



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Briefing on the UK Counter-Terrorism and Sentencing Bill

July 2020

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.2** recommends that sufficient time is provided for the Bill to be comprehensively scrutinised by the NI Assembly for the purposes of the Legislative Consent Motion and that the views of the NI Assembly are given appropriate weight regarding any required amendments to this Bill.
- 2.7** advises the UK Government to include reference to non-discrimination within the Bill, to emphasise to public authorities that counter-terrorism measures should be implemented in such a way that is compatible with Article 14 ECHR and, in particular, that implementation of these measures should not result in racial profiling.
- 3.5** is concerned that the drafting of clause 1 is too broad. The NIHRC recommends that clause 1 is amended to reflect the principle of proportionality, as required by Article 5 ECHR.
- 3.15** recommends that, to ensure compliance with Article 3 ECHR, clauses 7, 13 and 14 are amended to clarify that sentence reviews by Parole Commissioners are required and to clearly set out the conditions for sentence reviews. Furthermore, it should be guaranteed that these clauses are implemented in such a way that prisoners know at the outset of their sentence what they must do to be considered for release and under what conditions, including when a review of sentence will take place or may be sought.
- 3.20** recommends that clauses 20 and 24 are amended to include reference to the principles of rule of law, legal certainty, proportionality and non-arbitrariness, in line with Article 5 ECHR. Furthermore, when sentences are being extended consideration should be given as to whether the place and conditions of detention are appropriate and offers the opportunities for rehabilitation.

- 3.21** advises that the UK Government has regard to the recent research from the Prison Reform Trust and considers the consequences of longer sentences on individual prisoners, including reoffending rates, overall size of the prison population, and potential overcrowding issues.
- 3.33** recommends repealing clauses 16 and 22. Children are more vulnerable to radicalisation and extremism through targeted recruitment and should be recognised as victims that require protection in line with the UN CRC. This is particularly pertinent in Northern Ireland where paramilitary recruitment of children is a persistent issue.
- 3.38** recommends not introducing the increased maximum sentence to 14 years in clause 26. It is disproportionate and unnecessary given research suggests that it is unlikely to make a difference to the offender reoffending.
- 3.44** recommends that clause 30 is amended to only apply to offenders sentenced from the date of the legislation is introduced. The NIHRC further recommends that the Article 7 rights of prisoners currently serving sentences is adhered to.
- 3.48** recommends that clause 31 is not introduced. This provision is likely to have a detrimental effect on an affected individual's rehabilitation and prospects of not reoffending.
- 3.55** recommends that clause 34 is not introduced until the accuracy of such tests has been verified through independent research.
- 3.56** advises that if introduced, then such tests are not the only evidence taken into account when reaching a decision linked to the polygraph test and this should be made plain on the face of the Bill. Moreover, the clause should not be applied to those already serving sentences.
- 3.63** recommends the UK Government does not introduce the further Terrorism Prevention and Investigation Measures proposed in clauses 37 to 43. Instead, the NIHRC recommends the use of methods such as surveillance, or allowing intercepted evidence to be used in court, which would allow suspects to be prosecuted

under the normal criminal justice system, and either be convicted or acquitted.

3.68 recommends, if the UK Government decides to employ the use of Terrorism Prevention and Investigation Measures, then clause 37 is amended to replace the 'reasonable suspicion' threshold with the 'balance of probabilities' threshold, in accordance with the recommendations by the Independent Reviewer of Terrorism.

3.72 recommends that, if the UK Government employ the use of Terrorism Prevention and Investigation Measures, then the two-year statutory limit for such measures is maintained, with the intention of bringing charges against the individual.

3.75 recommends that clause 47 is amended to uphold the UK Government's commitment to conduct an independent review of the 'Prevent' Strategy within a set deadline. Given the circumstances, this may be an opportunity to amend the existing deadline to something more realistic, but any amendment by way of a timeline must be reasonable and committed to a prompt outcome.

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with these functions, the following statutory advice is submitted to the House of Commons Public Bill Committee on the Counter-Terrorism and Sentencing Bill.

1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);¹
- UN International Covenant on Civil and Political Rights;²
- UN International Covenant on Economic, Social and Cultural Rights;³
- UN Convention on the Elimination of All Forms of Racial Discrimination;⁴
- UN Convention against Torture;⁵
- UN Convention on the Rights of the Child;⁶ and
- UN Convention on the Rights of Persons with Disabilities.⁷

1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Declaration of Basic Principles of Justice for Victims of Crime

¹ Ratified by the UK in 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² Ratified by the UK in 1966.

³ Ratified by the UK in 1966.

⁴ Ratified by the UK in 1969.

⁵ Ratified by the UK in 1988.

⁶ Ratified by the UK in 1989.

⁷ Ratified by the UK in 2009.

and Abuse of Power;⁸

- UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules);⁹
- UN Standard Minimum Rules for the Treatment of Prisoners;¹⁰
- UN Basic Principles on the Independence of the Judiciary;¹¹
- UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules");¹²
- UN Committee against Torture (UN CAT Committee) General Comment No 2;¹³
- UN CAT Committee's 2019 Concluding Observations to UK;¹⁴
- UN Human Rights Committee's 2015 Concluding Observations to UK;¹⁵
- UN Committee on the Rights of the Child (UN CRC) 2016 Concluding Observations to UK;¹⁶
- UN CERD Committee's 2016 Concluding Observations to UK;¹⁷
- UN Human Rights Committee General Comment No 36;¹⁸
- UN CAT Committee's 2019 Concluding Observations to UK;¹⁹ and
- UN CRC Committee's General Comment No 10.²⁰

1.4 The NIHRC understands the context through which the UK Government has introduced this legislation due to recent terrorist related incidents affecting England and that public safety is paramount. However, the NIHRC is deeply concerned that the intricacies of and existing protections within other parts of the UK, particularly in Northern Ireland, have not been given due consideration. The NIHRC is also concerned that a number

⁸ UN General Assembly, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', 29 November 1985.

