Written evidence from Birnberg Peirce Solicitors (NSB0005)

1. About Birnberg Peirce Solicitors

1.1 Our predecessor firm, BM Birnberg & Co was founded more than 50 years ago to provide what was then hardly recognised as a focus of legal practice: upholding of the civil rights and liberties of individuals challenging unjust or oppressive treatment by police or state agencies or authorities. Our aim is to enable those who seek our assistance, and in particular those who are most disadvantaged within society, to access ways of enforcing their rights and to effectively defend them, through representation in criminal defence, civil claims, inquests and public inquiries, immigration, public law, prison law, and in response to administrative national security measures such as TPIMs, TEOs and deprivation of citizenship.

1.2 In light of our experience and the specific background of casework involving national security considerations, we hope we are able to provide information that can assist the Committee. The scope, complexity and gravity of the proposals in the Bill cannot be adequately addressed in these submissions. We would welcome the opportunity of attending oral evidence sessions to provide further detail if it was considered helpful.

2. Offences Under Part 2 of the Serious Crime Act 2007 (Clause 23)

2.1 This, arguably, is the clause that should attract the highest degree of concern, disapplying, as it appears to envisage, the requirements of binding international obligations that would appear to permit behaviour on the part of intelligence agencies or armed forces (and without outside scrutiny) if "necessary for the proper exercise of their respective functions". This was the rationale adopted in the eight years following 9/11, argued as justification for actions taken in the eight years before May 2010 which led the incoming Prime Minister David Cameron to grapple with the treatment of "detainees" and how "for the past few years the reputation for the Security Services" had been overshadowed by allegations of their involvement in the treatment of detainees held by other countries… and "in the rendition of detainees in the aftermath of 9/11.[1]"

2.2 William Hague, then the new Foreign Secretary described the previous government as having falling into a chasm of its own making ending "with allegations of British complicity in torture", attracting "accusations of hypocrisy and double standards in respect to international law… at the end of their period of government, it was not in a position to be as effective as it could and should have been in dealing with a world marred by tyranny, oppression and injustice."

2.3 The experience of this firm engaged as we were in a significant body of legal challenges resulting from such actions was to understand the need for unambiguous, unavoidable adherence to the rule of law, the need to eradicate any concept of exceptionalism and the need to have transparent enquiry in order to reaffirm principles that appear again to be imperilled by clause 23.

[1] https://www.gov.uk/government/speeches/statement-on-detainees

2.4 A number of these cases are referred to in respective clauses 57 to 60 below. It is the firm view of our firm that the legal actions below were able to play their part in ensuring the permanence of principles which clause 23 appears potentially now to disapply.

3. Damages in National Security Proceedings (Clauses 57 – 60)

3.1 We believe clauses 57-60 will have a chilling effect on upholding the rule of law, exposing misconduct of the most serious nature (state involvement in rendition and torture) and access to justice.

3.2 This firm represented 13 British nationals who were detained in Guantánamo Bay without charge or trial in damages claims against the government, and 18 Libyan nationals in civil claims against the UK government arising from the British State's involvement in their rendition, detention, and torture in Libya. These claims are subject to confidential out of court settlements.

3.3 Both of these claims upheld the constitutional principle that an arm of the State (the Security Services) must not be absolved from responsibility for unlawful acts committed in the purported interest of national security. These claims also uncovered a pattern of unlawful behaviour by the Security Services which had been hidden from Parliament. As a consequence, after the Guantánamo claims were settled, Parliament established the Intelligence and Security Committee to oversee the activities of the Security Services. These claims therefore served an important constitutional and political purpose.

3.4 This is highly complex and highly contested litigation, which is often appealed to the Court of Appeal and Supreme Court. If clauses 57-60 were in force, the Claimants would have been unable to bring these claims. The effect of clauses 57-50 is to reduce damages in these claims, potentially to zero. In these circumstances, the LAA will be unable to fund these claims because the Claimants' legal costs are likely to exceed any award of damages. Therefore, the Claimants will fail the cost benefit and proportionately tests. Even if the Claimants were in a position to fund litigation privately or enter into a conditional fee agreement with their solicitors, they would be unlikely to recover their full legal costs if successful at the detailed assessment stage.

3.5 Clause 58(2) lists the "national security factors" which the Court must consider on an application to reduce damages. These include the commission of a terrorist offence or involvement in terrorist-related activity. However, what the government has deemed to amount to terrorism at a particular time in history, has been viewed through a different prism in retrospect. For example, when Gaddafi became an ally of the British State, genuine opposition to the regime in Libya was seen as terrorism. A Claimant could fall foul of these sections depending on which period of history they brought their claim.

4. Freezing and Forfeiture of Damages (Clause 61 and Schedule 10)

4.1 Schedule 10 permits the Court to forfeit or freeze damages recovered in any type of civil claim "if there is a real risk that those damages will be used for the purpose of terrorism" for up to 4 years. This is a very low threshold. This clause extends to claims which are unconnected to any alleged or established terrorist-related activity. This means that, for example, a Claimant who

suffers a life-changing injury but has a historic terrorism-related conviction, will be denied access to his/her damages.

5. Removal of civil legal aid for individuals convicted of terrorism offences (Clause 62)

5.1 Legal advice and representation must be available to everyone involved in the criminal justice system to ensure that the system functions properly. We represent individuals who are suspected of terrorism offences, are serving sentences for terrorist offences and those who have been wrongfully convicted of terrorist offences. Refusal of legal aid for these groups denies them access to justice.

