COUNTER-TERRORISM AND SENTENCING BILL 2020

ECHR MEMORANDUM

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Counter Terrorism and Sentencing Bill 2020 ("the Bill"). On introduction in the House of Commons, the Secretary of State for Justice made a statement under section 19(1)(a) of the Human Rights Act 1998 ("HRA 1998") that in his view the provisions of the Bill are compatible with Convention rights.

A. Summary of the Bill

2. The Bill covers a range of counter-terrorism sentencing and release measures, as well as general provisions in the area of counter-terrorism:

Sentencing:

a. provides for a serious terrorism sentence for certain dangerous offenders which sets a minimum term of 14 years in custody, with a licence period of a minimum of seven years and a maximum of twenty five years; (UK wide)
b. provides for a minimum 14 year term order to be given for certain terrorist offences where the court decides that the applicable sentence should be that of discretionary life imprisonment for England and Wales and makes equivalent provisions for Scotland and Northern Ireland;
c. provides for a new licence period of 10 years for specified terrorist offenders who receive an extended sentence; (England and Wales and NI)
d. introduces new offences with a terrorist connection to be considered as part the extended sentence regimes across the UK;
e. extends the Special Sentence for Offenders of Particular Concern so that additional terrorist offences and offences with a terrorist connection can be considered for this sentence (England and Wales);

f. extends the Special Sentence for Offenders of Particular Concern (which requires the setting of a custodial term and mandates a 12 month licence period on release) to Scotland and NI
g. extends the Special Sentence for Offenders of Particular concern to under 18s (UK wide).

Release:

a. changes the release point of extended sentenced offenders convicted of relevant terrorism offences to spend the full custodial term in custody with automatic release at the end (UK wide);
b. changes the automatic release point of relevant terrorism sentences to a two thirds referral to the Parole Board (Northern Ireland);
c. provides for the inclusions of a polygraph testing condition in the licence of a person who has committed a relevant terrorism offence (UK wide).

Other measures:

a. removes the statutory deadline for completion of the review of the Government's "Prevent" strategy (UK wide);
b. increases the maximum sentences that are available for certain terrorism offences (UK wide);
c. extends the offences that a court may determine have been committed with a "terrorist connection", thereby bringing such offences within the scope of the relevant regimes for aggravated sentencing, notification requirements and forfeiture provisions (UK wide);
d. brings certain terrorism offences within the scope of the notification requirements that apply to Registered Terrorist Offenders under Part 4 CTA 2008 (UK wide);
e. enables the police to apply for serious crime prevention orders in respect of crime that is terrorism-related (UK wide);
f. amendments to the measures which may be imposed under the Terrorism Prevention and Investigation Measures Act 2011 (UK wide);
g. decreases the threshold for imposing a Terrorism Prevention and Investigation Measure so that the Secretary of State must have

"reasonable grounds" for suspecting that an individual is or has been engaged in terrorism-related activity (UK wide);

h. removes the 2-year statutory time limit for a Terrorism Prevention and Investigation Measure, so that it is capable of indefinite renewal (UK wide).

Bill Provisions

3. The sentencing provisions at (c), (d), (e) and (f), and the release measure (a), have retrospective effect in as far as they apply to offenders who have committed offences pre-commencement but not yet been sentenced.

4. The release measures at (b) and (c) will apply to offenders who have been sentenced before the commencement date. With (b), some prisoners currently serving the custodial part of their sentence will now spend longer in prison until they can be considered for release. With (c), offenders currently serving their custodial sentence, or who have already been released on licence, will be subjected to mandatory polygraph testing as part of their licence conditions.

5. The Convention rights raised by provisions in the Bill are liberty and security of person (Article 5); fair trial (Article 6); retrospective application of a penalty(Article 7); private and family life (Article 8) and discrimination (Article 14).

ECHR Analysis

Article 5

6. Article 5 provides everyone has the right to liberty and security of person, nor be unlawfully deprived of their liberty.

7. The new 'serious terrorism sentence' (STS) and the imposition of a minimum term of 14 years for discretionary life sentences engage Article 5 as provisions with minimum terms must be formulated compatibly with the Convention (*R v Offen (Matthew Barry)* (No. 2) [2001] 1 WLR 253). In order for a sentence not to amount

to arbitrary detention, the court must retain discretion and be able to take into account material circumstances.

8. The Department considers that these measures engage Article 5 but do not amount to a provision that amounts to arbitrary detention under Article 5(1). As well as the strict statutory criteria to be eligible to be given an STS, the court retains the ability to not apply the STS if in its view there are exceptional circumstances relating to the offence or the offender which means that there is justification in in not applying the STS. The sentence as a whole continues to be set by the court after judicial evaluation of the potential risk to the public posed by the offender and evaluation of the commensurate penalty to be imposed in respect of the offence committed. Therefore, the Department is satisfied that these measures do not breach Article 5.

