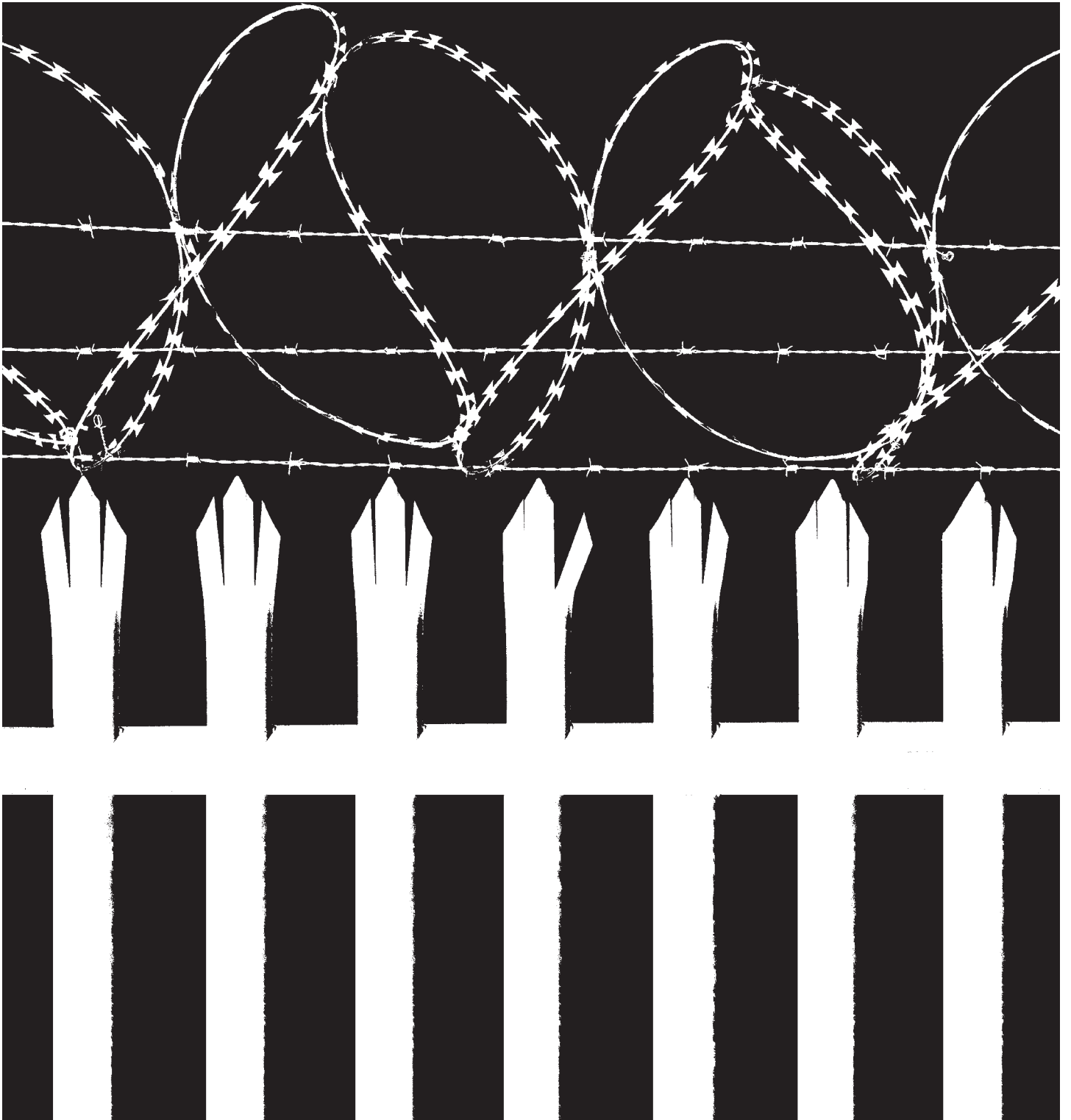


The Rules of the Game

The government's counter terrorism laws and strategy



A Democratic Audit Scoping Report for the Joseph Rowntree Reform Trust ● November 2005

The Rules of the Game: The government's counter terrorism laws and strategy

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Preface

This is a preliminary scoping exercise that examines the Terrorism Bill, introduced in Parliament on 12 October 2005, primarily against the background of previous counter terrorism legislation, common and other statute law; civil and political rights and the rule of law in the United Kingdom; and experience of previous counter terrorism laws. We also attempt an initial analysis of wider counter terrorism measures, concentrating on the use of lethal force.

This report was commissioned after the terrorist attacks of 7 July 2005 and is necessarily an interim report, based on official reports, parliamentary debates and reports, secondary works, media coverage and informal interviews.

The most immediate issues for the British people are – will the government's emerging counter terrorism strategy work? And will the new Bill strengthen our ability to identify and apprehend those who plan terrorist attacks and to prevent the attacks. But the strategy and new laws will also have a profound effect on British democracy, the rule of law, criminal justice, the conduct of the police and security forces, civil and political rights and the shape of community relations perhaps for generations to come.

This report has two purposes. First, to set down an informed marker for those involved in the current debates about the Terrorism Bill itself and to highlight the major issues its proposals and the government's overall strategy raise. But Acts of Parliament do not of themselves constitute a counter terrorism strategy, they merely provide a statutory framework for such a strategy. Our second purpose is to ask the essential questions: does the huge volume of "anti-terrorism" legislation – 200 pieces of legislation in all – actually work? Does it create the framework for an effective counter terrorism strategy that can win the confidence of the relevant communities? Will it make it easier or harder to obtain the intelligence from those communities that is necessary to apprehend terrorists and prevent their

attacks? What will be the long-term effects of the legislation on the way of life and values that the government is seeking to protect?

This report seeks only to raise these – and other – questions, not to answer them. It is the first part of a two-stage process. We intend that it will provide the basis for further research, comment and advice for a final report next spring. We will maintain the focus on how far the legislation and other counter-terrorism measures add up to an effective strategy against what is the source of the major threat, extremist Islamist terrorism, and so must gain the co-operation and trust of the minority Muslim communities. Thus we will continue the analysis of the Terrorism Bill and the government's associated measures, talks with Muslim "leaders", the policy on "places of worship", policing and security arrangements; and will closely examine their impact on Muslim communities and community relations in general.

In particular, we will examine the Bill's passage through Parliament; keep the practice of the police and security forces under scrutiny; gauge the effects of the legislation on the criminal justice system, civil liberties and the rule of law; strengthen the comparative aspect of the research; analyse the European Union and international perspective; examine more fully the lessons from combating IRA and Loyalist terrorism from the 1970s onwards; and make inquiries into the effects that existing and new laws and measures might have within minority Muslim communities. These inquiries will be particularly significant in gauging the state's ability to gather intelligence that might prevent further terrorist outrages in the UK. We also intend to conduct a series of interviews with those who have been and are involved in improving and assessing the quality of anti-terrorism laws and measures, including members of the police and intelligence community.

We prefer to use the term "counter terrorism" to the "anti-terrorist" and "anti-terrorism" usages now current. The government uses both terms, as in

the Anti-terrorism, Crime and Security Act 2001 and then the discussion paper of February 2004, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*.¹ We believe the term "anti" has echoes of the "war on terrorism", focusing on an enemy, whereas the idea of counter terrorism describes a more complete approach which takes into account the role of community and the inseparability of security, human rights and democracy.

Dr Andrew Blick
Professor Stuart Weir
3 November 2005

Summary

This report is in effect a preliminary review of a vast terrain of legislation, policies and practices. It is not appropriate to come to hard and fast conclusions at this stage of our work. However, it is possible to list a series of tentative conclusions and suggestions:

- The key to containing and preventing Islamist terrorist activities, at least at a domestic level, is accurate and reliable intelligence that will depend on gaining the confidence and trust of Britain's Muslim communities and not "wounding the identity" of Muslim people;
- Much of the government's counter terrorism strategy risks discriminating against Muslim people and alienating the Muslim communities, not least the recent proposals for dealing with extremism at places of worship;
- Britain has no need to choose between security and liberty in combating terrorism. Respect for the rule of law and civil and political rights is an important and positive aspect of a counter-terrorism strategy – and human rights laws allow for necessary adjustments at times of national emergency;
- Counter terrorism laws alone will not stop terrorism, they can at best only reinforce the legal framework in which the police and intelligence services and the criminal justice system can operate effectively;
- There should have been pre-legislative scrutiny of the draft Terrorism Bill, as promised, especially as many proposals will erode significant civil and political rights – freedom of expression and association, the right to liberty, the presumption of innocence, protection against arbitrary arrest and detention, the right to a fair trial;
- It is regrettable that the government has abandoned its consensual approach to its counter terrorism laws and strategy;
- There is a wide range of counter terrorism and criminal offences that can be used to bring prosecutions and multiplying further counter terrorism laws is not necessary; the new Terrorism Bill largely replicates existing laws;
- It is important that the authorities are able to prosecute suspects so far as possible for criminal offences successfully without diluting the existing principles and safeguards of the criminal justice system or loosely criminalising yet more behaviour; the definition of "terrorism" in its legislation is too wide and vague;
- Since most evidence in such cases is usually intelligence material the ban on making use of intelligence intercepts in open court is self-defeating. It is possible to use such material without risk to the intelligence agencies or to the advantage of terrorist organisations;
- The proposal to prolong the period of detention without trial for terrorist suspects for up to three months is wholly disproportionate and liable to create individual injustices and abuse; while it is admirable that the police have made their case for such powers in a transparent way, their case is not substantial enough to justify the huge erosion of basic human rights the proposal entails;
- Stop and search powers against terrorism are being used oppressively and discriminate against ethnic minorities, and even the police acknowledge that their use is not of value in apprehending possible terrorists;
- The new police strategy of "shoot to incapacitate" potential bombers moves the boundaries for the use of lethal force too far towards extra-judicial killing, especially given the historic failure of the authorities to control the forces' use of fire-arms;
- There should be an urgent inquiry into the use of made of information obtained by torture abroad, and

especially into the possibility that it is used as evidence in "closed" detention, proscription and control order procedures;

- The idea that the government may enact statutory guidance for the courts over its plans to deport foreign suspects to countries which might torture them on the basis of assurances of good behaviour violates the proper balance between the executive and the judiciary; the proper course is for the courts to decide upon any cases that come before them;
- Notwithstanding the valuable oversight role of the Newton Committee and Lord Carlile in reviewing counter terrorism laws, there is a need for democratic and comprehensive oversight of the government's counter terrorism laws and strategy as whole, and of the activities of the police and security forces.

Section 1: The Balance between Security and Liberty

The rule of law and civil and political rights are the basic foundation stones of a modern representative democracy. In the heat of post-7/7 debate, it is often blandly stated that Britain faces a choice between security and human rights², but this is an illusory choice that must be challenged. For as Cherie Booth said in her lecture after 7 July, "it is all too easy for us to respond to such terror in a way which undermines commitment to our most deeply held values and convictions and which cheapens our right to call ourselves a civilised nation". It is therefore important to stress that human rights and security are not polar opposites; and that, indeed, Britain's human rights obligations under the European Convention on Human Rights are actually drawn up specifically to allow for emergencies, such as a campaign of terror.

