Amnesty International UK

Counter-Terrorism and Sentencing Bill 2019-21

Submission to the Public Bill Committee

June 2020

Amnesty International United Kingdom Section
The Human Rights Action Centre, 17-25 New Inn Yard, London EC2A 3EA
Tel: 020 7033 1500 advocacyteam@amnesty.org.uk www.amnesty.org.uk

Key Recommendation

- Considering the concerns outlined in this response, **Amnesty International UK strongly urge for the deletion of Clauses 37, 38 and 40 of this Bill.**

Amnesty International UK

Amnesty International UK is a national section of a global movement of more than seven million people. We represent more than 600,000 individuals in the UK. We undertake research and action focused on preventing and ending grave abuses of all human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We are independent of any Government, political ideology, economic interest, or religion.

Introduction and Summary

1. Amnesty International UK provides this submission to the Committee to assist in its consideration of the *Counter-Terrorism and Sentencing Bill*. It focuses solely on three of the most significant changes to the Terrorism Prevention and Investigation Measures ('TPIM') regime this Bill would introduce[1] – unfortunately, the pace at which it is currently progressing through the scrutiny process at this particular time necessitates this approach.

2. This Bill removes a number of the key safeguards and restrictions on this most serious exercise of administrative discretion.

3. Lowering the standard of proof to the bare minimum capable of being considered a threshold condition; removing entirely the limit on the number of times an Order can be re-imposed indefinitely on the basis of the same (increasingly old) evidence; and removing the restriction on the maximum number of hours of curfew (house arrest) the individual can be placed under, amounts to a significant increase in the severity of the measures that may be imposed - while removing a key safeguard.

4. That is completely the opposite approach that should be taken, as the current Independent Reviewer of Terrorism Legislation ('IRTL') has pointed out[2]. Indeed, he has said that *"there is reason to doubt whether there exists an operational case for changing the TPIM regime at this point in time"*[3]. That is consistent with the lack of proper justification given by the government for these most serious of changes. They are changes to a regime which was recognised at its inception in 2005 to be a undesirable circumvention of the criminal justice system (even to those who felt it was necessary – hence the original designation of this as a temporary scheme under emergency legislation

[1] The absence of comment as to the remainder of this Bill should not be taken to mean that we consider those changes to be unproblematic, including the further TPIM changes. Indeed, we continue to have serious concerns about the ongoing treatment of terrorism related offences outside the 'normal' approach to criminal justice, at all stages, particularly given our long documented concerns as to the vague definition of 'terrorism' in domestic law and the recent introduction of new offences that take the UK further down the road of criminalisation of speech and behaviour which would not normally be treated as such.

[2] Note on Counter-Terrorism and Sentencing Bill: TPIM Reforms (1), Jonathan Hall QC at [18]

[3] Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2), Jonathan Hall QC at [2]

that parliament had to re-approve each year), making it particularly surprising that evidence as to the need for the changes has been cursory almost to the point of non-existence.

5. It should be noted that Amnesty International UK opposes the TPIM system in its entirety. These measures essentially allow the government to bypass the ordinary criminal justice system whenever it is considered expedient, precisely to avoid the safeguards which there exist for liberty and fairness. TPIMs allow the government, using a process which relies on secret undisclosed evidence and fails to respect ordinary fair trial rights, to impose measures that can severely interfere with the rights to liberty, privacy, association and movement among others, and to do so where breach of those measures is a criminal offence. We consider that to be inconsistent with the UK's international human rights obligations.

6. These changes, however, make what was already a deeply problematic system far more intrusive, while simultaneously removing some of the key safeguards. They do so against the advice of the IRTL, and his predecessors.

7. In light of the concerns outlined in this response, Amnesty International UK **strongly urge for the deletion of Clauses 37, 38 and 40 of this Bill.**

A minimal threshold: Clause 37

8. With this Bill, TPIMs have come full circle. From a Conservative Minister confidently making the case for the raising of the threshold for imposition of a TPIM to the balance of probabilities in 2015[4], this Bill would take it back to the most minimal of standards - that contained in non-derogating Control Orders back in 2005 - reasonable grounds for suspecting someone may be involved in terrorism-related activity.

9. The extent of the government's discussion of this change in its ECHR memorandum is to assert that lowering the threshold "*does not in itself infringe a person's ECHR rights; it is the measures themselves imposed under the TPIM which might do that*" and to further 'note' as the sole reference, perhaps, to the need for such a change, that "*the raising of the threshold was a voluntary political decision in a somewhat different national security climate"* [56].

10. That lack of reasoned argument as to the need for this change mirrors the lack of appropriate evidence or justification presented to this House at second reading. In the Bill's accompanying Impact Assessment, moreover, the answers given to the key question of *"What is the problem under consideration? Why is government intervention necessary?"* relate solely to convicted offenders, with only a later minimal reference to the policy objective '*better protect the public'* linking at all to *"individuals of terrorism concern outside of custody"* and a vague explanation that the Bill will allow for "*more effective intervention when this is required*". TPIM changes, it is said, will "*enhance the ability of operational partners, such as counter terrorism policing, to manage the risk posed by individuals subject to TPIMs*". The change to the standard, it is simply said,

[4] Lord Bates, see https://hansard.parliament.uk/Lords/2015-01-13/debates/15011360000366/Counter-TerrorismAndSecurityBill?highlight=Manningham%20Buller%23contribution-15011360000177 , January 2015

will "*help ensure that operational partners are better able to impose TPIM notices on individuals where there is a requirement to protect national security*" [85]. Nothing more.

