Terrorism Bill

JUSTICE Briefing for Commons Second Reading

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. The terrorist attacks of 7 July on innocent commuters in London were horrific. In the wake of the attacks, the government's desire to do everything it can to prevent further such attacks is understandable. However, at times such as these, it is important to bear in mind that terrorist violence targets not only human life but also the values of a free and democratic society. A vigourous defence of those values requires not only action but also restraint.

3. Following the bombings, we were prepared – and indeed remain ready – to support such counter-terrorism measures that are compatible with fundamental rights. We wrote to the Home Secretary on 27 July indicating that, while some of the planned measures seemed to be sensible tidying-up provisions, the bulk of what had been proposed so far appeared only to replicate existing laws. We warned against a proposed offence of 'indirect incitement' that seemed to us to be a disproportionate interference with legitimate free expression. We also cautioned against the adoption of an easy rhetoric that sought to portray human rights as obstacles to a security agenda rather than as the most basic safeguards of a free society.

4. In both these things we have been disappointed. The careful approach adopted by the government in the immediate aftermath of the July bombings appears to have vanished. The Bill seeks to significantly limit free expression, and contains an unprecedented proposal to extend pre-charge detention to three months. Even many of the sensible tidying-up measures originally outlined by the government have been drafted in such a way as to by-pass the most basic protections of the criminal law. And yet virtually all of the offences in the Bill are directed at conduct that is already illegal under the existing criminal law.

5. Accordingly, we believe that the Terrorism Bill is not a worthy legislative response to the terrorist attacks of 7 July. It is the responsibility of government to provide a calm, rational and effective response to the threat of terrorism, not to allow fear to give way to legislative panic. It falls to Parliament, therefore, to protect not only the lives of the inhabitants of the UK but also their freedoms. This responsibility is a heavy one and we do not for a moment suppose that there are any easy solutions to the threat of terrorist attack. But the democratic traditions of this country deserve better than this Bill, at least as it is presently drafted.

Summary

- A person may be guilty of *encouraging terrorism* (clause 1) even if he or she has no intention of doing so. The scope of the offence is so broad that any reference to any political violence against any government anywhere in the world would be covered. Accordingly, we regard the offences as draconian in scope, unworkable in practice, and a serious threat to legitimate free expression (pp 5-9).

- A '*terrorist publication*' under clause 2 includes any item that contains '*information of assistance*' to someone planning a terrorist attack, e.g. a London A-Z may be a 'terrorist publication' for the purpose of this offence. Accordingly, a person may be guilty of *disseminating a terrorist publication* merely by making such a publication available with the knowledge that someone somewhere may regard it as useful for terrorism. We regard this draft offence as draconian, unnecessary and hopelessly broad (pp 9-11).

- The offence of *preparation of terrorist acts* (clause 5) to a large extent replicates the existing criminal law. We would not oppose the creation of such an offence, however, if it were more carefully drafted (pp 12-13).

- *Training for terrorism* (clause 6) is a sensible offence in principle but – as it is currently drafted – would include any chemistry or home economics teacher who suspects some of their students of involvement in terrorism. We cannot support it in its current state (pp 14-15).

- *Attendance at a place used for terrorist training* (clause 8) is an offence based purely on the idea of 'guilt by association'. It is offensive to the legal traditions of this country and should be scrapped (p 15).

- *Offences involving radioactive devices and materials* (clauses 9-12) are sensible if largely redundant. In general, we would support such provisions (pp 16-17).

- *Commission of offences abroad* (clause 17) would extend criminal liability to anyone in another country training to attack the UK or UK nationals. We agree with this. However, it would also criminalise foreign nationals training to attack foreign governments without any connection to the UK. We think this is much too broad (pp 17-18).

- *Proscription of terrorist organisations* (clause 21) is based upon an earlier draft provision that the Home Secretary has already withdrawn. Existing grounds for proscription are already sufficiently broad (pp 18-19).

- *Detention of terrorist suspects* (clauses 23-24) would extend the maximum period of pre-charge detention to 3 months. In our view, the existing limit of 2 weeks is more than enough time for police to identify a suitable charge against a terrorist suspect. Any extension beyond 2 weeks seems likely to violate the right to liberty under Article 5(3) of the European Convention on Human Rights (pp 19-22).

Clause 1 - Encouragement of terrorism

6. We acknowledge that the government is right to be concerned at statements that seek to encourage or glorify terrorism. However, it is important to recall that incitement to terrorist violence – whether direct or indirect – is *already illegal under UK law*.

7. Specifically, it is already a criminal offence to:

   - '*encourage, persuade or endeavour to persuade* any person to murder any other person';[1]
   - *'counsel or procure'* any other person to commit any indictable offence;[2]
   - *'solicit or incite'* another person to commit any indictable offence;[3]
   - *incite* another person to commit an act of terrorism wholly or partly outside the UK;[4]
   - *conspire* with others to commit offences outside the UK;[5] or
   - *invite support* for a proscribed terrorist organisation.[6]

8. Each of the above offences requires the prosecution to show that the accused used such words *with the intention of causing the offence in question*. Indeed, the requirement upon the prosecution to prove an accused's 'guilty mind' is regarded as one of the most basic protections provided by the criminal law. As the then-Lord Chancellor, Viscount Sankey observed in the 1935 case of *Woolmington v DPP*:[7]

   > throughout the web of the English criminal law one golden thread is to be seen, that is the duty of the prosecution to prove the prisoner's guilt.

9. To punish a person for something they did not intend to do is contrary to elementary principles of criminal justice. This is recognised in Article 5 of the Council of Europe Convention on the Prevention of Terrorism, which requires signatory states to criminalise 'public provocation to commit a terrorist offence' and defined as:

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[1] Section 4 of the Offences against the Person Act 1861.