Respect for the rule of law

Far from being antithetical to effective anti-terrorism laws and measures, respect for the rule of law and civil and political rights provides the essential basis for an effective counter-terrorism strategy, for protecting the public, for intelligence gathering and for asserting and upholding the values of a modern and pluralist democracy. Respect for the rule of law and individual rights is especially important to the state's dealings with people within the Muslim communities who are likely to be essential allies in counter-terrorism strategy.

The fact is that civil and political rights are constitutive of democracy and the rule of law. These rights are the sinews of the two basic principles of representative democracy – that the citizens of a country ultimately exercise control over their government, and that they share equally in that control. Such principles are meaningless in the absence of civil and political rights. Citizens must be able to debate issues freely in civil society, to communicate with each other and to associate and act together if they are to judge the policies and actions of governments and act upon

those judgments. These freedoms are equally integral to democracy within the sphere of civil society, allowing society and communities to adapt and develop their values and convictions that provide an overall normative framework for the policies and conduct of governments of all colours. Protests and demonstrations are an important and legitimate part of these processes so long as they are peaceful. All these activities must take place free from the surveillance and interference of government and the state unless it is necessary to protect the lives and livelihood of citizens and their democracy. Otherwise citizens will not feel free to make use of their civil and political rights.

Equally people must be protected from arbitrary arrest, imprisonment and torture. *Habeas corpus* and the rule of law are the hallmarks of British freedoms. As Albert Venn Dicey, the 19th century authority on the British constitution wrote, "When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions, We mean, in the first place, that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land ..." This tradition – of the security of the person and due process alongside the right to life and civil and political liberty – occupies a significant place in the European Convention, which is in effect modern Britain's Bill of Rights.

Reconciling security and liberty under the European Convention

Few human rights protected under the European Convention are absolute. The Convention makes specific allowance for the government lawfully to reconcile the needs of security with the protection of democracy and human rights. In fact, government plans to limit the democratic rights of free speech, association, information and movement may legitimately be justified under a wide variety of "recognised aims": national security,

public safety, public health or morals, for the prevention of public disorder or crime, or to protect the rights and freedoms of others. In practice, the European Court of Human Rights has given governments a wide degree of latitude in protecting national security, for example, or preventing public disorder. Moreover, the government can go further in an emergency. Under Article 15, the government may take measures derogating from its human rights obligations "in time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation . . ." Only a few key rights are non-derogatory: the right to life (Article 2), the prohibition of torture (Article 3), and "no punishment without law" (Article 7) among them.

But at the same time the Convention insists upon strict tests of the need for any limits or derogations from civil and political rights. The measures taken must be "necessary in a democratic society" – that is, they must fulfil a pressing need and serve a "recognised aim"; they must be proportionate to the need; they must be "prescribed by law"; and they must conform to the democratic values of "pluralism, tolerance and broad-mindedness."³

Section 2: Preparing the Way for the Terrorism Bill 2005

The new Terrorism Bill had its second reading in the House of Commons on 26 October. It is the government's fourth counter terrorism measure in five years and has long been part of the government's plans. The government has stressed that it seeks to hold a balance between security and freedoms. The Home Office discussion paper, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*, in February 2004 indicated that the government wished to follow a balanced approach, acknowledging the challenge of "how to retain long held and hard won freedoms and protections from the arbitrary use of power or wrongful conviction, whilst ensuring that democracy and the rule of law itself are not used as a cover by those who seek its overthrow".⁴ How far its counter terrorism laws and strategy fulfil this goal is one of the two major questions that this report and its successor seek to answer.

The abandonment of pre-legislative scrutiny and consensus

One way to try and achieve this goal would be to submit counter terrorism legislation to pre-legislative scrutiny in Parliament. This would give MPs, peers and interested parties time to examine and debate major issues in advance. When the government rushed the Prevention of Terrorism Act through Parliament in February 2005, adapting counter terrorism law to the House of Lords ruling against the indefinite detention of foreign terrorist suspects, the Home Secretary Charles Clarke promised pre-legislative scrutiny of a draft counter-terrorism Bill in late autumn. Labour's election manifesto in April gave details of the new legislation.

The 7 July 2005 bombings and the failed bombings of 21 July have given a new urgency to the government's plans. The Prime Minister's first response to the atrocities was measured and Charles Clarke embarked upon cross-party talks and consultations with prominent Muslims. However, the Home Secretary also abandoned the important phase of

pre-legislative scrutiny in Parliament; and the Prime Minister then greatly toughened the government's position in a poorly prepared statement on 5 August 2005, proclaiming that "the rules of the game have changed". The Home Office was not consulted and was taken by surprise by his proposals, though Charles Clarke would not admit to this when appearing in front of the Commons Home Affairs Committee on 11 October 2005. Clarke himself became the subject of a whispering campaign, attributed to Downing Street, that he was "soft" on terrorism. He continued to inform his counterparts on the government's intentions, but regrettably there was no longer any sign that he was seeking to achieve a cross-party approach to the new legislation.

In an early letter to his political shadows (on 15 September), Charles Clarke indicated that three months might be too long a period for detention of suspects without charge. But while the government has partially withdrawn the absurd and unworkable proposal to create a criminal offence of "glorifying" terrorism, the position of Tony Blair and Clarke on the proposal for up to three months detention, without charge, for people suspected of terrorism, has hardened in the face of Conservative and Liberal Democrat concerns. It seems likely that this proposal was at the root of the tension between Downing Street and the Home Secretary.

The influence of the police

It may be supposed that much of the proposed new legislation is expressive, or "gesture politics": that is, it is designed to appease the tabloid press's intolerant response to the bombings and to reassure the public that the government is taking strong measures to deal with the threat of terrorism. But the police and security forces have also exerted a major influence on the government's proposals. In this sense the Prime Minister may perhaps be regarded as a weak rather than strong leader. At his monthly press conference on 11 October 2005 he said:

These anti-terrorist measures are necessary, not in the view of myself or people in government simply, but in the view of the Police who are charged with protecting our country against terrorist activity . . . The Police have set out why they need these powers. I think it would be irresponsible of me if I think that the fears of the Police are well grounded about the existing law and the problems with it, I think it would be irresponsible of me not to take this forward, and that is why I am doing it. I am not doing it because I am authoritarian or don't care about the civil liberties of this country.

He did not say, nor was he asked, what other views he and "people in government" took into account.

Presenting the draft Bill

It is important that ministers and officials present and discuss the Bill in measured terms. Debate on the government's proposals must be both accurate and balanced and must avoid being coloured by the pre-occupations of the tabloid press. Yet, for example, the day after the draft Bill was published, the Prime Minister said on BBC Radio 4's *Today* programme,

the fact that someone who comes into our country and maybe seeks refuge here, the fact that we say if, when you are here play by the rules, play fair, don't start inciting people to go and kill other innocent people in Britain,

and similarly, the Home Secretary said in the *New Statesman* on 26 September,

if somebody says on *Newsnight* . . . that he urges people to blow up a bus or two . . . I would say that is behaviour that rightly ought to be illegal.

As Liberty has pointed out,⁵ these are both clear examples of incitement to murder or terrorism – crimes that are already punishable by life imprisonment – and Tony Blair's example runs perilously close to an

unpleasant tabloid agenda. Further, the Home Office press release on 6 October on the “tough new powers” in the revised clause on glorifying terrorism said that, “the offender must have also intended to incite further acts of terror”. This is simply not the case. One of the main themes of informed criticism of the Bill is that it creates criminal offences without making them subject to the fundamental principle of intent. On glorifying terror, as JUSTICE has pointed out, the prosecution merely has to show that the accused “knew or believed” or “had reasonable grounds for believing”, that other people were likely to understand their statement as a direct or indirect encouragement or inducement to commit acts of terrorism.

The Terrorism Bill in Parliament

The Terrorism Bill thus goes into Parliament within the usual “rules of the game”. That is to say that a powerful executive will seek to mobilise the government majority in the House of Commons to get “its business through” and ultimately, if need be, to resist any amendments that peers in the House of Lords may make. Yet this time the committee stage is being held on the floor of the House and, with the opposition opposed to some of the Bill’s central provisions and widespread disquiet on the government benches, scrutiny of the Bill will not be the usual perfunctory process. The government is likely to make concessions and it is already clear that even the three-month detention period is negotiable. Charles Clarke has asked for all-party talks to stave off what was likely to be a government defeat on 2 November, the first day of the committee stage. Thus the three months may turn out to be simply the first bid in a political auction designed to achieve the greatest possible length of prolonged detention – an eventuality that Lord Carlile, the official reviewer of counter terrorism legislation, has condemned.

It also seems that MPs will resist the recent tendency in the Commons, the pre-eminent chamber, to leave human rights issues to the second chamber. Such issues do in fact come under informed scrutiny in the Lords, but the constitutional weakness of the unelected second chamber means that this scrutiny, and any amendments that may ensue, usually have no effect – unless they come at the end of a parliamentary session when the government is anxious to save its legislative programme, not as now at the beginning. But concern about

the draft Bill seems to be so high that MPs will not play pass the parcel with human rights: for once, they seem set to carry out their duty to ensure that the Bill does hold the appropriate balance between security and liberty.

However, the government is still most likely to get the Bill through, with an as yet uncertain degree of amendment. But if MPs and peers fail to hold the balance, the Human Rights Act means that Tony Blair and his ministers will not have the last word. That rests with the courts, though the Prime Minister has very strongly intimated that he expects them to respond to a changed situation “where people can understand that it is important that we do protect ourselves”.

Section 3: Existing Counter-Terrorism Law

But how necessary is the new Bill in any case? "There is an enormous amount of legislation that can be used in the fight against terrorism," Ken Macdonald QC, the Director of Public Prosecutions, told the Joint Committee on Human Rights in May 2004.⁶ The government accepted, in its discussion paper, that there is already a wide range of criminal and terrorist-related offences that can be used to bring prosecutions.⁷ Moreover, Lord Lloyd, the former law lord who made the case for the Terrorism Act 2000, told BBC Television for its *Panorama* programme that the government should be enforcing the "comprehensive" and "fair" 2000 Act,

Instead of which, whenever a new terrorist event occurs, we start adding new things to that act. And that I think is a mistake. It started first immediately after the Omagh bombing, and then it happened again after 9/11 in America, and now it has happened again as a result of the terrorist activity of 7 July.⁸

There are some 200 pieces of counter terrorism legislation, plus the criminal and common law. Much of the existing law, such as the Explosive Substances Act 1883, dates back to the 19th century and beyond, but it is still effective and pressed into use. Thus this is a necessarily brief summary, which describes the most recent legislation.

