

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Terrorism Bill

Liberty's briefing for Second Reading in the House of Commons

October 2005

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

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Summary of Concerns

Liberty believes that the Government must take appropriate steps to protect us all from terrorism. Security and freedom (as manifest in the right to life and freedoms of speech and against arbitrary detention) are best reconciled and advanced within the international human rights framework left to the world by the generation which survived the Holocaust and the Blitz. This framework pays considerable respect to questions of public safety, but rightly demands detailed and rigorous thinking from Governments and legislators who find themselves interfering with competing rights and freedoms.

Legislation of this kind should never be devised as a blunt tool for expressing political revulsion at terrifying acts. Statutes must be drafted with greater care than speeches. It is not sufficient that the passing of a new law would send tough signals to Britain's enemies, nor that it somehow makes some of us feel safer. Each proposed interference with democratic rights and freedoms must be carefully weighed against its purported benefits. Such laws are likely to be with us for a very long time and we would respectfully remind Parliamentarians of previous British experiences of the unintended and counter-productive consequences of "exceptional" anti-terror legislation.

We are concerned that a number of measures in the Bill will do little to make us safer but will threaten free speech and protections against unjustified detention. As a consequence they will be counterproductive by undermining national unity in the face of the threat, and criminalising those who are not involved in terrorism.

Of particular concern:

- Proposals to create new offences of encouragement of terrorism and dissemination of terrorist publications are extremely broadly drafted. They do not require any intention to incite others to commit criminal acts. The Terrorism Act 2000 (TA) and existing common law means there is already very broad criminal law. Any difficulty in bringing prosecutions can be

largely attributed to factors such as the self imposed ban on the admissibility of intercept evidence.

- Plans to allow three month detentions without charge will have a severe impact on community relations. This would allow for the equivalent of a six month custodial sentence. It is over twenty times the pre charge detention time limit for murder. If the police have genuine difficulties in gathering evidence we should look for more proportionate ways of dealing with the problem.
- Extension of the grounds for proscription under the TA will criminalise membership or support of non-violent political parties. It is not possible to overstate the implications of criminalising non-violent organisations on the basis of their opinions. This is an incredibly dangerous road for the Government of a democratic state to consider.

Introduction

1. The Terrorism Bill ('the Bill') is the direct legislative response to the attacks on London in July 2005. Liberty agrees that the state is under an obligation to take appropriate steps to safeguard people within the United Kingdom. Now that the UK has been subjected to direct terrorist attack it is inevitable that there be consideration of laws and powers available to agents of the state. However, as so often in the past, there has been a hasty assumption that new legislation must be at least a considerable part of the answer. According to an ICM/Guardian poll almost three quarters of the public believe it is right to give up civil liberties to improve security against terrorist attacks¹. This poll, in common with much of the rhetoric used in recent months, did not permit respondents to choose to protect both freedom and security. Liberty firmly believes that it is both possible and necessary to balance the two. We have fundamental concerns over the human rights and civil liberty implications of the draft Bill. In particular, criminalisation of speech with no intent for others to commit crimes along with powers of excessive detention without charge have the potential to

¹ 22 August 2005

undermine centuries of democratic tradition. Crucially, they are also likely to be counterproductive and will have a significant impact on race and inter-faith relations and the broad national unity that is essential to the flow of intelligence and other vital aspects of cooperation with the authorities. If there are concerns that need to be addressed we will attempt to make constructive suggestions as to more proportionate responses that could be made.

2. In 2004 the Director of Public Prosecutions, Ken Macdonald Q.C., gave evidence to the Joint Committee on Human Rights, saying, "*There is an enormous amount of legislation that can be used in the fight against terrorism*"². We agree that the recent terrorist attacks make it appropriate to review existing laws and that Parliamentarians have an onerous responsibility. We would ask them to bear in mind the comments of the DPP. Further, when considering the proposals in the Bill we suggest a number of questions should apply. Is there a problem that must be addressed? Can it be dealt with by other, more proportionate means? Is there already sufficient criminal law? Will the new measure be counterproductive? Only by applying rigorous standards can rights and freedoms be protected. Oppressive laws will leave a lasting legacy.

3. This Bill will have a huge impact. It is vital that debate is fair and balanced. We have been extremely concerned by recent comments that imply the new offence of 'encouragement of terrorism' is intended to criminalise incitement to murder. On Radio 4's Today programme the day after the draft Bill was published, the Prime Minister said "*...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.*"³ Similarly, in an interview with the New Statesman⁴ the Home Secretary said "*It's simply wrong that it will become illegal . . . to promote a Palestinian state. But 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*". Both these are clear examples of incitement to murder or terrorism. They are already punishable by life imprisonment.