[2] See section 8, Accessories and Abettors Act 1861: 'Whosoever shall aid, abet, counsel or procure the commission of any indictable offence … shall be liable to be tried, indicted and punished as a principal offender'.

[3] A common law offence, separate from the statutory provisions of the 1861 Act. See *DPP v Armstrong (Andrew)* [2000] Crime LR 379 DC.

[4] Section 59 of the Terrorism Act 2000.

[5] Section 1A of the Criminal Law Act 1977.

[6] Section 12 of the Terrorism Act 2000.

[7] [1935] A.C. 462 at 481.

the distribution, or otherwise making available, of a message to the public, *with the intent to incite the commission of a terrorist offence*.

10. In the explanatory notes to this Bill, the government has cited its obligation under Article 5 as a justification for introducing clause 1.[8] The fundamental importance of intention in the formulation of criminal offences was also recognised by the Home Office at the time that the revised clause 1 was released on 6 October. According to its press release that day:[9]

> Mr Clarke made clear his determination to bring in tough new powers to tackle terrorism and extremism as the Home Office today published … Amended draft clauses for the forthcoming Terrorism Bill, making it clear that for an offence of glorifying terrorism to be committed, *the offender must have also intended to incite further acts of terror* [emphasis added].

11. Sadly, the Home Office's description bears no resemblance to legal reality. Although the language of clause 1 was indeed amended, there is nothing in the proposed definition of 'encouragement to terrorism' to require the prosecution to prove intention 'to incite further acts of terror'. Instead, the prosecution merely has to show that – at the time the accused made the statement in question – he or she 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 acts of terrorism.[10] It is also irrelevant whether any person was actually encouraged to attempt or commit an act of terrorism as a consequence of the statement being published.[11]

12. As we noted above, the proposed offence is offensive to long-held notions of criminal responsibility in UK law. It seeks to punish those making statements not for what effect they *intended* their words to have but according to what they might suspect others will make of them. Accordingly, any person who makes any statement with utterly innocent intent may nonetheless be found guilty – and subject to up to 7 years imprisonment – simply on the basis that he was *aware or reasonably suspected* others *might* regard his statement as encouraging – directly or indirectly – their own terrorist acts.

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[8] See explanatory notes for the Terrorism Bill, para 21: 'Article 5 of the Convention requires parties to have an offence of public provocation to commit a terrorist offence'.

[9] Home Office Press Release, 6 October. The quote was widely reported: see e.g. 'Clarke clarifies anti-terror plans', 6 October 2005, epolitix.com; 'UK dilutes law banning glorification of terrorist acts', Forbes, 6 October 2005.

[10] Clause 1(1)(b).

[11] Clause 1(4)(b).

13. In particular, clause 1 does not specify which 'members of the public' would be 'likely to understand' the statement as incitement. If a statement were published to 100,000 people, therefore, it would be an offence within the meaning of clause 1(1)(b) if the publisher were aware that one or two mentally unstable readers might regard it as 'direct or indirect encouragement' to terrorism. Indeed, if a statement were published on the internet, it would conceivably be available to anyone in the world with a computer. In such circumstances, it would therefore become a criminal offence under clause 1 for a person to publish even the most innocuous statement so long as he or she reasonably believes or 'has reasonable ground to believe' that anyone in the world, no matter how unreasonable their interpretation, may regard it as incitement.

14. In most cases of such broadly-drafted legislation, it would be possible to avoid such an absurd outcome by amending 'members of the public' to 'reasonable members of the public'. This is not possible with incitement offences, however, for the obvious reason that no reasonable person could ever be incited to commit a criminal act – still less an act of terrorism – in the first place. Inevitably, incitement offences are directed at statements that seek to affect the *un*reasonable. Accordingly, the requirement to show intention is an essential safeguard against the manifest injustice of punishing a person for what others unreasonably understood him to mean. Without the requirement of intention, any person publishing a statement would be liable for the unreasonable interpretations of others.

15. The effect of this is made even worse when read together with clause 20(3)(a), under which references to members of the public includes 'the public … of a country or territory outside the United Kingdom'.[12] Therefore, someone in the UK, for instance, would be liable for prosecution to the extent that statements which they make on the internet (whether through their home pages or posting to message boards, etc) might be thought to encourage any person *in any other country* with access to the internet to commit an act of terrorism. Someone making a comment on the internet in the UK would therefore be liable for the effect of their remarks on readers – reasonable and unreasonable alike – in such places as Afghanistan, Chechnya, Iraq or the West Bank.

16. The global scope of the offence of 'encouraging terrorism' under clause 1 is made even more problematic by the Bill's reliance on the definition of 'terrorism' under section 1 of the Terrorism Act 2000.[13] This definition includes not only acts which any reasonable person would regard as terrorist (e.g. attacks against civilians), but also includes activities which – in

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[12] Clause 16(3)(b).

[13] See clause 20(2) and section 1(1) of the Terrorism Act 2000, which defines terrorism as 'the use or threat [of violence] designed to influence the government or intimidate … any section of the public … for the purpose of advancing a political, religious or ideological cause'.

the context of a repressive or totalitarian regime – may seem entirely justified (e.g. attacks against government or military targets). Again, while such a broad definition may seem appropriate in the context of liberal democratic states governed by the rule of law, there is much less agreement on the legality or morality of the use of force in other contexts, e.g. the activities of the ANC during Apartheid. Clause 1, however, makes no distinction between different kinds or contexts of political violence in other countries: any statement published in the UK concerning any political violence anywhere in the world may be the subject of prosecution under clause 1.

