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The Terrorism Bill 2005-06

Bill 55 of 2005-06

The *Terrorism Bill 2005-06*, which was introduced in the House of Commons on 12th October 2005 and is due for debate on second reading on 26 October, is designed to amend and extend previous counter-terrorist legislation. It seeks to create a number of new offences, including an offence of encouragement of terrorism; extend the maximum period during which a person suspected of being a terrorist can be detained by judicial authority; and make a number of other amendments to the *Terrorism Act 2000* and other legislation.

The Bill follows the controversial *Prevention of Terrorism Act 2005* and the London bombings of July 2005.

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Summary of main points

The *Terrorism Bill 2005-06*, which was introduced in the House of Commons on 12 October 2005, seeks to amend and extend previous anti-terrorist legislation and create a number of new measures, including some new offences connected with terrorism. Some of the changes are needed to enable the UK to implement international Conventions concerning terrorism to which it is a party. A number of additional measures have been introduced following the bombings in London on July 7th and July 21st 2005, after which concerns were expressed by the police and others about whether current legislation was adequate to deal with the threat facing the UK.

Additional changes to anti-terrorist legislation were being considered by the Government following the debate on "control orders" and other related matters during the passage of the legislation that became the *Prevention of Terrorism Act 2005,* but these have now been "decoupled" from the Bill and the Government is proposing to consider them separately in the spring of 2006.

Existing anti-terrorist legislation includes the *Terrorism Act 2000*, the *Anti-Terrorism, Crime and Security Act 2001* and the *Prevention of Terrorism Act 2005*.

Before the introduction of the *Terrorism Bill* the Home Secretary, Charles Clarke, made a number of statements about the need for further legislation, both in the immediate aftermath of the London bombings and in correspondence with the Opposition home affairs spokesmen during the summer recess. The Prime Minister also made statements about the need for additional measures. The Home Secretary was hoping to achieve a degree of cross-party support for his proposals but he has not been able to do so, as his proposals have created considerable controversy. This has been particularly true of proposed new offences involving encouraging or "glorifying" terrorism and of the proposal to increase from 14 days to 3 months the maximum period during which terrorist suspects may be detained without charge on judicial authority.

The Bill itself creates new offences, such as the re-drafted offence of encouragement of terrorism, revised arrangements for proscribing organisations, and other amendments. Controversially, it also seeks to increase the maximum period of detention without charge for terrorist suspects to here months, subject to judicial consideration at seven-day intervals. Detention without charge is currently governed by the ordinary criminal law and, in cases involving individuals suspected of involvement in terrorism, by anti-terrorist legislation, such as the *Terrorism Act 2000*. The maximum period of detention without charge was last increased, from 7 days to 14 days, by an amendment to the *Terrorism Act 2000* inserted by the *Criminal Justice Act 2003,* which came into force on 20th January 2004.

Amongst other analysis and opinion is a detailed commentary on the Bill's provisions from Lord Carlile of Berriew Q.C., the independent reviewer of the *Terrorism Act 2000* and other anti-terrorist legislation. The House of Commons Home Affairs Select Committee took evidence on the Bill from the Home Secretary and others on 11 October 2005.

The Bill extends to the whole of the United Kingdom. Special powers and provisions for dealing with terrorism are reserved matters under the *Scotland Act 1998*.

CONTENTS

I Existing anti-terrorist legislation

A. The *Terrorism Act 2000*

This Act, which came into force on 19 February 2001, replaced previous, "temporary", anti-terrorist legislation, much of which applied only to Northern Ireland. The Act consolidated and amended provisions that had been in earlier anti-terrorist legislation and also introduced a number of new measures. The Library Research Paper on the Bill that became the 2000 Act is available on the intranet and the internet.[1]

Prior to the enactment of the 2000 Act the definition of "terrorism" used for the purpose of the exercise of the various powers provided under anti-terrorist legislation was that set out in section 20 of the *Prevention of Terrorism Act 1989* and section 58 of the *Northern Ireland (Emergency Provisions) Act 1996* as follows:

> "terrorism" means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.

