



UK Mission Geneva

UK Mission Geneva
PO Box 6
Avenue Louis Casar 58
1216 Cointrin GE

Tel: 022 918 2453
Fax: 022 918 2333

Special Procedures Branch
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
CH-1211
Geneva 10
Switzerland

Note Verbale No. 318

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland presents its compliments to the Office of the United Nations High Commissioner for Human Rights and has the honour to submit the response to communication OL GBR 7/2020, further to the letter dated 22 July 2020 from the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right to privacy; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, 12 October 2020

Special Procedures Branch
Office of the United Nations High Commissioner for Human Rights

Annex

Response of the Government of the United Kingdom of Great Britain and Northern Ireland to the Joint Communication OL GBR 7/2020 from the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right to privacy; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

The UK's Counter-Terrorism and Sentencing Bill will better protect the public in the UK and elsewhere by strengthening every stage in the process of dealing with terrorist offenders across the UK, from sentencing and release through to monitoring in the community. It will ensure that serious and dangerous terrorism offenders will spend longer in custody, properly reflecting the seriousness of the offences they have committed, which provides both better protection for the public and more time in which to support their disengagement and rehabilitation through the range of tailored interventions available while they are in prison. It will also improve our ability to monitor and manage the risk posed by terrorist offenders and individuals of terrorism concern outside of custody, allowing for more effective intervention when this is required. The UK Government is confident that the legislation is compatible with both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).

The appalling terror attacks at Fishmongers' Hall, London, on 29 November 2019 and in Streatham, London, on 2 February 2020 demonstrate the risk that the United Kingdom continues to face from terrorism. The protection of the public is the foremost duty of government and this legislation builds on recent UK Government action to bolster the country's response to terrorism, and to ensure that we have some of the strongest measures in the world to tackle the evolving threat that we face.

We are confident that the measures set out in the Counter-Terrorism and Sentencing Bill ("the Bill") appropriately balance that duty to protect the public with the rights of the individual. On introduction of the Bill to Parliament, the Ministry of Justice published – as is a pre-requisite – an ECHR Memorandum,¹ which provides a detailed analysis of the Bill's measures, demonstrating their compliance with the ECHR. The Lord Chancellor and Secretary of State for Justice made a statement in the House of Commons, under section 19(1)(a) of the Human Rights Act 1998, confirming that the provisions of the Bill are compatible with Convention rights.²

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886107/cts-echr-memorandum.pdf

² Rights set out in the ECHR and incorporated into UK domestic law by the Human Rights Act 1998.

Despite the ongoing COVID-19 pandemic, Parliament has continued to play a full and thorough role in scrutinising the Bill and its measures.³ The Bill passed through the relevant stages of scrutiny in the House of Commons, with active and detailed cross-party engagement from Members of Parliament, and detailed evidence provided by a range of expert witnesses.⁴ On 22 July, the Bill was introduced in the House of Lords for further scrutiny.

Below we set out a response to each of the issues included in the Joint Communication, and how they interact with both the ECHR and the ICCPR. Separately, we provide specific responses to the Joint Communication's questions on the compatibility of this legislation with Article 40 of the Convention on the Rights of the Child, and the positive oversight measures that will ensure robust scrutiny of this legislation.

1 and 2. Additional information on the Bill and compatibility with obligations under ICCPR [& ECHR?]

A. Terrorism Prevention and Investigation Measures (TPIMs)

In addition to changes to sentencing, the Bill will improve public protection by strengthening the ability of the police and Security Service to disrupt and manage the risk posed by individuals who have been involved in terrorism-related activity. It does this by enhancing various tools at their disposal: strengthening TPIMs; supporting the use of Serious Crime Prevention Orders in terrorism cases; and adding breaching a TPIM notice and breaching a Temporary Exclusion Order to the list of relevant offences that can trigger the Registered Terrorist Offender notification requirements. These changes have been developed in consultation with operational partners. Those partners have expressed support for the changes during the Bill's consideration at Committee stage in the House of Commons. The changes represent a proportionate and justified response to the current threat to national security and the need for enhanced risk management of those of terrorism concern within the community.

The Bill makes a number of changes to the regime for TPIMs. At present, a TPIM can be imposed where the Secretary of State for the Home Department (the Home Secretary) is satisfied, on the balance of probabilities, that an individual is, or has been, involved in terrorism-related activity. A TPIM is a range of civil measures placed on an individual, which are designed to prevent or restrict his or her involvement in future terrorism-related activity. The Bill amends existing measures and introduces a number of new measures. The Bill also lowers the standard of proof required from "balance of probabilities" to "reasonable suspicion"; and removes the two-year

³ <https://services.parliament.uk/Bills/2019-21/counterterrorismandsentencing/stages.html>

⁴ <https://services.parliament.uk/Bills/2019-21/counterterrorismandsentencing/stages.html>

statutory time limit so that TPIMs are capable of annual extension as long as is necessary.

