



NORTHERN  
I R E L A N D  
HUMAN  
RIGHTS  
COMMISSION

**Home Office consultation on Possible Measures for Inclusion in a Future  
Counter Terrorism Bill: Response of the  
Northern Ireland Human Rights Commission**

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by the human rights bodies.
2. The Commission welcomes this opportunity to comment on counter-terrorism measures proposed in the Government’s consultation paper of July 2007, and its attempts to consult widely with stakeholders on the measures. In particular the Commission welcomes the initiative taken by Home Office officials to travel to Belfast to meet with interested organisations to discuss the proposed measures in more detail. Key concerns of this Commission are firstly that lessons be learned from Northern Ireland’s experience in terms of what does and does not work in this area of law, and secondly, that attention be paid, in framing legislation of UK-wide application, to the particular circumstances of this region including the potential of new legislation to

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid.*, s.69(3).

<sup>3</sup> *Ibid.*, s.69(4).

<sup>4</sup> *Ibid.*, s.69(6).

affect progress in the normalisation of the legal, policing and security environment here.

3. Given the level of engagement with stakeholders, the Commission hopes that Government will respond positively to concerns being raised about the human rights implications of the proposed measures, and that the approach eventually adopted will be in accordance with the Preamble of the Council of Europe's Guidelines on Human Rights and the Fight against Terrorism: "... it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law".
4. It is disappointing, however, that there is scant reference to human rights throughout the document *Possible Measures for Inclusion in a Future Counter Terrorism Bill*, and disappointing that each individual measure is not accompanied with a robust consideration of its impact on human rights.
5. The proposals undoubtedly engage a number of human rights under the ECHR, most notably Article 5 (the right to liberty), Article 6 (the right to a fair trial), Article 8 (the right to privacy and family life), Article 9 (the right to freedom of thought, conscience and religion), Article 10 (the right to freedom of expression), Article 11 (the right to freedom of assembly) and Article 14 (the non-discrimination clause). This paper sets out the Commission's concerns regarding the measures being proposed; in summary, the Commission's view is that if all the elements are implemented in legislation they could have a serious adverse impact on human rights protection in the UK.

### **Pre-charge detention**

6. The Commission is concerned at the proposal to extend the current pre-charge detention period from 28 days to 56 days. Government will of course be aware that currently the UK's pre-charge detention period is considerably longer than in other countries, including those that, like the UK, have suffered from terrorist atrocities in recent years. In Spain, for example, it is five days, and it is not apparent that this time limit has impeded the efficiency of the state's response to terrorism.
7. In its supplementary paper *Options for Pre-Charge Detention in Terrorist Cases* the Government indicates that the complexity of terrorist cases in recent years justifies extending the pre-charge detention period, and outlines a number of safeguards that are envisaged to prevent arbitrary use of the detention power. To address first the proposed safeguards, these are:
  - a. Any application for each period of seven days beyond 28 days to be approved by the Crown Prosecution Service (CPS) before being decided by a High Court Judge.
  - b. The Home Secretary to notify Parliament of any extension beyond 28 days as soon as practicable after the extension has been granted, with a requirement to provide a further statement to

Parliament on the individual case, and an option for the House to scrutinise and debate this.