² Transcript of evidence to the JCHR 19 May 2004

³ See BBC News report at http://news.bbc.co.uk/1/hi/uk_politics/4251516.stm

⁴ 26 September 2005

To imply that the new offences in the Bill are somehow necessary to allow prosecution of those who incite to kill is, at best, fundamentally misconceived.

The Bill

Part 1

4. The first section of the Bill deals with offences of ‘encouragement of terrorism’ (Clause 1), and ‘dissemination of terrorist publications’ (Clause 2). The draft bill published in September also contained a separate offence of ‘glorification of terrorism’. This offence criminalised any comment in support of terrorism and was heavily criticised. As a consequence, when the Bill was published ‘glorification’ was subsumed into Clause 1 and became a subset of ‘encouragement of terrorism’. While we are pleased to see that there is now no separate offence of glorification, encouragement is still drafted far too broadly. The offence goes much further than existing criminal law relating to incitement as it allows for acts to be criminalised without the need for any intention on the part of the person committing the offence.

5. A person commits an offence of encouraging terrorism if they publish⁵ a statement (or cause another to) believing, or having reasonable grounds to believe, that people will take it as a direct or indirect encouragement to commit terrorist acts. What are ‘reasonable grounds’ are determined by what it would be reasonable to believe members of the public would understand given the contents and the circumstances and manner of the statement. It is irrelevant whether the statement is understood as encouragement to commit any particular act of terrorism. It is also irrelevant whether anyone was in fact encouraged. Indirect encouragement is defined as a statement which ‘glorifies the commission’ of terrorist offences and which is a statement which members of the public could reasonably infer was conduct that should be emulated. The test for both direct and indirect encouragement is the same (what a person could reasonably understand as encouragement to act or to emulate). This is legally known as a ‘negligence’ test. It makes a crime of careless talk.

⁵ Under Clause 20 ‘publish’ will include any spoken statement

6. This offence is far broader than the previously mooted offence of ‘indirect incitement’. It would be misleading to continue to refer to this offence as ‘indirect incitement’ as it lacks the essential elements of the definition in criminal law. Since the early 19th Century it has been an offence at common law to incite or solicit another to commit an offence. No offence has to be committed or attempted. The reason there is a specific statutory offence of incitement to racial hatred (which is planned to be extended to cover religious hate offence under legislation currently passing through Parliament) is because it is not an offence to hate someone. The crucial point is that the concept of incitement in criminal law has always been dependant on an element of intention. The person has to intend that, as a consequence of their words or actions, another would commit an offence.

7. The current criminal law already allows great scope for prosecution. When the common law of incitement is coupled with the Terrorism Act 2000 (see paragraph 24) the range of existing law is extremely broad. For example, it would be an offence to incite others to belong to a proscribed terrorist organisation or to incite others to support or ‘further the activities of’ a proscribed organisation. There is a huge difference between the intent needed for incitement and the requirement in the Bill that ‘members of the public are likely to understand it as direct or indirect encouragement’. The requirement is not even that it be the defendants’ audience. If members of the public, having regard for the circumstances of publication and its contents, reasonably believe it to be encouragement, that will suffice. This is a crucial distinction. Since the London bombings in July there has been considerable speculation in the press and elsewhere as to how comments made by Muslim clerics can be interpreted. For example, the Mayor of London, Ken Livingstone, recently invited the cleric Yusuf al-Qaradawi to speak in the UK. Much of the criticism he faced as a consequence centred on comments made by Mr al-Qaradawi⁶. It is easy to see how these comments could be interpreted by some sections of the press as encouraging terrorism. For example *The Sun* referred to him as “*A ranting Islamic*

⁶ For example on Newsnight in 2004, when speaking of suicide bombers in Palestine “It is not suicide; it is martyrdom in the name of God. I consider this type of martyrdom operation as an indication of the justice of Allah almighty. Allah is just”

*rabble-rouser who supports suicide bombings by children and brutal punishment of gays”*⁷

8. Other opinions on Mr al-Qaradawi can help demonstrate the dangers inherent in basing criminality solely on third parties assessment. On its website⁸ the Muslim Association of Britain described him as “*The scholarly figure widely considered to be the world’s chief proponent of moderate Islam... [His] rulings are recognised by Muslims around the world as reflecting the balanced nature of Islamic law and its relevance to modern life*”. If Mr al-Qaradawi were to make a statement, what would be the ‘circumstances and manner’ that would help establish his guilt or innocence? Would it be the manner associated with a ‘ranting Islamic rabble-rouser’ or of ‘a scholarly moderate figure’? Would the views of the Muslim Association of Britain or of *The Sun* best represent ‘members of the public’?

