

Counter-Terrorism and Sentencing Bill - TPIMs: A Rule of Law Analysis

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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill, the Terrorist Offenders (Restriction of Early Release) Bill, UK Internal Markets Bill and various coronavirus laws.

This Report has been prepared externally and on a pro bono basis by Tom Hickman QC, Professor of Public Law University College London, Barrister, Blackstone Chambers. We are extremely grateful to Professor Hickman for his assistance.

The Project is being led by Dr Ronan Cormacain, Senior Research Fellow at the Bingham Centre and Consultative Legislative Counsel.



Introduction

This Report relates to Part 3 of the Counter-Terrorism and Sentencing Bill which contains proposed amendments to the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). TPIMA makes provision on Terrorist Prevention and Investigation Measures (TPIMs). The Report focuses on two of the proposed amendments:

- (a) the proposed creation of a polygraph testing measure (clause 41), and
- (b) the proposed removal on the two year time limit for a TPIM absent new terrorism related activity (“TRA”) (clause 38).

Despite this narrow focus, I share the doubts of the Independent Reviewer of Terrorism Legislation that there is any operational case for changes to the TPIM regime.¹

The Rule of Law requires access to justice,² which includes the right to a fair trial³ and the presumption of innocence.⁴ It is within this context that these measures are considered.

The proposed polygraph measure

1. A polygraph test is designed to measure a person’s physiological reactions to determine if they are lying. It is defined in the Bill as follows:

“Polygraph examination” means a procedure in which-

- (a) the polygraph operator questions the individual,
- (b) the questions and the individual’s answers are recorded, and
- (c) physiological reactions of the individual while being questioned are monitored and recorded⁵

2. Terrorists and those supporting them can be devious and accomplished at concealing their true intentions. There is an undoubted problem in the criminal justice context of convicted terrorist offenders gaining release on licence when they remain a risk to the public. In such a context, the Bill proposes the introduction of polygraph testing which has already been used in the context of child sex offenders. Such a reform is understandable.
3. However, the further extension of polygraph testing to TPIM measures as proposed by clause 41 of Part 3 of the Bill raises very different considerations.
4. Clause 41 of the Bill would enable any TPIM subject to be required to participate in polygraph testing with a view to (a) monitoring compliance with other specified measures, and (b) assessing whether any variation (i.e. increase) in the TPIM measures is necessary.
5. These are far-reaching objectives. The latter objective would enable a TPIM subject to be questioned about the suspicions that form the basis for the TPIM itself. The former would not only enable questioning about people a TPIM subject might have met with or spoken to, but would also enable questions about engagement with PREVENT, which can be imposed as a TPIM

¹ Jonathan Hall QC, *Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2)*, 5 June 2020, p 1

² Venice Commission, *The Rule of Law Checklist*, Benchmark E.

³ Benchmark E2, *ibid.*

⁴ Benchmark E2b, *ibid.*

⁵ Clause 41.

measure under TPIMA Schedule 1 para 10A. It therefore raises the prospects of subjects being questioned about their engagement with PREVENT approved Imams.

6. Furthermore, the analogy with persons convicted of serious offences who are released on licence, which seems to underpin the case for this change, is fundamentally unsound.
7. First, TPIM subjects have not been convicted of any crime. Indeed, if the current draft Bill becomes law they would be subject to a TPIM on the basis of suspicion only.
8. Second, the consequence for a TPIM subject in refusing to cooperate with a polygraph test would be that he or she would commit a criminal offence by failing to comply with a TPIM measure. This is quite different from the recall of a convicted offender.
9. Third, the consequence for a TPIM subject is that incriminating product of a polygraph test would be adduced to support increased or prolonged TPIM measures. This means that the polygraph tests would be relied upon in civil proceedings – the TPIM proceedings – which is, again, very different from licence reviews. In *Fennell v Jerome Property Maintenance Ltd*, 24 November 1986,⁶ a civil damages claim, Mr Justice Tuckey stated that it was “inherently wrong” for a court to rely upon “any mechanically or chemically or hypnotically induced” evidence in civil proceedings.
10. TPIM proceedings are also not ordinary civil proceedings. In *MB v Secretary of State for the Home Department* [2008] 1 AC 440 the House of Lords held the severity of control orders (now TPIMs), which impose obligations more serious than most criminal penalties, meant that they attracted greater procedural protections than ordinary civil proceeding.⁷
11. Such authorities support the view that the proposed polygraph measure would be unfair and would contravene the right against self-incrimination.
12. This opinion is consistent with the view of the Independent Review of Terrorism Legislation that evidence obtained from polygraph tests performed on convicted terrorist offenders should not be capable of being used in any subsequent TPIM proceedings.⁸ That indicates that it is not appropriate for polygraph tests to be used in civil proceedings of the nature and severity of TPIMs.