- c. The Independent Reviewer of Terrorism Legislation, in addition to his general annual review, to report on the operation of the pre-charge detention powers in an individual case, in order to inform the Parliamentary debate.
  - d. An annual Parliamentary debate with the powers being subject to annual renewal, as now.
8. There are several problems with these proposed safeguards. In relation to judicial oversight it is questionable what precisely the role of the CPS and judge could feasibly be in the absence of a formal charge, and this has been noted as a substantial problem with the current judicial oversight of pre-charge detention beyond 14 days in Great Britain. The Commission requests clarification of whether such arrangements would be exactly the same in Northern Ireland where the role of the Public Prosecution Service is somewhat different to that of the CPS in England and Wales, in that the PPS is not as actively involved in deciding which charges are to be brought against individuals.
9. In any case, the judge and defence will be told about police suspicions and concerns, but there may be little or no concrete evidence for them to weigh or contest in order to arrive at an informed decision. Being told by police officers that a particular individual poses a serious threat to the public if released, that further enquires need to be made, and what line of enquiry is to be followed, may mean that the judge is more likely than not to authorise an extension of the detention. Moreover, if the arrangements are to be the same as those under the Terrorism Act 2000, sensitive material will not be disclosed to the defence. Not being aware of what information is being used to support the case for further detention, makes it extremely difficult for the defence to challenge that case.
10. Similar arguments hold true of the proposal to notify Parliament and facilitate a debate. While an investigation is ongoing it is unrealistic to expect detailed information to be disclosed to Parliament on the case being assembled against the detained individual(s). It is likely to be claimed by the Home Secretary that disclosing such information may pose a risk to national security or jeopardise the current police investigation. In the absence of such information it will prove extremely difficult for Parliament to assess the necessity of the detention. The safeguard also requires that Parliament be notified “as soon as practicable” which suggests that a number of days or even weeks might pass before Parliament is notified, by which time the individual’s right to liberty under Article 5 of the ECHR has already been seriously compromised. The paper does not clarify the impact that the Parliamentary debate will have on the decision to detain the particular individual(s), but in any case, while in a liberal democracy Parliament is sovereign in terms of passing legislation, the outcome of legal cases where an individual has been deprived of his/her liberty should be decided by a politically neutral court, as independent of the legislature as it is of the executive, and which bases its decision purely on the facts of the case. It is

improper to give any role in this matter to politicians answerable to their electorates.

11. In terms of the annual renewal of the pre-charge detention period being subject to Parliamentary debate, this was the procedure under Part IV of the Anti-Terrorism, Crime and Security Act 2001 under which foreign nationals were subject to indefinite pre-charge detention. Parliament approved the renewal of that provision but some months later it was found by the House of Lords to be incompatible with Article 5 of the ECHR, thereby forcing Government to repeal the legislation. Similarly the renewal of the system of control orders under the Prevention of Terrorism Act 2005 was approved by Parliament but ruled incompatible with Article 5 of the ECHR by the Court of Appeal. Parliamentary scrutiny, while essential in a liberal democracy, does not always guarantee human rights-compliant legislation, and in the interests of preserving confidence in the integrity and efficiency of Parliament as guarantor of individual liberties, a particular effort should be made to avoid introducing legislation that is unlikely to be upheld by the Courts.
12. The Joint Committee on Human Rights has already concluded, in its report *Counter-Terrorism Policy and Human Rights: 28 days, intercept evidence and post charge questioning*, that it is not convinced of the case for extending the pre-charge detention period beyond the current 28 days.
13. Pre-charge detention obviously engages Article 5 of the ECHR under which no one shall be deprived of liberty save in the cases of lawful arrest or lawful conviction by a competent court. However, another argument against detaining persons without charge for lengthy periods is that it can and inevitably will be compared to internment in Northern Ireland. In human rights terms, detention for unreasonably long periods runs counter to the requirements of Article 5, and if, as in the current circumstances may be likely, such a measure were used almost exclusively against one community, Article 14 would also be engaged. Even in terms of its supposed efficacy as a counter-terrorist measure, it could be argued that the experience of Northern Ireland has proven internment, “executive detention”, or long pre-trial detention which has been characterised as “internment on remand”, to be ineffective and counter-productive. It can increase resentment and engender a lack of trust towards police, security services and the judicial system from within the communities that are being targeted, and whose co-operation is in fact required to counter terrorism effectively.

### **Intercept evidence**

14. As already mentioned, the Joint Committee on Human Rights (JCHR) concluded in *Counter-Terrorism Policy and Human Rights: 28 days, intercept evidence and post-charge questioning* that there was no case for extending the pre-charge detention period beyond 28 days. The JCHR, this Commission and others have made the case that making intercept material admissible as evidence in court may be one key way of enabling charges to be brought against individuals more speedily than at present, thereby

weakening the case for extending the current pre-charge detention period and indeed making the case for reducing it further.

