HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

Number 8970, 17 July 2020

Counter-Terrorism and Sentencing Bill 2019-21: Progress of the Bill

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Summary

The Counter Terrorism and Sentencing Bill 2019-21 was introduced in the House of Commons on 20 May 2020.

Second Reading took place on 9 June 2020. The Bill was considered by a Public Bill Committee over 8 sittings between 25 June and 7 July 2020.

The Committee took evidence from expert witnesses for the first three sittings, including Jonathan Hall QC, The Independent Reviewer of Terrorism Legislation. A range of external stakeholders submitted written evidence to the Committee.

The only amendments made during Committee Stage were Government amendments, which were technical and were made without division.

There were 3 divisions:

- on a new clause tabled by Labour to provide for a review of the impact of the Bill's provisions on deradicalisation in prisons;
- on an opposition amendment requiring additional consideration of an offender's age where a court was considering imposing a serious terrorism sentence on an adult aged 18-21; and
- on an opposition amendment that would have reinstated a statutory deadline for conducting a review of Prevent, as required by the Counter-Terrorism and Border Security Act 2019.

None of the divisions resulted in amendments to the Bill.

The Government committed to make amendments concerning the interaction between the serious terrorism sentence and the order for lifelong restriction in Scotland.

Other issues that arose at Committee stage included:

- the removal of the role of the Parole Board in the release of serious terrorist offenders;
- the impact of the Bill's provisions on children and young adults and on people with protected characteristics;
- the impact of the removal of the possibility of early release for certain terrorist offenders;
- the use of polygraphs in the criminal justice system;
- lowering of the threshold for imposing a Terrorism Prevention and Investigation Measure (TPIM);
- removing the two year time limit for extending a TPIM.

The Bill, together with its Explanatory Notes and an overview of its parliamentary progress, is available on the Parliament website. Overarching documents are available on Gov.uk.

Full policy background to the Bill as introduced is set out in Library Briefing Paper, Counter-Terrorism and Sentencing Bill 2019-21 prepared for Second Reading of the Bill.

Details of the members of the Public Bill Committee and a list of written evidence are provided on the Bill page on the Parliament website.

1. Second Reading

The Bill was introduced at Second Reading by the Lord Chancellor, Robert Buckland, on 9 June 2020.[1] He explained that the Bill was intended to build on the Government's initial response to the terrorist attacks in late 2019 and early 2020. He suggested that it would strengthen the process for responding to the threat from potential terrorist offenders and convicted terrorist offenders at each stage.

Mr Buckland suggested that, taken together, the sentencing measures would reduce the threat to the public by incapacitating dangerous terrorists and maximising opportunities to disengage offenders from their ideologies. The Bill would also improve the authorities' ability to monitor offenders in the community by strengthening licensing conditions, he said.

The changes to the TPIM regime and in relation to Serious Crime Prevention Orders would increase the effectiveness of existing disruptive and risk management powers.

In response to numerous interventions questioning the rationale for lowering the threshold for imposing TPIMs, in the absence of any recommendation from the Independent Reviewer of Terrorism Legislation (IRTL), Jonathan Hall QC, Mr Buckland suggested that it would create greater agility. He also pointed to the requirement that the imposition of TPIMs should be both necessary and proportionate as a safeguard against misuse.

David Lammy, Shadow Justice Secretary, said that the Opposition believed that the broad thrust of the changes in the Bill were needed.[2] He said the greatest problem with the Bill was that the Government had failed to announce a coherent deradicalisation strategy to go alongside it. Mr Lammy indicated some key areas where Labour would seek to scrutinise the Bill. He said the removal of the role of the Parole Board in the release of serious terrorist offenders was a problem in terms of monitoring threat level and that removing the possibility of early release could undermine these offenders' incentives to engage in rehabilitation in prison. He said this was particularly concerning in the case of young adult offenders. Mr Lammy said the Opposition was also concerned about the proportionality and cost of the maximum 25 year licence period for serious terrorism sentences.

Conor McGinn, Shadow Security Minister, noted that the Chairs of both the Justice and Home Affairs Committees had highlighted that the IRTL had said there was reason to doubt whether there is an operational reason for a change to the TPIM regime at this point.[3] Mr McGinn also said there was "woefully little" in the Bill on the Prevent strategy and how to counter extremism, radicalisation and hatred more widely.

1 HC Deb 9 June 2020, c202-260
2 HC Deb 9 June 2020, c212
3 HC Deb 9 June 2020, c252

Joanna Cherry indicated that the SNP intended to be constructive, and did not oppose the Bill, but had a number of reservations in common with the Opposition, and the IRTL. She noted that polygraph testing is not used in Scotland's justice system, because of the lack of evidence of its effectiveness. The application of the Bill to Scotland would therefore represent a "significant shift in policy and practice".[4]

She also questioned the necessity of the changes to the TPIM regime, and expressed reservations about the human rights implications, and the lack of safeguards and review mechanism. She pointed to the analysis of the IRTL, who also expressed doubt as to the need for the proposed changes, and asked the Government to present a clearer justification.

Sir John Hayes spoke in support of the Bill, and in particular praised the Government for lowering the bar on TPIMs. He also welcomed the sentencing provisions, suggesting that early release was hard to reconcile with the need for justice to be seen to be done.