17. Clause 1 contains two safeguards. First, any prosecution under clause 1 would require the consent of the Director of Public Prosecutions[14] or – in the case of statements concerning 'affairs of a country other than the United Kingdom' – the Attorney General.[15] However, requiring the consent of a public official as a check against malicious or over-zealous prosecution seems to us a wholly unsatisfactory measure where the offence itself is odious to basic principles of justice. Secondly, it will be a defence to prosecution under clause 1 for the publisher of a statement to show that they were merely publishing it in the course carrying out the business of an internet service provider.[16] Again, it will be no defence for a person to prove that they did not intend to incite terrorist violence.

18. In our view, these proposed safeguards do nothing to limit the egregious quality of clause 1. In making people criminally responsible for the effects of their statements rather than their intention in making them, the draft offence is injurious to core principles of criminal justice and inimical to the very idea of free expression. Indeed, the chilling effect of such a broadly-worded offence seems difficult to overstate. In practical terms, anyone committing any opinion to print, website or broadcast will be obliged to consider the effects of their words may have upon any who happen to read it or hear it. No matter how wilful the misunderstanding, unreasonable the consequence or innocent the intent, the publisher will be liable for anything that may be read as encouragement by terrorists.

19. For the these reasons, we think it clear that – if enacted – the courts will find the draft offence contained in clause 1 to breach the right to free expression under Article 10(2) of the European Convention on Human Rights. Specifically, although a court would agree the restrictions imposed by clause 1 on free expression pursue a legitimate aim of safeguarding national security, public safety and the prevention of crime, it is bound to find that the draft offence fails to strike a fair balance between national security considerations and the

[14] Clause 19(1).

[15] Clause 19(2).

[16] Clause 1(5).

fundamental right of free expression.[17] Specifically, the lack of any requirement on the prosecution to prove:[18]

(i) an *intention* by the maker/publisher to incite an act of terrorism;
(ii) a *likelihood* that the statement will incite an act of terrorism; and
(iii) a *sufficient causal nexus* with an actual attempt or act of terrorism.

together with the very broad scope of the offence (i.e. 'direct or indirect encouragement') means that a court would most likely to find that the interference posed by clause 1 to legitimate free expression is 'disproportionate to the aims pursued and therefore not 'necessary in a democratic society''.[19]

20. Again, we acknowledge that the government is right to be concerned at statements that seek to encourage or glorify terrorism. However, in view of the fact that incitement to commit terrorism – whether direct or indirect – is already a covered by a range of criminal offences, we see no need for the creation of fresh offences in this area, especially not an offence as poorly-drafted and inimical to free expression as this one.

Clause 2 – Dissemination of terrorist publications

21. It is already a criminal offence to:

- *'collect or make a record of information of any kind* likely to be useful to a person committing or preparing an act of terrorism';[20] or
- '*possess an article*' for a purpose connected with the commission, preparation or instigation of an act of terrorism.[21]

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[17] See e.g. *Association Ekin v France* (2002) 35 EHRR 35 at para 56: the court's task under Article 10(2) 'is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient''.

[18] C.f. principle 6 of the 1996 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* U.N. Doc. E/CN.4/1996/39 (1996): 'expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is *intended to incite* imminent violence; (b) it is *likely* to incite such violence; and (c) there is a *direct and immediate connection* between the expression and the likelihood or occurrence of such violence'.

[19] See e.g. *Sürek and Özdemir v Turkey* (App No 23927/94, judgment of 8 July 1999 at para 64. See also *Karatas v Turkey* (App No 23168/94, judgment of 8 July 1999) at para 49, referring to 'the obligation on the State not to encroach unduly on … freedom of expression'.

[20] Section 58 of the Terrorism Act 2000.

[21] Section 57 of the Terrorism Act 2000.

22. Together with the existing offences against incitement detailed earlier,[22] the current law already afford the police immense scope to arrest and charge any individual who possesses, publishes, or otherwise makes available material (including material stored electronically, i.e. websites) that appears to be connected to or useful to the preparation or commission of an act of terrorism. In the event that such powers are not thought sufficient – and we question whether they are not already too broad – we doubt that such powers could sensibly be extended further without creating an offence so vague as to be meaningless.

23. Nonetheless, clause 2 of the Bill provides that it will be a criminal offence to '*distribute, circulate, give, sell, lend, offer for sale or loan*', transmit the contents of electronically, make available to others, acquire by way of gift, sale or loan, or possess '*any article or record of any description*'[23] with the purpose of disseminating a 'terrorist publication'. A publication is considered to be a 'terrorist publication' for the purposes of clause 2 if:[24]

> matter contained in it constitutes … either:
>
> (a) a direct or indirect encouragement or other inducement to the commission preparation or instigation of acts of terrorism; or
>
> (b) *information of assistance in the commission or preparation of such acts*.

24. Subclauses 2(3) and 2(4) further define what constitutes '*direct or indirect encouragement*' and '*information of assistance in the commission or preparation*' of acts of terrorism for the purposes of liability under clause 2. Specifically, they require that the publication in question must be understood as such by 'some or all of the persons to whom it is or is likely to be available'.[25]

25. The breadth of what may be considered 'direct or indirect encouragement' to terrorism has already been addressed in our analysis of clause 1. If it were possible, the category of 'information of assistance in the commission or preparation' of terrorist acts is even broader. It would conceivably include, for example, a map of the London Underground, an A-Z map of any British city, and any timetable for any bus, train or plane. In respect of material published to the world at large – i.e. any website, broadcast, book, magazine or newspaper article – it seems inevitable that potential terrorists may be among those who obtain or receive the information in question. The reasonable possibility cannot be ruled out, therefore, that a potential terrorist somewhere in the world may understand the publication as 'wholly or mainly … useful' for their activities.

