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Parliamentary Brief

The Law Society

Draft Terrorism Bill

Evidence to the HASC

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Contents

Contents 2

Introduction 3

Summary 3

Clause 1 – Encouragement of Terrorism 4

Clause 2 – Glorification of terrorism 5

Clause 3 – Dissemination of terrorist publications 5

Clause 4 – Preparation of terrorist acts 6

Clause 5 – Training for terrorism 6

Clause 6 – Attendance as a place used for terrorist training 7

Clause 13 – Commission of offences abroad 7

Clause 19 – Extension of period of detention by judicial authority 7

Other Issues - Exclusion and deportation 8

Introduction

On 20 July the Home Secretary Charles Clarke set out the details of proposed anti-terrorism legislation, brought forward in the light of the 7 July bomb attacks in London.

He announced that three new offences would be created, those of acts preparatory to terrorism; indirect incitement to terrorism; and the giving and receiving of terrorist training. Indirect incitement would target those who 'glorify and condone terrorist acts' with the intention of inciting terrorism.

In relation to powers to exclude extremists who sought to enter the UK, the Home Secretary noted that he already had certain powers, but stated that these needed to be applied more widely and systematically. He noted the need to “tread very carefully indeed in areas that relate to free speech”. He said the Government was seeking to sign memoranda of understanding with countries to ensure that deportation was consistent with the European Convention of Human Rights, and revealed that such a memorandum had been signed with Jordan.

On 15 September, the Home Secretary published a new Terrorism Bill with a letter to David Davis MP and Mark Oaten MP explaining the Government’s thinking behind the proposed new offences.

Summary

The Society entirely agrees that it is vital that we have effective measures to combat terrorism and we fully recognise that it is the Government’s responsibility to protect its citizens. However, we continue to believe that the protection of us all can be achieved without serious intrusion on human rights standards.

We are not opposed in principle to new offences relating to acts preparatory to terrorism (clause 4), the direct or indirect encouragement to terrorism (clause 1) or the dissemination of terrorist publications (clause 3). However, the proposed offences in the Bill cause us serious concern due to the broad nature of the drafting, particularly the lack of intention in clauses 1 and 3.

We are however, concerned that the proposed glorification of terrorism offence will be unworkable and is likely to have a very negative and detrimental impact on free speech.

The Society would not oppose the offence of acts preparatory to terrorism (clause 4) although this provision broadly replicates existing law [1] and is poorly drafted. The current difficulty with prosecuting offences relates in part to the inadmissibility of evidence. We would greatly welcome the admissibility of intercept evidence, as this, we believe, would help significantly with the Government’s stated aim of prosecuting alleged terrorists[2].

We would support in principle an offence of training for terrorism (clause 5) although the offence as drafted in the Bill is too broad.

The Society is opposed to the offence of attendance at a place used for terrorism training (clause 6). It is unnecessary (given that receiving terrorist training is already an offence)

[1] For example the Terrorism Act 2000 already provides a very broad range of offences, including support for terrorism.
[2] Hansard (HL) 29 November 2001, Column 459

and does not require any knowledge or intention on the part of the accused – it will therefore be possible to be guilty of this offence just by being in the wrong place at the wrong time.

The Society supports offences involving radioactive devices and materials (clauses 7-10). We also support in principle the offence of the commission of offences abroad (clause 13) but as currently drafted the offence is too broad, as it would apply to foreign nationals attacking foreign governments with no connection to the UK.

We oppose the extension of detention powers from 14 days to 3 months as being unnecessarily draconian. There are far more appropriate and proportionate ways of dealing with problems relating to pressure of time.

Clause 1 – Encouragement of Terrorism

We understand the Government's motivation to ensure that there are offences to cover this type of behaviour and welcome the fact that the Home Secretary has explicitly recognised that freedom of speech should not be inappropriately curtailed in relation to this offence[3]. However, we have concerns that the way this offence is currently drafted will in fact infringe free speech in an unnecessary and wholly disproportionate way.

Clause 1 contains no requirement of intention that acts of terrorism should result from the statements made by the accused. On the contrary, the requirement is only that the accused knew or believed or had *'reasonable grounds for believing'* that other members of the public were 'likely to understand it as a direct or indirect encouragement or other inducement' to commit terrorist acts (which itself is widely defined, using the Terrorism Act 2000 definition). Nor need it be shown that anyone was actually encouraged to attempt or commit an act of terrorism as a consequence of the statement being published.