Yvette Cooper noted that she had been consistently critical of the decision to repeal the control order regime and replace it with TPIMs, and that many of the changes had subsequently been reversed. She suggested that, in removing the two year time limit, the Bill would represent another reversion to the previous regime. However, she expressed concerns about the lack of safeguards. She asked the Government to justify the change in threshold for TPIMs and about the lack of judicial scrutiny for extensions beyond the two-year point. This was also a weakness with control orders, which should have been addressed in 2011, rather than replacing them with TPIMs, she suggested. Yvette Cooper endorsed the suggestion of the IRTL that the Secretary of State should be required to seek the court's permission for any extension beyond two years. She also questioned the Government's justification for lowering the burden of proof for imposing a TPIM, noting that operation flexibility and administrative convenience were not sufficient when it came to such extreme measures.

Stephen Farry drew attention to concerns expressed by the Justice Minister in Northern Ireland about changes to the early release of some terrorist offenders to align Northern Ireland with changes already made in Scotland and England and Wales.

4 HC Deb 9 June 2020, c224

2. Public Bill Committee

2.1 Serious terrorism sentence

The Bill (clauses 4-7) would introduce a new serious terrorism sentence which 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.

Young adults 18-21

The Opposition tabled amendments in Committee that sought to provide for additional consideration of an offender's age where a court was considering imposing a serious terrorism sentence on an adult aged 18-21[5]

The amendments would have required that, where a court was considering imposing such a sentence, the pre-sentence report would be required to take account of the offender's age and consider what other sentencing options might be more effective. The court would then have been required to take such matters into account when deciding whether the circumstances were exceptional which would allow the court not to impose a serious terrorism sentence.

Alex Cunningham, speaking for Labour, stated that the issue of young adults needed particular attention from the Government. He said:

> We need a basic recognition in the Bill's sentencing framework, that, simply put, young adults and adults are inherently different, not only in terms of maturity but in their potential for rehabilitation.[6]

Mr Cunningham referred to oral evidence from Jonathan Hall, IRTL, commenting on the differences between young adult and older adult offenders. Mr Hall had said:

> … there is recognition that people who are young and immature are probably more susceptible to change than adults. I suppose it is a choice for Parliament, but the age for a mandatory minimum sentence – meaning no prospect of early release and effectively putting to one side the possibility of reform – might be raised to 21.[7]

Alex Cunningham spoke of a trend of opinion from experts, referring to work undertaken by the Justice Committee, the Royal College of Psychiatrists and the Howard League for Penal Reform on the maturity and development of young adults.[8]

Responding for the Government, Chris Philp said that clause 4, as drafted, would apply to "an extremely small subsection" of offenders aged 18-21, that "narrow subsection who have committed a serious terrorist offence".[9] He noted that such a sentence could only be

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5 PBC 30 June 2020, c105
6 PBC 30 June 2020, c105
7 PBC 25 June 2020, c10
8 PBC 30 June 2020, c105
9 PBC 30 June 2020, c112

imposed where a finding of dangerousness had been made by a judge following a pre-sentence report. A finding of dangerousness would require that there is a significant risk of the offender causing serious harm by committing further serious terrorism or other specified offences. There was discussion as to the number of offenders aged 18-21 estimated to be affected and the Minister suggested this would be less than ten and perhaps less than five at any one time.

The Minster further noted that if the judge found there were exceptional circumstances in a case the judge would be able to decide not to impose a serious terrorism sentence.[10]

Alex Cunningham stated that he remained concerned that a larger number of people might be affected than had been discussed and that some might not be the most serious offenders. He therefore pressed the amendment to a vote. The amendment was negatived on division 8 votes to 6.

Length of licence period

Labour tabled an amendment based on concerns about the maximum licence period of 25 years for offenders given a serious terrorism sentence. Alex Cunningham questioned whether a period of up to 25 years was reasonable and proportionate. He also expressed concern about a lack of a review mechanism.[11]

He noted points raised by Jonathan Hall who, in oral evidence said that it would be very hard for a judge at the point of sentencing to decide whether, on release from prison, a 25 year old (for example) was going to require monitoring for seven or 25 years. Mr Hall said:

> … If one were going to impose a mandatory sentence, there might be thought to be more sense in imposing an indeterminate sentence – in other words, where someone has fallen into this category of really serious offending, realising that there could be a risk for life, and keeping them in prison for life, unless and until they are seen as safe to be released, and then once they have been released, keeping them on licence for life and giving flexibility to the authorities, which includes … where someone is no longer a threat, to … bring that licence to an end.[12]

Jonathan Hall questioned how the licence periods provided for in the Bill would be brought to end, saying he did not think there was currently any scope for this.

The Prison Reform Trust proposed that if the serious terrorism sentence, which it opposes, was introduced, provision for a review of the licence period should be built into the legislation which could be similar in substance to the review provision in place for the abolished sentences of imprisonment for public protection (IPP).[13]

Chris Philp, for the Government, responded that 25 years is a maximum and the judge in the case chooses the most appropriate length at the

10 PBC 30 June 2020, c114
11 PBC 30 June 2020, c116
12 PBC 25 June 2020, c11
13 Written evidence submitted by the Prison Reform Trust (CTSB04)

point of sentence. He said that while the probation service would not be able to vary the period of licence decided by the judge, it could and frequently does, vary licence conditions as an offender's behaviour changes over time.[14] He stated that were the probation service to be given the ability to change the length of the licence period, this would be overriding a judicial decision which he said, is wrong in principle and might infringe the offender's human rights. The amendment was withdrawn.

