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BRIEFING PAPER

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Counter-Terrorism and Sentencing Bill 2019-2021: Lords amendments

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1. Background

The Counter-Terrorism and Sentencing Bill 2019-2021 was introduced in the House of Commons on 20 May 2020. It had Second Reading on 9 June 2020 and Report stage and Third Reading on 21 July 2020. The Bill was introduced in the House of Lords on 22 July 2020 and completed Third Reading on 11 March 2021.

The Library produced briefings for the earlier stages of this Bill in the House of Commons, for Second reading: Counter-Terrorism and Sentencing Bill 2019-21 and after Committee stage: Counter-Terrorism and Sentencing Bill 2019-21: Progress of the Bill.

The House of Lords made several amendments to the Bill. These are set out in Lords Amendments to the Counter-Terrorism and Sentencing Bill and explained in the Explanatory Notes on Lords Amendments. They include:

- Government amendments to ensure that the new terrorism sentence with fixed licence period functions as intended in Scotland.
- Government amendments concerning the position in Scotland with regard to the release of terrorist offenders subject to consecutive sentences.
- Government amendments to remove clauses from the Bill which would have provided for the imposition of polygraph testing as a licence condition for terrorist offenders in Scotland and Northern Ireland.
- Government amendments to the regime governing Terrorism Prevention and Investigation Measures (TPIMs) to raise the burden of proof for imposing a TPIM, and to require the Independent Reviewer of Terrorism Legislation to produce an annual report on their operation.
- An amendment tabled by Lord Anderson to impose a limit of four years on the duration of a TPIM without new evidence of terrorism-related activity.

2. Committees

The House of Lords Constitution Committee in its report on the Bill, Counter-Terrorism and Sentencing Bill,[1] raised a number of issues including:

[1] Select Committee on the Constitution, 16th Report of Session 2019–21, HL Paper 134, Counter-Terrorism and Sentencing Bill, 30 September 2020

- The retrospective effect of certain provisions of the Bill with regard to offenders who commit offences before the commencement of the provisions but are sentenced after commencement.
- The "significant change to justice policy" effected by the Bill and the Terrorist Offenders (Restriction of Early Release) Act 2020 with regard to the role of the Parole Board and early release.
- Whether the Government has sufficiently justified the provisions concerning:
  - the new serious terrorism sentence for terrorist offenders aged over 18 but under 21, which is comprised of a custodial term of 14 years or longer and an extension period between 7 and 25 years to be served on licence; and
  - The extension of the Sentences for Offenders of Particular Concern (SOPC) regime to offenders under the age of 18.
- Whether the Government has provided sufficient justification for the expansion of powers with respect to TPIMs.
- Whether a new deadline for the review of Prevent should be specified in the Bill.

3. Lords stages

3.1 Second reading

At Second Reading. Lord Falconer stated that Labour did not oppose the first two parts of the bill, on sentencing and release, on principle.[2] He said the Opposition would "look carefully at the details of the increase in sentences and the proposed change to the way the system deals with early release of those convicted of terrorist offences". He also said the Opposition would look at when and how the Parole Board should be involved and how it should approach these issues.

Lord Falconer said the House would need to consider whether it is appropriate for someone convicted under the age of 21 to have no opportunity for Parole Board-directed release before the end of their custodial term, as is proposed in the bill for certain terrorist offenders. He raised concerns about the proportionality and cost of the proposal for a maximum licence period for certain terrorist offender of 25 years.

Lord Falconer noted what was not in the Bill, saying, "there must be a much more driven and focused effort on de-radicalisation measures".

Lord Paddick, for the Liberal Democrats, raised a number of issues,[3] including:

- Whether the Prison Service have the information, training, expertise and resources to be able to deradicalise those in its custody and to prevent inmates from being radicalised or further radicalised; and
- Whether it is more effective to deradicalise those in prison or those on licence—and what is the impact of longer sentences on the susceptibility to deradicalisation.

