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Prison Reform Trust evidence to the Independent Commission on UK Counter-Terrorism Law, Policy and Practice

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

www.prisonreformtrust.org.uk

PRT welcomes the opportunity to provide evidence to the Commission. PRT does not have a specialism in counter-terrorism and is not a legal charity. However, we do have expertise in areas of significance to terrorism offenders, including recent developments in sentencing law and parole legislation and practice, the treatment of Black, Asian and Minority Ethnic people in custody, and the use of segregation and closed supervision centres. We have restricted our response to questions 1.5 and 1.8.

1.5. What effect have laws, policies and practices on preventing and countering terrorism had on individuals, groups and communities?

The overall increase in sentence lengths imposed by many of the provisions of recent terrorism legislation are likely to have disproportionate and negative impacts on individuals from Asian/British Asian and Muslim individuals in particular. For instance, the equality statement accompanying the Counter-terrorism and Sentencing Act 2020 acknowledges that "Asian/British Asian and Muslim individuals within the Criminal Justice System (CJS) have been disproportionately affected by terrorism legislation relative to the percentage of Asian/British Asian and Muslim individuals in the total population."[1] It puts this disproportionate impact down to trends which "reflect the terrorist ideologies prevalent in the UK, most notably Islamist Extremist and extreme Far Right terrorism." It concludes that the provisions of the bill are "unlikely to result in indirect discrimination within the meaning of the Equality Act 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, and the overrepresentation of some groups within scope of this policy will reflect the nature of terrorism in the UK at any given point."

[1] Ministry of Justice. (2020). Equality statement: Counter-Terrorism and Sentencing Bill 2020. Gov.uk. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886105/cts-equality-statement.pdf

We believe this statement to be complacent in view of the increase in the number of Muslim prisoners in the last few years and the significantly more negative experience they report of their treatment by the prison authorities in comparison to other groups. It assumes that all the processes of investigation and prosecution that lead up to imprisonment operate without bias, despite the strong evidence from the Lammy review that this is not the case. Given the experience of people from ethnic and religious minorities in the justice system as a whole, it would be more accurate to say that these provisions are likely to result in indirect discrimination, and therefore place a duty on the government to take steps to monitor closely and take appropriate remedial action if that probable outcome is realised.

Furthermore, in that context, we are extremely concerned by the poor quality of the data provided by the government on the ethnicity of terrorism offenders, particularly given the commitments made by the government in response to the Lammy review to improve the accuracy and transparency of data on ethnicity in the criminal justice system. See for instance statistical information prepared for the consultation on the Sentencing Council'sdraft terrorism offences guideline.[2] The lack of data is particularly concerning because numbers involved are so low. It would have taken relatively little effort for the government to have examined each case to determine probable ethnicity in each case. It is hard to see how bodies involved in the oversight of counter-terrorism policy can provide adequate scrutiny of the impact of terrorism legislation when the quality of data is so poor. We recommend urgent attention to this problem by the government.

1.8. What impact do laws, policies and practices on preventing and countering terrorism have on the Rule of Law and the UK's international legal obligations, including those relating to human rights?

We are concerned that recent and proposed changes to sentencing law and parole legislation and practice made in the name of strengthening public protection are disproportionate and could potentially undermine the UK's international legal obligations under human rights law. The key developments are highlighted below.

Bill of Rights
Clause 6 of the proposed Bill of Rights introduces a specific carve-out from human rights for people given custodial sentences. This contradicts one of the fundamental principles underlying human rights – their universality and application to each and every person on the simple basis of their being human. Moreover, it is precisely in custodial institutions like prisons and youth offender institutions that human rights protections are most vital, because individuals are under the control of the State. Clause 6 appears to be designed to prevent challenge to certain policies already enacted or proposed that affect prisoners. Broadly speaking, the provisions of section 6 would seem to anticipate potential legal challenges to new provisions already introduced or planned relating to the progression and release arrangements for parole eligible prisoners and the use of closed separation centres. It is perverse, discriminatory and unfair to deny access to normal avenues of challenge to those who are subject to the most extreme sanctions available to the state.

