

HOUSE OF LORDS

Select Committee on the Constitution

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16th Report of Session 2019–21

# Counter-Terrorism and Sentencing Bill

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### *Committee staff*

The current staff of the committee are Matt Korris (Clerk), Ava Mayer (Policy Analyst) and Dan Weedon (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

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# Counter-Terrorism and Sentencing Bill

## Introduction

1. The Counter-Terrorism and Sentencing Bill was introduced to the House of Commons on 20 May 2020 and passed on 21 July. It was brought to the Lords on 22 July and received second reading on 21 September.
2. The Bill provides for changes to the sentencing and release of terrorist offenders. It also provides for greater monitoring of terrorist offenders following their release from prison.
3. The Bill is of constitutional significance because it encroaches on civil liberties and changes the sentencing of terrorist offenders with retrospective effect.

## Retrospective provisions

4. Clauses 15–20 provide for extended sentences for a range of terrorism offences. These provisions have retrospective effect insofar as they would apply to offenders who have committed offences before the commencement of the provisions but have not yet been sentenced on commencement.
5. Clause 27 provides that offenders serving a serious terrorism sentence, or an extended determinate sentence for an offence that has a maximum penalty of life imprisonment, no longer qualify for release by the Parole Board at the two-thirds point of their custodial term. This provision also has retrospective application insofar as it would apply to persons who committed offences before, but are sentenced after, clause 27 comes into force.
6. We have considered the constitutional implications of retrospective legislation in previous bills,<sup>1</sup> including in respect of terrorist offences.<sup>2</sup> As we have previously stated, there needs “to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable”.<sup>3</sup>
7. **The House may wish to consider the extent to which the Government has provided an adequate justification for the retrospective effect of clauses 15–20 and 27.**

## Terrorism Prevention and Investigation Measures

8. Terrorism Prevention and Investigation Measures (TPIMs) are preventative civil measures imposed under the Terrorism Prevention and Investigation Measures Act 2011. They are designed to protect members of the public from the risk of terrorism by imposing restraints on those suspected of involvement in terrorism-related activity. Those subject to TPIMs may be required to comply with various requirements including curfew/overnight

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1 See, for example: Constitution Committee, *Banking Bill* (3rd Report, Session 2008–09, HL Paper 19); *Energy Bill [HL]* (4th Report, Session 2015–16, HL Paper 27); *Immigration Bill* (7th Report, Session 2015–16, HL Paper 75)

2 Constitution Committee, *Terrorist Offenders (Restriction of Early Release) Bill* (3rd Report, Session 2019–21, HL Paper 23)

3 Constitution Committee, *Banking Bill* (3rd Report, Session 2008–09, HL Paper 19), para 7

residence; electronic tagging; relocation to a residence up to 200 miles away; restrictions on travel, communication, work/study and association; and reporting to police stations and complying with directions issued by constables in respect of such reporting.<sup>4</sup>

9. The Bill widens the application of TPIMs in a number of ways. Clause 37 replaces the “balance of probabilities” standard for imposing a TPIM with a standard of “reasonable grounds for suspecting” involvement in terrorist activity.
10. Clause 38 removes the two-year time limit on the imposition of a TPIM, replacing it with a one-year limit that may be indefinitely renewed.
11. Clause 40 provides for the extension of residence measures, limiting the movements of those subject to TPIMs and increasing the scope of permitted curfew arrangements to “any such hours that are specified”, subject only to the requirement that they do not amount to a deprivation of liberty under Article 5 of the European Convention on Human Rights.<sup>5</sup>
12. In a briefing to the Commons Home Affairs Committee, the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, expressed concerns about the potential breadth and lack of judicial oversight of TPIMs. He suggested that any TPIM proposed to run beyond two years ought to require renewal permission from a judge at the two-year point.<sup>6</sup> He doubted “whether there exists an operational case for changing the TPIM regime at this point in time” and saw no need to lower the standard of proof in respect of the return of individuals from possible terrorist activity abroad.<sup>7</sup>
13. **The revised regime for Terrorism Prevention and Investigation Measures represents a substantial interference with the liberty of those subject to them. Individuals may be the subject of TPIM without having been convicted of any offence in the past. Curtailments of liberty, association, residence and work or study may be made on the basis of a standard of reasonable suspicion and may be renewed indefinitely. The House may wish to consider the extent to which the Government has provided an adequate justification for these measures.**

#### Other constitutional issues

14. The following sections deal with other constitutional issues raised by the Bill, including civil liberties, the role of the Parole Board and opportunities for scrutiny of executive action. We do not take a view on the merits of the policy decisions involved, but draw these constitutional matters to the attention of the House.