As set out in the ECHR Memorandum¹ that we have published alongside the Bill, all of these changes mean that a TPIM will more closely resemble the forerunner to TPIMs: the non-derogating control order under the Prevention of Terrorism Act 2005 (“PTA 2005”).⁵ While the PTA 2005 was entirely repealed when the TPIM Act 2011⁶ came into force, the obligations under the control order regime were subject to scrutiny by the High Court, and in many cases also by the appeal courts. Although in several individual cases the Court overturned specific obligations imposed, we should highlight that the enabling powers in the legislation were not found to be incompatible with ECHR rights. The case law in this context provides guidance as to the limits of the measures that may be imposed and the factors the Secretary of State must take into account.

The Joint Communication indicates that the broad scope of the provisions contained in the Bill give rise to a concern about a lack of a robust and independent review mechanism. There are, however, robust safeguards built into the TPIM regime, including independent oversight by the Court. The following core safeguards will remain without change once the Bill secures Royal Assent⁷ later this year:

- Section 6 (permission of the court): When the Secretary of State first seeks to impose a TPIM notice, they must seek permission from the Court to do so. The Court will consider the same national security case that the Secretary of State considered and will then decide whether the initial decision to impose a TPIM notice was ‘obviously flawed’. Only after this hearing can the signed TPIM notice and accompanying schedule of measures be served.
- Section 9 (review hearing): Once a TPIM notice has been imposed, all TPIM subjects have an automatic right to have a court review the imposition of their TPIM and each of the measures imposed. This hearing also provides an opportunity for the subject to hear the national security case against them.
- Section 11 (review of ongoing necessity): This requires that TPIMs be kept under regular review during the period which they are in force and be revoked where it is no longer necessary or proportionate to maintain them for the purposes of public protection.
- Section 16 (appeals): The Court also considers a TPIM notice during any modification appeal. This avenue is available to all TPIM subjects who wish to challenge a refusal by the Secretary of State to vary one or more measures contained within the notice, or if they wish to challenge the extension of their notice.

⁵ <https://www.legislation.gov.uk/ukpga/2005/2/contents>

⁶ <https://www.legislation.gov.uk/ukpga/2011/23/contents>

⁷ Once a Bill has completed all the parliamentary stages in both Houses, it is ready to receive Royal Assent. This is when the Queen formally agrees to make the bill into an Act of Parliament (law).

Looking in turn at the key TPIM changes raised in the Joint Communication:

i) Standard of proof

At present, the Secretary of State for the Home Department must be satisfied on the 'balance of probabilities' that an individual is, or has been, involved in terrorism-related activity. The provisions in this Bill lower that standard to 'reasonable suspicion', which was the standard applied previously under Control Orders. The Government does not consider that reverting to 'reasonable suspicion' engages or infringes any ECHR rights in and of itself. During debates on the Bill in Parliament, the Government set out several scenarios in which the lower standard of proof could make a material difference. This includes the ability to impose a TPIM on an individual who has been to Syria (or similar theatres) to fight for, or assist, a terrorist organisation, but evidence of their activities there is hard to gather because of the environment in which those activities took place.

Amending the TPIM Act 2011 will ensure that one of the five conditions (see section 3 of the TPIM Act 2011⁸) that needs to be met in order to impose a TPIM is easier to satisfy. The other four conditions will remain unchanged. There will remain strict conditions around the measures that can be imposed and a robust set of safeguards. Lowering the standard of proof does not mean that the Government will be able to impose TPIMs whenever there is suspicion of terrorism-related activity. Proving past terrorism-related activity and demonstrating necessity of the TPIM and each of its measures are separate and distinct limbs of the TPIM test. Even if past terrorism-related activity was proven beyond all reasonable doubt, by way of successful prosecution for a terrorism offence, the necessity test will still have to be met. In respect of the concern expressed in the Joint Communication that TPIMs are a tool that can be applied to individuals who have not been convicted of a terrorism (or any other) offence, it is important to note that TPIMs are not intended to act as a sanction or punishment for past conduct but are instead intended to manage the risk posed by an individual to the extent that it is necessary to do so in order to protect the public from a risk of terrorism. The Government therefore does not agree that Article 14(2) (right to a fair trial) ICCPR and Article 6(2) (right to a fair trial) ECHR are engaged. TPIM proceedings will engage the civil limb of Article 6 ECHR, but we do not consider that any of the changes made by this Bill render those proceedings incompatible.