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[22] See para 7 above.

[23] Clause 2(1) and 2(12).

[24] Clause 2(2).

[25] Clauses 2(3) and 2(4).

26. Unlike the existing offences under sections 57 and 58 of the Terrorism Act, however, the proposed offence of dissemination of terrorist publications under clause 2 does not allow any defence of reasonable excuse[26] or lack of terrorist purpose.[27] Indeed, it does not require the prosecution to prove any terrorist intent on the part of a distributor whatsoever. The only defences available are where the accused can show that he was not aware of the contents of the publication *and* that he had no reasonable grounds for suspecting it was a 'terrorist publication' (within and, indeed, despite the incredibly broad meaning of the clause)[28] *or* that the accused distributed the publication only in the context of being an internet service provider.[29]

27. Although the prosecution is not required to prove any knowledge on the part of the accused that he was distributing, it is highly likely that prosecutors themselves will find the draft offence to be unworkable in practice. Simply put, it is difficult to see how even the most diligent prosecutor could hope to prove beyond a reasonable doubt that any particular publication distributed by an accused was 'likely to be understood' as a terrorist publication 'by some or all of the persons to whom it is or is likely to be available' without also being put to the task of what this latter category of as-yet-unapprehended potential terrorists themselves knew or believed. In short, it requires the prosecution to prove what potential terrorists not present in court are likely to make of an accused's publication. As a terrorist offence it represents the worst of both worlds: sufficiently broad to indict the most innocent person distributing the most anodyne of material, yet impossible to secure a conviction without being obliged to prove the thoughts and beliefs of absent terrorists.

28. As with clause 1, we regard the chilling effect that such a provision would have on the free flow of ideas and information to be considerable. Accordingly, as with clause 1, we consider that such a vaguely-worded, overly-broad provision is bound to breach Article 10(2) ECHR on the grounds that it fails to demonstrate any kind of proportionality between the aim of preventing terrorism and the measured pursued, i.e. criminalizing the distribution of *any* material which terrorists may find useful. Bearing in mind that it is already illegal to incite terrorism by any written or electronic publication,[30] to collect or make any record of information useful for terrorism, [31] or possess any article for the purpose of terrorism,[32] we consider that the proposed offence under clause 2 adds nothing of any value to the existing law.

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[26] Section 58(3) of the Terrorism Act 2000.

[27] Section 57(2) of the Terrorism Act 2000.

[28] Clause 2(8).

[29] Clause 2(9).

[30] Such publications would be covered by the existing range of incitement offences set out at para 6 above.

[31] Section 58 of the Terrorism Act 2000.

Clause 5 – Preparation of terrorist acts

29. We are aware that the proposed offence of acts preparatory to terrorism has been under discussion for some time. Although some have suggested that such an offence would close a supposed gap in the existing range of terrorism offences,[33] it is not clear that such a gap actually exists. As noted above, the Terrorism Act 2000 already provides a very broad range of offences, including support for terrorism.[34] There is also the law on attempted offences,[35] which greatly increases the scope for criminal prosecution, as well as the offence of conspiracy.[36] In their review of the Anti-Terrorism Crime and Security Act 2001, the Newton Committee said:[37]

> it has not been represented to us that it has been impossible to prosecute a terrorist suspect because of a lack of available offences.

Indeed, the Newton Committee found that the difficulties with sustaining prosecutions for terrorism offences were primarily evidential rather than legal. In particular, it noted reluctance on the part of authorities to adduce sensitive intelligence-based material in open court 'for fear of compromising their source or methods'.[38]

30. Similarly, the Joint Committee on Human Rights in 2004 considered the question of whether new terrorism offences were warranted. It referred to the central evidential problem identified by the Newton Committee and gave its view that this problem 'is unlikely to be helped by the creation of still more criminal offences'.[39] We would also draw attention to the view of Ken MacDonald QC, the Director of Public Prosecutions that there is already 'an enormous amount of legislation that can be used in the fight against terrorism' and that the existing criminal law 'covers a huge swathe of activity that could be described as terrorist'.[40]

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[32] Section 57 of the Terrorism Act 2000.

[33] See e.g. 2002 Report of the statutory reviewer under section 28 of the Anti-Terrorism Crime and Security Act 2001 Lord Carlile of Berriew QC, para 6.5.

[34] Section 12.

[35] Criminal Attempts Act 1981.

[36] Section 1, Criminal Law Act 1977, codifying the common law offence of conspiracy.

[37] Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004) at para 207.

[38] Ibid.

[39] 'Review of Counter-terrorism Powers', 18th report of session 2003-2004, 4 August 2004 (HL 158, HC 713), para 67.

[40] Ibid, Q42, 19 May 2004.

31. Accordingly, it is difficult to see how the creation of an additional offence covering 'preparation of terrorist acts' would overcome the principal difficulty with prosecuting such offences – proving that the accused carried out the actions in question *with the intent* to commit an act of terrorism. This weakness is apparent in the language of clause 5 itself. The requirement to prove that an accused had an intention to either (i) commit an act of terrorism[41] or (ii) assist another to commit such acts[42] means that any prosecutor will face the same evidential hurdles as before.

32. At the same time, liability under the draft offence is triggered by 'any conduct in preparation for giving effect' to the terrorist intent. This strikes us as spectacularly and unhelpfully broad. Although – for the reasons set above above – we consider it unlikely that the creation of an offence of preparation of terrorist acts will result in an increase in convictions for terrorist offences, it is nonetheless likely to increase greatly the number of arrests and prosecutions brought.