9. Article 5 is relevant in relation to the addition of extra offences to the extended sentence regime UK-wide, and to the increase of the extended licence period from 8 to 10 years in England, Wales and Northern Ireland. Where an offender may be subject to an extended licence period where previously they may only have been eligible for a standard determinate sentence or a SOPC, or may spend more time on licence as the result of measures and be liable to recall, Article 5 is engaged. However, the length of licence imposed is one which the court considers is proportionate in all the circumstances. The discretion is retained because the court decides whether to impose an extended sentence and if so, the length of the licence period required to manage the risk of the offender on release. The Department is satisfied that this provision does not infringe Article 5.

10. There are several measures relating to special custodial sentences for offenders of particular concern (SOPCs) in the Bill which engage Article 5. The introduction of SOPC for Northern Ireland and Scotland (the new 'Terrorism Sentence') and the addition of offences to the SOPC regime, will mean offenders will be sentenced to a SOPC rather than a standard determinate sentence where they do not meet the dangerousness test for an extended sentence. The SOPC is a determinate sentence, with a licence period fixed for one year to supervise the offender. SOPC

provides the court with discretion, when imposing the sentence, to ensure that the resulting deprivation of liberty is not arbitrary for the purposes of Article 5. This falls within the permissible grounds in Article 5(1), namely, the lawful detention of a person after conviction, and 5(1)(a); the lawful arrest or detention of a person for non-compliance with the lawful order of a court which may apply if an offender fails to comply with the licence period. The sentence imposed is one which the court considers is proportionate in all the circumstances. The discretion is retained because the court decides whether to impose a custodial sentence and if so, the length of it. The Department is satisfied that this provision does not infringe Article 5.

11. Article 5 is engaged by the measures which retrospectively apply to all terrorist offenders (including those already sentenced) in Northern Ireland, changing release arrangements so all will be subject to two-thirds referral to the Parole Board. All offenders caught by the new provisions will now be subject to release at the discretion of the Parole Board and eligibility for release will not be until the two-thirds point of the sentence. In these above cases, it will be at the discretion of the Board whether to direct release, when the Board considers it is no longer necessary for the protection of the public that the offender should be confined. They may be subject to a no release decision by the Parole Board and further detained until the end of their custodial term or sentence. Therefore, Article 5 is engaged. However, it is the Department's position that there is no interference with Article 5.

12. The Supreme Court case *Brown v the Parole Board for Scotland and Others* [2017] UKSC 69 ('Brown') is authority that the whole of the custodial period of an extended sentence is the penalty part of the sentence, while the whole of a determinate sentence of imprisonment is the penalty imposed by the court for the commission of an offence, and detention during the penalty period is part of the sentence imposed by an independent court and is therefore in accordance with Article 5(1)(a).

13. It is the Department's position that the changes will not unduly interfere with the sentence passed by the judicial authority owing to the judicial principle that early release, licence and their various ramifications are irrelevant considerations on sentencing (*R v Round [2009] EWCA Crim 2667, R. v Bright [2008] EWCA Crim 462*). It is established case-law in a line of authorities up to the Court of Appeal that a Court should pass a sentence which is commensurate to the offending behaviour in relation to the offence committed, without consideration of any possible early release. That consideration is within the remit of statute or executive policy as Parliament directs.

14. Article 5 is engaged by the Bill measure which changes the release arrangements for prisoners serving extended sentences for terrorism offences where the maximum penalty is life imprisonment – these offenders will serve the entire custodial period in custody before being released on licence, therefore these offenders will be detained, or will potentially be detained, in prison for a longer period of time as the result of the provision. However, there is no breach of Article 5 as detention at all times will be in accordance with the sentence of imprisonment imposed by the court.

15. As outlined above, the whole of a determinate sentence of imprisonment is the punishment/penalty imposed by the court for the commission of an offence. Per *Whiston* and *Brown*, the whole of the custodial period of an extended sentence is the penalty part of the sentence and any detention during that period is therefore in accordance with Article 5(1)(a).

16. The ECHR does not require states to establish a scheme for early release, and prisoners may, consistently with the Convention, be required to serve the entirety of the sentence passed, if that is what the domestic law provides. Detention in accordance with a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. The Department is therefore satisfied that Article 5 is engaged by these provisions but not breached.

17. Article 5 is also engaged by the polygraph provisions of the Bill because terrorist offenders being polygraph tested may be recalled to prison as a result of a failure to cooperate with a test, or based on evidence adduced from information obtained from a test. However, there is no breach of Article 5 as detention will be in accordance with the sentence of imprisonment as set by the court. The entirety of a determinate sentence prisoner's sentence is decided by the sentencing court and is in accordance with a procedure prescribed by law under Article 5(1)(a), as confirmed in *Whiston* and *Brown*, which includes recalls. For extended and indeterminate sentence prisoners, any further detention resulting from recall will be confirmed by the Parole Board in compliance with Article 5.4 and therefore the offender is safeguarded from any arbitrary detention.