The TPIM Act provides for extensive judicial oversight of each TPIM. The imposition of the TPIM and each of the relevant measures requires the prior permission of a judge who is required to determine whether the TPIM is obviously flawed (section 6 of the TPIM Act 2011⁹); and is subject to an automatic review by the courts (section 9 of the TPIM Act 2011¹⁰). In addition, an individual may appeal a decision to extend his or her TPIM and appeal a refusal by the Secretary of State to grant a request to vary

⁸ <https://www.legislation.gov.uk/ukpga/2011/23/section/3>

⁹ <https://www.legislation.gov.uk/ukpga/2011/23/section/6/enacted>

¹⁰ <https://www.legislation.gov.uk/ukpga/2011/23/section/9/enacted>

the measures or to grant permission for the individual to do an act that is contrary to the TPIM measures.

As set out in the Bill's Equality Statement,¹¹ our assessment is that the proposals are unlikely to result in indirect discrimination within the meaning of the Equality Act¹² as we believe they do not put people with protected characteristics at a particular disadvantage when compared to others who do not share those characteristics. In addition, the overrepresentation of some groups within scope of this policy will reflect the nature of terrorism in the UK at any given point.

The Government is clear that TPIMs are a last resort to protect the public from dangerous individuals whom it is not possible to prosecute or deport, or individuals who remain a real threat after release from prison. They are used in a very small number of cases (as of 31 May 2020, there were six individuals on a TPIM¹³) and it is not expected that this will change significantly as a result of this legislation.

ii) Extension of time limit

At present, a TPIM is subject to a two-year limit. Another TPIM can be imposed after that period, but it requires evidence of “new terrorism-related activity” – in other words, activity occurring after the imposition of the first TPIM. In contrast, control orders lasted for a year at a time, but were capable of indefinite renewal. . Of 52 control orders imposed during the life of the scheme, 15 orders were revoked, and four orders were not renewed, as a result of a decision by the Government that the necessity test was no longer satisfied.

The provisions in this Bill remove the two-year statutory limit so there will be no restriction on the number of times the Secretary of State may renew a TPIM. This change ensures that where subjects do pose an enduring risk, we will be better placed to restrict and prevent their involvement in terrorism-related activity for as long as is necessary for public protection. As with lowering the standard of proof, removing the time limit does not in itself infringe a person's ECHR rights.

This change tackles the threat from TPIM subjects “biding time”: in other words, waiting for the current maximum of two years to expire with no change to their mindset and an unwillingness to engage with rehabilitative measures. This is an issue that a former Independent Reviewer of Terrorism Legislation has publicly reported on.¹⁴ It also addresses the risk of a “cliff edge” being created by removing the TPIM after two years when a risk to public safety remains. Experience has shown that there have been occasions when we have had to impose a further TPIM on a subject after they have reached the current two-year limit. This has resulted in gaps of up to 16 months

¹¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886105/cts-equality-statement.pdf

¹² <https://www.legislation.gov.uk/ukpga/2010/15/contents>

¹³ The number of people subject to a TPIM is published quarterly by the Secretary of State for the Home Department.

¹⁴ https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The_Terrorism_Acts_in_2017.pdf

while a new TPIM was prepared and imposed. It is not in the interests of public protection to have such individuals at large within the community without the appropriate risk management tools in place.

Furthermore, the Secretary of State must be able to demonstrate to a court, both at the time that the TPIM is imposed and during the period that it is in force, how each of the measures is necessary in order to protect the public and prevent the individual subject to the notice from engaging in terrorism-related activity. Section 11 imposes an obligation on the Secretary of State to keep under review the necessity of the TPIM. Under section 5 the Secretary of State will, at the end of 12 months, have to make a decision as to whether to renew the TPIM; at which point they must consider whether the TPIM and each of the measures are necessary to protect the public and prevent the individual engaging in terrorism-related activity. This decision may be appealed (see section 16). It is self-evident that the longer the period since the terrorism-related activity the harder it will be to demonstrate necessity, which will likely result either in the TPIM being revoked or a tapering off its measures.