But before describing the domestic legal framework for the state's counter-terrorism strategy, it is important to stress a significant shift from an earlier era when governments treated terrorists as criminals, to avoid attaching special value to their acts or "glorifying" their cause. There is a danger that the rhetoric of the "war on terror" and the overt adoption of "anti-terrorist" laws and state actions might make this mistake, especially among communities which terrorist and fanatical groups might wish to win over. The Newton report on anti-terrorism legislation proposed that so far as possible terrorists

should be dealt with specifically as criminals under the criminal law.⁹

The Terrorism Act 2000

The foundation stone for the UK's counter terrorism legislation is the Terrorism Act 2000 which consolidated existing terrorism laws on the recommendation of Lord Lloyd of Berwick. The former law lord was asked,

To consider the future need for specific counter-terrorism legislation in the United Kingdom if the cessation of terrorism connected with the affairs of Northern Ireland leads to a lasting peace, taking into account the continuing threat from other kinds of terrorism and the United Kingdom's obligations under international law.

Lord Lloyd noted a view put to him that the threat from terrorism was often exaggerated. More people were killed in car accidents, for example, than in terrorist attacks. Drug abuse and other problems posed greater threats to society. He acknowledged the opinion that past anti-terrorist legislation was excessively repressive and should not be put on a permanent basis. However, he concluded that special anti-terrorist legislation was needed because of the exceptionally serious threat terrorism posed to society and the difficulty in catching and convicting perpetrators without special laws and police powers.¹⁰ The government response to his report, *Legislation against terrorism* (Cm 4178) appeared in December 1998.

Thus the 2000 Act was introduced to reform and extend previous temporary counter-terrorism legislation to all forms of terrorism, not just Irish-related terrorism, putting it mainly on a permanent basis. (It also prolonged the life of the Northern Ireland (Emergency Provisions) Act 1996 for another five years, subject to annual renewal.) The prior legislation had also been subject to annual renewal by Parliament: the Prevention of Terrorism (Temporary Provisions) Act 1989; the Northern Ireland (Emergency Provisions) Act 1996; and parts of the Criminal Justice (Terrorism and Conspiracy) Act 1998. Between them

these Acts contained measures falling into three broad categories: powers for the Home Secretary to proscribe terrorist organisations, with associated offences (membership, fundraising and so on); other specific offences connected with terrorism (fund-raising for terrorist purposes, training in the use of firearms, and so on); stronger police powers (investigatory, arrest, stop and search, detention and so on). The Act also made provision for an annual report to Parliament on its workings.

Part I (Introductory) defines terrorism for the purposes of the Act. The definition of terrorism was criticised at the time by Amnesty International and others as being too wide and "catch-all" to satisfy the clarity required for the criminal law.

Part II on proscribed organisations provides for the Home Secretary to be able to proscribe organisations, subject to affirmative resolution in Parliament, and sets out associated offences; section 5 and schedule 3 established the Proscribed Organisations Appeal Commission (POAC) to hear appeals against proscriptions. The Commission comprises three members, one of whom must be a current or past holder of high judicial appellate office; the other two members are appointed by the Lord Chancellor. In the first instance, the Home Secretary considers appeals against proscription. If he or she refuses an appeal, POAC can hear the case "if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review"; and there is provision for further appeal on a point of law. POAC sits in public but is able to hear closed evidence – with the applicant and the applicant's representatives excluded. The Act also provides for the appointment of special advocates by Law Officers of the Crown "to represent the interests of an organisation or other applicant" in the secret proceedings. They can see all the secret evidence.

Part III (Terrorist property) creates offences related to fund-raising and financing terrorism and allows for courts to order forfeiture of money

and property connected with terrorist offences.

Parts IV and V (Terrorist investigations and Counter-terrorist powers) provided police powers to set up cordons, carry out searches, investigate finances, and arrest and detain suspected terrorists, and strengthened stop and search powers of both pedestrians and vehicles. They provided for the power of arrest without warrant. Normally the police would have to have reasonable grounds for suspecting that someone had committed or was about to commit an offence. Under the Act, a constable can arrest someone "whom he reasonably suspects to be a terrorist" – not in relation to a specific offence. They extended the periods for which suspects could be held without charge. Under the Police and Criminal Evidence Act 1984 (PACE), an individual could be detained for up to 24 hours without charge, which could be extended for up to four days by a senior officer if it was necessary to obtain evidence. The 2000 Act gave the police powers to detain an individual without charge for up to 48 hours. This can be extended by warrant for up to seven days, then for another seven days. (The Criminal Justice Act 2003 later extended the period to 14 days.) Under PACE, a suspect has a right to see a solicitor, which can be delayed only by an officer of superintendent rank in the case of a serious offence for up to 36 hours. Under the 2000 Act, an officer of superintendent rank can authorise a delay in seeing a solicitor of up to 48 hours for someone suspected of being involved in terrorism. Further, under schedule 8, an assistant chief constable can require the consultation to be within sight and hearing of an officer (of inspector rank, not involved in the case).

Part VI (Miscellaneous) provides for associated offences of weapons training and recruiting; directing a terrorist organisation; possessing items for terrorist purposes; possessing information for terrorist purposes; incitement of overseas terrorism. It also deals with extra-territorial powers and extradition, enabling the UK to ratify UN Conventions for the Suppression of Terrorist Bombings and for the Suppression of the Financing of Terrorism. Part VII (Northern Ireland) provides for non-jury trials in Northern Ireland for terror-related offences and establishes extra police and army powers for Northern Ireland. Schedule 14 contains general powers for police, customs and immigration officers, including powers to exchange information.

The Anti-Terrorism, Crime and Security Act 2001

The Anti-Terrorism, Crime and Security Act 2001 was introduced hastily in response to the terrorist attacks in the US of 11 September 2001. Part 1 and schedules 1 and 2 provide for preventing terrorists from gaining access to their money. They complement parts of the Proceeds of Crime Act, ensuring that investigative and freezing powers can be utilised whenever funds might be used for terrorism. Account monitoring orders enable the police to require financial institutions to provide information on accounts for up to 90 days. The pre-existing requirement to report knowledge or suspicion of terrorist financing was strengthened, making it an offence not to report when reasonable grounds for suspicion existed. Law enforcement agencies were given the power to seize terrorist cash anywhere in the UK and to freeze assets at the start of an investigation, rather than just before a charge was made.

Part 2 and schedule 3 of the Act updated the Emergency Laws (Re-enactments and Repeals) Act 1964, enabling the authorities to target and freeze the assets of foreign governments or individuals more speedily. The trigger for such acts was widened. Part 3 and schedule 4 allow HM Customs and Excise and the Inland Revenue to disclose information held by them for law enforcement purposes to the intelligence services. It clarifies and extends the gateways for public authorities to disclose information to criminal investigation agencies.

The indefinite detention of foreign terrorist suspects was introduced in part 4 of the Act (clauses 21 to 33). Part 4 allowed for the indefinite detention of foreign nationals, certified by the Secretary of State as threats to national security, who could not be deported from the United Kingdom because it was likely that they would be tortured or ill-treated in their own countries. Their detention was made subject to regular independent review by the Special Immigration Appeals Commission (SIAC). (Three commissioners hear appeals, one of whom holds or has held high judicial office and another who is or has been an immigration judge.) This measure required derogation from the European Convention on Human Rights (ECHR) and was overturned by the House of Lords in December 2004 on the grounds that it was incompatible with the ECHR. The Act also enabled the Home Secretary

to exclude substantive consideration of asylum claims by certifying that removal would be to the public good. The Explanatory Notes to the Bill stated, "This would not be in breach of the 1951 Refugee Convention because they [presumably suspected terrorists] are excluded from the protection of that Convention."

The Act prohibited judicial review of SIAC decisions in respect of both these measures (though appeals from SIAC to the Court of Appeal remained possible on points of law). It further allowed for the retention for 10 years of fingerprints taken in asylum and immigration cases, to prevent applicants from creating multiple identities.

Part 5 extended the racially aggravated offences of assault, public order, criminal damage and harassment to cover attacks aggravated by religious hatred;

- part 6 strengthened existing controls of chemical, nuclear and biological weapons, and part 7 (with schedules 5 and 6) obliged laboratories and other premises holding stocks of disease-causing micro-organisms and toxins to notify their holdings, and to comply with reasonable police security requirements;

- part 8 strengthened the regulatory regime for safety in the nuclear industry, extending the jurisdiction of the United Kingdom Atomic Energy Authority constables to protect sites and materials, and strengthening sanctions against the unauthorised disclosure of sensitive information;

- part 9 introduced a power to remove an unauthorised person from an airport's Restricted Zone, or an aircraft; and it made it an offence to refuse to leave;

- part 10 gave the police and customs officials powers to demand the removal of any item they believe is being worn for the purpose of concealing identity.

The jurisdiction, potential and actual, of the British Transport Police and Ministry of Defence Police was also extended..

The Act also gave the authorities powers over modern communications, providing for service providers to retain data about their customers' communications for the use of law enforcement agencies and for national security reasons (part 11). The government took reserve powers to review arrangements and issue directions if necessary. These powers were made subject to renewal by affirmative order in Parliament every

two years. Part 12 put beyond doubt the fact that the law of bribery applies to foreign public officials, ministers, representatives and judges. It gave courts jurisdiction over such crimes committed overseas.

Part 13 (and its schedules) contained a miscellany of significant initiatives, allowing for measures on police and criminal judicial co-operation by the JHA Council of the EU (third pillar) to be implemented by statutory order and not primary legislation, as previously;

- introducing measures relating to the use or threatened use of noxious substances for terrorist and similar purposes (and hoaxes apparently involving such substances);
- amending the Intelligence Services Act 1994 to enable more flexible intelligence gathering outside the UK and altering the definition of serious crime;
- reintroducing the previous PTA offence of failure to disclose information about terrorism, extending it to domestic and international terrorism;
- amending schedule 7 of the 2000 Act to allow the stopping, detaining and searching of people making internal as well as external journeys; and
- creating a new power to require carriers to supply information about passengers and freight and allow sharing of information between the enforcement agencies.

The Prevention of Terrorism Act 2005

The Prevention of Terrorism Act 2005 was introduced after the Law Lords ruled that the indefinite detention of foreign national terrorist suspects was incompatible with the European Convention on Human Rights (ECHR). The government took some time to respond to the House of Lords ruling while ministers were searching for another means for dealing with those who had already been detained and potential future detainees. The Act ended the discriminatory aspect of the detentions by establishing a regime of control orders for all those who were perceived to be a sufficient threat to national security, regardless of nationality. But control orders still allowed for severe restrictions on the liberty of suspects, on the basis of evidence which was kept from them and which could not be challenged in open court.

Control orders allow the authorities to order restrictions on the activities of suspects, ranging from the possession of certain substances, choice of place of residence to curfews and house arrest. There are two general categories of control order – derogating and non-derogating. Derogating control orders, which apply to house arrest, are incompatible with Article 5 of the ECHR and require six-monthly renewal. They require a designated derogation order from the ECHR in advance of their being introduced. This would be made and laid before Parliament and has to be confirmed by both Houses, following a debate, within 40 days. The government has not yet found it necessary to seek any such order. Non-derogating control orders can run for a year on the Home Secretary's say-so.

