

## Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2)

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#### Introduction

1. This is my second Note on the TPIM reforms in the Counter-Terrorism and Sentencing Bill introduced into Parliament on 20 May 2020, and concerns the duration of TPIMs. My first Note<sup>1</sup> considered the proposal to lower the standard of proof.
2. TPIMs are an exceptional and valuable means of mitigating the terrorist risk posed by a small number of individuals in the United Kingdom. But there is reason to doubt whether there exists an operational case for changing the TPIM regime at this point in time. Terrorism laws are not in general best served by unnecessary expansions: that risks reaction and counter-reaction, which can in hindsight be identified in the changes to the scheme of administrative controls. Control orders were passed, then abolished by TPIMs in 2011 (including the removal of relocation), until relocation was (sensibly) reintroduced in 2015.
3. The purpose of this Note is to inform debate as fully as possible from an independent perspective as legislative choices come to be made.

#### Background

4. During the lifetime of the regime, 30 individuals were subject to control orders for up to 2 years; 8 individuals for between 2 to 3 years; 4 individuals for between 3 to 4 years; and 3 individuals for between 4 and 5 years<sup>2</sup>. It is likely that some of these individuals would have been subject to control orders for longer had the regime not been abolished, since they were subject to TPIMs immediately that the new regime came into effect<sup>3</sup>.
5. The TPIM Act 2011 was a balance between on the one hand enabling administrative controls to be imposed outside the criminal process for a significant period of time, and on the other hand ensuring that individuals were not controlled indefinitely on the basis of an assessment that they had once engaged in terrorism-related activity, unless there was evidence that they have done some further act.
6. This was the balance recommended by the Independent Reviewer of Terrorism Legislation (Lord Carlile QC) prior to the TPIM regime coming into effect<sup>4</sup>. When introducing these measures the government stated that TPIMs were intended to be targeted, temporary measures and not to be used “simply as a means of parking difficult cases indefinitely”<sup>5</sup>.

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<sup>1</sup> Available on the website at <https://terrorismlegislationreviewer.independent.gov.uk>.

<sup>2</sup> <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/control-orders-2011.pdf> at 3.47.

<sup>3</sup> TPIMs in 2012 Report, Lord Anderson QC, [https://www.legislationline.org/download/id/4605/file/terrorism%20prevention%20and%20investigation%20measures%20in%202012\\_independent%20reviewer\\_2013.pdf](https://www.legislationline.org/download/id/4605/file/terrorism%20prevention%20and%20investigation%20measures%20in%202012_independent%20reviewer_2013.pdf) at 11.33a.

<sup>4</sup> Lord Carlile, *Sixth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, February 2011 at paragraph 55.

<sup>5</sup> Hansard 26 January 2011 – col 307.

7. The case for and against lifting the 2-year cap was considered in detail by the Independent Reviewer (Lord Anderson QC) in his report on TPIMs in 2012<sup>6</sup>. Lord Anderson observed that it was tempting to wish for longer in the most serious cases, noting that the allegations against some TPIM subjects were at the highest end of seriousness. These included, at that time, the cases of AM and AY (alleged would-be suicide bomber and key co-ordinator in the airline liquid bomb plot of 2006) and CC, CF and CD (alleged to be hardened terrorists involved in attack planning in the UK or abroad)<sup>7</sup>.
8. However, Lord Anderson concluded that the two year limit was an “acceptable compromise” because, in summary, even 2 years was a serious length of time in the life of an individual, and TPIMs should not be allowed to become a shadow alternative to criminal prosecution with their lesser standard of proof (at that time, reasonable belief), with the possibility of no serious thought being given to how the measures might come to an end (exit strategy).
9. The 2-year balance was subsequently endorsed by the government when the power to relocate TPIM subjects was reintroduced by the Counter-Terrorism and Security Act 2015. The government cited Lord Anderson’s observations that there was no need “to put the clock back”, that the majority of the changes brought in with TPIMs had not made the regime any less effective, and that the “two-year limit is a reminder that executive constraints of this kind are no substitute for the criminal process, and no long-term solution.”<sup>8</sup> No changes were made in the Counter-Terrorism and Border Security Act 2019 despite the events in Manchester and London in 2017.