⁹ UN General Assembly, 'United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)', 14 December 1990.

¹⁰ UN General Assembly, 'Standard Minimum Rules for the Treatment of Prisoners', 13 May 1977.

¹¹ UN General Assembly, 'Basic Principles on the Independence of the Judiciary', 13 December 1985.

¹² UN General Assembly, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)', 29 November 1985.

¹³ CAT/C/GC/2, 'UN CAT Committee General Comment No 2: Implementation of Article 2 by States Parties', 24 January 2008.

¹⁴ CAT/C/GBR/CO/5, 'UN CAT Committee Concluding Observations on the Fifth Periodic Report of the UK', 24 June 2013.

¹⁵ CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and Northern Ireland', 17 August 2015.

¹⁶ CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

¹⁷ CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of the UK of Great Britain and Northern Ireland', 3 October 2016.

¹⁸ CCPR/C/GC/36, 'UN Human Rights Committee General Comment No 36: Article 6 of the ICCPR on Right to Life', 30 October 2018.

¹⁹ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.

²⁰ CRC/C/GC/24, 'UN CRC Committee General Comment No 10 on Children's Rights in the Child Justice System', 18 September 2019.

of proposed changes are contrary to human rights laws and standards, which the UK is obliged to uphold.

- 1.5 The NIHRC is concerned that aspects of the Bill resort to previous counter-terrorism measures that have already faced criticism and legal challenge in terms of compatibility with human rights and questions whether this has been given due consideration.
- 1.6 The NIHRC is also concerned that this legislation has been introduced during a pandemic and therefore will not be subject to the same level of public scrutiny and debate.

2.0 General Comments on the Bill

Legislative Consent Motion

- 2.1 Counter-terrorism matters lie within the scope of national security, an excepted matter remaining with the legislative responsibility of the UK Government. However, Schedule 3 of the Northern Ireland Act 1998 provides that criminal justice and policing are transferred matters to the NI Assembly, which includes legislation concerning sentencing. This Bill will therefore require a Legislative Consent Motion to be passed by the NI Assembly to confirm that the UK Parliament can pass legislation on an issue, which the Assembly has regular authority. In that context, the Commission expects that the Bill will be subject to political challenges over existing arrangements and safeguards in place for those convicted of terrorist-related crimes in Northern Ireland.
- 2.2 **The NIHRC recommends that sufficient time is provided for the Bill to be comprehensively scrutinised by the NI Assembly for the purposes of the Legislative Consent Motion and that the views of the NI Assembly are given appropriate weight regarding any required amendments to this Bill.**

Profiling and non-discrimination

- 2.3 All counter-terrorism measures must be compatible with Article 14 of the ECHR, which refers to the prohibition of "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,

national or social origin, association with a national minority, property, birth or other status”.

2.4 The Committee on the Elimination of Racial Discrimination (UN CERD Committee) has called on States to ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.²¹

2.5 Furthermore, the UN CERD Committee in its 2016 concluding observations on the UK expressed concern with existing counter-terrorism measures as having created an atmosphere of suspicion towards members of Muslim communities.²² The UN CERD Committee urged the UK Government:

to review the implementation of and evaluate the impact of existing counter-terrorism measures, in particular the ‘prevent duty’ under the Counter-Terrorism and Security Act 2015, in order to ensure that there are effective monitoring mechanisms and sufficient safeguards against abuse, and that they are implemented in a manner that does not constitute profiling and discrimination on the grounds of race, colour, descent, or national or ethnic origin, in purpose or effect.²³

2.6 The Human Rights Committee further echoed these concerns stating that the UK Government “should ensure that the fight against terrorism does not lead to raising suspicion against all Muslims”.²⁴

2.7 **The NIHRC advises the UK Government to include reference to non-discrimination within the Bill, to emphasis to public authorities that counter-terrorism measures should be implemented in such a way that is compatible with Article 14 ECHR and, in particular, that implementation of these measures should not result in racial profiling.**

²¹ CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland’, 3 October 2016, at para 19.

²² Ibid, at para 18.

²³ Ibid.

²⁴ CCPR/C/GBR/CO/6, ‘UN Human Rights Committee Concluding observations of the Human Rights Committee United Kingdom and Northern Ireland’, 30 July 2008.

3.0 Specific Clauses of the Bill

- 3.1 The NIHRC recognises the UK Government’s intention for the Bill to introduce measures that provide better protection for the public and more time in which to support the disengagement and rehabilitation of terrorism offenders. However, these measures pose a range of human rights concerns.

Clause 1: Terrorism notification requirements

- 3.2 Clause 1 increases the number of non-terrorist offences that can be found to have a terrorist connection, and therefore triggers the notification provisions. Currently only a range of specified offences can be found to have a terrorist connection, meaning that the sentencing judge is entitled to find that the offence is, or took place in the course of, an act of terrorism, or was committed for the purposes of terrorism. Clause 1 extends an offence that can be aggravated by a terrorist connection to include an offence committed after the Act comes into force and is punishable with imprisonment for more than 2 years. The offence no longer has to be a listed offence.
- 3.3 It also moves beyond existing legislation by enabling the courts to find any offence with a maximum penalty of more than two years to have a terrorist connection. This may result in a higher sentence than would otherwise be the case.
- 3.4 This potentially engages Article 5 ECHR, right to liberty and security. The European Court of Human Rights (ECtHR) is clear that any detention due to a conviction by a competent court must follow and have “a sufficient causal connection with a lawful conviction”.²⁵ The ECtHR further confirmed that:

the requirement that detention not be arbitrary implies the need for a relationship of proportionality between the ground of the detention relied on and the detention in question. However, the scope of the proportionality test in a given case varies depending on the type of detention involved. For example, for detention