11. As to the national security climate, it is notable that no such proposals were made in the Counter-Terrorism and Border Security Act 2019, made in the aftermath of the attacks in 2017, as pointed out by the IRTL in his recent notes.

12. Control Orders were meant to be temporary, introduced under emergency legislation in 2005. Their replacement, TPIMs, were introduced on a permanent basis in 2011. The then IRTL, Lord Anderson, reviewed the TPIM regime and recommended they be made less intrusive, time limited and only imposed where the Secretary of State could satisfy a court that on the balance of probabilities the individual was or had been involved in terrorism related activity ('TRA'). The government accepted that advice (other than the recommendation that it be required also to satisfy a court to that same standard[5]) and raised the threshold in 2015 in the Counter Terrorism and Security Act. It was no accident that this coincided with reintroducing the power to relocate an individual – a more intrusive power was recognised to require a higher standard.

13. Even without that increase in the severity of the interference with individual rights, however, it was felt to be a necessary principled change. As Lord Anderson said in his 2013 Report:

> *"[TPIMs] do function in some respects as an alternative to the criminal process. They give an advantage to the Government by allowing intelligence to be taken into account which could not be deployed in a criminal court. With all that evidence available, why should the Government not be kept at least to the civil standard of proof in making out their case on TRA*?" [11.49]

14. The current IRTL, like those before him (Lord Carlile also supported a higher threshold), has been absolutely clear that in his expert, independent view, such a threshold is not an impediment to safeguarding national security, stating that:

> "*it is not clear why there is any need to change the law in the manner proposed…where harsher measures are to be imposed, safeguards should be encouraged, not jettisoned. Moreover in these cases the current standard of proof does not make TPIMs impractical…even administrative convenience does not appear to provide a basis for reversing the safeguard of a higher standard of proof*"[6]

15. The reasons given by the Secretary of State at second reading for this change to TPIMs were limited to stating that it was being made in order to "*increase their value as a risk-management tool and support their use by operational partners in cases when it is*

[5] The Independent Reviewer of Terrorism Legislation Lord Anderson was concerned that the changes did not go far enough – calling not only for the secretary of state to be satisfied, but also for them to be required to satisfy a court, that on the balance of probabilities a TPIM subject was involved in terrorism-related activity. The government disagreed. See TERRORISM PREVENTION AND INVESTIGATION MEASURES IN 2014, March 2015 at [3.8]. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPIMs_2014_final_report__web_.pdf

[6] Note on TPIM Reforms (1) [at 17-19], emphasis added

considered necessary" and to create "*a more flexible means of monitoring*"[7]. In response to a request from Sir Robert Neill MP, Chair of the Justice Committee, asking him to explain the evidence triggering this change, he simply said that it was "*all about making sure that we have as agile a tool as possible, bearing in mind the rapidly changing nature of the terrorist threat that we face*[8]".

16. That is woefully inadequate justification for the removal of such a critical safeguard, particularly when the measures that may be imposed could be, in effect, indefinite. As such, **Amnesty International UK strongly urge for the deletion of Clause 37 of this Bill.**

An 'enduring' control - indefinite TPIMs: Clause 38

17. If this Bill passes unamended, "*there will be no restriction*", as the government's ECHR memo explains, "*on the number of times the Secretary of State may renew a TPIM*" [59]. The 'enduring' Orders (perhaps a less disturbing characterisation than the reality) will be indefinitely renewable, on the basis of the same original evidence, and without any further Court process. There are no specific safeguards to accompany this very significant change. As with the standard of proof, the government asserts that "*in itself*" the removal of a key safeguard around this exercise of administrative discretion does not infringe a person's ECHR rights, going on to say that "*The most important safeguard still exists: each and every renewal of the TPIM notice must be necessary for purposes connected with protecting the public with a risk of terrorism*"[60].

18. This will be little reassurance to an individual who faces the prospect of a never-ending interference with their rights, based on increasingly old evidence, and where even that (secret, undisclosed) evidence will only have needed to give rise to a reasonable suspicion on the part of the Secretary of State that they were indeed engaged in TRA.

19. As the IRTL points out, this could mean that an individual who has been properly convicted by a Court of terrorism-related offences spends less time under controls than "*an individual who has never been convicted, based on one episode of terrorism-related activity"* - an "*uncomfortable contrast*" (Note 2 at 17).

20. Currently, evidence is needed of engagement in fresh TRA to impose a further Order after two years, but where such evidence exists, that can be done. With that in mind, there does not appear to be any proper justification given for the change. In 2016, when providing its preliminary assessment of TPIMs to the Home Affairs Committee, the Home Office explicitly stated that "*the Government is clear that restrictions should not and do not continue indefinitely on the basis of historical evidence*"[9], contrasting that with where an individual engages in new TRA. No explanation has yet been provided for this change in position.