There is clear precedent under the Control Order regime for the orders not to last indefinitely, and we expect a similar approach to be taken with TPIMs. TPIMs are resource-intensive and we therefore do not envisage operational partners wishing to maintain a TPIM for any longer than is absolutely necessary to manage the risk an individual poses.

iii) Residence measure

One of the measures which can be imposed under a TPIM is a requirement for the individual to remain in their residence “overnight”. The TPIM Act 2011 does not specify what is meant by “overnight” but it is thought, based on case law, that 10 to 12 hours would be about the maximum permitted limit. The provisions in the Bill remove the “overnight” restriction so that an individual can be subject to a longer and more flexible curfew. This is in line with the curfew power for control orders, under which an individual could be required to remain in their residence between such hours as were specified, without a constraint on that period being overnight.

The residence measure is vital in terms of managing an individual of national security concern and the risk they pose to the public. Through engagement with operational partners we have established that the existing “overnight measure” can be improved by allowing for greater flexibility in the way in which it can be imposed; specifically, by introducing a requirement for a TPIM subject to remain within their residence at specific times during the day, as well as overnight, when this is assessed as necessary and proportionate to manage the risk they pose. The updated residence measure that this clause looks to introduce will allow the Secretary of State to specify a period that could be longer than overnight or split into varying segments throughout a 24-hour period if considered necessary.

A bare requirement that an individual remain in their residence for a specified period or periods during the day could engage Article 5 (right to liberty and security) ECHR and Article 9 (right to liberty and security) ICCPR. The requirement to remain in a residence for a specified period has been reviewed extensively by the courts in the context of control orders:

- a. In *SSHD v JJ & Others*,¹⁵ the House of Lords found that curfews of 18 hours (or more) amounted to a deprivation of liberty in breach of Article 5.
- b. In *SSHD v E & Another*¹⁶ and *SSHD v MB & AF*,¹⁷ the House of Lords found that control order curfews of 12 and 14 hours did not deprive an individual of their liberty.
- c. In *AP v SSHD*,¹⁸ the Supreme Court held that proportionate restrictions on private and family life in a control order (such as relocation combined with a lengthy curfew) could be decisive in determining whether the overall effect of the order constituted a deprivation of liberty under Article 5.
- d. Lord Bingham also said in that case (*AP v SSHD*) that in his view “for a control order with a 16-hour curfew...to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living”.

no control order curfew in excess of 16 hours has been imposed after 2007. It is clear, therefore, that the Secretary of State will need to consider the draft package of measures in the TPIM notice as a whole – in particular the measures which impact on the individual’s sense of social isolation – when deciding on the appropriate length of a curfew in a particular case.

The principle of imposing a curfew on an individual under civil preventative measures does not therefore breach Article 5 (right to liberty and security) ECHR and there are protections in place to ensure that measures do not individually or cumulatively amount to an unlawful deprivation of liberty. In particular, there is a duty on the Secretary of State (under section 6 of the Human Rights Act 1998¹⁹) to act compatibly with the Convention rights in determining the length of the curfew and any other measures to be imposed under a TPIM notice – taking into account the relevant case law. Further, the Secretary of State may not impose measures unless they are “necessary”, and she is obliged to keep the necessity of the TPIM notice and each measure in it under review.⁹ The Government therefore considers that the provisions in the Bill allowing for the imposition of a period of confinement to the residence, together with the provisions allowing for other restrictions on the individual, are

¹⁵ [2007] UKHL 45.

¹⁶ [2007] UKHL 47.

¹⁷ [2007] UKHL 46.

¹⁸ UKHL 24; [2011] 2 AC 1.

¹⁹ <https://www.legislation.gov.uk/ukpga/1998/42/section/6>

compatible with Article 5 (right to liberty and security) ECHR and Article 9 (right to liberty and security) ICCPR.

In addition, in setting a curfew, the Secretary of State will have to satisfy themselves that doing so is compatible with Article 8 ECHR (respect for private and family life) and Article 17 (freedom from arbitrary or unlawful interference) ICCPR (qualified rights) as well as the Article 5 (right to liberty and security) ECHR rights of the individual. This will include assessing the various aspects of the individual's life, including their family, work and other commitments, and considering whether it is necessary and proportionate to impose measures that may have some interference with those rights. However, where it is necessary to impose measures in order to protect the public from the risk posed by that individual, it is justified to interfere with the rights protected by Article 8 (respect for private and family life) ECHR and Article 17 (freedom from arbitrary or unlawful interference) ICCPR.