Parole changes
Recent documents released by the Parole Board to the Prison Reform Trust under freedom of information reveal the extent of the concerns on principled human rights grounds that senior parole officials have regarding the potential impact of the changes made and proposed in the parole system by the Secretary of State for Justice.[3] The government has

[2] https://www.sentencingcouncil.org.uk/publications/item/terrorism-offences-data-tables-2/
[3] https://prisonreformtrust.org.uk/parole-board-dominic-raab-making-an-already-difficult-job-close-to-impossible/

already made changes to parole board rules to introduce a 'single view' procedure through secondary legislation, as well as changed the criteria for transfer to open conditions. Some of these changes are already having a significant negative impact on sentence progression for parole eligible prisoners. Our concerns are outlined in a series of recent exchanges with the minister on the single view procedure[4] and the changes to criteria to open conditions.[5] Furthermore, instead of enhancing public protection as the Justice Secretary claims, the Parole Board has highlighted how these provisions may serve to undermine the interest of public protection in a number of important respects.[6] For instance, the Parole Board highlights how the change in criteria to open conditions will have the result that "*some of the most complex individuals will be released directly from closed conditions into the community, with less certainty on how they might behave and that could increase risk to the public*".

The root and branch review of the parole system,[7] published earlier this year, proposes further and more profound changes to the release arrangements for parole eligible prisoners. The most controversial aspect of the proposals is to introduce a new power of review and refusal for the Secretary of State to intervene directly in release decisions made by the parole board in relation to 'top tier' offenders. This change would require primary legislation which has not yet been introduced. The Parole Board has made clear its reservation about the legality of these proposals under existing human rights law. Article 5 of the European Convention on Human Rights requires decisions on release to lie with a court or court-like body. The Board explains in one of the documents released to the PRT under FOI the basic problem in domestic law of anyone being "judge in their own cause".[8] In other words, the Secretary of State cannot be both a party to the panel's proceedings and then act as the decision maker as well.

Section 132 of the Police, Crime, Sentencing and Courts (PCSC) Act 2022
Section 132 of the PCSC Act 2022 introduces a new power for the secretary of state to refer high risk offenders to the parole board in place of automatic release.[9] The case of Jody Simpson[10] is the first use of this new power. The criteria for the power are broad and apply to a significant number of prisoners. As was pointed out during the passage of the legislation, there is a clear danger that the power could be used more widely than originally envisaged. In addition, section 132 creates a worryingly informal procedure with a significant degree of discretionary power being placed in the hands of the Secretary of State. There are few due process safeguards for a prisoner in this process. They are empowered merely to 'make representations' to the Secretary of State about a proposed referral to the Parole Board – but even this entitlement is circumscribed by the Secretary of State expressly not being required to delay the referral in order to give them the opportunity to make such representations. The procedure falls a long way short of the usual judicial process that is normally required to find an offender to be 'dangerous' with a consequential impact on the sentence they will serve. Upon a referral to the Parole Board, the default position is that the prisoner will serve their full sentence in custody and this would mean that they may spend many extra years in prison because of the determination of future risk made, not by a court upon full consideration of all relevant facts, but by the Secretary of State.

Counter-terrorism and Sentencing Act 2020

[4] https://prisonreformtrust.org.uk/parole-changes-keep-coming/
[5] https://prisonreformtrust.org.uk/parole-changes-some-questions-answered-but-many-not/
[6] https://prisonreformtrust.org.uk/wp-content/uploads/2022/08/5.-Document-FOI.pdf
[7] https://www.gov.uk/government/publications/root-and-branch-review-of-the-parole-system
[8] https://prisonreformtrust.org.uk/wp-content/uploads/2022/08/5.-Document-FOI.pdf
[9] https://www.legislation.gov.uk/ukpga/2022/32/section/132/enacted
[10] https://news.sky.com/story/mother-who-abused-her-child-so-badly-he-had-to-have-his-legs-amputated-may-be-kept-in-prison-12670701

The provisions of this Act removed parole authorised release for individuals convicted of terrorism offences who receive a new Serious Terrorism Sentence (STS) or an Extended Determinate Sentence where the maximum penalty is life imprisonment. It doing so, it undermined the vital role of the Parole Board in assessing risk to determine safe release and could undermine public protection. It also removes a key incentive for individuals to comply with their sentence plan and engage in rehabilitation. The Prison Reform Trust provided detailed oral and written evidence to the public bill committee on the Counter-terrorism and Sentencing Bill, including on the provisions of the STS.[11] Many of our concerns were shared by the independent reviewer of terrorism legislation Jonathan Hall QC in his own evidence to the committee.[12] These provisions add a further degree of complexity to the sentencing framework for terrorism offences which will further confuse sentencers and the wider public. Their imposition could lead to instances of injustice and disproportionate sentencing, as well as undermine effective measures for public protection.

