RESEARCH PAPER 01/99
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The *Anti-Terrorism, Crime and Security Bill:* Parts I, II, VIII, IX & XIII

Property, Security & Crime

Bill 49 of 2001-02

This paper examines five Parts of *the Anti-Terrorism, Crime and Security Bill*, those which would bring in enlarged powers for the seizure and civil forfeiture of terrorist property (Part I), allow the Government to make freezing orders over the assets of overseas governments or residents (Part II), reinforce and update the regulatory regime for security in the nuclear industry (Part VIII), and improve the enforcement of aviation security requirements (Part IX): Part XIII contains miscellaneous provisions including a power to implement EU third pillar obligations by secondary legislation, new offences relating to noxious substances, and an offence of failure to disclose information about terrorism.

An introduction to, and summary of, the Bill, is given in Library Research Paper 01/101. Other elements of the Bill are covered in the following papers: 01/92, 01/94, 01/96, 01/97 and 01/98

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Summary of main points

This paper covers those parts of the Bill which deal with enlarged powers for the seizure and civil forfeiture of terrorist property, and for freezing orders over the assets of overseas governments or residents (Parts I and II), reinforcement and updating of the regulatory regime for security in the nuclear industry (Part VIII), improving the enforcement of aviation security requirements (Part IX), a new power to implement EU third pillar obligations by secondary legislation, new offences relating to noxious substances, and an offence of failure to disclose information about terrorism, and other miscellaneous provisions (Part XIII).

Part I provides for the seizure, detention and forfeiture of terrorist cash. These are civil powers which replace and build on those which are currently set out in the Terrorism Act 2000, with some parallel to the provisions of the Proceeds of Crime Bill 2001 which had its second reading on 30 October 2001. Under the Bill terrorist cash, and "property earmarked as terrorist property" will be seizable anywhere in the UK.

Part II would replace the existing power of the Treasury to control certain transactions ordered by governments or persons abroad in relation to gold and securities, with a wider power relating to "funds", which will be exercisable when it is believed that an action constitutes a threat to the life or property of UK nationals or residents as well as when such an action may be detrimental to the UK economy.

Part VIII of the Bill would extend the power of the Atomic Energy Authority special constables to operate on a wider range of nuclear sites. It would also allow the Secretary of State to make regulations to improve nuclear security and prohibit various disclosures that might prejudice the security of any nuclear premises or nuclear material.

Part IX of the Bill aims to improve the enforcement of aviation security requirements and the ability of the police to deal with potentially dangerous situations at airports and on board aircraft. It includes provisions in respect of the removal of unauthorised persons from airport restricted zones and from aircraft.

Part XIII of the Bill contains miscellaneous provisions, several of which have attracted controversy. Among other things, it introduces a new power to enable Ministers to implement UK obligations arising under the third pillar of the European Union (police and judicial cooperation in criminal matters), and new offences connected with the use of noxious substances (including anthrax) and with hoaxes and threats involving such substances. It also reintroduces and extends the offence, which used to be in the Prevention of Terrorism (Temporary Provisions) Act 1989 of failing to disclose information which a person knows or believes might help prevent another person carrying our an act of terrorism, or might help the police in bringing a terrorist to justice in the UK. Part V of this paper outlines some of the criticisms which have been made of the miscellaneous provisions, in particular the power to implement third pillar obligations by secondary legislation.

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I Terrorist Property

A. Introduction

In his statement to the House on 15 October 2001, the Home Secretary announced the scope of new emergency measures to tackle terrorist funds:

> Terrorists use organised crime and trade in human misery to finance their activities. The tough new financial controls in the emergency Bill will help us to staunch the flow of terrorist funding.
>
> The emergency legislation will build on the provisions of the Proceeds of Crime Bill to deal specifically with terrorist finance through monitoring and freezing the accounts of suspected terrorists. My right hon. Friend the Chancellor of the Exchequer will spell out in more detail measures on the seizure of cash within this country and strict reporting requirements on the financial institutions. Separately, a new anti-terrorist finance unit is to be established in conjunction with my right hon. Friend under the auspices of the National Criminal Intelligence Service.[1]

The Chancellor of Exchequer explained later that afternoon:

> Our UK domestic controls are already among the best in the world, but as part of the emergency anti-terrorism Bill announced this afternoon by the Home Secretary the Government propose a new power to freeze funds when suspicious transactions are under investigation. That will be backed up by new reporting requirements on financial institutions so that they must disclose not only known transactions destined for terrorism, but transactions where there are grounds for suspicion.
>
> Clearly, a balance has to be struck between individuals' right to privacy and their security at a time of increased risk, but we believe that there is a case for new powers for the police to monitor accounts that may be used to facilitate terrorism; for Customs to be allowed, where there are suspicions, to seize cash not only at our borders, as it can now, but within the UK as well…[2]

Part 1 of this Bill contains these new measures. The Chancellor referred also in his statement to a UK Action Plan on Terrorist Financing.[3] That Action Plan, which was placed in the House of Commons Library, describes the full range of initiatives which the UK is pursuing at home and abroad against terrorist funds. They include:

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1 HC Deb 15 October 2001 c 923
2 HC Deb 15 October 2001 c 940
3 www.hm-treasury.gov.uk/speech/cx_151001.html The Action Plan is reproduced at this location.

- a terrorist finance unit which is being established within the National Criminal Intelligence Service with an initial staff of eight and a remit to track down terrorist funds[4]

- a multi-disciplinary task force which will improve financial intelligence skills and investigate the possible use of underground banking systems in the transfer of terrorist assets

- consultation on a new 'light touch' regulatory regime for bureaux de change, cheque cashers and money transmission services.[5] Operated by Customs and Excise, the regime came into force on 12 November 2001[6]

- consultation on whether companies should be required to disclose their beneficial ownership

At international level, the Financial Action Task Force, an independent body composed of 29 member states and the Gulf Co-operation Council and the European Commission, has agreed to expand its remit from money laundering to include efforts to combat terrorist financing.[7] The FATF has brought forward eight Special Recommendations on Terrorist Financing which are to sit alongside its existing Forty Recommendations on Money Laundering. The intention is that member countries will assess their own regimes against the new recommendations by the end of December 2001 and bring their regimes into compliance by June 2002. FATF will also start a process to identify other jurisdictions which have inadequate measures to combat terrorist financing and consider appropriate follow-up action. Gordon Brown has indicated that the UK already meets the standards of the new Special Recommendations:

> "I welcome today's agreement by the FATF to adopt new standards against terrorist financing. I am pleased to say that the UK already complies with all of them – one of the very few countries to do so."[8]

The Chancellor has said that further steps to combat terrorist financing will be discussed in Ottawa (where the IMF meets on 16 November 2001). In response to a question from

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4 See Action Plan and HC Deb 7 November 2001 c 252W

5 Regulatory Regime for Bureaux de Change, Money Transmission Agents & Cheque Cashers (Money Service Businesses), HM Treasury,15 October 2001 www.hm-treasury.gov.uk/docs/2001/money_services_businesses_letter.html

6 *The Money Laundering Regulations 2001*

7 'FATF cracks down on terrorist financing', FATF press release, 31 October 2001

8 'HM Treasury welcomes tough new measures to tackle terrorist financing', HM Treasury press release 118/01, 31 October 2001

John McFall MP, he set out proposals which the UK hopes will be approved to support the FATF's work:

> On issues of terrorist finance, I believe that we will get international consensus on the need for action, but that consensus will require countries to take the necessary action. That is why we offer London as a clearing house for the exchange of information on the activities of terrorist groups which are seeking to launder money or to use underground banking. I believe that it will be necessary to build up an international database on the subject, so that we can take effective action against all the groups which are involved in terrorist action and using the legitimate processes of banking to launder money through this country and others. I assure my hon. Friend that we will take the necessary action, and that in the next few days we will make proposals that will involve the UN taking further action.[9]

B. Seizure, detention and forfeiture of terrorist cash

Clause 1 and **Schedule 1** provide for the seizure, detention and forfeiture of terrorist cash.[10] These are civil powers which replace and build on those which are currently set out in the *Terrorism Act 2000* which came into force on 19 February 2001.[11] Under the Bill, terrorist cash will be seizable anywhere in the UK whereas the 2000 Act powers are directed primarily at border seizures, that is at seizing terrorist cash on its import or export.

The Bill envisages that terrorist cash will be subject to successive procedures. First there are powers to seize suspicious cash, initially for up to 48 hours. Continued detention of seized cash is permitted if a court order is subsequently obtained. That order is only granted if there are grounds for continuing to hold the cash, otherwise the cash must be released. When it can be shown that the cash which is being held is terrorist cash, a further application can be made to the court which if granted will result in the cash being forfeited (subject to appeal). The schedule also includes provisions as to when terrorist cash may be traced through subsequent transactions. Although clause 1 introduces these powers, their precise scope is contained in a lengthy schedule, Schedule 1.

Both the Chancellor and the Home Secretary described the Bill as adding incremental powers to a regime which is already thought to be sound. It is therefore appropriate to consider the form of these incremental powers against similar legislation which already exists or which is before the House. The power to seize terrorist cash is analogous to proposals in the *Proceeds of Crime Bill 2001-02* which had its second reading on 30

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9 HC Deb 8 November 2001 c 350

10 Part I of the Bill applies throughout the United Kingdom.

11 ss 24-31 *Terrorism Act 2000* are repealed by clause 1(4) of the Bill.

October 2001. Those proposals allow the seizure of cash which is related to 'unlawful conduct'. As its Explanatory Notes recount, the *Proceeds of Crime Bill* proposals are themselves evolved out of powers in relation to drug trafficking cash:

> Chapter 3 expands and replaces the scheme set out in Part II of the Drug Trafficking Act 1994 which provides for the seizure and forfeiture of cash which is being imported into or exported from the United Kingdom, and which represents the proceeds of, or is intended for use in, drug trafficking. This scheme is expanded to include cash related to all unlawful conduct and also provides for the seizure of such cash inland.[12]

There are strong similarities between the cash forfeiture regime in the *Proceeds of Crime Bill* and that proposed in the *Anti-Terrorism, Crime and Security Bill*. Points of similarity include, broadly, provisions for judicial scrutiny of the continued detention of seized cash; the procedure for the forfeiture of seized cash; and, arrangements for following cash into the hands of other persons. One key difference between the Bills is that the current provisions apply only to terrorist cash whereas Chapter 3 of Part 5 of the *Proceeds of Crime Bill* applies more widely to any cash which has been obtained through unlawful conduct or is intended for use in unlawful conduct. While the power to seize cash under the *Proceeds of Crime Bill* is therefore more narrowly focused, within that focus its application is more complete in that no minimum threshold for seizure applies. In contrast, there is a provision to set a threshold for seizing criminal cash under the *Proceeds of Crime Bill* which is expected to be fixed at £10,000 initially.

The current Bill gives seizure powers over terrorist cash. Terrorist cash is cash which:

- is intended to be used for the purposes of terrorism (clause 1(a)).

  Terrorism is defined in s.1 of the *Terrorism Act 2000*.

- consists of resources of an organisation which is a proscribed organisation (clause 1(1(2)).

  Such organisations are listed in schedule 2 of the *Terrorism Act 2000*.

- is property which is earmarked as terrorist property (Schedule 1 para 1(1)(b) and para 12).

  This means property which was obtained through terrorism, both in the hands of the person who obtained it and (if it can be followed there) in the hands of other people.

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[12] Explanatory Notes to *Proceeds of Crime Bill 2001-02*, Bill 31-EN, para 392

The definition therefore includes both cash which has been obtained from terrorist acts and cash which is intended to be used for terrorism. It also covers the resources of proscribed terrorist organisations.

'Cash' includes notes, currency and other specified monetary instruments which are readily convertible into cash. Constables, customs officers and immigration officers can seize terrorist cash if they have reasonable grounds for suspecting that it is terrorist cash (or that part of the cash is terrorist cash) (Sched. 1 para 2). Once seized, that cash can be detained for up to 48 hours initially. Thereafter detention can be extended by order of a magistrates court or sheriff (in Scotland) for additional periods of up to three months (subject to a maximum of two years in all).

Before making a detention order, the court must be satisfied that there are reasonable grounds for suspecting that the cash is terrorist cash. Its continued detention must then be justified either pending further investigation as to its nature or a consideration of whether to bring proceedings. Alternatively, there must be ongoing proceedings in relation to an offence to which the cash is connected (Sched. 1 para 3). Detained cash is held in an interest-bearing account until it is either released or forfeited. Cash should be released when the conditions for detaining it are no longer justified: this can be triggered by an application to the court for its release by the person from whom it was seized or it can be released by an authorised officer (after notifying the court).

Cash that has been seized can subsequently be made forfeit. Note that this forfeiture is a civil process. The Bill expressly provides that there is no requirement for there to have been related criminal proceedings before Schedule 1 powers are exercised; therefore cash may be forfeited where no criminal conviction exists. Since the definition of terrorist cash includes cash which is 'intended to be used' for terrorist purposes forfeiture may occur without any associated terrorist act.