Lord Falconer also expressed doubts about the reliability of polygraph tests, and questioned whether it was appropriate to rely on them at all, given their known limitations.[4]

2 HC Deb 21 September 2020 c1616-1618
3 HC Deb 21 September 2020 c1619-1621
4 Ibid, c 1618-1619

On TPIMs, he emphasised the need for the Government to make a proper case for the expansion of powers.

Lord Paddick questioned the need for the proposed reduction in the burden of proof for imposing a TPIM, noting that the Independent Reviewer of Terrorism Legislation (IRTL), Jonathan Hall QC, did not support the change. He also noted Mr Hall's suggestion that additional safeguards would be needed if the duration of TPIMs were to be extended beyond the current limit of two years.[5]

3.2 Committee

There were two days of Committee, during which the Government tabled amendments relating to polygraph testing, which were agreed.

The Government also tabled other amendments which were minor, technical or consequential and these were also agreed.[6]

A number of opposition amendments were debated but were withdrawn, including those seeking:

- A reduction in the proposed minimum custodial period of a serious terrorism sentence for offenders aged 18-20 from 14 to 10 years, tabled to probe the balance between custody and licence for such offenders.[7]
- A requirement for a pre-sentence report, addressing the age of the offender, before a court considers imposing an extended sentence on an offender aged under 18.[8]
- A requirement for the Government to lay before Parliament a strategy setting out how a programme of rehabilitation and de-radicalisation is to be applied to those sentenced under the Act.[9]
- To maintain the current release provision for under 21s sentenced to an extended determinate sentence for a serious terrorism offence, thereby continuing the role of the Parole Board in determining release for these offenders.[10]
- To retain the role of the Parole Board for all offenders sentenced to extended determinate sentences and to provide for the Parole Board to have a role in the release of offenders subject to the new serious terrorism sentence by considering them for release at the two thirds point of their custodial term.[11]
- To require the Government to report on whether the removal of Parole Board consideration of certain prisoners' release leads bad behaviour in prison.[12]
- An independent review of the sentencing and release provisions of the Act to consider, amongst other things, the effects of the Act on the reform or rehabilitation of prisoners and on the radicalisation of prisoners.[13]
- A pilot of polygraph testing on terrorist offenders, the outcome of which would need to be reported to Parliament before the relevant provisions were commenced.[14]

5 Ibid, c 1620-1621
6 A letter providing further details on these Government amendments was placed in the Library: DEP2021-0138, Letter dated 16/02/2021 from Lord Wolfson of Tredegar to all Peers regarding the Counter-Terrorism and Sentencing Bill committee stage: further detail on government amendments in group 24 and 25 (included in Annex A)
7 HL Deb 26 January 2021 c1544
8 HL Deb 26 January 2021 c1552
9 HL Deb 26 January 2021 c1560
10 HL Deb 26 January 2021 c1574
11 HL Deb 26 January 2021 c1576
12 HL Deb 26 January 2021 c1593
13 HL Deb 9 February 2021 c218
14 Ibid, c241

- To maintain a higher standard of proof for imposing a TPIM.[15]
- To impose an upper time limit for extending TPIMs, and a requirement for judicial authorisation.[16]
- To retain the time limit on curfew conditions imposed under TPIMs.[17]
- To reinstate a statutory deadline for the independent review of Prevent.[18]

Polygraph testing

The Government tabled amendments in Committee to remove clauses from the Bill which would have provided for the imposition of polygraph testing as a licence condition for terrorist offenders in Scotland and Northern Ireland.[19]

Clause 33 would have made provision that Scottish Ministers could impose a polygraph condition as a licence condition for specified terrorist offenders. Clause 34 would have made equivalent provision for the Department of Justice in Northern Ireland.

Neither jurisdiction currently has express provision for polygraph testing but both have broad powers to set licence conditions.

The Minister explained that it had become clear that pursuit of the provisions could result in the Scottish and Northern Irish Ministers withholding consent for the Bill, and further acknowledged that they were "not strictly necessary". However, he expressed hope that the Scottish Parliament and the Northern Ireland Assembly would "see the demonstrable benefits of its introduction in England and Wales".[20] The provisions were removed on the understanding that, should the Scottish Parliament or Northern Ireland Assembly change their minds on polygraph testing, implementation would be possible without the need for further legislation.

