HOUSE OF COMMONS LIBRARY

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Counter-Terrorism and Sentencing Bill 2019-21

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Summary

The Counter-Terrorism and Sentencing Bill was introduced on 20 May 2020. Second Reading in the House of Commons is due to take place on 9 June 2020.

In the Queen's Speech in December 2019, the Government said it would legislate to "ensure the most serious terrorist offenders stay in prison for longer". Following the attacks at Fishmongers Hall in November 2019 and in Streatham in February 2020 the *Terrorist Offenders (Restriction of Early Release) Act 2020* was passed as emergency legislation to change release arrangements for certain terrorist offenders (in England and Wales and Scotland). At that time the Justice Secretary said wider measures would follow.

The Government has said the purpose of this Bill is to better protect the public from terrorism by strengthening the law which governs the sentencing, release and monitoring of terrorism offenders.

The Bill would:

- Introduce a new sentence for terrorist offenders; the "serious terrorism sentence", made up of a minimum of 14 years in custody and a 7 to 25 year period of extended licence. Courts would be required to impose the sentence for specified offences where certain conditions are met unless exceptional circumstances apply.
- Remove the possibility of release at the two thirds point of the custodial part of an extended sentence for relevant terrorist offenders and provide that offenders serving a serious terrorism sentence cannot be released until the end of the custodial part of their sentence.
- Increase from 10 to 14 years the maximum sentence available for the offences of: membership of a proscribed organisation, inviting or expressing support for a proscribed organisation and attendance at a place used for terrorist training.
- Allow for any non-terrorist offence with a maximum sentence of over 2 years to be found to have a terrorist connection.
- Expand the list of offences which can result in an extended sentence and increase the maximum period of the extended licence for certain terrorist offenders from 8 to 10 years (in England and Wales and Northern Ireland, it is already 10 in Scotland).
- Expand the list of offences that can result in a Sentence for Offenders of Particular Concern (SOPC) and create new sentences, the equivalent of a SOPC, for Scotland and Northern Ireland and for under 18s UK wide.
- Provide for polygraph testing of certain terrorist offenders when released on licence.
- Revise the scheme for imposing Terrorism Prevention and Investigation Measures (TPIMs) on those suspected of involvement in terrorism, by lowering the standard of proof required; expanding the range of measures available; and removing the two year time limit.
- Enable the police to apply for Serious Crime Prevention Orders (SCPOs) in terrorism cases.
- Remove the statutory deadline for conducting an independent review of the Prevent Strategy.

The Government has published Explanatory Notes. A Gov.uk page for the Bill provides links to a Fact sheet, Equality Statement, European Convention on Human Rights Memorandum and an Impact assessment. There is also a Bill page on the Parliament website.

The provisions of the Bill extend and apply to England, Wales, Scotland and Northern Ireland. Counter-terrorism is a reserved matter, although sentencing (including release provisions) is devolved to Scotland and Northern Ireland. For details see the Explanatory Notes, page 15 and Annex A.

Some provisions of the Bill would come into force on commencement, some two months after the Act is passed and others on a day to be set out in regulations. See the Government's Fact sheet and the Explanatory Notes, page 42, for details.

1. Background

1.1 Threat from terrorism

The national threat level from terrorism is currently "Substantial". This means that an attack is likely. It was reduced from "Severe", meaning that an attack is highly likely, in November 2019, where it had been since September 2017.

The threat level is set by the Joint Terrorism Analysis Centre (JTAC) and MI5.

According to the latest Government statistics, there were 280 arrests for terrorism-related activity in 2019, which was a decrease of 1% compared with the previous year.[1]

Five Terrorism Prevention and Investigation Measure (TPIM) notices were in force at the end of February.[2]

For further statistical analysis see Library Briefing Paper *Terrorism in Great Britain: the statistics*.

MI5 and CTP said in evidence to the Intelligence and Security Committee (ISC) that 2017 represented a step change, with a shift in the threat from terrorism, largely due to developments in Syria and Iraq. This, combined with the speed of the radicalisation process, has meant that the police and security services have not been able to concentrate solely on the immediate threat, but have also had to consider how to manage the level of risk associated with this volume.[3]

According to the Explanatory Notes accompanying the Bill, there have been 25 foiled attacks since March 2017.[4]

Recent attacks:

- 2020:
  - On 2 February 2020 Sudesh Amman attacked two people with a knife in Streatham (neither of whom died), before being shot by police. Amman had been released from prison in January 2020, having been convicted of terrorism offences in November 2018. He was given a standard determinate sentence of 3 years' and 4 months' detention. He was released from prison automatically at the halfway point.[5] The Parole Board was not involved in his release.
  - On 9 January 2020 a convicted terrorist offender, Brusthom Ziamani, was reported to have attacked a prison officer with another inmate at HMP Whitemoor. Both were reported to have been wearing fake suicide vests. A prison officer was

1 Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Home Office, December 2019
2 HCWS203, 28 April 2020
3 The 2017 Attacks: What needs to change?, Intelligence and Security Committee of Parliament, HC1694, 22 November 2018
4 Para 5
5 *R. v. Sudesh Faraz Amman*, Sentencing remarks, 17 December 2018

slashed and stabbed and several others were injured.[6] The Metropolitan Police confirmed that the incident was being treated as a terrorist attack and investigated by officers from the Met Police Counter Terrorism Command.[7] Both have been charged with attempted murder.[8]

- 2019:
  - On 30 November 2019 Usman Khan killed two people at Fishmongers' Hall near London Bridge before being shot by police. Khan had been released from prison in December 2018, having been convicted of terrorism offences in 2012. He was released from prison automatically at the halfway point of the custodial part of an extended sentence for public protection (EPP). [9]
- 2017 - between March and June 2017 there were four terrorist attacks in London and Manchester in which vehicles, knives and explosives were used to kill and injure members of the public. 36 people were killed in the attacks and almost 200 were injured.
  - On 22 March 2017 Khalid Masood killed five people, including an on duty police officer, in Westminster before being shot by armed police.
  - On 22 May 2017 Salman Abedi detonated an explosive at Manchester Arena, killing himself and 22 others.
  - On 3 June 2017 Khurum Butt, Rachid Redouane and Youssef Zaghba killed eight people before being shot by armed police.
  - On 19 June 2017 Darren Osbourne drove a van into a crowd outside Finsbury Park Islamic Centre, one of whom died.
  - On 15 September 2017 Ahmed Hassan left an improvised explosive device on an underground train. It partially exploded after the train arrived at Parsons Green station, injuring a number of people. No one was killed.

1.2 Responses to recent attacks

The Government published an update to its overarching counter-terrorism strategy, CONTEST, in 2018. Setting out the strategic context, it states that the UK faces a number of different and enduring terrorist threats, the foremost of which is Islamist terrorism.

The Strategy committed to introducing legislation that would enable the CPS to intervene at an earlier stage, underpinned by "longer prison

6 HMP Whitemoor prison stabbings classed as 'terror attack', bbc.co.uk, 10 January 2020
7 Update: Counter Terrorism investigation into serious assault at HMP Whitemoor, 10 January 2020, news.met.police.uk
8 Two to face trial in September re attack on prison officer at HMP Whitemoor, news.met.police.uk, 8 April 2020
9 *R v. Khan & ors [2013] EWCA Crim 468.* Khan had successfully appealed his original sentence

sentences and stronger management of terrorist offenders after their release".[10]

The *Counter-Terrorism and Border Security Act 2019* ("CTBSA 2019") introduced a number of new offences and provided for longer prison sentences for certain existing offences.