⁶ The Times Law Reports 27 November 1986, Lexis Transcript Citation 1031.

⁷ Lord Bingham of Cornhill stated that the subject of such an order is entitled, “to such measure of procedural protection as is commensurate with the gravity of the potential consequences” (at [24]). The European Court of Human Rights has also held that respect for the will of a person precludes them being compelled by threat of criminal sanctions to answer questions (as opposed to providing blood samples or physical evidence), even in the context of terrorism (*Heaney & ano v Ireland*, App No. 34720/97).

⁸ “Although not criminal, TPIMs can be life-changing measures, are separate from the administration of a licence, and not based on a criminal conviction. Whilst statements made during polygraph sessions may result in a recall decision, such statements are not a current source of evidence for TPIM proceedings. To admit them would have an additional effect which is not the intended purpose of this otherwise acceptable extension of polygraph testing.” (emphasis supplied) Terrorist Risk Offenders: Independent Review of Statutory Multi-Agency Public Protection Arrangements, Jonathan Hall QC May 2020, page 12.

For these reasons, I suggest that clause 41 should not be approved.

The proposed removal of the 2 year limit on TPIMs

13. Clause 38 of the Bill would amend the TPIMA so that the current 2 year maximum limit for a TPIM is removed.
14. The most important reform that Parliament introduced in 2011 when it replaced control orders with TPIMs was the removal of the indefinite duration of the measures. Parliament should be very slow indeed to reverse that decision.
15. TPIM measures often involve the separation of married couples, the separation of fathers from their children,⁹ confinement to a residence far from home, a curfew (which the Government proposes to increase to up to 16hrs per day) regular reporting at the police station outside these times, tagging and restrictions on associations and communications. In other words, TPIMs can amount to almost total control over a person's life. To subject individuals to such measures indefinitely, in the absence of a conviction for any crime, requires the most compelling evidence of necessity.
16. It was also a recognised problem with control orders that controlled persons were – understandably given the restrictions imposed upon them - unable to demonstrate that they had changed their habits or associations. This was especially difficult for people who disputed that they had been involved in TRA in the first place.
17. Of 52 control orders, only 19 were allowed to expire or were lifted by the Secretary of State because she accepted that the individuals were no longer a risk. The remainder were ended in some other way (such as deportation, as the result of court intervention or the subject being placed on a TPIM).¹⁰ There is therefore a real risk that TPIM subjects will remain subject to TPIMs for many years.
18. The case for removing the TPIM time limit is said to be that: (a) some TPIM subjects “bide their time” before re-engaging in TRA, and (b) the two year limit creates a “cliff edge” resulting in a “gap” before a new TPIM can be imposed. It is said that it has taken up to 16 months to “prepare and impose” a new TPIM.¹¹
19. Both these concerns are in reality directed at the same issue. The concern is that it is difficult to acquire sufficient evidence of “new” TRA occurring during the currency of a TPIM or following its expiration to support a further TPIM (TPIMA s.3(2), (6)).

⁹ Households are usually given the option to relocate with a TPIM subject but often this is impractical, such as where children are in school near the family home.

¹⁰ Control Orders in 2011, Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005, David Anderson QC, March 2012 at 3.50.

¹¹ Fact Sheet, The Counter-Terrorism and Sentencing Bill- Changes to TPIM Standard of Proof and Time Limit, 20 May 2020 at [8] and [9].

20. There is however strikingly little evidence that there is a serious issue here, given the magnitude of the proposed change. There is no evidence of how often the situation arises or the degree of risk posed to society.¹²
21. The concern is in any event satisfactorily addressed by clause 37 of the Bill which would reduce the evidential threshold for establishing involvement in TRA from the balance of probabilities standard to reasonable suspicion. The Government's case for removing the two year time limit has not taken into account the knock-on effect of the significant change to the burden of proof that it proposes. Reducing the threshold to reasonable suspicion will meet the difficulty that the Government states that it currently faces in gathering evidence sufficient to establish new TRA, either during the currency of a TPIM or once it has expired, because in the future new TRA would not have to be established on balance of probabilities.
22. Clause 38 of the Bill should therefore not be approved.

¹² Indeed, information provided to the Independent Reviewer of Terrorism Legislation suggests that where a second TPIM has been imposed, a gap before this has been put in place would not have caused any direct risk to society. He was informed that the targets of this amendment are "not the most serious terrorists posing a risk to the public" but "long-standing subjects of interest who are engaged in radicalisation". These persons do "not fall within the highest tier of immediate risk to the general public": *Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2)*, Note 2 on *TPIM Reforms*, 5 June 2020, at [19].

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