18. Article 5 is also engaged by the new statutory aggravation further to the designation of a terrorist connection. In relation to sentencing, the Department 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.

19. It is, therefore, the Department's position that the processes and safeguards in place prevent any Bill measures from an unlawful interference with Article 5.

Article 6

20. Article 6 protects individuals' rights to a fair trial. The polygraph provisions in the Bill engage Article 6 as information from polygraph tests can be shared with police where there is lawful authority to do so. Protections against any unlawful interference with Article 6 in relation to criminal charges are built into the existing legislation and the Bill, which contains express provision prohibiting the use in criminal proceedings of information obtained from a polygraph test. The Bill limits the testing to questions that aim to monitor compliance with other conditions of the offender's licence, and questions that will improve the way the offender is managed in the community. This can include the offender's behaviour in the community, but

the test cannot be used to ask question concerning an ongoing investigation into an offence.

21. Article 6 could be engaged in relation to civil rights if information from the tests was used to apply for a civil order against the offender, for example a TPIM. However, it is the Ministry of Justice's position that this would not breach the offender's Article 6 rights as the evidence presented would need to meet the relevant test for the order, and the result of a failed polygraph test would not be the only evidence provided in such an application but would be supported by other evidence. There would be also be further safeguards in the judicial process, as the court would be able to assess the 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 of course be bound to act in compliance with the Human Rights Act.

Article 7

22. Youth SOPC (in England and Wales and Northern Ireland), the new STS, and the new minimum term order for discretionary life sentences are wholly prospective in nature, only applying to offences committed after commencement of the Bill.

23. The change in release provision for terrorist offenders in Northern Ireland, the removal of the Prevent Review deadline, the polygraph provisions, and the notification measures are all formally retrospective in that they will act upon prisoners who have already been sentenced, or change previously defined obligations. All other provisions are retrospective in effect only, as they will apply to prisoners who have committed offences pre-commencement but not yet been sentenced (which is the approach conventionally taken to sentencing and release changes to ensure consistency). In Scotland, the new terrorism sentence (SOPC equivalent) will apply to all prisoners (whether adult or youth) who are convicted from date of commencement, consistent with the effect of the England and Wales SOPC. Article 7 is engaged but not breached because whilst some provisions will be applied retrospectively to all relevant offenders who already have these

sentences imposed at the point of commencement, the provisions do not alter the length of the sentence, and therefore the penalty, already imposed by the court.

24. The Department considers that none of the provisions in the Bill breach Article 7 as none constitute the imposition of a more severe penalty for the purposes of Article 7. There is an established body of case-law to the effect that release provisions are the administration of the sentence and do not form part of the penalty for the purposes of Article 7 - *Uttley v UK* (Application No. 3694/03) *Csoszanski v Sweden* (Application No. 22318/02), and *M v Germany M v Germany* (Application 19359/04), *R(Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130. Consequently, any changes early release is not an additional penalty.

25. The domestic courts and the ECtHR have consistently drawn a distinction between a measure that constitutes a 'penalty' and a measure that concerns the "'execution' or 'enforcement' of a penalty: release arrangements are part of the execution of the penalty, not the penalty itself. When the nature and purpose of a measure relate to a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7 (*Hogben v United Kingdom* (Application No. 11653/85, 3 March 1986); *Del Rio Prada v Spain* (Application No 42750/09, 21 October 2013 and recently again confirmed in *Abedin v the United Kingdom App* 54026/16).

26. Domestically, the changes are in line with the judgment in *R(Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130 in that it is a change to the administration of the sentence and not to the sentence itself as imposed by the court. That case concerned a post-sentence change in release provisions that required the applicant to be released on licence rather than unconditionally. The House of Lords found that there was no breach of Article 7 as early release provisions "mitigates rather than augments the severity of the sentence of imprisonment which would otherwise be served". The Supreme Court also affirmed the position in *R v Docherty* [2017] 1 WLR 181 that the release conditions applied to a sentence are not part of the "penalty" for the purposes of Article 7.

27. As these new provisions which have retrospective effect do not form part of the offender's 'penalty' within the meaning of Article 7, it is therefore considered that Article 7 is not breached.

Article 8

28. Many of the provisions in the Bill engage Article 8, the right to private and family life. Prisoners who might have expected to be released earlier and automatically, or who may potentially spend longer in custody, or those who will be subject to curfew, polygraph or drug testing, or those who are required to provide information pursuant to a TPIM, may suggest that these changes are a breach of their Article 8 rights.

29. However, the right to private and family life is a qualified right, and any interference is a result of the sentence imposed and the offence committed by the offender. All offenders, whether those close to release at the point of imposition or further away, will still be serving the punishment part of their sentence, and as such, whilst the impact may be greater the nearer to release, the justification for the interference remains the same.

30. It is considered that any interference, including those more significantly affected, is justified as being in the interests of national security, public safety and the economic wellbeing of the country, for the prevention of disorder or crime, and for the protection of the rights and freedoms of others, owing to the significant risk to the public potentially posed by this cohort of offenders in the current environment.