Without more specific definition, this offence is likely to have the unintended consequence of inhibiting free speech. Furthermore, it is unacceptable to create an offence as wide as this, which will require reliance on the discretion of the prosecution as to its appropriate use. In addition, the breadth of this clause means that decisions will need to be made in every case of an alleged breach (which we believe will be many) whether to prosecute or to ignore most infringements, which risks bringing the law into disrepute. Either prospect is unsatisfactory and unwelcome.

Statements which might be considered unwise, but are not intended to encourage terrorism and which do not have such an effect, should not be criminal. Recent remarks by Cherie Blair and Jenny Tong expressing understanding of the motives for terrorism in some parts of the world would be very likely to be caught by this offence as it is currently drafted. It therefore runs the risk of criminalising conduct that ought not to be criminalised because of lack of intent, and is likely to be counter-productive to its aims.

It is a principle of statutory interpretation that penal statutes should be interpreted narrowly. The law must be accessible, such that those affected by it can find out what the law prohibits, and must be formulated with sufficient clarity that those affected can

[3] Letter to David Davis and Mark Oaten, 15 September 2005

understand it and regulate their conduct to avoid breaking the law[4]. This offence appears to breach these principles.

Clause 2 – Glorification of terrorism

This clause makes it an offence to publish a statement that glorifies, exalts or celebrates the commission, preparation or instigation (past, future or generally) of acts of terrorism, and the circumstances, manner and content of the statement's publication are such that it would be reasonable for members of the public to whom it is published to assume the statement expresses the views of that person. It may relate to terrorism generally, and if the statement related to anything occurring more than twenty years ago a suspect will only be guilty if the conduct or events are specified in a statutory order. Like the offence in clause 1, no intent on the part of the statement maker is necessary.

The definition of terrorism used in this offence is very wide. In view of the breadth of the definition of terrorism in the Bill (clause 16 (1)) and in the Terrorism Act 2000, any statement published in the UK concerning any political violence could potentially be construed as glorifying terrorism to another person somewhere in the world.

The offence contains an objective test (i.e. what is reasonable for the public to assume), which means that a person could be guilty of an offence for honestly and reasonably (in their own view) publishing statements which the public might reasonably assume contravenes the law.

We have serious concerns that this offence will cause a disproportionate interference with free speech. Many sorts of speech and statements may be offensive, but that does not necessitate creating a criminal offence to deal with them. In the absence of intent relating to such statements, the only appropriate concern should be whether there has been conduct which is likely to cause a breach of the peace[5].

Clause 3 – Dissemination of terrorist publications

This offence covers a publication containing material that constitutes a direct or indirect encouragement or inducement to commission acts of terrorism, or information of assistance to acts of terrorism. It will constitute a direct or indirect encouragement or inducement if it is likely to be understood as such by some or all of the persons who it is or is likely to be available to. This includes any information that is capable of being useful in the commission or preparation of such acts, and so could conceivably include maps or train timetables.

Whilst we understand the motivation behind the creation of such an offence, we are concerned at its breadth. It contains no element of intent that the dissemination should encourage terrorism, only that it will constitute an encouragement or inducement if it is likely to be understood to do so by its recipients. Neither does it contain the defence of reasonable excuse or lack of terrorist purpose, as there is in the existing and similar offences under sections 57 and 58 of the Terrorist Act 2000.

[4] Sunday Times v UK (1979-80) 2 ECHR 245
[5] Our concern about the impact that this offence could have on free speech is highlighted by an incident on 28 September 2005, when a Labour Party member was ejected from the Labour Party Conference for heckling and then stopped by police under the Terrorism Act 2000 when he tried to re-enter.

We also have practical concerns that the offence may be difficult to prosecute as it would require proof beyond reasonable doubt that a potential and perhaps hypothetical terrorist is likely to interpret the publication in a particular way.

Clause 4 – Preparation of terrorist acts

This clause makes it an offence, with the intention of committing acts of terrorism or assisting others, to engage in any conduct in preparation for giving effect to this intention. Whilst we are not opposed in principle to this offence, we are not clear that there is a gap in the law necessitating its creation[6].

The Newton Committee said that that they had not been told that it has been impossible to prosecute a terrorist because of a lack of available offences and found that the difficulty in prosecuting terrorism offences related to evidential rather than legal problems[7]. The Joint Committee on Human Rights has considered whether new terrorism offences are necessary. It concluded that the evidential problem, highlighted by the Newton Committee, "is unlikely to be helped by the creation of still more offences"[8].