33. We previously indicated that we would not oppose the creation of an offence of acts preparatory to terrorism, on the basis that it seemed to us a redundant measure. However, it is unlikely that we could support the creation of an offence as currently drafted in clause 5. In our view, any law which attaches criminal liability to certain acts must state with a certain degree of specificity the acts which are proscribed. This is a basic requirement of the rule of law: people must be able to know in advance which activities are liable to expose them to criminal sanction.[43] It is also a requirement of Article 5 ECHR that any criminal provision whose breach may result in detention must be 'lawful', i.e. drafted with sufficient precision to allow the citizen to regulate his conduct: to 'forsee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[44] Clause 5 fails to meet either of these requirements.

34. In our view, attaching liability to '*any conduct*' in preparation for an act of terrorism lacks the certainty demanded of the criminal law. However, we would not necessarily oppose a more carefully-tailored offence directed against preparatory acts – e.g. one which provided a non-exhaustive list of preparatory conduct – subject of course to our continuing view that creating further terrorist offences is unnecessary.

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[41] Clause 5(1)(a).

[42] Clause 5(1)(b).

[43] See e.g. *R v LB Hammersmith and Fulham ex parte Burkett* [2002] UKHL 23 per Lord Steyn at para 46: 'In procedural legislation, primary or subordinate, it must be a primary factor in the interpretative process, notably where the application of the procedural regime may result in the loss of fundamental rights to challenge an unlawful exercise of power. The citizen must know where he stands'.

[44] See e.g. *Steel and others v United Kingdom* (1999) 28 EHRR 603 at para 54; Sunday Times v United Kingdom (1979) 2 EHRR 246.

Clause 6 – Training for terrorism

35. As the Home Secretary Charles Clarke noted in his letter of 15 July, section 54 of the Terrorism Act 2000 already 'covers most of the requirements of [these provisions], apart from those relating to hazardous substances and methods or techniques'. Nor do we have any difficulty in principle with extending the provisions of section 54 in this way to include these things.

36. However, we are concerned that the offence of 'training for terrorism' set out in clause 6 does not simply extend the provisions of section 54 to cover those areas indicated in the Home Secretary's letter but also weakens significantly its safeguards. In particular, it is a defence for a person charged with an offence under section 54 to prove that 'his action or involvement [in receiving or providing training] was wholly for a purpose other than assisting, preparing for or participating in terrorism'.[45] We see no reason why this should not also be a defence to a charge of any of the offences contained in clause 6. However, rather than impose liability on the basis of a person's *intention* in providing or inviting others to receive training, clause 6 makes a person liable if they 'know or suspect' that a person receiving training intends to use the skills in question for a terrorist purpose.[46]

37. Similarly, whereas section 54 has been carefully drafted to refer specifically to training in the use of 'weapons', i.e. firearms, explosives or chemical and biological weapons,[47] clause 6 includes training in:

    - 'the making, handling or *use of a noxious substance*';[48] and
    - 'the design, adaptation … *of any method or technique for doing anything*' for the purposes of, or in connection with, an act of terrorism.[49]

38. Under clause 6(7), a 'noxious substance' is not merely 'a dangerous substance within the meaning of Part 7 of the Anti-Terrorism Crime and Security Act 2001'[50] (which would be a reasonable definition for the purpose of criminal liability) but also includes 'any other substance which is hazardous or noxious or which may be or become hazardous or noxious

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[45] Section 54(5) Terrorism Act 2000.

[46] Clause 6(1)(b)

[47] Section 54(1) Terrorism Act 2000.

[48] Clause 6(3)(a).

[49] Clause 6(3)(c).

[50] Clause 6(7)(a).

only in certain circumstances'.[51] In other words, it would be a criminal offence under clause 6(1) for a chemistry teacher or a home economics teacher to provide students with instruction in the use of most household chemicals if they suspect that their students may seek to use that knowledge for a terrorist purpose.

39. The scope of clause 6(3)(c) is even broader: 'the design … or use of any method or technique *for doing anything … which is capable of being done*' for the purposes of terrorism would appear, on the natural and ordinary meaning of the words used, to cover virtually all applied or technical knowledge of any kind. To impose criminal liability on teachers and trainers on the basis of their suspicion of what their students may do with the knowledge they impart is an utterly unnecessary burden on educators. A more carefully-drafted clause, containing the defence available under section 54(4) of the Terrorism Act, would seek to avoid the likelihood of such absurdities.

Clause 8 – Attendance at a place used for terrorist training

40. Clause 8 makes it a criminal offence for a person simply to attend any place (in the UK or abroad) where terrorist training is taking place, irrespective of whether they themselves receive any training.[52] Nor is the prosecution required to show that the person in question had any intention of being involved in terrorism. It is sufficient that they prove that the accused 'could not have reasonably have failed to understand that training … was being provided there wholly or partly for such purposes'.[53]

41. We consider such an offence to be not only unnecessary in practice (given that receiving terrorist training is already an offence) but also odious in principle. The premise of criminal liability in clause 8 is explicitly 'guilt by association', i.e. punishment not for anything which the accused has done or intends to do or has even received training to do but simply on the basis that they have been in the wrong place at the wrong time. In criminal proceedings under English law, any inference by a judge or prosecutor that a defendant is guilty merely by reason of association with others would be unlawful. To do otherwise would breach common law standards of fairness and the right to a fair trial under Article 6 ECHR.[54] It is impossible to see, therefore, how such a principle could sensibly form the basis for a criminal offence at UK law.

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[51] Clause 6(7)(b).

[52] Clause 8(3)(a).

[53] Clause 8(2)(b).