### **The Effect of the Amendments**

10. Clause 38 of the Bill would remove the 2-year cap on TPIMs, creating the prospect of enduring TPIMs with no automatic end point. As with lowering the standard of proof, this is a reversion to position under control orders<sup>9</sup>.
11. The manner of the amendment is stark. It is simply to replace the possibility of extending a TPIM on one occasion only to “one or more occasions”<sup>10</sup>. The Bill does not require that any extension beyond 2 years is reserved to particularly serious or exceptional cases, and there is no proposal for any heightened degree of judicial scrutiny after 2 years. There is no new upper maximum, and there are no additional safeguards.
12. It should be noted that the 2-year cap on TPIMs, which has been the position since the introduction of TPIMs in 2011, does not mean that there is currently no possibility of continuing administrative controls on dangerous individuals after 2 years.
13. This is because under current legislation the initial 1-year TPIM notice may already be extended to 2 years; and then a further TPIM notice may be imposed at the end of 2 years if the individual has engaged in *fresh* terrorism-related activity, that is terrorism-related activity after the imposition of the first notice<sup>11</sup>. This power has been used in practice to ensure TPIM measures are in place for more than 2 years.
14. Moreover, there is no limit the number of new TPIM notices that may be imposed, so long as new terrorism-related activity is established after each 2-year period.

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<sup>6</sup>[https://www.legislationline.org/download/id/4605/file/terrorism%20prevention%20and%20investigation%20measures%20in%202012\\_independent%20reviewer\\_2013.pdf](https://www.legislationline.org/download/id/4605/file/terrorism%20prevention%20and%20investigation%20measures%20in%202012_independent%20reviewer_2013.pdf) at 11.36 to 11.38.

<sup>7</sup> Ibid at 4.15(a).

<sup>8</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/540543/CTS\\_Bill\\_-\\_Factsheet\\_4\\_-\\_TPIMs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/540543/CTS_Bill_-_Factsheet_4_-_TPIMs.pdf)

<sup>9</sup> Prevention of Terrorism Act 2000, section 2(4)(b).

<sup>10</sup> Clause 38(3)(a).

<sup>11</sup> Sections 3 and 5 TPIM Act 2011.

## Analysis

15. The new power to extend is only needed where the individual subject to a TPIM for 2 years is not assessed to have engaged in *fresh* terrorism-related activity. So it affects individuals based on an assessment of their future risk with, as time goes by, less and less recent evidence of their current involvement.
16. In his Terrorism Acts in 2017 Report the Independent Reviewer (Max Hill QC) reported some evidence that TPIM subjects may be ‘biding time’ until the expiry of the 2-year limit<sup>12</sup>. This raises the question of how long it is fair to keep individuals subject to administrative measures (which may include severe restrictions such as relocation) not on the basis of what they have done, but what they may be contemplating after the biding period is over.
17. Given past experience, the possibility of a TPIM which lasts a decade cannot be excluded under the proposals in the Bill. In the year ending December 2019, the majority of sentence lengths for terrorism-related offences were between 1 and 4 years giving rise to an uncomfortable contrast: an individual actually convicted of an offence may be free of controls sooner than an individual who has never been convicted, based on one episode of terrorism-related activity.
18. There is no limitation on the type of terrorist who may be subject to an enduring TPIM, but current TPIM subjects are not amongst them: clause 38(7) provides that the amendment is not to have effect in relation to a TPIM notice served before the amendments come into effect. So this begs the question as to the cohort of known or suspected terrorists who are the intended target of these longer orders: are they attack-planners, terrorist funders, radicalisers or others?
19. I am informed that the likely targets of enduring TPIMs are not the most serious terrorists posing a risk to the public (as in the cases of AM and AY referred to above). Enduring TPIMs are more likely to be focussed on long-standing subjects of interest who are engaged in radicalisation rather than attacks, and are careful to keep below the radar during the initial 2-year period. The risk that these individuals pose should not be underestimated, but their terrorist-related activity does not fall within the highest tier of immediate risk to the general public.
20. This does not rule out the use of enduring TPIMs for more serious terrorists, and there may well be general desire to have the ability to extend for a further period if the right case presents itself. However, in my Terrorism Acts in 2018 Report I warned against the seductive argument for another “tool in the toolkit”: the homeliness of which phrase, so beloved of police and security officials, risks obscuring the question of justification<sup>13</sup>. 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.
21. In particular, as Lord Anderson QC pointed out, the imperative to obtain sufficient evidence to prosecute starts to pall if the non-criminal route, with its lesser standard of proof, is readily available. The criminal justice route for dealing with terrorists commands the widest public support, and is the fairest process. Ideally individuals who endanger the public by engaging in terrorism-related activity should be identified, punished and sentenced.
22. Moreover, the authorities are able to identify fresh terrorism-related activity, so TPIM measures can be kept in place for more than 2 years in suitable cases, as currently happens.