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4 Terrorism Prevention and Investigation Measures Act 2011, [schedule 1](#)

5 Following a ruling of the Supreme Court, a residence measure may amount to such a deprivation if it exceeds 14–16 hours a day, depending on the severity of the other accompanying measures. *R (AP) v Secretary of State for the Home Department* [2010] UKSC 24

6 Summary note of a private briefing for the House of Commons Home Affairs Select Committee, inquiry on The Counter-Terrorism and Sentencing Bill, 29 June 2020 (Session 2019–21) ([CTB0001](#))

7 Jonathan Hall QC, [Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms \(2\)](#), 5 June 2020, p 1

*Sentences for young adult offenders*

15. Clause 4 creates a new type of sentence for terrorist offenders aged over 18 but under 21. This new sentence entails detention in a young offender institution for a custodial term of 14 years or longer, together with an extension period between seven and 25 years to be served on licence. Clause 4 requires the court to impose this sentence where certain conditions are met, unless exceptional circumstances apply.<sup>8</sup>
16. **A custodial sentence of this length and extended licence requirements may be considered a significant deprivation of liberty for young adult offenders. The House may wish to consider whether the Government has provided sufficient justification for clause 4.**
17. Clause 7 makes a similar provision in respect of 18 to 20-year-old offenders in Northern Ireland. In contrast to the arrangements for England and Wales, the sentence is for “detention at such place and under such conditions as the Department of Justice may direct” provided that the person detained “shall be in legal custody”. This provides greater discretion to the justice system in Northern Ireland to consider rehabilitative options for the offender. **We recommend the Government explains its reasons for the differing approach between the sentencing of young adult offenders in England and Wales compared with those in Northern Ireland.**

*Sentences for child offenders*

18. The Sentence for Offenders of Particular Concern (SOPC) was introduced in the Criminal Justice and Courts Act 2015 in England and Wales. It must be imposed on certain offenders aged over 18 who have committed a terrorist or sexual offence specified in Schedule 18A to the Criminal Justice Act 2003. Terrorist SOPC offenders cannot be considered for release by the Parole Board before the two-thirds point of their custodial sentence. All SOPC offenders, whether terrorist or non-terrorist, must be released at the end of their custodial term and are subject to a further 12-month licence period to manage the assessed risk the offender poses.
19. Clause 22 extends the SOPC regime to offenders under the age of 18 and removes a bar in the Sentencing Code to the imposition of a custodial sentence on persons under the ages of 12 and 15 in certain circumstances. The Explanatory Notes to the Bill state:

“The new custodial sentence for those under the age of 18 (SOPC) will only be available where a life sentence, EDS [Extended Determinate Sentence] or DTO [Detention and Training Order] would not be appropriate, either because the severity of offending does not warrant a life sentence, the dangerousness criteria are not met in the case of an EDS sentence, or a DTO would be insufficient because of the nature and severity of the offending. In those cases, the custody threshold has been crossed and custody deemed necessary by the court.”<sup>9</sup>

8 Counter-Terrorism and Sentencing Bill [HL Bill 177 (2019–21)], [new section 268B\(2\), as inserted by clause 4](#)

9 Counter-Terrorism and Sentencing Bill, [Explanatory Notes](#), para 307

## 20. The Explanatory Notes continue:

“As with every sentencing decision for those aged under 18, the courts must always take account of the child’s age and welfare when deciding on the most appropriate sentencing option: a custodial sentence will continue to be the last resort for children, only when deemed absolutely necessary, and only for the shortest appropriate period. The approach to sentencing should be individualistic and focused on the child or young person.”<sup>10</sup>

21. **Although the courts will retain the discretion to impose an appropriate custodial term, clause 22 provides for a significant extension of custodial liability for children. The House may wish to consider the extent to which the Government has justified this approach to the sentencing of children.**

*Early release and the role of the Parole Board*

22. This Bill follows the Terrorist Offenders (Restriction of Early Release) Act 2020.<sup>11</sup> That Act ended the automatic early release of certain terrorist offenders halfway through a custodial sentence, replacing it with a referral to the Parole Board at the two-thirds point of the sentence.

