

**PROPOSALS BY HER MAJESTY'S
GOVERNMENT FOR CHANGES TO
THE LAWS AGAINST TERRORISM**

**Report by the independent reviewer
LORD CARLILE OF BERRIEW Q.C.**

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BACKGROUND TO THIS REPORT

1. Pursuant to the *Prevention of Terrorism Act 2005 section 14* I am required to prepare periodic reports on the operation of the Act. By *section 14(5)* my report “*must contain*” my opinion on

“(a) the implications for the operation of this Act of any proposal made by the Secretary of State for the amendment of the law relating to terrorism;”

2. In the normal course of events, in early 2006 I should have prepared a single report as independent reviewer. This would have been published in the same way as my other reports, on the Terrorism Act 2000 as amended. They are printed and available through the Houses of Parliament, and also on the internet via www.homeoffice.gov.uk
3. The terrorist bombings in London of the 7th July 2005 brought a new if not unexpected element to the terrorist threat from those perceived to be connected with Al Qaeda. This was the use of suicide bombers to kill members of the public in places of mass aggregation. The London underground train system was the kind of target one feared, though chillingly there were and are no grounds for believing that any other equally accessible place might not be targeted in the same way.

4. The events of the 21st July 2005 provided further evidence of the preparedness of some young males to act as suicide bombers. Nobody now can doubt the reality of the threat.
5. The death of a member of the public shot by the police after apparently being mistaken for a terrorist is the subject of inquiry at the present time. It would not be right for me to make any comment on the merits of what was a tragedy for all concerned. I observe merely that it demonstrates the unintended consequences of terrorist crime and of the changed perceptions and alerts that may ensue. The point of mentioning this is that it provides evidence of the paramount need for effective counter-terrorism legislation that can increase the potential for preventing terrorist plots being brought to fruition well before they would otherwise occur.
6. The London occurrences of July 2005 rightly and inevitably catalysed an earlier examination of potential additional legislation than had been envisaged at the time of the enactment of the *Prevention of Terrorism Act 2005*. The government indicated its intention to legislate very early in the resumed Parliamentary session commencing on the 10th October 2005. Consultation followed between the Home Secretary and the shadow spokespersons of the main Opposition parties.
7. There has been a full public debate in the media on the possible changes that might be made to the law. Much of this was of the megaphone variety between politicians in the highest offices, not always as calm as one would wish ideally for so important a subject. However, public debate is a good thing especially in relation to laws potentially affecting on the one hand the liberties of the subject, and on the other seeking to protect the lives of the majority from the horrific prospect of being blown apart whilst going about their everyday lawful business. There can be no doubt that the public as well as politicians are

now better informed about the issues and possibilities surrounding tougher counter-terrorism legislation.

8. I have been consulted by senior officials in the Home Office concerning my own thoughts and suggestions for amendment of the law. Such contributions as I have made to the process have been taken into account as part of the wide process of consultation.

9. Given that new legislation has now been drafted and is intended to be in force before the routine publication of my first report under *section 14*, it would have been absurd for me to wait until early next year to prepare my report on government proposals. Therefore, having received the draft *Terrorism Bill 2005*, I have decided to prepare this short additional report to be published prior to the Parliamentary debates on that Bill. I hope that it will assist in informing the debate. I may have strayed somewhat beyond the tightest interpretation of my role under *section 14(5)*, but if so that is inevitable in preparing a report of this kind.

THE TERRORIST CONTEXT

10. There are several significant pieces of legislation in existence with the potential to counter terrorism. The ordinary law has a wide selection of offences that can be used in convicting terrorist criminals - ranging from murder to quite small but persistent credit card fraud used to fund terrorist organisations. I have heard the view expressed by some with profound knowledge of the criminal justice system that there is no need for terrorism specific legislation. That view has been far less in evidence since the 7th July 2005, and I disagree with it.

11. In my role as independent reviewer I have been able to see closed material, including some product of criminal intelligence obtained from technical and human sources of various kinds. In my view the Joint Terrorism Analysis Centre (JTAC) has continued to play a significant role in the assessment of the available material. That the 7th July events clearly involved British nationals, born and/or resident in the UK, as the suicide bombers was a feared and worrying development. Its effect is to render the finding of terrorist cells far more difficult, since they are less likely than foreign nationals with a discernible intelligence profile to leave and enter the country in circumstances likely to attract attention. There is a huge amount of work being done by the police and the security services, at home and abroad, to try to identify links and allegiances likely to lead to the easier identification of potential British terrorists.

12. However, it is a well-known pattern of experienced terrorist organisations to use "*clean skins*", i.e. terrorists who have not committed serious crime before and are therefore less likely to attract the attention of the authorities. Nobody should be in any doubt of the difficulty this causes in detecting likely terrorists.

13. It would be utterly illogical to imagine that the events of July mean that it is now less likely that terrorist outrages will continue. I give the warning that they will continue, albeit perhaps with an interval of time greater than might otherwise have been the case had the events of the 21st July been deadly.
14. It is clear beyond doubt that elements connected with Al Qaeda and its loose co-fraternity of sympathisers contain persons in the UK with the skills to make small explosive devices capable of causing devastation. It is equally clear that there are still young men prepared to rationalise their own criminal acts in terms of death and glory. In an article in the Financial Times of the 29th July 2005 David Gardner referred to this phenomenon as “*The politics of wounded identity*”, and referred to
- “...the ways in which Islamist extremists are able to manipulate the question of identity and make it synonymous with religion, or rather, a religion they portray as everywhere under infidel assault.”*
15. It is that very manipulation that calls for a response by the introduction of laws that justly balance the important and even fundamental civil liberties of the suspected terrorist, and the innocent public. Laws which have the effect of wounding identity further are unlikely to do more than exacerbate the situation. Laws with the effect of bringing together in a fair way the proper and constitutional will of the majority of the public have some prospect of persuading the disaffected that terrorism is an unacceptable option, and of preventing it when it would otherwise occur.