21. At second reading, as with the change to the standard if proof, little of any substance on this point was presented by the Secretary of State. In the Bill's Impact Assessment, concerningly, a key justification appears to be an administrative burden one: "*Extending*

[7] Col 205
[8] Col 206
[9] Memorandum to the Home Affairs Committee: Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011, at [45]

the length of time for which a TPIM notice can last from two years to indefinite will avoid a potential scenario where a TPIM subject reaches the end of their TPIM notice but is still considered a threat to national security, and will avoid the administrative burden of requiring operational partners to apply for a new TPIM notice where the existing measures are still needed." [86]. That is a wholly inappropriate basis on which to impose a measure of this seriousness.

22. The lack of cogent reasoning for doing away with the existing time limit is perhaps unsurprising given that it was strongly supported by previous IRTLs. Lord Carlile said on this point, for example, that:

> "*In the current system, and for its replacement, I remain of the opinion I have expressed before about duration. I agree with the intention expressed in the Counter-Terrorism Review that there should be a maximum duration of the intervention of two years, with a new one available after that time only if there is new evidence that the individual has continued to be engaged or has reengaged in terrorism-related activities*[10]"

23. It is "*tempting"*, Lord Anderson explained, "*to wish for longer".* However, he explained that

> "*The longer a TPIM notice is allowed to last and the heavier its restrictions, the harder it becomes to defend it as a preventative measure rather than as part of a shadow system of punishment that bypasses both the criminal courts and the criminal burden of proof…*
>
> *… Even the two years of constraint now permitted is a very strong power by international or indeed historic British standards…The two-year limit is short enough to render TPIMs an unattractive alternative to criminal prosecution. It gives a number of healthy incentives to the authorities: in particular, to find ways of allowing sensitive evidence to be deployed in criminal proceedings and to devote serious and constructive thought to TPIM exit strategies [11.37] …the two-year maximum seems to me an acceptable compromise between the various interests involved*" [11.38] (emphases added)

24. The first point appears to be echoed by the current IRTL, referring to the "*seductive argument for another 'tool in the toolkit'*". His note states that "*absent a compelling operational case that the authorities are unable to keep the public safe, there is less reason for discounting the positive reasons for a 2-year limit*"[11].

25. No such case appears to be being made – for this House to even consider approving this serious change to a time limit, it should require commensurately strong evidence as to why it is considered necessary, contrary to the government's previous position and when no such changes were made in the 2019 Act.

26. As such, **Amnesty International UK strongly urge for the deletion of Clause 38 of the Bill.**

---

[10] Lord Carlile, Sixth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005, February 2011, at [55].

[11] Note 2

Unlimited confinement to the home: Clause 40

27. This Bill also removes the restriction on the number of hours the Secretary of State may require the individual to remain inside their home each day, the 'curfew'. Instead of restricting this to 'overnight', which had the twin characteristic of likely being perhaps less impactful (since for most people they will more likely be at home for some of this time) and being a limited period, it will now fall within the Secretary of State's unrestricted discretion to impose what may be anything up to 24 hours a day of confinement to the home.

28. The Courts have been clear that in assessing whether a measure of this kind amounts to a deprivation of liberty and is thus unlawful (terrorism risk on its own is not a valid basis for a deprivation, since article 5 ECHR sets our an exhaustive list of cases where a person may be deprived of their liberty, under a procedure prescribed by law[12]):

> "*Account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question*" (Lord Bingham in *JJ* at [16], emphasis added)

29. Since *JJ,* we are told that no comparable Order has been imposed which included - even before the change to the overnight restriction - a curfew in excess of 16 hours. That is presumably because in the concurring Opinion of Lord Brown in that case, he was the only Judge who expressed the view that a bright line could be drawn as to when length of curfew would tip a restriction of liberty into a deprivation, and he set that "*absolute limit*" as being 16 hours (*JJ* at 105).

30. This Bill would remove even the minimal restriction of curfews ('residence measures') having to be 'overnight'. Again, no proper justification has been given for this change. The restriction does not appear to have been addressed at Second Reading. There is no substantive justification given for it in the Bill's ECHR memorandum, which refers to this change being made "*so that an individual can be subject to a longer curfew"*, bringing the position back to that of the original Control Order measures of 2005 [62]. The Impact Assessment sheds little further light, merely stating that this change "*will strengthen the Secretary of State's power to specify that a TPIM subject must remain at a specified residence between certain hours and therefore enhance their ability to manage individuals of terrorist concern*" (at [88], emphasis added).

31. This is a change which raises the likelihood – indeed explicitly would allow for – the imposition of curfews that would clearly on their own, or in combination with other measures, amount to an unlawful deprivation of liberty. They also have the potential to interfere with other rights. We do not consider this to be justified, or indeed justifiable.

32. **Amnesty International UK therefore strongly urge for the deletion of Clause 40 from the Bill.**

[12] See Lord Bingham in *JJ v SSHD* [2007] UKHL 45 at [5]