Forfeiture may be ordered by the court or sheriff (in Scotland) where the court or sheriff is satisfied on the balance of probabilities that the cash is terrorist cash (Sched. 1 para 6). It is occasioned by a further application to the magistrates court (by Customs and Excise or an authorised officer) or an application to the sheriff (by the Scottish Ministers). There is an appeal procedure, set out in Sched. 1 para 7. Forfeited cash is ultimately paid into the Consolidated Fund (or the Scottish Consolidated Fund if forfeited by the sheriff) once the period allowed for an appeal has expired or any appeal has been disposed of.

Some safeguards are provided to prevent injustice. If the cash which is the subject of forfeiture proceedings belongs to joint tenants, the court or sheriff has a discretion not to forfeit that part of it which may be attributable to an innocent partner. Paragraph 9 of Schedule 1 allows others who claim ownership of detained cash - for example those from whom cash has been stolen originally - to apply for detained cash to be released to them. There are also provisions for compensation to be payable in some circumstances in the event that cash is seized but no forfeiture order is made. Normally the fact that the cash has been kept in an interest-bearing account will mean that compensation is unnecessary. However, where the cash could not be kept in such an account - for example where the

cash itself is evidence in proceedings - an equivalent sum to the interest that could have been earned can be paid, and, in exceptional circumstances, compensation may be ordered for other consequential losses (Sched. 1 para 10).

Whilst the general concept of terrorist cash is readily described, the definition of cash which is 'property earmarked as terrorist property' is more complex. Paragraphs 11 to 16 of Schedule 1 set out how widely this term is to be understood. It includes property obtained by or in return for acts of terrorism (e.g. being paid to murder someone), and property obtained by or in return for acts carried out for the purposes of terrorism (e.g. stealing a car to carry out an act of terrorism). It also includes property which represents property obtained through terrorism but which is no longer the original property, for example where the original property was used to obtain the 'representative property'. Property can also be traced where it is mixed with other property (say in a bank account or part payment of an asset). Profits which accrue to earmarked property are again treated as terrorist property. There are some exceptions to the ability to follow terrorist funds, including where someone else has acquired the property in good faith for value. These provisions have a parallel in the new arrangements for the civil recovery of 'recoverable property' which are set out in the *Proceeds of Crime Bill 2001-02*.

Paragraph 19 of Schedule 1 sets out definitions for Part 1. In respect of whether property is earmarked as terrorist property, the provisions of the Schedule are retroactive so that 'if cash is obtained through terrorism before commencement of the Schedule, it is still liable to seizure and forfeiture under the Schedule'.[13]

In its response to the Bill, the Law Society has criticised the level at which decisions on detention and forfeiture would be taken:

> We are concerned that the Bill proposes that the seizure and restraint powers will be dealt with by lay benches and district judges in magistrates courts. That is unsatisfactory. Terrorism is such a sensitive and complex matter that it is far more appropriate for it to be dealt with in the High Court, at an appropriately senior level of the judiciary.[14]

A code of practice governs the use of powers under the *Terrorism Act 2000*. That code will also apply to the powers set out in Schedule 1 of the current Bill, which replaces some of the powers originally set out in the 2000 Act. Normally the code of practice is changed after consultation through a statutory instrument which is subject to the affirmative procedure. Clause 1(5) of the Bill allows the commencement order for the schedule to make one-off changes to that code which are 'necessary or expedient'.

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13 Explanatory Notes para 353

14 Parliamentary Brief for Second Reading, Law Society

Clause 2 makes a number of statutory amendments relating to clause 1. Among these are provisions to make Community Legal Service funding available for proceedings under Schedule 1 of the Bill.

C. Account monitoring orders

Clause 3 introduces **Schedule 2**. The Schedule sets out amendments to the *Terrorism Act 2000* which have two main effects: the regime for obtaining an order to monitor terrorist bank accounts is altered and the nature of the duty on the financial sector to report suspicious transactions is adjusted.

Part 1 of Schedule 2 addresses a perceived weakness in the *Terrorism Act 2000's* monitoring powers:

> 355. The Terrorism Act contains a provision enabling a judge to order a person to produce particular material to a constable for the purposes of a terrorist investigation (paragraphs 5 to 10 of Schedule 5). Information on accounts held by financial institutions is included and may be subject to such orders. This power is, however, not well suited to information relating to transactions. In particular it only relates to material in the possession, power or custody of the financial institution or such material, which will come into existence within 28 days of the order. As a result such production orders cannot require the "real-time" disclosure of the fact that a transaction on the account had occurred, as there may well be a delay before the material recording that fact is produced.
>
> 356. Thus there is a gap in the current provisions where investigating authorities need to be able to obtain information relating to the account or accounts held with a specified financial institution by a named individual or body. Account monitoring orders will be the mechanism available to obtain this information. The information required is principally that relating to transactions on the account.[15]

The Bill would insert a new schedule into the *Terrorism Act 2000*, Schedule 6A, which would allow an application to be made to a judge (a Circuit judge in England and Wales, sheriff in Scotland and Crown Court judge in Northern Ireland) for an account monitoring order. The order states the name of the financial institution against whom the order is sought, the account holder and the type of information sought.[16] It can be made ex parte (i.e. without the other side being present) and in chambers (i.e. not in open court). Orders may last for up to 90 days: currently, monitoring orders may only last for 28 days before renewal is required. Failure to comply with an order is treated as contempt of court. The information obtained as a result of an account monitoring order cannot generally be used as evidence in criminal proceedings.

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[15] Explanatory Notes paras 355-6

[16] Such orders are estimated to cost about £250 per institution: Terrorist Property, Supplementary Regulatory Impact Assessment, Home Office

The threshold for obtaining an account monitoring order is perhaps lower than some other recent legislation. In the Bill, the judge has discretion to grant an account monitoring order where he is satisfied that:

> (a) the order is sought for the purposes of a terrorist investigation,
>
> (b) the tracing of terrorist property is desirable for the purposes of the investigation, and
>
> (c) the order will enhance the effectiveness of the investigation.[17]

The *Proceeds of Crime Bill 2001-02* also contains provisions for obtaining account monitoring orders in the context of confiscation investigations, civil recovery investigations and money laundering investigations.[18] In that Bill, for all three types of investigation, there have to be reasonable grounds for believing that information which would be provided under an account monitoring order 'is likely to be of substantial value (whether or not by itself) to the investigation'.[19] That appears to set a higher test for the value of the information to be derived from account monitoring than the current Bill's stipulation that the order should 'enhance' the effectiveness of the investigation.

D. Restraint orders

The *Terrorism Act 2000* allows restraint orders to be made which freeze assets so as to prevent dissipation of terrorist assets which might in due course be liable to forfeiture. According to the Explanatory Notes:

> 365. The Bill makes a fundamental change to this scheme. The point at which a restraint order may be made is brought forward to any time after an investigation has been started (at present, although a restraint order may be made at the investigative stage, it is only possible to do so where charges are anticipated). This will reduce the risks that funds will be dissipated or used for terrorism before a decision has been made on whether to launch formal criminal proceedings investigation.[20]

The change (see **Schedule 2, Part 2**) is made by amending the relevant paragraphs of Schedule 4 of the *Terrorism Act 2000* for each UK jurisdiction. The 2000 Act provides that a court may make a restraint order where proceedings have been instituted or where

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17 Schedule 2, para 1(2) [Inserts new Schedule 6A into *Terrorism Act 2000*]
18 Bill 31 2001-02, clause 360
19 Ibid., clause 360(5)
20 Explanatory Notes, para 365

'it is satisfied that a person is to be charged.…for an offence under any of sections 15 to 18'.[21] The new wording allows a restraint order to be made where:

> (a) a criminal investigation *has been started* …. with regard to an offence under any of sections 15 to 18[22]

E. Disclosure obligations: regulated sector

One of the ways in which the reporting of criminal activity may be encouraged is by imposing sanctions for the failure of certain people to report information or suspicions to investigatory authorities. Such obligations have historically been quite limited in scope. For example, the *Drug Trafficking Act 1994* included an obligation on those who receive information about drug money laundering in the course of their trade, profession, business and employment to disclose such information to a constable as soon as reasonably practical; if they do not, and do not have a reasonable excuse, then they commit an offence. The current *Proceeds of Crime Bill 2001-02* would modify the position on drug money laundering so that the obligation will apply to a smaller community - the 'regulated sector' rather than all those who receive information in the course of employment etc - but it makes the obligation stricter in the sense that that offence can now be committed negligently. The offence under the *Proceeds of Crime Bill* would apply to all money laundering offences rather than any limited categories of money laundering.

The *Anti-Terrorism, Crime and Security Bill* displays a similar pattern of development. A duty already exists under s. 19 of the *Terrorism Act 2000* to report a belief or suspicion that another person has committed an offence under ss.15-18 of that Act, where that belief or suspicion is based on information which came to one in the course of a trade, profession, business or employment. That provision is to be retained but the current Bill would add a stricter obligation for the regulated financial sector using the same approach as that for money laundering under the *Proceeds of Crime Bill*.

The present Bill inserts a new section 21A into the *Terrorism Act 2000*. The new section provides that a person commits an offence if the following conditions are satisfied:

> (2) The first condition is that he—
> (a) knows or suspects, or
> (b) has reasonable grounds for knowing or suspecting,
> that another person has committed an offence under any of sections 15 to 18.

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[21] *Terrorism Act 2000* Schedule 4 para 5(2)(a). This paragraph of the schedule refers to England and Wales.

[22] Schedule 2, para 2(2) [emphasis added]

> (3) The second condition is that the information or other matter—
>
> (a) on which his knowledge or suspicion is based, or
>
> (b) which gives reasonable grounds for such knowledge or suspicion,
>
> came to him in the course of a business in the regulated sector.
>
> (4) The third condition is that he does not disclose the information or other matter to a constable or a nominated officer as soon as is practicable after it comes to him.[23]

The offences referred to in sections 15 to 18 of the *Terrorism Act 2000* relate to terrorist fund-raising, using or possessing money or other property for terrorism, making funding arrangements for terrorism, and terrorist money laundering. New section 21A carries a maximum penalty of five years imprisonment or an unlimited fine or both.

The regulated sector is defined in new Schedule 3A of the 2000 Act (**schedule 2, para 6** of this Bill). It includes those engaged in deposit-taking (i.e. banks and building societies); those advising on, managing and dealing in investments; and bureaux de change and cheque cashing businesses. The scope is apparently similar to the definition of the regulated sector in the *Proceeds of Crime Bill* except that that Bill refers to the regulated sector in terms of the *Financial Services Act 1986* regime whereas the current Bill adopts the terminology of the *Financial Services and Markets Act 2000* regime which is to come into force on 1 December 2001.

The effect of the new offence is to make those in the regulated sector subject to an objective standard in assessing whether information relating to terrorism should be disclosed. That is, while those outside the regulated sector commit an offence if they fail to make a disclosure where they have 'a belief or suspicion', those in the regulated sector commit an offence if they fail to make a disclosure where they have either knowledge or suspicion, or where they have reasonable grounds for knowing or suspecting. Whether they have reasonable grounds is an objective test since it depends on whether the person *should have* known or suspected rather than whether they *actually* did know or suspect. It therefore makes it possible for those in the regulated sector to commit the new offence negligently as well as intentionally. As a result, the offence should be easier for the prosecuting authorities to prove.

The Explanatory Notes justify placing a stricter standard on the regulated sector in the following terms:

> 369. That this provision is only directed at persons who are carrying out activities in the regulated sector reflects the fact that they should be expected to exercise a higher level of diligence in handling transactions than those engaged in other businesses. Where a business carries out some activities which are specified in Schedule 3A, Part 1 and some which are not, then it is only to the extent that

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[23] Schedule 2, Part 3 para 5(2) [new section 21A, *Terrorism Act 2000*]

> information is obtained in the course of the specified activities that [it] is covered by these provisions.
>
> 370. The requirement to pass on information where there are reasonable grounds to know or suspect that someone has committed an offence lays down an objective test for criminal liability. In recognition of this *subsection (6)* of section 21A provides that the court must take any guidance issued by the supervisory authority or any other appropriate authority into account when determining whether an offence has been committed. That guidance has to be approved by the Treasury and is published in a manner approved by the Treasury so as to bring it to the attention of persons likely to be affected by it. A list of supervisory authorities is to be found in Schedule 3A, Part 2.

When the similarly phrased duty in respect of information as to money laundering (in the *Proceeds of Crime Bill*) was put out for consultation, some respondents questioned whether it was indeed appropriate to place a stricter objective test of failure on all those in the regulated sector, including junior financial sector staff. There was also concern about how clear the dividing line would be between the regulated sector and the non-regulated sector when some firms (notably lawyers and accountants) carry out business in both sectors. Note that the Bill excludes the regulated sector from the more general disclosure obligation which exists under s.19 of the *Terrorism Act 2000* and which will remain in force.