16. There are reports from abroad of possible continuing and specific terrorism in the UK. For example, on the 12th September 2005 a press report by Udo Ulfkotte entitled "*Security circles: Indications of a third London terror cell*" was issued by the German news agency *ddp*. It reported that European intelligence services had "*vague indications that [a] terror cell controlled from Bosnia is preparing a new attack on London*". Whilst vague indications are hardly a justification for any hard conclusions, such reports help to emphasise the need for vigilance and effective preventative laws.

17. There are non legislative measures too that can be taken to improve work against terrorism. The Metropolitan Police Commissioner announced recently a reorganisation of such work, with significant effects on the deployment of current special branch officers. The Home Secretary's declared intention to reform the organisation of police forces in England and Wales could be important in this context. My own observation after looking closely at the policing of terrorism over the past 3 years is that the existence of so large a number of police forces as at present does not lead uniformly to the best use of available expertise, and does not always provide a sufficient career structure for the retention of such expertise in counter-terrorism policing.

18. In the weeks since the 7th July I have received numerous representations about the future shape of legislation from members of the public, lawyers, police officers and others. I have scrutinised the observations of non-governmental organisations with a material interest. I have too followed the media coverage at home and to an extent abroad.

THE PROPOSALS

19. I regard the proposals on which I report here as coming from the following 4 sources -

- (i) The draft Terrorism Bill 2005. I have seen two versions. The first was provided on the 15th September 2005, and a significantly altered draft on the 5th October. Properly, that draft was produced following various representations, and represents the government's reconsidered view of what is required.
- (ii) The Home Secretary's published letters of the 15th September 2005 and 6th October 2005 to the Rt. Hon David Davis M.P. and to Mark Oaten M.P.
- (iii) Some parts of the Home Office's written evidence of September 2005 to the House of Commons Select Committee on Home Affairs
- (iv) The Consultation Paper issued on the 6th October 2005 "*Preventing Extremism Together: Places of Worship*".

THE DRAFT TERRORISM BILL 2005.

20. **Clause 1: Encouragement of terrorism.** This proposal provides an offence arising from the publishing of statements likely to be understood as an encouragement or inducement to terrorism. The maximum sentence would be 7 years' imprisonment.

21. The original draft I was shown has been changed substantially. The previously separate proposed offence of glorifying terrorism has been subsumed into the heading of encouragement. The original version was in my view capable of drawing some odd results; the present version now concentrates in *sub clause (2) (a)* on statements designed to encourage emulation. What this means is that effectively the controversial idea of a separate offence simply of *glorifying* terrorism rightly has been dropped. A more specific state of mind is required of the putative offender. This is a sensible decision, consistent with the concerns I would have expressed about the original draft Bill shown to me. It was not workable in its original form.

22. A statutory defence with a reverse onus provision excuses innocent publication on the internet, which in this context is extremely difficult for internet service providers and chat room sites to control.

23. In my view this proposal in its revised form is a proportionate response to the real and present danger of young radically minded people being persuaded towards terrorism by apparently authoritative tracts wrapped in a religious or quasi-religious context. The balance between the greater public good and the limitation on the freedom to publish is no more offended by this proposal than it would be by, say, an instruction manual for credit card fraud were such to be published. I believe that it is Human Rights Act compatible.

24. **Clauses 2 and 3: Dissemination of terrorist publications.** These clauses seek to make it an offence to disseminate in printed form or electronically including on the internet any terrorist publication. The maximum sentence proposed is 7 years' imprisonment. Some have argued that this would impose an unacceptable level of censorship on bookshops and websites, far greater than any restriction on, for example, obscene publications.
25. Analogies could be drawn with the dissemination of publications giving direct or indirect encouragement or other inducement to or information about other serious criminal acts, for example paedophile offences. There is no acceptable ground for objection to it being an offence to disseminate such publications. The defining sub clauses narrow significantly the circumstances in which an offence would be committed. There are two statutory defences set out in *clause 2 subclauses (8) and (9)*, of which the latter appears designed to protect the innocent internet service provider and electronic publisher. The evidential burden of establishing the statutory defences is placed on the accused.
26. Clause 3 provides a detailed system of notification by a constable to the provider of an internet service. In short, the provider is required to remove from the service material offending the earlier clauses. If they are not removed, offences may be committed.
27. A question parliamentarians may wish to address in relation to clause 3 is whether such notices given by a constable should be subject to judicial control or confirmation, for example by a district judge (Magistrates' Court).