²⁵ *Saadi v UK* (2008) ECHR 79, at para 71.

pursuant to Article 5(1)(a), the ECtHR has generally been satisfied that the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for this Court. However, the ECtHR has also indicated that in circumstances where a decision not to release or to re-detain a prisoner is based on grounds inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, then, detention that is lawful at the outset could be transformed into a deprivation of liberty that is arbitrary.²⁶

- 3.5 The NIHRC is concerned that the drafting of clause 1 is too broad. The NIHRC recommends that clause 1 is amended to reflect the principle of proportionality, as required by Article 5 ECHR.**

Clauses 7, 13 and 14: Serious terrorism sentence

- 3.6 In Northern Ireland, clause 7 amends the Criminal Justice (NI) Order 2008 by creating a serious terrorism sentence intended for a handful of dangerous adult offenders whose acts are likely to have caused or contributed to multiple deaths. The effect is a mandatory minimum custodial term of 14 years and a further mandatory minimum licence period of 7 years, with an extended licence period up to 25 years. Terrorist offenders will therefore spend longer in custody and if a 25-year licence period is imposed this is little different from a licence for life.
- 3.7 Clause 13 creates the minimum 14-year term for a serious terrorism offender given a life sentence in Northern Ireland by amending the Life Sentences (Northern Ireland) Order 2001. It inserts section 5A which introduces a minimum 14-year tariff in serious terrorism cases where the court is imposing a life sentence.
- 3.8 Clause 14 amends the Criminal Justice (NI) Order 1998 to create a minimum custodial period of 14 years for serious terrorist offenders given indeterminate custodial sentences.

²⁶ *James, Wells and Lee v UK* (2012) ECHR 1076, at para 195.

- 3.9 The NIHRC understands that in terms of the new 14-year minimum tariff there will be a review process by Parole Commissioners, but this is unclear from the drafting of clauses 7, 13 and 14.
- 3.10 The NIHRC is concerned that including changes to life or indeterminate sentences risk being incompatible with Article 3 ECHR (right to freedom from torture or inhuman or degrading treatment or punishment).
- 3.11 The case of *Vinter and Others v the United Kingdom* (2013) concerned three applicants given whole life orders, meaning they could not be released other than at the discretion of the Justice Secretary, on compassionate grounds.²⁷ They complained that their imprisonment for life amounted to inhuman and degrading treatment as they had no hope of release.²⁸ The ECtHR found that there had been a violation of Article 3 ECHR and that for a life sentence to remain compatible with Article 3, it had to be reducible or with a prospect of the prisoner's release and the possibility of a review of the sentence.²⁹
- 3.12 The ECtHR stated that:
- a whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.³⁰
- 3.13 In the applicants' case, the ECtHR noted that domestic law concerning the Justice Secretary's power to release a person subject to a whole life order was unclear. In addition, prior to 2003 a review of the need for a whole life order was carried out automatically by a Minister 25 years into the sentence. This was ended in 2003 and no alternative review mechanism put in place. In

²⁷ *Vinter and Others v UK* (2013) ECHR 645.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, at para 121 and 122.

these circumstances, the ECtHR was not persuaded that the applicants' whole life sentences were compatible with the Convention. However, the ECtHR maintained that whether or not prisoners should be released would depend on whether there were still legitimate penological grounds or issues of danger to the public for their continued detention.

3.14 In *Öcalan v. Turkey (No 2)* (2005) the founder of the PKK (Kurdistan Workers' Party), an illegal organisation under Turkish law, complained inter alia about the irreducible nature of his sentence to life imprisonment, and the conditions of his detention. In August 2002, Turkey abolished the death penalty in peace time and in October 2002 the Ankara State Security Court commuted the applicant's death sentence to life imprisonment. The ECtHR found that, in the absence of any review mechanism, the life prison sentence imposed on the applicant constituted an irreducible sentence that amounted to inhuman treatment and a violation of Article 3 ECHR. The ECtHR observed in particular that, given his status as a convicted person sentenced to aggravated life imprisonment for a crime against State security it was clearly prohibited for him to apply for release throughout the duration of his sentence.³¹

3.15 **The NIHRC recommends that, to ensure compliance with Article 3 ECHR, clauses 7, 13 and 14 are amended to clarify that sentence reviews by Parole Commissioners are required and to clearly set out the conditions for sentence reviews. Furthermore, it should be guaranteed that these clauses are implemented in such a way that prisoners know at the outset of their sentence what they must do to be considered for release and under what conditions, including when a review of sentence will take place or may be sought.**

Clauses 20 and 24: Extending licences and custodial sentences

3.16 The extension of licences and custodial sentences in Northern Ireland as set out in clauses 20 and 24 potentially interfere with Article 5 ECHR (right to liberty and security), which provides that:

³¹ *Öcalan v. Turkey (No 2)* (2014) ECHR 286.

- 1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a) the lawful detention of a person after conviction by a competent court;
 - b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose

3.17 Article 5 ECHR is guided by the principles of rule of law, legal certainty, proportionality and non-arbitrariness, which should be considered in the development and implementation of sentencing laws and practices.³²

3.18 In *James, Wells and Lee v UK* (2012), the applicant was issued with an indeterminate sentence for the public protection, which required the direction of the Parole Board for a prisoner to be released following a minimum term or tariff that is fixed by the sentencing judge. In this case, the applicant experienced delays in accessing treatment and courses, which meant he was likely to experience a prolongation of detention. The ECtHR found this amounted to a violation of Article 5 ECHR.³³ This relates to the requirement that "for a deprivation of liberty not to be arbitrary there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention".³⁴

³² *Saadi v UK* (2008) ECHR 79, at paras 68-74; *James, Wells and Lee v UK* (2012) ECHR 1076, at paras 191-195.