For a derogating control order the Secretary of State must apply to the High Court for the court to make the order. The court can examine all the relevant material and witnesses. The court must hold a full hearing of a suspect's defence if it finds there is a case for an order. At the full hearing, the defence will have access only to "open" material. Only a special representative (not chosen by the suspect) is able to see closed material and represent his or her case at closed hearings. For derogating control orders, the standard of proof is "balance of probabilities", lower than the criminal standard of "beyond reasonable doubt".

For non-derogating control orders, the standard of proof – "reasonable suspicion" – is lower still. For these orders, the security service and the police put together a case which, if the Secretary of State agrees is sufficient, leads to an application to the High Court. If the court agrees that the Secretary of State has a case, it gives permission to make the order. The Secretary of State then refers the order to the court for a full hearing, along the same lines as the hearing for a derogating order.

The Act makes it possible for the Home Secretary to issue control orders immediately in urgent circumstances, a power used for the 10 remaining suspects previously detained under part 4 of the ATCSA2001. In such cases the order must be referred immediately to the High Court and considered within seven days. The court issued anonymity orders for those subject to orders who were previously anonymous.

The Act's provisions for control orders require renewal every 12 months, though the Act cannot be amended in debates on renewal. There

is no sunset clause. Section 14(2) requires the appointment of a reviewer of the Act – Lord Carlile has been given this task. He is due to report early in 2006.

The Identity Cards Bill

In November 2003 the government announced its intention to begin an identity card scheme. Ministers initially presented identity cards partly as a means of combating terrorism, as well as reducing illegal immigration and identity fraud and bringing about more effective public service delivery. However, the Bill introducing the ID card scheme fell at the dissolution of Parliament in 2005. During the 2005 election campaign, Sir Ian Blair, Commissioner of the Metropolitan Police, said in an interview on BBC1 TV that he would welcome the re-introduction of the bill to help the security forces trying to uncover al-Qaeda units targeting Britain. He said that several hundred people who had trained in al-Qaeda camps in Afghanistan were living in this country.

The government introduced the Identity Cards Bill in the Commons in May 2005, in a similar form to the one which fell earlier. At time of writing, the Bill is still going through Parliament. It is an enabling bill that establishes the framework for a compulsory scheme of cards containing secure biometric information, and not an actual compulsory card scheme itself. At first the cards would be voluntary and the government does not anticipate moving to make them compulsory until around 2013. The proposed scheme has been widely criticised, most severely by a team of London School of Economics experts.¹¹ They warned that the scheme was too expensive and relied on unproven technology, said that it was likely to have a minimal impact on crime and terrorism, while being unfair on ethnic minorities and threatening civil liberties. Ministers have resiled from the earlier claims that it would assist in combating terrorism. In August 2005, Tony McNulty, the Home Office minister responsible for the project, told a private Fabian Society meeting that the government had oversold the potential benefits of the card, including its anti-terrorism potential. Home Secretary Charles Clarke had already stated that identity cards would not have stopped the 7 July 2005 bombers.

Other recent legislation

Immigration Act 1971

Under the Immigration Act 1971, the Home Secretary may order the deportation of foreign nationals if he or she thinks that to do so is conducive to the public good. He may also exclude individuals from the country. In the *Chahal* case in 1996 the European Court of Human Rights struck down a deportation order as contrary to Article 3 of the ECHR, ruling that individuals could not be deported to a country where they might be subject to torture, inhumane or degrading treatment, or exposed to execution. As we have seen, the 2001 Act introduced a power to detain indefinitely foreign national terrorist suspects who could not be deported, only to be ruled incompatible with the ECHR by the House of Lords in 2004.

Regulation of Investigatory Powers Act 2000

This Act prohibits the use of domestic intercepted communications as evidence in open court. The UK is the only country other than Ireland to have such an absolute prohibition in place. Strangely there is no ban on the use of foreign intercepts, or bugged (as opposed to intercepted) communications, or the products of surveillance or eavesdropping, even if unauthorised and an invasion of privacy. There is no bar on foreign courts using UK intercepted material, if the Security and Intelligence Agencies are willing to provide it.

The Extradition Act 2003

The Act strengthened the extradition powers which enable terrorist suspects – both foreign and British nationals – to face trial abroad.

Nationality, Immigration and Asylum Act 2002

Section 4 of the Act introduced a power to remove British citizenship from those who were previously nationals of another country or who have dual nationality.

The Criminal Justice Act 2003.

Section 306 of this Act extended the period of detention from up to seven days under the Terrorism Act 2000, to up to the current 14 days.

The Civil Contingencies Act 2004

This Act was introduced to modernise the state's ability to deal with civil contingencies, including the effects of terrorism and natural disasters. In its first form it gave rise to considerable concerns over the scope of the powers it sought to introduce.

THE TERRORISM BILL 2005: AT A GLANCE SUMMARY

Description and analysis	Does it replicate existing law?	What is the effect on human rights and the rule of law?
Definition of terrorism Clause 33		
The broad definition of terrorism, established in the Terrorism Act 2000 and Anti-terrorism Crime and Security Act 2001, includes serious violence against people or damage to property that is designed to influence the UK or other governments or to intimidate the public to advance “a political, religious or ideological cause.” Clause 33 adds attempts to influence international organisations such as the UN for the first time.	Clause 33 extends existing law.	The Terrorism Act 2000 definition was criticised at the time for being too wide and vague to satisfy the clarity required for the criminal law. Amnesty International warns that new offences in the draft Bill based on the UK’s definition of terrorism may not amount to “recognizably criminal offences” under international law.
Encouraging or glorifying terrorism Clause 1		
The original clauses 1 and 2 are substantially revised to form a new clause 1 that now covers statements that glorify the commissioning or preparation of acts of “terrorism” (of the past, present or future) which other people may understand as direct or indirect encouragement to similar acts. Maximum penalty: 7 years.	Incitement to commit terrorism (direct or indirect) is already covered by a range of criminal offences. There is no need to create this fresh offence, especially one so broad and poorly-drafted.	A serious threat to legitimate free expression that almost certainly breaches Article 10(2) of the European Convention on Human Rights (ECHR). A person may be guilty of “encouraging or glorifying terrorism” without meaning to do so. The broad scope of the offences could cover any reference to political violence at any time against any government anywhere in the world. Lord Lloyd, Britain’s former adviser on terrorism law, said, “we’re trying to create a criminal offence out of something that is just too vague and too uncertain”.
Disseminating “terrorist” publications Clause 2		
Clause 2 makes it an offence to distribute, publish, loan, etc, any publication which contains “information of assistance” to someone planning a terrorist attack. This offence carries a maximum penalty of seven years in prison and is designed to tackle bookshops and websites that deal in “terrorist” publications, including “apparently authoritative tracts wrapped in a religious or quasi-religious context” (<i>Guardian</i> , 13 October).	Clause 1 already makes it illegal to incite terrorism by any written or electronic publication. Together with sections 57 and 58 of the Terrorism Act 2000, the police already possess sufficient powers to arrest and charge any individual who possesses, publishes on a website or in written form, or otherwise makes available, material connected to or useful to the preparation or commission of an act of terrorism.	Casts an imprecise net too widely. The prosecution does not have to show that an accused person intended to encourage or facilitate terrorism. A person may be guilty of this offence merely by making available a publication that someone else may regard as useful for terrorism. As JUSTICE points out, the London A-Z may thus qualify as a “terrorist publication”.
Preparing terrorist acts Clause 5		
Lord Lloyd, Britain’s former terrorism law adviser, “implored” the Home Secretary to include such an offence in the Terrorism Act 2000 and Lord Carlile, who reviews terrorism law for the government, has also recommended this provision. The offence widens existing criminal and conspiracy laws to catch those who, intending to commit terrorist acts, prepare the facilities to do so (securing accommodation, fund-raising through credit card fraud, etc.).	Yes, largely replicates existing provisions in the Terrorism Act 2000, including support for terrorism, as well as existing criminal and conspiracy laws.	This clause is acceptable, though widely drafted and could be abused. It makes someone found guilty of any conduct preparatory to terrorism, however trivial or marginal, liable to life imprisonment. Charges under this offence could be used to assist the police questioning a suspect if they were denied an extension to their powers to hold suspects for up to three months without charge.
Training for terrorism Clause 6		
Clause 6 provides that anyone who provides or receives instruction or training in connection with terrorist offences may be imprisoned for up to ten years. It includes invitations to take part in training and provides for the seizure of materials used in such courses.	Largely replicates section 54 of the Terrorism Act 2000 on weapons training, but does add “noxious substances”.	This is a valuable offence in principle but is too widely drawn. It makes it an offence for someone to provide or invite others to receive training knowing or just “suspecting” that the person being trained has terrorist intent. The clause needs careful re-drafting.
Attendance at a place used for terrorist training Clause 8		
Clause 8 creates an offence of attending a terrorist training camp which could carry a ten-year jail term. It is designed to ensure that someone who receives training at a terrorist training camp overseas as well as in the UK should not be able to escape prosecution.	New offence.	Again, too widely drafted. A person may commit this offence simply by being at a training camp while training is going on. They need not receive training or instruction; they must just either know or “could not reasonably have failed to understand” that training for terrorist purposes is going on. JUSTICE complains that this is an offensive offence based purely on the idea of “guilt by association” and should be scrapped.