Following the attacks at Fishmongers Hall in November 2019 and in Streatham in February 2020 the *Terrorist Offenders (Restriction of Early Release) Act 2020* ("TORER Act") was passed as emergency legislation to change release arrangements for certain terrorist offenders, meaning that they would spend longer in prison.

The 2018 CONTEST strategy also described the approach to managing risks from terrorist offenders, explaining that in 2017 the Home Office and Ministry of Justice established a joint unit to strengthen the response to the threat from extremism and terrorism in prisons and among those on probation. This unit manages the risk from a wide range of offenders, approximately 700 at any one time, ranging from highly motivated terrorists to those with mental health issues or other vulnerabilities

> We identify the risk and needs of each offender of concern both in prison and on probation and provide a range of interventions, from psychological support and mentoring to education provision.[11]

A multi-agency case management process identifies those that pose the greatest risk of radicalising other prisoners. According to the Strategy, two specialist Separation Centres were introduced to help safeguard the mainstream prison population from these individuals.

The National Prisons Intelligence Coordination Centre is a multi-agency organisation led by counter-terrorism policing ("CTP") which co-ordinates the response to the threat from extremism, terrorist and organised crime prisoners.[12] According to CONTEST it "continues to improve … understanding of the risk terrorist offenders pose while in prison and upon release".[13]

The Government has said that the measures in the Bill will ensure that terrorist offenders spend longer in custody, providing "more time in which to support their disengagement and rehabilitation through the range of tailored interventions available while they are in prison".[14]

The Bill itself, like the TORER Act 2020, does not contain any measures regarding the management of terrorist offenders within prisons.

As was noted during debate surrounding the TORER Act 2020, it is not clear whether the interventions used in prisons with extremist offenders are effective. Separation centres set up for some extremist offenders

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10 HM Government, CONTEST, 2018, para 10
11 Ibid, page 41
12 The 2017 Attacks: What needs to change?, Intelligence and Security Committee of Parliament, HC1694, 22 November 2018, para 61
13 Ibid, page 41
14 Explanatory Notes, para 1

have been little used. For further information see section 4 of the Library briefing Terrorist Offenders (Restriction of Early Release) Bill 2019-2020.

The Government has also announced various non-legislative measures in response to the recent attacks, including an increase in funding for counter-terrorism policing; additional funding for victims of terrorism; and an independent review of the multi-agency public protection arrangements (MAPPA).[15]

[15] HC Deb 3 February 2020, c54-55. The MAPPA review was carried out by the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, who delivered his report to the Government on 22 May 2020

2. The sentencing and release of terrorist offenders

As with most criminal offences, there are currently no minimum sentences for terrorism offences. Maximum sentences are set out in legislation and guidelines for sentencers are produced by the independent Sentencing Council.[16]

The CTBSA 2019 made recent changes to terrorism sentences, including:

- increasing the maximum penalty for five terrorism offences;
- requiring the courts in Northern Ireland to consider whether specified offences have a terrorist connection and extending the list of offences where a terrorist connection must be considered in England and Wales and Scotland; and
- extending the list of terrorism offences for which Extended Determinate Sentences and Sentences for Offenders of Particular Concern are available.

The main types of prison sentences that would be affected by the changes in the Bill are briefly described below along with the current release arrangements.[17]

Release on licence

When a person is given a sentence of imprisonment for a period of time, they will not usually spend all of that time in prison. The law allows for prisoners to be released on licence for the last part of their sentence. Prisoners released on licence will be supervised in the community and must comply with certain conditions. For extremist or terrorist offenders, in addition to the standard licence conditions imposed, further conditions are available which can be imposed where necessary and proportionate to manage the risk posed by the offender.[18] If an offender breaches the conditions of their licence they can be returned (recalled) to prison to serve part, or all, of the remainder of their sentence in prison.[19]

Changes to release for terrorist offenders

The TORER Act 2020 changed the law in England and Wales and Scotland so that all offenders sentenced to a determinate sentence for a

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16 See Sentencing Council, Terrorism Offences: Definitive Guideline. A consultation on a revised terrorism guideline closed in December 2019, see Terrorism Guideline Consultation.

17 For a fuller explanation of the types of sentence available in England and Wales, Scotland and Northern Ireland and the relevant release provisions see the Explanatory Notes, paras 20-39

18 The Prison Service Instruction, Licence Conditions, Licences and Licence and Supervision Notices, 12/2015, sets out in detail the various licence conditions that can be imposed. Annex B lists the additional conditions that are available only for terrorist or extremist offenders.

19 For detail on recall see: Ministry of Justice/ HM Prison and Probation Service, Recall, Review and Re-Release of Recalled Prisoners Policy Framework, 31 March 2020

relevant terrorist or terrorism related offence must be referred to the Parole Board at the two-thirds point of the custodial part of their sentence before they can be considered for release.[20] Prior to the TORER Act some terrorist offenders, depending on the type of sentence and when it was imposed, were eligible for automatic release at either the half way or two thirds point and some were eligible for release at the discretion of the Parole Board at the half way point.

The TORER Act did not extend to Northern Ireland.[21] This Bill would make changes to the law in Northern Ireland to align the law on the release of terrorist offenders with that in England and Wales and Scotland.

2.1 England and Wales

Life sentence

Where a person is given a life sentence, a judge must specify the minimum term (sometimes called the tariff) the person must spend in prison before becoming eligible to apply to the Parole Board for release.[22] In rare cases a life sentence with a whole life order is imposed meaning that the offender is never considered for release.

Most prisoners with life sentences are eligible for release on life licence at the end of the minimum term. Release is subject to a Parole Board recommendation which is binding on the Secretary of State.[23] The Parole Board will only direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.[24] Once released, the offender remains on licence for life, liable to recall to prison.

Extended Determinate Sentence

An offender convicted of committing a specified serious offence,[25] who is not given a life sentence and is judged to be 'dangerous' can receive an Extended Determinate Sentence (EDS).[26] An EDS comprises a custodial term and an extended period to be served on licence in the community. The extended licence period for a terrorist offence can currently be a maximum of eight years.

For terrorist offenders, release on licence from the two thirds point of an extended sentence is at the discretion of the Parole Board. Prior to changes made by the TORER Act terrorist offenders serving extended

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20 For background on the TORER Act 2020 see the Library's briefing, Terrorist Offenders (Restriction of Early Release) Bill 2019-2020

21 See Explanatory Notes, para 7

22 The Library briefing The Parole System of England and Wales provides information on the Parole Board

23 Section 28 of the *Crime (Sentences) Act 1997*

24 For details see Parole Board, Guidance, How we make our decisions

25 The specified terrorism offences for which an EDS is currently available are listed in Part 3 of Schedule 15 of the *Criminal Justice Act 2003*. A number of these offences were added to Schedule 15 by the *Counter-Terrorism and Border Security Act 2019*.

26 The EDS was created by section 124 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

sentences imposed before 2015 could be released automatically on licence at either the two thirds or half way point.

The Parole Board will only direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. If the Parole Board does not grant release during the custodial part of the sentence, release is automatic at the end of the custodial term. When released, the offender must serve the remainder of their custodial term (if any) plus the extended period on licence and is liable to recall to prison during this time.

Sentence for offenders of particular concern

For certain offences,[27] if an adult offender is sentenced to a term of imprisonment, is not deemed 'dangerous' and does not receive a life sentence or EDS, the court must impose a Sentence for Offenders of Particular Concern (SOPC).[28]

A SOPC comprises the custodial term and an additional 12 month licence period. For terrorist offenders serving a SOPC, release on licence from the two thirds point is at the discretion of the Parole Board. Release is automatic at the end of the custodial term. On release the offender must serve the remainder of their custodial term (if any) plus 12 months on licence and is liable to recall to prison during this time.