15. The Commission is aware that Government has now commissioned a review on Privy Council terms to advise it on whether the use of intercept material in court can be introduced without compromising the necessity to safeguard national security. However, it would seem that no linkage is made between the use of intercept and enabling charges to be brought more speedily against suspects, which of course would weaken the case for extending the pre-charge detention period. The Commission urges Government to give further consideration to the potential of intercept in this area before the introduction of the proposed counter terrorism Bill.
16. Given the conclusions of the JCHR Inquiry into Relaxing the Ban on the Admissibility of Intercept as Evidence, which took evidence from a range of stakeholders, it would be appropriate for Government to engage more widely on the issue of intercept as evidence. The Commission's submission to that Inquiry is attached.

### **Post-charge questioning**

17. Government is proposing to allow questioning of terrorist suspects after they are charged, on any aspect of the offence for which they have been charged. At present there are circumstances in the Police and Criminal Evidence Act, under which police can question the suspect after charging him/her. These circumstances are to allow for police to clarify the defendant's statements; to prevent or minimise loss or harm to some other person or the public; or where new evidence comes to light (but in the latter case, only if the defendant agrees).
18. The JCHR in its report recommended the introduction of post-charge questioning as an alternative to lengthening pre-charge detention. Thus an individual would initially be charged with a lower level offence, for example acts preparatory to terrorism, inciting terrorism or being a member of a terrorist organisation. Post-charge questioning would then allow for that lower level offence to be replaced with a more appropriate one, allowing for police to gather further evidence to substantiate that charge without detaining individuals without charge.
19. For post-charge questioning to be compliant with individual human rights and in particular Article 6 of the ECHR it must be subject to strict legal safeguards. Those charged would still have the right to legal advice during post-charge questioning, the right against self-incrimination and freedom from oppressive questioning. In addition, the initial charge must of course be a legitimate one with sufficient evidence at that time to sustain that charge.
20. However, as with intercept evidence, the Commission is concerned that Government does not suggest that the introduction of post-charge questioning would in any way diminish the perceived need for a longer pre-charge detention period. On the contrary, Government says that post charge

questioning “would not negate the need for pre-charge detention as a sufficient case would still need to be made before a charge could be brought; pre-charge detention is about ensuring that we have sufficient evidence to charge a suspect in the first place”.

21. That view is not one shared by the JCHR and civil liberties groups such as Justice and Liberty. Given the scale of the suspected offence for individuals might detained without charge, it is difficult to accept that sufficient evidence would not have been gathered by the police that would enable them to bring at least a lesser holding charge against the suspect(s) in question. Once charged the individual has access to appropriate safeguards with the defence and courts having some idea of the focus of the questioning and police investigation. Again Government fails to make the link between making intercept material admissible as evidence and increasing the capacity of police to bring charges more speedily.

### **Notification requirement**

22. Government is proposing to impose a notification requirement on those convicted of terrorist or terrorist related offences similar to the current notification requirement on convicted sex offenders. Government “would also like to take powers to ensure that those convicted of a terrorist offence overseas are made subject to the notification requirements if they come to the UK”.
23. The notification requirements appear to be quite onerous on the offender, and on police forces who would have to hold details of the identity, whereabouts and foreign travel plans of anyone who had been convicted of a terrorist or terrorist related offence. The offender would be required to notify at a police station his name, any other names he uses, where he lives, any other address he stays at for five days or more and the details of any foreign travel he intends to undertake that will last for more than five days. A breach of these requirements would be a criminal offence punishable by up to five years in prison.
24. It is for Government to make the case that such intrusive requirements would serve the presumed purpose of preventing further involvement in terrorism-related activities – it may seem that, for instance, a foreign trip of up to four days might well be adequate for such a purpose but it does not come within the scheme. It is equally apparent that the scheme severely impinges on the rights of the individual who will already have served the prescribed sentence. It would impact upon how those affected made key decisions about their lives, such as moving home, making holiday arrangements and other personal, religious or work arrangements that might involve travel within the UK or beyond. The requirements therefore engage Article 8, 10 and 11 of the ECHR.
25. Moreover, when these requirements are assessed along with the other elements of the proposals – enhanced sentencing, data sharing powers between agencies, proposals to implement overseas travel bans on suspected