Description and analysis	Does it replicate existing law?	What is the effect on human rights and the rule of law?
Offences involving nuclear devices, materials and sites <i>Clauses 9-12</i>		
Clauses 9-11 create offences for making and possessing nuclear devices or materials or damaging nuclear facilities for terrorist purposes which will carry a life sentence. Clause 11 covers blackmail using nuclear threats. Clause 12 creates offences dealing with trespassing and damaging civil nuclear sites. These offences require proof of intent for conviction – a requirement that should apply to all offences created under the draft Bill.	There is already an abundance of criminal offences relating to the use or possession of radioactive material for criminal purposes (including section 47 of the Anti-Terrorism Crime and Security Act 2001). Thus any person in possession of radioactive material for the purposes of terrorism would almost certainly be guilty of one or more of the existing criminal offences.	A sensible precaution, but there are two concerns. The offence of damaging a nuclear facility and creating or increasing the risk of a nuclear release could conceivably make a nuclear protester liable to prosecution if he or she damaged a nuclear site and arguably increased the <i>risk</i> of such a release. It should be an appreciable risk. Secondly, the perimeter fences around nuclear sites are often within the designated exclusion zones. Thus protesters who demonstrate around a perimeter fence may well be committing an offence.
Terrorist offences abroad <i>Clause 17</i>		
Clause 17 creates provision for anyone in another country who commits any of the new offences in the draft Bill or some offences under the Terrorism Act 2000 to be treated as having committed them in the UK. Clause 17 also catches people who plan, incite or aid any such terrorist offence or who are members of a proscribed organisation while abroad.	New law.	The clause doesn't specify that there is any intention to commit an offence in the UK and could apply to an act that takes place elsewhere if it would be an offence in the UK. Is it really right, or the government's intention, that people (possibly foreign nationals struggling against repression) should be tried in the UK for acts or statements than have nothing to do with this country? The clause as such is far too broad.
Proscription of non-violent organisations <i>Clauses 21-22</i>		
Clause 21 extends the grounds for proscription under the Terrorism Act 2000 to cover non-violent organisations that glorify terrorism, "whether in the past, in the future, or generally". Under the 2000 Act belonging to a proscribed organisation carries a maximum penalty of ten years in jail. It is sufficient to support or "further the activities" of such an organisation by literally any means – even to wearing a T-shirt or displaying a badge that may indicate membership or support. Clause 22 creates a new offence that prevents proscribed organisations escaping the ban by simply changing their name. Appeals are allowed to a proscribed organisations appeal commission.	A new and undesirable extension of the 2000 Act.	The leap from proscribing groups involved in violence and terror to non-violent groups, such as presumably the Prime Minister's prime target, Hizb-ut-Tahira, would bring state censorship of political views to Britain. All the arguments against making glorification an offence apply to this proposal. But clause 21 would people who have never made any "glorification" comment liable to arrest and prosecution. Just wearing the wrong T-shirt could land them in jail. If enacted, clause 21 would violate rights to freedom of association and expression under the European Convention on Human Rights.
Three-month detention without charge <i>Clauses 23-24</i>		
The upper limit for holding a terrorist suspect without charge will be increased from the current 14-day limit to up to three months. After 48 hours a police superintendent or superior officer or crown prosecutor can apply to a district judge for weekly extensions up to the new three-month cut-off. The police have argued vigorously for this extension in view of the difficulties they encounter in investigating modern terrorism. There is a well-founded suspicion that the proposal may be the first bid in a political auction for a period between 14 days and three months.	A new provision which considerably weakens the already weak rules for judicial supervision of people held under anti-terrorism laws. Under ordinary legislation, the maximum period of detention without charge is four days, with further 36-hour and 24-hour extensions being granted by a judicial authority after the initial 36 hours. As has been widely stated, this is equivalent to sentencing someone who is simply a suspect to a six-month jail sentence imposed on a person found guilty of a criminal offence.	This proposal seems likely to violate the right to liberty under Article 5(3) of the ECHR. Lord Lloyd has said that it "borders" on internment and is "intolerable". Lord Steyn, another former law lord, says that it is a "wholly disproportionate power" and warned that such excessive powers are abused "from time to time", citing miscarriages of justice under previous anti-terrorism laws. Amnesty International has also warned from its long experience that "prolonged periods of pre-charge detention provide a context for abusive practices". A variety of experts have suggested that there are legal means for dealing with the difficulties the police have adduced in support of the proposal. The Law Society suggests giving them more resources.
Consent to prosecution <i>Clause 19</i>		
Requires the consent of the DPP for any prosecutions for offences under Part 1 of the draft Bill in England and Wales (or the DPP for Northern Ireland in the province). Where the offences apply wholly or partly to a foreign country the relevant Attorney General's consent is also required.	Not in principle new.	A provision officially described as "a safety valve against hasty or inappropriate decisions".
Review of terrorism legislation <i>Clause 35</i>		
The Home Secretary must appoint someone to review the operations of the draft Bill's Part 1 (which introduces the new offences) and the 2000 Act. The reviewer must report at least annually to the Home Secretary who must then lay the report before Parliament.	A now standard provision	It would strengthen the mechanisms of accountability to Parliament if the chairman of the Home Affairs Committee and the committee were given responsibility for appointing the reviewer and receiving his or her report.

Section 4: The Terrorism Bill 2005

The main aim of the current Terrorism Bill seems to be to criminalise as widely as possible any acts or conduct that may be connected with terrorism, and at the same time to facilitate prosecutions (as well as to give the police far stronger powers of detention). Thus the Bill casts a loosely-drafted net of new or expanded offences, most of which do not require the authorities to prove criminal intent or are not even clearly criminal acts – and in some cases, the prosecuting authorities need not meet the criminal standard of “beyond reasonable doubt”. A secondary purpose may well be simply to reassure the public that tough measures are being taken and to express outrage and revulsion at terrifying acts and about the conduct of extremists and the “preachers of hate”, reviled by the tabloid press, who approve or even seem to glorify such acts. But will the Act make the public safer? Do the police and prosecutors need all the additional scope that the Bill seeks to provide?

The main proposals

Various organisations have published detailed briefings on the Bill’s provisions, among them Amnesty International, JUSTICE and Liberty. This scoping report gives a simpler, “at a glance”, review of the Bill’s main proposals, with a similarly brief summary of the comments on the Bill of Lord Carlile, the official reviewer of counter terrorism legislation. As the “at a glance” summary of the Bill shows (preceding pages), most of the offences it sets out are already covered by existing legislation. Even the most widely canvassed change, making the preparation of terrorist acts a criminal offence, largely replicates existing laws. Existing laws make the new much-publicised provision against encouraging and “glorifying” terrorism unnecessary, except for propaganda purposes. Yet there is in general support for introducing the offence of preparing for terrorism, with caveats, and for adding to the protection of nuclear sites and facilities.

Where the Bill extends existing laws, however, the drafting is often

too wide and open to abuse by the authorities. And it incorporates the very broad definition of terrorism from the Terrorism Act 2000, while extending it, so that as Amnesty International warns, the offences as set out in the Bill “violate the principle of legality and legal certainty by being too wide and vague”.¹²

Lord Carlile on the Terrorism Bill 2005

Lord Carlile, the official reviewer of counter-terrorist legislation, has made a number of criticisms of the Terrorism Bill as well as general comments about improvements that could be made. The table below confines itself to his remarks on the provisions of the Bill. Section 4 of this report takes up other comments.

Lord Carlile on the Terrorism Bill

Dissemination of terrorist publications. Clause 3

[Clause 3 provides a detailed system of notification by a police constable to a network provider, requiring the provider to remove material which allegedly encourages or glorifies terrorism]

1. “A question parliamentarians may wish to address in relation to Clause 3 is whether such notices given by a constable should be subject to judicial control or confirmation, for example by a district judge (Magistrates’ Court).”
2. “It is important to ensure that genuine and sometimes useful research is not turned into a Samizdat activity.”

Training for terrorism; attendance at a place used for terrorist training. Clauses 6 and 8

1. “It is important that there should be the clearest understanding that...clause [6] and clause 8 would not be misused. I question whether it is the role of our law, or even enforceable, to make it a criminal offence triable in our country to fight in a revolution the aims of which we support.”
2. “There is something of an overlap between [clause 8] and clause 6.”
3. “Some of Britain’s most respected journalists have from time to time reported from terrorist training camps in various parts of the world . . . As drafted, the law would render these journalists potential criminals.”
4. “In my view the government should look at clause 8 again, and possibly elide it with clause 6.”

Extension of the period of detention by judicial authority. Clauses 23-24

- Lord Carlile suggests that the continental examining magistrate model might be adapted for use for the extension of pre-charge detention.
1. “I do not regard extra time for interviews as being a sound basis for the extension of the time period”.
 2. “I regard the current draft clauses as providing too little protection for the suspect.”
 3. “I question whether what is proposed in the Bill would be proof to challenge under the Human Rights Act given the length of extended detention envisaged.”
 4. “I should be concerned if there was a Parliamentary Dutch auction over the length of the extended period . . . there is no magic in the proposed three months”.

Search, seizure and forfeiture of terrorist publications. Clause 27

“There is a degree of concern that this provision may be used more than necessary, and could be seen as a form of censoring of bookshops, and bookstalls in mosques and other places where publications are made available.”

Extension to internal waters of authorisations to stop and search. Clause 29

“In previous reports I have recommended that there be a strong programme of training and comprehension of the use and limits of the section... Mistakes are still being made”.

Section 5: Major Issues of the Counter Terrorism Strategy

The most immediate issues for the British people are – will the government's emerging counter terrorism strategy work? And will the new Bill strengthen our ability to identify and apprehend those who plan terrorist attacks and to prevent the attacks. But the strategy and new laws will also have a profound effect on British democracy, the rule of law, criminal justice, the conduct of the police and security forces, civil and political rights, and the shape of community relations perhaps for generations to come.

It is too soon to predict what will happen. But we can identify dangers and opportunities. Governments in this country are too strong and are making themselves stronger. From the 1970s onwards, governments of both main parties have taken more and more powers to combat terrorism, crime, public disorder and "anti-social behaviour". The activities of the security forces, emergency measures and laws for dealing with terrorism related to the conflict in Northern Ireland included unjustifiable killings by the security forces, arbitrary detentions (soon rightly abandoned), the arguable misuse of stop-and-search powers, arrest and holding charges, maltreatment and beatings of prisoners, and miscarriages of justice (the worst injustices, paradoxically, resulted from jury trials in Great Britain, not in the province's jury-less Diplock courts). It is important that the authorities avoid the excesses of this period in this new period of anti-terrorist activity, not least because they contributed to resentment and alienation within the minority Catholic community which made access to intelligence more difficult.

We do not live in a police state. But we do live under an increasingly authoritarian regime that is often intolerant not only of free speech and dissent, but of the legitimate role of the judiciary in applying the rule of law to its actions, and under which the basic principle of British justice – namely, the presumption of innocence – is being questioned. The two key motors of an effective counter terrorism strategy are, first

and foremost, accurate and reliable intelligence and secondly, the ability successfully to prosecute those guilty of terrorist or criminal plans and acts. What we should ask of the draft Bill – and indeed preceding counter terrorism legislation – is this: how far does it contribute to either or both of these objectives?

Certainly the fit of laws to action is not always apparent. In October, a Downing Street report criticising the government's immature, unaccountable and disconnected counter terrorist strategy was leaked to the press.¹⁴ The report complained that "real work impact is seldom measured". Our preliminary view is that more thought needs to be devoted to the root causes of terrorism, rather than multiplying legislation. Sir Andrew Turnbull, the then Cabinet Secretary, wrote to permanent secretaries in April 2005 that, "The aim is to prevent terrorism by tackling its causes . . . to diminish support for terrorists by influencing social and economic issues", pointing out that certain Muslim communities were most likely to suffer from unemployment and other disadvantages.¹⁵

Intelligence and community relations

Intelligence is the first key to defeating terrorism. It cannot be done by laws alone, however severe; and indeed, it is widely accepted by the security community, as well as by human rights organisations, that overly severe measures, particularly those that target a particular community, are counter-productive. The Jellicoe review of terrorism law in 1983 found that the measures which were most likely to violate civil liberties were also the least valuable.¹⁶

Sir David Omand, the former Cabinet Office Security and Intelligence Co-Ordinator, observed recently that security measures implemented in Northern Ireland in the early 1970s were an example of what can go wrong "if you don't have appropriate intelligence . . . you end up using a bludgeon." The consequence was "alienating the

community" which was, "in the end, counter-productive".¹⁷ Lord Carlile also gave the government a stark warning in his review of the new Terrorism Bill: "there are . . . young men prepared to rationalise their own criminal acts in terms of death and glory . . . laws which have the effect of wounding identity further are unlikely to do more than exacerbate the situation."¹⁸

It is therefore important that the Terrorism Bill, and police tactics, take care not to target Britain's Muslim communities insensitively, but are instead geared to winning their confidence and co-operation. We acknowledge that the government is seeking to maintain a dialogue with Muslim "leaders", but it is too soon to assess how real a bridge the talks are to "hearts and minds" within the Muslim communities.