[54] See e.g. *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123 per Pill LJ at para 64, referring to the 'need to avoid guilt by association'.

Clauses 9-12 – Offences involving radioactive devices and materials and nuclear facilities and sites

42. Clauses 9-12 make it illegal to:

- make or possess any radioactive device with the intention of terrorism;[55]
- use any radioactive device or material for the purposes of terrorism;[56] or
- make threats in relation to the supply of any radioactive device or material for the purpose of terrorism.[57]

43. We note, however, that there is already a wealth of criminal offences in relation to the use or possession of radioactive material for criminal purposes. For instance, the Nuclear Materials (Offences) Act 1983 provides that it is an offence for any person to possess any nuclear material for the purposes of committing a criminal act,[58] or to threaten to do so.[59] Moreover, it is already a criminal offence under section 47 of the Anti-Terrorism Crime and Security Act 2001 to possess a nuclear weapon[60] or to participate in the development or production of a nuclear weapon.[61] In addition, it is already illegal for any person to use or keep any radioactive material on their premises without being registered to do so.[62] Accordingly, we doubt that any person in possession of radioactive material for the purposes of terrorism would not already be guilty of one or more of the existing criminal offences already mentioned. Nonetheless, although we think it a most unlikely loophole, we would not object to the creation of offences along the lines of those set out in clauses 9-12, subject to the following points:

- the definition of a 'radioactive device' in clause 9 includes, in clause 9(4)(c), a '*radiation*-emitting device'. We note that 'radiation' is a much broader term than 'radioactive', and is not limited to the types of radiation emitted by radioactive substances (i.e. alpha particles, nucleons, electrons and gamma rays). Instead, 'radiation' is a general term for the emission of energy in the form of rays or waves. In this sense, clause 9(4)(c) would include the use of such everyday objects as a television (cathode-ray emitter), a mobile phone (microwave emitter), or a light bulb (photon emitter). Although we think it likely that a court would apply the principle of *ejusdem generis* to limit the meaning of clause 9(4)(c)

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[55] Clause 9(1).

[56] Clause 10(1).

[57] Clause 11(1).

[58] Section 2 Nuclear Materials (Offences) Act 1983.

[59] Ibid.

[60] Section 47(1)(c).

[61] Section 47(1)(b).

[62] Sections 6 and 32 of the Radioactive Substances Act 1993.

to radiation caused by nuclear decay, we would nonetheless suggest that it be redrafted for the avoidance of doubt.

- clause 10(2)(b) provides that a person commits an offence if they 'damage a nuclear facility in a manner which … creates or increases a risk that such material will be released'. Given that 'nuclear facility' includes a 'plant … being used for the production, storage, processing, or transport of radioactive material', and given that 'terrorism' would include any unlawful property damage 'designed to influence the government' and 'made for the purpose of advancing a political, religious or ideological cause',[63] it seems plausible that this provision would apply to any anti-nuclear protester whose damage to incidental parts of a nuclear site might be said to *marginally* increase the risk of release of radioactive material but, in all the circumstances, did not amount to a real or non-neglible risk. By contrast, we consider that this offence should only cover those who cause such damage to nuclear sites that there is an appreciable risk of the release of nuclear material. Consequently, we would suggest amending clause 10(2)(b) from 'risk' to 'material risk' to reflect this.

44. Clause 12 amends sections 128 and 129 of the Serious Organised Crime and Police Act 2005 to include trespass on civil nuclear sites. So long as the site in question is limited to the 'outer perimeter of protection provided' for the facility,[64] we would have no objection to this amendment.

Clauses 17 – Commission of offences abroad

45. Clause 17 affords extra-territorial application to a number of terrorist offences, including membership of a proscribed organisation,[65] weapons training,[66] any attempt, conspiracy or incitement to commit such offences,[67] and all of the offences in Part 1 of the Bill. It applies to both nationals and non-nationals, whether in the UK or abroad, and includes both natural and legal persons.

46. We have no objection in principle to giving extra-territorial effect to terrorist offences, particularly where persons abroad are planning to commit offences in the UK or against UK nationals abroad. Indeed, if it is possible to have universal jurisdiction for offences such as piracy or torture, we can see strong arguments for making terrorist crimes punishable on a

[63] Section 1(1) of the Terrorism Act 2000.

[64] Clause 12(3).

[65] Section 11 of the Terrorism Act 2000.

[66] Section 54 of the Terrorism Act 2000.

[67] Sub-clauses 17(2)(d) and (e).

similar basis. Our main objection, therefore, is linked to the practical difficulties associated with the definition of terrorism itself. Unlike piracy, there is a lack of clear consensus at the international level as to which acts constitute terrorism.[68] Again, although attacks against innocent civilians for a political purpose are obviously and undeniably terrorist in nature, there is much less agreement as to whether attacks by non-state actors against totalitarian or authoritarian regimes, for example, can be described as such. The broad definition of terrorism in section 1 of the Terrorism Act 2000 draws no distinction between the use of violence against such liberal democratic states as the UK or the US, for instance, or that against such totalitarian regimes as North Korea or Saddam Hussain's Iraq. This would not be problematic so long as the scope of terrorism offences is restricted to those seeking to attack UK nationals. However, the scope of clause 17 would not only cover a foreign national plotting against UK nationals anywhere in the world but also a foreign national training to attack government troops of a repressive regime in a foreign country. We do not think it is sensible to extend the scope of UK terrorist legislation in this way. Accordingly, if extra-territorial effect is to be given to terrorist offences, we recommend that demonstrating some link to the UK's *jurisdiction in personam* (e.g. the involvement of a UK national as either an accused or a victim) should be a prerequisite to prosecution.