Clause 35 was supplementary to clauses 33 and 34 and would have restricted the circumstances in which polygraph testing could be imposed as a licence condition. It was therefore also removed from the Bill, and a number of further amendments were made which were consequential on the removal of clauses 33 to 35.

The opposition parties expressed some reservations in principle to the use of polygraph tests, but did not oppose the amendments.

3.3 Report

Offences aggravated by a terrorist connection

At Report Stage Lord Marks tabled an amendment to clause 1 of the Bill. 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. Lord Marks' amendment would have required a trial of the issue as to whether or not there is a terrorist connection in relation to the offence.

Lord Marks had raised concerns about this this proposal on the first day of Committee and he repeated these at report:

> The principal point I made in Committee was that the decision that the offence had a terrorist connection was not made by the jury before the offender was convicted but was reserved to the judge at the sentencing stage. A defendant might be convicted by

15 HL Deb 9 February 2021, c251-270
16 HL Deb 9 February 2021, c270-281
17 HL Deb 9 February 2021, c286-293
18 HL Deb 9 February 2021, c302-305
19 Amendments 14-16
20 HL Deb 26 January 2021, c1539-1541

> a jury of the basic offence, for which the appropriate penalty might be a short term of imprisonment, but sentenced on the basis of a decision taken by a judge alone, without hearing any evidence, that the offence had a terrorist connection and merited a sentence of a long term of imprisonment. I said then and repeat now that that feature would cut across the principle of our criminal law that no one should be convicted of an offence except upon admissible evidence, open to challenge in a trial and, if in the Crown Court, heard by a jury.[21]

Lord Parkinson responded that the Government considered the amendment unnecessary and inappropriate because the changes proposed would:

> …represent a fundamental departure from existing processes—a significant divergence from practice within the wider criminal justice system.[22]

He stated that, in England and Wales, and in Northern Ireland, it is the standard approach for the judge, rather than the jury, to determine the presence of aggravating factors as part of the sentencing function. He said:

> The current system provides adequate safeguards against the erroneous finding of a terrorist connection. A judge who has determined that the offence was committed with a terrorist connection is required to state in open court that that is the case. That determination is capable of being appealed to the Court of Appeal.[23]

There was a division and the amendment was disagreed (Content 126, Not Content 281).

Removal of release for certain terrorist prisoners

Lord Carlile moved an amendment to clause 27 which he subsequently withdrew. The clause would provide that certain terrorist offenders will not be released from prison until the end of the custodial part of their sentence. A terrorist offender sentenced to a new serious terrorism sentence, or to an Extended Determinate Sentence (EDS), for an offence with a maximum penalty of life imprisonment, would not be released until the end of their custodial term.

Lord Marks noted that clause 27 had been the subject of considerable controversy in Committee, including because there would be no role for the Parole Board in the release of these offenders. He said:

> …many of us felt then and continue to feel strongly that the Parole Board has had, and should continue to have, an important part to play in determining whether and at what stage even dangerous terrorist offenders should be released on licence.[24]

Lord Wolfson responded that there would be no role for the Parole Board in these cases because it would not be necessary since there would be no early release and no parole.[25]

Lord Carlile said his amendment to Clause 27 was an attempt to persuade the Government "to change the architecture of the process of extended sentences in relation to terrorism offences". It sought to maintain and extend the role of the Parole Board. He explained:

> I suggest that the changed architecture, as I have called it, should allow, first, the sentencing judge to inform and warn a defendant at the time of sentence—no ifs, no buts—that at the time when otherwise they may or should be released, they will be subject to assessment by the Parole Board and that that assessment will be based on whether they represent a serious and continuing risk to the public. (…)

21 HL Deb 3 March 2021 c1157
22 HL Deb 3 March 2021 c1160
23 HL Deb 3 March 2021 c1162
24 HL Deb 3 March 2021 c1169
25 HL Deb 3 March 2021 c1173