Article 14

31. Article 14 is engaged as, coupled with Article 5, the proposals will provide for different treatment in relation to the release of prisoners serving analogous sentences. However, the type of offending is not analogous and any differential treatment is justified by the nature and consequences of the offending.

32. We recognise that there may be groups with certain protected characteristics who will be over-represented in the cohort of offenders affected by the Bill, but any difference in treatment is based on the type of offending which can have catastrophic consequences and not on the personal characteristics of the offender. The new provisions will apply equally to all relevant terrorist offenders, regardless of race, religion or otherwise.

33. Quantitative data gleaned from the Counter-Terrorism and Border Security Act 2019 shows that the current types of terrorism prevalent in the UK are notably Islamist and extreme far right terrorism, with significant numbers of individuals arrested, charged and convicted of terrorism offences under the 2000 Act relating to these two forms of terrorism. As with the Terrorist Offenders (Restriction of Early Release) Act 2020 (TORER Act), which made equivalent provision for England, Wales and Scotland, the quantitative data shows that no group in Northern Ireland defined by a protected characteristic, has been disproportionately affected relative to the scale of the threat that these types of terrorism pose.

34. The Supreme Court in *Stott v Secretary of State for Justice [2018]* UKSC 59 found that sentence length was capable of being "other status" under Article 14 (discrimination). *Stott* did not find that offence type constitutes "status" under Article 14. The Grand Chamber ECtHR in *Gerger v Turkey App* 24919/94 found that offence type is not 'other status' for the purposes of Article 14 where a legitimate aim is pursued, or there is a reasonable relationship of proportionality between the means and the aim.

35. However, even if sentence type might be considered "status" for the purposes of Article 14, the Government nonetheless considers that any such differential treatment justified. It is considered these measures are justified and are both proportionate and necessary as a public protection measure. It is noted that the changes apply to terrorist offenders of all types, and not just one particular group.

36. Further, whilst the affected prisoners will be in an analogous position to those serving the same sentence they will not be in an analogous position in respect of the type of offending, which has particular impact and wide public protection issues.

Despite the fact a risk of reoffending exists for any offender released from custody, terrorist offenders can be distinguished on the basis of immediate risk materialising in the form of an intention of doing serious, unpredictable harm to members of the public, and a corresponding desire to martyr themselves at the hands of the police and security services. This means the particular and immediate risk of this cohort of offenders justifies a different approach.

37. It is evident from terrorist cases – again, as evidenced by the Streatham attack – that the index offences actually committed and therefore the sentence imposed, do not deal with or reflect the very high level of harm they may subsequently cause. This also distinguishes terrorist offenders from other types of offender who pose a serious risk to the public - a relatively short standard determinate sentence imposed upon a terrorist can mask that the individual could be much more dangerous than other offenders who receive similar sentences, because of the continuing risk presented by their ideology and desire to do harm.

38. Accordingly, it is considered that any potential difference in treatment would be justified. The objective and reasonable justification for the different sentences and release provisions with reference to the instance case is the legitimate aim of protecting the public from dangerous offenders by ensuring they are kept in custody for a longer proportion of the penalty part of their sentence. It is a legitimate aim to protect the public, give more time for rehabilitation, and a purpose to work towards rehabilitation (to obtain discretionary release) and where a prisoner does not do so to detain them for the whole of the penalty part of the sentence.

39. It is therefore the Department's position there is no unlawful interference with Article 14.

Analysis of certain measures in the Bill

40. The Bill makes provision to increase the maximum sentence that can be imposed on a person convicted of certain terrorist offences. Specifically:

a. the offence provided by section 11(3)(a) of the Terrorism Act 2000 ("TACT 2000") (membership of proscribed organisation) is raised from 10 to 14 years;
b. the offence provided by section 12(6)(a) TACT 2000 (inviting or expressing support for proscribed organisation), is increased from 10 to 14 years; and
c. the offence provided by section 8(4)(a) of the Terrorism Act 2006 (attendance at place used for terrorist training), is increased from 10 to 14 years.

41. The new maximum sentences will be available only in respect of offences committed on or after commencement.

42. Groups are proscribed by Parliament as terrorist organisations if they are "concerned in terrorism" within the meaning given by section 3(5) TACT 2000. Section 11 TACT 2000 makes it an offence to be a member or profess to be a member of such a group; while section 12(1) TACT 2000 makes it an offence to "invite" others to support a proscribed organisation. The offence does not criminalise mere expressions of support for, or personal approval of, such an organisation where there is no accompanying invitation to others to support the group.[1]

43. The existence of the offences under sections 11 and 12 TACT 2000 constitutes a restriction of the freedom of expression of individuals who are either members of prescribed organisations, or who wish to invite support for such organisations; restricting a person's ability to receive and impart information and ideas concerning his or her religion or political/ideological beliefs. The increase in the maximum sentences that are available for these offences may increase, to a degree, the extent of the existing interference.