Clause 21 – Grounds of proscription

47. Clause 21 allows the Secretary of State to proscribe as 'involved in terrorism' under section 3 of the Terrorism Act any group whose activities:[69]

    - 'include the unlawful glorification' of acts of terrorism; or
    - 'are carried out in a manner which ensures that the organisation is associated' with such statements.

48. However, there are already grounds for proscription under section 3 where the Secretary of State believes that a group 'promotes or encourages' terrorism.[70] We also note that the Home Secretary has already withdrawn 'glorification' of terrorism as a distinct offence under this Bill.[71] In our view, the vague grounds set out in clause 21 add nothing of value to the existing grounds. In particular, the notion of activities 'which are carried out in a manner which ensures

[68] Although there are already a number of international and regional instruments relating to the prohibition of terrorism (see e.g. the European Convention on the Prevention of Terrorism 2005, the Inter-American Convention Against Terrorism 2002, the International Convention for the Suppression of Terrorist Bombing 1977) there is as yet no single agreed definition of 'terrorism' at international law.

[69] Using his power to proscribe groups under section 3 of the Terrorism Act 2000.

[70] Section 3(5)(c) of the Terrorism Act 2000.

[71] See draft Terrorism Bill published 15 September, clause 2.

that the organisation is associated' with statements 'glorifying' acts of terrorism is especially unclear. Members of any group subject to proscription on such grounds could reasonably complain that their right to freedom of association under Article 11 ECHR was being violated. Nor do such broadly-worded grounds seem likely to meet the test of proportionality that is required by this right.[72]

Clauses 23-24 – Detention of terrorist suspects

49. Clauses 23 and 24 seek to amend Schedule 8 of the 2000 Act in order to allow police to seek judicial authorisation to detain terrorist suspects up to 3 months on the grounds that it is necessary to:[73]

    - 'obtain relevant evidence whether by questioning him or otherwise';
    - 'to preserve relevant evidence'; or
    - 'pending the result of an examination or analysis of any relevant evidence'.

50. As has already been widely noted, a maximum period of 3 months detention is equivalent to a 6 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.

51. We note, moreover, that the current period was the product of intensive review of over 3 decades of UK counter-terrorism legislation,[74] including a series of cases in the European Court of Human Rights,[75] and culminating in extensive parliamentary debate prior to the Terrorism Act 2000.

52. Indeed, on 6 and 11 October, the European Court of Human Rights handed down two further judgments concerning detention periods during counter-terrorism investigations in South-Eastern Turkey.[76] In both cases, the Court found that detention of more than 6 days in custody

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[72] See e.g. *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121.

[73] Clause 24(3).

[74] See e.g. Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984.

[75] See e.g. *Brogan v United Kingdom* (1988) 11 EHRR 117; *Brannigan & McBride v. United Kingdom* (1993) 17 EHRR 539.

[76] See *Sinan Tanrikulu and others v Turkey* (application nos. 00029918/96, 00029919/96 and 00030169/96, 6 October 2005); *Yasar Bazancir and others v Turkey*, (application nos. 00056002/00 and 0007059/02, 11 October 2005).

without being brought before a judge was a breach of Article 5(3) ECHR, 'notwithstanding … the special features and difficulties of investigating terrorist offences'.[77]

53. In a note annexed to the Terrorism Bill when it was published in draft on 15 September,[78] the government advanced a number of justifications for seeking longer detention periods in criminal cases, including:

- the nature of the terrorist threat, i.e. the need to intervene early in order to prevent a possible attack;
- difficulties in decrypting heavily-encrypted computer data;
- the large volume of evidence in criminal cases;
- complexity of terrorist networks;
- international nature of terrorism, including the need to use interpreters;
- delays involving the handling of CRBN and other hazardous substances;
- other difficulties in recovering of evidence from a crime scene; and
- delays caused by religious observance and the use of a single solicitor by suspects.

54. Although we greatly appreciate the willingness of the government to make their reasoning transparent in this matter, we do not think the justifications offered stand up to scrutiny.

55. First, it is well-established that the police may only arrest a person where they have reasonable suspicion that the person has committed a criminal offence.[79] This means that there must already be some grounds for their belief and, thus, *some* evidence to support a charge under one or more criminal offences.

56. Secondly, the existing range of terrorist offences is extremely broad and the range of non-terrorist criminal offences even broader. We therefore consider it most unlikely that the police and Crown Prosecution Service will take more than 2 weeks at the maximum to identify an appropriate 'holding charge' that would enable the suspect to be brought before a competent court and an application for bail considered. In circumstances where there is a large amount of evidence to be processed, nothing prevents the laying of subsequent and more serious charges against a suspect who has already been charged with a criminal offence. In circumstances where a suspect is charged with a lesser offence in connection with an ongoing investigation into terrorist activity, we have difficulty accepting the Home Office's contention that there is 'a greater likelihood that he will be granted bail' and thus pose a further risk to the

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[77] *Tanrikulu,* ibid, para 41.

[78] Annex A, Pre-Charge Detention Periods, 15 September 2005.

[79] Section 24 of the Police and Criminal Evidence Act 1984, as amended by section 110 of the Serious Organised Crime and Police Act 2005.

public. In the event that bail is granted, courts have extensive powers to impose stringent conditions on a suspect. Such conditions, together with further monitoring by the police, would make it most unlikely that a suspect would present an appreciable risk to public safety.