We go on to discuss the impact of counter terrorism powers on the Muslim communities, especially stop and search powers, which of course also have a wider impact on others, and as Lord Carlile observed, the Terrorism Bill's provisions on the seizure of "terrorist publications" raise the concern that they may be used more than is necessary and "could be seen as a form of censoring of bookshops, and bookstalls in mosques and other places where publications are made available." Thus far there is not much evidence that the government is also seeking to tackle the root causes of terrorism, as Sir Andrew Turnbull saw them.

Extremism at mosques and other places of worship

The government's new proposals for dealing with terrorism at mosques and other places of worship also have the potential to create tensions between the police and Muslim communities. On 6 October 2005 the Home Office issued its consultation paper *Preventing Extremism Together: Places of Worship*, outlining proposals for measures that could be taken at places of worship "where extremist preachers, clerics or teachers have taken over, or have encouraged supporters to take over . . . and use them to disseminate extremist views

and practices". The paper opens by extolling democratic British values of "tolerance and free speech" and refers to problems of extremism in "all places of worship of whatever faith" – but mosques are clearly the main target.

The paper notes that the Charity Commission already has powers to take action against many places of worship if they have links with terrorism. It adds "There is already scope to prosecute those who foment extremism at or near places of worship with the current offences of incitement and the proposed offences of encouragement to terrorism and dissemination of terrorist publications". But it argues that more powers may be needed in cases where "it is unclear which individual is causing the problem." Where the police believe that people are giving backing to proscribed organisations, or encouraging terrorism (as under the new Bill), they will be able to apply for a court order requiring those "controlling" the place of worship to take certain steps to prevent the extremist activities. Any places of worship which fail to comply will be guilty of an offence and further orders could be obtained if the activities continue, restricting use of the place of worship and even temporarily closing parts or all of the premises. The Home Office concedes that these actions are unlikely to stop "radicalisation taking place" and that agitators could well move to places that are harder to monitor. Moreover, "extremist followers may also be less exposed to the mainstream moderating influences available in places of worship".

Lord Carlile has stated in his most recent report: "There are some human rights issues around these proposals, given the fundamental nature of freedom of worship. There are practical difficulties too, about defining *worship*, and *places of worship*." He has added, "I doubt the urgency of this additional proposal" and therefore believes that time should be allowed for full pre-legislative scrutiny of any legislation.¹⁹

The use of lethal force

The right to life is the paramount human right. The government is under a duty to protect the public from terrorist atrocities like those of 7 July 2005 and to seek out those who plan such atrocities. The difficult and dangerous tasks of identifying and apprehending them and preventing further outrages falls upon the police and intelligence services. The government has to give them sufficient powers and resources to perform these tasks, but at the same time it is under

a duty to protect the right to life of individual citizens and others living in the United Kingdom from abuse of those powers.

On 22 July 2005, the day after the failed bomb attempts in London, police or security service marksmen shot dead Jean Charles de Menezes, a 27-year-old Brazilian electrician, in the belief that he was a potential terrorist. He was shot under a new "shoot-to-incapacitate" policy – a policy which is bound in almost all circumstances to lead to the death of anyone shot. This policy was drawn up by the Association of Chief Police Officers, to deal with suicide bombers who might blow up themselves and ordinary citizens nearby at the point of arrest if not immediately incapacitated. This shift in policy was apparently agreed without reference to ministers or the Home Office, but it significantly moves the boundary of what is permissible and reduces the margin of protection for suspects who may, as we have seen, be entirely innocent people.

As is well-known, Sir Ian Blair, the Metropolitan Police Commissioner, wrote at once to the Home Office in an attempt to prevent the Independent Police Complaints Commission (IPCC) from investigating the shooting and barred the IPCC staff from the scene. He requested that the Home Office draw up "rules of engagement", similar to those provided for the military in a war. He described discussing with the Prime Minister "maximising the legal protection for officers who had to take decisions in relation to people believed to be suicide bombers". The Home Office refused his request and the IPCC inquiries began a few days later. In the atmosphere of heightened fear in July there was a danger that the atrocities and failed bombing would not only strengthen the coercive powers of the police, but also reduce their already low accountability for fatal incidents.

Sir Ian Blair apologised for the killing of Jean Charles de Menezes, but insists that the police must be able to shoot to incapacitate someone whom they believe is about to detonate a bomb. On 26 October the Metropolitan Police strongly defended the policy. Assistant Commissioner Steve House said, "In a terrorists scenario, the action must be decisive and end any threat to the public. If there was a way we could incapacitate that person without the use of lethal force we would use it."

Section 3 of the Criminal Law Act 1967 states that "a person may use such force as is reasonable in the circumstances in the prevention of crime, or in the effecting or assisting

in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large". Police officers may use force "only when strictly necessary and to the extent required for the performance of their duty".²⁰ They also have a right of self-defence.

The authorities and courts have always given the police a wide margin of discretion in the use of fire-arms, recognising the difficult circumstances in which most such incidents occur. This was especially the case with Irish-related terrorism from 1969 to 1993 when the security forces killed 350 people and there were well-founded suspicions that a "shoot to kill" policy was briefly in operation. Only 18 cases came to full trial and two convictions, for murder and manslaughter, resulted.

The recent decision not to prosecute two police marksmen for the lethal shooting of Harry Stanley (who had the misfortune to be carrying a table leg) has also highlighted the fact that no officers have been convicted for any of the 30 fatal shootings of civilians that have occurred over the past 12 years. Further, the police and its representative bodies have put the authorities under intense pressure not to investigate such cases. Tony Blair has also publicly defended the shooting and the overall police record in fatal shootings. He says that in the nine years of its existence, armed officers from the special fire-arms unit have responded to 109,000 calls, fired shots 58 times, wounding 18 people and killing eight. "The commentary that the Met is somehow 'trigger happy' is not borne out by this."

The European Convention establishes a non-derogable right to life in Article 2 – the very Article that justifies the government's anti-terrorist policies. But this right cuts both ways and should apply to actions of the security forces as well. However the Standing Commission on Human Rights in Northern Ireland (SACHR) drew attention in 1993 to "a substantial divergence between the legal standard for the use of lethal force in the United Kingdom . . . and the prevailing international standards."²¹

In 1995, the European Court itself condemned authorities' lack of appropriate care in control and organisation of the Gibraltar arrests that ended in three IRA terrorists being shot dead.

The Menezes inquiry will prove to be a significant test case for the IPCC and British justice.

Prolonged detention without charge

The proposal to prolong the period of detention for terrorist suspects

for up to three months is a wholly disproportionate power that is liable to abuse (see also the “at a glance” table, page 13). The Terrorism Bill seeks this prolonged period of detention for terrorist suspects on the grounds, set out in clause 20(3), that it is necessary to:

- “obtain relevant evidence whether by questioning him or otherwise”;
- “to preserve relevant evidence”; or
- wait upon “the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence”.

The Act stipulates that continued detention would have to be approved by a district judge on a weekly basis. The judge would have to be satisfied that the further detention was necessary and may extend the period of detention for a shorter period than specified in a warrant where there are “special circumstances”. The police officer or other investigating official in charge of the detained person’s case must either release the suspect or secure his or her release if the reasons for holding them further no longer apply.

The official case for the extension

Two notes set out the authorities’ case for detention for up to three months – a note annexed to the first draft Terrorism Bill in September and a further memorandum attached to the government’s revisions of that draft released on 5 October.²² There is considerable overlap between the two documents, though the second memorandum attaches case studies, actual and theoretical. The heart of their case is that public safety demands earlier intervention in dealing with modern “international terrorism” than was the case with Irish terrorists. It is no longer safe to intervene at or near the point of attack with potential terrorists who may be suicide bombers or might use “chemical, biological, radiological or nuclear weapons”. Thus the gathering of evidence in often “extremely complex” cases must begin effectively after arrest, giving rise to the need for a longer period of detention to enable evidence to be gathered and for “high quality charging decisions to be made”.

This argument is buttressed by a number of consequent justifications for seeking longer detention periods, including:

- global terrorist networks make it necessary for the police to pursue inquiries in many different jurisdictions, “many of which are not able to operate to tight time-scales”;
- establishing the identity of detainees, who may use forged or stolen identity documents, takes time;
- decrypting and analysing heavily-encrypted computer data that needs to be incorporated into an interview strategy also takes time;
- complex forensic testing, especially where sophisticated weaponry is involved, is time-consuming and causes delays (e.g., it took over two weeks to gain safe access to the “bomb factory” after the July 7 attacks in London);
- there are other difficulties in recovering of evidence from a crime scene;
- obtaining records of mobile phone use and analysing the data takes time;
- there is a large volume of evidence in criminal cases involving complex terrorist networks;
- there is often a need to find and use interpreters;
- there is a need to allow for regular religious observance; and
- the requirement for consultations by a single solicitor serving multiple suspects causes delays.

Commentary

As has already been widely noted, a maximum period of three months detention without charge or trial is equivalent to a six-month custodial sentence served with good behaviour, following conviction for a criminal offence. It is 30 times the maximum period that any suspect can be detained for any serious, non-terrorist offence (e.g. murder, rape or serious fraud). This proposal was severely criticised both by Lord Lloyd and Lord Steyn, the former law lords, on BBC1 *Panorama* on 10 October and also by Lord Steyn in an interview published in the *Independent*. Lord Steyn warned:

Experience shows that governments frequently ask for more powers than they need, and when they get those powers, they abuse them from time to time.

Any change to the current two-week period would require more

justification than has so far been produced. The two-week limit was the product of intensive review of over three decades of UK counter-terrorism legislation, including a series of cases in the European Court of Human Rights,²³ and culminating in extensive parliamentary debate prior to the Terrorism Act 2000. In practical terms, Democratic Audit analysis of the statistics for detention under the existing powers, suggests that there is no difficulty in charging suspects within the two-week period. It is right that the Home Office and police should make a transparent case for a longer period of detention, but it does not stand up to scrutiny. (Moreover, the three case studies from 2005 and 2004 are all to go to trial and the details given in the SO13 report could prejudice a fair hearing.) No more does the Home Secretary’s assurances that few cases would go the full three months.

It is a well-established principle, laid down in statutory law, that the police may only arrest a person where they have reasonable suspicion that he or she has committed a criminal offence.²⁴ Therefore there must already be some grounds for their belief and some evidence to support a charge under the very broad range of terrorist and non-terrorist criminal offences. It should therefore be possible for the police and Crown Prosecution Service to identify an appropriate “holding charge” that would enable a suspect to be brought before a competent court within two weeks. In such circumstances, subsequent and more serious charges can be laid against the suspect when the full evidence available has been amassed and analysed.

Conclusions

Article 5(3) of the European Convention requires that anyone who is arrested or detained must be brought *promptly* before a judge and is entitled to trial within a reasonable time. It remains our view that the current limit of two weeks pre-charge detention is the maximum period that would be compatible with Article 5(3). The government’s own survey of practice in similar countries shows that three months’ detention far exceeds the period of detention without charge in six similarly developed countries.