³³ *James, Wells and Lee v UK* (2012) ECHR 1076, at para 194.

³⁴ *Ibid.*

3.19 Furthermore, evidence shows that longer sentences and longer periods in custody does not translate to more opportunity for rehabilitation. The Prison Reform Trust has recently published research showing that over recent years, there has been a significant increase in the number of people serving long sentences.³⁵ The research highlighted that there is no clear evidence that increasing tariff lengths in England and Wales reflect changes in the nature of offending and the growth of very long sentences is by no means risk free – “violence, suicide and self-harm, disorder and radicalisation all pose a challenge as people struggle to come to terms with their situation”.³⁶ The report stated that the growing number of prisoners serving such long sentences virtually guarantees that prisons will remain overcrowded, regardless of any changes in sentencing practice for less serious offending or improvements in reconviction rates.³⁷ Similar concerns apply in Northern Ireland. In effect, there is a risk that the absence of opportunities for rehabilitation and the impact of prison conditions will create additional risk of mental well-being issues and less prospect of prisoners moving on and away from terror on release.

3.20 **The NIHRC recommends that clauses 20 and 24 are amended to include reference to the principles of rule of law, legal certainty, proportionality and non-arbitrariness, in line with Article 5 ECHR. Furthermore, when sentences are being extended consideration should be given as to whether the place and conditions of detention are appropriate and offers the opportunities for rehabilitation.**

3.21 **The NIHRC advises that the UK Government has regard to the recent research from the Prison Reform Trust and considers the consequences of longer sentences on individual prisoners, including reoffending rates, overall size of the prison population, and potential overcrowding issues.**

Clauses 16 and 22: Application to under-18s

3.22 It is noted that clause 16 allows for an increase in the extension period for serious terrorism offenders aged under 18 in England and Wales and that

³⁵ Prison Reform Trust, 'Bromley Briefings Prison Factfile: Winter 2019' (PRT, 2019).

³⁶ Ibid, at 9.

³⁷ Ibid.

clause 22 allows for special custodial sentences for certain terrorist offenders aged under 18 at time of the offence in England and Wales. The NIHRC is concerned with these provisions meeting international human rights standards and to any prospect of being introduced to Northern Ireland.

3.23 The UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) state that a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner that is different from an adult.³⁸ However, this is within certain limits.

3.24 Article 37 of the UN CRC provides that:

States Parties shall ensure that:

- a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

³⁸ UN General Assembly, 'Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)', 29 November 1985, at para 2.2(a).

d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

3.25 Article 40 of the UN CRC also requires that:

States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

3.26 The UN CRC Committee set out in its General Comment No 24 on children's rights in juvenile justice that:

children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.³⁹

3.27 The UN CRC Committee further stated that it:

acknowledges that preservation of public safety is a legitimate aim of the justice system, including the child justice system. However, States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child. As the Convention clearly states in Article 40, every child alleged as, accused of or

³⁹ CRC/C/GC/24, 'UN CRC Committee General comment No 24: Children's Rights in the Child Justice System', 18 September 2019, at para 2.

recognised as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.⁴⁰

3.28 The UN CRC Committee is clear that:

no child shall be held guilty of any criminal offence that did not constitute a criminal offence, under national or international law, at the time it was committed. States parties that expand their criminal law provisions to prevent and combat terrorism should ensure that those changes do not result in the retroactive or unintended punishment of children. No child should be punished with a heavier penalty than the one applicable at the time of the offence, but if a change of law after the offence provides for a lighter penalty, the child should benefit.⁴¹

3.29 How children viewed as terrorists are treated is particularly pertinent in Northern Ireland, where it is not uncommon for children to be recruited by paramilitaries within their community from a young age.⁴² Such children should be viewed as needing protection, rather than given mandatory lengthy prison sentences save for exceptional circumstances.

3.30 The UN CAT Committee in its 2019 concluding observations on the UK made specific reference to this persistent issue. It noted the UK Government and NI Executive's "efforts to identify and provide support to young people at risk of involvement in paramilitarism".⁴³ However, the UN CAT Committee was concerned about reports that these groups continue to recruit children and thus recommended that the UK Government and NI Executive intensify "its efforts to prevent the recruitment of children by paramilitary groups in Northern Ireland".⁴⁴

3.31 The UN CRC Committee also make specific reference to children recruited and used by non-State armed groups, including those designated as

⁴⁰ Ibid, at para 3.

⁴¹ Ibid, at para 42.

⁴² Vincent Kearney, 'Loyalist paramilitaries: 'Once you join it's impossible to get out', *BBC News*, 4 February 2019; Rebecca Black, 'Terrorist groups are still recruiting children in NI', *Belfast Telegraph*, 15 November 2015.

⁴³ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 42.

⁴⁴ Ibid.

terrorist groups, and children charged in counter-terrorism contexts. In General Comment No 24, the UN CRC Committee states that:

the United Nations has verified numerous cases of recruitment and exploitation of children by non-State armed groups, including those designated as terrorist groups, not only in conflict areas but also in non-conflict areas...When under the control of such groups, children may become victims of multiple forms of violations, such as conscription; military training; being used in hostilities and/or terrorist acts, including suicide attacks; being forced to carry out executions; being used as human shields; abduction; sale; trafficking; sexual exploitation; child marriage; being used for the transport or sale of drugs; or being exploited to carry out dangerous tasks, such as spying, conducting surveillance, guarding checkpoints, conducting patrols or transporting military equipment.⁴⁵

3.32 In the context of sentencing children engage with non-State actors, the UN CRC Committee specifically recommends that:

States parties should ensure that all children charged with offences, regardless of the gravity or the context, are dealt with in terms of Articles 37 and 40 of the UN CRC, and should refrain from charging and prosecuting them for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups.⁴⁶

3.33 The NIHRC recommends repealing clauses 16 and 22. Children are more vulnerable to radicalisation and extremism through targeted recruitment and should be recognised as victims that require protection in line with the UN CRC. This is particularly pertinent in Northern Ireland where paramilitary recruitment of children is a persistent issue.