Close Supervision Centres and Separation Centres
HM Prison and Probation Service established Separation Centres in 2017 to isolate prisoners involved in terrorist activities or promoting extremist views. The reasons for selection are:

> "• Prevent and disrupt terrorist activity by separating those who present a significant threat to national security by actively seeking while in custody to build their capabilities or perpetrate terrorist acts.
> • Safeguard the mainstream prisoner population from being encouraged or induced to commit terrorist acts.
> • Separate and disrupt prisoners who may be attempting to radicalise others, influence peers to adopt identities in prison that challenge the UK's fundamental values, and/or use criminal dominance to enforce the power of groups who seek to challenge these values.
> • Safely manage those prisoners whose actions pose a significant threat to the safety of others and/or the good order or discipline of a prison.
> • Provide separated prisoners with the opportunity to reduce their risks through desistance, disengagement and de-radicalisation in the long term."

(cited in HMCIP, April 2022)[13]

The prisons inspectorate's report on the Separation Centres assessed selection, treatment, and legal rights. At the time of the inspection, all residents were Muslim. The inspectors concluded that the selection was rigorous, and that all prisoners were appropriately placed in the Centres. Further, they reported that the placement is reviewed regularly and that the men have full access to legal representation.

On this basis, it appears that people in the Separation Centres fulfil at least one of the criteria for presenting a threat to national security, a risk of terrorist activity in prison, or attempting to radicalise others.

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[11] Prison Reform Trust. (2020, June 26). Written evidence submitted by the Prison Reform Trust to the Counter-Terrorism and Sentencing Bill Committee. Parliament.uk. https://publications.parliament.uk/pa/cm5801/cmpublic/CounterTerrorism/memo/CTSB04.htm

[12] Hall, J., QC. (2020, June 1). Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (1). Independent Reviewer of Terrorism Legislation. Retrieved 10 January 2022, from https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/Note-1-on-Sentencing-Reforms-1.pdf

[13] HMCIP (April 2022) Report on an inspection of Separation Centres Separation Centres; https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2022/08/Separation-centres-web-2022.pdf

The inspectorate's report predicted that, following the review by Jonathan Hall QC, the number of men placed in Separation Centres is likely to increase. However, a premature or excessive increase in provision may create a tendency among staff to broaden their interpretation of the criteria. The Justice Secretary's determination to create capacity when current experience suggests that what is available may already be sufficient, and long before there is evidence to determine whether the centres are effective in achieving their final aim of reducing risk through desistance, disengagement and de-radicalisation, increases the likelihood of this happening.

Justice requires that the criteria controlling the imposition of greater restriction are precise and based on evidence which is open to challenge. The UK Supreme Court ruled on extended periods of segregation in 2015. Part of the judgment concluded that prisons have a duty to explain the reasons for separation: "A prisoner's right to make representations is largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond."[14] There is, therefore, a duty to assess the criteria for selection. The criterion that fails the tests of precision and tangible evidence is: "Safely manage those prisoners whose actions pose a significant threat to the safety of others *and/or the good order or discipline of a prison*." (Our emphasis.)

In 2008, the Joint Committee on Human Rights examined legislation which would define circumstances in which staff in institutions holding children could use force. The text introduced the phrase "good order or discipline" as one justification of physical restraint. The Committee concluded that: "The phrase 'good order and discipline' is imprecise, overbroad and inherently subjective."[15]

The likelihood that this ambiguity could result in inaccurate and unjust selection is heightened by a prison culture that is intolerant of Islam (see Mubarek Inquiry Report)[16] and fails to appreciate examples of genuine faith. As a 2011 assessment of staff-prisoner relationships in HMP Whitemoor found: "Staff sometimes viewed any outward appearance of Islam as evidence of radicalisation, rather than a manifestation of faith, and these 'signs' were written up in security reports. Staff perceived Islam as a radical religion; they over-estimated extremism. . ."[17]

To ensure that selection for the Separation Centres continues to be based on precisely defined evidence, and to prevent 'net-widening', the Prison Reform Trust suggests that the reference to good order or discipline be removed, so that this criterion reads: "Safely manage those prisoners whose actions pose a significant threat to the safety of others."

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[14] R (on the application of Bourgass and another) (Appellants) v Secretary of State for Justice (Respondent) (2015)
https://www.supremecourt.uk/cases/uksc-2013-0230.html

[15] House of Lords / House of Commons Joint Committee on Human Rights (2008) The Use of Restraint in Secure Training Centres, London: The Stationery Office (page 23)
https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/65/65.pdf

[16] The Honourable Mr Justice Keith (2006) The Mubarek Inquiry (recommendation 86);
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/231789/1082.pdf

[17] Helen Arnold, Christina Straub, and Alison Liebling (2011) An exploration of staff-prisoner relationships at HMP Whitemoor: 12 years on. Cambridge Institute of Criminology. Prisons Research Centre;
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217381/staff-prisoner-relations-whitemoor.pdf