

PEACE & PROGRESS
a party for human rights

BRIEFING
on the
COUNTER TERRORISM BILL 2008

Contents

1.	Introduction	1 - 4
2.	The definition of 'terrorism'	4 - 5
3.	Pre-charge detention	5 - 7
4.	Post-charge questioning	7 - 8
5.	Aggravated or enhanced sentences	8
6.	Closed inquests	9 - 10
7.	Conclusions	10

Published by Peace & Progress, The Warehouse, 54-57 Allison Street,
Birmingham B5 5TH

mail@peaceandprogress.org
07888 841586

Introduction

“It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”

Preamble to the UN Declaration of Human Rights 1948

On 24th January 2008 the Counter Terrorism Bill 2008 received its first reading in the House of Commons. Amongst its measures, the Bill proposes changes to criminal law which have not been seen before and an extension of powers under civil law which are not limited to those suspected of involvement with terrorism.

The Counter Terrorism Bill is the 5th piece of anti-terror legislation laid before parliament since a Labour government came into power, the others being:

- Terrorism Act 2000
- Anti-Terrorism, Crime and Security Act 2001
- Prevention of Terrorism Act 2005
- Terrorism Act 2006

The Terrorism Act 2000 followed a review of counter terrorism legislation by Lord Lloyd of Berwick in 1996 after the IRA ceasefire. In December 1998, the Labour Government published a Consultation Paper on ‘Legislation against terrorism’.

The Terrorism Act 2000 widened the definition of ‘terrorism’ beyond any previous definition. For the first time in UK law, any action taken against any government in the world, no matter what its political complexion, could be labelled ‘terrorist’ if the action involves serious violence against persons, serious damage to property, a risk to the health or safety of the public and the use or threat is designed to influence government or intimidate the public with the purpose of advancing a political, religious or ideological cause.

It also banned particular organisations, describing them as ‘proscribed’, making it illegal to belong to such organisations. The organisations were primarily concerned with action against governments abroad and not against the UK and, with a few exceptions, were Muslim.

The 2001 Act, hastily drafted in response to the events in the USA on September 11th, introduced indefinite detention without trial of foreign nationals suspected of involvement in international terrorism. It included the appointment of ‘security-vetted’ lawyers known as Special Advocates for the detainees who had access to ‘closed material’ considered to be sensitive for national security purposes but who were prevented from consulting their ‘clients’ about the material which was being used to justify their indefinite detention. Part 4 of the Act was condemned by the House

of Lords in a judgment given in December 2004 when it was declared incompatible with the UK's obligations under the European Convention on Human Rights (ECHR).

The Labour Government's response was the introduction, after no more than a week of discussion in parliament, of the Prevention of Terrorism Act 2005. The PTA introduced control orders for those suspected of terrorism, both British and foreign nationals, imposing severe restrictions upon their movement, association and access to information. In October 2007, the House of Lords gave its judgment in 3 cases involving control orders, deciding in majority decisions that control orders as they existed constituted a deprivation of liberty, that the procedures in place (particularly the use of Special Advocates) were not compatible with the right to a fair hearing and that there should be a continuing review of the possibility of bringing a criminal prosecution rather than an indefinite control order. There has been no significant amendment to control orders since the judgment with the exception of increasing the curfew hours for at least one of the men.

In the light of the events in London on 7th July 2005, the government heightened its attempts to obtain 'diplomatic assurances' or 'memoranda of understanding' with governments of countries renowned for their use of torture, in the hope of being able to deport foreign nationals suspected of terrorism although none were linked to the London bombings.

In December 2005, the House of Lords ruled unanimously against the Government in a second case brought by 'suspected international terrorists'. The Government had argued that reliance could be placed on evidence obtained under torture as long as the UK had not participated in the torture. The Law Lords upheld the principle that torture is prohibited in all circumstances. Lord Hoffman stated that:

"[Torture] corrupts and degrades the state which uses it and the legal system which accepts it".

As a further response to the events in London on 7/7, the Government rushed through another piece of legislation, the Terrorism Act 2006, introducing 9 new criminal offences which included the glorification of terrorism, acts preparatory to terrorism and encouragement to terrorism (whether or not any act of terrorism followed). In its review of the new legislation, the Joint Human Rights Committee noted:

"The main problem to which this gives rise is that counter-terrorism measures are capable of application to speech or actions concerning resistance to an oppressive regime overseas. For example, the creation of the offence of encouragement of "terrorism" defined as broadly as in section 1 of the Terrorism Act is to criminalise any expression of a view that armed resistance to a brutal or repressive anti-democratic regime might in certain circumstances be justifiable, even where such resistance consists of campaigns of sabotage against property, and specifically

directed away from human casualties. The Home Secretary does not deny that this is the effect of the offence but defends its scope on the basis that there is nowhere in the world today where violence can be justified as a means of bringing about political change.”