9. Similar uncertainty would arise if someone were to interpret comments they had heard as being an encouragement to attempt a terrorist attack. If, upon arrest, they stated their motivation as being something they had heard or read it is likely that the person who made the statement would face investigation and possible prosecution. Having no intention that their comments would lead to an act of terrorism would be of little assistance. Knowing that the statements *had* taken place before an attack would make it difficult for any jury to acquit. This has the potential to lead to a situation where any real or attempted terrorist attack could lead to a retrospective search for anything read, any meeting attended, any conversation had, to allow prosecution. However tenuous the causal link between comment and action prosecution could take place. Whether or not the Government argues that this is not the purpose of the legislation is irrelevant. The duty of parliament is to provide the parameters of legislation so that it does not permit unjust prosecution. It could be suggested that Clause 1(4) provides some protection against improper prosecution by making it irrelevant whether anyone was encouraged to commit an act of terrorism. This however seems intended to allow conviction when there was no attack rather than provide any defence where there has been an attack.

⁷ Britain’s welcome for devil, *The Sun* July 2004

⁸ <http://www.mabonline.info/english/>

10. When giving evidence to the Home Affairs Select Committee on 11 October the Home Secretary was asked that given the breadth of the definition of ‘terrorism’ under Section 1 TA, Clause 1 would criminalise calls to overthrown oppressive regimes. Examples given were North Korea, Zimbabwe and the Ceausescu regime in Romania. The Home Secretary’s response was that this would not be criminal, commenting, *“In fact, I think the Romanian change illustrates my point extremely clearly. What actually happened at the process of change in Romania was precisely as you said, millions of people coming on to the streets and it leading, as a result, to a change in loyalty for the army and so on.”* We believe the Home Secretary was mistaken. Section 1 TA defines terrorism as (among other things) an action⁹ that involves serious violence against a person, serious damage to property or which endangers a person's life, and which is intended to influence the government or intimidate the public for the purpose of advancing a political, religious or ideological cause. We do not see how the overthrow of Ceausescu could fail to satisfy this definition. Anyone who ‘encouraged’ the Romanian revolution in 1989, or indeed who ‘glorifies’ it today, would be committing a Clause 1 offence.

11. The dangers of allowing Clause 1 to be passed are huge. The broad and vague definition and lack of any need for intent means that the sense of certainty essential to a fair and credible criminal justice system are missing. People will be unaware of the consequences of their actions and will have no control over how their words or publications might be interpreted. Liberty believes this offence is unnecessary as there is sufficient criminal law allowing prosecution of those who incite terrorism. However, if there is to be any new offence it must retain the element of intent. If the Home Secretary does not intend that the Romanian revolution should be covered by the offence of encouragement, then this should be reflected in the Bill. Rather than rely on the definition in Section 1 TA, this Bill should clearly define those acts that the Government intends to be covered.

12. Clause 2 criminalises ‘dissemination’ of terrorist publications. It is an offence to distribute, circulate, sell, lend, electronically communicate, etc any terrorist publication. It is similarly an offence to possess such material with a view to

⁹ Which can be outside the UK

distribute etc. A terrorist publication is one that is a direct or indirect encouragement to commission acts of terrorism or which gives information that will be of assistance in the commission of a terrorist act. What constitutes ‘direct or indirect encouragement’ is defined by being understood as such by some or all of the persons to whom it is available. What constitutes ‘assistance’ is something that would be useful in the commission of terrorism and would be understood as such by some or all of those it is available to.

13. This clause is intended to ensure that the disseminators as well as the author of terrorist publications are subject to criminalisation. The offence carries the penalty of up to seven years imprisonment. Many of our concerns with Clause 1 also apply here. In particular, we highlight the unacceptably vague term of ‘encouragement’. All that is required for a publication to ‘encourage’ is that is likely to be understood as such to some of the people to whom it is available. The lack of intention by the person making the statement (referred to when discussing Clause 1) is particularly problematic here. The people disseminating did not write the publication, their opinion of it is not relevant¹⁰, yet they will be convicted if some people to whom it is available are likely to understand it as encouragement. As explained in relation to Clause 1, we fear the current climate might allow extremely broad interpretation of what constitutes encouragement.

14. We are concerned over the chilling effect of Clauses 1 and 2. Casting the net of criminality so wide means that people will be loath to say anything, that might be interpreted as encouragement (or indeed glorification) of terrorism. Similarly, broad criminalisation will mean that no-one will want to distribute any materials that may potentially be considered suspect by others. This is not an area where the criminal law is currently lacking. As well as the incitement offences we have referred to, it is already illegal to incite terrorism by any written or electronic publication,¹¹ to collect

¹⁰ Under Clause 3 (7) (b) it is a defence to show that he had no reasonable grounds for suspecting that it was a terrorist publication. The wording of this however indicates that his view is not relevant, it is simply a defence if he was, for example, misled.