and convicted terrorists (discussed below) and the pre-charge detention period – they present a quite alarming picture. The consultation paper suggests that the notification requirements might help with the investigation of future crimes, so that if a terrorist incident did take place police would be able to visit those on the register and eliminate them from their enquiries. Equally of course, if the proposals are implemented *in toto*, the police could hold such individuals without charge for up to 56 days on the basis that they had committed a relatively minor ‘terrorist-related’ offence (such as possession of a forged passport) in the past. The information held by the police as a result of the notification requirements would also be available to the intelligence services under the current proposals.

26. There is no indication in this consultation paper as to whether there would be scales on the register through which individuals could move corresponding with their level of rehabilitation, re-integration and threat of re-offending. There is also no indication of whether, when the requisite time has elapsed for a conviction to become ‘spent’ under the Rehabilitation of Offenders Act, individuals would then be taken off the register. Similarly the document does not elaborate on who else might have access to the register and if an individual placed on it would have that fact revealed to, for example, a potential employer through a process similar to the clearance required by the Protection of Children and Vulnerable Adults (NI) Order 2003 or equivalents in other jurisdictions.
27. The proposal is also put forward in the consultation paper that the notification requirement might be extended to overseas offenders. It is not made clear if this refers to UK citizens convicted of terrorist or terrorist-related offences overseas, or non-UK citizens convicted overseas who subsequently come to the UK to live. If the latter, it raises further concerns about definitions of ‘terrorism’ in other states, and in particular in non-democratic regimes responsible for human rights abuses where individuals displaying legitimate opposition to the state are liable to be characterised and may be convicted as terrorists, possibly through judicial processes falling below UK standards. Such individuals could be subject to the same onerous notification requirements in the UK and objects of suspicion by the relevant authorities here.

### **Enhanced sentencing**

28. Government is proposing that sentences for terrorists who are convicted of non-terrorist offences should be enhanced to “reflect the additional seriousness that terrorist involvement represents”. Government also envisages that this proposal will provide a deterrent in more minor offences. An example provided is that someone involved in the forgery of travel documents might be more reluctant to do this for terrorist purposes if they knew that they would face a higher sentence than they could expect under the current sentencing guidelines. The consultation paper suggests that the court would determine whether or not an offence was terrorism-related, with the prosecution and defence having the right to appeal against such a determination.

29. The Commission can see how the rationale for this proposal might be similar to that advanced for the introduction of the Criminal Justice (No. 2) (Northern Ireland) Order 2004. That Order was intended to send out a clear message to the victims and perpetrators of ‘hate crime’ that, given the seriousness of such offences in terms of the impact they have on minorities, the perpetrators should be subject to longer sentences. It was also hoped that this might act as a more effective deterrent to ‘hate crime’. Indeed, terrorist offences when carried out instil fear and mistrust amongst the population as a whole and not only minorities. The Commission supported the Criminal Justice (No.2) (Northern Ireland) Order 2004 in its introduction of enhanced sentencing for crimes motivated by hostility based on the victim’s actual or perceived race, sexual orientation, political opinion or disability. Under the NI Order when the offence is proven the sentencing judge has the option of adding on up to two years to the custodial sentence if it is proven that the offence was motivated by racism for example. In Great Britain, similar provisions exist (ss.28-32 & 82 of the Crime & Disorder Act 1998) whereby a racially aggravated offence may be sentenced as a distinct offence or, when racial motivation is shown in another offence, it attracts heavier sentencing.
30. The current proposals suggest that, as in the NI legislation on ‘hate crime’, the terrorist intent or purpose would be treated as an aggravating factor for the purpose of sentencing to be determined by the court rather than the jury. However, it is this Commission’s view that the accusation of terrorist intent is too serious to be left to the decision of the court and should instead be treated as an element of the offence to be determined by the jury. In particular, the repercussions of being convicted under such legislation could be far greater than in cases of ‘hate crime’ in terms of the notification requirements discussed above and possible bans on overseas travel below.

