Terrorism Bill

JUSTICE Briefing for House of Lords Report Stage

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For further information contact

Eric Metcalfe, Director of Human Rights Policy

email: emetcalfe@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

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. JUSTICE has previously produced briefings on the Bill for Second Reading and Committee stage in the House of Lords. Rather than repeat those more detailed briefings, this briefing is meant to provide a summary of the most significant problems with the Bill as it currently stands.

Clause 1 – encouragement of terrorism

3. The ingredient of recklessness in clause 1(2)(b) means that it is possible for a person to be guilty of encouraging terrorism even if he had no intention of doing so. No defence is available to a person who publishes a statement with innocent intent, but with the knowledge that other unreasonable people might misunderstand or misinterpret his words as an encouragement to terrorism. We consider that this is profoundly inimical to legitimate free expression.

4. Similarly, the language of glorification in clause 1(3) is vague and the attempt at further elucidation in clause 1(4) unhelpful. Taken together, the language of glorification is likely to lead to serious difficulties for judges, confusion for juries and injustice for defendants.

5. Neither the ingredient of recklessness nor the language of glorification are required by the UK's obligations under Article 5 of the Council of Europe Convention on the Prevention of Terrorism 2005. Indeed, Article 12 of the same Convention requires that any criminal provisions made pursuant to Article 5 must, among other things, respect the right to freedom of expression under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

6. By contrast, if enacted in its current form, we consider it very likely that the offence of encouragement to terrorism contained in clause 1 would be held incompatible with the right to free expression under Article 10 ECHR.

Clause 2 – dissemination of terrorist publications

7. The definition of a 'terrorist publication' under clause 2(2)(b) is extremely broad, including any item or document containing 'information of assistance in the commission or preparation' of terrorist acts. In other words, it would include such everyday items as a London A-Z or a map of the London Underground.

8. The proposed offence does not allow any defence of reasonable excuse or lack of intention to incite terrorism. 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' (clause 2(8)) *or* that the accused distributed the publication only in the context of being an internet service provider (clause 2(9)).

9. On its face, the government's proposed amendment (clause 2(1B)) seeks to restrict the scope of the offence to persons who circulate material either with the intention of making it available to 'persons who will be directly or indirectly encouraged or otherwise induced by it to commit, prepare or instigate acts of terrorism' or are reckless in doing so. Far from restricting the scope of the criminal offence, however, the amendment would result in even greater uncertainty. Indeed, we consider that the language of the government's amendment is so convoluted as to be nearly unworkable in practice

10. In our view, a far more straightforward formulation would be to provide that anyone who disseminates a terrorist publication *with the intention of inciting, encouraging or assisting* the commission of an act of terrorism is guilty of an offence. For the same reasons as those set out in paragraph 3 above, we consider that an ingredient of recklessness is wholly at odds with the right to free expression.

Clause 8 – attendance at a place used for terrorist training

11. Under clause 8, a person is guilty of an offence if they knowingly attend any location where terrorist training is taking place, irrespective of whether the person in question had any intention of being involved in terrorism.

12. No regard is made for the possibility of someone knowingly attending a training site for some worthy purpose, e.g. a journalist conducting an undercover investigation of the camp or a relative seeking to persuade a family member to return home. Since clause 8 applies inside the UK as well as abroad, it would even include the spouse and children of anyone who allowed their home to be used as a venue for terrorist training.

13. It is in our view essential that clause 8 be amended to include a defence of lawful excuse or lack of terrorist intent. Failure to do would mean that an individual could be convicted of a criminal offence simply for being in the wrong place at the wrong time. Such a provision would seem to us contrary to deeply-held notions of criminal responsibility in UK law.

Clause 17 – commission of offences abroad

14. Although 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, we note that there are significant conceptual and practical difficulties associated with the definition of terrorism itself.

15. Specifically, there is a lack of clear consensus at the international level as to which acts constitute terrorism. 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.

16. 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 Hussein's Iraq. This would not be problematic so long as the offences were restricted to those seeking to attack UK nationals.

17. 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. Nor is such global jurisdiction required by the provisions of Article 14 of the Council of Europe Convention for the Prevention of Terrorism.

Clause 21 – grounds of proscription

18. Section 3(5)(c) of the Terrorism Act 2000 already allows the Secretary of State to proscribe a group that 'promotes or encourages' terrorism. We also note that the Home Secretary has already withdrawn 'glorification' of terrorism as a distinct offence under this Bill.

19. In our view, the grounds set out in clause 21 are vague and ill-defined. 'Glorification' is an uncertain and deeply subjective concept and adds nothing to the existing grounds against groups that promote or encourage terrorism. Also, the prohibition against activities 'which are carried out in a manner which ensures that the organisation is associated' with statements 'glorifying' acts of terrorism seems especially unclear.

20. Accordingly, we consider that extending grounds for proscription in this manner is likely to breach the rights to free expression and free association under Articles 10 and 11 ECHR respectively.

Clause 23 – extension of period of detention of terrorist suspects

21. While we welcome the defeat of the 90-days' maximum period for pre-charge detention that was originally put forward by the government, we regret that the amended clauses have nonetheless doubled the existing maximum period of detention to 28 days.

22. In our view, such an extension was unnecessary. We note that the original 7-day period set out in the Terrorism Act 2000 was the product of intensive review of over 3 decades of UK counter-terrorism legislation,[1] including a series of cases in the European Court of Human Rights,[2] and culminating in extensive parliamentary debate prior to the Terrorism Act 2000. This was subsequently amended to 14 days by section 306 of the Criminal Justice Act 2003.

23. While the government appears to regard maximum periods of pre-charge detention as pliable, the standards laid down by Article 5(3) of the European Convention on Human Rights 1950 have remained clear. 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.[3] In both cases, the Court found that detention of more than 6 days in custody without being brought before a judge was a breach of Article 5(3) ECHR, 'notwithstanding … the special features and difficulties of investigating terrorist offences'.[4]

24. As an aside, 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[5] 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.[6] As the author of the

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[1] 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.

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

[3] 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).

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

[5] 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'.

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

1996 review of counter-terrorism legislation,[7] the former Law Lord Lord Lloyd of Berwick, noted during parliamentary debate on the Regulation of Investigatory Powers Bill in 2000:[8]

> 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*.

25. 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.[9] 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.

26. 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.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
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[7] 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.

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

[9] 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'.