23. Clause 27 of this Bill provides that offenders serving a serious terrorism sentence, or an extended determinate sentence for an offence that has a maximum penalty of life imprisonment, can no longer be considered for release by the Parole Board at the two-thirds point of their custodial term. They would remain in prison for the whole of their custodial term. Clauses 28–29 make similar provision for Scotland, and clauses 30–31 for Northern Ireland.

24. These measures remove the Parole Board’s discretion to determine whether the public interest is best served by the early release of terrorist offenders on licence. **While reducing the role of the Parole Board in respect of terrorist offenders is a policy decision rather than a matter of constitutional principle, we draw the attention of the House to the significant change to justice policy effected by this Bill and the Terrorist Offenders (Restriction of Early Release) Act 2020.**

*Prevent Strategy review*

25. Section 2 of the Counter-Terrorism and Border Security Act 2019 requires the Secretary of State to make arrangements for an independent review of the Prevent Strategy for counter-terrorism. The recommendations of the reviewer and the response of the Secretary of State are to be laid before both Houses of Parliament within 18 months of the Act being passed.

26. Clause 47 removes the deadline for the review but retains the duty on the Secretary of State to arrange it. The Lord Chancellor explained that there was “a difficulty with the process” with the appointment of the independent reviewer and that a new open competition for the post was being undertaken.<sup>12</sup> During committee stage, the Parliamentary Under-Secretary of State for

<sup>10</sup> *Ibid.*, para 308

<sup>11</sup> Constitution Committee, *Terrorist Offenders (Restriction of Early Release) Bill* (3rd Report, Session 2019–21, HL Paper 23)

<sup>12</sup> HC Deb, 9 June 2020, [col 209](#)

the Home Department said that the Government wanted the review to be completed by August 2021, but resisted an attempt to put a new deadline in the Bill as it “could be problematic if something unforeseen happens again.”<sup>13</sup>

27. **An independent review of the Prevent Strategy was considered sufficiently important to be included in the Counter-Terrorism and Border Security Act 2019 with a set deadline. Independent reviews facilitate scrutiny of executive action and are often proposed where there are particular concerns about the provisions of a Bill. While we recognise the process difficulties and wider circumstances that delayed the review such that it missed its original deadline, the House may wish to consider whether a new deadline should be specified in this Bill.**

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<sup>13</sup> Counter-Terrorism and Sentencing Bill, Public Bill Committee, Eighth Sitting, 8 July 2020, [cols 211–212](#)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Beith  
Baroness Corston  
Baroness Drake  
Lord Dunlop  
Lord Faulks  
Baroness Fookes  
Lord Hennessy of Nympsfield  
Lord Howarth of Newport  
Lord Howell of Guildford  
Lord Pannick  
Lord Sherbourne of Didsbury  
Baroness Taylor of Bolton (Chair)  
Lord Wallace of Tankerness

### Declarations of interest

Lord Beith  
*Honorary Bencher of the Middle Temple*  
Baroness Corston  
*No relevant interests*  
Baroness Drake  
*No relevant interests*  
Lord Dunlop  
*No relevant interests*  
Lord Faulks  
*No relevant interests*  
Baroness Fookes  
*No relevant interests*  
Lord Hennessy of Nympsfield  
*No relevant interests*  
Lord Howarth of Newport  
*No relevant interests*  
Lord Howell of Guildford  
*No relevant interests*  
Lord Pannick  
*No relevant interests*  
Lord Sherbourne of Didsbury  
*No relevant interests*  
Baroness Taylor of Bolton (Chair)  
*No relevant interests*  
Lord Wallace of Tankerness  
*No relevant interests*

A full list of members' interests can be found in the Register of Lords' Interests:  
<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>



Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.