### **Terrorist travel overseas**

31. Government is proposing to introduce powers that would enable police officers at ports to temporarily retain the travel documents of individuals who are suspected of wanting to travel abroad for terrorism-related purposes (on basis of examination undertaken or other intelligence). However it is not apparent that, where police had strong reason to suspect travel for terrorism-related purposes, they could not exercise their powers of arrest under existing legislation.
32. The restriction on overseas travel by convicted terrorists and suspects may take various forms. The consultation paper states “Such restrictions could range from a complete ban on overseas travel to stopping them travelling to particular countries or groups of countries”. Such a restriction engages Article 12 of the International Covenant on Civil and Political Rights under which

*‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own.*

*The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. No one shall be arbitrarily deprived of the right to enter his own country.'*

33. The suggestion that such a restriction could be extended to *suspected* persons is of even greater concern. As the consultation paper states, a suspected terrorist who has been charged with the appropriate offence and bailed is likely to have bail conditions that would prevent him/her from traveling overseas in any case.
34. The consultation paper does not elaborate on who would impose the travel ban and the Commission awaits further clarification on this before commenting on the appropriateness of such arrangements in more detail.
35. Such bans may have serious implications for individuals. In particular the suggestion is that certain countries will be targeted which individuals may wish to visit for religious reasons, for family purposes or legitimately for leisure. The proposals indicate that any relevant legislation might be accompanied by a list of targeted countries and this in itself may have implications for Article 14 of the ECHR (prohibiting discrimination on numerous grounds including race, religion and national origin) along with Articles 8, 9, 10 and 11.
36. In addition those convicted for relatively minor offences, but subject to enhanced sentencing and to the notification requirements, may additionally find themselves subject to overseas travel restrictions depending on how Government plans to implement them in practice. Taken together, the range of impacts on the rights of the individual, over and above the completion of the sentence or other penalty ordinarily attracted by the core offence, could be disproportionate.

### **Control orders**

37. A number of proposals are set out in relation to control orders. The first of these is empowering the police to take, retain and store DNA samples and fingerprints of individuals subject to control orders in the same way as individuals detained under the Terrorism Act 2000 and PACE. The second is to give police a self-standing power of entry and search of premises and seizure of items to enforce and monitor the control order effectively.
38. This Commission has opposed the system of control orders because of its implications for individuals' rights under Articles 3, 5, 6, 8, 9, 10 and 11 of the ECHR. In a case involving nine men placed under control orders the High Court and Court of Appeal have ruled that control orders under the Prevention of Terrorism Act 2005 are too restrictive and breached the suspects' right to liberty under Article 5. The Commission is disappointed by the House of Lords decision in relation to the system of control orders.

The Commission awaits the Bill to see how Government plans to respond to that ruling and will comment in more detail accordingly.

### **Measures in relation to DNA of terrorist suspects**

39. Government is proposing a number of measures in relation to the DNA of terrorist suspects. In particular it is proposed to broaden the purposes for which DNA of suspects can be used to include ‘for the purposes of national security’. The ambiguity of the phrase ‘for the purposes of national security’ is problematic and goes far beyond the current usages stated in the Terrorism Act 2000 (under which DNA samples can be used for a terrorist investigation, the prevention and detection of crime and the prosecution of offences) and in the Police and Criminal Evidence Act 1984 (under which DNA samples can be used for the prevention and detection of crime, the prosecution of offences and the identification of a deceased person). While the Commission does not at this stage wish to comment on the core proposal to place the counter-terrorism DNA database on a proper statutory footing and the proposal to allow DNA samples obtained under the Terrorism Act 2000 to be loaded on to the national DNA database, it does not believe that Government has made a case for broadening the purposes for which DNA can be used.
40. In the Commission’s view it is also not appropriate that the DNA samples of terrorist suspects who are not subsequently charged and convicted be retained on the same basis as PACE. The Commission holds that retention of DNA samples should be restricted to those convicted of terrorist offences.