Lord Lloyd has said that the proposal “borders” on internment and is “intolerable”. Amnesty International has added weight to Lord Steyn’s fears, warning from its long experience that “prolonged periods of pre-charge detention provide a context for abusive practices”. A variety of experts have

Periods of detention without charge (survey of selected nations)²⁵

Country	Pre-charge detention
Australia	Normally 24 hours, 48 hours with interpreter. Can be extended by warrant up to 168 hours (seven days).
France	Normally 48 hours, with two 24-hour extensions possible in terrorist cases.
Germany	24-48 hours
Greece	Suspects must be brought to public prosecutor within 24 hours
Norway	48 hours
Spain	72 hours incommunicado + up to two more days

suggested that there are legal means for dealing with the difficulties the police have adduced in support of the proposal.

Further, Lord Carlile has also noted that a number of individuals formerly held in indefinite detention and then subject to control orders under the Prevention of Terrorism Act 2005 have been detained in custody under immigration powers with a view to deportation. "With the exception of one individual, all those recently detained as described above could not be deported without at least one MoU [Memorandum of Understanding that they would not be tortured, etc.] being reached. When that will be reached is uncertain. In my view it is of real concern that detention without charge should be reinstated in effect for this group of people unless there is an early and realistic prospect of the relevant MoU being reached presently."²⁶

Stop and Search Powers

Intensive use of police stop and search powers seem most likely to turn people against the police, especially among members of any community that feels that it is being unfairly targeted. The police can stop and search anyone whom they "reasonably suspect" of being a terrorist (under the Terrorism Act 2000). In 2003-04, 29,407 stop and searches were carried out under the Act, 77.5 per cent in London. A BBC survey has now shown that they are being used more intensively since 7 July: more than half the forces surveyed had stopped more people in the past three months than in the previous year.

The use of stop and search against Asians has been rising far faster than for whites in the past few years. The Joint Committee on Human Rights has noted "mounting evidence that the powers under the Terrorism Act are being used disproportionately against members of the Muslim community in the UK. According to Metropolitan Police Service data, the stop and search rates for Asian people in London increased by 41% between 2001 and 2002, while for white people

increased by only 8% over the same period."

Designated areas

Senior officers can also designate areas in which police can stop and search people and vehicles without having a "reasonable suspicion" that they are terrorists. The whole of London has long been continuously a designated area under rolling 28-day authorisations. The Metropolitan Police misused these powers to search and harass protestors outside the Arms Fair in Docklands, London, in September 2003. The then Home Secretary David Blunkett's first reaction was to challenge this use of the powers that he had plainly been unaware of. The Newton review report warned that the powers could cause individual cases of injustice or harm, "creating a false sense of security" while real terrorists went about their business, and bringing special powers into disrepute.²⁷ The Appeal Court held that the police action was "a close call", but nevertheless found it acceptable. The case is now going to the House of Lords.

More recently, over 600 people were stopped and searched in the Brighton area during the Labour Party conference. Walter Wolfgang, the 82 year old party delegate, was simply the most famous victim of zealous police action. We have heard evidence of other heavy-handed policing. For example, a 72 year old woman, driving a soft-top Volkswagen in Brighton, was stopped and searched twice within 20 minutes, even though the police in the second incident knew she had just undergone the same process. A delegate to the conference itself went outside for fresh air and was stopped and searched and his delegate pass was confiscated.

Out of 8,120 uses of stop-and-search powers in designated areas in 2003-04, there were only five arrests for offences connected to terrorism, all of white people, though there were also arrests for other offences. The police defend the low arrest and even lower conviction rates on the grounds that stop and search is intended to

disrupt and deter terrorism, more than detect it. Hazel Blears, the Home Office minister, argues that the powers are used "in support of structured counter-terrorist operations . . . [they] help to deter all kinds of terrorist activity by creating a hostile environment for would-be terrorists to operate in."²⁸ Unfortunately, zealous and seemingly indiscriminate use of the powers is also "hostile" for many more non-terrorists.

The Newton report expressed concern about the extensions of police powers to search, examine, photograph and fingerprint persons at police stations. The report noted, "Most of the reported uses of the Part 10 powers have not been related to counter-terrorism." The government responded that while most uses were not related to terrorism, the police welcomed the new powers which had proved to be "appropriate and useable".

The danger is that all such powers contaminate criminal justice and make the police more powerful in their dealings with the public, creating "injustices and harm" to individuals and a "hostile environment" for many people in designated areas while contributing rather less to combating terrorism. Are we in danger of resorting once more to David Omand's "bludgeon"? Moreover, there should be concern about seeking Parliament's consent to powers to combat terrorism which members might very well withhold if they were simply to be "appropriate and useable" for other non-terrorist purposes.

Using Intercept Evidence in Court

As we noted above, the two key motors of an effective counter terrorism strategy are accurate and reliable intelligence and the ability successfully to prosecute those guilty of terrorist or criminal plans and acts. The Newton committee observed in the course of its inquiry into the 2001 Act that nobody had suggested that it has been impossible to prosecute a terrorist suspect because of a lack of available offences.²⁹ At the same time, there is mounting concern that the government is watering down fundamental principles and safeguards of existing criminal law in order to make it easier to prosecute terrorism offences.

This concern has recently been fuelled by the Prime Minister's equivocal comments at the Labour Party conference about the need to look again at the primary responsibility of the criminal justice system to protect the innocent. Tony Blair was then asked at his regular

press conference on 11 October whether Brtian was passing through "a kind of watershed moment in the way that we view the criminal justice system". He replied:

I think I do accept that actually, but I don't maybe put it as starkly as you have put it. Because it of course must be the duty of any criminal justice system to protect the innocent, but I want to just tell you this absolutely frankly . . . If people want us to tackle the new types of crime today, international terrorism, this very brutal violent organised crime, antisocial behaviour . . . you can't do it by the rules of the game we have at the moment, you just can't . . . you can't do it, it is too complicated, too laborious, the police end up being completely hide-bound by a whole series of restrictions and difficulties, it doesn't work. Now if people want me to deal with this, I can deal with it, but my honest view is that the only way you deal with it is by saying you have got to put the duty to protect the law abiding citizen at the centre of this system, and that comes first.

The Home Secretary Charles Clarke was asked about the low ratio of convictions to arrests under the Terrorism Act at the Home Affairs Committee on 11 October. Clarke replied:

There is a timescale of cases going through but what the statistics illustrate is the difficulty of getting evidence to bring prosecution in a number of the cases...we are looking very closely at whether we are using the current legislation as effectively as we could to address [this problem]. I come back to the same point the whole time, it is about evidence in a very, very difficult area of police work.

And yet the government refuses to introduce a simple change to the law in the new Bill which would make more evidence available, make prosecutions easier to bring to fruition and make unnecessary much of the government's tampering with due process and interference with basic civil and political rights. The Regulation of Investigatory Powers Act 2000 bans the use of domestic intercepted communications as evidence in open court. The UK is the only country other than Ireland to have such an absolute prohibition in place. (Strangely, foreign courts *may* use British if the security services are willing to provide it.) The prohibition is a major obstacle to mounting

prosecutions and therefore provides an excuse for exceptional measures – extended pre-charge custody, control orders, deportations and the like. There is, as the parliamentary Joint Committee on Human Rights noted, "overwhelming support" for allowing its use in the courts, subject to the safeguard that the security forces could protect damaging releases. Lord Lloyd, the former law lord who conducted the 1996 review of counter terrorism laws, says that the ban is "potty". In 1996, he found at least 20 cases of Irish-related terrorism in which intercept information would have enabled prosecutions for serious offences. Lord Carlile, in his latest report, argues, "the *potential* to use intercept evidence should be available. This would not mean that it would *have* to be used...it would help to secure convictions."

Charles Clarke played a dead bat on this issue before the Home Affairs Committee. There were, he said, "two very serious issues which we are trying to wrestle with . . . The first is in using evidence of this kind, to what extent do we reveal to the potential terrorist organisation our means of collecting intelligence." But as Lord Carlile observes, the authorities would not be obliged to use intercept evidence that would assist terrorist organisations. Clarke said the second serious issue was,

if a phone conversation...were to be adduced in court as evidence in this area, your lawyers would say "We would like to see all the material of all conversations that have taken place...that you have"...the volume and quantity of material that would then need to be kept to deal with that and the amount of court time involved in it would be absolutely enormous and would make the difficulty of getting that intercept evidence that much more difficult.

The main way the government has been looking at this issue was, Clarke said, foreseen by the Newton Committee, which is to have some kind of sifting process beforehand with a judge "who actually goes through and deals with the point I have just described by saying that only certain types of material are relevant."

The Use of Torture Information

There are concerns that the government makes use of information extracted under torture in other nations in contravention of its international human rights obligations. In 2004, the Court of Appeal ruled that the government could rely on information obtained by torture,

including to justify detention, provided the government was not complicit in the torture. Government ministers have not unequivocally given assurances that they do not rely on such information in secret detention, proscription and control order proceedings. For example the Home Secretary, told the Joint Committee on Human Rights (JCHR) in February 2005 that he did not believe that information obtained by torture was used in detention cases heard by SIAC, "but we are in a serious difficulty here in that proving a negative is a difficult thing to do." The JCHR has noted the Prevention of Terrorism Act 2005 "'was silent" on this question, despite the fact the government might well rely on material obtained by torture to obtain control orders;³⁰ and has expressed its concern about whether the government has a system for ascertaining whether intelligence reaching it on people allegedly involved in terrorism has been obtained by torture. The UN Committee Against Torture has recommended that the government give formal effect to its expressed intention not to rely on or present in proceedings evidence known or believed to be obtained by torture. The JCHR has endorsed this recommendation.³¹

Proscription

The 2005 Bill extends the grounds for proscription under the Terrorism Act 2000 to cover non-violent organisations that glorify terrorism, "*whether in the past, in the future, or generally*". Under the 2000 Act belonging to a proscribed organisation carries a maximum penalty of ten years in jail. It is sufficient to support or "further the activities" of such an organisation by literally any means – even to wearing a T-shirt or displaying a badge that may indicate membership or support. The leap from proscribing groups involved in violence and terror to non-violent groups, such as presumably the Prime Minister's prime target, Hizb-ut-Tahira, would bring state censorship of political views to Britain; and just wearing the wrong T-shirt could someone in jail.

Deporting terrorist suspects and "preachers of hate"

The government has been for months under pressure from the popular press to deport "preachers of hate" and others who disseminate extremist views and on 24 August Home Secretary Charles Clarke published a list of grounds on which foreigners considered to be promoting terrorism

could be deported or excluded from the UK. The list of “unacceptable behaviour” was designed to include those said to provoke or glorify terrorism and indirectly to threaten public order, national security, or the rule of law. However, Halya Gowan, for Amnesty International, observed, “The vagueness and breadth of the definition of ‘unacceptable behaviour’ and ‘terrorism’ can lead to further injustice and risk further undermining human rights protection in the UK.” The Muslim Council of Britain said the list was “too wide and unclear”.