JHRC Report to Parliament, 19th February 2008

In addition to the piecemeal legislative changes, there have also been procedural changes which have made it easier to charge in terrorist and other serious cases but which have not been debated in parliament. The Crown Prosecution Service has introduced a ‘Threshold Test’ which enables charges to be brought when there is a ‘reasonable suspicion that a suspect has committed an offence’ and not, according to the ‘Full Code Test’, when the CPS is satisfied that there is a ‘realistic prospect of conviction’.

It is in that context, that the Government now proposes to introduce yet further legislation allegedly required to enable the law enforcement agencies to fulfil their responsibilities to protect the British public from terrorist attack. This is despite the fact that, out of the 19 people jailed in 2007 for terrorist offences (including the failed 21/7 bombers), all of them were convicted under legislation which existed before 9/11, some passed as far back as 1883. Even Abu Hamza, the notorious Muslim cleric, was convicted in 2006 of offences which included soliciting to murder, an offence under an Act passed in 1861.

The essence of this analysis is that the Government is not addressing the real issues raised by the ‘war on terror’ but is instead responding to the public’s need for reassurance by creating a climate where there will be greater alienation of those affected by measures and therefore an increased security risk arising from the legislation itself.

This analysis does not address every aspect of the Counter Terrorism Bill 2008 but only those which are considered to be the worst examples of an abuse of power which the proposed legislation represents, either in its contents or in its omissions.

The definition of terrorism

The 2008 Bill proposes an amendment to the definition of ‘terrorism’, the first since the 2000 Act was passed.

The amendment is to include the word ‘racial’ amongst the motives in the definition. So the use or threat of action designed to influence government or intimidate the public would now be for the purpose of advancing a “political, religious, racial or ideological purpose”.

The proposed change has come from a recommendation of Lord Carlile, the independent reviewer of terrorist legislation and practice appointed by the government. It is contained in his report, ‘The definition of terrorism’ published in March 2007. In paragraph 66 of his report, he states that the change to the definition of terrorism to include ‘racial’ would cement into

the law that terrorism includes campaigns of terrorist violence motivated by racism. He acknowledged that it was covered by the current law:

“However, given the increasing debate in Western Europe about ethnic and religious customs (including modes of dress), the amendment proposed might be seen as providing a positive message as well as some increase in legal clarity.”

The lack of clarity in Lord Carlile’s remarks are matched by the lack of a substantive explanation by the government for extending the definition to include ‘racial’. In the notes which accompany the Bill, it states:

“Although a racial cause will in most cases be subsumed within a political or ideological cause this amendment is designed to put the matter beyond doubt that such a cause is included”.

Given the attacks upon ‘multiculturalism’ as part of a rise in a demand for allegiance to a ‘British identity’, alongside the increased attacks on those who are or who are perceived to be Muslim, (because of the association of terrorism with Islam and to some extent therefore with all Asian and Arab communities in the UK), it is difficult to see any reason for this amendment to the definition above and beyond joining the ‘popular’ perspective that ‘alien’ cultures are undermining the ‘British way of life’ and are therefore responsible for the growth of terrorism in the UK. Religious leaders such as Michael Nazir Ali, the Anglican Bishop of Rochester, may well support such a view but it can hardly help to ‘win the hearts and minds’ of the very people whose support is needed to establish a more equal and just society where terrorism has no place.

Pre-charge detention

This is the most talked about aspect of the Bill and the arguments against extending pre-charge detention from 28 to 42 days are well-rehearsed elsewhere and are not therefore set out in this document. See for example the Liberty ‘Charge or Release’ campaign on their website.

The background to the proposal to extend the time a suspect can be held and questioned by the police without being charged is as follows: in 2003, the limit was raised from 7 to 14 days; in 2006, the Government advocated an increased limit to 90 days but was defeated in parliament and the limit was raised instead from 14 to 28 days. The current proposal is to raise the limit to 42 days but with conditions attached. This includes an element of parliamentary and judicial scrutiny but, in reality, with very little control.

The proposal has received widespread opposition, including from senior figures associated with the Government and parliamentary bodies such as the House of Commons Home Affairs Committee. The main argument against the increase is that no evidence has been put forward to show that the increase is required or that the police or prosecution have been forced to release a suspect because the period of 28 days has been insufficient.

There are other proposals in the Bill or current practices which themselves argue against the need for an extension beyond 28 days, not that they are without controversy. The danger is that the campaign to defeat the extension of pre-charge detention will detract from the powers already available and take focus away from equally alarming elements in the Bill, not least post-charge questioning (see below).

The alternatives to pre-charge detention, either in force or available, are lowering the threshold test for charging, allowing the use of intercept evidence and post-charge questioning. Of these, the lower threshold is already in force, the Prime Minister and others in the Government have given an indication that changes should be made to allow the use of intercept as evidence and the Bill contains provision for the introduction of post-charge questioning.