A TPIM notice does not prevent an individual from seeking or maintaining employment or study, and TPIM subjects have in the past pursued both. The Government proactively encourages those who are subject to a TPIM notice to seek appropriate employment, including through the provision of practical mentoring sessions. Employment and education are considered stabilising factors that can assist in reducing the risk that individuals pose to national security. There may be instances in which as part of a subject's TPIM notice a work and studies measure is imposed. When a work and studies measure is imposed on a TPIM subject it prohibits employment in notified fields and means that the subject must seek permission from the Home Office before taking up any new employment or course of study. This measure can only be imposed where it can be demonstrated that it is necessary and proportionate to restrict the subject's involvement in terrorism-related activity.

All TPIM subjects are routinely granted an Anonymity Order by the Court, which prohibits the publication and broadcast (including on social media) of information that would identify that individual as being on a TPIM.

B. Sentencing Reform

One of the central aims of the Bill is to protect the public, by ensuring that dangerous terrorists spend the whole of their custodial term in prison, and that the most serious of these spend a minimum period in custody. The Serious Terrorism Sentence (STS) is intended to strengthen terrorist sentencing provisions and will be for the Courts to impose on serious and dangerous terrorist offenders who would otherwise receive a life sentence. It is designed to specify as far as possible the conditions under which Parliament deems it should be utilised, so that its mandatory nature is clearly understood. It will entail a mandatory minimum sentence when the relevant criteria have been met, though it also retains the usual provision allowing the judiciary to depart from such a sentence where there are exceptional circumstances relating to the offending or the offender.

To qualify for a STS, an offender must first have been convicted of a terrorist offence which has a maximum prospective penalty of life imprisonment and, thereafter, that offender must be assessed by the court as being “dangerous” in terms of committing further specified offences in the future. The dangerousness test is a well-established tool in the UK courts and is defined with reference to section 308 of the Sentencing Code²⁰ (which consolidates sentencing legislation for England and Wales in one place and will come into force ahead of this Bill’s enactment). Equivalent provisions exist for Northern Ireland and Scotland. If the court is satisfied that the offender is dangerous, the court must then establish, to the relevant criminal standard of proof, that the offender was aware or ought to have been aware that a risk of multiple deaths was very likely from their offending. In deciding that whether an offender is dangerous, the depth and extent of radicalisation or extremism and the likelihood of that conduct continuing will be a significant factor for the consideration of the court, as offenders who are idealistically extreme are likely to pose a serious risk for an extended period. If these tests are satisfied, and the Court does not impose a life sentence, the Court then must apply the STS, unless there are exceptional circumstances pertaining to the offender or the offending that means in the view of the court its application would be unjust.

This test of “very likely” is known to the Courts with reference to the current sentencing guidelines for terrorism offences in England and Wales, which require a consideration of “very likely” when assessing the risk of harm resulting from an offence to categorise the seriousness of the offending for the purpose of setting a sentence. Further to that, the Government considers that “very likely” would mean that the court had to consider that the risk of multiple death had to be in excess of the balance of probabilities. We are confident that the Courts will be familiar with the language used in the context of sentencing guidelines, if not the overall test which we accept is a novel approach.

To support the effective application of sentencing legislation, there are guidelines produced by the independent Sentencing Council in England and Wales, with Scotland and Northern Ireland both having equivalent bodies to set guidelines to assist the judiciary in setting sentences. We expect that these independent bodies will further support both the Courts and the public in understanding the changes made through the Counter-Terrorism and Sentencing Bill through updated guidelines.

An important qualification to make in relation to compliance with Article 7 (no punishment without law) ECHR is that the STS will only apply to offenders who have committed ‘serious terror offences’ as defined in Schedule 2 of this Bill, all of which carry a maximum prospective penalty of a life sentence. We therefore assess that the introduction of the STS is sufficiently clear, both for effective use by the Courts in the UK’s jurisdictions and for the public to understand what type of behaviour constitutes a relevant offence for the purposes of imposing this sentence.

²⁰ <https://publications.parliament.uk/pa/bills/lbill/58-01/127/5801127.pdf>

The Bill also ensures that the Courts have the flexibility to identify terrorist offenders by enabling them to find a terrorist connection without reference to a fixed list of non-terrorism offences. The effect of these changes is that, where a Court is sentencing an offender for what is a relatively serious offence (i.e. one that carries a maximum term of imprisonment of at least two years), it must find a terrorist connection if the offence is, or takes place in the course of, an act of terrorism, or is committed for the purposes of terrorism (see the definition provided by section 93 of the Counter-Terrorism Act 2008²¹).