¹¹ Under existing incitement offences at common law.

or make any record of information useful for terrorism,¹² or possess any article for the purpose of terrorism¹³.

15. There are a number of defences available to the offences under Clauses 1 and 2 which essentially protect Internet Service Providers (ISP) and newspapers which do not endorse the terrorist publication. However, under Clause 3 a person providing an electronic service will be deemed to have endorsed a statement if they fail to comply with a notice informing them that they are hosting it. They have 2 days to comply with a notice once served. This means that any ISP will commit an offence of encouraging terrorism if they do not remove the statement without good reason. If such an omission is to be criminalised then it should be a separate and specific crime rather than a Clause 1 or 2 offence. Mistakes or delays in acting upon a notice should not be taken as endorsement. We dispute whether omission of this nature should even be criminal. It cannot be fair that people working for internet service companies are labelled as ‘terrorism offenders’ by a failure to act. If an ISP were genuinely supportive of the statement, then presumably evidence could be produced in court to show that they *actually* endorse it.

16. Clause 5 creates a new offence of ‘preparation’ of terrorist acts. Creation of an offence of ‘acts preparatory to terrorism’ has been suggested on numerous occasions by Lord Carlile, the independent reviewer of terrorist legislation¹⁴. Liberty previously doubted that existence of an offence criminalizing preparatory acts would add any substantive weight to the current law. The Joint Committee on Human Rights reached the same conclusion when it said “*we are not yet persuaded that a new criminal offence of acts preparatory to terrorism would be a valuable addition to the existing range of offences or a means of ensuring that the current detainees (under Part 4 of the Anti Terrorism Crime and Security Act 2000) could be dealt with through the criminal process.*”¹⁵ In particular the broad range of offence under the TA, coupled with offences of attempt and conspiracy, make this a well legislated area.

¹² Section 58 of the Terrorism Act 2000.

¹³ Section 57 of the Terrorism Act 2000.

¹⁴ For example Lord Carlile, Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2002, para 6.5: “if the criminal law was amended to include a broadly drawn offence of acts preparatory to terrorism, (all those detained under Part 4 of ATCSA) could be prosecuted for criminal offences and none would suffer executive detention”.

¹⁵ JCHR Review of Counter terrorism Powers, Eighteenth Report of session 2003-04 at para 67

17. However, despite earlier uncertainty as to the necessity of an ‘acts preparatory’ offence, having seen the Bill we can now see some scope for its creation. In particular, although it is extremely unlikely that anyone will act alone, it may be easier for the prosecuting authorities to charge suspects with acts preparatory rather than with conspiracy. This means that it would not be necessary to prove agreement between the co-defendants, as it would be in a successful conspiracy prosecution. However, while we recognise there may be scope for the offence in principle, we are concerned by the drafting. Whilst the speech offences in the Bill lack sufficient intention, this offence lacks precision in relation to the acts which might trigger it. Both elements are vital to a properly constructed criminal offence which protects the innocent but allows proper prosecution of the guilty. All that is necessary for the offence to be committed is that the person ‘engages in any conduct in preparation’. While we are pleased to see the offence requires an intention to commit or assist in acts of terrorism (intent being missing from so many other offences in the Bill) this is extremely broad. As mentioned previously, if an attack has occurred, or been attempted, the police will naturally follow and examine a trail of events some distance back. Any number of people could have innocently been in contact with the perpetrators. Acts of generosity such as allowing someone to stay at a house might appear significant with the benefit of hindsight. It is easy to see that behaviour unnoticed at the time could be interpreted as suspicious after the event. We are concerned that such an open ended offence would allow ‘intent’ to be too easily implied. The element of intent should be accompanied by a non-exhaustive list that attempts to define those types of behaviour likely to attract criminal sanction. For example the movement of money, the purchase of items or any meeting which does yet not amount to a ‘conspiracy’ due to a lack of common purpose. What is crucial is the element of intent.

18. Liberty does not have any principled concern over the creation of a new offence of ‘training for terrorism’ (Clause 6). It is entirely appropriate that those who offer training to people who commit terrorist attacks should be prosecuted. The offence largely mirrors Section 54 of the TA (weapons training) although it does go further in specifying ‘noxious substances’. It may well be that there is this need for an extension and we have no particular comment to make about it. The new offence also

goes further in criminalising the person who gives the training who ‘knows or suspects’ that the training will be used for terrorist purposes. The inclusion of ‘suspects’ is too broad. Again, with the benefit of hindsight it will be easy to find grounds for suspicion. For example, it could be argued that those who gave flight training to the September 11 bombers should have had their suspicions aroused by the lack of interest in certain parts of the training. At the very least, the offence should require that the person ‘knows or should have known.’