Since disclosure obligations might expose the financial sector to other sanctions or actions for breach of confidentiality when they make a disclosure, the Bill provides statutory protection from such suits. New section 21B of the *Terrorism Act 2000* (set out in **Schedule 2, Part 3** of the current Bill) states:

> (1) A disclosure which satisfies the following three conditions is not to be taken to breach any restriction on the disclosure of information (however imposed).
>
> (2) The first condition is that the information or other matter disclosed came to the person making the disclosure (the discloser) in the course of a business in the regulated sector.
>
> (3) The second condition is that the information or other matter—
>
> (a) causes the discloser to know or suspect, or
>
> (b) gives him reasonable grounds for knowing or suspecting,
>
> that another person has committed an offence under any of sections 15 to 18.
>
> (4) The third condition is that the disclosure is made to a constable or a nominated officer as soon as is practicable after the information or other matter comes to the discloser.

Again, this provision is similar to those which will exist under the money laundering obligations of the *Proceeds of Crime Bill*.

II Part II: Freezing Orders

A. Existing legislation

The Emergency Laws (Re-enactment and Repeals) Act 1964 repealed most of the remaining defence regulations which had been made under the Emergency Powers (Defence) Act 1939, but continued some of the powers conferred by the regulations. These included the power to control certain transactions ordered by governments or persons abroad in relation to currency gold and securities, under section 2 of the 1964 Act.

Section 2, as amended, provides:

> **2 Power of Treasury to prohibit action on certain orders as to gold, etc**
>
> (1) Where the Treasury are satisfied that action to the detriment of the economic position of the United Kingdom is being, or is likely to be, taken by the government of, or persons resident in, any country or territory outside the United Kingdom, the Treasury may give general or special directions prohibiting, either absolutely or to such extent as may be specified in the directions, the carrying out, except with permission granted by or on behalf of the Treasury, of any order given by or on behalf of the government of that country or territory or any person resident therein at the time when the directions were given or at any later time while the directions are in force, in so far as the order—
>
> (i) requires the person to whom the order is given to make any payment or to part with any gold or securities; or
>
> (ii) requires any change to be made in the persons to whose credit any sum is to stand or to whose order any gold or securities are to be held.
>
> (2) Where any directions are given under this section with respect to any country or territory, a branch in that country or territory of any business, whether carried on by a body corporate or otherwise, shall, for the purposes of this section, be treated in all respects as if the branch were a body corporate resident in that country or territory.
>
> […]

B. Substitution of a wider power

Clause 4 of the Bill would replace that power with a wider power which would be exercisable not only when the Treasury

> reasonably believes that action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons[24]

which reflects the present provision, but also when it -

> reasonably believes that action constituting a threat to the life or property of one or more nationals of the United Kingdom or residents of the United Kingdom has been or is likely to be taken by a person or persons[25]

In either case the person or persons must be either the government of a country or territory outside the UK or the resident of such a country or territory.

A freezing order will be an order which prohibits all persons in the United Kingdom, and all persons elsewhere who are United Kingdom nationals, bodies incorporated in the United Kingdom or Scottish partnerships from making "funds" available to or for the benefit of a person or persons specified in the order. The order may specify the persons taking the action referred to in clause 4 and any person who has provided or is likely to provide assistance (directly or indirectly) to those persons. The specification may be by name or by description of persons set out in the order. Where a person is specified by description, the description must be such that a reasonable person would know whether he fell within it.

Clause 6 introduces Schedule 3, which makes further provision about the contents of freezing orders. By paragraph 2 of Schedule 3:

> a freezing order may include provision that funds include gold, cash, deposits, securities (such as stocks, shares and debentures) and such other matters as the order may specify.

C. Offences

Non-compliance will *not* automatically be an offence[26], but Schedule 3, paragraph 7(1) specifies that a freezing order *may* include any of the provisions set out in the paragraph.

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[24] Clause 4 (1)(ii)(a)
[25] clause 4(1)(ii)(b)
[26] as it would be under the existing legislation

The remaining sub-paragraphs are provisions which set out a number of offences (not limited simply to failure to comply with a prohibition), defences and penalties which may be included in a freezing order. Paragraph 8 deals with limitation and procedure, and paragraph 10 specifies that a freezing order may include provision for the award of compensation on the grounds that a person has suffered loss (either as a result of the order, or as a result of licences eg authorising funds to be made available).

Clause 12 allows a freezing order which would otherwise be treated as a hybrid instrument to proceed as if it were not.

D. Making and review of freezing orders

Freezing orders are to be made by statutory instrument, which must be laid before Parliament and will cease to have effect after 28 days unless approved by each House.

Clause 7 requires the Treasury to keep under review whether any freezing order should be kept in force or amended[27], and clause 8 provides that a freezing order will lapse two years after it is made.

III Civil Nuclear Security

a. General Concerns

Civil nuclear sites such as power stations and nuclear waste depositories contain material closely related to that in nuclear weapons. Security has always been a prominent feature of the civil nuclear programme, partly because of its origins in the nuclear weapons programme. For many years, security concerns were concentrated on the care of "weapons grade plutonium" with which advanced nuclear weapons could be made. More recently, concern has spread to other types of fissile material. Although the construction of a sophisticated nuclear device would be difficult, there is an easier option for a terrorist. A radiological weapon or "dirty nuclear bomb" is a conventional bomb containing radioactive material. An explosion would scatter the radioactive material, in some circumstances perhaps making large areas of a city uninhabitable.

For several reasons, the terrorist attacks of 11 September have increased concerns. The ruthlessness of the terrorists suggested that they might be prepared to commit an even more serious attack. The use of a highjacked aircraft suggested a delivery mechanism far easier to obtain than a sophisticated long-range missile. Osama bin Laden has apparently claimed to possess nuclear weapons. Then, after the fall of Kabul, the *Times*

[27] they may be revoked by order under the negative resolution procedure: clause 12.

correspondent reported on 15 November the discovery of documents relating to nuclear weapons in a house that had been used by Al-Qaeda. Apparently they showed the intention of building a full nuclear device. Experts suggested that they might be working on a fission device similar to that dropped on Nagasaki.[28]

It is very difficult to control the spread of knowledge of such technology, partly because people trained in a nuclear weapons programme may choose to divulge it, for either financial or ideological reasons. Therefore the control of the fissile material capable of contributing to the construction of a bomb becomes particularly important.[29]

Security details relating to UK nuclear sites are not divulged, as the following PQ shows:

> **Mr. Chaytor:** To ask the Secretary of State for Trade and Industry what assessment she has made of the security threat posed by civil nuclear installations and processes as objects of terrorist attacks.
>
> **Mr. Wilson:** It is not our policy to disclose details of security measures taken at civil nuclear sites. All aspects of required security arrangements for civil nuclear sites are kept under continuing review by the Director of Civil Nuclear Security, who regulates security in the civil nuclear industry. [30]

b. Reprocessing at Sellafield

Coincidentally, the issue of the British Nuclear Fuels strategy of reprocessing nuclear fuel at Sellafield has become important at the same time. The MOX (Mixed Oxide) plant to create MOX fuel for use in conventional (thermal) reactors has been built, but a Government decision was required to start operating it. That decision was controversial, and has followed several years of consultation. The original idea was to reprocess nuclear waste to produce fuel for fast breeder reactors. Those reactors could become increasingly economic as more power stations were built and the price of uranium rose. In the event, more power stations have not been built and the price of uranium has stayed low. The lack of demand for the fuel increases fears that the plant would simply increase the supply of plutonium in the world. Two pressure groups summed up the case:

> Greenpeace and Friends of the Earth also believe that the MOX facility, which is intended to make nuclear reactor fuel out of plutonium and uranium for export around the world, will increase the risk of terrorists seizing nuclear material and increase the risk of Sellafield itself being targeted by terrorists. Plutonium is one of the most dangerous materials in the world. As little as 4kg is required to make a nuclear bomb. Far less is required to make a "dirty bomb" – conventional

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28 "Bin Laden's Nuclear Secrets Found in Al-Qaeda's Kabul Safe Houses", *Times*, 15 November 2001

29 The Library Research Paper, *Nuclear Safeguards Bill (HL) (Bill 59 of 1999/2000)* 00/40, 30 March 2000 contains further details

30 HC Deb 29 October 2001 c501W

> explosive added to plutonium so it causes widespread contamination on detonation.[31]

The Government announced on 3 October 2001 that the manufacture of MOX fuel was justified in accordance with the requirements of European Community law. Margaret Beckett, Secretary of State for Environment, Food and Rural Affairs, referred to the economic case, but added:

> In addition to evaluating the economic case for MOX fuel and the operation of the Sellafield MOX Plant, we have also considered the wider risks and benefits involved.[32]

The whole nature of the Sellafield reprocessing strategy inevitably involves movement of nuclear materials. They have to be transported at least from nuclear power stations to Sellafield. Much of Sellafield's work is to be based on importing nuclear fuel, reprocessing it and then re-exporting the resulting nuclear fuels. Transport inevitably increases security problems.

c. Aircraft Impact

The question of aircraft impact is a further worry. The Office of Civil Nuclear Security, part of the Department of Trade and Industry, has issued the following statement concerning the consequences of aircraft impact on nuclear installations:

> Civil nuclear sites apply stringent security measures regulated by the Department of Trade and Industry's Office of Civil Nuclear Security (OCNS). OCNS works closely with HSE's Nuclear Installations Inspectorate, which provides advice on the safety implications of events, including external hazards such as plane crashes, at nuclear installations.[33]

However, modern aircraft are much larger, and contain more fuel, than when many of the nuclear power stations were built. Particular concern has been raised about the storage of more than 1500 cubic metres of high-level radioactive liquid waste at Sellafield. According to the *New Scientist*, collision from a large modern jet would probably break open some tanks and start a major fire. It might also damage the cooling system, resulting in overheating and further releases of radioactivity within hours. The results might be catastrophic.[34]

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31 Friends of the Earth Press Notice, *Sellafield "Bomb Factory" Go-Ahead not Unlawful*, 15 November 2001

32 DEFRA News Release 165/01, *Sellafield MOX Plant – Manufacture of MOX Fuel Justified*, 3 October 2001

33 BNFL Current issues http://www.bnfl.com/website.nsf/index.htm

34 Rob Edwards, "What would happen if a Passenger Jet Ploughed into a Nuclear Plant", *New Scientist*, 13 October 2001

Flying restrictions over Sellafield prohibit aircraft from flying over the nuclear installation below a height of 2,200 feet above mean sea level in a two nautical mile radius.[35] Similar restrictions have operated around ageing Magnox reactors on five sites owned by the State-owned British Nuclear Fuels Ltd. Flying restrictions have now been started around other nuclear plants owned by British Energy.[36]

d. UKAEA Constabulary

On 1 August 1954, the UK Atomic Energy Authority assumed control of establishments that, until then, had been part of the Ministry of Supply. They were policed by the War Department and Admiralty constabularies. The *Atomic Energy Authority Act 1954* provided that the UKAEA could nominate persons to be sworn in as constables under section 3 of the *Special Constables Act 1923*. The Act also provided that any such officer could exercise the office of constable, with the same powers and privileges as a constable of the Metropolitan police in England and Wales and as a constable in Scotland, in relation to premises possessed or controlled by the Authority and in relation to Authority property within a radius of fifteen miles of those premises.

The Constabulary has a strength of around 500 officers and is accountable to Parliament through the Department of Trade and Industry. A Police Authority, representing the prime users of its services, agrees the force's funding and decides its policing plans and objectives. The Constabulary's main role is to provide a secure working environment at all UKAEA licensed sites and those of BNFL and URENCO. The Constabulary's core task is the protection of special nuclear materials both on site and in transit. The training of the officers includes "advanced training in the use of firearms".[37]

A report in August 2000 by the Director of Civil Nuclear Security described the role of the police, as well as justifying an increase in numbers:

> There is no precise way to determine the number of police officers needed to counter assessed security threats: decisions have to be made from informed assumptions. However, I am satisfied as a result of the Standing Committee On Police Establishments (SCOPE) first round of reviews that AEAC establishments at sites are now sufficient to provide effective guarding and patrolling, and a robust defence in the event of an armed attack. I am especially pleased at progress achieved in reinforcing the AEAC's armed response capability. It is vital that any terrorist groups contemplating attacking a licensed nuclear site realise they would be confronted by well-trained, armed police officers based at each site. SCOPE also gave priority to ensuring that all sites would deploy dog patrols around the clock. Dogs are a valuable deterrent, excellent at detecting intruders in cover and an essential less-than-lethal option, but one site had been

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35 HC Deb 12 November 2001 c 540W

36 "No-fly Zones Set Up for Nuclear Plants", *Daily Telegraph*, 5 November 2001

37 UKAEA Website http://www.ukaea.org.uk/constabulary/Main_Cheif.htm

resisting dog patrols and others had insufficient capacity. This has been remedied.[38]

e. Clauses 76-81 of the Bill

Clause 76 would extend the power of Atomic Energy Authority special constables to operate on a wider range of nuclear sites, beyond those of UKAEA, BNFL and Urenco Limited. Plants owned by British Energy would be included. An AEA constable would have powers and privileges extended to 5 kilometres of all these nuclear sites, as well as powers to escort nuclear material, and to prevent its theft.