The powers set out in the 1989 Act were available only in respect of acts of terrorism connected with the affairs of Northern Ireland, or international terrorism. They were not generally available in respect of acts of "domestic" terrorism, that is, acts of terrorism connected solely with the affairs of the United Kingdom or any part of the United Kingdom other than Northern Ireland. The powers available under the 1996 Act were not limited in terms of the type of terrorism to which they applied, but in practice they were used only to combat terrorism connected with the affairs of Northern Ireland.

The *Terrorism Act 2000* introduced a broader definition of terrorism, which allowed the powers under the Act to be used in respect of acts of "domestic" terrorism. The definition, which is set out in section 1 of the Act, was also extended to cover a wider range of actions or threats of action, including those "made for the purpose of advancing a political, religious or ideological cause".[2]

The Act includes the following measures:

- Power to proscribe organisations involved in international or domestic terrorism.
- Enhanced powers to seize terrorist property and disrupt terrorist financial activity.
- Specific police powers and provisions related to terrorist investigations (eg stop and search, arrest, port and border controls).
- Incorporation of *Northern Ireland (Emergency Powers) Acts* provisions – renewable annually. Additional temporary Northern Ireland-only measures.
- Creation of several offences specific to terrorism (eg fund-raising, offences related to proscribed groups, directing terrorism and training offences).

There is a requirement in the Act for its provisions to be reviewed annually and for a report on its operation to be provided to Parliament. The review is carried out by an

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[1] Library Research Paper 99/101 *The Terrorism Bill [Bill 10 of 1999/2000]* at http://www.parliament.uk/commons/lib/research/rp99/rp99-101.pdf

[2] *Terrorism Act 2000* s.1(1)(c)

independent reviewer, currently Lord Carlile of Berriew QC. His reports are available on the internet.[3]

B. The *Anti-Terrorism, Crime and Security Act 2001* [ATCSA]

The 2001 Act is a much longer and more wide-ranging Act than the *Terrorism Act 2000*. It was passed in response to and within a few months of the attack which destroyed the twin towers of the World Trade Centre on 11 September 2001. It contained numerous new powers and created many new offences. The most contentious of the new powers were in Part 4, which allowed for the detention – potentially indefinitely and without charge – of foreign nationals who were suspected of links with terrorism but who could not be prosecuted or safely deported. That involved derogation from Article 5 (right to liberty and security) of the *European Convention on Human Rights*. Most of Part 4 has now been repealed.

The Act is in 14 parts. The first three deal with forfeiture of terrorist property and seizure of terrorist funds. They replace and add to measures in the 2000 Act. Part 3 deals with the freezing of foreign property held by UK institutions. Parts 6-7 govern dangerous substances, including weapons of mass destruction (Part 6) and pathogens and toxins (part 7). Parts 8-10 deal with acute vulnerabilities, such as nuclear and aviation facilities, and Parts 10-11 relating to the specialist police forces assigned to their protection and other policing measures and surveillance powers.

The 2001 Act also contentiously reintroduced the offence of failing to disclose information about acts of terrorism, which had existed under the *Prevention of Terrorism Act 1989* but had not been included in the *Terrorism Act 2000* because its abolition had been recommended. Part 10 introduced a number of new police powers, which appear to have been used principally outside the context of counter-terrorism.