Order for lifelong restriction in Scotland

Kenny MacAskill, for the SNP, tabled an amendment concerning the impact of the introduction of the serious terrorism sentence in Scotland on the order for lifelong restriction.[15]

The IRTL, Jonathan Hall, in his third briefing note on the sentencing reforms in the Bill, described the order for lifelong restriction:

> This type of sentence is unique to Scotland and is imposed among other things for serious violent offences if certain risk criteria are met: that is, where the offender would otherwise seriously endanger the lives, or physical or psychological wellbeing, of members of the public at large. It was designed to deal with those considered to pose an enduring risk. No such order can be made without a formal risk assessment by Scotland's respected Risk Management Authority. An Order for Lifelong Restriction is an indeterminate sentence comprising a stated period of detention or imprisonment (called a punishment part) during which the offender cannot be considered for release, followed by the continued incarceration of the offender unless and until the Parole Board for Scotland is satisfied that the offender no longer fulfils the risk criteria and can be released on licence. It is possible that an offender subject to an OLR will never be released from custody due to the risks they pose. If release is authorised, the offender is supervised by a criminal justice social worker (the equivalent to a probation worker) under supervision by the Risk Management Authority.[16]

Mr Hall questioned why a serious terrorism sentence would be required to be passed in priority to an order for lifelong restriction:

> Certain offenders who commit terrorism and terrorism-connected offences could qualify for an Order for Lifelong Restriction, but the apparent effect of clause 6 of the Bill is that a serious terrorism sentence would have to be passed in priority. This means that, even where the criteria would ordinarily be made out for lifelong supervision, paradoxically a determinate sentence, potentially of shorter duration, must be imposed. It is not clear why this is so.[17]

He said it would be preferable if the provision on serious terrorism sentences in Scotland (clause 6) was disapplied where an order for lifelong restriction is passed. He said this raised a wider question about the inflexibility of a serious terrorism sentence:

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14 PBC 30 June 2020, c118
15 PBC 30 June 2020, c120
16 Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (3), 19 June 2020
17 Ibid

> This also raises the question of whether a more flexible indeterminate sentence, such as the Order for Lifelong Restriction, is not preferable generally to the inflexibility of a serious terrorism sentence.

Kenny MacAskill stated that his amendment sought to allow a court in Scotland to have the opportunity to use an order for lifelong restriction where the court thought it would be a better sentence in the particular case.

Chris Philp stated that there was clearly a question about how the Bill interacts with the order for lifelong restriction and indicated amendment would be made:

> The Government essentially accepts the principle that there is an interaction which requires further work – and let me be clear – further amendment.[18]

He said he hoped the Government could find a way to amend the Bill to preserve the 14-year minimum of a serious terrorism sentence but not take away the ability that Scottish judges have to impose longer restrictions, should they see fit. Kenny MacAskill accepted the Minister's undertaking and withdrew the amendment.[19]

2.2 Removal of early 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.

Ruth Cadbury confirmed that Labour dis not oppose the changes proposed. She noted however, that the changes carried risks and warned about the possibility of unintended consequences.[20]

Impact on prisoner behaviour

Ruth Cadbury noted Jonathan Hall's evidence that the possibility of early release might act as a spur to good behaviour and reform for some offenders who were going to be spending the longest time in custody.

She referred also to the evidence of Peter Dawson of the Prison Reform Trust[21] and Mark Fairhurst of the Prison Officers Association[22] who had spoken about the impact of a loss of hope for prisoners and what this might mean for prison management and staff. Written evidence from the Prison Reform Trust stated that ending early release for these individuals would remove a key incentive for individuals to comply with their sentence plan and engage in rehabilitation.[23] Professor Andrew Silke, in his evidence, agreed with Mark Fairhurst that potential for early

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18 PBC 30 June 2020, c121
19 PBC 30 June 2020, c121
20 PBC 2 July 2020, c152
21 PBC 25 June 2020, c32
22 PBC 30 June 2020, c68
23 Written evidence submitted by the Prison Reform Trust (CTSB04)

release was an important incentive for behaviour in custody and questioned whether it was sensible to lose "a tool from the toolbox".[24]

Chris Philp said that against the point about hope, the Government had to balance public protection.[25] He said that in these circumstances the Government felt that public protection was overwhelmingly served by the full sentence being served in custody.

Children and young adults

Ruth Cadbury was also concerned that the removal of the possibility of early release in clause 27 applied to those aged under 18. This was an issue raised by Jonathan Hall in his evidence who suggested that for those aged under 18, and also for those aged 18-21, one choice for Parliament would be for the Parole Board to retain a role in considering their early release.[26]

The Prison Reform Trust, in its written evidence raised concerns about the "fairness and proportionality of removing parole authorised release from children". The Trust noted that there is a separate sentencing regime for children "underpinned by the primary importance of the welfare needs of the child". It said:

> Removing the possibility of parole authorised release for children and young adults is counter to existing sentencing practice; and the evidence that it is this age group in particular which is most capable of change and desistance for crime. [27]

Northern Ireland

Conor McGinn, speaking for Labour, expressed concern about the retrospective removal of automatic release in Northern Ireland.[28] Clause 30 would provide that the first eligible release point for all relevant terrorist offenders would 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 *Terrorist Offender (Restriction of Early Release) Act 2020*.

Mr McGinn's three key concerns were:

- A belief in the Department of Justice in Northern Ireland that the measures would attract legal challenge on human rights grounds;
- A risk that the measures might destabilise the separated regime within prison; and
- The potentially increased risk to the safety of prison staff as a result of reaction to the measures.

