill explains that the strategic objective is to keep citizens safe and secure. The policy objectives are to: 1) reduce the impact of terrorist attacks where they do occur; 2) provide clarity of responsibility at premises in scope; 3) improve consistency of security considerations; and 4) expand the support available to help those responsible for the delivery of security in publicly accessible locations (PALs).

The Bill provides for two sorts of premises – standard duty and enhanced duty premises. Both must fulfil the use criteria set out in Schedule 1. The former have a public capacity of at least 100, the latter have a public capacity of at least 800. The legislation also provides for qualifying public events, which would include concerts and festivals with a capacity of at least 800. All of these must be registered with or notified to a national regulator.

Standard duty premises will have to carry out a standard duty evaluation, whereas enhanced duty premises and qualifying public events will have to carry out an enhanced terrorism risk assessment. The latter is more detailed, with greater focus on practicable prevention measures which will need to be adopted, together with a security plan, overseen by a "designated senor officer". All premises will need to train relevant workers.

The role of licensing

It is likely that licensed premises will form the majority of larger premises affected by the Bill precisely because they are places where people congregate with a degree of density attractive to those intent on terror.

That being so, the Bill suffers from a remarkable lacuna. It simply fails to acknowledge the role of the licensing system in protecting the public. The only mention of licensing is in Clause 38, dealing with when licence plans can be removed from the public register.

The purpose of the Licensing Act 2003 was essentially four-fold:

- To place control of licensed premises in the hands of local licensing authorities, which are obliged to have regard to national guidance issued by the Secretary of State under s 182, and also to have regard to their own statement of licensing policy under s 4, so achieving a broad consistency of approach, whether local or national.

- To bring together regulation of premises under one legislative scheme, so as to avoid duplication of regulation, with a long list of responsible authorities able to make representations on applications as well as applying to review premises which are non-compliant or failing to meet the public interest objectives of the legislation. The police, obviously, are a responsible authority.

- To set out licensing objectives, which are the prevention of crime and disorder, the prevention of nuisance, public safety and the protection of children from harm.

- To give licensing authorities power to curtail or even revoke licences using powers of review or, in urgent cases, summary review.

Clearly, The Prevention of Terrorism Act 2005 engages all

of the licensing objectives. Therefore, such prevention is directly within the scope of the Licensing Act 2003.

In practice, the prevention of terrorism is already dealt with under the Licensing Act 2003 in a number of ways.

First, at the individual decision-making level, any responsible authority, or indeed anyone else, can make a representation dealing with terrorism. Similarly, a review may be brought on the grounds that the premises are not doing enough to counter the threat of terrorism. This gives the licensing authority power, for example, to attach conditions concerning counter-terrorism.

Second, an authority may set out specific expectations regarding terrorism in its licensing policy. A good example is Westminster City Council, which sets out detailed requirements which operators need to meet on pain of facing a refusal of their application or a revocation of their licence.[1]

Third, in respect of events, authorities establish safety advisory groups (SAGs), which scrutinise pending events and work with organisers to ensure that the licensing objectives are promoted. Whether because they have a power of veto over the event under licensing legislation or because of their independent powers under health and safety legislation or police legislation, organisers need to have secured the approval of the SAG before their event proceeds. For festivals, taking one example, there is practically always a need for a counter-terrorism risk assessment, with the police playing a key role in ensuring that the measures proposed are adequate, and based on factors including the current risk level, local intelligence and factors directly related to the event.

For events taking place in sports stadia, as well as a premises licence or licences, there can be three other, separate, consents in place: a licence from the Sports Grounds Safety Authority (SGSA); a safety certificate for the sporting events there; and a special safety certificate for other types of events. SGSA's policy is to adopt a wide approach to the concept of safety, to include counter-terrorism. It can therefore attach conditions to a licence requiring incorporation of counter-terrorism measures. It can also direct local authorities to include measures in safety certificates. Its advice to authorities is as follows: [2]

4. Counter Terrorism

- *Are procedures in place to hold parts of a SAG meeting in confidence where this is required by the information to be discussed?*
- *Does the ground have contingency plans that include the different methods of people movement in an emergency situation?*
- *Does the ground have a lock down plan?*
- *Is there a specific counter terrorism plan that has been developed by the club?*
- *Are all counter terrorism documents marked in accordance with a secure documents scheme, such as the Government Security Classification Scheme?*
- *Has the ground produced a plan to deal with an increase in the threat level?*

In all of these ways, therefore, provision has been made or could be made for counter-terrorism measures to be dealt with through the licensing regime.