Clause 77 would allow the Secretary of State to make regulations to improve nuclear security.

Clause 78 contains repeals of existing legislation.

Clause 79 would prohibit various disclosures that might prejudice the security of any nuclear premises or nuclear material. The maximum penalty would be seven years imprisonment, combined with a fine.

In view of the seriousness of the disclosure of nuclear information or materials, the offence in Clause 79 may appear entirely reasonable. However, in such cases, it is worth considering whether such powers might be used to stifle exposures of other matters. For example the revelation of inefficient working practices or careless security to a journalist might be inhibited by concern that the revelation could constitute a security offence.

Clause 80 would allow the Secretary of State to make regulations to prohibit the disclosure of uranium enrichment technology. That technology would allow the transformation of uranium ore (naturally found in the ground in some sites) into the enriched uranium that could be used in a nuclear power station or in a nuclear weapon. Clearly the widespread dissemination of such technology greatly increases the risk that more countries or terrorist organisations will acquire the capacity to build nuclear weapons.

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[38] SCOPE, *A Report to the Minister by the Director of Civil Nuclear Security*, August 2000 paragraph 7

IV Aviation security

A. International conventions on crimes against aircraft

Aviation security is governed by several international treaties. The *Tokyo Convention 1963,* the *Convention on Offences and Certain Other Acts Committed on Board Aircraft,* is concerned with establishing jurisdiction over offences committed on board aircraft, and with the extradition of offenders. Its provisions on the suppression of hijacking itself are weak and political offences are normally excluded for extradition purposes, although not if they affect the safety of the aircraft.

After the large increase in hijacking of aircraft between 1969 and 1970 the international community became active in seeking new legislation to prevent hijacking. The *Hague Convention 1970,* the *Convention for the Suppression of Unlawful Seizure of Aircraft* was intended as a remedy. This establishes hijacking as a crime and obliges parties to make it punishable by severe penalties. It also introduces further provisions on extradition. The *Montreal Convention 1971,* the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,* deals with the sabotage of aircraft and follows a similar model to the Hague Convention. This was supplemented by the *Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation* signed in 1988. This protocol commits the states ratifying it to make it an offence to carry out armed attacks at international airports or to cause damage or disruption at such airports. The protocol provides for severe penalties for these offences.

One development facilitating extradition in the case of offences against aircraft and their passengers is the *European Convention on the Suppression of Terrorism* which takes some such offences outside the category of 'political' offences. The convention entered into force between the first three states to ratify it on 4 August 1978 and for the UK on 25 October 1978 under the *Suppression of Terrorism Act 1978.*

After the destruction of a Pan Am aircraft over Lockerbie in December 1988, the International Civil Aviation Organisation (ICAO) adopted an aviation security plan in eight points which became the basis for improvements in aviation security throughout the world.
The plan concerns:

- the screening of checked passengers' baggage;
- baggage reconciliation;
- screening of cargo and mail;
- control of access to sensitive areas at airports;
- carriage of items that cannot be easily opened;
- better detection of explosives;
- building security into the design of aircraft;
- strengthening of the powers and organisation of ICAO to enable it to implement more actively the safety standards.

B. United Kingdom legislation

The Tokyo Convention was originally enacted in UK legislation by *the Tokyo Convention Act 1967* which was replaced by section 92(1) of the *Civil Aviation Act 1982*. The *Civil Aviation (Amendment) Act 1996* closed a previous loophole in the *Civil Aviation Act 1982* by the insertion of section 92(1B); so that acts or omissions which take place on board United Kingdom-bound foreign aircraft, should constitute offences had they occurred in the United Kingdom. It also provides that proceedings may be brought in relation to any such offence on a United Kingdom-bound foreign aircraft, whether the landing of the aircraft in the United Kingdom was scheduled or not. Proceedings could not be previously be brought if the aircraft had not in fact landed in the United Kingdom, or if the aircraft had landed abroad following the incident and before its arrival in the United Kingdom.
The hijacking provisions of the Hague Convention were given effect in the UK by the *Hijacking Act 1971*. This was replaced by the *Aviation Security Act 1982,* the relevant provisions of which are identical. Offences under this Act are covered regardless of the nationality of the aircraft or the person committing the offence and the whereabouts of the aircraft.

The provisions of the Montreal Convention were enacted in the UK by the *Protection of Aircraft Act 1973* now repealed and replaced by identical provisions in the *Aviation Security Act 1982* (the 1982 Act). The 1982 Act, sections 12 to 14, gave the Secretary of State power to issue to Directions to airport and aircraft operators .

The *Civil Aviation and Maritime Security Act 1990* enabled the UK government to ratify the ICAO's *Montreal Protocol 1988* adopted after the Lockerbie bombing. The aviation security provisions of this Act were framed as amendments to the 1982 Act. They widened the category of person to whom the Secretary of State could give Directions to include businesses which go on at airports. In practice this meant that catering suppliers, cleaning firms, aircraft maintenance and servicing firms and suppliers of aircraft stores were brought within the scope of the 1982 Act. The Act gave powers to aviation security inspectors to issue enforcement notices when there is a failure to comply with a direction. The Act also created new offences relating to security at aerodromes, bringing individuals within the scope of aviation security legislation so that certain acts prejudicial to aviation security became offences. For example it became an offence for a person to give false information in answer to questions relating to baggage cargo or stores.

The *Aviation Security (Air Cargo Agents) Regulations 1993,* made under section 21F of the *Aviation Security Act 1982*, provide for the Secretary of State to establish and maintain a list of security approved cargo agents. To be included on this list, an agent must be able to satisfy the Department about the security standards of his operations. The air cargo security regime came into effect in August 1994 but under amending regulations

the Secretary of State can remove an air cargo agent from the list. Listed agents are now prevented from passing on known cargo once they have been proposed for de-listing, until such time as any appeal against de-listing has been accepted.

The government has the power under section 60 of the *Civil Aviation Act 1982* to make an Order in Council to give effect to the Chicago Convention which regulates international civil aviation. Under Article 118 of the *Air Navigation Order 2000*[39], the CAA or an authorised person may detain aircraft where the aircraft is not fit to fly by virtue of contravention of airworthiness regulations. Inspection of the aircraft is allowed by authorised persons to check the airworthiness of the aircraft. Detention of an aircraft is also allowed if an airline is in default of the payment of airport or air traffic control charges.

C. The Bill

Part 9 of the Bill aims to improve the enforcement of aviation security requirements and the ability of the police to deal with potentially dangerous situations at airports and on board aircraft. It includes provisions in respect of the removal of unauthorised persons from airport restricted zones and from aircraft.

1. Clause 82 Arrest without a warrant

Clause 82 provides for certain offences to be inserted at the end of section 24(2) of the *Police and Criminal Evidence Act 1984* (PACE). This has the effect of giving the police the power to arrest suspects. The power will apply to offences relating to unauthorised presence in the restricted zone of an airport or on an aircraft under sections 21(C)(1) and (21(D)(1) of the *Aviation Security Act 1982.* The maximum penalty for this offence is a fine of level 5 on the standard scale. The offence of trespassing on a licensed aerodrome under section 39(1) of the *Civil Aviation Act* 1982 is also included.

Section 24 of PACE extends only to England and Wales. The clause therefore makes a similar change to the equivalent policing legislation in Northern Ireland by amending Article 26(2) of the Police and Criminal Evidence (Northern Ireland) Order 1989.[40] In Scotland powers of arrest for these offences would be subject to the general rule that arrest without warrant is not justified unless necessary in the interests of justice. In order to ensure that police in Scotland have the desired power of arrest, a statutory power of arrest without warrant is to be introduced under Clause 82(3).

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[39] SI No 1562
[40] SI No 1341

2. Clause 84 Penalty for trespass on an aerodrome

The maximum penalty for such an offence is a fine of level 1 on the standard scale but is to be increased under Clause 83 of the Bill to a level 3 fine, currently £1,000.

3. Clause 84 Removal of an intruder

Sections 21C and 21D of the Aviation Security Act 1982 make it an offence for an unauthorised person to go into an airport's restricted zone, or onto an aircraft or to remain in either place after being asked to leave. However there is no specific power to remove someone who refuses to leave after being asked to do so and this could leave the travelling public and airport/airline staff open to potential danger. Clause 84 clause provides a power to enable a constable or authorised person to remove a person from a restricted zone or aircraft. Clause 84(1) deals with aerodromes and Clause 84(2) deals with aircraft. This will bring the aviation industry into line with the maritime industry and the Channel Tunnel where equivalent powers exist under section 31(4) of the *Aviation and Maritime Security Act 1990*, as amended, and under section 39(2A) of the *Channel Tunnel Security Order 1994.* [41]

4. Clause 85 Aviation security services

Clause 85 will give the government the power to make similar regulations to the cargo agents regulations for other parts of the industry which provide security services to civil aviation. These could include for example companies contracted by airports and airlines to provide passenger and baggage screening services. The clause inserts a new section 20A into the *Aviation Security Act 1982* to give the Secretary of State the power to set up, by regulations, lists of such categories of companies or individuals associated with the provision of aviation security services.

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[41] SI No 570

5. Clause 86 Detention of aircraft

Under the *Aviation Security Act 1982* there is no specific power for an authorised person under the Act to detain an aircraft other than for the purposes of inspecting it. Once the inspection has finished, an inspector has no powers to detain the aircraft even if he is concerned at the level of security. Nor is there a power for an authorised person to prevent an aircraft from flying if he believes that the aircraft may be the target for an attack. Such powers do exist for the detention of ships and channel tunnel trains where there has been a failure to comply with a direction or Enforcement notice. Clause 86 inserts a new section 20B into the 1982 Act giving an authorised person the power to detain aircraft if there is reason to believe that its security has been compromised because of a failure to comply with the Department's statutory Directions or an Enforcement notice.

The new section 20B(3) provides for what an authorised person may do to ensure that the aircraft does not fly which includes using reasonable force. The new provision allows for objections to the direction and for offences for failure to comply with the direction. On summary conviction a maximum penalty of a level 5 fine (currently £5,000) can be imposed. On indictment the penalty could be a maximum of 2 years imprisonment or a fine of any level set by the court.

6. Clause 87 Air cargo agent documents

Under the current *Aviation Security (Air Cargo Agents) Regulations 1993* it is not an offence to pretend to have been approved by the DTLR to operate as a security approved air cargo agent. Clause 87 inserts a new section 21FA into the 1982 Act to create a new offence of issuing a document which falsely claims to come from a security approved cargo agent. This would be a summary offence attracting a maximum penalty of six months imprisonment or a maximum fine of level 5 on the standard scale, or both.

D. Costs

The Regulatory Impact Assessment of the Bill estimates that using estimates for the average cost of disruption to flights the costs for a delay of one hour to a flight could be in the region of £1,740-£3,780. These costs could be incurred through rechecking of baggage and waiting for another take-off slot. DTLR advise that the circumstances would have to be very serious for it to seek to prevent an aircraft from flying and that the power is only intended to be used in times of extreme concern. Costs will depend on circumstances and could be potentially very high and possibly unquantifiable.

The reserve powers under clause 85 for the listing of companies may impact on industry if used. The DTLR will carry out a full regulatory impact assessment if secondary legislation is sought.

Clauses 116 and 117, in Part XIII of the Bill, are also relevant to aviation security: these are described below in the section dealing with amendments to the *Terrorism Act 2000*.

V Part XIII Miscellaneous

Part XIII is a relatively short part containing miscellaneous provisions, under four headings:

- *Third pillar of the European Union*
- *Dangerous substances*
- *Intelligence Services Act 1994*
-*Terrorism Act 2000*

Although there are only 10 clauses, Part XIII includes significant new powers and new offences over three wholly separate subject areas, namely implementation of third pillar obligations by secondary legislation, new offences relating to the use of, or hoaxes about, noxious substances such as anthrax, and the reintroduction, with wider application, of an offence of failing to disclose information about acts of terrorism.

A. Third pillar implementation

1. Introduction

Clauses 109 and 110 introduce a new enabling power for implementation of UK obligations arising under the third pillar of the European Union. The effect of the two clauses is described very briefly in the Explanatory Notes[42]:

> **Clause 109 Implementation of the Third Pillar**
> 294 This clause will allow measures adopted under Title VI of the Treaty on European Union (Police and Judicial Co-operation in Criminal Matters) to be implemented by secondary legislation. The European Union's objective in adopting measures under Title VI is to "provide citizens with a high level of safety within an area of freedom, security and justice" by "preventing and combating crime .. in particular terrorism, .. illicit drug trafficking and illicit arms trafficking" (Article 29 of Title VI).
>
> 295 The drafting of the clause follows closely the drafting of section 2(2) of the European Communities Act 1972, which allows measures adopted under the Treaties establishing the European Communities and related treaties to be implemented by secondary legislation. Like the enabling power in section 2(2) of the 1972 Act, the clause enables such provision to be made as might be made by Act of Parliament but subject to a number of limitations. The power conferred by the clause does not include power to raise taxes, to legislate retrospectively, or to

[42] Bill 49-EN (Home Office etc) Paras 294-7

create further legislative powers. The power to create new criminal offences is also limited.