It is important to note that the Courts already have a power to find a terrorist connection related to offending at the point of sentence and have significant experience in applying this. The UK's Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, praised the clarity and effectiveness of the existing process during his oral evidence to the Public Bill Committee.²²

Where a terrorist connection is found, the Court must aggravate the sentence. However, the sentence imposed on the defendant must be within the maximum penalty set out in the legislation that provides the relevant offence. The sentencing judge retains the discretion to impose a sentence that reflects all of the circumstances surrounding the offence; provided that proper account is taken of the terrorist connection. As any sentence imposed must be within the maximum penalty for the particular offence, the new approach to the finding of a terrorist connection is consistent with the rights protected by Article 7 (no punishment without law) ECHR and Article 15 (no one can be guilty of a criminal offence which did not constitute a criminal offence at the time) ICCPR.

. In relation to sentencing, the Government considers that these proposals, which may cause the resulting sentences to be more severe and extend to a wider group of offenders in principle, are compatible with Article 5 as any finding of the court of a terrorist connection to offending requires only that the sentence that is given reflects the increased severity. The decision to impose a custodial sentence at all times remains with the Court. It is the Government's view that it is appropriate that a court which has heard all of the evidence that relates to the offence is well-placed to make this judgement.

Furthermore, in order to make a finding of a terrorist connection, the Court must be satisfied to the criminal standard of proof (i.e. beyond reasonable doubt). Therefore, any uncertainty will be resolved in the favour of the defendant. If the individual being sentenced believes that the Court has made an error, then they may appeal the finding of a terrorist connection in the usual way. This change is supported by the Crown Prosecution Service which has commented²³ that the current list of offences in which

²¹ <https://www.legislation.gov.uk/ukpga/2008/28/section/93>

²² Oral Evidence sessions are a stage in the scrutiny carried out by Parliament on the Bill.

²³ <https://committees.parliament.uk/work/410/the-counterterrorism-and-sentencing-bill/publications/3/correspondence/>

a terrorist connection can be applied is fairly limited, and the range of terrorist related offending can take many forms.

C. Polygraph usage in a licence condition

The Bill creates a power to impose a polygraph testing licence condition on certain offenders convicted of a terrorism or terrorism-connected offence. The UK Government considers that it is essential for offender managers to have access to as many tools as possible to manage and monitor terrorist offenders when released to the community. This power already exists in England and Wales for sex offenders via sections 28 through 30 of the Offender Management Act 2007,²⁴ and the Polygraph Rules 2009²⁵ (the Rules). Restrictions on the use of polygraph are set out in the Bill, in the Rules, and in the Polygraph Examinations Prison Service Instruction,²⁶ all of which are publicly available.

Polygraph examinations undertaken on terrorist offenders on licence will be used to pose questions regarding their compliance with other licence conditions, such as contact with other known terrorists, entering exclusion zones or accessing certain information from the internet. Information gathered from testing, both disclosures and physiological reactions, will enable offender managers to refine and improve risk management.

There are safeguards in place to ensure imposition of a polygraph condition only where appropriate. The legislation specifies particular restrictions as to when a polygraph condition can be imposed as part of an offender's licence condition:

- a. offenders sentenced to 12 months or more custody (not considered necessary or proportionate for those serving less than 12 months);
- b. offenders sentenced to particular offences classed by risk (in this case, the offences contained in Schedule 19ZA of the Criminal Justice Act 2003²⁷ which are terrorism/terrorism connected offences with at least a two-year sentence, plus murder);
- c. participation in polygraph sessions must only be for the purposes of managing an offender whilst on licence (which prevents unnecessary or irrelevant polygraph sessions being conducted, unrelated to the offender's management on licence).

Furthermore, the polygraph policy (already utilised for sex offenders, as set out above) provides further restrictions to ensure the condition is only imposed where necessary and proportionate. The condition may only be imposed on offenders who are assessed as having a high/very high risk of causing serious harm where it is necessary

²⁴ <https://www.legislation.gov.uk/ukpga/2007/21/contents>

²⁵ <https://www.legislation.gov.uk/uksi/2009/619/contents/made>

²⁶ <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2014/psi-36-2014-pi-53-2014-polygraph-examinations.pdf>

²⁷ <https://www.legislation.gov.uk/ukpga/2003/44/contents>

and proportionate in order to manage them in the community; or, on a discretionary basis on offenders who are not assessed as high/very high risk by offender managers,²⁸ but for whom the polygraph condition is necessary and proportionate in order to manage them in the community.

