



Counter Terrorism Proposals

House of Commons Home Affairs Committee

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Summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.
2. JUSTICE welcomes the reasoned, consultative approach of the new government towards counter-terrorism policy, particularly as demonstrated by its calm handling of the failed terrorist attacks in London and Glasgow. Although we disagree with several of the proposed measures set out in the discussion paper released on 7 June, we look forward to a rational discussion of their merits in the coming months.
3. Of the measures proposed by the government thus far, we support:
 - Privy Council review of the use of intercept evidence in court
 - Post charge questioning with appropriate safeguards
 - Notification requirements on those convicted of terrorism offences
4. We have reservations concerning:
 - Enhanced sentences
 - Data sharing powers for the intelligence agencies
 - Seizure of terrorist assets
5. We would oppose:
 - Police powers to stop and question
 - Police powers to hold passports and travel documents at ports
 - The introduction of further powers relating to control orders
 - Any further extension of pre charge detention

Pre-charge detention

6. In December 2005, we submitted evidence to the Committee opposing any extension of the maximum period of pre-charge detention in terrorism cases beyond 14 days. As an alternative, we identified several steps that the government could take to enable suspects in terrorism cases to be charged more swiftly: (i) lifting the ban on intercept evidence; (ii) allowing questioning of suspects post-charge; (iii) bringing into force the power under Part 3 of the Regulation of Investigatory Powers Act 2000 to enable police to obtain court orders

against suspects to provide encryption keys for computer evidence; and (iv) clarifying the 'threshold test' for prosecutors in terrorism cases.

7. We are pleased to see that the first two of these suggestions have now been included for discussion in the government's June 2007 paper. For all the reasons set out in our evidence in December 2005, however, we would continue to oppose any proposal to further increase the maximum period of pre-charge detention for persons suspected of terrorism offences. At 28 days, the UK limit already far exceeds that found in any other Western country,¹ including the two other countries that have also suffered serious terrorist attacks in recent years – Spain and the United States.² Although we readily accept that terrorism cases involve forensic and investigative challenges for police, we remain sceptical that these challenges are somehow different in kind from those faced by police in other jurisdictions where the maximum period of pre-charge detention is much shorter. Lastly, we reiterate our view that 14 days is the maximum period likely to be held by the courts to be compatible with fundamental rights.³
8. In the twelve months since the 28 day maximum was brought into force,⁴ we are not aware of any additional evidence that has come to light that would support the further extension of the limit from 28 days to 90 days. As was reported by the BBC in November 2006, the then-Attorney General Lord Goldsmith QC also said he had seen no evidence to support such an extension.⁵ Nor do the statistics appear to offer any compelling evidence: according to figures provided by the Home Secretary in April, a total 6 suspects have been detained up to the current 28 day maximum of which 3 were charged and 3 were released.⁶
9. Although the June discussion paper suggests that any increase in the detention limit would involve 'further judicial and Parliamentary oversight [including] judicial approval every seven days for any requests to hold suspects',⁷ we are doubtful that any additional oversight would

¹ See e.g. Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: A Survey of Selected Countries* (October 2005), showing the maximum periods of pre-charge detention in other EU countries including France (4 days) and Germany (2 days).

² The maximum period of pre-charge detention in Spain is 5 days (see FCO paper, *ibid*, para 94). In the US, the maximum period is 48 hours (judgment of the Supreme Court in *County of Riverside v McLaughlin* 500 US 44 (1991)).

³ Article 5(3) of the European Convention on Human Rights provides that anyone arrested on suspicion of a criminal offence: shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. See e.g. the 1988 decision of *Brogan v United Kingdom* 11 EHRR 117. C.f. the decision of *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539 in which similar periods of detention were held to be covered by the UK's derogation following the *Brogan* decision.

⁴ Section 23 of the Terrorism Act 2006 was brought into force on 26 July 2006.

⁵ BBC Online, 'Goldsmith doubts 90 day detention', 19 November 2006.

⁶ Written Parliamentary Answer, 16 Apr 2007 : Column 507W.

⁷ *Government Discussion Document Ahead of Proposed Counter Terror Bill 2007* (Home Office, 7 June 2007), para 6.

be capable of preventing injustice. Indeed, since judicial approval is already a requirement under the current legislation, it is very difficult to see how 'further' judicial scrutiny could be achieved. And although additional parliamentary oversight of counter-terrorism measures is always welcome, it is equally difficult to see what such oversight could add given the intrinsic limitations of even judicial oversight in this area.