Les Allamby, Chief Commissioner of the Northern Ireland Human Rights Commission, in oral evidence expressed concern about the retrospective

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24 PBC 30 June 2020, c85
25 PBC 2 July 2020, c154
26 PBC 25 June 2020, c19
27 Written evidence submitted by the Prison Reform Trust (CTSB04)
28 PBC 2 July 2020, c156

nature of the changes to early release being made in Northern Ireland to align the law with that in Scotland and England and Wales.[29] He urged the Minister to listen closely to the Justice Minister in Northern Ireland as to "whether this change is advantageous to the circumstance of Northern Ireland".

The Minister noted that the Government was currently having detailed conversations with the Justice Minister in Northern Ireland which were continuing. He said the Government would support the Northern Ireland Department of Justice in any litigation on this issue.[30]

2.3 Role of the Parole Board

In the debate on the ending of the possibility of early release for certain terrorist offenders, Ruth Cadbury raised the issue of the removal of the role of the Parole Board in the release of these offenders.[31] She pointed to evidence from Jonathan Hall who had noted the difficulty with measuring terrorism risk. Mr Hall said that, although he agreed that the probation service, the police and MI5 will be carrying out assessments, "the confrontation that takes places at the Parole Board hearing" would be lost.[32] He said:

> The role of the Parole Board is quite an important part of identifying terrorist risk, and if you don't have that role then you lose that insight.[33]

Peter Dawson, Director of the Prison Reform Trust, said in his evidence that the role of the Parole Board should be left as it is:

> There needs to be a discretionary release element in all extended sentences with no exclusion for terrorist offences and no exclusion for the new [serious terrorism] sentence.[34]

Professor Ian Acheson had told the Committee that he did not believe the Parole Board is "philosophically or organisationally the best suited" to managing terrorist offenders and that a "different, multi-agency approach to managing that risk" was probably needed.[35]

Professor Andrew Silke said that the Parole Board usually brings a "serious and considered assessment of the available evidence to a particular case" and therefore questioned whether removing its role would be to lose something of value.

In debating new clause 4,[36] Chris Philp said that, for the "very small minority of offenders" who would serve their full sentence in prison and not be considered by the Parole Board,

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29 PBC 25 June 2020, c39
30 PBC 2 July 2020, c158
31 PBC 2 July 2020, c152
32 PBC 25 June 2020, c9
33 PBC 25 June 2020, c12
34 PBC 25 June 2020, c34
35 PBC 30 June 2020, c77
36 New Clause 4 would have required an oral statement to be made on the role of the Parole Board before certain provisions in the Bill came into force

> …a whole range of measures are taken to make sure those prisoners are properly managed and risk assessed. The existing multi-agency public protection arrangements are at the core of that: they have been well-documented and well-reviewed.[37]

2.4 Deradicalisation in prisons

New clause 1, tabled by Alex Cunningham for Labour, would have provided for a review, one year after the Bill is passed, of the impact of its provisions on the effectiveness and availability of deradicalisation programmes in prison.[38] Mr Cunningham explained that it had been suggested that increases to sentences for terror offences would simply be delaying inevitable further offences unless action was taken to use the offender's time in prison to deradicalise them.[39]

He noted evidence given to the Committee that deradicalisation programmes are not entirely fit for purpose. He pointed to the Government's impact assessment for the Bill which said that longer incapacitation of terrorist offenders would enable more time to support their disengagement and rehabilitation through tailored interventions while in prison. Mr Cunningham said:

> However, the amount of time during which individuals have access to deradicalisation in prison is not a key factor in determining their success or otherwise; rather, it is the effectiveness and the availability of the programmes in prison that has come under increasing scrutiny.[40]

Chris Philp said that the Healthy Identity Intervention (HII) has merit.[41] There was discussion of HII and the other deradicalisation programme used in prisons in the oral evidence given to the Committee. Peter Dawson, of the Prison Reform Trust, stated that while the evidence base for the deradicalisation programmes run in prisons was small because it is innovative work, they are "clearly worthwhile".[42] Mark Fairhurst, of the Prison Officers Association, said that a full review of the two deradicalisation programmes for terrorist offenders was needed.[43] Professor Ian Acheson said that he would categorise the HII as a "sheep-dip style" approach that he thinks does not work.[44] Professor Andrew Silke said that while HII has come in for criticism "it is actually a much better intervention than perhaps it gets credit for".[45]

Mr Philp told the Committee that, following earlier legislation, a new counter-terrorism assessment and intervention centre was being set up. He also said that the number of probation officers who specialise in counter-terrorism and deradicalisation work was to be doubled. With

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37 PBC 7 July 2020, c240
38 PBC 7 July 2020, c227
39 PBC 7 July 2020, c228
40 PBC 7 July 2020, c228
41 PBC 7 July 2020, c231
42 PBC 25 June 2020, c37
43 PBC 30 June 2020, c73
44 PBC 30 June 2020, c76
45 PBC 30 June 2020, c 84

regard to a requested review, he said the standard three year review of legislation would be a checkpoint.

Alex Cunningham pressed the clause to a division and it was negatived by 8 votes to 6.[46]

2.5 Impact of sentencing provisions

Children and young people

Joanna Cherry for the SNP moved new clause 5 that would have provided for a review of the effects of the Bill's sentencing provisions on children and young offenders.[47] She said the clause reflected concerns already raised by Alex Cunningham for Labour and by witnesses to the Committee. She noted the debate regarding the impact of the serious terrorism sentence on a young adult (see section 2.1 above).