The relevance of this is that, not only will licensed premises form the lion's share at least of the largest premises to be regulated under the proposed legislation (such as stadia, festivals and nightclubs), they will be the most concentrated in point of location, and the most densely packed in terms of users. For these reasons, it is not easy to understand why the draft Bill simply does not recognise that there is a regime which is operational and actually and potentially capable of achieving the same ends as the legislation in view.

In Volume 1 of the Manchester Arena Inquiry Report, Sir John Saunders clearly contemplated that the Protect Duty would be enforced through existing regulatory regimes, including licensing:

> *8.46 For venues capable of accommodating large audiences, it seems to me that considerations of eliminating or reducing risk from terrorist attacks should be part of the prebuilding process. Once premises are constructed, it may be that compromises in the discharge of the Protect Duty will be reached to enable the premises to trade. For example, one of the principal reasons that SA was able to detonate his bomb was the difficulty of making the City Room secure because of its design and use.*
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> *8.47 I consider it is important that before premises are built, or there is a change of use, consideration is given to whether the design is suitable for providing the level of security required by the Protect Duty. In the end, it*

1 Westminster City Council, Statement of licensing policy, CE 1.

2 https://sgsa.org.uk/wp-content/uploads/2018/09/Wider-Definition-of-Safety-Local-Authority-Checklist.pdf

would be better for developers to know in advance whether their building was likely to comply with any Protect Duty rather than face difficulties after they have constructed the building.

8.48 Safe means of entry and egress can be considered before the premises are built, so that security difficulties such as those caused by access through grey spaces can be resolved. The nature of the risks and threats from terrorists change, as we have seen over the past decade. While it may be impossible to consider every possibility at the construction planning stage, many could be.

8.49 There are already statutory requirements which could cater for this. It could be done as part of the construction planning or the licensing process. Considerations of public safety are already part of the licensing process and there is no reason why consideration of the vulnerability of a terrorist attack in new premises should not be part of the planning process. I understand this could come within the present planning legislation, but if a widening of the ambit of planning permission was required, there is no reason why that could not be achieved by government guidance or, if necessary, the primary legislation which will be required to introduce the Protect Duty.

8.50 Similar considerations apply to licensing permissions. Any building such as the Arena would require a licence to permit public entertainment and the sale of alcohol. Public safety has always been a consideration in the granting of licences and the clear terms of the Licensing Act 2003 mean that it still is.

8.51 I recommend consideration is given to these matters when legislating for a Protect Duty. The Home Office, in their submissions to me, indicated that they will consider reviewing the Licensing Act 2003 guidance once a Protect Duty has been brought in. An addition to that guidance is all that would be required. Any change in the guidance needs to be consistent with a new Protect Duty and there seems no reason why it should not be issued at the same time as the introduction of the new duty.

As may be seen, Sir John Saunders contemplated that the Protect Duty would find its expression through construction, planning and licensing laws.

Therefore, one might reasonably have expected to find in the Impact Assessment accompanying the draft Bill some explanation for why the licensing system (among others) was not considered to be a suitable means of protecting the public from terrorism, or at least an explanation of why it was thought necessary to bring in a new regime altogether, and how it was expected to complement existing regimes. However, the Impact Assessment is silent on the topic. It does not mention the Licensing Act 2003 at all, except in the context of Sensitive Information in Licensing Applications.