44. The Government considers that the overall interference, and the limited expansion of such interference, is justified as necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others.

[1] In *R v Choudhary* ([2016] EWCA crim 1436), paragraph 42, the Court opined that "it is difficult to see how an invitation could be inadvertent."

45. Proscribed groups are those Parliament has decided are concerned in activity, or the threat of activity, which involves seriously harmful outcomes, including serious injury, death and property damage. There is a clear public interest in stymieing support for terrorist organisations since the more support they have, the stronger their capacity to engage in terrorism, with the attendant risks listed above.

46. The public interest in choking off support for terrorist groups is all the more pronounced now, given modern-day terrorist methodologies adopted by members or supporters of such groups (for example, easily perpetrated lowtech attacks such as the Westminster Bridge attack) and the propensity for people to graduate swiftly, through online radicalisation, from a position of posing little threat to committing terrorist atrocities in the name of such groups.

47. The purpose of increasing the maximum available sentences for these offences is to provide the courts with the necessary powers to ensure that offenders receiving sentences that reflect the severity of the offending; and provide a more effective deterrent to those who would otherwise join proscribed organisations or seek to invite others to join and support them. To restrict the degree to which proscribed terrorist organisations are able to garner support is sufficiently important to justify the limitation of the fundamental rights under Article 10.

48. In addition, providing for these greater maximum sentences is a proportionate means of achieving the legitimate aim. The increase in available sentences is rationally connected to the aim, since it strengthens the deterrent provided by the section 11 and 12 offences; and does no more than is necessary to accomplish the objective. Furthermore, while the measures increases the sentencing powers available to the courts, it will be for the courts to assess each case based on its facts, and impose a sentence that is justified by the circumstances of the particular offender. This increase in sentencing powers will therefore impact only on the most serious offences.

49. Consequently, a fair balance has been struck between the rights of the individual and the interests of the community. The gravity of the risk posed by terrorist groups

to the public at large is such that it is proper to curtail the Article 10 rights of persons who are members of proscribed organisations or invite others to support them.

50. As a general point, the European Court of Human Rights ("ECtHR") has previously concluded that legal restrictions designed to deny representatives of known terrorist organisations and their political supporters the possibility of using the broadcast media as a platform for advocating their cause, encouraging support for their organisations and conveying the impression of their legitimacy are not incompatible with the right to free expression. See, for example, Leroy v France.[2]

Changes to the Terrorism Prevention and Investigation Measures Act 2011 ("TPIMA 2011")

51. This Bill makes a number of changes to the regime for Terrorism Prevention and Investigation Measures (TPIMs). At present, a TPIM can be imposed where the Secretary of State is satisfied, on the balance of probabilities, that an individual is or has been involved in terrorism-related activity (TRA). A TPIM is a range of civil measures placed on an individual which are designed to prevent or restrict his involvement in future TRA. This Bill amends existing measures and introduces some brand new measures. The Bill also lowers the standard of proof required from "balance of probability" to "reasonable suspicion"; and removes the 2-year statutory time limit so that TPIMs are capable of indefinite extension.

52. All of these changes mean that a TPIM will more closely resemble the forerunner to TPIMs: the non-derogating control order[3] under the Prevention of Terrorism Act 2005 ("PTA 2005"). PTA 2005 was entirely repealed when TPIMA 2011 came into force, but obligations under the control order regime were subject to scrutiny by the High Court, and in many cases also by the appeal courts. The enabling powers in

[2] *Leroy v. France*, 36109/03, §§ 36-48, 2 October 2008.

[3] For all future reference in this document, control orders should be taken to mean "non-derogating control orders". PTA 2005 allowed for the making of both derogating and non-derogating control orders. Derogating control orders, if accompanied by a derogation from Article 5 of the ECHR (right to liberty), could have imposed restrictions extending as far as house arrest in the form of a 24-hour curfew. It was never thought necessary for any such order to be made, and so no derogating control order was ever imposed.

the legislation were not found to be incompatible with ECHR rights – although, in a number of cases, obligations imposed in *individual cases* were found to be incompatible. 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.

53. Looking at the TPIM changes in turn:

TPIMs: Lowering the standard of proof

54. At present, the Secretary of State must be satisfied on the balance of probabilities that an individual is or has been involved in TRA. The provisions in this Bill lower that standard to reasonable suspicion.

55. The threshold has changed a number of times over the years. Control orders under PTA 2005 could be imposed on the basis of reasonable suspicion. When TPIMs were introduced in 2011, this was increased to reasonable belief. And in 2015, this was increased again to balance of probability, responding to a recommendation by David Anderson QC when he was Independent Reviewer of Terrorism Legislation.

56. 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. The Department does not consider that the change itself engages any ECHR rights, and notes that the raising of the threshold was a voluntary political decision in a somewhat different national security climate.

TPIMs: Extension of time limit

57. 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.