(a) The 'Threshold Test'

As set out in the introduction to this document, the CPS has already changed the threshold for charging people in terrorist or other serious cases. The change is set out in the CPS Code at paragraph 6.3. Instead of reaching the higher standard (the 'Full Code Test') of "realistic prospect of conviction", the test is only that there is "reasonable suspicion that the suspect has committed an offence", with the Full Code Test to be applied at a later stage. In giving evidence to the Joint Human Rights Committee (JHRC), the person responsible for counter terrorism at CPS accepted that the lower test had led to all suspects being charged within the 28 days. The JHRC has argued that the lowering of the charging threshold reduces the force of the case for extending the period of pre-charge detention.

With the test for charging being on a parallel with the test for arresting, it is difficult to see why even a period of 28 days is required for pre-charge detention.

The problem with the threshold test is that there is no independent review of its use and the CPS are not obliged to inform either the court or the defence that the lower threshold has been applied, leading to the prosecution being given lengthy periods of time to prepare its case before filing its evidence with the defence. The JHRC has proposed that the threshold test be given statutory authority in order to allow proper debate and control. The Bill contains no reference to the threshold test and the recommendation has therefore apparently been ignored.

(b) Intercept evidence

The apparent reluctance of the security and intelligence services to allow certain forms of material obtained by intercept to be used as the basis of a prosecution has led to an inability to charge some suspects with a criminal offence. The results include the use of control orders (when individuals rarely know the case against them) and arguments in favour of increased pre-charge detention.

The lifting of the ban on the use of intercept evidence was proposed by Lord Lloyd in his 1996 report. The use of intercept evidence is regarded as indispensable in other countries including the USA and with the government indicating its acceptance of its use, the case for extending (or indeed maintaining) the period of pre-charge detention is further undermined. The Bill extends the use of intercept evidence to asset-freezing proceedings (set out within the Bill) but makes no extensions for criminal trials.

(c) Post-charge questioning

This proposal, a key element of the Bill, is more controversial but it does exist as an alternative to lengthy pre-charge detention. It is dealt with separately below given that it is a feature of the Bill itself.

Post-charge questioning

The law at the moment is that, once a suspect has been charged with an offence and is awaiting trial, they cannot be questioned again about that offence unless particular and limited circumstances apply, including the consent of the defendant.

In its submissions on the proposed legislation before the Bill was published, the Criminal Bar Association indicated that the issue of post-charge questioning was under review in all cases and therefore questioned why the Government was pressing ahead with the change in terrorist cases before the review had been completed. No answer has been forthcoming.

The proposal is that, between charge and trial, a defendant can be questioned without his consent on any aspect of the charge and, if he or she chooses not to answer, adverse inferences can be drawn at trial from their silence as it can from silence before charge.

Lord Lloyd, a former Law Lord, who carried out a review of terrorism legislation and presented his report in 1996, has said that this aspect of the Bill carries a very real risk that the defendant will not get a fair trial. In a debate in the House of Lords on the Queen's Speech, he said that the trial judge was responsible for ensuring fairness in all aspects of the case, including leading up to the trial and that the accused is, at the stage, in a particularly vulnerable position. In his opinion:

“Post-charge questioning is not an easy way out and we should resist it as vigorously as we should resist any extension beyond 28 days”

House of Lords debate on the Queen's Speech, 12th November 2007

The exclusion of post-charge questioning under most circumstances is given a statutory basis in the Police and Criminal Evidence Act (PACE), following the development of the practice in the 'judges' rules'. It was borne out of recognition of the vulnerability of the accused at this stage and the possibility that undue pressure might lead to a false confession or a

'negotiation' over the charge. Even when it is allowed at the moment, there is no negative inference that can be drawn from silence.

The proposed change takes criminal law and practice to a new level, without the seriousness of this development being properly understood and debated. The proposal seeks to undermine entrenched protections in criminal law and it is alarming that post-charge questioning has received so little attention, even from those who oppose the Bill.

Aggravated or enhanced sentences

The Bill contains a proposal, arising from a recommendation from Lord Carlile, that offences which are linked to terrorism, should lead to an increased sentence upon conviction. In his March 2007 report, 'The definition of terrorism', Lord Carlile proposed that any non-terrorist offence punishable by 5 years imprisonment or more should be susceptible to an additional term of up to 5 years if the offence was aggravated by an intent to facilitate or assist a terrorist, a terrorist group or a terrorist purpose.