Use of polygraph testing in a licence condition was piloted prior to its national roll-out for use with sexual offenders in England and Wales. During that pilot, an offender challenged the imposition of testing based on Article 8 (right to respect for private and family life) ECHR.²⁹ This challenge was rejected by the Courts, on the basis that the offender's risk level and previous history of offending made the condition necessary and proportionate for the prevention of crime. The Government is therefore confident that any interference with Article 8 will be held to be necessary in a democratic society, in pursuit of a legitimate aim, namely: public safety, the prevention of crime/disorder, and the protection of the rights and freedoms of others.

There are restrictions on conduct of testing, recalling offenders and use of polygraph material which ensure an offender's Article 5 (right to liberty and security), 6 (right to a fair trial) and 8 (respect for private and family life) ECHR rights are protected. An offender cannot be recalled for 'failing' a polygraph examination i.e. displaying physiological reasons that indicate deception. However, an offender may be recalled for attempting to interfere or 'trick' the test, refusing to take the test or refusing to follow any reasonable instructions given to him/her by the polygraph examiner. They may also be recalled for failing to attend for the test without producing evidence for the missed appointment, such as a medical appointment certificate or evidence of employment. They may be recalled if disclosures give rise to increased risk of managing the offender in the community. The Government considers that these recall restrictions fairly and adequately balance the purpose of the provision (taking into account the other mandatory conditions an offender is already subject to, including good behaviour and not to do anything that undermines the purpose of the licence) and the rights of an offender.

This information can be shared with other agencies in compliance with statutory and data protection restrictions if lawful and necessary; for example, with police under multi agency public protection arrangements. If polygraph material suggests a further offence has been committed, then the offender may be charged and recalled to custody – however, polygraph material cannot be used in a prosecution against the released person for an offence in accordance with Article 6 (right to a fair trial) ECHR.

There is no statutory prohibition against polygraph material being utilised in civil proceedings against the offender, for example a TPIM application. However, to be admitted, any such evidence presented would need to meet the relevant test for any civil order, and the result of a polygraph test would not be the only evidence provided in such an application but would be supported by other evidence. There would also be further safeguards in the judicial process, as the court would be able to assess the

²⁸ <https://www.gov.uk/government/organisations/national-offender-management-service/about>

²⁹ *R. (on the application of C) v Ministry of Justice* [2009] EWHC 2671

evidence as presented and could refuse to grant the order or make the evidence inadmissible, if it would be unfair to the offender to admit it. In considering these issues the court would be bound to act in compliance with the Human Rights Act 1998. Consequently, if the court concluded, taking into account relevant public interest matters, that making any such order based on information from a polygraph test would breach the offender's Article 6 rights it would be obliged to refuse the application for the order.

It is the Government's view therefore, as upheld by the Courts, that polygraph testing in the statutory regime described above is compliant with Article 8 (respect for private and family life) of the ECHR.

D. Removal of early release at Parole Board discretion

Clause 30 does not remove the prospect of early release. It alters the point and mechanism for early release of terrorist offenders serving determinate sentences in Northern Ireland. This change will require that terrorist offenders whose offending had a maximum penalty of over two years will now become eligible for Parole Commissioner considered release at the two-thirds point in their sentence, rather than automatic release prior to then. This change aligns Northern Ireland with the changes made through the Terrorist Offenders (Restriction of Early Release) Act 2020³⁰ in England and Wales and in Scotland.

Removal of early release does not apply to all those found to be dangerous by the sentencing Court. Rather it only applies to those who are sentenced to an extended determinate sentence (of which a finding of dangerousness is a requirement) for a serious terrorism offence, all of which carry a maximum penalty of a life sentence. This measure is not about removing the role of the Parole Board, rather it is about removing the prospect of early release for the most serious offenders to ensure that their sentence is commensurate to the gravity of their offending. As these offenders will be serving the whole of their custodial term, they will instead be released automatically in line with the relevant statutory release provisions.

Where the Parole Board are not engaged in release decisions, Prison Governors will then set licence conditions on behalf of the Secretary of State. This is not a significant departure from current practice as the Parole Board do not currently review all offenders in England and Wales: their role is reserved to those subjects to indeterminate sentences and to those eligible for early release. As such, Governors have extensive experience in setting licence conditions that will support an offender's reintegration to society after their punishment is served.

3. Compatibility with Article 40 of the Convention on the Rights of the Child

³⁰ <https://www.legislation.gov.uk/ukpga/2020/3/notes/division/1/index.htm>

The Bill is compatible with the UK Government's obligations under Article 40 of the Convention on the Rights of the Child.

We anticipate that the impact of the new legislation will be minimal and will affect only the most serious offenders, given the small number of children and young people under 18 sentenced to detention for terrorist offences. While acknowledging this, recent events in the UK have shown that children and young people can plan, and sometimes go on to commit, atrocities. Youth is no obstacle to offending.