57. Thirdly, we note that much of the discussion concerning *pre*-charge detention in the UK has been hopelessly flawed by inaccurate comparisons with *post*-charge detention in a number of European jurisdictions. According to the comparative study recently released by the Foreign and Commonwealth Office,[80] none of the European jurisdictions surveyed appeared to allow pre-charge detention longer than 6 days:

    - France – 4 days;[81]
    - Germany – 2 days;[82]
    - Greece – 6 days;[83]
    - Norway – 2 days;[84]
    - Spain – 5 days.[85]

58. Although it is correct that several European countries allow for extensive periods of detention post-charge, it is also possible to be detained post-charge in the UK, i.e. where a suspect is refused bail. More generally, we are concerned at suggestions that extensive periods of pre-charge detention could be justified by incorporating a degree of judicial control along the lines of some of the above European jurisdictions. The role of examining magistrates in such civil law jurisdictions as France is vastly different to that in common law countries such as the UK.[86] In particular, the role of the examining magistrate is not merely to provide an independent check upon criminal investigation by the police but to actively direct that investigation. This indicates a degree of judicial control over criminal investigations far in excess of that found in any common law jurisdiction based on an adversarial – rather than inquisitorial – system of justice. We therefore caution strongly against seeking to import features from other systems of law without first understanding the very different distribution of checks and balances in those systems.

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[80] Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: A Survey of Selected Countries* (October 2005).

[81] Ibid, para 32.

[82] Ibid, para 40.

[83] Ibid, paras 54-55;

[84] Ibid, para 84.

[85] Ibid, para 94.

[86] While Scottish law is on civil law principles, the role of the judge in criminal proceedings in Scotland appears far closer to that in England, Wales and Northern Ireland than to other civil law jurisdictions.

59. Fourthly, we note that much of the justification for extending the period of pre-charge detention is premised on the situation where the reasonable suspicion for arrest is based on evidence that is inadmissible at trial, e.g. intercept evidence. We have long argued[87] that the ban on the admissibility of intercept evidence should be lifted, and our conclusion was supported by the recommendations of the Newton Committee in 2003.[88] As the author of the 1996 review of counter-terrorism legislation,[89] the former Law Lord Lord Lloyd of Berwick, noted during parliamentary debate on the Regulation of Investigatory Powers Bill in 2000:[90]

> We have here a valuable source of evidence to convict criminals. It is especially valuable for convicting terrorist offenders because in cases involving terrorist crime it is very difficult to get any other evidence which can be adduced in court, for reasons with which we are all familiar. *We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; and we are the only country in the world to do so*.

60. Lifting the ban on admitting intercept evidence would bring UK criminal procedure into line with that of the great majority of common law jurisdictions, including Canada, Australia, South Africa, New Zealand and the United States.[91] If the use of intercept evidence is admissible on a regular basis in these other jurisdictions, it seems difficult to conceive of a compelling reason for the government to maintain the current self-imposed ban while at the same time seeking to justify a departure from basic standards of fairness in other areas.

61. For the reasons given above, the current limit of 2 weeks pre-charge detention is the maximum period that we believe would be compatible with Article 5(3) ECHR and we would strenuously oppose any attempt to extend it beyond this.

Clauses 25-26 – All premises warrants for searches in terrorist investigations

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[87] JUSTICE, *Under Surveillance: Covert Policing and Human Rights Standards*, p76: 'there is a growing consensus that [the] restriction is now unsatisfactory and that material lawfully obtained through an interception should be *prima facie* admissible evidence, subject to the usual judicial discretion under section 78 [of the Police and Criminal Evidence Act 1984] on fairness grounds'.

[88] Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2003), para 208.

[89] Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, 30 October 1996 (Cm 3420). The report identified at least 20 cases in which the use of intercept evidence would have allowed a prosecution to be brought – see vol 1, p 35.

[90] See Hansard, HL Debates, 19 June 2000, Col. 109-110. Emphasis added.

[91] See Lord Lloyd, *ibid,* col. 106: 'evidence of telephone communications of that kind is admissible in court in every country in the world as I am aware. The countries I visited during my inquiry into terrorism--France, Germany, the United States and Canada--regard such evidence as indispensable. They were astonished to hear that we do not use it in this country'.

62. We note that police enjoy extensive search powers under Schedule 5 of the Terrorism Act 2000. We further note that sections 113 and 114 of the Serious Organised Crime and Police Act 2005 already provide police with the power to obtain 'all premises' warrants in respect of premises occupied or controlled by a specified person as part of investigations into serious crime. Accordingly, it is not clear why further specific search powers should need to be granted in respect of terrorism investigations.

Clause 27 – Search, seizure and forfeiture of terrorist publications

63. Clause 22 provides a justice of the peace with the power to issue a warrant for search of premises and seizure of any 'terrorist publications' as defined by clause 2. Given the immensely-broad definition of what may constitute a 'terrorist publication', the threshold for the issue of a warrant ('reasonable grounds for suspecting') is inordinately low and likely to constitute a disproportionate interference with an individual's right to respect for their family and private life contrary to Article 8(2) ECHR as well as unlawful interference with the right to enjoyment of their possessions contrary to Article 1 of the Protocol 1 ECHR. Given the very broad range of search powers already available to police under existing legislation,[92] we regard this provision as both unnecessary and unsupportable.

Clauses 28 and 29 – Power to search vehicles under Schedule 7 to the Terrorism Act 2000 and extension to internal waters of authorisations to stop and search

64. We have no objection to the extension of search powers proposed in clauses 28 and 29. However, we remain deeply concerned at the extent to which such powers, introduced as exceptional measures to combat terrorism, are subsequently applied to ordinary activities such as peaceful protest.[93]

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
24 October 2005

[92] See e.g. Schedule 5 of the Terrorism Act 2000.

[93] See e.g. *R (Gillan) v Commissioner for Metropolitan Police* (2004) EWCA Civ 1067.