As with the *Terrorism Act 2000*, the operation of the *Anti-Terrorism, Crime and Security Act 2001* is reviewed by an independent reviewer, Lord Carlile of Berriew. His reports are available on the internet.[4]

A more detailed summary of the 14 parts of the 2001 Act can be found in the Home Office's Explanatory Memorandum to the Act.[5]

C. The *Prevention of Terrorism Act 2005*

This Act was passed quickly earlier this year following a successful challenge to the human rights compatibility of the detention provisions in Part 4 of the *Anti-terrorism, Crime and Security Act 2001*. It is aimed at preventing terrorism-related activity, irrespective of nationality or terrorist cause, through use of two kinds of control orders: "derogating" and "non-derogating". These terms refer to the Government's view of the compatibility of the orders with Article 5 of the European Convention on Human Rights

[3] http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/
[4] http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/
[5] http://www.opsi.gov.uk/acts/en2001/2001en24.htm

(ECHR).[6] The Home Office Explanatory Memorandum summarises the provisions concerning control orders as follows:

> 9. Sections 1 - 9 relate to the circumstances in which control orders may be made, their duration and the obligations (including penalties) attached to them.
>
> 10. This part of the Act describes the tests which the Secretary of State or court must apply in determining whether a control order may be made against an individual, and the obligations which may be imposed by the order. The Act provides an illustrative list of the obligations to which an individual may be subject and specifies penalties for failing, without reasonable excuse, to observe any obligations so imposed and for intentionally obstructing a person delivering a notice setting out the terms of the order.
>
> 11. The Act provides that the Secretary of State must obtain permission from the court before making a non-derogating control order. However, if a non-derogating control order has to be imposed urgently, the Secretary of State can make the order straight away but must refer it to the court immediately for the court to consider whether to confirm it. When considering whether to grant permission for a non-derogating control order to be made, and when considering whether to confirm a non-derogating control order that was made urgently, the court may hold an ex parte hearing and must consider whether the Secretary of State's decision in each case was obviously flawed. If it finds that it was, the order cannot be made or must be quashed; if it finds that it was not, the court must refer the control order to a full inter partes hearing which will apply a judicial review test to the control order in order to decide if it, and the obligations it imposes, should continue in force.
>
> 12. At a full hearing of a non-derogating order, the Court must consider whether any of the following decisions of the Secretary of State were flawed:
>
> - his decision that there are reasonable grounds for suspecting that the person was involved in terrorism-related activity;
> - his decision that a control order is necessary for purposes connected with protecting members of the public from the risk of terrorism; and
> - his decisions on the imposition of each of the obligations imposed by the order.
>
> 13. The Act provides that the Secretary of State will apply to the court to make a derogating control order. At a preliminary hearing (which may be ex parte), the court will decide if there is a prima facie case for the

[6] Article 5 of the European Convention on Human Rights is set out in an Appendix to this paper.

order to be imposed. If it finds that there is not, it will not make the order; if it finds that there is, it will make the order and give directions for a full inter partes hearing to be held.

14. The court will confirm a derogating control order at a full hearing if:

- it is satisfied, on the balance of probabilities, that the controlled person is or has been involved in terrorism-related activity;
- it considers that the obligations imposed as part of the control order are necessary for purposes connected with protecting members of the public from a risk of terrorism;
- it appears to the court that the risk arises out of or is associated with a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the ECHR; and

the obligations imposed by the control order are in a list of derogating obligations set out in the designation order.

15. In full hearings on control orders, the court can quash the control order, modify the obligations which it imposes or, in the case of non-derogating control orders, give directions to the Secretary of State to revoke or modify the control order.

16. The Secretary of State or court (in the case of non-derogating and derogating control orders respectively) may revoke or modify an order at any time.

17. The Act lists the offences associated with breaching an order or obstructing those exercising statutory powers in relation to an order and the relevant penalties.

The 2005 Act enables a person who is subject to a non-derogating control order to appeal to the court against the following decisions of the Secretary of State:

- his decision to renew the control order;
- his decision to modify the control order;
- his decision not to revoke or modify the control order on an application from the controlled person.[7]

Provision is also made in the 2005 Act for general oversight of its operation, including annual review of the provisions by an independent reviewer (currently Lord Carlile of Berriew QC, who also carries out the annual review of the *Terrorism Act 2000*), and quarterly reporting to Parliament by the Secretary of State on the exercise of his control order powers.