This omission is really underlined by the two options which the Impact Assessment explores. The first option is to do nothing. The second option is to introduce the legislation contained in the draft Bill. That is a clearly deficient analysis, in the context of a regulatory system which already deals with matters of security and safety.

In the case of licensed premises, there is no reason why the licensing system cannot be utilised to ensure that venues are training their staff, carrying out risk assessments and adopting measures to promote counter-terrorism.

A Protect Code

It is suggested that the Secretary of State publish a Protect Code, containing all the substantive duties on premises currently found in the Bill. This would then be imposed on all the premises covered by the Bill through existing regulatory structures.

When it comes to licensing, a light touch means of enforcing the Protect Code would be to amend the Secretary of State's Guidance under s 182 of the Licensing Act 2003 to set out expectations on licensees.

If, however, it is considered that all premises licences should simultaneously be subject to legal obligations, this could be achieved through a small amendment to s 19A(1) of the Act, deleting the words "relating to the supply of alcohol" and "relevant" so entitling the Secretary of State to publish a Protect Code and order that the code be imposed as a mandatory condition on all licences for premises with capacities corresponding to those applicable to the standard and enhanced tiers.

The same code could be imposed by the Secretary of State:

- On gambling premises under s 167 of the Gambling Act 2005.
- On stadia by s 2(2) of the Safety at Sports Grounds Act 1975.
- On all other premises by regulations under s 15 or approved codes of practice under s 16 of the Health and Safety at Work Act 1974.

In short, the Secretary of State should publish a Protect

Code, and the provisions of the code should be enforced immediately through existing regulatory structures.

Advantages of the Protect Code

There are several advantages to the Protect Code approach.

First, a Code could be published and enforced immediately. In contrast, it is understood that the process of legislation and establishment of the regulator will take at least three years. There is no need for that delay.

Second, the enforcement of a Protect Code will be through existing regimes. This will avoid conflict between the licensing regime and the Martyn's law regime. For example, in licensing, the requirements of the prevention of crime objective might cut across the Protect Code. For example, invacuation might breach a licensing condition as to searching entrants. The licensing authority can accommodate and iron out these conflicts in its decision-making. Another example is where there are existing conditions dealing with terrorism. Are they to fall away when the Protect Duty comes into being, or are they to be enforced simultaneously? The Bill does not deal with this. The Protect Code approaches avoids the difficulty altogether.

Third, by the same token, the enforcement of the Protect Code regime avoids duplication between the two regimes.

It is not only that there is a serviceable system, tailor-made to achieve the ends of the Bill but ignored by the Bill, but the Bill itself does not explain exactly how the two regimes are to sit side by side. Should authorities cut and paste the Protect Duty into licences, or must they abjure involvement? Should the Protect Duty cease to apply provided that the licence contains equivalent matters? Should licence conditions dealing with counter-terrorism be deemed null and void if the Protect Duty applies, as occurs with Licensing Act conditions replicated in a sex establishment licence, or fire safety conditions?

What if measures under the Protect Duty cut across measures under the licence? For example, a search condition under a licence may result in a queue. The Protect Duty may require the obviation of queues. Obviously, when the licensing authority has dominion over its terrain it can decide how the two aims are to be reconciled. But if there is a separate authority dealing with the matter, whose will prevails? The last to regulate, or the first, or the national regulator, or the local? No answer is given, because the question has not apparently been considered.

Fourth, the enforcement of the Protect Code through existing regimes will avoid extra burdens on business, on having to deal with two regulators rather than one, both dealing with the same subject matter.

Fifth, a Protect Code will avoid the burden of having to establish a new regulator. On 19 July 2023, in its report on the Bill, the House of Commons Home Affairs Committee said:

> *66. The regulator will be a key factor in determining the success of the Draft Bill's measures. It will have extensive powers and oversee a regulatory framework estimated to cost billions of pounds. However, the Draft Bill is currently incomplete on the identity of the regulator, its governance, and its accountability. There are no provisions setting out who the regulator will be, whether it will be independent or not, how it operates and how it should be accountable. It appears to be the Government's intention that the Draft Bill will be developed on this point once it has considered the outcome of the pre-legislative scrutiny process. However, that is misunderstanding the nature of such scrutiny; it is not for select committees to help initiate legislative provisions, particularly of such a fundamental nature, but rather to comment on draft provisions produced by Government. The Government should develop concrete proposals on the regulator within the next two months and amend the Draft Bill before introducing the Bill to the House.*

Nearly a year later, there has been no announcement as to the identity of the regulator.