Lord Carlile's proposal comes directly from his conviction that the threat from Muslim 'fanatics' is so real that no stone should be left unturned to stamp it and them out. In his report, he states as follows:

"I am in no doubt that, for the time being at least, there are groups of people dedicated to violent and lethal jihad....They are driven by a common purpose though not always with clear common goals....The ethos underpinning their common purpose is to condemn Western society and its value systems and to replace it and them by a set of values and with a legal system claimed to be a pure form of Islam. Their secondary purpose has become to change the foreign policies of several countries"

Paragraph 32, 'The definition of terrorism', March 2007

"Given the risk level posed by violent jihadists ... there is the primary justification for dealing with them in a special way"

Paragraph 35, 'The definition of terrorism', March 2007

The proposal in the Bill is not that an allegation of an association with terrorism should be part of the charge (or the subject of a separate charge) and therefore subject to the usual standard of evidence in criminal cases - "beyond all reasonable doubt" - but that the trial judge (conducting a 'trial within a trial') should determine if conviction for the non-terrorist offence should lead to an increased sentence.

If the Government, which apparently shares Lord Carlile's views of radical Islam, is so convinced by the proposal, then the right way forward would either be to use the existing law (which allows for an increase in sentence for a "hate crime") or to make it the basis for a separate charge to be determined by the jury in accordance with the usual procedures and safeguards. That it has not done so suggests a further attempt to erode the hard won freedoms set out in the criminal law in the UK.

Closed inquests

One of the few places where intercept evidence is currently allowed is in a coroner's inquest. The Bill proposes to limit the availability of intercept evidence in some cases to a 'specially appointed coroner' who may therefore be the only person at an inquest or inquiry into a suspicious death to see the evidence which establishes the cause of death and possibly liability.

The Bill also proposes that the specially appointed coroner, an appointee of the Home Secretary, must hear the inquest in the absence of a jury. The Bill gives the Home Secretary the power to issue a certificate in the circumstances where the inquest will involve the consideration of material that should not be made public:

“in the interests of national security, in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest”

Paragraph 194 of the Counter Terrorism Bill Explanatory Notes

The Bill makes no specific reference to terrorist-related cases, just to cases where national security or the UK's relationship with another country is involved. It has already been indicated that it will apply to suspicious deaths which have no connection to alleged terrorism.

It means another nail in the coffin for the attempts to hold law enforcement officials responsible for the deaths that they cause.

The family of Azelle Rodney, a unarmed 24 year old London man shot dead on 24 April 2005 by officers of the same force which killed Jean Charles de Menezes nearly 3 months later, has already been told that his inquest will be covered by the changes proposed in the Counter Terrorism Bill. Like Jean Charles, Azelle Rodney had no connection to terrorism but his family now see little hope of the truth being known about his death.

The proposal is a further indication of the trend under this Government of secrecy and cover up. This from a Government which introduced not only the Human Rights Act but also the Freedom of Information Act! Speaking for 'Inquest', Helen Shaw has said:

“The public will find it difficult to have confidence that these coroner-only inquests, with key evidence being suppressed, can investigate contentious deaths involving state agents independently”.

The proposed changes to the conduct of some inquests extends the concept of 'special advocates' introduced under the Prevention of Terrorism Act. The Bill allows the coroner to release restricted information to the person appointed as counsel to the inquest but not to the family or their lawyer. Commenting upon the system of special advocates, Lord Bingham, a Law Lord, described it as:

“taking blind shots at a hidden target”.

Conclusions

In December 2004, the House of Lords gave its judgment on the law passed three years' previously by parliament under which it had introduced indefinite detention without trial. The response of one of the Law Lords, Lord Hoffman, was that the law itself was a greater threat than terrorism:

“The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That it the true measure of what terrorism can achieve”

In seeking to justify yet further draconian legislation in the Counter Terrorism Bill, for which very little if any justification has been given, the Government has attempted to suggest that it has adopted the right balance between national security and human rights. In its 'Summary of responses to the Counter Terrorism Bill Consultation', published in December 2007, it said:

“It is the first duty of government to protect its citizens. There remains a serious and current threat to the UK from terrorism. In order to protect the public, it is vital that our legislation is kept under constant review to ensure that it remains adequate and proportionate to that threat. The Government is always mindful of not seeking additional powers for the sake of them. It is important to achieve the proper balance between measures necessary to counter threats to national security and preserving the civil and human rights of the population”

It is impossible to find any sense that the Government has even understood let alone attempted to preserve civil and human rights in the Counter Terrorism Bill. It builds upon laws which have either been condemned by the highest court in the UK as incompatible with obligations under the European Convention on Human Rights or about which strong reservations have been voiced. The Bill assumes that there is an enemy within and that the enemy is terrorism. But, as Lord Hoffman has effectively said, British society is undermined far more by measures such as this than by terrorism. And as he concluded his statement about the 'real threat':

“It is for Parliament to decide whether to give terrorists such a victory”

Those that value the democratic principles embodied in British society and the rule of law should oppose the new Bill and seek a review of the measures already in place.