19. We agree that it is appropriate to consider an offence of ‘attendance at a place used for terrorist training’ (Clause 8). Terrorism is an international phenomenon. Someone who receives training at a terrorist training camp overseas should not be able to avoid prosecution in the UK. However, we are again concerned by the broad nature of the drafting. The offence is committed simply by attending the place where the training takes place. There is a need for the person to be aware that the place is used for training, but they do not need to have been involved in any training themselves. Presumably they will commit an offence if they realise that there is training being carried out but do not leave immediately. On a strict reading of the Bill they will in fact commit an offence even if they *do* leave the training camp immediately. In any event, this allows for conviction followed by a lengthy custodial sentence simply for being in a particular place. The basis for criminalisation must surely be through action, word, intent or deed meriting criminal sanction. Most offences require both action (*actus rea*) and intent (*mens rea*). This offence requires neither.

20. Clauses 9 to 12 introduce a range of offences involving radioactive devices, materials and facilities. We have no particular issue of principle with these, particularly as the use of nuclear materials and threats to nuclear facilities would be devastating weapons in a terrorist arsenal. We note that the offences in Clause 9 (making and possession of devices or materials) and Clause 10 (misuse of devices and material and damage of facilities) require intent for conviction. We would again suggest that the requirement for intent should feature throughout the Bill. Clause 12 extends the offence of criminal trespass in the Serious Organised Crime and Police Act 2005 (SOCP) to specifically cover civil nuclear sites. While we do have concern about the criminalisation of trespass generally, our objections to SOCP mainly relate

to the Secretary of State's powers to designate, and difficulty in telling which areas are subject to restriction. The Secretary of State's designation is not relevant here as the clause specifies the areas affected. However, we are concerned about the area covered. Many nuclear sites have perimeter fences within the actual boundary of the land covered by the exclusion. It is not a defence under SOCP if you trespass without knowledge of the boundary (the only defence is if you did not know there was any exclusion area). Clause 10 means that any anti nuclear or other peaceful protestor who goes to demonstrate around a perimeter fence is likely to be committing an offence. Liberty is already extremely concerned about the use of anti-terrorism powers against peaceful protestors¹⁶. The proposed extension of SOCP will provide further scope for this to happen. We would like to see a specific defence made available to anyone who was not aware that they were trespassing.

21. Clause 17 creates provision for a range of specified offences committed abroad to be treated as having been committed in the UK. As we have already stated, terrorism is international so it is appropriate that those who plan terrorist attacks in the UK whilst abroad should be punishable. However, we have two principal concerns with this clause. Firstly, the specified offences include all the offences contained in this Bill. Therefore, the objections we have to offences of encouragement, glorification and so on apply to this offence. It appears that under Clause 13 it will be an offence for any person (it does not have to be a British citizen) anywhere in the world to say anything that 'glorifies' terrorism. Secondly, there appears to be no specification that there is any intention to commit an offence in the UK. All that is required for criminalisation is that an act takes place elsewhere that would be an offence if committed in the UK. This appears to mean that any person encouraging an act of terrorism overseas, with no reference or connection to the UK, could be convicted of an offence here. Even without the vagueness and arbitrary nature of these offences, we query whether it is the Government's intention that people be tried in this country for such a broad range of acts or statements that have nothing to do with the UK. Under the Suppression of Terrorism Act 1978 (STA) any of a number of specified offences¹⁷ committed in any of the 40 European countries to have ratified the

¹⁶ In particular, the use of stop and search etc powers under s.44 Terrorism Act 2000.

¹⁷ Murder manslaughter, kidnapping, false imprisonment, hostage taking, causing explosions or firearms offences or conspiracy to do any of these.

European Convention on the Suppression of Terrorism can be treated as having been committed in the UK. Similarly, there are a number of offences¹⁸ that can be tried in the UK wherever they are committed. Clause 17 should be restricted to similar offences to those covered by the STA¹⁹.

22. Clause 18 extends liability for any offence listed in the first part of the Bill to cover to company directors or other officers if the offence is committed by a corporate body. Liberty does not propose to deal in detail with the law relating to existing criminal and civil liability of company officers for corporate acts. However, we hope that the Government and Parliamentarians considering the Bill will appreciate that the broadness of Part 1 is likely to mean offences will be committed in a wide range of situations where the officers show ‘neglect’.

23. We anticipate that the Government’s response to criticisms of broadness and vagueness will be to point out that Clause 19 requires that no prosecution under Part 1 can take place without the consent of the Director of Public Prosecutions (DPP). While it is certainly preferable to have this requirement it does not negate the problems with the speech offences in particular. Overbroad offences are not remedied by requiring permission to prosecute. The essence of criminal law should be a degree of certainty, a knowledge of the boundary between those acts that are lawful and those illegal. Overbroad offences mean that many individuals may be technically guilty of an offence and the State chooses which to prosecute. This certainly will not have any impact upon the chilling factors identified earlier.