The TORER Act changed the release provisions for terrorist offenders serving SOPCs. Previously, they could be released on licence from the halfway point at the discretion of the Parole Board.

2.2 Scotland

Extended Sentences

In Scotland the court may impose an extended sentence if it is intending on passing a determinate sentence in relation to a sexual offence of any length, or a violent or terrorism offence of four years or more, and considers that the terms of a standard sentence would not be adequate for the purpose of protecting the public from serious harm from the offender.[29]

An extended sentence is made up of a custodial term and an extension period set by the court (of up to ten years). Terrorist offenders serving an extended sentence are eligible to be considered for release by the Parole Board for Scotland at the two thirds point of the custodial term.[30] If not released by the Parole Board, release will be automatic at the end of the custodial term. Release will be on licence, subject to recall to prison, until the end of the extension period.

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27 The specified terrorism offences for which a SOPC is currently available are listed in Schedule 18A to the *Criminal Justice Act 2003*. Further terrorism offences were added to Schedule 18A by the *Counter-Terrorism and Border Security Act 2019*

28 The SOPC was created by the *Criminal Justice and Courts Act 2015*

29 Explanatory Notes, para 31

30 The release provisions for extended sentences for terrorist offenders were amended by the *Terrorist Offender (Restriction of Early Release) Act 2020*

Indeterminate Sentences

A terrorist offender serving a sentence with no set end point, such as a life sentence, will be eligible for release at the discretion of the Parole Board after the minimum custodial term set by the court is served. Once released the offender is subject to licence conditions for life.[31]

2.3 Northern Ireland

Determinate Custodial Sentences

A person sentenced to a determinate custodial sentence will serve the custodial part of their sentence, set by the court and which cannot be longer than half the overall sentence, in prison. The offender is automatically released on licence at the end of the custodial term.[32]

Extended Custodial Sentences

An extended custodial sentence can be imposed for certain violent or sexual offences if the court believes the offender is likely to commit similar offences in the future. The sentence is made up of at least one year in custody and an extended period on licence. The licence period can be up to five years for violent offences and eight years for sexual offences.[33]

Offenders serving an extended custodial sentence are eligible to be considered for release on licence by the Parole Commissioners at the half way point of the custodial term.[34]

Indeterminate Custodial Sentences

Offenders serving an indeterminate sentence are eligible to be considered for release by the Parole Commissioners after the minimum custodial term, decided on by the court, has expired. On release they are subject to licence conditions for life, unless revoked.

31 Explanatory Notes, paras 33-35
32 Explanatory Notes, para 36
33 Explanatory Notes, para 38
34 Explanatory Notes, para 39

3. Prevention and Investigation of Terrorism

3.1 TPIMs

TPIMs were introduced by the *Terrorism Prevention and Investigation Measures Act 2011* ("TPIMA"), which came into force on 15 December 2011.[35]

A TPIM notice imposes restrictions on an individual in order to protect the public from a threat posed by a person suspected of terrorism-related activity. TPIMs are intrusive measures aimed at disrupting terrorism related activity and facilitating the investigation of such activity. They are intended to be used as an exceptional measure in cases where there is a terrorist threat but it is not possible to prosecute or deport the suspect.

The criteria for imposing a TPIM are that the Secretary of State is satisfied on the balance of probabilities that a person is or has been involved in terrorism-related activity and that she reasonably considers that it is necessary to protect the public.

The TPIMA replaced the control order regime that had previously operated under the *Prevention of Terrorism Act 2005* ("PTA").

Control orders

Control orders were executive measures which imposed certain obligations upon an individual where it was considered 'necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.'[36] The Labour government introduced them through the *Prevention of Terrorism Act 2005*, following a House of Lords' ruling that the Government's previous scheme allowing for the deportation or indefinite detention of non-UK nationals suspected of terrorism was incompatible with the European Convention on Human Rights ("ECHR").[37]

Control orders were preventative measures, intended to protect members of the public from the risk of terrorism by imposing restraints on those suspected of involvement in terrorism-related activity.[38]

They were designed to address the threat from a small number of people engaged in terrorism in this country who the Government could

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35 A Draft Enhanced TPIM Bill was also published with the intention of enabling more stringent restrictions to be imposed should they become necessary in an emergency

36 Section 1(3) *Prevention of Terrorism Act 2005*

37 *A and others v Secretary of State for the Home Department* [2004] UKHL 56. The previous scheme was set out in the *Anti-Terrorism, Crime and Security Act 2001*, Part IV of which allowed for the deportation or indefinite detention of non-UK nationals who had been certified by the Secretary of State as suspected international terrorists. In 2004, a House of Lords ruling declared that these provisions were incompatible with Articles 5 (right to liberty) and 14 (non-discrimination) of the ECHR.

38 David Anderson QC, Control Orders in 2011, Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005, March 2012

neither successfully prosecute or deport. The objective of the orders was to prevent these individuals engaging in terrorism-related activity by placing a range of restrictions on their activities, including curfews, restrictions on access to associates and communications and, in some cases, relocation.[39]

Control orders were imposed by the Home Secretary but were also overseen by the courts to ensure they were in accordance with the law. Subjects were not entitled to see all the evidence against them, for national security reasons, but were entitled to sufficient information about the allegations to give effective instructions to a Special Advocate instructed on their behalf.[40]

Over the lifetime of the PTA 2005, control orders were made against 52 people who were all men suspected of involvement in Islamist terrorism. Control orders could be imposed on both British citizens and foreign nationals. At the start of the regime in 2005, all controlled persons were foreign nationals, but by the end in 2011, all were British citizens. The duration of the orders was from between a few months to more than four-and-a-half years.[41]

Following a review of counter-terrorism legislation in 2010, the Government concluded that:

> Control order powers have always been controversial because they are imposed without the person on whom they are applied being convicted for the terrorist activity in which he is judged to be engaged, because of the use of closed material and because of the very intrusive restrictions that they can involve. Moreover, control orders can mean that prosecution and conviction (a principal purpose of our counter-terrorism work) becomes less not more likely. For all these reasons the Government has been committed to an urgent review of control orders, as part of this wider review of counter-terrorist legislation.[42]

As Independent Reviewer of Terrorism Legislation (IRTL), David Anderson QC described the control order regime as repressive:

> The purely preventative aim of the control order system, its separation from the criminal justice process, its application to home citizens and the length of time for which an individual could be subject to it however placed it towards the more repressive end of the spectrum of measures operated by comparable western democracies.[43]

He attributed this to two characteristics of the regime:

> First, they restricted a range of basic freedoms, including the freedom of expression and association, the right to respect for private and family life and even - depending on the length of the curfew – the right to liberty. Of all the powers at the disposal of the state, only imprisonment has a greater impact on these freedoms. Yet unlike imprisonment, control orders could be

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39 HM Government's Review of Counter-Terrorism and Security Powers, CM8004, January 2011
40 *SSHD v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269, per Lord Phillips at §59
41 D. Anderson QC, Control Orders in 2011, p.4
42 HM Government's Review of Counter-Terrorism and Security Powers, Cm8004, January 2011, p.37
43 Control Orders in 2011, p.4

> imposed on persons who had neither been charged nor convicted of a criminal offence.
>
> Secondly, the ability of individuals to mount an effective court challenge was diminished by the non-disclosure to them, for national security reasons, of the detailed allegations upon which their control orders were founded. This was said to contravene their right to a fair trial, essential elements of which are the right to know the case against you and the ability to challenge that evidence.[44]

As a result, following consultation, the Government decided to repeal the control order regime and replace it with new Terrorism Prevention and Investigation Measures.[45]

Differences between TPIMs and control orders

The purpose of the TPIMA was to repeal control orders and replace them with a system which had improved safeguards for civil liberties.