58. In contrast, control orders lasted for a year at a time, but were capable of indefinite renewal. The longest period for which a person was subject to a control order was in excess of 55 months. The shortest period was two months. Renewal was for a year at a time, though the view would sometimes be taken that, absent evidence of re-engagement in terrorism-related activity, the order should be brought to an end earlier by revocation. Of 52 control orders imposed during the life of the scheme, 15 orders were revoked and 4 orders were not renewed, as a result of a decision by the Government that the necessity test was no longer satisfied[4].

59. The provisions in this Bill remove the 2-year statutory limit so there will be no restriction on the number of times the Secretary of State may renew a TPIM. As with lowering the standard of proof (above), removing the time limit does not in itself infringe a person's ECHR rights; it is the TPIM measures themselves which may do that.

60. 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[5]. The absence of a statutory time limit in PTA 2005 was never found to be incompatible with Convention rights, and the decision to impose one was a voluntary political one. The Home Office does not consider this change to directly engage ECHR rights.

TPIMs: curfew

61. One of the measures which can be imposed under a TPIM is a requirement for the individual to remain in his residence "overnight". The Act does not specify what is meant by overnight but it is thought that 10 to 12 hours would be about the maximum permitted limit.

62. The provisions in this Bill remove the "overnight" restriction so that an individual can be subject to a longer curfew. This is in line with the curfew power for control

[4] Statistics from David Anderson QC's report on Control Orders in 2011, when he was Independent Reviewer of Terrorism Legislation.
[5] Section 5(3) TPIMA 2011 states that Conditions A, C and D in section 3 must be met for a TPIM Notice to be extended.

orders under PTA 2005. Under that Act, an individual could be required to remain in his residence between such hours as were specified, without a constraint on that period being overnight. This is also the position under the Enhanced Terrorism Prevention and Investigation Measures Bill, a Bill published in draft in 2011 which would allow for the swift introduction of TPIMs with more stringent measures.

63. The requirement that the individual remain in their residence for a specified period or periods during the day may engage Article 5.

Article 5

64. 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*[6], 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*[7] and *SSHD v MB & AF*[8], 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*[9], 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*

[6] [2007] UKHL 45.
[7] [2007] UKHL 47.
[8] [2007] UKHL 46.
[9] [2010] UKHL 24. [2011] 2 AC 1.

unusually destructive of the life the controlee might otherwise have been living".

65. Following the judgment of Lord Brown in *JJ*, no curfew in excess of 16 hours was imposed after 2007.

66. It is clear therefore that enabling the Secretary of State to impose a requirement on the individual to remain in their residence for a specified period during the day, may risk breaching Article 5 where that period amounts to 14/16 (or more) hours. Where the Secretary of State considers it necessary to impose a curfew of 14 to 16 hours, she will need to consider very carefully whether this would amount to a deprivation of liberty in the circumstances of the case. In making this assessment, she 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.

67. The *principle* of imposing a curfew on an individual under civil preventative measures does not therefore breach Article 5 and there are protections in place to ensure that measures do not individually or cumulatively amount to a deprivation of liberty. In particular, there is a duty on the Secretary of State (under section 6 of the Human Rights Act 1998) 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[10].

68. The Home Office therefore considers that the provisions in the draft 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 compatible with Article 5.

TPIMs: polygraph measure

[10] See duty of continuing review in section 11 TPIMA 2011.

69. The Bill introduces a new measure of polygraph testing. If imposed by the Secretary of State, a TPIM subject will be required to undergo mandatory polygraph testing. This requirement is designed to help monitor the individual's compliance with his other TPIM measures, and assess whether the existing package of measures is appropriate. Rules will regulate the conduct of polygraph sessions. Statements given or reactions made by the TPIM subject during the polygraph examination cannot be used for prosecution of an offence, although refusal to submit to a polygraph examination would count as breach of a TPIM measure, which is in itself an offence[11]. The scheme is modelled on that contained in section 28 of the Offender Management Act 2007.

70. A proposal to conduct mandatory polygraph tests on particular TPIM subjects is capable of engaging Article 8.

Article 8

71. The requirement to undergo mandatory polygraph testing can only be imposed under TPIMA 2011 if the Secretary of State considers it necessary to protect the public from a risk of terrorism[12]. It is in the interests of preventing terrorism that the individual has been placed on a TPIM, and it is equally in the interests of preventing terrorism that the TPIM subject complies with his measures. If a TPIM subject is not complying, it is essential for the Secretary of State to be aware of that, in order to manage the TPIM more effectively (e.g. perhaps by amending existing measures or adding new ones if it is necessary to do so).

72. Interferences with Article 8 may be justified where they are in accordance with/prescribed by law and necessary in a democratic society for various legitimate ends, including the interests of national security, public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. The Home Office considers that these measures are in accordance with the law since they are set out in primary legislation, and that the requirement to submit to a

[11] Under section 23 TPIMA 2011.
[12] Section 3(4) TPIMA 2011.

polygraph examination can be justified within the terms of Article 8(2) given the important public interest in preventing terrorism.