28. In my view Clauses 2 and 3 generally are proportional and a sensible part of the legal armoury. However, I have one residual concern. Much research has been done into terrorism, and it involves a high degree of co-operation between genuine and respected academics in universities and institutes around the world. In addition, my own experience as a former M.P. and my current Parliamentary life leave me in no doubt that Members of Parliament and Peers with a particular interest in the subject might themselves and with their research staff pass publications to each other for the purposes of preparing policies, speeches and correspondence. Similar comments could be applied to some serious journalists. It is important to ensure that genuine and sometimes useful research is not turned into a *samizdat* activity. The government should consider whether amendments might be needed to ensure that these categories of activity are not criminalised.
29. **Clause 4** is an appropriate procedural provision dealing with the giving of notices under clause 3.
30. **Clause 5: preparation of terrorist acts.** In my earlier reports on the operation of the *Terrorism Act 2000* I have supported the idea of an offence of acts preparatory to and connected with terrorism. Effectively this would be an offence of facilitation. It is intended to catch those who, knowing the connection with terrorism and an intention to commit terrorist acts provided the facilities so to do. Examples would include the provision of accommodation for terrorists knowing they were such, and committing credit card fraud to assist in providing a living for terrorists.
31. Ministers should satisfy themselves that the clause is sufficient to cover the types of facilitation described. It occurs to me that the use of the words “*committing*” and “*commit*”, with their direct reference to “*acts of terrorism*” might arguably limit the intended scope of the new offence.

32. Subject to checking the solidity of the drafting, Clause 5 is a proportional and proper response to achieve the criminalisation of the conduct described. The offence is potentially very serious, with a maximum of life imprisonment. Whilst many such offences in reality would attract far less severe sentences, the deterrent effect of it being made known that there is that maximum might be considerable.
33. Clause 5 has the advantage of being short, crisp and should emerge readily comprehensible. This will further strengthen its contribution to a fair yet robust canon of counter-terrorism law.
34. **Clause 6: training for terrorism.** This clause is designed to create an offence punishable with up to 10 years' imprisonment of deliberately providing or receiving instruction or training in connection with terrorist offences. It covers too invitations to such training or instruction. The clause makes the extensive range of activity covered clear, and provides for the forfeiture of equipment and materials used in the commission of the offence.
35. In this instance too there are clear reasons for the introduction of the offence. It is in my view proportional and could make a significant contribution to the detection of potential terrorists well before operational harm is done by them. However, it is important that there should be the clearest understanding that this clause and clause 8 would not be misused. I question whether it is the role of our law, or even enforceable, to make it a criminal offence triable in our country to fight in a revolution the aims of which we support. The example of the ANC before the release of Nelson Mandela almost automatically springs to mind. Whether this concern is properly in the area of legislative drafting or of appropriate Ministerial statements is a matter for others.
36. **Clause 7** provides reasonable powers of forfeiture in relation to offences under clause 6.

37. **Clause 8: attendance at a place used for terrorist training.** There is something of an overlap between this proposal and Clause 6. However, it is significantly wider. It covers mere attendance at any place, anywhere in the world, where instruction or training of the type described in Clause 6 is going on. The maximum sentence is 10 years' imprisonment.
38. In my view this proposal is in clear need of modification. Some of Britain's most respected journalists have from time to time reported in the public interest from terrorist training camps in various parts of the world. On occasion, they are the camps of fighting groups revolting against despotic regimes whose overthrow is greatly desired by the United Kingdom and others. As drafted, the law would render these journalists potential criminals, albeit subject to the ultimate discretion of the Attorney General as to whether they would be prosecuted.
39. In my view the government should look at Clause 8 again, and possibly elide it with Clause 6. The mischief legitimately and proportionately aimed at is principally the attendance for and/or receipt of instruction and training for a terrorist purpose presenting a danger because of affiliation to Al Qaeda and similar organisations, and/or danger to UK citizens and their allies and connected interests.
40. **Clause 9: making and possession of devices or materials.** This proposal is designed to make it an offence subject to a maximum of life imprisonment to be involved with radioactive devices or materials for the purposes of terrorism.
41. There is evidence and information from around the world of efforts to produce nuclear terrorism devices. The proposal is clearly needed and proportional to the risk to the public. This clause too has the virtue of clarity and simplicity.

42. **Clauses 10, 11 and 12: misuse of devices or material and misuse and damage of facilities: terrorist threats relating to devices, materials or facilities: trespassing etc. on nuclear sites.** These clauses too deal with the risk of nuclear terrorism, and the associated risks arising from trespass on nuclear sites. In my view these clauses provide a useful and necessary new set of offences to counter the horrific threat of nuclear terrorism ranging from attempts to build devices to hostage threats and dangerous trespass. They will not remove the possibility of legitimate protest very near to albeit outside the boundaries of nuclear sites.
43. **Clause 13, 14 and 15** increase the maximum penalties for certain existing offences. They would allow the court a fuller range of penalty to meet the needs of each case. They are appropriate.
44. **Clause 16** brings into effect an existing statutory provision requiring the holding of preparatory hearings in the Crown Court in terrorism cases. Hearings of this type, though sometimes protracted, help considerably in case management and in the isolation of issues capable of consideration and resolution before a jury starts to consider evidence.
45. **Clause 17** extends the UK jurisdiction to acts committed abroad in respect of all the proposed offences described above, and a list of others set out in sub-clause (2). The extra-territorial application is to all persons and companies, whether UK citizens/corporations or not.
46. The absence as yet of an effective and operational international criminal court has meant the inevitable increase in extra-territorial jurisdiction. In my view it could hardly be considered wrong to arrest and prosecute a major international terrorist if he happened to transit through the UK and be apprehended here; or a UK national involved in terrorism offences in other parts of the world.