The enhanced safeguards included:

- A higher threshold test of *reasonable belief* of involvement in terrorist-related activity, rather than *reasonable suspicion*.[46] ;
- A maximum time limit of 2 years. Further measures can only then be imposed if the individual has re-engaged in new terrorism-related activity;
- Restrictions that impact on an individual's ability to follow a normal pattern of daily life should be kept to the minimum necessary to protect the public, and be proportionate and clearly justified;[47]
- Judicial oversight and rights of appeal for individuals subject to a TPIM notice.

Less onerous restrictions

Whereas the possible restrictions under a control order were non-exhaustive, the TPIMA limited the possible restrictions on individuals by prescribing 12 measures in Schedule 1 of the Act.

The TPIMA provided for less onerous restrictions compared to the control order regime, for example:

- A more flexible overnight residence requirement (instead of lengthy curfews under the control order regime);
- A more limited power to impose tightly-defined exclusions from particular areas (instead of geographical boundaries under the control order regime);

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44 *Ibid.*, p.9
45 *Ibid.*, p. 41
46 This threshold was raised further by the *Counter-Terrorism and Security Act 2015* to satisfaction of involvement in terrorism "on the *balance of probabilities"*
47 Home Office, Overview of Terrorism Prevention and Investigation Measures 2011 Act and supporting documents, updated October 2016

- TPIM subjects are permitted a landline, a mobile telephone, and a computer with internet connection.[48]

Judicial oversight

The TPIMA also introduced further judicial oversight:

- High court permission is required to impose any measures under a TPIM notice;[49]
- Alternatively, in urgent cases, the High Court's permission must be sought immediately following the imposition of measures;[50]
- There is no appeal from an initial permission or urgent case decision except by the Home Secretary.[51] However, individuals have a right of appeal against a refusal to revoke or vary the measures; extension or revival of a notice; and variation of a measure without consent;[52]
- Each case is automatically reviewed by the courts.[53]

The High Court, whether giving permission for a TPIM notice or confirming retrospectively, will approve the Secretary of State's decision where it is not "obviously flawed".[54] Having done so, it must give directions for a full review hearing where the court will apply judicial review principles to the Secretary of State's decisions.[55]

Duty to consult and review

There is also a duty on the Secretary of State to consult on the prospects of prosecuting an individual before measures may be imposed, and to keep under review the continuing necessity of measures that have been imposed.[56]

Previous TPIM reforms

Following recommendations made by David Anderson QC as IRTL, the *Counter-Terrorism and Security Act 2015* ("CTSA 2015") introduced a number of amendments to the TPIMs regime. These included:

- Strengthening the locational constraints, including reintroducing involuntary relocation where necessary and proportionate, whilst retaining the freedom to travel more widely than under the control order regime;

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48 Home Office, Overview of Terrorism Prevention and Investigation Measures 2011 Act and supporting documents, updated October 2016. See Schedule 1, *Terrorism Prevention and Investigation Measures Act 2011*
49 Section 6, *Terrorism Prevention and Investigation Measures Act 2011*
50 Section 7 and Schedule 2, *Terrorism Prevention and Investigation Measures Act 2011*
51 Section 18(2), *Terrorism Prevention and Investigation Measures Act 2011*
52 Section 16, *Terrorism Prevention and Investigation Measures Act 2011*
53 Sections 9, *Terrorism Prevention and Investigation Measures Act 2011*
54 Section 6 – 9 *Terrorism Prevention and Investigation Measures Act 2011*
55 *Ibid.*
56 Section 10 and Section 11, *Terrorism Prevention and Investigation Measures Act 2011*

- Introducing appointments requiring TPIM subjects to meet with certain persons as required by the Secretary of State with a view to deradicalisation;
- Increasing the threshold test from reasonable belief of involvement in terrorism-related activity to a belief on the balance of probabilities;
- Narrowing the definition of "terrorism-related activity" by removing conduct which gives "support or assistance" to individuals who are known or believed to be involved in the "encouragements or facilitation of acts of terrorism". [57]

These changes were deemed to be necessary in light of the increased threat level from "substantial" to "severe" determined by JTAC in August 2014. The increased threat was attributed to the rise in the number of UK-linked extremists returning from Syria and Iraq.[58]

The Explanatory Notes ("EN") to this Bill say of the changes made by the CTSA 2015

> These amendments addressed the changing threat picture in 2015. More recently, in response to the Streatham attack, Lord Carlile, a former IRTL called for tougher restrictions on released prisoners, such as the reintroduction of control orders.[59]

The ECHR memorandum also suggests that the decision to raise the burden of proof was a "voluntary political decision in a somewhat different national security climate".[60]

However, as noted above, the CTSA 2015 reintroduced some stricter TPIM measures in response to an increased threat from terrorism at that time, but also raised the threshold that needed to be met for a TPIM to be imposed. The Government explained at the time that the threshold test was being increased in recognition of the "stringent preventative measures that may be imposed", which were not part of the package of measures agreed by Parliament in 2011.[61] The increased threshold was therefore intended to be a safeguard.

Further, Lord Carlile's suggestion of reintroducing control orders was intended to be an alternative to the measures which were enacted by the TORER Act, because of concerns that those measures might be vulnerable to legal challenge.[62] And as IRTL, Lord Carlile had proposed that any imposition of restrictions under the control order regime beyond two years should be subject to the extant higher burden of proof (balance of probabilities).

Consequently, the rationale for lowering the threshold test again, at a time when the threat from terrorism is assessed by JTAC to be lower than when it was raised in 2015, is not evident from the EN.

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57 David Anderson QC, Terrorism Prevention and Investigation Measures in 2013, March 2014
58 Explanatory Notes
59 Para 14
60 ECHR Memorandum, para 56
61 HL Deb 26 January 2015, c24
62 HL Deb 3 February 2020, c1689

3.2 Serious Crime Prevention Orders

Serious crime prevention orders (SCPOs) are civil injunctions aimed at preventing serious crime. They can be imposed for up to five years if the court has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales. Breach of an order is a criminal offence.

The CTBSA 2019 amended the *Serious Crime Act 2007* ("SCA 2007") in order to make the scheme explicitly available with respect to certain terrorist offences.

SCPOs can be imposed by the Crown Court following conviction. It is also possible for to apply for an SCPO in civil proceedings in the High Court in the absence of a conviction.

The 2018 report of the current IRTL, Jonathan Hall QC, notes that the SCA 2007 does not expressly limit the types of prohibitions, restrictions or requirements that may be imposed by an SCPO, and that in principle they could mirror those available under TPIMs. However, the report also suggests that the power is "seriously underused" and has not been used in connection with suspected terrorists to date.[63]

The IRTL recommended that the Home Secretary and CTP consider whether it would be practicable to obtain civil SCPOs against returning Foreign Terrorist Fighters for whom prosecution and TPIMs were not an option.

3.3 Prevent

The Prevent strategy was drawn up after the London bombings of 2005, as part of CONTEST. It sought to deal with community cohesion and integration, with those individuals and groups promoting division and hatred, and with the factors that predispose individuals or groups to respond to terrorist ideologies.