PART 2

24. Clause 18 allows or the extension of the grounds for proscription under the TA. This will now cover non-violent organisations who ‘glorify’ terrorism. There are currently 25 organisations subject to proscription, including al-Qaeda, Hamas and many other groups associated with international terrorism. Being a member of, or

¹⁸ Piracy *jure gentium*, breaches of the Geneva Conventions, offences on British controlled aircraft or hovercraft, hijacking and hostage taking. Most of these relate to various international conventions.

¹⁹ Which would then cover all countries, not just those European nations that have signed the convention.

belonging to, a proscribed organisation is an offence under section 11(1) TA, and carries a maximum penalty of ten years imprisonment. Under section 12 TA, it is sufficient to support or 'further the activities of' an organisation by literally any method. The TA stresses that support is not restricted to money or property terms. Organising or addressing a meeting, with full knowledge of its aims to support or further the activities of a proscribed organisation, is an offence under section 12. All of the offences under section 12 are punishable by 10 years imprisonment. It is even an offence to wear an item of clothing, or to wear or displaying any article which can give rise to reasonable suspicion of membership or support of a proscribed group (section 13 TA).

25. The Government clearly intends that this extension will allow groups such as Hizb-ut-Tahira to be proscribed. The Prime Minister stated his intention to do this in August. There is a vast difference between proscribing groups involved in violence and terror and non-violent political groups. It allows for state censorship of political views. The Government has accepted that creating an offence of 'glorification of terrorism' goes too far and has removed this offence from the Bill. Because of this we cannot see any justification for allowing the extension to the grounds for proscription as it goes further than the offence of 'glorification' in the draft bill. The Government is effectively saying that it accepts that it is wrong to criminalise a person for glorifying terrorism but will criminalise those who support a group that glorifies terrorism. An attempt has been made to limit this by specifying 'unlawful glorification'²⁰. This does not provide a realistic limitation. A decision to proscribe is made by the Home Secretary, not a court. As the Prime Minister has already stated an intention to proscribe political parties it is difficult to see how this could be prevented unless no extension to the current grounds were allowed by Parliament.

26. We believe that banning non-violent political organisations will be extremely counterproductive. Whatever we may think of organisations that praise terrorists, banning and criminalising them will only create martyrs and drive debate underground. We must accept that there are people in this country who believe that Islam is at war with western democracy. Many have profound conceptual concerns

²⁰ The word 'unlawful' was missing from the draft bill.

with definitions of terrorism which, whilst rightly condemning violent acts of individuals and groups, ignore comparable acts by Governments. The practical challenge is to establish and persuade that whatever the complexities and injustices of world affairs, Britain is not at war with any belief or religion, and most importantly, that the murdering of innocent civilians should be abhorred by all. Sending those who express unjustified and unpleasant views (or their supporters) to prison will make them martyrs. Criminalising expressions of belief will not make us safer from terrorism. This risks adding weight to the arguments of those who maintain the UK applies double standards in its treatment of Muslims.

27. One of the most contentious clauses in the Bill is the proposal to allow police detention of terrorism suspects to be extended from the current limit of fourteen days to three months. This is over twenty times the pre-charge detention limit for murder. It would effectively allow the equivalent of a six month custodial sentence to be imposed without any need for a charge to be brought.

28. *Habeas Corpus* is an ancient tradition of the civil law. Clause 39 of the Magna Carta states “*No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgement of his peers or the law of the land.*” This right against unjustified detention was later enshrined in statute in the Habeas Corpus Act 1679. More recently Article 5 of the Human Rights Act 1998 provides protection of liberty and security of person.

29. Naturally, liberty is not an absolute right and the state must be permitted to detain individuals for a reasonable period, without laying charges, to allow investigation. Currently terrorism suspects can be detained for a maximum fourteen days. The proposal to extend this to three months is a direct response to a request by the Association of Chief Police Officers (ACPO) in a press release issued shortly after the London bombings. ACPO claimed that due to difficulties with collecting evidence, three months detention would be a more appropriate for terrorism suspects. The legality of pre-charge detention is governed by Article 5(3) of the HRA. This provides that anyone arrested or detained must be brought before a judge within a

reasonable time and tried or bailed²¹. We think it is extremely unlikely that any attempt to allow three month detention could be compatible with Article 5, regardless of whether the detainee is regularly brought before a judge to authorise detention as required in the Bill. Rather than argue about how many days extension may or may not be permitted by the Convention, we choose to focus on the community impact of any extension and investigate alternative solutions.