Sixth, it appears that the Impact Assessment may seriously underestimate the costs of such a regulator. The assessment states at Table 1 that there will be over 303,000 premises in the Standard and Enhanced Tiers. It suggests that 5% of premises will be inspected each year, making 15,150 inspections per year. It says that each inspection will take five days to complete and write up. That implies 75,750 working days. Yet it says that this will be done by 56 inspectors. That would involve each inspector working 1,352 days per year, just on inspections.

Accordingly, its estimate of a set up cost of £14.4m and ongoing running costs of £112m appears to be a severe underestimate. Moreover, the estimate is based on just 1 in 20 premises inspected per year, or each premises being inspected every 20 years, which itself appears to cut across the very purpose of having the legislation.

Seventh, the proposed system for national regulation stands in contradistinction to most other regulation in this country, including policing, licensing and health and safety, which is enforced locally. Home Office officials have

suggested that there may be a lack of local competence to enforce the regime, but were that so, the solution is to up-skill local officials rather than replacing them with remote national officials.

The Regulatory Policy Committee's assessment was that the Bill is not fit for purpose, in that it has not provided evidence that the Bill would reduce terrorism for small venues, or that a new regulator with national inspectors would be efficient compared with local compliance. This is plainly true.

Eighth, the ability of the system to respond to risk is going to depend very much on local expertise, including understanding of the threat level locally, local intelligence, knowledge of local premises and so forth. It is hard to see the logic of removing from local agencies the control of risk in their own areas.

The local regulatory system established under the Licensing Act 2003 is bound to be superior to, and more sensitive and responsive than a national regulatory system given the knowledge of local CTSAs, local police and PCCs, local SAGs and local licensing authorities. It is unclear why it has been thought necessary to side-line the existing regime in favour of a remote national regulator. In its report on the draft Bill, the Regulatory Policy Committee said that the assessment needs to address disproportionality. The establishment of an extra regulatory system does indeed appear disproportionate.

Ninth, Clause 7 of the Bill takes out of regulation under the Act certain categories of premises, including premises subject to a transport security regime, such as railway stations. That is because the objectives of the legislation are achieved under the regimes governing such assets. It is hard to see why such a specific exemption has been made for some types of premises but not others, such as licensed premises. An appeal to consistency would suggest that the same arguments for exemption appertain, but these have not apparently been considered at all.

It is not easy to conjure significant counter-arguments. The question of enforcing the Protect Duty through existing structures simply does not seem to have been considered at all.

It is possible that there is a feeling, perhaps at ministerial level, that there needs to be an overarching "brand" to the legislation. That is achieved by terming the overarching code "The Protect Code". It does not need to result in wholly new legislation and a new regulator.

It is also possible that it is thought that there should be one piece of legislation enforceable across the UK. However, even if this is achievable in the devolved nations, it does not begin to answer the problems of new legislation cutting across existing regulatory regimes and a new regulator potentially cutting across existing local regulators. Moreover, it does not answer the problem of the significant and unjustified cost of a new regulator or the extended time for establishment of such a body.

Conclusion

Martyn's Law is important. But that does not mean that the wheel must be reinvented, or that a wholly new regulatory regime should be introduced to sit over an existing regime catering for the same things.

A better course would be for the incoming Government to publish a Protect Code and enforce it through existing legislative structures. This carries several legal, practical and logistical advantages and no significant disadvantages. It would also enable the Code to be implemented very quickly and certainly without the several years of delay and cost attendant on the establishment of a new regulator.

Philip Kolvin KC, CIOL
Barrister, 11 KBW

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