It is said that after 7/7 Clarke ordered an immediate review of his powers to exclude and deport people, saying he wanted to ensure that any non-British citizen suspected of inciting terrorism was deported immediately. The grounds for deportation were:

- fomenting, justifying or glorifying terrorist violence
- seeking to provoke terrorist acts
- fomenting other serious criminal activity; and
- fostering hatred that might lead to inter-community violence.

As part of a raft of measures to crack down on “preachers of intolerance and hatred”, the Home Office has been assembling a new database of foreign-born radicals accused of encouraging acts of terrorism. The global database will list those who face automatic vetting before being allowed into the UK. It will also list “unacceptable behaviour”, such as radical preaching and publishing websites and articles intended to foment terrorism. Articles already published, as well as speeches or sermons already made, will be covered by the new rules.

Tabloid newspapers have been publishing their own lists of radical Islamic clerics who could fall foul of the new measures. Clarke himself announced that the cleric Omar Bakri Mohammed, who left Britain for a visit to Lebanon, would not be allowed back. Others who could come under scrutiny include Mohammed al-Massari, the Saudi Arabian dissident whose website carried images of attacks on British troops in Iraq. The Islamic Human Rights Commission meanwhile has issued a statement, saying: “The IHRC views the new grounds for deportation as the criminalisation of thought, conscience and belief.”

Negotiating assurances on torture

The government also hopes that a

strong deportation policy will enable it at last to deport foreign terrorist suspects who cannot at the moment be sent back to their countries of origin because there are well-grounded fears that they would be tortured or ill-treated by regimes which are known to practice torture on dissidents. Ever since the European Court ruled in 1996 that the government could not deport Karamjit Singh Chahal, a leading Sikh separatist, to India on security grounds, the government has been legally prohibited from deporting foreign terrorist suspects who might also be tortured. The Court held that Chahal was likely to face torture in India and in sending him back the UK would violate Article 3 of the ECHR which outlaws torture. It was to overcome this obstacle that the government resorted to indefinite detention without charge for a number of such individuals; and then when the House of Lords ruled that this too was illegal, introduced control orders to confine them.

The government is now seeking to negotiate assurances from the countries from which these former detainees come that they will not be tortured or ill-treated if they are returned there. The idea is that the courts will accept these assurances and allow deportations to proceed. So far only Jordan has given the assurances that the government is seeking. Meanwhile, former subjects of detention and control orders are now being detained under immigration procedures with a view to deportation and may well, as Lord Carlile has noted, be subject once more to another category of indefinite detention without charge.

The Home Office insists that it will not deport people if there is a real risk of them being tortured. Lord Carlile has observed, “I believe it is realistically possible that some offending countries may agree to an internationally verifiable process that would ensure, at the very least in connection with those deported and their families, proper standards would be applied”.³² However, critics of the government say any such assurances are worthless and anyone suspected of supporting terrorism should be put on trial in this country. They point out that countries that practice torture and subject dissidents to inhumane and degrading treatment do not admit to their violations of human rights; and that even if their governments give assurances, there can be no assurance that lesser officials will observe them. Manfred Nowak, the UN Special Rapporteur on Torture, said in August that agreements with countries

which might have committed human rights abuses in the past was “not an appropriate tool to eradicate this risk”.

The Prime Minister’s intervention

On the issue of deporting foreign terrorist suspects, or those who meddle or engage in extremism, to countries where they may be tortured, Tony Blair said at a press conference on 26 July:

Let me just say this to people very very clearly, this is the beginning of, and there will be lots of battles in the months ahead on this, let’s be quite clear because of the way that the law has been interpreted over a long period of time, and I am prepared for those battles in the months ahead. I am also absolutely and completely determined to make sure that this happens.

At a second press conference on 5 August he pressed the issue still further, saying, “Let no-one be in any doubt, the rules of the game are changing.” He described the government’s plans to secure assurances from Jordan, Algeria, Lebanon and some seven other nations that deportees would not be tortured or ill-treated. Such assurances, he said, were acceptable to the courts of other European countries subject to the European Convention on Human Rights:

So it is important to test this anew now in view of the changed conditions in Britain. Should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights.³³

Lord Carlile has condemned Blair’s proposal that “the judiciary might be directed by statute towards a particular interpretation of Article 3 and possibly other connected national and/or international legislation. That is a very bad idea. The Convention is written in happily plain language.” He added:

Statutory judicial interpretation (besides being a contradiction in terms in this context at least) could lead to unwelcome and unnecessary tension between the executive and the judiciary.³⁴

The courts will almost certainly be asked to adjudicate upon the government’s measures to deport foreign terrorist suspects and extremists, and upon the legality of prolonged detention without trial and other human rights aspects of the Terrorism Bill. Lord Phillips, the Lord Chief Justice, has signalled clearly

that the judiciary will not be “brow-beaten” by politicians who potentially sought “scope for bending the law or trimming sails.”³⁵

This is properly the case. As Cherie Booth recently stated in a recent lecture in Malaysia,

it is clear that the responsibility for a value-based, substantive commitment to democracy rests in large part on judges. The importance of the judiciary in this context is that judges in constitutional democracies are set aside as the guardians of individual rights. Their supervisory role becomes intimately tied up with ensuring and enhancing a democracy that is participatory, inclusive and open . . . Contrary to the sceptics of judicial review who believe that [judicial] power frustrates the will of the people, it will already be clear that I am of the view that judicial review is a vital ingredient for the attainment of true, inclusive democracy.³⁶

Accountability and oversight

There is concern that the government needs to consider ways in which it could increase the independent democratic scrutiny of its assessment of the level of threat from international and domestic terrorism so as to enable Parliament and the public to reach a better informed judgment of the measures that are required by the exigencies of the situation, especially as some of those measures put at risk long treasured aspects of the British way of life. The Joint Committee on Human Rights has argued for example that “we have never been presented with the evidence which would enable us to be satisfied of the existence of a public emergency threatening the life of the nation, but have proceeded on the basis that there might be such evidence.”³⁷

We shall consider the question of public scrutiny, accountability and oversight more fully in our final report. Issues we will examine are the higher than usual level of cross-party consensus over national security issues, exacerbated by the fear that the political parties have of being out-flanked on such vital matters. Parliamentary procedures are often largely bypassed. The government is reluctant to present intelligence information to Parliament, and many aspects of counter-terrorist policy are protected from disclosure by exemptions under the Freedom of Information Act 2000. The mere existence of the Intelligence and Security Committee,

a non-parliamentary committee for investigating the intelligence and security agencies, effectively closes off certain areas of investigation to parliamentary committees.

Yet this Committee, admirable though much of its work is, is responsible to the executive, not to Parliament.

Individual Acts and parts of Acts are subject to scrutiny by reviewers. But though there are regular reviews of parts of it, no one body or individual has responsibility for oversight of the totality of anti-terrorist law and policy or the principles underpinning it. As the Newton Committee, responsible for assessing the 2001 Act, noted, “New legal powers are only a part of the total counter-terrorism effort. We have not attempted to assess the Government’s wider counter-terrorism strategy.” As for individual justice, while the proscription of organisations and deportation powers are subject to appeal, evidence can be taken in secret and concealed from the appellant. Control orders must be authorised by the courts, but again evidence may be taken in secret, and the criminal standard of proof is not applied.

Footnotes

- ¹ Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper*, Cm 6147, 2004.
- ² Even the *Guardian*/ICM poll of 22 August 2005 obliged respondents to make this choice, rather than to allow them to choose both security and liberty.
- ³ See further, Klug F, Starmer K, and Weir S, *The Three Pillars of Liberty: Political Rights and Freedoms in the UK*, Routledge, 1996
- ⁴ Home Office, *Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society*, Cm 6147, 2004.
- ⁵ Liberty, *Draft Terrorism Bill, Liberty’s briefing*, September 2005.
- ⁶ Joint Committee on Human Rights, *Review of Counter-Terrorism Powers*, Annex B, HL Paper 158, HC 713, August 2004
- ⁷ Home Office, *op cit*.
- ⁸ see www.news.bbc.co.uk/1/hi/programmes/panorama/432518.stm
- ⁹ The Privy Counsellor Review Committee, *The Anti-terrorism, Crime and Security Act 2001 Review* (“the Newton report”), HC 100, December 2003
- ¹⁰ Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, Cm 3420, October 1996.
- ¹¹ *The LSE Identity Project Report*: June 2005.
- ¹² *Amnesty International’s Briefing on the Draft Terrorism Bill 2005*, October 2005, p.6.
- ¹³ *Proposals by Her Majesty’s Government for Changes to the Laws against Terrorism*, Report by the independent reviewer, Lord Carlile of Berriew Q.C., October 2005
- ¹⁴ *Guardian*, 24 October 2005
- ¹⁵ *Guardian*, 24 October 2005
- ¹⁶ Lord Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976*, Cmnd 8803, February 1983
- ¹⁷ Gresham College lecture, 20 October 2005.
- ¹⁸ Lord Carlile of Berriew QC, *Proposals by Her Majesty’s Government for Changes to the Laws against Terrorism*, October 2005
- ¹⁹ Lord Carlile of Berriew, *op cit*.
- ²⁰ See, for example: Association of Chief Police Officers (ACPO), ‘Briefing Note concerning ACOI Firearms policy and Deadly and Determined Attacks’.
- ²¹ SACHR Annual Report, 1992-93.
- ²² Annex A, *Pre-Charge Detention Periods*, 15 September 2005; and Anti Terrorist Branch (SO13), *Three Month Pre-Charge Detention*, 5 October 2005
- ²³ See e.g. *Brogan v United Kingdom* (1988) 11 EHRR 117; *Brannigan & McBride v. United Kingdom* (1993) 17 EHRR 539.
- ²⁴ Section 24 of the Police and Criminal Evidence Act 1984, as amended by section 110 of the Serious Organised Crime and Police Act 2005.
- ²⁵ Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: A*

Survey of Selected Countries, October 2005.

²⁶ Lord Carlile of Berriew, op cit.

²⁷ *Anti-terrorism, Crime and Security Act 2001 Review: Report*, HC100, December 2003.

²⁸ Letter to the *Guardian*, 7 October 2005

²⁹ Privy Counsellor Review Committee, op cit, para 2076.

³⁰ *Prevention of Terrorism Bill*, Joint Committee on Human Rights, HL 68, HC 334 (Stationery Office, London, 4 March 2005).

³¹ *Prevention of Terrorism Bill*, Joint Committee on Human Rights, HL 68, HC 334 (Stationery Office, London, 4 March 2005).

³² Lord Carlile of Berriew, op cit.

³³ The Prime Minister's press conferences, 26 July and 5 August 2005

³⁴ Lord Carlile of Berriew, op cit.

³⁵ "Don't browbeat judges, chief justice warns Blair", Joshua Rozenberg and George Jones, *Daily Telegraph*, 12 October 2005.

³⁶ The 19th Sultan Azlan Shah Law Lecture, delivered by Cherie Booth QC, Kuala Lumpur, 26 July 2005

³⁷ *Review of Counter-terrorism Powers*, Parliamentary Joint Committee on Human Rights, HL 158/ HC 713 (Stationery Office, London, 21 July 2004).



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