30. An earlier draft of the letter sent by the Home Secretary to his Conservative and Liberal Democrat shadows on 15 September indicated that three months might be too long. While we agree with this assessment we hope that the three month suggestion is not simply the first bid in an auction for a period somewhere between that and the current position. The only acceptable approach for Parliament is to determine whether *any* extension is justified. The justifications, set out in detail in the Home Secretary's letter of 15 September are based on an assertion that a number of factors make it difficult to obtain the evidence necessary to bring suitable charges. We do not intend to discuss the detail of these. Rather, if the police do have genuine difficulties we should look for alternative solutions that do not have such a profound impact.

31. In a letter of 6 October, Andy Hayman, the Assistant Commissioner of the Metropolitan Police, wrote to the Home Secretary explaining why he believed the extension to 90 days was necessary. The letter contained a number of theoretical and actual case studies and a summary of the difficulties in evidence gathering that the police could face. The difficulties can be summarised as relating to resource issues (such as finding interpreters), time and logistical difficulties (such as delays caused by distance and establishing identity) and technological or forensic difficulties (such as breaking encryption). In addition to these, the Assistant Commissioner listed a few 'difficulties' which we do not accept as genuine problems. For example, 'religious observance' would only take up a short amount of time. The need to pray should not have any particular impact as the Police and Criminal Evidence Act 1984 (PACE) specifies the need for regular breaks anyway. Any delays caused by solicitors acting

²¹ The person arrested can of course be charged and application made for remand in custody.

for several clients are unlikely to be significant as more than one representative from a firm is likely to be involved in taking instructions.

32. We do not intend to attempt to deal with each justification and case study in turn. We cannot claim to have better knowledge of these problems than the police and security services. Instead we make a number of suggestions of more proportionate solutions to these difficulties and ask if any of these problems could not be met by a combination of one or more of the alternatives we propose. There are two initial points we would make. First, other types of criminal investigation have similar problems as the type referred to in Assistant Commissioner Hayman's letter. For example, white collar fraud can involve huge amounts of material and any number of jurisdictions. Yet pre trial detention is limited to a maximum of four days, less than a third of the current time permitted for terrorism detention. Second, unless there has been an attack or attempted attack which the police and security services were not aware of²² arrests are likely to follow months of investigation and surveillance. The difficulties described in the AC's letter seem to imply that the arrest will be from a 'standing start'. In reality, it is difficult to see how months of investigation could not mean that there was a considerable amount of evidence available at the time of arrest.

33. The first proposal is one that we and others have made on repeated occasions. The bar on intercept evidence in criminal trials must be removed. We do not intend to go over arguments in favour of removing the bar again other than to point out that it must be the case that the inadmissibility of intercept must be a major factor in being unable to bring charges. We presume that much of the evidence gathered must be by way of intercept and would certainly be sufficient to meet the relevant charging standard. Continuing inadmissibility means that charges cannot be bought as easily.

34. Next, review the way in which people that have already been charged can be re-interviewed and recharged as further evidence is uncovered. This will allow for a charge to be replaced at a later stage of proceedings with a more appropriate offence. Given the range of offences available under the TA, under offences such as 'preparation of terrorist acts' once the Terrorism Act 2005 is enacted, and under other

²² In which case we imagine there would be a considerable amount of evidence.

criminal law²³ it is difficult to see how no charge could be brought. There is likely to be investigation and evidence gathering prior to arrest, followed by fourteen days further investigation. In this time it must be possible to bridge the small gap between the evidence needed to arrest and the evidence needed to charge. Once an initial charge has been brought the police and Crown Prosecution Service, they can apply to the Court to remand in custody as they feel appropriate.

35. Assistant Commissioner Hayman's letter makes references to difficulties arising from the need to locate and break encryption keys. A civil court can currently make an order requiring such a key to be handed over. Anyone failing to comply with such an order will be in contempt of court and can be detained in custody for a fixed period. This means they do not have to be under arrest with the custody clock running.

36. Section 47 of PACE already allows for people to be bailed to reappear back at a police station while the police continue investigations. This is a commonly used technique to allow time for forensic examination (for example, the testing of a substance to see if it is a narcotic). We presume that section 47 powers would not usually be used in terrorism cases due to a concern that the suspect would abscond. This problem could be addressed by attaching conditions to section 47 bail. Conditions could include curfew, reporting, or the surrender of a passport. Defendants in criminal cases will frequently have restrictions placed on their bail. Similarly, section 1 of the Prevention of Terrorism Act 2005 (PTA) suggests a range of restrictions. Part of our objection and opposition to the provisions of Section 1 PTA was that they were applied as a punishment in themselves, were not made in anticipation of any criminal proceedings, and were potentially indefinite. If conditions were time limited and made part of criminal process by being imposed in conjunction with Section 47 PACE we do not imagine the same concerns arising.