Clause 110 Third pillar: supplemental

296. This clause sets out supplementary provisions concerning the exercise of the powers conferred by clause 109.

297. The enabling power would be exercised by any Secretary of State, the Lord Chancellor, the Chancellor of the Exchequer or by the Devolved Administrations where the powers relate to devolved issues. The secondary legislation will be subject to the draft affirmative procedure.

2. The existing power under the 1972 Act: limitations

The existing power[43], under section 2(2) of the *European Communities Act* 1972 is similarly expressed:

> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—
>
> (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;
>
> and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.
>
> In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

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[43] under which very numerous orders have been made

Clause 109 is subject to limitations, so there would be no power:

> (a) to make any provision imposing or increasing taxation,
> (b) to make any provision taking effect from a date earlier than that of the making of the instrument containing the provision,
> (c) to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for a court or tribunal, or
> (d) to create, except in accordance with subsection (7), a criminal offence which is punishable
>
> (i) on conviction on indictment, with imprisonment for more than two years,
> (ii) on summary conviction, with imprisonment for more than three months,
> (iii) on summary conviction, with a fine (not calculated on a daily basis) of more than level 5 on the standard scale or (for an offence triable either way) more than the statutory maximum, or
> (iv) on summary conviction, with a fine of more than £100 a day.

Thus far, the limitation on the creation of criminal offences reflects the limitation on the 1972 power. However, by subsection (7):

> Subsection (5)(d) does not preclude the creation of an offence punishable on conviction on indictment with imprisonment for a term of any length if
>
> (a) the offence is one for which a term of that length, a term of at least that length, or a term within a range of lengths including that length, is required for the offence by an obligation created or arising by or under the third pillar,
> (b) the offence, if committed in particular circumstances, would be an offence falling within paragraph (a), or
> (c) the offence is not committed in the United Kingdom but would, if committed in the United Kingdom, or a part of the United Kingdom, be punishable on conviction on indictment with imprisonment for a term of that length.

Thus it would, if those conditions were satisfied, be possible to create by secondary legislation, criminal offences carrying maximum custodial sentences exceeding the two year ceiling which applies to offences which may be introduced by secondary legislation under the 1972 Act.

The *Anti-Terrorism, Crime and Security Bill* would make Third Pillar matters subject to a procedure for adoption by secondary legislation, similar to that already used for Community legislation (First Pillar) under the *European Communities Act 1972* (ECA).

Third Pillar proposals will still be subject to the UK scrutiny process and to the Scrutiny Reserve. These mechanisms, and how they have evolved, are described below.

3. The Third Pillar in the Treaty on European Union

a. Overview

National criminal law has in the past given effect to EC law, but the Community Institutions have not themselves imposed criminal sanctions, and there had been a presumption that criminal law was a matter for Member States. Before the Amsterdam Treaty amendments, the Treaty was silent on whether the Community had competence. The Amsterdam Treaty brought in new provisions on criminal law cooperation. More detailed development of EU criminal law competence is to be found in the third pillar. The wide ranging objective is spelled out in Article 29:

> To provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.
> That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:
>
> > -closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;
> > -closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32;
> > -approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).

Article 31 expands:

> Common action on judicial cooperation in criminal matters shall include:
> (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;
> (b) facilitating extradition between Member States;
> (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
> (d) preventing conflicts of jurisdiction between Member States;
> (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

b. The third pillar

The Third Pillar is concerned with cooperation in the area of Justice and Home Affairs. Unlike the Community (first) pillar, it does not make use of the Community legal instruments and procedures set out in the original *Treaty of Rome* (*Treaty Establishing the European Communities* or TEC). It is governed by the European Council and the Council of Ministers, with the Commission and Parliament playing subordinate roles and the Court of Justice largely absent. Decision-making in this area is intergovernmental.

Article K1 of the *Treaty on European Union* (TEU) defined as "matters of common interest" asylum policy, external border controls, immigration policy, combating drug addiction and international fraud, judicial cooperation in civil and criminal matters, customs cooperation and police cooperation in action against terrorism, drug-trafficking and other serious international crime. Member States would consult and exchange information and could then:

- Adopt joint positions "and promote … any cooperation contributing to the pursuit of the objectives of the Union";
- Adopt joint action (subject to the subsidiarity test); and
- Draw up conventions for adoption by the Member States under their national constitutional requirements.[44]

The Commission is "fully associated", the EP is "regularly informed of discussions" and consulted "on the principal aspects of activities", when its views are "duly taken into consideration". The EP may ask questions of the Council of Ministers or make recommendations to it. The EP does not have the right to be consulted on the detail of proposed positions or actions or to insist on any opinion.

c. Treaty of Amsterdam Changes to Third Pillar

At Amsterdam the Third Pillar was split into two parts. One became a new title in the EC Treaty as a sphere of fully-fledged Community competence, while the other remained predominantly inter-governmental. Regarding the latter, the Justice and Home Affairs label disappeared and the revised title VI is now known as *Provisions on police and judicial cooperation in criminal matters*. It comprises fourteen Articles (29-42). The revised Title VI covers fewer areas, but its objectives are set out more clearly, that is, to establish close cooperation between police services, customs and judicial authorities. This pillar retained its essentially inter-governmental character, but it is moving closer to Community institutional arrangements, thus gradually eroding the difference between the

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[44] Article K.3.2.

First (Community) and Third Pillars. This is because the Third Pillar provisions still include a 'bridge' allowing Member States to transfer areas of competence from Title VI to Title IV (TEC). The transfer procedure is very complex and has not yet been applied, but its existence suggests that in time all areas concerning justice and home affairs may one day be brought within the Community framework.

d. Remaining Third Pillar Matters

Amsterdam established that the Union is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters, and by preventing and combating racism and xenophobia. In order to achieve that objective, the Member States undertake to inform and consult one another within the Council with a view to coordinating their action, establishing collaboration between the relevant departments of their administrations. To that end, acting unanimously on an initiative of any Member State, the Council may adopt common positions, framework decisions and establish conventions.

The criminal phenomena that fall under the revised title VI are:

Racism and xenophobia[45]
Terrorism
Organised and other crime
Trafficking in persons
Offences against children
Illicit drug trafficking
Illicit arms trafficking
Corruption
Fraud

The revised Title provides for closer cooperation between police forces, customs and judicial authorities, both directly and through the European Police Office (Europol), and also, where necessary, through the alignment of criminal law in the Member States.

The Council continues to play the leading role, but some of the instruments at its disposal changed under Amsterdam. The common position and the convention remain, but the joint action was replaced by two new instruments: decisions and framework decisions.

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[45] These are to be prevented and combated, but are not categorised as a crime as are the other items in the list.

e. New First Pillar Matters

Amsterdam brought into the First Pillar Community legal order the former Third Pillar policies on visas, asylum, immigration and other policies connected with the free movement of persons. The Treaty stipulated that the measures are to be taken by the Council with a view to the progressive establishment of an area of freedom, security and justice within five years of its entry into force.

During the five-year transitional period following the entry into force of Amsterdam in May 1999, the Council would in general act unanimously on a proposal from the Commission or on the initiative of a Member State, and after consulting the European Parliament. After this period, the Council would act on proposals from the Commission which would from then on acquire sole right of initiative. The Council, acting unanimously after consulting the European Parliament, would then take a decision with a view to making all or part of the areas covered by this Title subject to the co-decision procedure. Co-decision gives a much greater role for the EP in decision-making, with the ultimate right of veto in certain circumstances. For the issue of visas by the Member States and rules on uniform visas, the Treaty provided for the co-decision procedure to apply after the five-year transitional period without the Council having to take a decision.

f. Treaty of Amsterdam and Schengen: special arrangements for the UK, Ireland and Denmark

While it was accepted by the Netherlands Presidency ahead of the Amsterdam Summit that the UK and Ireland would require special arrangements as regards the integration of the Schengen agreement into the Treaty (TEU) and the abolition of internal border controls, no text was inserted into the pre-Amsterdam drafts and the details of the proposed new arrangements became apparent only with the publication of Protocols 3 and 4 after the summit. Protocol 5 contains a special set of arrangements for Denmark.

The special position arrived at for the UK rests on provisions in the 'Schengen' protocol coupled with Article 69 of the new title and protocols 3 and 4. It is explicit in Article 2 of the Schengen protocol that the Schengen *acquis* applies only to the 13 states which have signed the Schengen agreements. Under Article 4 of this protocol the UK and Ireland "*may at any time request to take part in some or all of the provisions of this acquis*", and if they do so request, the response will be determined by unanimous decision of the other 13. According to Declaration 45 of Amsterdam the Member States will seek the opinion of the Commission on such a request, but this is not a legally binding requirement.[46]

Protocol 3 refers in its preamble to "*the existence for many years of special travel arrangements between the UK and Ireland*" and stipulates that the UK will be entitled to exercise controls at its frontiers with other Member States regardless of Article 7a (now

[46] Declaration 45, p.106.

Article 14 TEC) and of any other provisions in the TEU and TEC and any other agreements reached under these treaties or by the EU with other states. Such controls may be for the purpose of (a) verifying the right to enter the UK of citizens of the European Economic Area (i.e. the EU 15 together with Norway,
Iceland and Liechtenstein) and of other states with which the UK has special arrangements and (b) determining whether other persons may enter. The article also applies to territories for whose external relations the UK is responsible, i.e. Gibraltar. Under Article 2 the UK and Ireland may continue to make their own arrangements for the Common Travel Area. Under Article 3 the other 13 states are entitled to exercise the same controls on persons entering their territory from the UK (including for this purpose Gibraltar) and Ireland. This again is to be regardless of Article 14, which would otherwise require the elimination of these controls.

Protocol 4 governs the relationship of the UK and Ireland to the new title on free movement of persons, asylum and immigration. The basic provision in articles 1 and 2 is that the UK and Ireland will not take part in this Title and that nothing agreed under it will apply to them. This exemption is explicitly made to encompass any relevant decisions of the Court of Justice. These will not apply to the UK or Ireland, nor will they enter into the *acquis* or the corpus of community law as far as the UK and Ireland are concerned. Thus the UK and Ireland not only remain outside the existing Schengen arrangements, but they are also fenced off from the future development of these arrangements under the new Community Title.

However, Article 3 of Protocol 4 allows the UK and Ireland to opt in to measures adopted under this Title on a selective basis. This would mean, for example, that the UK and Ireland could choose to opt in to measures concerning the EU external frontier and asylum, while remaining outside any arrangements made in future for EU internal frontiers. Article 3 would allow both countries to take part in the negotiation of measures provided that they give notice of their intention to do so within 3 months of a proposal being presented to the Council. Since all measures under the new Title (other than short term visa measures) are to be adopted by unanimity, at least for the first five years, the UK and Ireland would acquire a veto during the negotiation process, but only for *"a reasonable period of time"*[47] After this period, if agreement could not be reached with the UK and Ireland taking part, but could be reached with the unanimous agreement of the other 13, then it would be adopted for the 13 only and would not apply in any way to the UK and Ireland. The UK and Ireland would have a right to opt in at a later date should they wish. Whenever the UK and Ireland chose to adopt a measure under the new Title they would have to accept also the jurisdiction of the ECJ under Article 68 of the new Title.

g. Government measures regarding opting in to Schengen

The Government decided to opt in to various Schengen measures, though not to any that required abandoning border controls. The measures were described by the then Home Secretary, Jack Straw, as follows:

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[47] Protocol 4, Article 3(2), p. 81.