The Newton Committee also noted a reluctance to adduce sensitive intelligence- based material in open court due to concern about compromising their source or methods[9]. The Society has repeatedly called for intercept evidence to be admissible as we believe that this would help with the prosecution of alleged terrorists. Evidential tools, similar to public interest immunity certificates, could be used to deal with what evidence is actually revealed to a jury and protect sources. The majority of common law jurisdictions, including Canada, Australia, S. Africa, New Zealand and the United States admit intercept evidence[10]. In the light of the use of such evidence by other common law jurisdictions, the use of foreign intercept evidence in UK courts[11] and greater EU co-operation, the introduction of intercept evidence is the logical next step. Indeed, the Society agrees with the Joint Committee on Human Rights that the case for relaxing the absolute ban on the use of intercept evidence is overwhelming[12].

The offence is drafted very broadly as it covers "any conduct in preparation for giving effect to terrorism". We are therefore also concerned that this may be so broad as to be unclear and in breach of the common law[13].

Clause 5 – Training for terrorism

Whilst we support this offence in principle, we have concerns that it is drafted too widely and does not contain the safeguard of the need for intention on the part of the accused.

In particular, clause 5(4)(b) covers training in "…anything …which is capable of being done, for the purposes of or in connection with" an act of terrorism. As Charles Clarke

[6] Current offences includes support for terrorism – s.12 Terrorism Act 2000, attempted offences- Criminal Attempts Act 1981, conspiracy – s.1 Criminal Law Act 1977
[7] Paragraph 207, Privy Counsellors review Committee. Anti-Terrorism Crime and Security Act 2001 Review Report (HC100: 18 December 2004)
[8] Para 67, Joint Committee on Human Rights, 18th Report, 4 August 2004, HL158/HC713
[9] Paragraph 207, Privy Counsellors review Committee. Anti-Terrorism Crime and Security Act 2001 Review Report (HC100: 18 December 2004)
[10] Page 9 JUSTICE Response to Counter Terrorism Powers: Reconciling Security and Liberty in an open society
[11] RvP [2002] 2WLR463
[12] Paragraph 56, Joint Committee on Human Rights, 18th Report, 4 August 2004, HL158/HC713
[13] Sunday Times v UK (1979 – 80) 2 EHRR 245

has noted[14], section 54 of the Terrorism Act 2000 already covers most of the requirements of this offence apart from those relating to hazardous substances and methods or techniques. We therefore think that a better way forward would be to extend section 54 to include hazardous substances and methods or techniques, rather than create this new offence.

Clause 6 – Attendance as a place used for terrorist training

The Society is opposed to this offence as it is unnecessary (given that receiving terrorist training is already an offence[15]) and does not require any knowledge or intention on the part of the accused.

The inclusion of an objective test means that the offence can be committed simply by being at such a place not because the accused understood it to be such a place, but on the basis that they 'could not reasonably have failed to understand the training or instruction was being provided there wholly or partly for terrorist purposes'. As currently drafted, it will therefore be possible to be guilty of this offence just by being in the wrong place at the wrong time.

Clause 13 – Commission of offences abroad

Whilst we agree with the purpose of this offence, i.e. giving extra-territorial effect to the commission of terrorist offences, its workability is undermined by the fact that there is no international agreement on what constitutes terrorism. In particular, there is no international agreement about acts by persons against totalitarian or authoritarian regimes.

As currently drafted, clause 13 would cover a foreign national attacking a repressive regime abroad. The better way forward would appear to limit this offence so that in order to prosecute there is a need to show a link to a UK national either as victim or accused.

Clause 19 – Extension of period of detention by judicial authority

We do not think that the case is made out for such an extension. 14 days is a serious length of time without charge. Powers to detain are already longer in terrorism cases. The 14 day limit applicable to terrorist offences was enacted by the Criminal Justice Act 2003 which amended schedule 8 of the Terrorism Act 2000. It came into effect on 20 April 2004 and involves an application to a senior District Judge. There is an initial period of 48 hours, then an application under paragraph 29 (7 days) or paragraph 36 of schedule 8 must be made. In relation to other offences, under PACE the limit for pre-charge detention is 24 hours, extendable to 36 hours by an officer of superintendent rank or above, detention in respect of an arrestable offence[16]. A magistrate can then extend the period to 72 hours, followed by a further extension to 96 hours at most. This proposal will therefore allow suspects to be detained more than 20 times longer than the maximum period that a suspect can be detained for any serious non-terrorist offence, for example murder, rape or serious fraud.