Clause 26: Increased maximum sentences

3.34 Clause 26 proposes amending the Terrorism Acts 2000 and 2006 to

⁴⁵ CRC/C/GC/24, 'UN CRC Committee General comment No 24: Children's Rights in the Child Justice System', 18 September 2019, at para 97.

⁴⁶ Ibid, at para 98.

increase the maximum sentences (from 10 to 14 years) for membership of a proscribed organisation, inviting or expressing support for a proscribed organisation, and attendance at a place used for terrorist training. As required by Article 5 ECHR, such an increase must be guided by the principles of rule of law, legal certainty, proportionality and non-arbitrariness, when considering the development and implementation of sentencing laws and practices.⁴⁷

- 3.35 The “encouragement of terrorism” listed under the Terrorism Act 2006 has already received criticism from human rights bodies, which should be taken into account, particularly where the Bill seeks to enhance the punishment for such actions. For example, the Human Rights Committee expressed concern that:

the offence of ‘encouragement of terrorism’ has been defined in section 1 of the Terrorism Act 2006 in broad and vague terms. In particular, a person can commit the offence even when he or she did not intend members of the public to be directly or indirectly encouraged by his or her statement to commit acts of terrorism, but where his or her statement was understood by some members of the public as encouragement to commit such acts.⁴⁸

- 3.36 The Human Rights Committee recommended that the UK Government “should consider amending that part of section 1 of the Terrorism Act 2006 dealing with ‘encouragement of terrorism’ so that its application does not lead to a disproportionate interference with freedom of expression”.⁴⁹

- 3.37 Jonathan Hall QC, the Independent Reviewer for Terrorism has also commented that published data does not show whether the most serious offenders for these offences tend to commit other more serious offences, in which case the increase in the maximum is unlikely to make any difference.⁵⁰

⁴⁷ *Saadi v UK* (2008) ECHR 79, at paras 68-74; *James, Wells and Lee v UK* (2012) ECHR 1076, at paras 191-195.

⁴⁸ CCPR/C/GBR/CO/6, ‘UN Human Rights Committee Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant - Concluding Observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland’, 30 July 2008, at para 26.

⁴⁹ *Ibid.*

⁵⁰ Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, ‘Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2)’, (UK Gov, 2020), at para 21.

3.38 The NIHRC recommends not introducing the increased maximum sentence to 14 years in clause 26. It is disproportionate and unnecessary given research suggests that it is unlikely to make a difference to the offender reoffending.

Clause 30 - Restricted eligibility for early release for terrorist prisoners in Northern Ireland

3.39 Clause 30 makes provision for prisoners in Northern Ireland serving Determinate Custodial Sentences. It proposes that offenders will serve two thirds of their custodial term before referral to the Parole Commissioners to consider release. These restrictions apply to all specified terrorist offenders whether sentenced before or after the date of commencement. This will mean prisoners spending more time in custody than had been the case at the time they were sentenced. In terms of retrospective application to sentenced prisoners in Northern Ireland, prisoners with an extended custodial sentence will no longer be eligible for release via the Parole Commission NI at the half way stage, but will have to wait until they have served two thirds of their custodial period. This will align the release arrangements for terrorist offenders in Northern Ireland to the changes made in Great Britain by the Terrorist Offenders (Restriction of Early Release) Act 2020. In practice, the retrospective use of this provision is more likely to impact on prisoners who have breached licence arrangements under the Belfast (Good Friday) Agreement and/or dissident Republicans than those involved in other forms of terror. The introduction of such provision is likely to create cause celebres among those antipathetic to the UK Government. The overall balance of impact is likely to be counter-productive in Northern Ireland.

3.40 Jonathan Hall QC provides an example of how this will apply to an offender in NI. If an individual is serving a sentence for the offence of membership of a proscribed organisation under section 11 of the Terrorism Act 2000 with a maximum penalty of 10 years' imprisonment and has a determinate custodial sentence of 6 years, under existing legislation the offender would spend half of their sentence in custody and be automatically released into the community on licence after 3 years. Under the Bill, if the offender has not been released by the day this Bill becomes law, he or she will be considered for early release by the Parole Board after serving two-thirds of their sentence (4 years). If deemed safe to release, the prisoner will spend the rest of their sentence (2 years) on licence in the community. If found

not to be safe for release by the Parole Commissioners, the prisoner will remain in custody until the next Parole Commission review finds them safe to be released (reviews occur every 2 years after the initial review), or until they have served their entire sentence in custody. In this example, if early release was denied by the initial Parole Commissioner review, the offender would be released automatically after serving all 6 years of their sentence in custody.⁵¹

- 3.41 In addition to the Article 5 ECHR requirements that deprivation of liberty is proportionate and non-arbitrary,⁵² the NIHRC is concerned that the retrospective nature of clause 30 potentially breaches Article 7 ECHR, which provides that no one shall have a heavier penalty “imposed than the one that was applicable at the time the criminal offence was committed”. Article 15 of the ICCPR, also provides “nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed”. Article 15(2) ECHR and Article 4(2) of the ICCPR confirm that the right to non-retrospectivity is non-derogable, meaning that it should not be interfered with under any circumstances.
- 3.42 Under Article 7 ECHR, the principle of legality precludes the imposition on an accused person of a penalty heavier than that carried by the offence found guilty of.
- 3.43 For example, the ECtHR case of *Del Río Prada v Spain* (2012) concerned the postponement of the final release of a person convicted of terrorist offences, based on a new approach, the “Parot doctrine”, adopted by the Spanish Supreme Court after the applicant had been sentenced.⁵³ The applicant complained that the Spanish Supreme Court’s departure from the case-law concerning remissions of sentence had been retroactively applied to her after sentencing, thus extending her detention by almost nine years.⁵⁴ The ECtHR held that there had been a violation of Article 7 ECHR. It considered in particular that the applicant could not have foreseen either that the Spanish Supreme Court would depart from its previous case-law in February 2006, or that this change in approach would be applied to her resulting in the date of her release being postponed by almost nine years.⁵⁵ The applicant had therefore served a longer term of imprisonment