> I have today made the following statement to the Justice and Home Affairs Council in Brussels. Other member states will be interested to know of the intentions of the United Kingdom about our participation in JHA matters after the entry into force of the Treaty of Amsterdam, in accordance with Article 4 of the Protocol integrating the Schengen acquis into the framework of the European Union and by the Protocol on the position of the United Kingdom and Ireland. The United Kingdom is committed to active and effective co-operation in the JHA field. We demonstrated that during our Presidency last year. Our citizens have a common interest in ensuring that effective action is taken to combat international organised crime; we shall continue to play a full role in such European union level co-operation. We have been playing an active part in preparation for the incorporation of Schengen and for the establishment of the new Free Movement Chapter under Amsterdam. We are also keen to assist in the development of a useful agenda for the special European Council in Tampere later this year. We have been giving serious thought to the areas of the Schengen acquis and the measures to be adopted under the Title IV in which we would wish to participate once Amsterdam comes into force. The different effects of our various Protocols influences our approach in this respect.
>
> Our starting point is the Protocol on frontier controls to which all member states agreed at Amsterdam. The United Kingdom Government will maintain their former controls, in line with that political agreement.
>
> Subject to the Amsterdam Protocol, the United Kingdom wishes to approach participation in Schengen and the Free Movement Chapter positively. Indeed we are keen to engage in co-operation in all areas of present and future JHA co-operation which do not conflict with our frontiers control. We are therefore ready to participate in law enforcement and criminal judicial co-operation derived from the Schengen provisions, including the Schengen Information System. We have been in the forefront of European Union co-ordination in the fight against crime and drugs and we shall maintain that position. We are also interested in developing co-operation with European Union partners on asylum--a European Union-wide phenomenon--and in the civil judicial co-operation measures of the Free Movement Chapter. Our intention to maintain our frontier controls has implications for our participation in the direct operation of external frontier controls. For similar reasons, enhanced visa co-operation raises difficulty for us. But, within this constraint, we shall seek discussions with European Union colleagues to maximise the scope for mutual operational co-operation in combating illegal immigration, without prejudice to the maintenance of our national immigration controls. We shall also look to participation in immigration policy where it does not conflict with our frontiers-based system of control.[48]

A Lords Written Answer in March 2001 details the proposed measures under Title IV that the Government intends to opt in to:

> … the UK has notified its intention under Article 3 of the Protocol on the position of the United Kingdom and Ireland to participate in the application and adoption

[48] HC Deb, 12 March 1999, cc. 380-2W.

of the following proposed measures under Title IV of the treaty establishing the European Community:

Asylum and Immigration Measures

Regulation: Commission proposal for a Council regulation concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens (title subsequently amended to "Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention").

Directives: Initiative of the French Republic for a Council Directive defining the facilitation of unauthorised entry, movement and residence;

Commission proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status;

Initiative of the French Republic for a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the member states third country nationals not in possession of the documents necessary for admission;

Initiative of the French Republic for a Council Directive on mutual recognition of decisions concerning expulsion of third country nationals;

Commission proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance between member states in receiving such persons and bearing the consequences thereof.

Decision

Commission proposal for a Council Decision establishing a European Refugee Fund.

External measures

Commission proposal for a Council Decision on the conclusion of an agreement between the European Community and Republic of Iceland and Kingdom of Norway concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a member state or Iceland or Norway. (The UK also notified its intention to participate at an earlier stage when the Commission brought forward its proposal for a negotiating mandate.)

Recommendations for Council Decisions authorising the Commission to negotiate readmission agreements with Sri Lanka, the Kingdom of Morocco, the Islamic Republic of Pakistan and the Russian Federation.

Civil Judicial Co-operation Measures

Regulations: Commission proposal for a Council Regulation (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;

Initiative of the French Republic for a Council regulation on the mutual enforcement of judgments on rights of access to children (Brussels IIbis);

Initiative of the Federal Republic of Germany for a Council regulation on co-operation between the courts of the member states in taking evidence in civil and commercial matters;
Commission proposal for a Council regulation extending the programmes of incentives and exchanges for legal practitioners in the area of civil law (Grotius - Civil);

Initiative of the Federal Republic of Germany and the Republic of Finland for a Council regulation on insolvency proceedings;

Commission proposal for a Council regulation on the service in the member states of judicial and extrajudicial documents in civil or commercial matters;

Commission proposal for a Council regulation (Brussels II) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children.

Decision: Commission proposal for a Council Decision establishing a European judicial network in civil and commercial matters.[49]

h. Treaty of Nice Amendments

The Treaty of Nice, as and when it comes into force, will make Articles in Title IV currently subject to unanimity, subject to Qualified Majority Voting (QMV) after the Council adopts unanimously (in date set in Treaty) the legislation laying down common rules and basic principles governing areas covered by Articles 63 (asylum and refugees). From May 2004 QMV will apply to Article 62(3) relating to the free movement of third-country nationals, and Article 63(3)(b), measures relating to illegal immigration. These provisions will not affect the UK unless the Government chooses to opt into them under the provisions of the Protocols described above.

4. Scrutiny of Third Pillar by UK Parliament

The parliamentary scrutiny of Third Pillar matters has been problematic for the European Scrutiny Committee in the Commons and the Lords European Union Select Committee.

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[49] HL Deb 1 March 2001 WA152-153.

The Lords reported on the difficulties in 1993 in *Scrutiny of the Inter-Governmental Pillars of the European Union*.[50] The Government replied that JHA conventions, joint positions and guidelines "which are of a longer-term and legislative character" may need to be implemented by primary legislation in the UK.[51] The Commons Select Committee on European Legislation (now the European Scrutiny Committee) tackled this issue in *The Scrutiny of European Business* in July 1996[52] and concluded that "the case for effective and systematic national Parliamentary scrutiny of these areas is [thus] if anything stronger than when our colleagues in the House of Lords reported".[53] At this time the Scrutiny Committee's Orders of Reference were limited to consideration of the First Pillar only. Third Pillar documents went to the Home Affairs Select Committee, which took oral evidence from time to time but which had not at this point reported on any documents. The Scrutiny Committee called for amendments to its Orders of Reference to bring Second and Third Pillar drafts within the European scrutiny system of the House. It also called for the scrutiny reserve to apply to the inter-governmental pillars, which the Government had resisted because of the speed with which decisions might have to be taken in this area. The Lords reported again on the scrutiny aspects in 1997 in *Enhancing Parliamentary scrutiny of the third pillar*.[54]

Following recommendations by the Select Committee on Modernisation of the House, changes were implemented in November 1998 which brought Third Pillar documentation within the remit of the European Scrutiny Committee under Standing Order No.143. The Scrutiny Reserve also applies with respect to common positions, framework decisions, decisions or conventions under Title VI (TEU).

5. Implementation of Third Pillar in the UK

Much Third Pillar activity concerns cooperation and consultation between Member States and does not entail legislation. Third Pillar agreements and conventions have, where necessary, been implemented in the UK as international treaties (laid before Parliament and on occasion debated). Primary legislation may need to be introduced or amended to take account of provisions in these agreements. The Europol Convention was one such agreement.[55] Another is the *Convention on Mutual Assistance and Cooperation between Customs Administrations*.[56] A third example is the *Convention on the Protection of the European Communities' Financial Interests* (Fraud Convention), which was adopted by the JHA Council on 26 July 1995 (with three protocols adopted and signed on 27 September 1996, 29 November 1996 and 19 June 1997). The then Home Affairs Minister,

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50 28th Report 1992-93, HL Paper 124.

51 *Observations* by the Foreign and Home Affairs Secretaries, ibid., para.(ii).

52 27th Report 1995-96, HC 51-xxvii, 18 July 1996.

53 Ibid., para.80.

54 European Communities Select Committee (HL) sixth report with evidence, HL 25 1997/98, 31 July 1997.

55 Cm 4837;Treaty 103 (2000).

Kate Hoey, set out the process for implementation of the Convention in the UK as follows:

> The Government published the Convention and its protocols on 16 May 1999 as Command Papers in the European Communities Series, and laid them for 21 sitting days in both Houses in accordance with the Ponsonby rule. Prior to adoption the Convention and its protocols had been submitted for, and cleared from, parliamentary scrutiny. The Convention will enter into force 90 days after the Secretary-General of the Council receives notice that it has been ratified by the last Member State of the European Union. The same rule applies to each of the protocols, except that they cannot enter into force before the Convention.
>
> Following the recent commencement of Part I of the Criminal Justice Act 1993, which was brought into force on 1 June 1999, and of equivalent provisions of the Criminal Justice (Northern Ireland) Order 1996, which were brought into force on the same date, no further changes to criminal law are needed in the United Kingdom in order to satisfy the requirements of the Convention and protocols. Arrangements are under way for the United Kingdom to ratify the Convention and protocols by September.[57]

The Justice and Home Affairs Council's work towards a Framework Decision on Combating Terrorism is continuing. The drafts have undergone modification. For the European arrest warrant, the most recent draft, of 31 October 2001, provides:[58]

> The following offences, as defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the action, give rise to a surrender pursuant to a European arrest warrant:
> Membership of a criminal organisation
> Trafficking in human beings
> Sexual exploitation of children and child pornography
> Illicit trafficking in narcotic drugs and psychotropic substances
> Illicit trafficking in weapons, munitions and psychotropic substances
> Corruption
> Fraud …
> Laundering of the proceeds of crime
> Counterfeiting of the euro
> High tech crime, particularly computer crime
> Environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties
> Murder, grievous bodily injury
> Illicit trade in human organs and tissue
> Kidnapping, illegal restraint and hostage-taking

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56 Cm 5020;European Communities 2 (2000), 20 December 2000, with explanatory memorandum EM 41 (Brussels 1997).

57 HC Deb, 11 June 1999, cc435-6W.

58 Article 2.2

Racism and xenophobia
Organised robbery
Illicit trafficking in cultural goods, including antiques and works of art
Swindling
Racketeering and extortion
Counterfeiting and product piracy
Forgery of administrative documents and trafficking therein
Forgery of means of payment
Illicit trafficking in hormonal substances and other growth promoters

6. The implementation procedure proposed by the Bill

Clause 110 (7) provides that no regulations may be made under the new power conferred by section 109(1) unless a draft of the regulations has been laid before and approved by a resolution of each House. According to Erskine May:[59]

> **The affirmative procedure**
>
> The affirmative procedure on statutory instruments takes one of three forms, according to the formula of the enabling Act. An instrument or Order in Council may be made by the appropriate authority, and have immediate effect, subject to the requirement that its effect shall not continue beyond a specified period (usually 28 or 40 days) unless one or both Houses within that period agree to the appropriate resolutions approving the document. Secondly, an Order or an instrument may be required to be laid in draft before one or both Houses , and not to be made and have effect unless one or both Houses present Addresses to the Crown, praying for the Order to be made, or have agreed to resolutions approving the draft instrument. In the third case, a Minister may make and lay an instrument, but it will have effect only after a resolution has been passed approving it. The first type is frequently resorted to when delegated legislation must come into force immediately upon being made, and without any prior consultation - usually but by no means always in the field of taxation. There is no substantial difference between the second and third types… All three are used principally for substantial and important portions of delegated legislation, on which a high degree of scrutiny is sought.
>
> [-]
>
> in the Commons most debates on statutory instruments are generally now held in standing committee rather than on the floor of the House. Under Standing Order No 118(3) all instruments subject to the affirmative procedure automatically stand referred to a standing committee on delegated legislation unless notice has been give by a Minister of a motion that the instrument shall not stand so referred

[59] Parliamentary Practice, 22nd edn, 1997 p 582

> or the instrument is referred to the Scottish or the Northern Ireland Grand Committee.
>
> Delegated legislation committees consider such instruments (whether subject to the affirmative or the negative procedure) on a motion 'That the committee has considered the instrument (or draft instrument)'. Debate in committee may continue for up to one and a half hours (two and a half hours in the case of instruments relating exclusively to Northern Ireland).
>
> Following debate in standing committee, a motion to approve an instrument subject to the affirmative procedure is put formally to the House and decided without debate.
> [-]
> Debate on any statutory instrument, whether subject to the affirmative or the negative procedure, is confined to the contents of the instrument, and discussion of alternative methods of achieving its object is not in order.[60] … Nor is criticism of the parent Act permitted.

7. Reactions to the proposal

When the Home Secretary made a statement on 15th October 2001 about the legislative steps necessary to counter the threat from international terrorism, he was questioned about the desirability of using secondary legislation for this purpose:

> **Oliver Letwin:**Turning to the proposed EU framework directives, does the Home Secretary share our view that there is a fundamental difference between the proposed directive on combating terrorism and the proposed directive on European arrest warrants? We all support the principle of the proposed directive on combating terrorism. That will force other EU counties to adopt legislation parallel to our Terrorism Act 2000. But does the right hon. Gentleman agree that we certainly should not let the current crisis drive us into abandoning either the principle of habeas corpus or the principle of a person being presumed innocent until proven guilty?
>
> Does the right hon. Gentleman accept that the proposed directive on European arrest warrants might threaten those principles? Does he acknowledge that many of us, in all parts of the House, will have very grave concerns about implementing those directives through affirmative orders? Does he agree that there should be urgent review by the Scrutiny Committee?
>
> Does the Home Secretary recognise the strength of the case for introducing sunset clauses to legislation in all these difficult areas, so that the House, and Parliament as a whole, can have the opportunity with the benefit of hindsight regularly to

[60] HC Deb (1950-51) 484, c 1537; ibid (1963-64) 691, c 174; ibid (1977-78) 940, c 30

reassess both the effectiveness of the legislation and its effect on individual freedom? [61]

David Blunkett: On the first matter, we have very clear treaties with main partner countries. There is no problem--indeed, there has been no problem--under section 11 of the Immigration and Asylum Act 1999 in relation to our European partners. There would be no problem on arrest warrants either, because to carry out an arrest is not to deny someone fair trial or to presume them guilty before trial has taken place; it is to respect mutual recognition of our judicial and policing systems throughout the European Union--something that goes back a long way, but which has taken a long time to recognise and to get through the system. [62]

Simon Hughes: The statement contained a surprising element: the implication that European legislation could get through both Houses of Parliament, without proper debate and scrutiny, simply on the basis of an affirmative order proposed by the Government. It is most important that the Home Secretary confirm that he did not mean that. It is not acceptable to any hon. Member, even ardent Europeans, because legislation should come through this place, not by a Minister putting a yes or no question to Parliament.[63]

Mr Blunkett: On the question of secondary legislation, I did not know that it had ever been Liberal Democrat policy that every single measure agreed at European level required primary legislation in the House. It certainly has not been since we joined the European Union and signed the treaty of Rome in 1972. Affirmative and negative orders as well as the European Scrutiny Committee have been used for such measures. I had thought that affirmative orders, which offer the opportunity for debate on the Floor of the House, provided a much more positive way to deal with such matters than do other measures.