In the wake of recent terrorist attacks, most perpetrated by young adults, the UK Government's view is that it is necessary to take a tough stance on terrorist offenders and this Bill aims to tighten our sentencing and release legislation. Under the current youth sentencing framework,³¹ children and young people aged 10-17 can already receive an Extended Determinate Sentence (EDS) where they are convicted of a specified terrorist offence and the court considers that they present a "significant risk of serious harm" to members of the public, but the court is not required to impose a sentence of detention for life. The appropriate custodial term must be at least four years.

The EDS is primarily about public protection; because of the nature and severity of the offending, and because the Court deems the offender dangerous, based on expert assessments in pre-sentence reports. It is a process independent of Government. As with every sentencing decision for those aged under 18, when considering whether to impose an EDS, the courts will balance the principal aim of the youth justice system, which is to reduce offending, the need for public protection, and the welfare of the child or young person. The courts must always take account of the individual's age and maturity, as well as their specific needs and risks when deciding on the most appropriate sentencing option. Nothing in this Bill changes the guiding sentencing principles applicable to children and young people aged under 18. The decision to remove early release in relation to children and young people sentenced to an EDS for certain terrorist offences has not been taken lightly, but these measures target a very specific and small cohort of offenders, where public protection has to be a priority.

As for adults, this provision only applies to offences which carry a maximum penalty of a life sentence. It is primarily about reducing the risk of further harm by ensuring those offenders serve their full custodial term and are appropriately monitored on release. The period served on licence is an integral part of the sentence and therefore necessary for the purpose of rehabilitation, by allowing a safe return in the community in a controlled and supervised way. We are giving courts the option to impose a longer licence period, to help reduce the risk of further offending and facilitate reintegration in society. Given the restrictive conditions applicable it is envisaged that only very serious and dangerous terrorist offenders will be captured by the new provisions.

³¹ <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/>

The new sentence of detention for terrorist offenders of particular concern introduced by this Bill aims to bridge the gap between sentencing options currently available to the courts. The new sentence will be available in cases where neither the most serious sentences (such as life or an extended determinate sentence) nor the existing Detention and Training order (which carries a maximum sentence of two years) would be appropriate for the offence. The additional fixed period on licence is designed to support reintegration in society upon release and ensure a minimum period of 12 months' supervision, even where the whole sentence was served in custody.

We do consider that these measure as compatible with the UK's obligations under the UNCRC for the reasons outlined above. There is clear policy rationale, cases must still pass the custody threshold and the court will retain the power to set the appropriate custodial term where custody is imposed, taking into account a wide range of factors including the child's circumstances.

4. Oversight of the legislation

The Bill is being carefully scrutinised by Parliament and must be approved in the same form by both Houses of Parliament before becoming an Act. Arrangements have been made, including through the use of virtual attendance, to ensure the impact of COVID-19 does not hamper due process, and the ability of Parliamentarians to properly consider and debate the detail of the Bill.

In addition to standard parliamentary scrutiny, the UK Government appoints an Independent Reviewer of Terrorism Legislation whose role is to inform the public and political debate on anti-terrorism law in the UK. This is a statutory role with full access to sensitive Government information and staff. The Government is required to publish his reports and recommendations. As noted above, the current Independent Reviewer, Jonathan Hall QC, has already provided views on the Bill. He has assessed the design and operation of the Bill's provisions in five reports³² published prior to debate in the House of Commons, and during his attendance at the oral evidence sessions held in the Public Bill Committee, Committee members were able to further explore and discuss his views on the legislation.

The Ministry of Justice has also committed to an internal review of polygraph usage with terrorist offenders as part of their licence conditions. We have determined it would not be viable to pilot the use of polygraph testing with terrorist offenders as any results from such a pilot would not be considered significant, given the low usage. However, following two years of its use when there is more robust evidence to consider, the department will review its impact and take any findings under consideration.

This legislation, once commenced, will further be subject to the usual post-legislative scrutiny procedures within the Houses of Parliament. Three years after the legislation has come into law, a Committee will convene to analyse how the new laws have

³² <https://terrorismlegislationreviewer.independent.gov.uk/>

worked in practice since they have come into force. Furthermore, the independent UK courts will also play a key role in applying and reviewing many of the Bill's provisions, with an ability to overturn actions of the Government and police, including by considering sensitive information in closed sessions if necessary.

This is all part of the careful balance the UK strikes between robust powers to protect national security and effective oversight to safeguard civil liberties.