The 2018 CONTEST strategy describes the objectives of Prevent, which are to:

- Tackle the causes of radicalisation and respond to the ideological challenge of terrorism.
- Safeguard and support those most at risk of radicalisation through early intervention, identifying them and offering support.
- Enable those who have already engaged in terrorism to disengage and rehabilitate.

The CTSA 2015 put Prevent on a statutory footing, placing a duty on certain bodies, in the exercise of their functions, to have "due regard to the need to prevent people from being drawn into terrorism".

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63 Jonathan Hall QC, The Terrorism Acts in 2018, March 2020, paras 8.63-8.70

The CTBS 2019 imposed a requirement on the Government to initiate an independent review of Prevent within six months, the findings of which would be reported to Parliament within 18 months.

Lord Carlile was appointed to conduct the review,[64] however he stepped down in December 2019 after a legal challenge was initiated. The challenge concerned his impartiality, given his previous expressions of support for Prevent.[65]

The Government subsequently launched an open recruitment campaign to appoint an Independent Reviewer, acknowledging that this would impact on its ability to meet the statutory deadline.[66]

64 Lord Carlile to lead independent review of Prevent, Home Office, 12 August 2019
65 Government removes Lord Carlile as Prevent reviewer, conceding RWUK's legal challenge to his independence, rwuk.org, 20 December 2019
66 Letter from the Home Secretary to Yvette Cooper, Chair of the Home Affairs Committee, 27 April 2020

4. Use of polygraphs

The Bill would provide for polygraph testing of certain terrorist offenders when released on licence and introduce polygraph condition for TPIMs. A Ministry of Justice Factsheet explains that polygraphs have been used successfully by the National Probation Service in the management of sexual offenders since 2013.[67] This followed a pilot scheme initiated in 2009 which found that offenders that were subject to polygraph tests made more 'clinically significant disclosures'[68] than those that were not.

They are used on offenders released on licence and measure physiological changes which may indicate that the subject is attempting to be deceptive.[69] Examinations are used to monitor compliance with licence conditions and are carried out by Probation Officers who have been trained as accredited examiners to the standards set by the American Polygraph Association, according to the Ministry of Justice.

The Factsheet cites research conducted by the American Polygraph Association which found a 'decision accuracy rate' of 89% for polygraph tests. It also quotes a 'recent independent academic evaluation' (without citation) which concluded:

> Polygraph testing has increased the chances that a sexual offender under supervision in the community will reveal information relevant to their management, supervision, treatment, or risk assessment. It has also increased the likelihood of preventative actions being taken by offender managers to protect the public from harm

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67 Mandatory Polygraph Tests: Counter Terrorism Bill, Ministry of Justice, March 2020

68 Defined as new information that the offender discloses, which leads to a change in how they are managed, supervised, or risk assessed, or to a change in the treatment intervention that they receive, The evaluation of the mandatory polygraph pilot, Ministry of Justice Research Series 14/12, July 2012

69 The Management of Offenders Act 2007 enables offender managers to insert a polygraph testing condition into the licences of offenders released from sentences of 12 months or more for a sexual offence.

5. The Bill

5.1 Offences with a terrorist connection

Clause 1 would provide that any offence is capable of being found, by the court, to have a terrorist connection if the offence is punishable with a maximum sentence of more than 2 years and is not a terrorism offence.[70] This change would greatly increase the number of non-terrorist offences that can be found to have a terrorist connection. Currently only certain specified offences can be found to have a terrorist connection.[71]

If the court determines that there was a terrorist connection, it must treat that as an aggravating factor when sentencing the offender. The presence of an aggravating factor may result in a higher sentence (within the statutory maximum) than would otherwise be the case.

The finding of a terrorist connection can also trigger terrorist offender notification requirements and may result in the court ordering forfeiture in a wider range of cases.

Such a finding also engages the restrictions on release contained in the TORER Act which requires that all determinate terrorist or terrorism-related offenders must be referred to the Parole Board at the two thirds point of their sentence before they can be considered for release.

5.2 Serious terrorism sentences

The Bill would introduce a new sentence for serious terrorist offenders, the "serious terrorism sentence". The Government has said this new type of sentence will properly reflect the seriousness of the offences committed by these offenders.[72]

The serious terrorism sentence would comprise a minimum of 14 years in custody and a period of extended licence of between 7 and 25 years, to be determined by the court. The whole of the custodial period imposed would be served in custody, see section 5.7 below.

The new sentence would be available for certain serious terrorism offences where the following conditions are met:

- there is a significant risk of serious harm caused by the commission by the offender of further serious terrorism offences or other specified offences;
- the court finds the offender was aware, or ought to have been aware, that the offending was very likely to result in or contribute to the deaths of at least two people as the result of an act of terrorism, irrespective of whether or not any deaths actually occurred (the "risk of multiple deaths" condition); and
- the court does not impose a life sentence.

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70 Schedule 1 of the Bill list the offences where terrorist connection is not required to be considered because the offences are terrorism offences

71 See the Explanatory Notes, paras 43-46 for further detail

72 Counter-Terrorism and Sentencing Bill, Factsheet, para 4

The court would be required to impose a serious terrorism sentence where the above conditions are met unless exceptional circumstances apply in relation to the offence or the offender that justify not imposing a serious terrorism sentence.

The Bill provides for serious terrorism sentences:

- in England and Wales
  - for those aged 18 to under 21 (**clause 4)**
  - for those aged 21 or over (**clause 5**)
- in Scotland for those aged 18 or over (**clause 6**)
- in Northern Ireland for those aged 18 or over (**clause 7**).

For England and Wales, **clause 2** would provide a definition of a serious terrorism offence for the purposes of sentencing an offender to a serious terrorism sentence. **Schedule 2** lists the relevant offences. The offences listed have a maximum penalty of life imprisonment. **Schedule 4** lists the relevant offences for Scotland. **Clause 3** and **Schedule 3** make similar provisions for Northern Ireland.

Guilty pleas and reductions in sentence

Clause 8 would provide that the court in England and Wales may reduce the custodial term specified in clause 2 from the 14 year minimum where the offender pleads guilty.[73] The court would be prevented from reducing the term to less than 80 percent of the term otherwise required. This would limit the credit for guilty pleas resulting in serious terrorism sentences to no more than 20 percent rather than the 33 percent that would otherwise be possible.

Clause 9 would make similar provision for Scotland.

Clause 10 would allow the court in England and Wales to pass a lesser sentence for serious terrorist offenders who have assisted the prosecution and would otherwise have received the serious terrorism sentence with a minimum custodial term of 14 years.

Clause 7 would make similar provision in Northern Ireland regarding reductions to take into account guilty pleas and assisting the prosecution.

Minimum terms for life or indeterminate sentences

For England and Wales, **clause 11** would provide that where a discretionary life sentence is given to an offender who would otherwise be sentenced to a serious terrorism sentence, the minimum custodial term must be at least 14 years, unless the court finds there are exceptional circumstances which justify a lesser period.

Clause 12 makes similar provision for Scotland and **clauses 13 and 14** for Northern Ireland.

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[73] For general information, see the Library briefing, Reductions in sentence for a guilty plea

5.3 Extended sentences

Clause 15 sets out a number of offences, relating to explosives, biological chemical and nuclear weapons, and aviation, which would be eligible for an extended sentence in England and Wales, where they are found to have a terrorist connection.

Clause 19 (and **Schedule 5**) set out a number of offences which would be eligible for an extended sentence in Scotland, including terrorist offences and offences where they are found to have a terrorist connection.