47. Of course, the discretion whether or not to prosecute is important and sensitive in this context.
48. **Clause 18** extends to directors, managers and comparable officers criminal liability for terrorism offences committed by a body corporate. Whilst this may cause some nervousness among companies trading in difficult parts of the world, the explicit inclusion in statute of this level of responsibility is proportional and fair, and will ensure the continuing vigilance of companies and other corporate bodies (including charities).
49. **Clause 19** is important. Prosecution of any of the proposed offences described earlier in the Bill requires the consent of the territorial Director of Public Prosecutions; and the concurrent consent of the Attorney General (or Advocate General of Northern Ireland) if the offence has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom. This double consent provision in all foreseeable circumstances should provide a safety valve against hasty or inappropriate decisions.
50. **Clause 20** is an interpretation clause. It is broadly acceptable. The power of the Secretary of State to modify Schedule 1 (which sets out offences to be regarded as terrorism offences) by statutory instrument is to be subject to active Parliamentary scrutiny via the affirmative resolution procedure – a welcome and entirely correct revision to the earlier draft of the Bill.

51. **Part 2 of the Bill.**

Clause 21: grounds of proscription. This clause extends the existing power to proscribe organisations which promote or encourage terrorism. It proposes the potential inclusion of organisations of which activities or statements glorify, exalt or celebrate terrorism. I expect a significant number of additional proscriptions of organisations around the time of publication of this report. I have seen the list of organisations to be additionally proscribed, and there are no surprises for the informed.

52. Proscription is regarded by some as something of a toothless tiger. However, after careful enquiry including discussions about the merits or otherwise of proscriptions during the worst of the troubles in Northern Ireland, I share the opposing view that it can play a role in reducing the opportunity for disaffected young people to become radicalised towards terrorism. That being so, extending the list to include the organisations envisaged in the clause is a proportional limitation on the freedom of association in relation to the greater public good. However, it is important that restraint is shown in the exercise of the power. In any event, proscription is subject to the system of law established through the Proscribed Organisations Appeal Commission [POAC].

53. **Clause 22: name changes by proscribed organisations.** This clause is intended to ensure that an organisation cannot slip out of proscription by the simple device of a change of name. This is an entirely practical and sensible proposal.

54. The system of law provided for the clause is procedurally elaborate, and seems well designed to use POAC as a protection against error or arbitrariness.

55. **Clauses 23 and 24: extension of the period of detention by judicial authority.** This proposal, to allow a maximum detention period of three months before charge, has provoked considerable political controversy. By the time of writing this report in early October 2005 views seem to have polarised into strong support or stark opposition – though in his letter of the 15th September to Mr Davis and Mr Oaten the Home Secretary made it clear that there was room for discussion about this proposal. Unfortunately the level of public information about this proposal has been poor, and the problem being tackled has been explained badly.
56. Currently the police investigate terrorism offences using what one might call traditional detective techniques, amply augmented by the work of the security services and deploying such technical skills as are relevant. Typically these control authorities may obtain tentative evidence of a terrorist cell, and piece by piece build up a case. There may be a huge amount of surveillance involved, and sometimes they have to play a patient waiting game against often extremely counter-surveillance skilled suspects.
57. In serious non-terrorist crime it is occasionally possible for the police to wait for the crime to be committed, and catch the criminals red-handed. This occurred with a major bullion robbery at Heathrow Airport for which the culprits were sentenced in September 2005. That approach is very rarely possible with terrorist crime, because of the potentially dreadful consequences of a terrorist act being brought to fruition. There have been occasions when, because of the nature of the threat, arrests have had to take place at an early stage to avoid the possibility of nervous terrorists acting earlier than might otherwise have been intended.

58. One consequence of a decision to arrest early in a police operation may be that though a great deal of evidence is potentially available, it simply has not been possible to gather it before arrest. It remains to be gathered after arrest if possible – even to the point of making a difference between someone being charged or not, or being charged at the appropriate criminal level or not. I am aware of several operations in which these problems have occurred.

59. Typical evidential issues requiring prolonged attention in this situation include –

- Decryption of computers: this sometimes requires expertise from abroad
- Other code breaking
- Analysis of recorded telephone product from home and abroad, sometimes very large in quantity
- Searches of large numbers of premises and vehicles
- Interviewing of many potential witnesses
- Discussions and cooperation with foreign police and security services where considered reliable
- Analysis of private libraries, offices and personal correspondence
- Translation of manuscript material, some in languages for which quality interpretative services are at a premium
- Giving adequate opportunity for suspects who wish to provide information to the authorities to do so discreetly and in a safe situation
- Obtaining carefully considered and good quality legal advice.

60. Much has been made of the process of interview, and there have been suggestions that more time is needed for that purpose than the current maximum detention period of 14 days in Schedule 8 of the Terrorism Act 2000 as amended. I do not regard extra time for interviews as being a sound basis for the extension of the time period. Typically those arrested for terrorism offences are taken under arrest to Paddington Green Police Station. There they are subject to forensic science procedures (taking of samples, fingerprinting etc.), and interviewed. Those arrested in groups often share the same solicitors, usually drawn from a narrow circle of firms with special expertise and experience in terrorist crime. Those solicitors are generally very professional, extremely skilled, and analytical in the advice they give. Although there are issues that take time, e.g. provision of interpreters, medical needs, prayer, the need for the solicitors to have time to see all their clients properly, and family visits, the reality is that most suspects exercise their right of silence in interview. If they are advised so to do, that advice is usually beyond reproach. In a potentially extremely serious case, the balance between whatever adverse inference might be available in court and, on the other hand, the advantage of only answering questions (if at all) in interview after a reasonable amount of disclosure by the police of their case, would lead most competent criminal lawyers to advise their clients to remain silent. This means that the interviewing process is rarely productive.