> Further, I suggest that the changed architecture should allow the following: if a prisoner presents a serious and continuing risk to the public, the ensuing procedure, founded on comprehensive evidence from both sides, as happens at Parole Board hearings, could result in the sentence being extended further, and possibly on more than one occasion.[26]

Lord Wolfson said that the Government's view was that the changes to release as set out in Lord Carlile's amendment would be contrary to safeguards set out in the European Convention on Human Rights and its case law governing sentencing and release. He explained:

> The reason the proposal would be contrary to the case law is that the EDS comprises two distinct parts. The first is a punitive component—namely, the custodial term—imposed for the length a judge considers commensurate with the seriousness of the offending. The second is a separate preventive element—namely, the extended licence—imposed to protect the public from the danger posed by other, future, yet to be determined serious offending. (…)
>
> If the Government were to detain EDS prisoners into their extended licence period for reasons related to their initial offending, that detention would be contrary to the nature and intended purpose of the community supervision component of the sentence, and contrary to the court's order imposing the EDS.[27]

Lord Carlile disagreed about the effect of the case law on his proposal.[28] He withdrew his amendment.

Release of terrorist prisoners in Scotland

Government amendments were agreed regarding the release of terrorist prisoners in Scotland. The Advocate-General for Scotland said these minor and technical amendments provided further clarification to the amendments made on this issue in Committee.[29] Those amendments were intended to ensure that terrorist offenders in Scotland would serve the appropriate custodial period of sentences for terrorism offences when they are imposed consecutively to other sentences.

Review of the Act's sentencing and release provisions

Lord Marks moved an amendment which called for an independent review of the sentencing and release provisions of the Act to be carried out after a year to consider, amongst other things, its effects on the reform and rehabilitation of the offenders affected by it and the effect on radicalisation in prisons.[30] Debate on this amendment echoed debate at Committee Stage on a similar amendment. The debate also considered amendments which called for other reviews of various aspects of the Bill. The Advocate General for Scotland responded that the Government already has an Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, whose remit, he said, covers the Bill.[31] Lord Stewart noted that the Independent Reviewer had announced he would conduct a review of matters within prisons.[32] The amendment was withdrawn.

TPIMS

The Government tabled amendments to clause 37 (clause 34 in the Bill as amended by the Lords in Committee) to change the proposed test for the imposition of a TPIM from one of

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26 HL Deb 3 March 2021 c1174
27 HL Deb 3 March 2021 c1172
28 HL Deb 3 March 2021 c1174
29 HL Deb 3 March 2021 c1175
30 HL Deb 3 March 2021 c1179
31 HL Deb 3 March 2021 c1183
32 Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, Terrorism in Prisons, 26 January 2021

reasonable suspicion of involvement in terrorism-related activity to one of reasonable belief.[33]

Lord Parkinson explained that the amendments were tabled in response to concerns raised during Committee stage about the proposal in the Bill to lower the standard of proof from "balance of probabilities" to "reasonable grounds for suspecting". The amendment would still lower the existing standard of proof, but "reasonable belief" would be a higher standard of proof than that originally proposed by the Bill:

> The Government are confident that this amendment represents a sensible compromise and trust that it addresses the concerns raised about the previously proposed standard of proof and the cumulative effect of the wider package of TPIM changes proposed in the Bill. We are particularly glad that the noble Lord, Lord Anderson of Ipswich, and the noble and learned Lord, Lord Thomas of Cwmgiedd, have put their names to this amendment. Both raised concerns in Committee, drawing on their considerable expertise in this area. I hope it will be welcomed by others across your Lordships' House.[34]

Another Government amendment would introduce a statutory requirement for the IRTL to review the operation of the TPIM Act 2011 on an annual basis for the five years following Royal Assent, commencing with a review in 2022.[35]

Lord Parkinson explained that this amendment was intended to address concerns raised about the importance of independent oversight of the TPIM regime:

> This amendment will guarantee that, alongside the judicial oversight built into TPIMs, which the House has heard about, the independent reviewer will provide independent, rigorous and transparent scrutiny to the operation of TPIMs for the next five years. He will have full access to the relevant sensitive information and personnel and will routinely attend Home Office and Security Service chaired meetings concerning the imposition of a TPIM notice and the management of TPIM subjects.
>
> We are pleased that the current independent reviewer, Jonathan Hall QC, has confirmed his support for this change and for government Amendment 14 on the standard of proof, and that the noble Lord, Lord Anderson of Ipswich, has put his name to the amendment, as well the noble and learned Lord, Lord Thomas of Cwmgiedd, and the noble Baroness, Lady Jones of Moulsecoomb.[36]

Baroness Hamwee did not oppose the amendment, but expressed reservations as to whether it was necessary, given that IRTL is already able to conduct annual reviews of the TPIM Act, and questioned whether imposing an obligation to do so would limit his discretion to set priorities.

Lord Anderson spoke in support of the amendments, noting that they would restore the position under the original TPIM Act. His support for the second amendment was conditional on the IRTL being provided with sufficient resources.

Lord Anderson tabled an amendment to clause 38 to provide that a TPIM could not be extended beyond four years without new evidence of terrorism-related activity.[37] Recognising the need in some cases for TPIMs to last longer than the current two year limit, Lord Anderson questioned whether the country would be kept safer by the "indefinite warehousing of TPIM subjects beyond the four-year mark".[38] He suggested that the country was in a different position now, as compared to 2005 when the control

33 Amendment 17
34 HL Deb 3 March 2021, c1190
35 Amendment 19
36 HL Deb 3 March 2021, c1190
37 Amendment 18
38 HL Deb 3 March 2021, c1195

order regime was first introduced. Noting that the death toll from terrorism in Great Britain this century stands at less than 100, he suggested that

> To introduce indefinite executive detention in response to this miserable bunch of ideologues would, I suggest, be a signal not of strength but of what the terrorists most want to see from us: fear and overreaction.
>
> National security law must be more than a series of proportionality assessments performed by the Executive and observed by respectful courts. Something more is needed—checks and not just balances—or how else can Parliament offer guidance on where the limits should be? Your Lordships' House has already this year greatly improved the Covert Human Intelligence Sources (Criminal Conduct) Bill, whose original version suggested that this important truth may have been forgotten. This Bill, on a similar theme, was described by the independent reviewer as
>
> "conspicuous for its lack of safeguards."
>
> Amendment 16 extends the reach of these always controversial TPIM measures, but it at least retains a tangible check on the executive power to constrain—a power of which the TPIM is the strongest example known to our law.[39]

Responding, Lord Parkinson explained that the Government supported its principle in so far as it recognised that the current two-year limit is too short. However, he reiterated the policy and operational justifications for having no absolute limit on the duration of TPIMs

Lord Anderson called a division and the amendment passed by 316 votes to 267.[40]

There were two further divisions on amendments tabled by the Lord Paddick which would have removed clause 37, which would provide for the extension of residence requirements under a TPIM, and clause 38, which would provide for the use of polygraph measures. Both were defeated.[41]

Other amendments

Further Government amendments were passed which would clarify the territorial extent of the Bill[42] and deal with other technical and consequential issues.[43]

3.4 Third reading

There were no amendments made at Third reading.

The Minister, Lord Wolfson, said:

> I am pleased to confirm to the House that the Scottish Parliament, on the advice of the Scottish Government, has passed a legislative consent Motion in support of the Bill. However, despite lengthy and continued engagement with the Northern Ireland Executive, it has decided not to proceed with recommending that legislative consent be given for the Bill by the Northern Ireland Assembly.[44]

39 HL Deb 3 March 2021, c1196
40 Ibid, c 1208-1211
41 Ibid, c 1212-1214 & 1221-1223
42 Amendment 20
43 HL Deb 3 March 2021, c1229-1232
44 HL Deb 11 March 2021 c1818

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