Clauses 16, 17 and 18 would increase the extended licence period of an extended sentence for a serious terrorist offence to a maximum of 10 years for offenders under 18, under 21 and over 21 respectively in England and Wales. In Scotland the current maximum licence period is already ten years for terrorist offenders.

Clause 20 would enable extended sentences to be imposed for serious terrorism offences or other specified offences in Northern Ireland and would increase the maximum extension period of an extended sentence for a serious terrorism offence to 10 years.

The effect of these provisions would be that a serious terrorist offender who does not receive a serious terrorism sentence, for example because they are aged under 18 or do not meet the "risk of multiple deaths" condition, would receive an extended sentence with a licence period of up to 10 years.

5.4 Sentences for offenders of particular concern and terrorism sentences with a fixed licence period

The Bill would add offences to the list of offences that can require the imposition of a SOPC in England and Wales. This would mean that only the most minor terrorism offences (with a maximum sentence of two years or less) would not require a SOPC where an EDS is not imposed. The Bill would also create new sentences, the equivalent of a SOPC, for adult offenders in Scotland and Northern Ireland and for under 18s UK wide.

The Government Factsheet explains that these changes would ensure that, across the UK, terrorist offenders have a minimum period of supervision on licence of 12 months following release, even if they serve the full custodial part of their sentence in custody.[74]

Clause 21 and **Schedule 6** would restate and add to the list of offences for which a SOPC may be imposed in England and Wales.

Clause 22 would provide, in England and Wales, for a special sentence of detention for terrorist offenders of particular concern aged under 18. The new sentence, like the SOPC for adults, would be made up of a custodial term and a fixed 12 month period on licence. The court would

[74] Counter Terrorism and Sentencing Bill Factsheet, para 9

be required to impose the new sentence where someone under 18 is convicted of a specified terrorism offence and the criteria for a sentence of detention for life and an extended sentence of detention are not met, if the court would otherwise impose a custodial sentence.

The Government has said that, while the number of children convicted of terrorism offences is small, some pose a threat and so the Government intends, through this Bill, to ensure that measures are extended to those aged under 18 where appropriate.[75] The Government notes that the Bill affects custodial sentences applicable to children and so raises issues under the United Nations Convention on the Rights of a Child. The Government considers that the Bill is compatible with the Convention, noting that all considerations applicable to youth sentencing will remain in place.[76]

Clause 23 would create, in Scotland, a new terrorism sentence with a custodial term and a fixed licence period of one year. The court would be required to impose the new sentence where a person is convicted of a terrorism offence and the court does not impose a sentence of imprisonment for life, a serious terrorism sentence, an extended sentence or an order for lifelong restriction. **Schedule 7** lists the offences which would be eligible for the new sentence.

Clause 24 would provide, in Northern Ireland, for a new terrorism sentence with a custodial term and a fixed licence period of one year. The court would be required to impose the new terrorism sentence where a person is convicted of a serious terrorism offences, a terrorism offence punishable with more than two years imprisonment or any offence where a terrorist connection is made and the court does not impose a life sentence, an indeterminate sentence, a serious terrorism sentence or an extended sentence but the court has decided to impose a custodial sentence.

The sentences created by clauses 23 and 24 would be available for offenders aged both over and under 18.

For each of the sentences created by clauses 22, 23 and 24, the custodial term would be decided by the court. The custodial term plus the one year licence period could not exceed the maximum term available for the offence.

5.5 Increase in maximum sentences for certain terrorist offences

Clause 26 would increase the maximum sentence for the following offences from ten to fourteen years' imprisonment:

- Membership of proscribed organisation (section 11 of the *Terrorism Act 2000*)
- Inviting or expressing support for a proscribed organisation (section 12 of the *Terrorism Act 2000*)

75 Explanatory Notes, para 8
76 Explanatory Notes, paras 293-295

- Attendance at a place used for terrorist training (section 8 of the *Terrorism Act 2006*)

5.6 The Sentencing Code

The sentencing provisions in the Bill for England and Wales have been drafted so that they will amend the new Sentencing Code as contained in the Sentencing Bill [HL[2019-21 currently before the House of Lords. The Sentencing Bill would consolidate the law governing sentencing procedure in England and Wales into a Sentencing Code.[77] The Sentencing Code is a Law Commission project which re-enacts the law already in force in a more logical framework. It does not alter its substance or effect, such as by changing maximum sentences.

The Sentencing Code will not include release provisions which will continue to be found in the *Criminal Justice Act 2003*. The Sentencing Code will not apply to Scotland or Northern Ireland because sentencing procedure is a devolved matter for those jurisdictions.

5.7 Release

The Bill would remove the possibility of release at the two thirds point of the custodial part of an extended sentence following consideration by the Parole Board for certain terrorist offenders. It would also provide that offenders serving serious terrorism sentences cannot be released until they have served all of the custodial term imposed.

For England and Wales, **clause 27** would provide that certain terrorist offenders will not be released from prison until the end of the custodial part of their sentence. Currently terrorist offenders serving an extended sentence are referred to the Parole Board at the two thirds point of the custodial part of their sentence to be considered for release. A terrorist offender sentenced, on or after the date this provision comes into force, to a new serious terrorism sentence (see section 5.2 above), or to an EDS, for an offence with a maximum penalty of life imprisonment, would not be released until the end of their custodial term. This would apply to adult offenders and those aged under 18.

Schedule 9 (parts 1 and 3) lists, for England and Wales, the offences for which there will be no release before the end of the custodial part of an EDS or new serious terrorism sentence.

Clauses 28 and **Schedule 10** would make corresponding changes to the law in Scotland.

For Northern Ireland, **clause 30** would provide that the first eligible release point for all relevant terrorist offenders will be the two-thirds point of their sentence at which time they would be referred to the Parole Commissioners for consideration of whether they are safe to release. This would align the release arrangements in Northern Ireland with those in place in England and Wales and Scotland as a result of the TORER Act. **Clause 31** would provide that where a terrorist offender is

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77 For background see the Library Briefing for the Sentencing (Pre-consolidation Amendments) Bill [HL] 2019-21

sentenced to an extended sentence or a new serious terrorism sentence, on or after the date the provision comes into force, for an offence with a maximum penalty of life imprisonment, they would not be referred to the Parole Commissioners but would instead be released at the end of their custodial term.

5.8 Polygraph testing

The Bill (**clauses 32-34**) would also enable a condition to be imposed on terrorist offenders released on licence that they undertake regular polygraph tests. This is provided for by amendments to relevant legislation in England and Wales, Scotland and Northern Ireland respectively.

Clause 35 would enable the Secretary of State to make regulations setting out the detail of which offenders may be subject to polygraph licence conditions and how polygraph sessions should be conducted.

According to a Ministry of Justice Factsheet Mandatory Polygraph Tests Counter Terrorism Bill,[78] testing will be imposed on offenders:

- aged over 18
- assessed as Very High or High risk of serious harm
- Convicted of a specified terrorist offence or a specified offence with a terrorism connection;
- Sentenced to 12 months custody or more and released on licence.