She noted Jonathan Hall's concerns regarding the effect of the proposed changes on the sentencing regimes for children and young people in Scotland and Northern Ireland specifically.[48] Mr Hall had said that some of the provisions in the Bill appear inconsistent with the distinct youth criminal justice regimes which have developed in each part of the United Kingdom. Joanna Cherry pointed out that both Jonathan Hall and the Law Society of Scotland had drawn attention to the potential interaction between the Bill's provisions and the Scottish Sentencing Council's consultation on applying special sentencing principles to offenders up to the age of 25.

In oral evidence Peter Dawson, of the Prison Reform Trust, called for the Bill to have a different sentencing framework for children and young adults.[49]

Chris Philp responded to the points raised by Joanna Cherry by stating that there is "clearly a wider debate to be had" about maturity and reform of young adult offenders compared to older adult offenders. However, he emphasised, in the context of the Bill it was those who had committed the most serious terrorist offences that were being discussed rather than an "average 20 or 21 year old".[50]

On the question of a review, Chris Philp said he was not convinced a bespoke review was the right thing to do. Joanna Cherry did not press the new clause to a vote but said that she anticipated returning to the issue.

After Committee stage had concluded the Government published a factsheet: The Counter-Terrorism and Sentencing Bill – Young offenders, 13 July 2020.

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46 PBC 30 June 2020, c232
47 PBC 7 July 2020, c240
48 See: Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (3), 19 June 2020, paras 21-26
49 PBC 15 June 2020, c33
50 PBC 7 July 2020, c245

People with protected characteristics

Labour tabled amendments to require the Government to commission, before the Bill comes into force, analysis of the impact on people with protected characteristic of clauses 1 and 21.[51]

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 two years and is not a terrorism offence. This change would greatly increase the number of non-terrorist offences that can be found to have a terrorist connection. Clause 21 would add offences to the list of offences that can require the imposition of a sentence for offenders of particular concern (SOPC) in England and Wales.

Alex Cunningham explained Labour's concern:

> There are significant risks involved in expanding the number of individuals who fall under the provisions of separate terrorism legislation, particularly if the imposition of additional sanctions is seen as neither fair nor proportionate and is found to have a disproportionate impact on minority faith and BAME communities in particular.[52]

Chris Philp replied that Labour's amendments called for a review before the clause came into effect and said that the impact assessment published with the Bill and the accompanying equalities statement had already analysed the Bill's impact with regard to racial and religious discrimination.[53] On the wider issue of the treatment of, and outcomes for, BAME individuals in the criminal justice system detailed by the Lammy Review, he said the Government was committed to acting to make sure that no unconscious biases discriminate against any particular group. The amendment was withdrawn.

2.6 Polygraphs

Both Labour and the SNP tabled amendments relating to the use of polygraphs. Clauses 32-35 would provide for the imposition of polygraph tests as a licence condition for terrorist offenders, and clause 41 would provide for the imposition of a polygraph measure under a TPIM.

The Northern Ireland Human Rights Commission (NIHRC) suggested that introducing mandatory polygraph testing as a licence condition for offenders who have already been convicted may not be compatible with Articles 5 (right to liberty) and 7 (no punishment without law) of the European Convention on Human Rights (ECHR). The NIHRC noted that an individual on licence, sentenced prior to the Bill's commencement, who refused to take a polygraph would have the licence revoked and would have to serve a longer prison sentence. This would amount to the retrospective imposition of a heavier penalty than the one that was applicable at the time the offence was committed, contrary to Article 7.

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51 PBC 30 June 2020, c96
52 PBC 30 June 2020, c97
53 PBC 30 June 2020, c100

The NIHRC therefore suggested that clause 34 should be removed from the Bill, or alternatively that it should not apply to those already serving sentences[54]

Professor Don Grubin gave evidence to the PBC on how polygraph testing may be utilised in the criminal justice context. He stated that it provides additional information in two main ways: through the test result, which can indicate whether or not someone is lying, and also through disclosures. He cited research which had found that test outcomes were 80-90% accurate, and that all studies had found that when people have polygraph tests, they make disclosures.[55]

He also noted that polygraph testing of offenders can have a deterrent effect, because if an offender knows they are going to be tested, they will pay closer attention to their behaviour.[56]

Amendments 48-50, tabled by the SNP, sought to ensure that evidence from polygraph testing could not be used in criminal proceedings. They were based on proposals put forward by the Scottish Law Society, who noted that polygraphs are not currently used in the Scottish criminal justice system, and suggested that stakeholders had not been adequately consulted about the proposals.[57]

Kenny MacAskill suggested that polygraphs are "currently unknown within the Scottish legal jurisdiction" and that the Scottish Government, as well as the legal profession and judiciary, were sceptical about them.[58] He accepted that the policy context was a reserved matter, but suggested that it was necessary to ensure that Scotland was able to implement it "adequately and appropriately".[59]

The amendment was supported by Labour. Alex Cunningham agreed that polygraph evidence should not be used in any criminal proceedings because "they are far too unreliable to be used as evidence or an indicator of a person having committed a crime".[60] He asked for assurance from the Government that the use of polygraph testing in this context would not give rise to their widespread use across the justice system.

Chris Philp responded, confirming that the Government agreed that polygraph evidence did not provide definitive information that could be used in criminal proceedings, but pointed to evidence provided by Professor Grubin as to its utility.