[7] *Prevention of Terrorism Act 2005* s.10-12

D. Other legislation

Other legislation dealing with terrorism includes the *Explosive Substances Act 1883*, the *Aviation and Maritime Security Act 1990* and the *Northern Ireland (Sentences) Act 1998*.

II The *Terrorism Bill 2005-06*: Background

The provisions concerning control orders in the Bill that became the *Prevention of Terrorism Act 2005* were highly controversial. In securing the Bill's passage through Parliament before the dissolution of Parliament in advance of the General Election the Government gave undertakings that it would provide an opportunity for the issue of control orders to be considered by Parliament again at a later stage.

Following the Tube and bus bombings in London on 7th July the Home Secretary, Charles Clarke, arranged to meet the Conservative and Liberal Democrat home affairs spokesmen David Davis and Mark Oaten to discuss a forthcoming counter-terrorism Bill. In advance of his meeting he wrote to them outlining his views and placed copies of the letter in the Libraries of both Houses.[8] The letter emphasised the Government's view that the new Bill should create new offences:

> Our aim is to ensure that the police and intelligence agencies have all the powers which they require to enable them to deal effectively with terrorism. Our priority is always to prosecute if at all possible, For this reason, and as we made clear in Parliament before the General Election, we are proposing that the Counter-terrorism Bill should create new criminal offences.
>
> The first of these concerns acts preparatory to terrorism. This has been widely discussed. As you know, in suspected terrorist cases the police and intelligence agencies seek to intervene early to protect the public. This may mean that the precise details of the planned terrorist act are not known - indeed, the terrorists themselves may not have decided exactly how they will act. However, there may be clear evidence of an intention to commit a serious terrorist act. For example, instructions on how to build a bomb, evidence of intention to acquire chemicals and evidence that terrorist related websites have been accessed. It may be clear that there is very serious criminal intent. The proposed new offence is designed to address this.
>
> The second proposed new offence relates to indirect incitement to commit terrorist acts. Direct incitement to commit a violent or criminal act is already an offence in our law. We now want also to cover indirect incitement to terrorism. We intend that the new offence should capture the expression of sentiments which do not amount to direct incitement to perpetrate acts of violence, but which are uttered with the intent that they should encourage others to commit, or attempt to commit, terrorist acts.

[8] The letter is also available on the Home Office website at http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/223513

This will enable the UK to ratify the Council of Europe Convention on the Prevention of Terrorism. The convention requires parties to the Convention to have an offence of `public provocation to commit a terrorist offence'. Article 5 of the Convention defines "public provocation" as "making a message available to the public with the intent to incite the commission of a terrorist offence ... whether or not directly advocating terrorist offences".

The third new offence is concerned with providing or receiving training in the use of hazardous substances and in other methods or techniques for terrorist purposes. This covers training provided or received in the UK and abroad. Again, our aim is to enable the authorities to prosecute those who are clearly intent on terrorist acts before they actually perpetrate them.

This new offence is also in line with the Council of Europe Convention which requires parties to the Convention to create an offence of providing training `in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose' (Article 7). Section 54 of the Terrorism Act 2000 (TACT) covers most of the requirements of this provision, apart from those relating to hazardous substances and methods or techniques. It is therefore proposed that a new offence should be created to address this gap.

The definitions of hazardous substances will be based on other international conventions. It is proposed to establish a broad offence that incorporates training in any methods or techniques, but is limited by the provisos that the training has, first, to have a potential terrorist use and, secondly, be given or received with the intention that it should be used for terrorist purposes.

Although the Convention only refers to providing training, it is proposed that the new offence should also capture receiving training in the making or use of hazardous substances or in specific methods or techniques. This would bring the new offence in fine with the offences in Section 54 of TACT.

We also want to use the Bill to make a number of other legislative changes to close loopholes and improve operational efficiency. These are as follows.