61. However, the evidential matters including those described in paragraph 59 above have been demonstrated to me by the police in England and Scotland as real problems. On the basis of my own enquiries and processes as independent reviewer, I am satisfied beyond doubt that there have been situations in which significant conspiracies to commit terrorist acts have gone unprosecuted as a result of the time limitations placed on the control authorities following arrest. This is not in the public interest, in which the prosecution of terrorism crime is of great importance.

62. The question then arises as to how much extra time should be permitted, and how it should be controlled. It would be wholly unacceptable for the extra time to be unrestricted, or in any way to be a form of internment. The proposal of a maximum of three months is founded on nothing more logical than the suggestion that it seems a reasonable maximum in all the circumstances. It is true to say that it is the maximum I have heard mentioned in several meetings I have attended. It would probably be an insufficient maximum period for a very few cases, but more than three months would certainly be unacceptably draconian. Almost all cases could be processed well within that period, most in far, far less time. I share the view that as a *maximum* three months is probably a practicable and sensible option, all other things being equal. I recommend that the proposal for that maximum should be so regarded.
63. Having said that, the question arises as to the protection to be offered to suspects, against arbitrary or over-long detention.
64. Clauses 23 and 24 enlarge the existing judicial scrutiny of applications to extend detention periods. Put simply for the purposes of this report, on the application of at least a police superintendent an application would be placed before a "*judicial authority*". For this purpose currently that is a district judge (Magistrates' Courts), though the phrase is not exclusive to that. A cadre of district judges with great experience deals with all such applications now. I believe that they do so carefully and fairly, thoroughly scrutinising what is placed before them. They do an excellent job. Nevertheless the system of law they apply was designed to deal with short periods of detention up to seven days, now extended to fourteen. Inevitably the material they see is likely to be one-sided, and they have only modest opportunity for in-depth scrutiny. Though they can ask questions and do seek further information, they have no role in the inquiry under way and they have no

independent advice or counsel before them. The procedure before district judges in my view has characteristics suited to short interference with liberty, and I should regret seeing it extended further. A more searching system is required to reflect the seriousness of the State holding someone in high-security custody without charge for as long as three months. I question whether what is proposed in the Bill would be proof to challenge under the *Human Rights Act* given the length of extended detention envisaged.

65. The *Privy Counsellor Review Committee into the Anti-Terrorism, Crime and Security Act 2001*, chaired by the Rt. Hon Lord Newton of Braintree, reported in December 2003 [2003 HC 100]. One of their recommendations, at paragraph 224 onwards, suggested the introduction of a system of examining magistrates along continental lines. Some in mainland Europe look longingly at our criminal justice system for better practice. However, without entering the wider debate about criminal justice procedures as a whole, I suggest that the Newton Committee's recommendation may provide the clue to the system of protections needed to enable the period of detention without charge to be extended to a maximum of three months in rare cases. In advising this I repeat what I have suggested previously to officials in the Home Office.

66. The Newton Committee said:

The merits of using an investigative approach in this specialised context

224. **Another approach to the problem of confronting the suspect with specific accusations and evidence, without damaging intelligence sources and techniques, would be to make a security-cleared judge responsible for assembling a fair, answerable case, based on a full range of both sensitive and non-sensitive material. This would then be tried in a conventional way by a different judge. In our view this approach could be well suited for use in this limited context.**
225. Variations on this approach are used in other countries. For example, in France the examining magistrate (*juge d'instruction*) hears witnesses and suspects, orders searches and authorises warrants. The magistrate's duty is to look for both incriminating and exculpatory evidence.¹¹⁵ Both the prosecution and the defence see the case file as the investigation proceeds and may request actions from the judge. If the *juge d'instruction* decides there is a valid case against a certain suspect, he puts the case to a court (presided over by a different judge). The case is then argued on the basis of evidence which the examining magistrate has assembled and which the parties have had the opportunity to contest. There are also hybrid systems. For example, in Scotland the procurator fiscal has an investigatory role as well as a prosecutorial one.
226. We do not envisage seeking to replicate another system in its entirety, but to use the underlying principles to devise a system that works in the context of the British legal system (just as the Special Immigration Appeals Commission was inspired by, and arguably improved on, a Canadian model).
227. This approach could mitigate two problems that arise in this context under the current system:
- a. the risk that the process of prosecution will lead to the need to disclose sensitive material;

¹¹⁵ *Code de la procédure pénale*, art. L81.

67. Detention for longer periods, certainly over a month, and beyond the slightest doubt three months, requires a reassuringly strong system of protection for the detained person. I suggest that the government should look again at this proposal, with a view to a system of law comprising the following key elements or similar requirements—

- Where detention beyond 14 days is to be applied for, the introduction of one of a small group of security-cleared, designated senior circuit judges as examining judge and “*judicial authority*” under the legislation

- That judge to be provided with a full and continuing account of all matters involved in the investigation in question
- The introduction of a security-cleared special advocate, also fully briefed as to the investigation, to make representations on the interests of the detained persons and to advise the judge
- The judge to have the power to require specific investigations to be pursued if reasonably necessary for the proper exercise of his/her jurisdiction
- Suitable opportunity for written and oral defence representations against extended detention, with oral hearings at the discretion of the judge
- Weekly decisions with reasons if extended detention granted
- The keeping of a written record (if necessary protected from disclosure for the purposes of any subsequent trial) of the judge's activities in a case
- Appeal with permission to the High Court.