37. The Foreign and Commonwealth Office recently published a document drawing comparison with other countries. We do not propose to comment on these in detail other than to observe that most of the countries had much shorter pre charge

²³ Presumably terrorist activities would include other offences of dishonesty such as fraud and deception

detention limits than the UK. Several had judicial involvement and it has been suggested by experts such as the independent reviewer Lord Carlile that something similar might be appropriate in the UK²⁴. We respectfully suggest that this is not an appropriate course to follow. Most of the examples of judicial involvement relate to post charge rather than pre charge scrutiny. Also their use is often in civil code countries which have entirely different (usually inquisitorial) legal systems. It would not be practical or desirable to ‘cherry pick’ aspects of an alien legal system and transpose onto our own. We have considered this issue in far greater detail in our response to the Home Office discussion paper of 2004 ‘Reconciling Liberty and Security in an open Society’.²⁵ On the issue of Judicial Scrutiny we would add that the need for judicial authorisation for extending detention is of course desirable but does not address our fundamental concerns over extended detention.

38. The overwhelming majority of people arrested under terrorism laws are released without charge. It is highly likely in the current context, that most of those arrested would be Muslim. At a time when the Prime Minister and others are emphasising the need for all sections of the community to work together any measure which caused Muslims to feel unfairly treated would be counterproductive. We appreciate many people will be in favour of extending time limits. It is unlikely that anyone who supports these measures would be directly affected by them. However, the impact upon those who have family, friends and neighbours arrested and then released weeks, or even months, later with no charge and no explanation will be huge.

39. The Bill contains a number of other provisions relating to searches and other investigatory powers. Due to the short time in which we have had to prepare this response we have not have the opportunity to consider these in detail. Liberty has publicly stated on many occasions that we believe that the most effective way of combating terrorism is to ensure that the police and security services have appropriate resource and powers to investigate and deal with those who are planning terrorist acts. We may comment in greater detail on these during later stages of the Bill.

²⁴ See ‘Proposals by Her Majesty’s Government for Changes to the Law against Terrorism’ para 64.

²⁵ Available at <http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/liberty-and-security.pdf>

40. Clause 29 extends powers of stop and search contained in Section 44 TA to cover internal waters. It may well be that there is such a loophole in the existing law and we have no particular comment to make. We do however have continuing concerns about the way in which Section 44 has been used generally. The whole metropolitan area of London has been on a rolling authorisation²⁶ for the use of these extended powers for over two years. In 2002-2003 the number of Asians subjected to Section 44 searches rose by over 300%. Even the Police have expressed concerns about this rise. Giving evidence to the Home Affairs Committee the Metropolitan Police Authority said that it had been given “powerful evidence” that it was having a “hugely negative impact” on community relations. The MPA added

“Section 44 powers do not appear to have proved an effective weapon against terrorism and may be used for other purposes, despite the explicit limitation expressed in the Act...It has increased the level of distrust of our police. It has created deeper racial and ethnic tensions against the police. It has trampled on the basic human rights of too many Londoners. It has cut off valuable sources of community information and intelligence. It has exacerbated community divisions and weakened social cohesion.”²⁷

Section 44 has also been used against anti war protestors, arms trade protestors and was used to detain Walter Wolfgang, the 82 year old recently ejected from the Labour Party conference.

41. We do not have an objection to the powers under Section 44. However, the way it is drafted allows too much scope for abuse and insufficient accountability. We would like to see this Bill used to place appropriate restrictions on Section 44. In particular we believe there should be judicial authorisation and parliamentary involvement either through the issuing of notices and/or allowing Parliament to be aware of the existence of all notices. We also believe that the current test allowing notices to be issued should be changed from the current need that it be ‘expedient’ to one based on the necessity and proportionality requirements to be found in the Human Rights Act 1998.

²⁶ The Home Secretary needs to renew authorisation every two weeks saying he is satisfied that the designated zone faces particular risk of terrorist attack

²⁷ Evidence from MPA to Home Affairs Committee 8 July 2004

Conclusion

42. There is a huge amount of criminal law already in place allowing prosecution of those who are involved in terrorism. The correct approach to now take is to look at ways in which prosecutions might be brought, in particular by lifting the bar on intercept material; to ensure that state agencies are able to do their work effectively; and to take every possible step to ensure that all groups in the UK are united in defeating the threat against us. Our fear is that the Bill will prove counterproductive. It undermines the rights and liberties of too many. It will be seen as unfair, disproportionate and will do much to harm national unity.

Gareth Crossman

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