I ask the hon. Gentleman to think again, because we shall grind our own legislative procedures to a standstill and make a nonsense of our partnership in Europe if we do not accept that secondary legislation is required. The matter involves the specific terms that I have laid down, not any old issue at any time, and it is important that we reaffirm that. [64]

The Law Society has commented:

The Government proposes to give the Secretary of State the power to implement Third Pillar decisions directly using secondary legislation. The Third Pillar of the European Union refers to decisions taken unanimously by the Justice and Home Affairs Council. The European Parliament does not have co-decision powers in

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[61] HC Deb 15 October 2001 Col 926
[62] HC Deb 15 October 2001 Col 927
[63] HC Deb 15 October 2001 Col 929
[64] HC Deb 15 October 2001 Col 930

> Third Pillar areas as it does in internal market issues in the First Pillar. Part 13 would effectively give the Government the power to introduce measures which effectively bypass parliamentary oversight, both here and in Brussels. As a matter of democratic principle, issues in the sensitive area of justice and home affairs need to be scrutinised by parliamentarians. The Law Society does not believe it is legitimate to legislate on matters of such importance through subordinate legislation.[65]

The civil rights organisation Liberty has also criticised the proposed creation of this power

> The proposal to allow European Union law on Home Affairs matters to be implemented by way of secondary legislation we believe is wrong in principle and usurps the key role of Parliament in protecting the rights of citizens. As a result of this measure laws which make substantial changes to our criminal law and criminal justice system will be introduced with very little opportunity for debate and no possibility of amendment.
>
> This measure is of constitutional significance and has no place in this Bill and should not be rushed through on the basis of the fear of terrorist attack.
>
> Extradition
>
> It is clear that one reason for this provision is to change the extradition process by statutory instrument. We have no objection to the aspiration of speeding up the extradition process or that of allowing closer EU co-operation in this area. However, to be taken from one's home and family to face detention and trial far away under foreign laws (usually in a foreign language) is a very serious matter. Parliament should ensure that adequate domestic judicial safeguards (for testing the basic evidence against an accused and the fairness of foreign legal regimes) remain[66].

8. Home Affairs Committee

In her evidence to the Home Affairs Committee on 14th November, Beverley Hughes, the Home Officer Minister explained the Government's intention:

> This is to enable the decisions that come out of the framework decision particularly to be implemented on a timescale that meets the current requirements. Otherwise, we would have to find a slot in primary legislation and the ability to do that is more restricted. Similarly, other EU measures already go through the affirmative resolution procedure and we think that procedure,

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65 Parliamentary Brief , November 2001

66 Briefing for the Second Reading, November 2001

> together with the earlier parliamentary scrutiny on the European Scrutiny Committee, will provide sufficient opportunity for Parliament to scrutinise adequately the proposals and we can get them on the statute book earlier. Where there is a legislative opportunity within a reasonable timescale, we will take it and we expect, for example, if there is a framework decision on the European arrest warrant as part of the terrorism road map that is being developed we probably can implement that within the Extradition Bill that we are going to bring forward. Where we can find a legislative slot within a reasonable timescale, we will do it, but this seems to us to be a necessary measure to make sure that all of the proposals coming through the JHA Council can be implemented within the timescale necessary to put the measures in place.[67]

David Cameron MP asked whether it was correct that

> We are taking emergency powers in this Bill to implement Third Pillar obligations that we do not yet know what we are going to do with.[68]

The Minister replied:

> There will be a number of framework decisions on combating terrorism, on setting up joint investigative teams and on freezing of assets. We need a mechanism in this country to bring those measures in. As I have just explained, our normal mechanism is primary legislation but we need a process which will enable us, as we are committed to working with our European partners in these matters, to bring them in in a timescale that reflects the urgency of the situation.

She confirmed that, in future, when things were agreed under the Third Pillar which had nothing to do with this current emergency, it would be possible for those to go through the House via affirmative resolution, but she did not accept the suggestion that it was a major constitutional change.

In its Report on the Bill, the Committee said:

> We view with concern the broad power to implement justice and home affairs measures under the third pillar of the Treaty of European Union – whether concerned with terrorism or not – by means of a secondary rather than primary legislation. This would enable a wide range of EU measures on police and judicial co-operation on criminal matters to be brought into effect in the UK. We believe that the power to do so in this Bill should be confined to EU measures contained in the proposed Framework Decision on combatting terrorism.[69]

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67 uncorrected evidence, para 248

68 ibid

69 The Anti-Terrorism, crime and Security Bill 2001

B. Dangerous substances

The next two clauses in Part XIII create new criminal offences concerned with the actual use of noxious substances, and hoaxes.

Clause 111 introduces a new offence which will be committed by a person who uses or threatens to use a biological, chemical, radioactive or other noxious substance to cause various kinds of serious harm in a manner designed to influence the government or to intimidate the public. Offences under this clause carry a sentence of up to 14 years and a fine.

Clause 112 introduces new offences concerned with hoaxing, for which the maximum penalty would be 7 years imprisonment. Subsection (1) makes it an offence to place, send or communicate false information about any substance or article intending to make others believe that it is likely to be or contain a noxious substance or thing which could endanger human life or health.

Subsection (2) makes it an offence for a person to communicate false information to another that a noxious substance or thing is or will be in a place and so likely to cause harm to endanger human life or health.

"Substance" is defined[70] to include:

> any biological agent and any other natural or artificial substance (whatever its form, origin or method of production)

but "noxious" is not defined.

1. Existing offences and reform proposals

a. Administering noxious things

It is an offence under section 23 of the *Offences Against the Person Act 1861* to administer a noxious thing to endanger life etc:

> 23 **Maliciously administering poison, etc, so as to endanger life or inflict grievous bodily harm**
>
> Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby

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[70] In clause 113(1)

> to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable . . . to [imprisonment] for any term not exceeding ten years . . .

The meaning of "noxious" has been judicially considered in the context of that offence. *Archbold*[71] gives the following summary:

> **- "noxious thing"**
> The jury has to consider the evidence of what was administered both in quality and qunatity and to decide as a question of fact and degree in all the circumstances whether that thing was noxious. A substance which may be harmelss in small quantities may yet be noxious in the quantity administered: R v Marcus, 73 Cr App R. 49, C.A. The court further held that "noxious" did not mean harmful in the sense of injury to bodily health. The meaning of the word is clearly very wide – see the Shorter Oxford Dictionary definition: "injurious, hurtful, harmful, unwholesome". In the opinion of the court, if a person were to put an unwholesome thing into an article of food or drink, with intent to annoy any person who might consume it, an offence would be committed. They gave the example of the snail in the ginger beer bottle.
>
> Heroin is a "noxious thing": the fact that it is administered to a person with a high degree of tolerance to whom it is unlikely to do particular harm is irrelevant. R v Cato, 62 Cr App R 41,CA.

b. Transmission of disease

The criminality or otherwise of deliberate or reckless transmission of disease, in the context of general criminal law, was one of the matters considered in the Home Office Consultation paper on *Violence: Reforming the Offences Against the Person Act 1861*[72]. The Government's then views are set out below:

> **Transmission of illness and disease**
>
> 3.13 In seeking to reform an archaic and outdated law, the Government has to consider what the present law includes, how the courts have interpreted it, and how any replacement law should replicate or alter the present law. That is the context in which the question of whether the intentional transmission of disease ought to fall within the criminal law is being considered. In LC218 the Law Commission were unequivocal that the Offences Against the Person Act 1861 could be used to prosecute the transmission of disease, and recommended that the proposed new offences should enable the intentional or reckless transmission of disease to be prosecuted in appropriate cases. The Government has not accepted this recommendation in full.

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71 *Criminal Pleading Evidence and Practice* 2001 edn para 19-230

72 Violence: Reforming the Offences Against the Person Act 1861: Home Office 1998

3.14 There are few decided cases on this point, so the position in the criminal law is not entirely clear. The most commonly cited case, that of Clarence (1888), seems to indicate that the 1861 Act could not be successfully used to prosecute the reckless transmission of disease. However it is now accepted that the judgement related to one specific offence and to the issue of consent, and that in principle it may well be possible to prosecute individuals for transmitting illness and disease at least when they do so intentionally. Although this has not been tested in the courts in recent years, in Ireland and Burstow the House of Lords held that the 1861 Act could be used to prosecute the infliction of psychiatric injury. In reforming the law, the issue of whether and if so how the transmission of disease should fall within the criminal law needs the most careful consideration.

3.15 The Government recognises that this is a very sensitive issue. The criminal law deals with behaviour that is wrong in intent and in deed. The Law Commission's original proposal, which included illness and disease in the definition of injury, would have resulted in the intentional or reckless transmission of disease being open to prosecution. They argued that the width of their proposal would be balanced by the fact that prosecution would only be appropriate in the most serious cases. The Government has considered their views very carefully, but is not persuaded that it would be right or appropriate to make the range of normal everyday activities during which illness could be transmitted, potentially criminal. We think it would be wrong to criminalise the reckless transmission of normally minor illnesses such as measles or mumps, even though they could have potentially serious consequences for those vulnerable to infection.

3.16 An issue of this importance has ramifications beyond the criminal law, into the wider considerations of social and public health policy. The Government is particularly concerned that the law should not seem to discriminate against those who are HIV positive, have AIDS or viral hepatitis or who carry any kind of disease. Nor do we want to discourage people from coming forward for diagnostic tests and treatment, in the interests of their own health and that of others, because of an unfounded fear of criminal prosecution.

3.17 The Government therefore considered whether it should exclude all transmission of disease from the criminal law, and concluded that that too would not be appropriate. The existing law extends into this area, even though it has not been used. There is a strong case for arguing that society should have criminal sanctions available for use to deal with evil acts. It is hard to argue that the law should not be able to deal with the person who gives a disease causing serious illness to others with intent to do them such harm. That is clearly a form of violence against the person. Such a gap in the law would be difficult to justify.

3.18 The Government therefore proposes that the criminal law should apply only to those whom it can be proved beyond reasonable doubt had deliberately transmitted a disease intending to cause a serious illness. This aims to strike a sensible balance between allowing very serious intentional acts to be punished whilst not rendering individuals liable for prosecution for unintentional or reckless acts, or for the transmission of minor disease. The Government believes

> that this is close to the effect of the present law, and that it is right in principle to continue to allow the law to be used in those rare grave cases where prosecution would be justified. This proposal will clarify the present law which, because it is largely untested is unclear; by doing so the effect of the law will be confined to the most serious and culpable behaviour.
>
> 3.19 It is important to emphasise that this proposal does not reflect a significant change in the law. Prosecutions for the transmission of disease are very rare for very good reasons. Any criminal charge has to be supported by evidence and proved to a court beyond reasonable doubt. It is very difficult to prove both the causal linkage of the transmission and also to prove that it was done intentionally. To do so beyond reasonable doubt is even more difficult. The Government does not expect that the proposed offence will be used very often, but considers that it is important that it should exist to provide a safeguard against the worst behaviour.
>
> 3.20 Clause 15 provides for the intentional transmission of serious injury or disease to be included for the purposes of clause 1 (intentional serious injury), but not for any other purpose. This means that only those who transmit diseases with intent to cause serious injury, will be criminally liable.

The consultation closed in May 1998. However, the 1861 Act has not been replaced. In a Lords written answer in January 2000, Lord Bassam indicated that legislation would be introduced:

> **Lord Windlesham** asked Her Majesty's Government: When they intend to introduce legislation to reform the Offences Against the Person Act 1861.
>
> **Lord Bassam of Brighton**: We hope to do so as soon as parliamentary time can be found. [73]

c. Hoaxes

The Explanatory Notes[74] say:

> Section 51 of the Criminal Law Act 1977 (as amended by the Criminal Justice Act 1991) makes it an offence for someone to place or send any article intending to make another person believe that it is likely to explode or ignite and thereby cause personal injury or damage to property. It is also an offence for someone to

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[73] 27 Jan 2000 : Column WA210

[74] *Bill 49-EN*: Home Office November 2001: Paras 299-230

> communicate any information which he knows or believes to be false intending to make another person believe that a bomb is likely to explode or ignite. Section 63 of the Act makes similar provision for Scotland. The Criminal Law (Amendment) Northern Ireland) Order 1977 created a similar offence in Northern Ireland.
>
> These offences relate only to hoax explosive devices. Other hoaxes, such as sending powders or liquids through the post and claiming that they are harmful, are not covered. This clause fills that gap.