68. I suggest that a structured system along these lines would gain sufficient confidence, and would be appropriately robust, to meet all exigencies. It would be compatible with Human Rights legislation. It would compare favourably with protections in other countries, including France, Spain, Germany and the United States. I believe that clauses for the necessary primary legislation could be drafted quite simply and added to the Bill, and that regulations could follow to deal with any procedural aspects requiring closer definition. There are enough senior circuit judges in existence for this to be a feasible proposal (all the judges at the Central Criminal Court and at least one at every major Crown Court Centre), and if required the appointment of one or two more would be well

worthwhile for this purpose. Special advocates exist already for the Special Immigration Appeals Commission [SIAC] and POAC, and their number has been increased by recent appointments. Steps have already been taken to improve their training to meet concerns expressed by me and others.

69. I claim no definitive authority for the suggestions made in this part of my report. I regard the current draft clauses as providing too little protection for the suspect, though I am concerned that extended periods of detention should be available for some investigations. I hope that what I have said may provide at least a signpost to an acceptable system. I am certain that this issue needs a more analytical and subtle approach than has seemed apparent from some comment to date.

70. **Clause 25 and 26: all premises warrants for searches in terrorist investigations.** This clause proposes amendments of the law relating to search warrants. It allows for warrants to be issued for '*sets of premises*', and for '*any premises occupied or controlled by persons specified in the application, including such sets of premises as are so specified...*'. Judicial supervision of the process is provided by circuit and district judges, in England and Wales. Separate provision is made for Scotland.

71. This proposal simplifies the law on search warrants in terrorism cases. It is proportional and necessary to reasonable operational requirements and the public interest.

72. **Clause 27: search, seizure and forfeiture of terrorist publications.** This clause gives a justice of the peace jurisdiction to issue a warrant authorising the seizure of terrorist publications. Such publications may be removed, seized and, in some circumstances, ultimately forfeited.

73. There is a degree of concern that this provision may be used more than necessary, and could be seen as a form of censoring of bookshops, and bookstalls in mosques and other places where publications are made available.
74. The power is necessary; indeed the scheme of the Bill could hardly function without it. Without in any way questioning the excellent job done by lay justices all over the country, in this jurisdiction there may be subtle judgments of law to be made.
75. I suggest that the jurisdiction should rest in the hands of a professional judge accustomed to the issue of warrants of various kinds. The appropriate level might be district judge (Magistrates' Courts) or equivalent.
76. **Clause 28: power to search vehicles under Schedule 7 to the Terrorism Act 2000.** This is a sensible provision to allow Schedule 7 searches of vehicles on a ship or aircraft or which an examining officer reasonably believes has been, or is about to be, on a ship or aircraft. It clarifies the law and is unexceptionable.
77. **Clause 29: extension to internal waters of authorisations to stop and search.** This proposal extends the authorisation and search powers under *Terrorism Act 2000 section 44* to internal waters, and therefore to vessels of all kinds on them and their crews and passengers. Much controversy has surrounded the use of *section 44*. In previous reports I have recommended that there be a strong programme of training and comprehension of the use and limits of the section. The Metropolitan Police have taken very seriously the concerns expressed by myself and others. Mistakes are still being made. Training programmes are being developed around the country to achieve more effective use of a sometimes important power. The Home Office is scrutinising authorisations more rigorously than

used to be the case, and by no means is every authorisation being approved. In some cases the geographical limit of applications is being confined by the Secretary of State. In Scotland *section 44* was not used before the G8 Summit in 2005, other powers being regarded as adequate. However, in the immediate aftermath of the 7th July events and those of the 21st July, the section was necessary and well used.

78. In my work as reviewer the illogicality of *section 44* powers being available on a road but not on an estuary or river nearby has been the subject of repeated frustration expressed by police officers. I share their view that the proposal in the clause is sensible and improves the law.
79. **Clause 30: amendment of the Intelligence Services Act 1994.** This clause amends powers for the issue to members of the intelligence services of *warrants to act* in particular ways. Urgent warrants could be issued by specified senior officials, in the immediate unavailability of the Secretary of State. Whilst this does not fall within my usual range of review, it seems to me a sensible and practical change to the law and subject to appropriate controls and limitations.
80. **Clause 31: interception warrants.** This proposal is for amendment of the *Regulation of Investigatory Powers Act 2000* [RIPA]. It extends the periods for which warrants remain valid, and simplifies the modification of warrants in the reasonable pursuit of national security. The warrants regime has its own system of law outside my review mechanism, and I leave it to others to comment on the effect of the proposed changes to RIPA so far as the integrity of the process is concerned. In terms of the effectiveness of counter-terrorism legislation, the clause is likely to be helpful.