⁵¹ Jonathan Hall, ‘The Counter-Terrorism and Sentencing Bill – Release Factsheet’ (UK Gov, 2020).

⁵² *Saadi v UK* (2008) ECHR 79, at paras 68-74; *James, Wells and Lee v UK* (2012) ECHR 1076, at paras 191-195.

⁵³ *Del Rio Prada v Spain* (2012) ECHR 1899.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

than she should have served under the legal system in operation at the time of her conviction.

- 3.44 **The NIHRC recommends that clause 30 is amended to only apply to offenders sentenced from the date of the legislation is introduced. The NIHRC further recommends that the Article 7 rights of prisoners currently serving sentences is adhered to.**

Clause 31: Removal of early release for dangerous terrorist prisoners Northern Ireland

- 3.45 Clause 31 amends the Criminal Justice (NI) Order 2008 so that where a terrorist offender is either sentenced to an extended sentence or a new serious terrorism sentence on or after the date the section comes into force, for an offence with a maximum penalty of life imprisonment, the individual will not be referred to the Parole Commissioners, but will instead be released at the end of their custodial term. The Commission understands that clause 31 will apply regardless of whether the offender is an adult or under 18. The offender would spend the entire custodial term with no opportunity for Parole Board directed release and at the end of the custodial sentence would be automatically released.
- 3.46 The NIHRC welcomes that this provision will not be retrospectively applied. However, Article 5 ECHR does require that such changes is considered in light of the principles of proportionality and non-arbitrariness.⁵⁶
- 3.47 During engagement with stakeholders, concerns were raised that there are benefits to releasing prisoners on licence, as it provides an opportunity for the Probation Board to work with ex-prisoners in the community, which assists with their rehabilitation.⁵⁷ Instead, under clause 31 such prisoners will be released without support and could be more prone to reoffending.
- 3.48 **The NIHRC recommends that clause 31 is not introduced. This provision is likely to have a detrimental effect on an affected individual's rehabilitation and prospects of not reoffending.**

⁵⁶ *Saadi v UK* (2008) ECHR 79, at paras 68-74; *James, Wells and Lee v UK* (2012) ECHR 1076, at paras 191-195.

⁵⁷ Meeting between NI Human Rights Commission and Minister of Justice, 22 May 2020.

Clauses 34: Polygraphs

- 3.49 Clause 34 requires that offenders currently serving their custodial sentence, or who have already been released on licence, are subject to a polygraph test as part of their licence conditions.
- 3.50 Making this condition mandatory on current offenders not informed of it as a condition of the sentence or release on licence may interfere with Articles 5 and Article 7 ECHR.
- 3.51 Article 5 ECHR provides that individuals cannot be held accountable for not complying with court orders if they have never been informed of them. A person's refusal to undergo certain measures or to follow a certain procedure prior to being ordered to do so by a competent court has no presumptive value in decisions concerning compliance with such a court order.⁵⁸
- 3.52 The ECtHR has stated that:
- the domestic authorities must strike a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court, and the importance of the right to liberty. Factors to be taken into consideration include the purpose of the order, the feasibility of Guide on Article 5 of the Convention – Right to liberty and security European Court of Human Rights compliance with the order, and the duration of the detention. The issue of proportionality assumes particular significance in the overall scheme of things.⁵⁹
- 3.53 An individual on licence, sentenced prior to clause 34's commencement who refuses to take a polygraph test will have the licence revoked and have to serve a longer prison sentence. The retrospective nature and the resulting heavier penalty "than the one that was applicable at the time the criminal offence was committed" engages Article 7 ECHR, which is a non-derogable right.⁶⁰

⁵⁸ *Petukhova v Russia* (2013) ECHR 606.

⁵⁹ *Gatt v Malta* (2010) ECHR 1205.

⁶⁰ Article 15(2), European Convention on Human Rights 1950.

3.54 Additionally, the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC has expressed reservations on the use of polygraphs. He has highlighted that:

whilst the purpose of testing is to monitor the person's compliance with the other conditions of their licence or to improve the way in which they are managed during their release on licence, the use of statements for the purpose of making a Terrorism Prevention and Investigation Measures is not expressly excluded. Unless addressed in the legislation, there is therefore the prospect of individuals making statements in the course of compulsory polygraph testing which are then used to secure a Terrorism Prevention and Investigation Measures following the ending of their licence. This is a potentially oppressive consequence which may not be intended. Because, unlike with sex offenders, the use of polygraphs for terrorist offenders will not have been piloted beforehand, there is a strong case for thorough post-legislative scrutiny. The possibility that polygraph testing is less effective than seems likely, and the danger of over-reliance on it, need to be kept in mind.⁶¹ While the Lord Chancellor offered reassurance that polygraphs would not be used without other evidence, this does not negate the potential flaws with such technology, which may either punish those who are innocent, or create the impression that someone who has not renounced terror from convincing the authorities otherwise through the outcome of a polygraph test.

3.55 The NIHRC recommends that clause 34 is not introduced until the accuracy of such tests has been verified through independent research.