### **Data sharing powers for the intelligence services**

41. Government is proposing to give data sharing powers for the intelligence and security services similar to those of the Serious and Organised Crime Agency. It is claimed that “the provisions remove barriers to individuals and organisations sharing with the intelligence and security agencies information that is necessary for the proper discharge of their functions”.
42. Barriers to information sharing between agencies are not simply bureaucratic inconveniences but are often measures designed to protect fundamental human rights, and most notably in this instance Article 8 (the right to privacy) of the ECHR. The underlying implication of data sharing is that the agency with which the data is shared will act upon that data in some way, and in the case of intelligence services it could reasonably be assumed that it could mean individuals about whom data is held and shared becoming subject to greater surveillance. While the notification requirements discussed above relate to the police, data sharing powers would mean that such information is also made available to the intelligence services. Intelligence services personnel are of course not subject to the same independent oversight and scrutiny as are police. The consultation paper states that these arrangements will be subject to the scrutiny of the Secretary of State, the Parliamentary Intelligence and Security Committee, the Intelligence Services

Commissioner and the Information Commissioner as well as the Investigatory Powers Tribunal.

43. The Commission has concerns about these levels of scrutiny given the extent to which an individual's right to privacy and family life could be breached. The Secretary of State cannot be considered an appropriate oversight mechanism since he/she will essentially be scrutinising arrangements which his/her officials operate. The second of the mechanisms is not empowered to look at individual complaints and its members are selected by the Prime Minister. The Intelligence Services Commissioner looks specifically at the issuing of warrants authorising intrusive surveillance but again does not address individual complaints. The Information Commissioner, while empowered to look at individual complaints, can withhold information on national security grounds and it is not unreasonable to assume that national security will be engaged in the overwhelming majority of terrorist investigations.
44. The Investigatory Powers Tribunal, which does in legislation have the power to investigate into and order remedial action for conduct by or on behalf of the intelligence and security agencies, has not to date shown itself to be a particularly effective oversight mechanism. The Tribunal, for example, cannot confirm if an individual has been or is the subject of surveillance but only if the conduct covered by Regulation of Investigatory Powers Act 2000 has been properly authorised and carried out in accordance with the appropriate guidelines. Hearings are held in private and since its creation in 2000 the Tribunal has upheld only one complaint. An indication of the difficulty in perceiving the Tribunal as a line of defence for human rights is that applicants to it, having filled out the main complaints form, must complete a separate form if they believe their human rights have been breached. This would seem to suggest a lack of recognition in the Tribunal procedures of the inextricable link between surveillance and Article 8 of the ECHR.
45. It is also questionable how far any of the mechanisms set out in the consultation paper will weigh the proportionality of surveillance operations in relation to the perceived threat, what if any viable alternatives there might have been to the level and type of surveillance carried out, and the extent and level of collateral intrusion engaged. Should enhanced data sharing powers be included in a Bill, Government must examine the effectiveness of the scrutiny arrangements and in particular the Investigatory Powers Tribunal.

## **Conclusion**

46. Overall the proposals represent an unsatisfactory development in Government's approach to the complex range of issues presented by the threat of terrorism, including the need to build confidence in the democratic order and the rule of law, and to avoid fostering alienation and perceptions of excessive and heavy-handed policing. The Commission urges Government to revisit the issues discussed above before presenting any counter terrorism Bill to Parliament.