81. **Clause 32: disclosure notices for the purposes of terrorist investigations.** This clause in effect introduces an obligation to disclose information of substantial value (or likely to be so) in connection with a terrorist investigation, on receipt of a disclosure notice. The logic of this is plain. If a person or body corporate has information that could lead to a terrorist, and therefore possibly prevent a terrorism event, such information should be disclosed. That this is in the public interest and proportional is plain.
82. **Clause 33: amendment of the definition of terrorism etc.** extends the statutory definition of terrorism in other statutes to cover terrorist actions against inter-governmental organisations. Given the prevalence and importance of such organisations, it is an acceptable proposal. They should have the same statutory protection from terrorism as the organs of the nation state.
83. **Clause 34: applications for extended detention of seized cash.** This proposes that an application to a justice of the peace for an order under *Anti-Terrorism, Crime and Security Act 2001 Schedule 1 paragraph 3*, relating to the period of detention of seized terrorist cash, might be without notice and in private. I can see sound operational reasons for this, upon which Ministers may wish to expand if appropriate.
84. **Clause 35: review of terrorism legislation.** This provides for the review (currently carried out by myself) of the operation of the *Terrorism Act 2000* to be extended to cover the new legislation. The merits of this proposal I leave to others. The process presents no difficulty. Reviewing the Act of 2000 without including the new legislation (if passed) would present practical difficulties for the statutory reviewer.

85. **Clause 36 to 38: consequential amendments and repeals, expenses and short title, commencement and extent.** For all purposes except one small exception it should be noted that the proposed legislation applies to the whole of the United Kingdom. I see no reason why those parts of the draft Bill as are passed should not come into force very quickly indeed. Beyond that I can make no useful comment on these clauses.
86. **Schedule 1: Convention offences.** These are offences deemed for certain purposes to be regarded as terrorism offences. The list includes offences relating to explosives, biological weapons, certain internationally protected persons, hostage-taking, hijacking or other offences against aircraft, nuclear material, aviation and maritime security including navigation ships and platforms, chemical weapons, terrorist funds, directing terrorist organisations, nuclear weapons and connected inchoate offences such as conspiracy. The list is unexceptionable.
87. **Schedule 2: seizure and forfeiture of terrorist publications.** This schedule provides procedural provisions connected with the proposals contained in *clause 27*. Doubtless there could be many views of the procedure if it is introduced. That set out in the schedule, whilst possibly capable of improvement, appears reasonably stringent and easy to understand. It should prove fit for the purpose.
88. **Schedule 3: repeals.** This appears to be accurate.

**THE HOME SECRETARY'S LETTERS OF THE 15TH SEPTEMBER 2005
AND THE 6TH OCTOBER 2005.**

89. In his 15th September letter to the other political spokespersons on Home Affairs Mr Clarke emphasised that the Bill contains "*very much draft clauses*". He then provided a brief explanation of each part of the draft Bill, doubtless to be augmented by an explanatory note and Notes on Clauses in due course. This process has been followed in the later letter.
90. I am satisfied that the explanations are accurate and provide an informed basis for the debate and for those attempting the always difficult task of drafting amendments.
91. On page 3 of his 15th September letter the Home Secretary realistically recognised the potential difficulty presented by *clause 23* dealing with the extension of detention periods. He seemed to be suggesting the possibility of a shorter period being acceptable. The October letter is less encouraging to changing the period envisaged. I should be concerned if there was a Parliamentary Dutch auction over the length of the extended period. As I have made clear above, there is no magic in the proposed three months: however, having examined the representations made to me by police officers and others, and for the reasons given above, I consider that three months is a reasonable estimate for the maximum time needed to bring the most serious and difficult cases to the point of fruition. That point is when the decision can be made on an empirical basis whether to charge, and if so what to charge. There is surely a public interest in the correct people being charged with offences of an appropriate nature and at the correct level of criminality. Of course, there remains a trial and they may be not guilty, but that is in the next stage of the procedure and may depend on factors not available to investigators.

92. The more important question than the period seems to me to be a well structured process with a high level of judicial protection. I suggest that especial attention be given to that part of the issue, and have set out some suggestions at paragraphs 66 and 67 above.
93. Also on the third page of his first letter, the Home Secretary dealt with the improvement of immigration procedures, to be included in the current *Asylum and Nationality Bill*. The particular proposals set out on that page are appropriate and proportional for dealing with the serious threats posed by terrorists to the safety of the public.
94. In the correspondence the Home Secretary has dealt with the potential improvement of trial procedures including the possible use of security-sensitive evidence. I repeat what I have said before - the *potential* to use intercept evidence should be available. This would not mean that it would *have* to be used. In a small number of terrorism cases, and probably a larger number of drug-smuggling and money-laundering cases, and possibly in other categories of crime especially with an international dimension, it would help to secure convictions. I appreciate and understand the problems of transcribing, disclosing and using such evidence. However, I feel that such problems could be addressed by particular rules ensuring fairness whilst not placing impossible burdens on the control authorities.

WRITTEN EVIDENCE BY THE HOME OFFICE TO THE SELECT COMMITTEE ON HOME AFFAIRS

95. The Select Committee requested this written evidence following the events in London of the 7th July 2005. It is a detailed document, with a useful annex containing The *Hague Multiannual Programme* and its *Action Plan* concerned with the strengthening of freedom, security and justice. The ten priorities of the Programme focus coherently on international action to combat terrorism and the associated issue of the security of borders.
96. Much of the document containing the Home Office evidence deals with matters now included in the draft Bill and discussed above. Of the matters outside the Bill, a few merit separate mention.
97. At paragraph 7 the evidence announced that the Home Office will consult on setting a maximum time limit for all future extradition cases involving terrorism. Whilst time limits must never be allowed to override fairness, plainly it is desirable that a realistic timetable should be set and followed wherever possible so that such cases are dealt with to a reasonable timetable.
98. At paragraphs 8 to 16 the evidence particularised the government's wish to enter into Memoranda of Understanding [MoU] with countries to which deportation would otherwise be excluded by reason of past and/or current failures by those countries in their criminal justice systems. Such failures would render deportation unlawful because they would be inconsistent with the UK's international obligations under the *European Convention on Human Rights*, and especially *Article 3*.