3.56 The NIHRC advises that if introduced, then such tests are not the only evidence taken into account when reaching a decision linked to the polygraph test and this should be made plain on the face of the Bill. Moreover, the clause should not be applied to those already serving sentences.

⁶¹ Jonathan Hall, 'Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2)' (UK Gov, 2020), at para 25 and 26.

Clauses 37 – 43: Terrorism Prevention and Investigation Measures

- 3.57 Clauses 37 to 43 make a number of changes to the regime for Terrorism Prevention and Investigation Measures. Terrorism Prevention and Investigation Measures are a range of civil measures that place restrictions on individuals outside the criminal justice process based on the risk to national security. At present, such measures enable the Secretary of State to impose a wide range of restrictions on individuals, outside of the criminal justice system, based on a reasonable belief of their involvement in terrorism-related activity. These include overnight curfews, exclusion from certain places or buildings, restrictions on travel, meetings, work, study, contact with others, use of phones and computers, access to financial services, daily reporting at a police station and GPS monitoring.
- 3.58 These changes mean that a Terrorism Prevention and Investigation Measures will more closely resemble its forerunner, the non-derogating control order under the Prevention of Terrorism Act 2005.⁶²
- 3.59 The Commission has opposed control orders since their creation in the Prevention of Terrorism Act 2005 and is disappointed that the Bill, if passed in its current form, does not address any of the long-standing human rights concerns with such orders. The UK Government's previous use of control orders received much criticism, equally applicable to the new measures being proposed in this Bill.
- 3.60 The Human Rights Committee in its 2008 Concluding Observations on the UK raised concerns about:

the control order regime established under the Prevention of Terrorism Act 2005 which involves the imposition of a wide range of restrictions, including curfews of up to 16 hours, on individuals suspected of being 'involved in terrorism', but who have not been charged with any criminal offence. While control orders have been categorized by the House of Lords as civil orders, they can give rise to criminal liability if breached. The Committee is also concerned that the judicial procedure whereby the imposition of a control order can be challenged is problematic, since the court may consider secret material in closed session, which in practice

⁶² Ministry of Justice, 'Counter-Terrorism and Sentencing Fact Sheet' (MoJ, 2020).

denies the person on whom the control order is served the direct opportunity to effectively challenge the allegations against him or her. The State party should review the control order regime established under the Prevention of Terrorism Act 2005 in order to ensure that it is in conformity with the provisions of the Covenant. In particular, it should ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, which requires access by the concerned person and the legal counsel of his own choice to the evidence on which the control order is made. The State party should also ensure that those subjected to control orders are promptly charged with a criminal offence.⁶³

3.61 The UK Joint Committee on Human Rights was also critical of the previous control orders stating that:

we have serious concerns about the control order system. Evidence shows the devastating impact of control orders on the subject of the orders, their families and their communities. In addition, detailed information is now available about the cost of control orders which raises questions about whether the cost the system is out of all proportion to the supposed public benefit. We find it hard to believe that the annual cost of surveillance of the small number of individuals subject to control orders would exceed the amount currently being paid to lawyers in the ongoing litigation about control orders.⁶⁴

3.62 While recommending that any replacement of control orders should aim to facilitate the prosecution and conviction of terrorist suspects, the independent reviewer of terrorism legislation and the UK Parliament's Joint Committee on Human Rights have found Terrorism Prevention and Investigation Measures to be an ineffective investigation measure. In January 2015, the Joint Committee on Human Rights said "we are left with the impression that in practice Terrorism Prevention and Investigation Measures may be withering on the vine as a counter-terrorism tool of

⁶³ CCPR/C/GBR/CO/6, 'UN Human Rights Committee Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant - Concluding Observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland', 30 July 2008, at para 17.

⁶⁴ House of Commons and House of Lords Joint Committee on Human Rights, 'Ninth Report Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010' (JCHR, 2010).

practical utility". It recommended that the next Government urgently review the powers to allow "Parliament to make a fully informed decision about the continued necessity of the powers at that time".⁶⁵ Terrorism Prevention and Investigation Measures lack the necessary safeguards to protect human rights and violate one of the key principles of civil liberties, namely, to prohibit punishment for what people might do, rather than what they have done. Following human rights legal decisions, there is a hesitancy to use Terrorism Prevention and Investigation Measures in the courts and they have never led to a terrorism-related prosecution.⁶⁶

3.63 The NIHRC recommends the UK Government does not introduce the further Terrorism Prevention and Investigation Measures proposed in clauses 37 to 43. Instead, the NIHRC recommends the use of methods such as surveillance, or allowing intercepted evidence to be used in court, which would allow suspects to be prosecuted under the normal criminal justice system, and either be convicted or acquitted.

3.64 In terms of lowering the burden of proof for Terrorism Prevention and Investigation Measures in clause 37 from "balance of probabilities" to "reasonable suspicion", this threshold is much lower than the "balance of probabilities" standard in civil proceedings, which is in turn lower than the "beyond reasonable doubt" standard, which applies in the determination of a criminal charge.

3.65 The Independent Reviewer for Terrorism, Jonathan Hall QC, has questioned whether the proposed reform is necessary.⁶⁷ He is concerned that putting the threshold at "reasonable" suspicion would enable the Secretary of State to impose Terrorism Prevention and Investigation Measures on a broader category of individuals, including those that might not be terrorists.⁶⁸ He explains that intelligence is often fragmentary and may be ambiguous, therefore a reasonable grounds threshold carries with it a stronger possibility that the individual may be innocent.⁶⁹

⁶⁵ House of Commons and House of Lords Joint Committee on Human Rights, 'Tenth Report Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011' (JCHR, 2014).

⁶⁶ *Secretary of State for the Home Department v AP* (2010) UKSC 24.