Section 51 of the Criminal Law Act 1977 was introduced in response to the prevalence of bomb hoaxes, which had been diverting the full resources of the emergency services from genuine emergencies such as those where bombs had actually exploded.

It was included without opposition at a relatively late stage[75] of the Bill's progress. Introducing it, Mr Brynmor John, Minister of State at the Home Office, said:

> It is one of the saddest commentaries upon our times that bomb hoaxing is now practised on a large scale. Figures from the Metropolitan Police area for example indicate that on an average day 10 calls threatening explosions are received, and during any period of activity involving bombings that number increases to 100 calls. In the immediate aftermath, on the very day after the explosion at the Hilton Hotel, when one would have thought that every person's mind would have been directed towards helping in whatever way possible, if not directly at least by keeping out of the way of those who could, no fewer than 200 bomb hoax calls were received.
>
> No one in the Committee can cavil at the statement of the police that this causes
>
> > "an enormous wastage of police time and great inconvenience to the public."
>
> What is more important, it also delays vital services going where they are needed. For example, in the Hilton Hotel case, the diversion of some strength to check out false calls prevented more help going to the Hilton Hotel to deal with that immediate problem.
>
> There is, therefore, a need to strengthen and clarify the law on this subject. The defects which (sic) in the present law are in two main categories. The first is that there is no sanction against a man who makes up a parcel to look like a bomb and leaves it in a public place, intending it to create a scare but without making a report about it. Second, even where the hoax comes somewhere within the ambit of the criminal law it is often a very tricky point to consider where exactly it fits. Section 5(2) of the Criminal Law Act 1967 deals with false reports which lead to a waste of police time. Section 2(a) of the Criminal Damage Act 1971 deals with threats to destroy or damage property and section 78 of the Post Office Act 1969 deals with abuses of the telephone system. There is also the generalised charge of

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[75] The Bill was introduced in the House of Lords, and the clause was added at Commons Committee Stage.

> committing a public nuisance. It is difficult for those who prosecute to decide exactly where the offence falls and, therefore, I believe it to be right that we should seek to remove uncertainty.
>
> [-]
> I want to make clear that we are not undertaking a comprehensive view of the law on this subject, we are responding to a particular and rather urgent gap in the law which has been revealed.
> [-]
> I think we are right to recognise that this is a grave offence which is symptomatic of much of the sickness of modern society, where people want to cause social dislocation even in the most tragic or bizarre circumstances.

The maximum penalty, originally 5 years imprisonment, was increased to 7 years by the *Criminal Justice Act 1991*, s.26(4). That is the same as the maximum penalty for the new hoaxing offences.

During the evidence given to the Home Affairs Committee on 14th November 2001, it was queried whether the section 51 offence would cover a person making a phone call threatening to fly an aircraft into Canary Wharf. The Minister agreed to consider whether it would do so[76].

Clauses 111 –113 would come into force on the day on which the Act was passed[77]. Contrary to some expectations reported in the press[78], there is no provision for them to have retrospective effect. That modification to the original proposal was welcomed by the Home Affairs Select Committee, and also by Liberty which did, however, query whether a sentence of seven years, a sentence that ordinarily might be given for a very serious assault or a rape, was a proportionate sentence for a hoax.

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[76] Uncorrected evidence p.259

[77] Clause 123(2)(h)

[78] see House of Commons Library Research Paper 01/ 101, Anti-Terrorism, Crime and Security Bill: Introduction and Summary

C. Additions and amendments to the Terrorism Act 2000 and the Intelligence Services Act 1994

1. Terrorism Act 2000

a. Information about acts of terrorism

Clause 13 adds a new clause 38A to the *Terrorism Act 2000*. It makes it an offence for a person, without reasonable excuse, to fail to disclose information which he either knows or believes might help prevent another person carrying out an act of terrorism or might help the police in bringing a terrorist to justice in the UK. The clause is different in format from section 18 of the *Prevention of Terrorism (Temporary Provisions) Act 1989* (which applied to acts of terrorism in Northern Ireland and was repealed by the *Terrorism Act 2000*) but the main differences of substance are:

- that the new offence applies to any act of terrorism[79], with no geographical limitation, and
- that, under subsection (5), proceedings for an offence under clause 38A may be taken, and the offence may for the purposes of the proceedings "be treated as having been committed, in any place where the person to be charged is or has at any time been since he first knew or believed that the information might be of material assistance…"

The *Explanatory Notes* say that:

> This allows a person resident in the UK to be charged with the offence even if he was outside the United Kingdom at the time he became aware of the information[80].

Subsection (3) inserts "or 38A" after "..to 21" in section 39(3) of the *Terrorism Act 2000* (which creates offences including disclosure of information etc likely to prejudice an investigation resulting from disclosures made under section19,20 or 21).

The *Explanatory Notes* say:

> . The effect of this is to make it an offence for someone to disclose information to another person which would be likely to prejudice an investigation under section 38A or if he interferes with material that is likely to be relevant to an investigation under section 38A.

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[79] "terrorism" has the meaning given in the Terrorism Act 2000, which differs from the previous definition

[80] Bill 49-EN (Home Office etc) para. 311

b. Abolition of the previous, similar offence

Abolition of the section 18 offence had been recommended by Lord Lloyd in his *Inquiry into Legislation against Terrorism*:

> This offence .. is one of the more controversial in the Act. Lord Colville[81] and Lord Shackleton [82]recommended its repeal. Lord Jellicoe[83] examined the provision at some length and concluded that it should stay.
>
> The offence clearly targets the person who finds him or herself on the fringes of terrorist activity. Such a person might, perhaps, have rendered assistance to someone whom he later discovers to be engaged on a terrorist enterprise. Or he might be close to the person concerned and thus have discovered what he is about. A public spirited citizen would have little difficulty in resolving that his duty lay in informing the police of his suspicions. The purpose of the offence is to bring home to the person who puts personal considerations above the public safety that staying silent is not an acceptable option where terrorism is concerned.
>
> In his admirable and well-balance examination, Walker[84] could find little evidence that the offence has been of mush practical value in increasing the flow of information to the police, and he is concerned about the "chilling" effect on the reporting of terrorism by the media.
>
> It is undoubtedly true that the offence has been little used. In Great Britain only 28 people have been charged since the offence was introduced in the 1976 Act, of which 10 were convicted. The figures for Northern Ireland are rather higher.
>
> The provision is commonly criticised on two grounds. First, there is the point of principle that, while every citizen has a moral obligation to help the police, the state should be reluctant to transform this into a legal duty. The second argument is a practical one: that prosecutions under section 18 are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties.
>
> Lord Jellicoe was not persuaded by the first of these arguments. As to the second, he recommended that the police should be advised by circular to use the section 18 power with great discretion, only deploying it where they suspect that information is being withheld which could, if revealed, prevent acts of terrorism

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81 1987
82 1978
83 1983
84 see *Walker: The Prevention of Terrorism in English Law*: 2nd edn 1992, pp130-144

> or lead to the apprehension of terrorist offenders. That was done. The current Home Office Circular says:
> A relative of a terrorist who is not involved in terrorism himself, but who happens to pick up information of the type covered by section 18, should not be put under strain by being reminded in a routine manner of the provisions of the section. The use of the section can only be justified in extreme cases where the withholding of information might lead to death, serious injury or the escape of a terrorist offender.
>
> Where I differ from Lord Jellicoe is that I do not regard it as satisfactory to create a wider-ranging offence, and then circumscribe it by a Home Office Circular. Since the abolition of the common law offence of misprision of felony in 1967, it is no longer an offence simply to withhold information which would assist the police. The policy of the criminal law has set the other way. There are some limited statutory exceptions, such as section 2(2) of the Criminal Justice Act 1987. But to make an exception in the case of terrorism would be inconsistent with the first of the principles[85] which I have set out in Chapter 3. This was the view of the government when the offence was first proposed by a Private Member in 1974. It was also Lord Colville's view in 1987. I agree with those views. I do not think that the police would be seriously hampered by the absence of section 18 powers once peace is established in Northern Ireland.[86]

In the consultation paper *Legislation against Terrorism*[87] which preceded the abolition of the offence by the *Terrorism Act 2000*, the views of Lord Lloyd were summarised, and the paper went on:

> The Government has some sympathy with this view-point. Limited use is made of the existing offence. And the Government is not wholly persuaded that the existence of the offence increases the likelihood that someone in possession of information of the kind covered by the offence would pass it on to the police. However, it is mindful that the Irish Government decided to include such an offence in the emergency legislation it introduced in the wake of the Omagh bombing, and recognises the clear signal such a provision can give.

During the Home Affairs Committee evidence session on 14th November, the Home Office Minister was asked why, if the previous provision had been found not to be effective, it should be thought that such a provision would be effective now. A Home Office official responded that in the present circumstances, given the huge casualties, the matter needed to be considered again. The view was that there must have been people who knew what was going to happen on September 11th.

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85 "Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure"

86 Cm 3420 October 1996

87 CM 4178 December 1998, para 12.7

The Law Society has referred to concerns as to how the proposed defence of reasonable excuse will be interpreted, and asked whether an unfounded fear of recrimination or intimidation would be considered a reasonable excuse

c. Other amendments to the Terrorism Act

Schedule 7 of the *Terrorism Act 2000* already provides extensive powers for examining officers (a constable or immigration officer or customs officer) to stop, question, detain and search people at ports, border areas, aircraft and ships in connection with travel between Great Britain and Northern Ireland.

Clause 116 extends those powers to internal flights and to arrivals at any place in Great Britain or Northern Ireland from any place whether from within or outside Great Britain or Northern Ireland. It similarly extends existing powers to search and detain goods.

The civil rights organisation, Liberty, has commented that the powers are exercisable at random and without any requirement of reasonable cause, and that their exercise has caused acute problems in the past.

> These examinations can last anywhere between a few minutes to 9 hours. In 1986, when statistics were still made available by the Home Office relating to these examinations, 59,481 people were examined in that one year alone. Of that number only 147 were detained, which would suggest that the exercise has more to do with information gathering than the apprehension of terrorists[88].

Schedule 7 to the *Terrorism Act 2000* also provides that if an examining officer makes a written request to the owners or agents of a ship or aircraft for information about passengers, crew or vehicles belonging to the passengers or crew the owners or agents must comply with the request as soon as is reasonably practicable. The provision currently applies only to the Common Travel Area (journeys between Great Britain, Northern Ireland, the Republic of Ireland and the Islands). Clause 117 extends the provision to ships or aircraft arriving (or expected to arrive) in any place in the United Kingdom whether from another place in the United Kingdom or from a place outside the United Kingdom, and to ships or aircraft leaving or expected to leave the United Kingdom. It also extends the power so that it extends to information which relates to "goods" as well as to passengers, crew and their vehicles.

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[88] Briefing for Second Reading

Liberty has expressed the hope that measures could be introduced to ensure that information about people's movements could be destroyed as soon as it is no longer necessary.

It is already an offence under section 54 of the *Terrorism Act 2000* to provide, receive or invite another person to receive instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons. A person guilty of an offence under this section may be imprisoned of up to ten years, receive a fine or both. It is a defence for the person to be able to show their involvement was wholly for a purpose other than terrorism.

Clause 118 (1) adds a new paragraph to sections 54 (1) and (2) of the *Terrorism Act 2000* to cover training relating to radioactive material and weapons designed or adapted for the discharge of radioactive material. Clause 118(2) provides a definition of a "radioactive material" as radioactive material capable of endangering life or causing harm to health, and a new definition of "biological weapon" to include any biological agent or toxin which is in a form that can be used for hostile purposes.

2. Amendments of the Intelligence Services Act 1994

The *Intelligence Services Act 1994* places on a statutory basis the activities of both the Secret Intelligence Service[89] and Government Communications Headquarters (GCHQ). It also established the Intelligence and Security Committee, comprising senior parliamentarians appointed by the Prime Minister. Countering domestic threats to security, be they from terrorism or other serious crime, is the provenance of the Security Service;[90] this is governed by the provisions of the Security Service Acts 1989 and 1996. All three intelligence and security agencies[91] are also subject to the *Regulation of Investigatory Powers Act 2000*, which provides for oversight by the Intelligence Services Commissioner (Lord Justice Simon Brown).[92]

Clause 114 of the present Bill recognises the blurring demarcation between overseas and internal threats to national security. It does so by extending the powers of GCHQ, and SIS, to act in the UK in relation to apparatus believed to be outside the British Islands. The term apparatus means any equipment, machinery or device, or any wire or cable.

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89 also known as MI6

90 MI5

91 For further background see Library Standard Note, *Intelligence and Security Agencies*, 16 November 2001

92 *Report of the Intelligence Services Commissioner for 2000*, Cm 5297, October 2001

This measure would extend the authorisation mechanisms in section 7 of the *Intelligence Services Act 1994* to include interception of communications between terrorists in the UK and their accomplices overseas.