99. I have read a great deal of what I consider to be intemperate and ill-considered discussion on this subject. Some appear to have suggested that the judiciary might be directed by statute towards a particular interpretation of *Article 3* and possibly other connected national and/or international legislation. That is a very bad idea. The Convention is written in happily plain language, and statutory judicial interpretation (besides being a contradiction in terms in this context at least) could lead to unwelcome and unnecessary tension between the executive and the judiciary.
100. I have pondered arguments amounting to an assertion that once in breach of civilised standards a country can never be trusted to change its ways or redeem itself. That is as clear a counsel of despair as can be imagined. Nobody should ignore the power of international diplomacy, economics, defence and trade, all part of the advantages of being part of the community of nations living in mutual comity. The 20th century saw many such changes, not least after the fall of the Soviet Union.
101. I believe that it is realistically possible that some offending countries may agree to an internationally verifiable process that would ensure that, at the very least in connection with those deported and their families, proper standards would be applied. Indeed, some EU countries already deport to at least one such country and I have seen little evidence of those so deported having been subject to human rights abuses on their return. Of course, if a person is returned it becomes incumbent upon them to obey the laws of that country as much as they are expected to obey our own whilst here.

102. I understand that the process of negotiating a MoU with at least one contextually significant country is intensive and moderately advanced, and is being given the attention of a small group of experts created for the purpose. This process should continue as diligently as possible. A MoU has already been reached with Jordan.
103. However, I do have a significant concern. Former subjects of control orders under the *Prevention of Terrorism Act 2005* have been detained in custody under immigration procedures with a view to deportation. Their control orders were revoked on their being detained. I have a continuing responsibility to review the operation of the control orders system. In relation to the persons in question there were some difficulties as to the effectiveness of the controls in terms of national security. However, those difficulties though involving very considerable departmental time were being addressed diligently and efficiently.
104. With the exception of one individual, all those recently detained as described above could not be deported without at least one MoU being reached. When that will be reached is uncertain. In my view it is of real concern that detention without charge should be reinstated in effect for this group of people unless there is an early and realistic prospect of the relevant MoU being reached presently.
105. At paragraphs 20-21 of the evidence, emphasis was placed on working with faith leaders and the Muslim community. As I meet ever more people with worries about the repercussions of terrorism in terms of community relations, I become ever more convinced that all measures should be taken to engage (especially) young Muslims in the discussion of terrorism and extremism as compared with responsible citizenship. A part of this places a great responsibility on religious Muslims to ensure as far as possible that

their teachers and preachers are not engaged in inappropriate activities or propaganda - just as other religions and the political process must do everything possible to persuade the public out of xenophobia and hostility to community dress and other customs.

106. At paragraph 23 the evidence discussed the protection of our borders. In this context the *e-borders programme* is already making progress. Embarkation checks are an important part of the counter-terrorism effort, and hopefully will be made more efficient and borne patiently by the travelling public and ports operators.

**THE CONSULTATION PAPER “*PREVENTING EXTREMISM TOGETHER:
PLACES OF WORSHIP*”**

107. This consultation paper and its covering letter are designed to address the problem of the religious promotion and preaching of extremist activity. It describes in paragraph 8 as “*essential*” taking action against extremism in places of worship where such extremism foments extremism in others and incites people to terrorist acts. It is intended to augment existing laws against incitement to criminal offences.
108. Paragraphs 17 to 22 set out a proposed new power under which those “*controlling*” a place of worship can be required to bring the extremist activity to an end. If they failed to do so, they would themselves be guilty of a criminal offence.
109. Plainly there are some human rights issues around these proposals, given the fundamental nature of freedom of worship. There are practical difficulties too, about defining *worship*, and *places of worship*. Some places of worship are merely domestic spaces, others in the open air. What is a sermon? When is a lecture a sermon, and vice-versa? These are serious questions and require careful examination before we introduce what could be a law we might come to regret.
110. Given the extensive tightening of the law against terrorism and the creation of additional offences contained in the new Bill, I doubt the urgency of this additional proposal. If after the consultation it remains the government’s wish to legislate in this way, I suggest that a draft Bill might be produced and subjected to the pre-legislative parliamentary scrutiny procedure. This followed by normal legislative procedures would provide the best possible prospect of workable legislation, if that can be achieved.

MAIN CONCLUSIONS

111. Generally, I regard the current proposals for legislative reform as providing a set of useful and necessary additions to the law to counter terrorism.
112. I had a serious concern about *Clause 2* of the original draft Bill, on the glorification of terrorism. The revised version, with its removal of an offence simply of glorifying terrorism, is significantly different.
113. I consider that *Clauses 6 and 8*, concerning training for terrorism and attendance at a place used for terrorist training, should be considered as to whether they are more extensive than required. Possibly they should be elided.
114. I have a set of concerns about *Clauses 23 and 24*, concerning the extension of the potential periods of detention by judicial authority. My concerns are not founded upon the notion of extending the time to three months. However, I advise that a much stronger form of judicial control is required.
115. I have a particular concern about the recent detention for deportation of former subjects of control orders, in the absence of current Memoranda of Understanding with the countries to which they would be deported.
116. The most recent proposal, concerning the control of worship and places of worship, needs careful scrutiny.

6th October 2005.

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