5.2 A conviction for a terrorist offence is very often not a conviction for what one might consider to be actual terrorist conduct. Terrorist offences are now drafted in much broader terms than in 2000. Consequently, in our experience in representing individuals suspected of such offences, we find that they often involve complex issues relating to community, age, and particular historical context. Some clients have particular vulnerabilities which are relevant to the offence. However, some terrorist offences have no *mens rea* requirement, i.e. the waving of a flag of a proscribed organisation. Most convictions nowadays relate not to ideology and communications but rather to, for example, possessing documents which may indirectly encourage terrorism and sharing them, often on social media.

5.3 Individuals subject to TPIMs or TEOs must comply with obligations such as reporting to a police station, attendance at rehabilitation programmes or mentoring, relocation, curfew, and can be prohibited from possessing phones or internet-enabled devices. Both measures intentionally have a low standard of proof. Breaches are extremely serious offences which can attract a custodial sentence of up to 5 years in the case of a breach of TEO or ten years in the case of a TPIM.

5.4 We have seen individuals convicted because they failed to declare an electronic device, because they walked down the wrong street, and because they failed to telephone the police station at the specified time. None of these actions are in themselves reflective of terrorist activity or intent, but convictions which flow from them would attract, under the National Security Bill, an extreme exclusion from the right to civil legal aid. Furthermore, there are direct impacts on wider circumstances such as family, housing, employment and mental health. Legal assistance is often required to protect family relations or housing rights. It is difficult to see how restricting access to civil legal aid can possibly assist national security.

5.5 To be excluded from accessing civil legal aid risks subjecting individuals to serious injustice for a period of 30 years. We have experience of youths receiving a referral order, which is a restorative measure, but which is also a conviction.[2] It is clearly inequitable, where a Court has imposed the lowest sentence option to a child (who clearly have the capacity to rehabilitate) to deny civil legal aid when they reach adulthood because that conviction was a terrorist one.

5.6 The Court of Appeal has made it clear that without the provision of legal aid, such as that proposed by clause 62, prisoners are unable to effectively uphold their rights and challenge unlawful decision making (*Howard League and PAS v Lord Chancellor* [2017] EWCA Civ 244).

[2] https://unlock.org.uk/advice/referral-order-18/

5.7 Legal intervention for prisoners, through challenging unlawful decision making such as challenging decisions that affect the ability to progress, can lead to prisoners being able to move through the system and ultimately lead to their successful rehabilitation and resettlement thereby reducing the risk to public safety. Illustrative of this point are a number of cases where the court have made important findings on applications brought by prisoners convicted of terrorist offences that they have been subjected to unlawful decision making by the prison and parole authorities on grounds wholly or primarily relation to procedural unfairness. These cases include *Hindawi v Secretary of State for Justice* [2011] EWHC 830 (QB); *Shaffi v Secretary of State for Justice* [2011] EWHC 3113 (Admin); *Hindawi v Parole Board* [2012] EWHC 3894 (Admin); *Zaman v Secretary of State for Justice* [2022] EWHC 188 (Admin); *Bourgass and Hussain v Secretary of State for Justice [2015] UKSC 54.* There are many more.

5.8 Removing civil legal aid from these prisoners means that they will be unable to challenge decisions ancillary to their Parole Review such as challenges to a Local Authorities refusal to provide housing or challenges to the Parole Board's decision making in relation to a Non-Disclosure Application. Legal intervention in these matters assists in better and informed decision making by the Parole Board.

5.9 In addition, in our experience claims brought by prisoners convicted of terrorism offences often settle following the issuing of a pre-action letter or following the issue of proceedings. Such concessions are made on the basis that, for example, the decision and/or a relevant policy provision was unlawful, or was unlawfully applied, and/or providing that a fresh decision will be made in accordance with required policy and fair procedure requirements so as to enable the prisoner to engage meaningfully in decisions relating to their progress. Some have led to the amending of relevant policies.

5.10 The provisions do not comply with either Article 6 or Article 13. As noted above, the right to a fair trial in civil matters is, for prisoners, dependent upon the provision of legal aid. The removal of legal aid therefore deprives this group of prisoners of the right to an effective remedy under Article 13.

5.11 We further consider that clause 62 constitutes direct discrimination on the basis that it subjects terrorist prisoners to differential treatment to any other offender based on the type of offence for which he/she is serving a sentence of imprisonment, and regardless of the rehabilitative progress made by the individual and wider benefits of being able to access the Court. We agree with the concerns expressed by Jonathan Hall QC, the Independent Reviewer of Terrorism Legislation, that to remove legal aid on the basis of someone's offence is discriminatory and sets a dangerous precedent[3]. Clause 62 constitutes direct discrimination because it is explicitly only applicable to those within the category of "terrorist offenders". A terrorist offender is clearly being treated less favourably than another prisoner serving a sentence for an offence, who is not considered a "terrorist prisoner" by reason of a separate (unrelated) offence.

5.12 The reliance on ECF funding is not sufficient to ensure access to justice. As set out above, many if not most of the Judicial Review cases bought on behalf prisoners convicted of terrorism are based on challenges on public law principles to breaches of policy or are based on

[3] https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2022/05/NS-Bill-Pt-3-Note.pdf

principles of common law fairness and would not be covered by ECF. Even if cases are potentially covered by ECF because they engage human rights, the threshold for demonstrating why it is necessary to receive legal representation is a high one and this funding is, by definition, awarded exceptionally.

5.13 We consider that clause 62 does not comply with Article 7 ECHR. The justification for the removal of legal aid on the basis that it is 'symbolic' is clearly no justification at all and disguises the fact that it is a wholly punitive sanction. Individuals will be unable to obtain legal remedies to which they are entitled, such as being able to pursue a serious housing disrepair claim, or representation in childcare proceedings. This measure applies to any individual who was sentenced to a terrorist offence after 2001 and therefore has retrospective effect on the individual who at the time of the offence would not have any knowledge or foresight of the measure.

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