Briefing for the Public Bill Committee of the Counter-Terrorism and Sentencing Bill

About us

The Bar Council is the representative body for the Bar of England and Wales, representing approximately 17,000 barristers. The independent Bar plays a crucial role in upholding and realising the constitutional principles of government accountability under law and vindication of legal rights through the courts.

Background

The Law Reform Committee of the Bar Council has given the Counter-Terrorism and Sentencing Bill considerable attention. There is of course much in there that is outside our remit, relating as it does to sentencing policy which is the prerogative of the Government (subject to approval by Parliament).

However, there are three aspects of the Bill's proposals which we feel engage rule of law issues and will need to be scrutinised with particular care:

Restriction of early release

1. Among a package of measures which are designed, individually and collectively, to achieve the result of increasing the severity of sentences imposed in respect of offences with a connection to terrorism (which, essentially, is a matter of policy), **Clause 27** stands out. That clause prohibits early release for dangerous terrorist prisoners (whether under or over 18) for certain relevant offences. Where such an offender is sentenced to a serious terrorism sentence or extended sentence, for an offence punishable with life imprisonment, they will not be referred to the Parole Board at the two-thirds point of the custodial term but will instead be released at the end of their custodial term.

2. We would question how Clause 27 fits with the obligation placed on the court to have regard to the reform and rehabilitation of offenders when sentencing (s.57(2) of the Sentencing Code). This provision would not appear to be the subject of an exception to the s.57(2) obligation, in contrast with the express carve out from s.57(2) relating to the imposition of life sentences for specific terrorist offences (Clause 11).

Polygraph testing

3. **Clause 32** extends the provision of polygraph testing to adult terrorist offenders subject to the release provisions of s.247A CJA 2003, or those who have committed an

offence with a terrorist connection. Reference is also made (in **clause 41**) to the introduction of a polygraph testing measure as a TPIM requirement.

4. Provision was made for polygraph testing in the Offender Management Act 2007, and a three-year pilot of polygraph testing was announced on 3 March 2020 in relation to domestic abuse offenders.[1] The Explanatory Notes to the Bill do not clarify whether the Government intends to conduct and resource a similar pilot programme with a view to revisiting the efficacy of this technique of monitoring risk. Clarity in this regard would be welcome.

5. The Committee will be aware that a body of research exists as to the reliability or otherwise of polygraph tests.

6. We would observe that there is a significant distinction between (a) using the result of a polygraph test for intelligence purposes, or as a trigger for further investigation – in which situation a degree of permissible error as "false positives" can be countenanced without too much disquiet and (b) relying upon such a test evidentially to demonstrate non-compliance with a particular measure for the purposes of *e.g.* breach proceedings. While polygraph testing might assist as part of a suite of tools to monitor an individual's behaviour, it is important that polygraph testing is not used as a stand-alone trigger for recall to prison from licence, for example.

7. We would also note that the Regulations relating to polygraph testing which under clause 35 the Secretary of State is empowered to make will need to be scrutinised with some care.

Terrorism Prevention and Investigation Measures (TIPM)

8. **Clause 37** provides for a reduction in the standard of proof to be applied to the test for imposition of a TPIM (and thereafter its review).

9. The current test, contained in s.3 of the TPIMA 2011, requires the Secretary of State for the Home Department ("the SSHD") to be *"satisfied on the balance of probabilities"* that the individual is or has been involved in terrorism related activity ("TRA"). The proposed amendment reduces this to a requirement that the SSHD *"has reasonable grounds for suspecting"* that the individual is or has been involved in TRA.[2]

10. This is therefore a considerable watering-down of the test. It represents a reversion to the test applicable to the making of a control order under s.2 of the Prevention of Terrorism Act 2005.

11. It is not clear to us why this reduction in the standard of proof is said to be necessary. We are not aware of any case in which a TPIM has been quashed on review on the basis that the standard of proof has not been met.

[1] https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/mandatory-polygraph-tests-factsheet

[2] While there are further tests which are required to be met before a TPIM can be imposed, each of those is connected to the question of whether the individual is, or has been, involved in TRA.

12. While Clause 37 weakens the protection for the individual upon whom such measures are made, **Clause 38** increases the maximum duration of a TPIM. At present the maximum duration of a TPIM is two years – an initial period of one year, with the opportunity to extend for a further year before expiry. There is presently no restriction on imposing a further TPIM following the expiry of the existing order, save that the new order must be based upon "new" TRA – *i.e.* that which post-dates the imposition of the initial order. What is now proposed is that a TPIM can roll over in one-year periods, indefinitely. That is a considerable extension of the power, which when taken in tandem with the weakening of the test for imposition of such orders presents real rule of law issues.

13. As will be known by the Committee, TPIMs involve considerable restrictions on the liberty of the subject (engaging Art.5), their family life (Art.8) and their property rights (Art.1 of the First Protocol), among others. The measures imposed typically include:

    i) relocation out of the area in which the subject habitually lives;
    ii) a prohibition on leaving the area to which they have been relocated, save for court appearances, legal conferences and the like;
    iii) exclusion from certain areas;
    iv) an electronically monitored overnight curfew;
    v) reporting to a police station;
    vi) restrictions on the possession and use of devices; electronic
    vii) a prohibition on associating with certain named individuals.

14. The possibility of an indefinitely renewable order is problematic in particular because the typical length of time taken by a court to review a TPIM is around one year – the target is generally considered to be six months but our understanding is that this is commonly not met, particularly where (as happens with reasonable frequency) two or more individuals are joined in the action because of features which the cases are said to have in common.

15. Further, as TPIM review proceedings are conducted partly in closed sessions which involve an evaluation of evidence which has not been disclosed to the individual who is subject to the measures, there is a real potential for unfairness if the test for imposition is diluted in the way proposed.

16. We endorse the position taken by Independent Reviewer of Terrorism, Jonathan Hall QC, in his evidence to the Committee – specifically that the reforms proposed require real justification – and are concerned that he has identified none. Indeed, he has specifically questioned the basis for the change. The significance of this is of course that he will have formed this view informed by access to sensitive material that we have not seen and would not be made public (or indeed openly debated in Parliament).

The Bar Council Law Reform Committee
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