[14] Letter to David Davis and Mark Oaten, 15 September 2005
[15] S 54 Terrorism Act 2000
[16] This distinction is to be abolished when the Serious Organised Crime and Police Act arrest powers come into effect in January 2006, and the power to arrest will exist for any offence.

From the information available[17], it appears to a large extent that the call for an extension of detention powers relates to the question of resources. Speed is of the essence in these cases where there may be evidence that could lead to prosecution for such serious offences, and the preferable option is surely therefore to ensure that investigations can be carried out as quickly as possible, in case they yield further useful information. We therefore believe that the more appropriate and proportionate way to deal with these concerns would be to ensure that the police and security services are properly resourced, rather than to extend the period of detention before charge.

Furthermore, under PACE[18], the police are required to have some reasonable grounds to arrest, and so there must be evidence to ground that suspicion. We have seen no clear explanation as to why it is not sufficient to charge a suspect with a lesser offence to ensure that they do not have to be immediately released from custody whilst other matters are still being investigated. Charges can always be upgraded at a later stage and suspects questioned in relation to those further charges. Even if suspects are granted bail, courts have the power to impose strict conditions.

Three months detention prior to charge is a length of time tantamount to internment. The government has stated that any extension would be used in extremely rare circumstances and would only apply to a tiny number of people[19]. In view of the serious nature of an extension and the few cases in which it should be necessary, should any extension beyond 14 days be made possible, it should be granted and reviewed at very short interviews by a High Court, rather than a District, Judge.

Other Issues - Exclusion and deportation

Whilst the Society has made representations about the proper application by immigration and entry clearance officers of exclusion powers[20], our main concerns relate to proposlas for deportation.

There are existing powers allowing the Secretary of State to exclude or deport people where their exclusion or deportation would be conducive to the public good. It has been suggested that these powers can only be used against those who pose a direct threat. However, the relevant immigration rules do not specify that the threat must be direct in order for the powers to apply. Indeed, the existing powers have been successfully used in the past to exclude those who may cause others to commit public order offences through their use of words or behaviour[21].

The Society believes that it is preferable to charge and prosecute those who are suspected of being terrorists or involved with terrorism. As the Newton Committee commented,

> "terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism'[22].

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[17] Annex A, letter from Charles Clarke to David Davis MP and Mark Oaten MP, 15 September 2005

[18] S 24 Police and Criminal Evidence Act 1984, as amended by s 110 of the Serious Organised Crime and Police Act 2005

[19] Charles Clarke, Today programme, 27 September 2005

[20] Law Society response to Home Office consultation document:"Exclusion or deportation from the UK on non-conducive grounds" August 2005

[21] In the case of *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] 4 All ER 289 the Home Secretary excluded Mr Farrakhan from entering the UK on that basis. The ban was upheld by the Court of Appeal despite Article 10 of the ECHR being engaged.

[22] Para 1, Report of the Privy Council Review Committee on Anti-Terrorism, Crime and Security Act 2001

Criminal prosecution of suspected terrorists remains the most effective and human rights compliant counter-terrorist measure.

The Society has grave concerns regarding the Government's use of diplomatic assurances to deport people to countries where they may be subject to torture or inhuman and degrading treatment. The right in Article 3 of the ECHR not to be subjected to torture or inhuman or degrading treatment or punishment is an absolute right (unlike the death penalty which is not outlawed in international law). We believe that individual suspects should not be deported to countries where they are at risk of torture as a result of who they are, or what they have done.

Blanket diplomatic assurances are not reliable. Evidence from Amnesty International shows that countries regularly breach international treaties they have signed up to, even if post-return monitoring arrangements are put into place[23]. Reports from the Home Office[24], the Foreign and Commonwealth Office[25], the United States Department of State[26] and bodies such as Human Rights Watch[27] show that human rights abuses and serious torture are still prevalent in these countries. Individual assurances might go some way to easing this problem but there remain difficulties in monitoring whether or not countries adhere to individual assurances and all the evidence we have would lead us to believe that they cannot be relied upon to do so. The courts should thus decline automatically to accept that an inter-Governmental agreement can be relied on when it is clear that the country concerned continues to engage in torture.

[23] see *Still at Risk: Diplomatic Assurances No Safeguard against Torture* Human Rights Watch, 2005
[24] Home Office Algeria Country Report, Home Office Country and Information Policy Unit, 2004
[25] Annual Human Rights Report, FCO, 2004
[26] e.g. 2004 Country Report: Jordan, US Department of State, 28 February 2005
[27] e.g. *Mass Arrests and Torture in the Sinai,* Human Rights Watch, February 2005