There would also be a discretionary group who could be made subject to mandatory testing, which would "include those who meet the legal criteria but do not necessarily meet the policy position of High Risk of Serious Harm".[79] The Factsheet states that this includes offenders whose risk of re-offending is such as to justify mandatory testing and "ensuring it is 'necessary and proportionate' to manage [that risk]".[80]

Polygraph evidence could not be used in criminal proceedings, and nor could offenders be recalled to custody for failing a polygraph test. However, they may be recalled if they make disclosures during testing that reveal they have breached licence conditions or that their risk has escalated. Information gathered would be shared with police and could result in charges if a further offence had been committed.[81]

5.9 Release on licence of repatriated terrorist prisoners

Clause 36 and Schedule 11 would impose release restrictions on terrorist prisoners who have been sentenced overseas and repatriated to the UK. The changes would ensure their release provisions are

78 Mandatory Polygraph Tests Counter Terrorism Bill, Ministry of Justice, 12 March 2020
79 Mandatory Polygraph Tests Counter Terrorism Bill, Ministry of Justice, 12 March 2020, page 2
80 Mandatory Polygraph Tests Counter Terrorism Bill, Ministry of Justice, 12 March 2020, page 2
81 Ibid

consistent with the provisions in the Bill for those who were sentenced in the UK.

5.10 TPIMs

Part 3 of the Bill would make a number of significant changes to the regime governing the imposition of TPIMs, lowering the burden of proof required for a TPIM to be imposed; expanding the range of restrictions that can be imposed on a TPIM subject; and removing the time limit:

- It would lower the standard of proof required for the Secretary of State to impose a TPIM from being satisfied "on the balance of probabilities" that a person is or has been involved in terrorism related activity to having "reasonable grounds for suspecting" that a person is or has been involved in such activity (**clause 37**).
- It would remove the current two year time limit on the imposition of a TPIM in the absence of there being evidence of further involvement in terrorism. Instead, TPIMs issued after the Bill comes into force would last for a year but would be renewable indefinitely (**clause 38**).
- It would enable the Secretary of State to vary the location of a specified residence imposed as part of a relocation requirement where necessary for resource reasons. The EN provide the example of police resources in a particular area becoming stretched, making it difficult to manage a TPIM subject (**clause 39**)
- It would expand the existing power to impose an overnight curfew as part of a TPIM. The Secretary of State would be able to require a TPIM subject to remain within a specified residence for a longer period, although the EN state that this power would be subject to the overriding restrictions on length of curfews established by caselaw relating to Article 5 of the ECHR (**clause 40**).[82]
- It would introduce new measures that could be imposed on TPIM subjects, including a requirement for regular polygraph testing (**clause 41**) or drug testing (**clause 42**). As with the use of polygraphs for terrorist offenders released on licence, the information obtained could not be used in criminal proceedings. The Secretary of State would have a power to make regulations setting out the detail of how polygraph sessions should be conducted.
- It would also expand the information that a TPIM subject could be required to provide, including details of electronic devices belonging to members of the TPIM subject's household, and further details of their residence on an ongoing basis (**clause 43**)

[82] The ECHR memorandum includes an overview of the Article 5 case law on the use of curfews under the control order regime. It acknowledges that curfews lasting more than 14 hours may risk breaching Article 5, but concludes that "The *principle* of imposing a curfew on an individual under civil preventative measures does not therefore breach Article 5 and there are protections in place to ensure that measures do not individually or cumulatively amount to a deprivation of liberty."

5.11 Notification requirements

Clause 44 would add the offences of breaching a TPIM notice or a requirement imposed by a temporary exclusion order[83] to those that trigger notification requirements under the *Counter-Terrorism Act 2008*. This would mean that individuals convicted of these offences would be required to inform police of their whereabouts and provide contact details and financial and other information.

5.12 Serious Crime Prevention Orders

Clause 45 and **Schedule 12** would enable chief officers of police to apply for Serious Crime Prevention Orders in terrorism-related cases. Currently, application may only be made by the Director of Public Prosecutions in England and Wales, the Lord Advocate in Scotland, or the Director of Public Prosecutions for Northern Ireland. Chief officers of police would have to consult the relevant prosecuting authority before making the application.

Clause 46 would provide for a post-legislative review of this power within three years.

5.13 Prevent Strategy

Clause 47 would remove the time limit for conducting a review of Prevent Strategy currently imposed by section 20 of the CTBSA 2019. This requires a review to begin within six months of that Act being passed, and to report within 18 months. It received Royal Assent on 12 February 2019 and the review was therefore due to be completed by 12 August 2020.

This provision would apply retrospectively so as ensure that it covers any period when the deadline was not met.

[83] An offence under the Counter-Terrorism and Security Act 2015

6. Reaction and comment

6.1 Sentencing and release

The Independent Reviewer of Terrorism Legislation has drawn attention to two "stand out" aspects of the Bill concerning sentencing:

- the creation of the serious terrorism sentence with a mandatory minimum custodial period of 14 years and a mandatory minimum licence period of 7 years; and
- the ending of the Parole Board's role in considering early release for certain dangerous terrorist offenders so that release would be automatic and at the end of the custodial period.

Jonathan Hall QC describes the principle behind these reforms as appearing pessimistic:

> 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.[84]

He states that, in most cases of conviction following trial, the requirement of a 14-year minimum custodial term for the most serious offences where multiple deaths are very likely should not make much difference in practice to the sentence imposed.

Mr Hall notes that 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. He contrasts the new sentence with the now abolished sentence of Imprisonment for Public Protection and notes that the extended licence period for a serious terrorism sentence cannot be terminated early:

> 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.
>
> 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 cases, that does not apply to serious terrorism sentences. This might be not just a matter of fairness to genuinely reformed

[84] Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (1), June 2020

> individuals but also a means of easing future administrative burden.[85]

Mr Hall describes the removal of the Parole Board's role to consider the early release of certain dangerous terrorist offenders as a "profound change". He notes 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.[86]

The IRTL states that the changes being proposed to extend the SOPC are a sensible reform.[87] He explains that recent changes made by the TORER Act mean that standard determinate sentence prisoners might not be released until the expiry of their custodial term, giving rise to the possibility of a 'cliff-edge'. The effect of SOPC is to ensure that terrorist offenders who are sentenced to determinate sentences (i.e. those who have not been found to be dangerous) are nonetheless subject to an additional licence period of at least one year following release. He states that, with some minor exceptions, the changes proposed would ensure that the cliff-edge is not possible for anyone convicted of a terrorism or terrorism-connected offence.

Jonathan Hall welcomes the introduction of a special sentence of detention for terrorist offenders of particular concern aged under 18. He notes that there is limited flexibility for release and recall for terrorist offenders subject to Detention and Training Orders especially where they become more dangerous in detention and he therefore concludes that the new sentence would be useful. He notes that as there is no mandatory minimum custodial term, sentencing judges will be free to sentence in a way that is consistent with the principles that apply to sentencing children.