Post charge questioning

10. As we noted in our written evidence to the Committee in 2005, there is already limited provision for questioning of suspects post-charge under Code C of the Police and Criminal Evidence Act 1984.⁸ In our subsequent oral evidence to the Committee, we endorsed the view expressed by Tim Owen QC that these grounds could be extended to include any case in which fresh evidence came to light:⁹

[S]ubject to not using evidence and breaching the privilege against self-incrimination, not using compelled questioning against a suspect, there is nothing, in principle, to prevent the holding of an interview, the presenting of the fresh evidence to the suspect and questioning and inviting the suspect to give an answer to it. Having been advised of their right not to say anything, if then they give answers, that evidence can be given at the trial. There is not a difficulty, in my view. Certainly there is no fundamental primary legislation or human rights principle which prevents an amendment to the Code in a way that [has been] suggested.

11. As noted above, questioning post-charge would have to be attended by the same safeguards as apply to questioning pre-charge, i.e. the right to legal advice, the right against self-incrimination, and freedom from oppressive questioning. Nonetheless, subject to those safeguards, we would support the government's proposal.

Notification requirement

12. The government has indicated that it is considering 'notification requirements similar to those for Sex Offenders once convicted terrorists leave prison'. Specifically, the Sex Offenders Act 1997¹⁰ imposes a requirement on those convicted or cautioned in relation to sex offences¹¹ to

⁸ Police and Criminal Evidence Act 1984, Code C, section 16.5: 'A detainee may not be interviewed about an offence after they have been charged with, or informed they may be prosecuted for it, unless the interview is necessary: to prevent or minimise harm or loss to some other person, or the public'.

⁹ Q43, Minutes of evidence, 7 February 2007, Home Affairs Committee, HC910-II.

¹⁰ as amended by the Criminal Justice and Courts Services Act 2000 and Part 2 of the Sexual Offences Act 2003.

¹¹ Including a sex offence committed outside the UK where the offence constituted an offence under the law in force in the country in question, and would have constituted a specified sexual offence if it had been committed in England and Wales.

notify the police of their name and address (including any change of address and significant periods away from home), date of birth, and national insurance number. The particular period for which notification is required depends on the sentence received, e.g. for someone sentenced to imprisonment between 6 and 30 months, the notification period is 10 years. Leaving aside the continuing problem created by overbroad terrorist offences – i.e. the offence of ‘encouraging’ terrorism under s1 of the Terrorism Act 2006 – the creation of a terrorist offenders register seems to us a sensible practical measure to ensure that those convicted of terrorist offences are subject to proper monitoring following the end of their sentences. In our view, the public interest in preventing reoffending of this kind would be sufficient to justify the proportionate interference with the privacy of a convicted terrorist caused by the notification requirements.

Enhanced sentences

13. A terrorist purpose or intent as an aggravating factor when sentencing for non-terrorist offences was one of the recommendations of the Newton Report in 2003,¹² and more recently by Lord Carlisle of Berriew QC in his March 2007 report on the definition of terrorism.¹³ Although we think this is a possible way forward, there are a number of different ways that it could be implemented, not all of which would be compatible with fundamental rights.
14. In particular, the discussion paper’s suggestion that ‘the courts ... would determine whether or not an offence was terrorism related’¹⁴ fails to specify whether the terrorist intent or purpose would be treated as an element of the offence (to be determined by the tribunal of fact to the criminal standard of proof) or whether it would simply be treated as an aggravating factor for the purpose of sentencing within the established tariff for the offence in question (e.g. in the way that a sentence for assault would be aggravated by being carried out against a particularly vulnerable victim e.g. child or elderly person). The difference between the two types of enhanced sentence is significant: in the former case, the aggravated offence is actually a distinct offence (e.g. a public order offence versus a racially aggravated public order offence); in the latter case, however, the aggravating factor would merely tend to indicate a sentence towards the upper range for the offence in question.

¹² Newton Report, para 216

¹³ See *The Definition of Terrorism* (Cm 7052: March 2007), para 86(8) ‘New sentencing powers should be introduced to enable an additional sentence for ordinary criminal offences, if aggravated by the intention to facilitate or assist a terrorist, a terrorist group or a terrorist purpose’. See also para 44: ‘during the course of my inquiry I received many powerful representations that the provision of special sentencing powers for apparently ordinary offences connected with terrorism would be a useful addition to the criminal law. I agree, and so recommend’.

¹⁴ Discussion paper, para 9.

15. Although there are a variety of sentencing models that could potentially be applied, we take the view that the seriousness of terrorism as an accusation would require – in serious cases at least – that terrorism as an aggravating factor should be treated as an element of the offence to be determined by the jury at trial. We also note the view of Lord Carlile in his 2003 report that, since ‘the terrorist element factually and logically would have to be the major element of the crime as a whole’, the prosecution of offences aggravated by terrorism will likely encounter similar evidential difficulties as the prosecution of other terrorist offences.¹⁵

Control orders

16. The government has suggested that the Prevention of Terrorism Act 2005 could be amended to provide the police with a ‘self-standing power of entry and search of premises to enforce and monitor the control order effectively’.¹⁶ In our view, the control order legislation is already incompatible with fundamental rights – in particular the right to a fair hearing – by imposing a variety of often sweeping restrictions upon individuals who have not been charged with any criminal offence. Indeed, we note the recent comment of the Home Office minister for security, Tony McNulty MP at a conference in July:¹⁷

It may be that we haven't thought in rigorous enough terms on how we capture [terrorist suspects] under the law. It may well be that we can do with a degree more rigour within the law and control orders are inappropriate.