TPIMs: drug testing requirement

73. The Bill provides for another new measure in TPIMA 2011: drug testing. If imposed by the Secretary of State, a TPIM subject will be required to undergo mandatory drug testing. Testing is for specified Class A and B drugs, and samples are limited to urine, saliva and other non-intimate samples. The testing would normally be carried out by a police officer at a police station, although there is a power to make regulations specifying other testers and other places. Failing a drugs test (by showing a positive result) is not in itself a criminal offence, although failing to submit to drug testing would be[13]. It is intended to use the information from the drug test to decide whether to mandate later attendance at drug treatment appointments.

74. The imposition of the requirement would engage Article 8.

Article 8

75. *Peters v Netherlands*[14] *and X v Austria*[15] *show* that a compulsory medical intervention, even if of minor importance, constitutes an interference with Article 8 rights[16].

76. The Home Office considers that any interference with a TPIM subject's Article 8 rights caused by drug testing can be justified as necessary in a democratic society in the pursuit of a legitimate aim.

77. In the context of TPIMs, the drug testing measure can only be imposed if the Secretary of State reasonably considers it necessary in the interests of preventing or restricting that individual's involvement in terrorism[17]. This might be, for example,

[13] As with any breach of a TPIM measure, by virtue of section 23 TPIMA 2011.
[14] App. No. 21132/93.
[15] App. No. 8278/78.
[16] In *Peters*, compulsory random urine tests on prisoners were found to be necessary and proportionate for the prevention of disorder or crime.
[17] Section 3(4) TPIMA 2011.

because a TPIM subject with an addiction becomes more unstable when taking drugs, and therefore more likely to engage in acts of terrorism. Drug use among particular groups could be a significant contributory factor in offending. For these reasons, the Home Office considers that the interference with Article 8 rights can be justified as necessary.

78. The ECHR intrusions that are involved with this offence are also considered proportionate. Sometimes there will be no other means for the Secretary of State to establish whether or not a TPIM subject had been taking drugs. Failing the drug test (by showing a positive result) will not constitute a breach of the TPIM; only failure to submit to a required test will do so. And, finally, the purpose of the drugs test is rehabilitative. The information from the drug test will help form an assessment about whether a TPIM subject should be mandated to attend drug treatment appointments in the future[18]. These restrictions together ensure that drug testing will only be mandated in those cases where it is necessary and proportionate in pursuit of a legitimate aim, namely in the interests of national security.

TPIMs: requirement to provide information

79. TPIM subjects are already required to provide various pieces information on request to the Secretary of State under TPIMA 2011 (for example, details of who will else will reside at the residence; details of the TPIM subject's bank accounts). This Bill adds further types of information which the Secretary of State may require: precise details of where a TPIM subject resides (if he is not relocated), and mobile phone details of other people who reside in the house with the TPIM subject. If requested information is not provided, that would constitute a breach of a TPIM measure, which is a criminal offence under section 23 TPIMA 2011.

80. A requirement to provide information on demand engages Article 8.

Article 8

[18] The requirement to attend appointments which are necessary to reduce the risk of terrorism is not a new requirement. It already exists in paragraph 10A of Schedule 1 to TPIMA 2011, and no further provision is made for this in the Bill.

81. As with the other measures in TPIMA 2011, the Secretary of State must consider that the provision of information is necessary for preventing or restricting the individual's involvement in terrorism. It will nearly always be necessary for the Secretary of State to know where a TPIM subject resides, in order to make an assessment of the risks presented by location and nearby associates. In some instances, a TPIM subject might move regularly and/or be unwilling to provide that information voluntarily. The requirement to provide details of home address is not particularly onerous. Neither is the requirement to provide details of mobile phones (and other electronic communication devices) belonging to people residing with the TPIM subject, which may be necessary to monitor communications coming in and out of the residence. The Department is therefore satisfied that the requirement is necessary and proportionate in view of the legitimate aim pursued, namely the prevention of terrorism.

TPIMs: variation of TPIM measures

82. Under TPIMA 2011, the measures in a TPIM can be varied for the reasons set out in section 12(1), namely: (i) if the variation consists of a removal or relaxation of measures; (ii) if the TPIM subject consents; or (iii) if the variation is necessary for reasons of national security. The Bill adds another reason for variation to section 12(1): variation of the residence address for reasons of efficient and effective use of resource where the TPIM subject has already been relocated away from his home. This could be required in the following instance: a TPIM subject is relocated away from his residence to area X but during the course of the TPIM it becomes necessary to move him to area Y to assist with stretched police resourcing in area X.

83. Variation of a TPIM subject's measures could engage various ECHR rights (Articles 8, 9, 10, 11) depending on how the variation took effect. For instance, in our example, the shops or mosque in area Y might be further away from the residence, or area Y might be further away from family and friends[19].

[19] Although no further than the 200-mile limit prescribed by paragraph 3A of Schedule 1 to TPIMA 2011.