On the increases to the maximum sentence for three offences that would be made by clause 26, Mr Hall notes that the CTBSA 2019 addressed the appropriate maximum sentences for terrorism offences, increasing the maximum sentences for five offences, but not these offences. He states that "whilst providing additional headroom for sentencers dealing with worst type of these offences is always a temptation, most offenders are likely to fall somewhere below the highest sentencing bracket". He questions the effect this change might have on sentences for less serious offences:

> In these cases the effect of increasing the maximum sentence may be to pull up the sentence by several months to a year for less serious offenders. This raises the question of whether additional

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85 Ibid
86 Ibid
87 Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2), June 2020

> short periods of custody are beneficial in terms of protecting the public.[88]

6.2 Management of terrorist offenders in prison

Ian Acheson is a former prison governor who led a Government review of Islamist extremism in prisons, probation and youth justice which reported in 2016.[89] Commenting on the Bill, he has argued that lengthening the time terrorist offenders are kept in custody alone is not sufficient to improve public safety, without also making changes to the way they are managed in prisons. He said:

> Crucially, the imposition of more severe jail terms for terrorist acts, welcome as they are, will not on its own keep us safer if we don't do something to break the hold of the extremist mindset while such offenders are detained. (…)
>
> We must assertively engage and challenge violent extremists from day one in custody where we have the best chance of reducing their dangerousness and supporting a better identity to emerge. We must tailor the response to the individual offenders extremist pathology, including theological deformities; not 'sheep dip' generic solutions.[90]

He warned:

> We do need to see more focus on how extra time for violent extremists in custody will be used to challenge and change their hateful ideologies. If this isn't effectively addressed, the new measures will simply delay further attacks, and might even inspire them.[91]

6.3 Polygraph testing

On polygraph testing the IRTL states that he has concluded that polygraph testing is likely to be a valuable additional means of gathering information relevant to terrorist risk for terrorist offenders on licence. He highlights that whilst statements made in polygraphs tests would be expressly excluded from use in criminal proceedings against that individual, the use of statements for the purpose of making a TPIM is not expressly excluded. Mr Hall states:

> Unless addressed in the legislation, there is therefore the prospect of individuals making statements in the course of compulsory polygraph testing which are then used to secure a TPIM following the ending of their licence. This is a potentially oppressive consequence which may not be intended.

The Government's human rights memorandum which accompanies the Bill addresses this point, acknowledging that the Article 6 right to a fair trial could be engaged if information from a polygraph test was used to

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88 Ibid

89 For further information on the Acheson Review see section 4 of the Library briefing Terrorist Offenders (Restriction of Early Release) Bill 2019-2020

90 Tougher terrorism laws are popular. But will they actually work?, The Spectator, 20 May 2020

91 Prison sentences for any serious crime to be increased for 'terrorist connection' under government plans, Independent, 21 May 2020

apply for a civil order such as a TPIM. However it asserts that this would not breach the offenders Article 6 rights because

> the evidence presented would need to meet the relevant test for the order, and the result of a failed polygraph test would not be the only evidence provided in such an application but would be supported by other evidence. There would be also be further safeguards in the judicial process, as the court would be able to assess the evidence as presented and could refuse to grant the order or make the evidence inadmissible, if it would be unfair to the offender to admit it. In considering these issues the court would of course be bound to act in compliance with the Human Rights Act.[92]

Mr Hall also points out that unlike with sex offenders, the use of polygraphs for terrorist offenders will not have been piloted beforehand and suggests that therefore there is a strong case for thorough post-legislative scrutiny.

6.4 Prevention and Investigation

Jonathan Hall expressed concerns about the decision to lower the standard of proof required for the imposition of TPIMs.[93]

He noted that the courts have interpreted "reasonable grounds for suspecting", the threshold provided for by the Bill, as "a belief not that the person *is* a terrorist, only that they *may be* a terrorist". As a result, the Home Secretary would be able to impose TPIMs on a broader category of individuals: those she believed might, but might not be, terrorists. This entails a stronger possibility that some TPIM subjects would be innocent.

He questioned the justification for this, noting that despite the serious terrorist incidents that have occurred since the original introduction of control orders in 2005, the trajectory has been towards "maintaining the fullest range of measures … whilst accepting a certain standard of proof which, it appears, has not proven impractical".

Addressing one potential rationale for the change, he suggested that it would not assist in managing terrorist offenders released from prison, on the basis that their involvement in terrorist activity would have already been established by the courts, so that the existing standard of proof could be met. Further, they would be subject to licence conditions which would largely replicate the measures available under TPIMs.

And the increasing use of "New variant TPIMs", which reduce the evidentiary burden on the authorities where fewer measures are imposed on TPIM subjects, means that a justification based on administrative convenience cannot be sustained.[94]

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92 ECHR memorandum, para 21

93 Jonathan Hall QC, Note on Counter-Terrorism and Sentencing Bill: TPIM Reforms (1), terrorismlegislationreviewer.independent.gov.uk, 2 June 2020

94 These are discussed in the 2018 Report of the IRTL as a way of reducing the burden on resources associated with more restrictive TPIM measures. The approach is to impose few individual measures, for example limiting them to preventing subjects from associating with certain individuals. The Home Office's aspiration is that the

Mr Hall concludes that

> A safeguard that requires the Secretary of State to consider the intelligence presented to her by officials, and decide whether the individual has actually been involved in the terrorist-related activity that is alleged against them, and which allows a court to review that decision in the light of all the information presented to it, is not an impediment to safeguarding national security.

In a separate note on the duration of TPIMs, he also expressed doubt as to whether there was an "operational case for changing the TPIM regime at this point in time", and cautioned against the unnecessary expansion of terrorism laws.[95]

He pointed to the fact that the two year limit had been considered in detail by the previous David Anderson QC as IRTL, who had concluded that it was an "acceptable compromise", on the basis that TPIMs, with their lower standard of proof, should not become "a shadow alternative to criminal prosecution". Further, when TPIMs were revised in 2015, with the reintroduction of the power to relocate, Lord Anderson's conclusions were endorsed by the Government.[96]

Addressing the suggestion that some TPIM subject might 'bide their time' and refrain from engaging in terrorism related activity for two years, Mr Hall raised the question of how long it is fair to place potentially severe restrictions on an individual's liberty on the basis of their future intentions, rather than their past actions. He pointed to the "uncomfortable contrast"[97] between individuals who are convicted of terrorism offences potentially being free of restrictions sooner than a TPIM subject who has never been convicted of an offence.

Mr Hall also expressed concern that the availability of enduring TPIMs could give rise to a temptation to bypass the criminal justice process, which is the fairest way of dealing with terrorists, and commands the widest public support.

Finally, he noted the lack of safeguards in the Bill, and suggested that they are appropriate no matter how carefully the Home Secretary and her officials consider TPIMs. In particular:

- There is no requirement that there is an exceptional or compelling case for extending a TPIM beyond two years;
- There is no specific requirement to review the existing evidence and investigatory steps in order to reconsider whether prosecution might be possible at the point a TPIM is extended beyond two years;
- There is no requirement for continuing judicial scrutiny;

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litigation burden of establishing the necessity for such orders may be reduced, para 8.23-8.32.

95 Jonathan Hall QC, Note 2 on TPIM Reforms, terrorismlegislationreviewer.independent.gov.uk, 5 June 2020

96 Counter-Terrorism and Security Bill Factsheet – Part 2 – Terrorism Prevention and Investigation Measures, Home Office 2015

97 Jonathan Hall QC, Note 2 on TPIM Reforms, terrorismlegislationreviewer.independent.gov.uk, 5 June 2020, para 17

- There is no upper limit or requirement to specify an exit strategy;
- There is no requirement for the threshold to be raised to the balance of probabilities after two years, as recommended by Lord Carlile QC in 2011.[98]

Liberty have criticised the Bill as a "threat to civil liberties", suggesting that the changes to TPIMs effectively amount to the reintroduction of control orders, which were abolished "as a stain on our human rights record".[99]

Counter Terrorism Policing expressed support for the Bill, stating that it would bolster their ability to monitor those in the community who pose a threat.[100]

98 Lord Carlile of Berriew QC, Sixth Report of the Independent Reviewer pursuant to section 14(3) of the prevention of Terrorism Act 2005, 2011, para 56

99 Liberty: Counter-Terror Bill is a threat to civil liberties, libertyhumanrights.org.uk, 20 May 2020

100 CTP welcomes new Counter-Terrorism and Sentencing Bill, counterterrorism.police.uk, 20 May 2020

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