He also noted that the *Offender Management Act 2007*, which the relevant provisions of the Bill would amend, already expressly precluded the admission of polygraph evidence in court, and that the Bill made

54 Written evidence: Northern Ireland Human Rights Commission (CTSB11)
55 PBC 25 June 2020, c53
56 Ibid, c54
57 Written evidence: Law Society of Scotland (CTSB05)
58 PBC 2 July 2020, c159
59 Ibid
60 Ibid

equivalent provision for the devolved administrations. The proposed amendments were therefore unnecessary, he suggested.[61]

The amendments were withdrawn.

New clause 6, tabled by Alex Cunningham for Labour, would have required the Government to publish reports on the expected impact of clauses 32-34 on people with protected characteristics before they could come into force and at regular intervals thereafter. He explained that the provision was intended to be an additional safeguard for these groups, and asked the Minister to consider piloting the scheme first in order to collect data on its impact.

Chris Philp stated in response that the use of polygraph licence conditions for sex offenders for several years, and its common usage elsewhere in the world, rendered a pilot unnecessary. He suggested that the technique would apply equally to everyone and that therefore an assessment of its impact on particular groups was unnecessary.[62]

Further amendments were tabled that would have required the Government to consult with the devolved administrations before commencing polygraph provisions or making regulations, and providing for safeguards around training and handling of polygraph records.

Chris Philp stated that it was the Government's intention to work closely with the devolved administrations and that the matters raised would be dealt with within the Bill's existing provisions. The amendments were therefore withdrawn.

Alex Cunningham also tabled an amendment in relation to the use of polygraphs as a TPIM measure. The amendment would have provided that where a person aged between 18-25 was required to take a polygraph test, a counsellor would be present.[63] The Secretary of State would also be required to lay an annual report in Parliament summarising any concerns raised about the use of polygraphs in this context.

He explained that the amendment was tabled in response to evidence provided to the PBC that there is a difference in maturity under the age of 25, which necessitates additional safeguarding.

Chris Philp responded, arguing that this additional safeguarding is unnecessary because of the training undertaken by those administering polygraph tests.[64]

The amendment was withdrawn, but Alex Cunningham indicated that the Opposition would return to the issue of young people at report stage.[65]

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61 PBC 2 July 2020, c161
62 C164
63 New clause 12, PBC 7 July 2020, c 202
64 PBC 7 July 2020, c203
65 Ibid, c204

2.7 TPIMs

Standard of proof

Both Labour and the SNP tabled amendments to clause 37 relating to the threshold that must be met in order for a TPIM to be imposed.

Clause 37 would provide that a TPIM could be imposed where the Home Secretary had "reasonable grounds for suspecting" that a person is engaged in terrorism-related activity. This would lower the threshold from the current requirement that the Secretary of State be satisfied "on the balance of probabilities".[66]

Conor McGinn tabled an amendment on behalf of Labour which would have required the Secretary of State to believe that an individual was engaged in terrorism-related activity "on the basis of reasonable and probable grounds".[67] Mr McGinn explained that this was intended as a compromise between the current position and the proposals in the Bill. He stated that the Opposition supported TPIMs and would welcome in principle any measures that would demonstrably assist the police and security services.[68]

He acknowledged the role of the previous Labour government in introducing the original control order regime, which had a threshold of reasonable suspicion, but explained that the Opposition struggled to see the logic of lowering the threshold at this point, either from an operational, administrative or procedural perspective.

He asked for evidence to justify the policy, pointing to the fact that the police and security services have given evidence that to date no TPIM request has been rejected on the grounds of insufficient evidence.

Mr McGinn also pointed to the evidence provided by Johnathan Hall QC, who expressed concern that a lower standard of proof would open up a greater margin for error.[69] He noted that in isolation, this prospect was serious enough, but that it was amplified by the proposal to also extend the length of time for which TPIMs can be imposed.

Jonathan Hall told the PBC that he had not been able "to identify a cogent business case" for reducing the burden of proof. He noted that there had been references to reducing the administrative burden, but stated that he did not understand this because steps had already been taken to reduce the administrative burden through the use of 'new variant' TPIMs, which he had discussed in his previous note on the Bill.[70]

The same point was raised repeatedly by witnesses who submitted evidence to the Public Bill Committee.

The NIHRC recommended that the threshold should be the 'balance of probabilities', as recommended by the IRTL.[71] Muslim Engagement and

66 S 3 Terrorism Prevention and Investigation Measures Act 2011
67 Amendment 69, PBC 7 July 2020, c173
68 PBC 7 July 2020, c 174
69 Ibid
70 PBC 25 June 2020, c15
71 Written evidence: Northern Ireland Human Rights Commission (CTSB11)

Development recommended that clauses 37-43 be removed from the Bill in their entirety.[72]

Amnesty International also strongly urged the deletion of clauses 37, 38 and 40, noting a lack of reasoned argument from the Government to justify the change in the burden of proof. Amnesty noted that control orders were intended to be temporary and were introduced under emergency legislation in 2005. When TPIMs were placed on a permanent footing in 2011, they were less intrusive, time limited and required a higher burden of proof, in accordance with the recommendations of the IRTL at the time, Lord Anderson. When more intrusive measures were reintroduced in 2015, this coincided with the threshold being raised again.[73]

Assistant Chief Commissioner Tim Jacques, providing the perspective of counter-terrorism policing and representing the views of the security service, told the PBC that there had not been any occasions thus far when the current burden of proof had prevented the application of a TPIM. However he provided the PBC with three scenarios in which a lower threshold could have utility. These were: when an individual's risk profile is rapidly increasing; where an individual has returned from abroad having been involved in terrorism-related activity but there is limited evidence; and, where the evidence against an individual is based on sensitive material, the disclosure of which might compromise sensitive techniques.[74]

Conor McGinn explained that he had tabled the amendment in order to give the Minister the opportunity to address the concerns raised.