⁶⁷ Jonathan Hall, 'Note on Counter-Terrorism and Sentencing Bill: TPIM Reforms (1)' (UK Gov, 2020) at 11.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

3.66 This Bill has been introduced because a number of attacks have been carried out in England by convicted terrorists that have been released on licence, such as the attacks at Fishmonger’s Hall in November 2019 and Streatham in February 2020. Jonathan Hall QC explains that:

when emergency legislation was introduced to prevent the early release of current serving terrorist prisoners, it was suggested that Terrorism Prevention and Investigation Measures could be used to ensure that post-sentence measures were in place for this cohort (to deal with the so-called ‘cliff-edge’ problems of the 50 or so offenders who might be released without licence). However, if it was intended to impose Terrorism Prevention and Investigation Measures on this cohort, there would be no need to lower the standard of proof: their involvement in terrorist activity has already been established beyond reasonable doubt in the criminal courts. So far as other terrorist offenders are concerned, they will be released on licences administered by specialist police and probation officers, whose conditions largely replicate the measures available under Terrorism Prevention and Investigation Measures.⁷⁰

3.67 Furthermore, when reviewing the previous control orders the UK Joint Committee on Human Rights found that the standard of proof in relation to both types of control order is set at too low a level. The Joint Committee recommended the standard of proof in relation to non-derogating control orders should be the balance of probabilities. The Joint Committee further recommended that in relation to derogating control orders, which by definition amount to a deprivation of liberty, the standard of proof should be the criminal standard of beyond reasonable doubt.⁷¹

3.68 **The NIHRC recommends, if the UK Government decides to employ the use of Terrorism Prevention and Investigation Measures, then clause 37 is amended to replace the ‘reasonable suspicion’ threshold with the ‘balance of probabilities’ threshold, in accordance with the recommendations by the Independent Reviewer of Terrorism.**

⁷⁰ Jonathan Hall, ‘Note on Counter-Terrorism and Sentencing Bill: TPIM Reforms (1)’ (UK Gov, 2020) at 13-14.

⁷¹ House of Commons and House of Lords Joint Committee on Human Rights, ‘Twelfth Report Session 2005-06 Counter-Terrorism Policy and Human’ (JCHR, 2005).

3.69 Clause 38 removes the two-year statutory time limit on Terrorism Prevention and Investigation Measures. This will mean that suspected persons can be placed indefinitely on control orders measures, mitigating the desirable incentive to introduce exit strategies, including prosecution, from the start.

3.70 This also raises concerns regarding Article 5 ECHR. Article 5(1)(c) allows for restriction on an individual's liberty when it is "reasonably considered necessary to prevent his committing an offence". In the case of *Fox, Campbell and Hartley v United Kingdom* (1990), the ECtHR found a violation of Article 5 ECHR. It ruled that:

the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5(1)(c) has been secured.

Consequently, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence. This is all the more necessary where, as in the present case, the domestic law does not require reasonable suspicion, but sets a lower threshold by merely requiring honest suspicion.⁷²

3.71 The indefinite use of Terrorism Prevention and Investigation Measures without a time limit also raises concerns under Article 8 ECHR, which provides for the right to respect for family and private life. For example, in *Szabó and Vissy v. Hungary* (2014), Hungarian legislation on secret anti-terrorist surveillance introduced in 2011 was scrutinised. The applicants complained that they potentially could be subject to unjustified and disproportionately intrusive measures within the Hungarian legal framework on secret surveillance for national security purposes. They alleged that this legal framework was prone to abuse, particularly in the absence of judicial control. The ECtHR accepted that it was a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies, including massive monitoring of communications, in pre-empting impending incidents. However, the ECtHR was not convinced that the legislation in question

⁷² *Fox, Campbell and Hartley v UK* (1990) ECHR 18, at para 34.

provided sufficient safeguards to avoid abuse and found a violation of Article 8 ECHR.⁷³

- 3.72 The NIHRC recommends that, if the UK Government employ the use of Terrorism Prevention and Investigation Measures, then the two-year statutory limit for such measures is maintained, with the intention of bringing charges against the individual.**

Clause 47: 'Prevent' Strategy

3.73 Clause 47 removes the statutory deadline for completing the review of the UK Government's 'Prevent' strategy. There has already been considerable delay in implementing the Prevent strategy. During the passage of the Counter Terrorism and Border Security Act 2019, the UK Government committed to carrying out an independent review of the Prevent strategy. Currently, the review must be completed, together with a government response, by 12 August 2020. The UK Government is yet to appoint the independent reviewer of strategy, after Lord Carlile QC was removed following a legal challenge by Rights Watch UK over his independence.

3.74 The Prevent strategy has already faced considerable criticism, for example, the wide-ranging definition of extremism under the strategy,⁷⁴ and a review is crucial for this reason. This is supported by the UN CERD Committee, which has urged the UK Government:

to review the implementation of and evaluate the impact of existing counter-terrorism measures, in particular the "prevent duty" under the Counter-Terrorism and Security Act 2015, in order to ensure that there are effective monitoring mechanisms and sufficient safeguards against abuse, and that they are implemented in a manner that does not constitute profiling and discrimination on the grounds of race, colour, descent, or national or ethnic origin, in purpose or effect.⁷⁵

- 3.75 The NIHRC recommends that clause 47 is amended to uphold the UK Government's commitment to conduct an independent review**

⁷³ *Szabó and Vissy v Hungary* (2016) ECHR 579.

⁷⁴ Liberty, 'Prevent'. Available at: <https://www.libertyhumanrights.org.uk/fundamental/prevent/>

⁷⁵ CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', 3 October 2016, at para 18.

of the 'Prevent' Strategy within a set deadline. Given the circumstances, this may be an opportunity to amend the existing deadline to something more realistic, but any amendment by way of a timeline must be reasonable and committed to a prompt outcome.

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