84. Articles 8, 9, 10 and 11 are all qualified rights, with which intrusion can be justified in the interests of national security. Importantly, even if the address in the relocation measure is varied for resource reasons, the underlying relocation measure must still be considered necessary for preventing the individual's involvement in terrorism-related activity. Furthermore, varying details of the measure for operational reasons is for purposes connected with pursuing this legitimate aim: after all, if the TPIM measures cannot be properly monitored and enforced due to operational difficulties, the TPIM will not be effective at preventing or restricting the individual's involvement in TRA.

85. The Home Office considers that the amendment is therefore justified, and is also proportionate to the legitimate aim pursued. It should be noted that amending TPIMA 2011 to add "efficient and effective use of resource" to the reasons for variation in section 12 does not in itself give rise to interference with an individual's ECHR rights. It is only upon the exercise by the Secretary of State of this power that the TPIM subject's rights are interfered with. In making a decision to vary the measures in a TPIM, the Secretary of State is under a duty to act compatibly with Convention rights[20], and will need to herself be satisfied that the package of measures is necessary and proportionate to reduce the risk to the public of terrorist activity carried out by the individual.

86. TPIMs are further safeguarded by judicial checks by way of appeal of measures imposed. During the life of the TPIM regime (and the control order regime before it), the High Court has reviewed the package of measures imposed on TPIM subjects to determine whether they are indeed necessary and proportionate in the particular circumstances of the case. Relocation of individuals to another part of the United Kingdom without consent under control order obligations has been reviewed by the courts on a number of occasions. The court has not always upheld the Secretary of State's decisions on relocation. For example, in the case of *BH v SSHD*[21] , although Mitting J agreed with the Secretary of State's assessment that the relocation of BH under his control order to another part of the country was

[20] Section 6 Human Rights Act 2000.
[21] [2009] EWHC 3319 (Admin).

necessary, he went on to find that, on balance, it was disproportionate in light of BH's particular family circumstances. These cases demonstrate the balancing exercise on the facts which is carried out in each and every TPIM, for each and every measure which is imposed (or varied) in order to ensure a proportionate decision is made.

87. For all these reasons, the Home Office considers that this provision is compatible with Convention rights.

Expanding offences that may be subject to the notification requirements

88. Section 41 CTA 2008 provides that listed terrorist offences (for example supporting a proscribed organisation or training for terrorism) fall within the scope of the notification regime without the need for a finding that they have been committed with a terrorist connection (because the offences are considered to be inherently terrorist in nature). The Bill adds two offences to that list.

89. Section 23 of the TPIM Act 2011 provides that an individual commits an offence if he or she contravenes a measure specified in a TPIM notice imposed in accordance with that Act. A person found guilty of such an offence is liable to maximum sentence of 5 years. Section 10 of the Counter-Terrorism and Security Act 2015 provides an individual who is subject to a Temporary Exclusion Order ("TEO") under Part 1 of that Act, commits an offence if he or she returns to the UK in contravention of a restriction specified in the TEO, or fails to comply with an obligation to which they are subject once they have returned (for example, requiring them to report to a police station or attend mentoring appointments).

90. The Government considers that both of these offences are inherently terrorist in nature; as well as being serious offences. Accordingly it is appropriate that they be included within the scope of the notification regime. Given that TPIMs or TEOs are imposed on individuals in respect of terrorism-related activity, if an individual has breached their obligations and receives a sentence, it is appropriate that the notification requirements should be capable of applying to them. Whether the

notification requirements will apply to an individual offender will depend on the length of the sentence that the offender receives.

Article 8

91. The Government notes that the notification regime under Part 4 CTA 2008 constitutes an interference with the right of those who are subjected to it, to private and family life. However while the existing interference may be increased to a degree as a result of the changes (in the sense that some offenders who would not otherwise have been subject to the notification requirements will become subject to them), this interference is both justified and proportionate. In *R (oao Irfan) v SSHD* [2012] EWCA Civ. 1471 the Court of Appeal held that the interference that arises as a result of the notification regime was justified and proportionate by the need to protect the public from terrorism, and therefore compatible with Article 8. The offences that are added to section 41 CTA 2008 are terrorist offences that are serious in nature; and therefore it is the Government's view that their addition to the scope of the notification regime would also be found to be compatible with Article 8.

Article 7

92. Although the amended regime will in some circumstances apply to those who committed the trigger offence prior to the coming into force of the new provisions, the application of the regime is not a penalty but is preventative and so Article 7 is not engaged.[22]

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[22] 7 See Ibbotson v UK (40146/98), [1999] Crim LR 153, (1998) 27 EHRR CD332, [1998] ECHR 119 and M v Chief Constable of Hampshire [2012] EWHC 4034 (Admin), in which the ECHR and the Court concluded that the SOA regime, on which the Part 4 CTA 2008 regime is modelled, found no Article 7 breaches because the measures did not amount to a "penalty".