Joanna Cherry for the SNP tabled a similar amendment, which would have required that the Secretary of State had "reasonable grounds for believing" that a person was engaged in terrorism-related activity. [75]

She indicated an intention to be constructive and to assist the Government in its duty to ensure public safety. However, she also suggested that the Government had not made the case for changing the existing standard of proof.[76]

Noting that in practice, TPIMs were "a step away from imprisonment" and could amount to a deprivation of liberty under Article 5 of the European Convention on Human Rights, Ms Cherry suggested that they should therefore be subject to the strictest safeguards. She suggested that lowering the threshold may be disproportionate, and that easing administrative burdens was not sufficient justification for such a drastic change.[77] She stated that in common with the Opposition, the SNP, the IRTL, and the majority of expert witnesses who gave evidence to the PBC, the Joint Committee on Human Rights had concerns about the proposal. If the Government did not provide a compelling justification

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72 Written evidence: Muslim Engagement and Development (MEND) (CTSB06)
73 Written evidence: Amnesty International UK (CTSB07)
74 PBC 25 June 2020, c20-21
75 Amendment 57, PBC 7 Jujly 2020, c 173
76 PBC 7 July 2020, c176
77 Ibid, c177

for the change, she anticipated further amendments would be tabled when the Bill returned to the floor of the House.

Acknowledging the three examples provided in evidence by ACC Tim Jacques, of scenarios in which the lower threshold could be useful, Ms Cherry noted that none of these scenarios were not novel, and all could seemingly be dealt with under the current arrangements. She suggested that if this was the justification for the change, the Government should present a business case on this basis.[78]

In response, Chris Philp pointed specifically to the evidence of ACC Tim Jacques when asked whether the change to the burden of proof would be of benefit to the police and the security services and make the public safer. ACC Jacques replied "That is the view of the security services … that is their clear view."[79]

Chris Philp then set out the three scenarios identified by ACC Jacques and sought to elaborate the Government's position as to why they justified the change. Addressing Joanna Cherry's point that people had been travelling to, and returning from, Syria for a number of years, and that there had not been any examples of a TPIM being sought but not granted, he suggested that the legislation aimed to deal with risks that might arise in the future. He also pointed to the difficulties in obtaining evidence of people's activities in Syria.

Both Joanna Cherry and Conor McGinn pushed the Minister on the point that Jonathan Hall had not agreed that a cogent business case had been presented, notwithstanding ACC Jacques' evidence, and on the fact that police are not the applicants for TPIMs. They suggested therefore that this evidence alone could not be relied upon to justify lowering the burden of proof.

Chris Philp also pointed to Jonathan Hall's evidence that he was not aware of any misuse of the control order regime when it was operating with the lower burden of proof, and that he was satisfied that the Government used the powers with care and circumspection.[80] And he noted the other conditions that must be satisfied before a TPIM can be imposed under the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). These include that it is necessary in order to prevent the individual's involvement in terrorism-related activity, and the requirement for judicial oversight of the decision.

Extension of time limit

Labour and the SNP also both tabled amendments to clause 38 relating to the time limit for extending a TPIM.

Clause 38 would amend the TPIMA to remove the current time limit of two years for extending a TPIM without evidence of new terrorism-related activity.

78 Ibid, c178
79 PBC 7 July 2020, c183
80 Ibid, c187-188

In evidence to the PBC, Jonathan Hall questioned whether this change was justified, because "it is none the less possible, as the law currently stands, to extend beyond two years".[81] He acknowledged that the need to assemble a new case against a TPIM subject, in order to extend beyond two years, could lead to a gap, however he suggested that in practice this did not pose a significant threat to public safety because TPIMs are generally used against radicalisers, rather than attack planners, and that any risk can be managed.[82]

The Labour amendment, tabled by Conor McGinn, would require the Secretary of State to seek permission from the High Court for any extension beyond two years.[83]

Conor McGinn explained that it was intended to address the concern raised by Jonathan Hall, that the changes would give rise to the possibility of individuals being subject to TPIMs measures for many years without robust scrutiny. He suggested that this would improve the quality of the TPIM process and ensure that the regime was effective and lawful.[84]

Responding, Chris Philp explained that the current two year limit posed difficulties in practice because of the need to provide fresh evidence at the end of it. This could be difficult, he explained, because sometimes there was a lack of fresh evidence as a result of the TPIM conditions, meaning the subject did not engage in any further terrorism-related activity during the period. It could also lead to gaps before a new TPIM could be imposed. He pointed to evidence from Jonathan Hall of cases in which this had happened.[85]

He also noted that under the TPIMA, the Secretary of State was under an obligation to keep TPIMs under review and ensure that the conditions for their imposition continued to be met. In practice this involves a quarterly review process with the security services and CTP. Further, TPIM subjects have an ongoing right of appeal in relation to any decision to extend a TPIM.[86]

Another Labour amendment would have imposed a higher evidentiary threshold for any extension beyond two years, requiring the Secretary of State to be satisfied "on the balance of probabilities" that the individual is involved in terrorism-related activity, where there is no evidence of new activity.[87]

Conor McGinn noted that this approach had been recommended by Lord Carlile as IRTL. Joanna Cherry spoke in support of the amendment and noted that Jonathan Hall, and his predecessor Lord Anderson, had

81 PBC 25 June 2020, c5
82 Ibid, c5-6
83 Amendment 60, PBC 7 July 2020, c189
84 PBC 7 July 2020, c190
85 Ibid, c191
86 Ibid, c192
87 Amendment 61, PBC 7 July 2020, c192

also suggested safeguards, including judicial oversight and an increased evidentiary threshold, for enduring TPIMs.[88]

Chris Philp responded by reference to his previous comments on the appropriate standard of proof and the need to extend beyond two years.