17. In our view, it would be a far better use of parliamentary time to look towards measures enhancing the ability of police and prosecutors to deal with suspected terrorists by way of the criminal law, rather than seek to improve the efficiency of untenable laws.

Data sharing powers for the intelligence agencies (including CT DNA database on a Statutory Footing)

18. The government has suggested provisions to ‘remove barriers to individuals and organisations sharing with the intelligence and security agencies information that is necessary for the proper discharge of the agencies’ statutory functions’.¹⁸ Although it is difficult to comment without further detail of the proposed measures, it is worth noting that so-called ‘barriers’ often exist not for bureaucratic reasons but in order to safeguard the rights of individuals to privacy – in

¹⁵ *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003*, para 115.

¹⁶ Discussion paper, para 10.

¹⁷ BBC Online, ‘Minister warns over terror laws’, 3 July 2007.

¹⁸ Discussion paper, para 11.

particular the right not to have their sensitive personal data unnecessarily transferred or otherwise disclosed by government agencies.

Police powers to hold passports and travel documents at post

19. The discussion paper suggests that there is currently a 'gap' in the law where 'an individual stopped at a port is suspected ... of wanting to travel abroad for terrorism-related purposes'. The paper notes that:¹⁹

at present no power exists short of arrest and so the police have requested powers to enable the temporary holding of travel documents from such individuals for sufficient, though limited, period to enable further investigations to be undertaken.

20. If, however, the police reasonably suspect a person intends to travel abroad to either commit or assist in the commission of one or more acts of terrorism, it would be entirely proper for the police to exercise their powers of arrest in such cases. Certainly the criminal law should not be extended to allow the police to prevent individuals from travelling in circumstances where the police lack reasonable grounds for their suspicion.

Seizure of Terrorist Assets

21. The discussion paper suggests extending the courts' current power to seize assets of those convicted of terrorist financing offences to 'all those convicted of a terrorist or terrorist related offence where the court believes that their assets might be used for terrorist purposes'. Although this seems to us to be a logical extension of the existing power, it is unclear from the discussion paper whether the relevant legal test applied by the court will be the same as that provided under Part 3 of the Terrorism Act 2000.

Increased security at Key Gas Sites

22. In the absence of further details, we have no comment on this proposal other than that it appears to be a sensible measure.

Intercept as evidence

23. We strongly welcome the government's announcement of a review of intercept as evidence on Privy Counsellor terms. In October 2006, we published a report entitled *Intercept Evidence*:

¹⁹ Discussion paper, para 14.

Lifting the ban,²⁰ in which we concluded that the current ban was archaic, unnecessary and counter-productive. The UK is the only country in the common law world that prohibits completely the use of intercepted communications as evidence in criminal proceedings. And yet, since 9/11, the lack of admissible evidence in terrorism cases has been cited by the government as justification for such exceptional measures as indefinite detention without trial, control orders, and the extension of pre-charge detention to 28 days.

24. Our report looked in detail at the UK's statutory ban on intercept evidence, and compared it with the use of intercept material in other common law countries with adversarial criminal procedures similar to the UK, including Australia, Canada, New Zealand, South Africa and the United States. The experience of other common law countries shows that the fears of the intelligence services that intercept evidence would lead to their interception capabilities being compromised are unfounded. Established common law principles of public interest immunity work well in other countries to prevent the unnecessary disclosure of sensitive intelligence material, such as methods of interception and the identity of informants.

Stop and Question

25. We note the discussion paper's description of proposals for 'stop and question' powers as being 'at a very early stage'.²¹ We have seen no evidence that would even begin to justify the introduction of such measures. Nor does there appear to be any demand for the measures from the police themselves.²² We hope that further consideration by government will result in the proposal being withdrawn.

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²⁰ Available online at <http://www.justice.org.uk/inthenews/index.html>

²¹ Discussion paper, para 19.

²² See e.g. 'Minister's plan for new stop-and-question powers takes senior officers by surprise' by Michael White, Vikram Dodd and David Pallister, *The Guardian*, 28 May 2007: 'Police sources told the Guardian that neither Scotland Yard or the Association of Chief Police Officers had officially asked the government for an extension of stop and search powers. Acpo also said it had not been consulted. One senior officer called the proposal 'bizarre'.