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<sup>12</sup> [https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The\\_Terrorism\\_Acts\\_in\\_2017.pdf](https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The_Terrorism_Acts_in_2017.pdf) at 5.13.

<sup>13</sup> <https://terrorismlegislationreviewer.independent.gov.uk/terrorism-acts-in-2018-report/> at 1.7.

23. The Bill is conspicuous for its lack of safeguards. Safeguards are appropriate however carefully the Home Secretary and her officials consider TPIMs, and however much resource constraints inevitably limit the appetite for more and longer TPIMs.
24. Firstly, there is no requirement that the Home Secretary is satisfied of an exceptional or compelling case for renewing a TPIM beyond 2 years. If there is an operational need for an enduring TPIM, despite the fact that fresh terrorism-related activity cannot be shown, then it should be possible for the Home Secretary to reach this conclusion.
25. Secondly, current TPIM legislation requires that the Secretary of State should consult the chief officer of the appropriate police force whether there is any evidence that could be realistically used for prosecution, and for that issue to be kept under review<sup>14</sup>. However for the review process I found that neither the Home Secretary nor her officials saw anything other than a tick in the box to show that the relevant chief officer had performed this role<sup>15</sup>. If Home Office officials were informed in greater detail about the current evidence and investigative steps that had been and might still be taken at the 2-year point, this would enable the Home Secretary to reach a properly informed view, to probe and scrutinise the position, and would offer greater encouragement to police and MI5 to see whether prosecution, or at least identification of fresh terrorism-related activity, might be possible.
26. Thirdly, there is an absence of continuing judicial oversight. A recent phenomenon is that TPIM subjects have opted out of High Court review all together<sup>16</sup>. The prospect of individuals being subject to administrative measures for many years without robust scrutiny is unappealing: particularly if any of them were within that increasing cadre of hard to place individuals, often self-radicalised and suffering from poor mental health, who may opt out of a legal challenge. A solution would be to require the Secretary of State to seek the Court's permission for any extension beyond after 2 years, in the same way that she currently does when a TPIM is first made<sup>17</sup>.
27. Fourthly, to avoid the possibility of difficult cases being parked (as previously recognised by the government) either there should be an upper limit or, at the very least, a requirement to specify an exit strategy including how the severest measures such as relocation can be tapered off.
28. Fifthly, if there is to be renewal beyond 2 years without any new terrorism-related activity being shown, the standard of proof should be "on the balance of probabilities". This differentiated standard of proof was recommended by Lord Carlile in his Sixth Report<sup>18</sup> and there is no basis to conclude that, if an enduring TPIM is warranted, this standard of proof would cause any problems in practice.

5 June 2020

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<sup>14</sup> Section 10 TPIM Act 2011.

<sup>15</sup> Terrorism Acts in 2018 Report at 8.22.

<sup>16</sup> Ibid at 8.29.

<sup>17</sup> Section 6 TPIM Act 2011.

<sup>18</sup> Supra at paragraph 56.