A further Labour amendment would have required the Secretary of State to specify a provisional 'exit strategy' for any TPIM extended beyond two years.[89]

Conor McGinn explained that the amendment aimed to address the open-ended nature of the Government's proposals. It would require the Secretary of State to conduct a review every six months to set out whether it was appropriate to issue a revocation notice and to draw up a tailored exit strategy with the police and security services. The strategy would include an assessment of the individual's current security threat, a plan for engagement and rehabilitation, and a plan for removing measures. He noted that it was not in anyone's interest to allow individuals to remain subject to a TPIM indefinitely, pointing to the evidence of Jonathan Hall, who suggested that the focus should remain on trying to obtain evidence in order to bring a criminal prosecution.[90]

Chris Philp responded to the effect that this is what happens in practice already, and that the requirement to keep under review the question of whether the conditions are still met was fulfilled in practice by quarterly meetings of the TPIMs Review Group.

Finally, Labour tabled an amendment that would have given the Intelligence and Security Committee a role in overseeing the evidence and investigative steps taken in relation to a TPIM after two years, along with the Secretary of State.[91]

Chris Philp suggested in response that the IRTL was the most appropriate person to over see the operation of the TPIMs regime.[92]

All of the amendments were ultimately withdrawn

2.8 Prevent

Conor McGinn, on behalf of Labour, tabled an amendment that would have reinstated a statutory deadline for the statutory review of Prevent, requiring it to report by 1 July 2021.[93]

The Counter-Terrorism and Border Security Act 2019 required the Government to commission an independent review into Prevent, which was due to report within 18 months of the Act coming into force. The deadline would be on 12 August 2020. The Bill removed the deadline, with retrospective effect, so that it would cover any period after the deadline had passed.

88 PBC 7 July 2020, c 193-194
89 Amendment 67, PBC 7 July 2020, c195
90 PBC 7 July 2020, c196
91 Amendment 68, PBC 7 Jul 2020, c197-199
92 Ibid, c199
93 Amendment 62, PBC 7 July 2020, c209

Mr McGinn suggested that the Government had missed an opportunity to expound on its wider strategy for tackling extremism, radicalisation and terrorism, including by removing the deadline for the review.

In support of this contention, he pointed to the evidence provided Assistant Chief Constable Tim Jacques, who told the Committee that the police regarded Prevent as absolutely vital, but also acknowledged that it was controversial.

Mr McGinn suggested that the Government's approach to the review lacked credibility, and questioned its reluctance to include a deadline in the Bill, given that it matched the Government's stated intention.[94]

Chris Philp responded, agreeing that the review is important, and explaining that the delay was due to the coronavirus epidemic and the resignation of Lord Carlile. He further explained that the process for appointing a replacement for Lord Carlile was underway, and was being conducted via an open competition and independent panel. The Government's intention was that the review should be completed by August 2021, he said. However, the Government was opposed to putting a deadline in primary legislation because it would create a risk that the deadline could not be met due to unforeseen circumstances, and it would then be necessary to amend it via further primary legislation.[95]

Conor McGinn pressed the amendment to a vote and it was negative by 8 votes to 5.[96]

2.9 Other amendments

The Government tabled a number of technical amendments which were agreed without division.

New clauses tabled by the opposition parties called for a number of reviews, including:

- into the effects of the Bill's provisions on women;[97]
- of the impact of the Bill's provisions on the National Probation Service;[98]
- of the effectiveness of interagency cooperation;
- an annual review of the measures in the bill as they apply to Northern Ireland;[99] and
- a judge-led review into the effectiveness of current strategies to deal with lone terrorists.[100]

The Government resisted all of these new clauses and none were pressed to a vote.

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94 Ibid, c 210
95 Ibid, c211
96 Ibid, c 212
97 New clause 2, PBC 7 July 2020, c232
98 New clause 10, PBC 7 July 2020, c256
99 New clause 7, PBC 7 July 2020,, c247
100 New clause 8, PBC 7 July 2020, c250

3. Annex: Membership of the Committee

The Committee consisted of the following Members:

Gareth Bacon (Con)

Rob Butler (Con)

Ruth Cadbury (Lab)

Bambos Charalambos (Lab)

Joanna Cherry (SNP)

Robert Courts (Con)

Alex Cunningham (Lab)

Sarah Dines (Con)

Ben Everitt (Con)

Kenny MacAskill (SNP)

Conor McGinn (Lab)

Alan Mak (Con)

Julie Marson (Con)

Taiwo Owatemi (Lab)

Chris Philp (Con)

Tom Pursglove (Con)

Laura Trott (Con)

BRIEFING PAPER
Number 8970
17 July 2020

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