

HOUSE OF LORDS

Select Committee on the Constitution

4th Report of Session 2005–06

Terrorism Bill

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Terrorism Bill

1. The Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.” In carrying out the former function, we regard our main task as being to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution. In the case of some bills, their subject-matter is such that it is plainly of constitutional significance. In the case of other bills, the fact that issues of constitutional principle arise may be less obvious. While it is our duty to draw attention to questions of constitutional principle that arise from a bill, it is not for us to reach a position on the merits of a particular proposal, since this is a matter for the whole House during the legislative process. In this report we consider those constitutional principles affected by the Terrorism Bill other than those concerning Convention rights under the Human Rights Act, which have been addressed by the Joint Committee on Human Rights (JCHR) and which we only cover briefly in paragraph 6.¹
2. There can be no doubt that the Terrorism Bill is of constitutional significance and all its provisions merit close scrutiny. While its purpose is to give greater protection to the whole community against the threat of terrorist acts, it includes provisions that increase the powers of the state in ways that affect traditional liberties protected in common law as well as, potentially, enjoyment of the newer Convention rights under the Human Rights Act. In emphasising the need for the Bill to be subject to close scrutiny, we are not suggesting that it should be subject to any unnecessary delay as it proceeds through the legislative process, but we do however draw the attention of the House to the fact that many of its clauses have not yet been subject to detailed scrutiny in Parliament.
3. The Bill follows a succession of Acts passed in recent years in response to the threat of terrorism, notably the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001, and the Prevention of Terrorism Act 2005, enacted after the decision of the Law Lords that part 4 of the Act of 2001, authorising indefinite detention without trial for certain foreigners suspected of involvement with terrorism, was incompatible with European Convention rights.² The Bill also amends Acts under which the security and intelligence services operate³ and gives effect to two international Conventions relating to terrorism, to which the United Kingdom is a party.
4. While anti-terrorist legislation is not new, each incremental instalment, generated by concerns about public safety, must be considered not only on its merits but also in relation to the totality of such legislation. Some of the Bill’s provisions have already been the subject of much parliamentary debate—notably the new offence of encouragement of terrorism (clause 1) that raises questions about the need for intent, the breadth of the offence, the related concept of glorifying terrorism and the contexts in which the offence

¹ Third Report of Session 2005-06: “Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters”, HL Paper 75-1, HC 561-1

² See *A v Secretary of State for the Home Department* [2004] UKHL 56.

³ In particular, the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000.

may be committed. Some of these aspects—for example, the effect of glorifying terrorism—impinge on the new offences (for instance, in clause 2, the dissemination of terrorist publications). The provision in clause 23 to increase to 28 days as the maximum period for which suspects may be detained, with the safeguard of approval by a senior judge after the first 14 days, is a substantial increase in the powers of the police and therefore of constitutional significance. Similarly, the provision in clause 25 for “all premises warrants” raises a question of constitutional principle so far as the existing law on search warrants is concerned, in that ever since the 18th century the traditional emphasis in the common law has been against “general warrants.”

5. A more general question of principle that arises in respect of legislation enacted in response to a particular situation calling for greater protection of society is whether the additional powers should be regarded as temporary or permanent in character. We have previously drawn attention to the desirability of “sunset” clauses for measures required for only a limited duration.⁴ We have also, in the context of the legislative process as a whole, advocated the need for regular post-legislative scrutiny by Parliament of the operation of new legislation to ensure, with the benefit of hindsight, that it has proved fit for purpose.⁵ The need for a form of retrospective scrutiny applies particularly to the present Bill. For the most part, its provisions are intended to be permanent rather than temporary in their duration. We note however that clause 35 continues the process of review established under the Terrorism Act 2000 by requiring the Secretary of State to appoint a person to carry out an annual review of the operation of the Terrorism Act 2000 and of part 1 of this Bill (when enacted). The report of the independent reviewer⁶ will be laid before Parliament and can then be debated. We do not however regard a report by an independent reviewer—even if he is a distinguished parliamentarian—as necessarily a substitute either for a “sunset” clause or for post-legislative review by Parliament itself. In this context, we also note that clause 36 provides for the extended period of detention under clause 23 to lapse after 12 months, subject to the Secretary of State’s power by order, but subject to parliamentary approval, to continue the clause for a further 12 months.
6. Since the Bill raises issues which affect rights under the European Convention on Human Rights, Parliament must satisfy itself that an acceptable balance is being drawn between the need for the extended powers and the continuing protection, so far as may be reasonably possible, of the Convention rights, and that no unnecessary harm is caused, whether from the viewpoint of criminal justice or in the protection of legal values. The House will therefore wish to give close attention to the statement by the Minister of State, Baroness Scotland of Asthal QC, that the provisions of the Bill are compatible with the Convention rights and in doing so take into account the views of the JCHR report already mentioned in paragraph 1 above. Such Convention rights as the right to liberty and security of the person (article 5) and the rights to freedom of thought and religion, freedom

⁴ See, for example, the Committee’s Second Report of Session 2004-05, “*Prevention of Terrorism Bill*” (HL Paper 66, paragraph 16).

⁵ See the Committee’s 14th Report of Session 2003-04, *Parliament and the Legislative Process* HL Paper 173-I, Chapter 5 (Post-legislative scrutiny).

⁶ Under the Act of 2000 the independent reviewer is currently Lord Carlile of Berriew QC.

of expression, and freedom of assembly and association (articles 9–11) are not absolute, and may be restricted or limited for specific purposes in the public interest. Since the Convention test of proportionality turns on what limitations and conditions are “prescribed by law and necessary in a democratic society,” this increases the need for fully informed legislative decisions to be made about the justification for such powers.

7 December 2005