- Introducing "all premises" warrants in terrorist legislation. This will enable the police to obtain search warrants covering any property owned or controlled by terrorist suspects.

- Giving the Security Service the ability to seek warrants authorising activities overseas. Currently the Service's powers are limited and it has to rely on the Secret Intelligence Service (SIS) acting on its behalf.

- Allowing a one day period of grace on warrants under Section 7 of the Intelligence Services Act 1994 if a person enters the United Kingdom. This will ensure that we do not lose coverage if a target comes to the United Kingdom.

- Allowing initial cash seizure hearings to take place in closed session. This would allow hearings concerned with seizure of terrorist cash to be heard in closed court session, as recommended by the Newton Committee in their report on the workings of the Anti-Terrorism, Crime and Security Act 2001.

- Ratification of the UN Convention on the Suppression of Nuclear Terrorism. Various minor technical changes are required to enable us to ratify this Convention.

- Amendments to the Explosive Substances Act 1883. These amendments would cover the loophole that it is not an offence to plan an explosion which will take place overseas.

- Extending terrorism stop and search powers to cover bays and estuaries.

- Increased flexibility of the proscription regime. We want to prevent organisations evading the proscription regime by changing their name.

- Improved search powers, at ports. We want to make it expressly clear that examining officers at ports have powers to search vehicles as part of their examining officer functions.

In addition, we intend to include an amendment which will ensure that there is a peg in the Bill to enable Parliament to consider again the issue of control orders, as I committed to Parliament during the passage of the Prevention of Terrorism Act 2005.

The Home Secretary went on to make a statement in the House of Commons on 20 July, updating the Government's response to the bombings on 7 July and outlining the proposed new offences again. He added that the Government was discussing with the police and the intelligence agencies whether there might be further powers that they needed in the light of the events of 7 July and the subsequent investigation.[9]

The Home Secretary said the Government would be "decoupling" the proposed new legislation from further consideration of control orders, to which the Government had committed itself during the passage of the *Prevention of Terrorism Act 2005.* He added that the Government would bring forward the legislation as soon as practicable when the House returned from the summer recess and that the Government would return to the issue of control orders in the spring after it had received a report on the 2005 Act from the independent reviewer, Lord Carlile.[10]

At a press conference on 5 August the Prime Minister outlined a series of further measures the Government intended to take in response to the threat from terrorism.[11] These included:

- Creating an offence of glorifying terrorism, in the UK or abroad.

- Examining calls for police to be able to hold terror suspects for longer prior to charging.

[9] HC Deb 20 July 2005 c1253-1254
[10] *ibid.* c1254-1255
[11] His comments are available on the internet at http://www.number10.gov.uk/output/Page8041.asp

- Proscribing the group Hizb ut Tahrir and the successor organisation of Al-Muhajiroun - and look at whether the grounds for proscription need to be widened.

- Consulting on creating new powers to close places of worship used to foment extremism.

On 15 September the Home Secretary wrote another letter to the Opposition home affairs spokesmen Rt Hon David Davis MP and Mark Oaten MP, providing more information about the likely contents of the Government's proposed legislation, including draft clauses. The text of the letter, a number of other documents sent with it (including written evidence submitted to the Home Affairs Committee), arguments for increasing the maximum period for which a person can be detained without charge, and the draft clauses, are available on the Home Office website.[12] In his letter the Home Secretary said:

> We have looked at creating additional new offences. Sitting alongside the new offence of indirectly inciting terrorism (draft clause l), we plan to create a power to ensure that those who glorify terrorist acts may be prosecuted. The celebration of despicable terrorist acts over the past weeks has only served to inflame already sensitive community relations in the UK. We are of course, conscious that such an offence needs to be carefully drawn and needs to balance the proper exercise of freedom of speech, even where views that are aired are deeply objectionable, with our duty to address radicalisation and the celebration of acts which are simply unacceptable. Draft clause 2 addresses this issue.
>
> In line with this change we are also proposing a corresponding change to the grounds for proscription, so it will become possible to proscribe organisations which glorify terrorism. The current regime concentrates on those groups that I believe are involved in or concerned in terrorism. However, there are a range of groups which whilst not involved in committing acts of terrorism, may provide succour and support to it, thus furthering radicalisation. Whilst we do not intend to penalise organisations where a stray member may on occasion glorify a terrorist act (though we would of course look to see if it were possible to prosecute that individual), we do want to demonstrate that it is not acceptable for organisations in this country systematically to foster that sort of climate. Draft clause 18 is designed for this purpose.
>
> We propose to create an offence to tackle dissemination of radical written material by extremist bookshops. The offence will be one of publishing and possessing for sale of publications that indirect incite terrorist acts or are likely to be useful to a person committing or preparing an act of terrorism. We wish to make it clear that it shall be illegal to disseminate both material that may incite terrorism, and material that may be of use to terrorists, such as training guides. We are deeply concerned that there are people disseminating different sorts of material that is clearly designed to encourage others to terrorist acts or which is expressly providing guidance on terrorist techniques. That sort of activity is not

[12] http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237936

> acceptable and that is why we are taking action. Draft clause 3 is for this purpose.
>
> As you know, attendance at terrorist training camps can often be a precursor to significant terrorist acts and to further radicalisation. We have therefore created an offence of attending a terrorist training camp. By virtue of this new offence people attending a place anywhere in the world at which they receive training or instruction, the purpose of which is the commission, preparation or instigation of acts of terrorism, will be liable to prosecution. Draft clause 6 covers this.
>
> We are also intending to amend section 128 of Serious Organised Crime and Police Act 2005 (SOCAP) to extend the offence of criminal trespass to cover licensed civil nuclear sites. These are clearly sites where the consequence of a terrorist attack would be very serious and we need to ensure that they have the maximum possible protection. Draft clause 10 deals with this issue.
>
> We will be extending disclosure notice powers conferred on prosecutors under Chapter I of Part 2 of SOCAP to investigations into the commission, preparation or instigation of acts of terrorism. We want to ensure that if people hold information that is relevant to a terrorist investigation there is every incentive for them to divulge it.

The proposed offence of "glorification of terrorism", which would have been punishable by up to five years' imprisonment and a fine, would have been committed by a person who published a statement or caused another to publish a statement on his behalf if:

- The statement glorified, exalted or celebrated the commission, preparation or instigation (whether in the past, in the future or generally) of acts of terrorism; and

- The circumstances and manner of the statement's publication (taken together with its contents) were such that it would be reasonable for members of the public to whom it was published to assume that the statement expressed the views of that person or had his endorsement.

The offence of glorifying terrorism would have applied only in respect of anything occurring within 20 years of the publication of the statement to which the offence related, unless the Secretary of State had made an order specifying conduct or events which occurred outside this period.

In his letter of 15 September the Home Secretary also noted that the draft Bill would give effect to the suggestion by the Association of Chief Police Officers (ACPO) that the maximum period of detention of terrorist suspects prior to charge be extended from 14 days to three months. His letter included an annex setting out arguments put forward by the police and the Crown Prosecution Service (CPS) in support of this change.[13] He said:[14]

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[13] http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237936

[14] *ibid.*

> I should stress that this addresses a maximum time period which we would expect to be reached only in very rare cases. Continued detention would need to be approved by a District Judge on a weekly basis and would only be permitted if the District Judge was satisfied that the further detention was justified and that investigation was being taken forward as efficiently as possible.

The proposals for a new offence of glorification of terrorism and for the extension of the maximum period for detention without charge, provoked considerable controversy. In a subsequent letter to Rt Hon David Davis MP and Mark Oaten MP on 6 October 2005 the Home Secretary said the Government had looked at what could be done to ameliorate some of the concern that had been expressed about the proposed glorification offence and had decided to move glorification into Clause 1 of the Bill (the proposed new offence of encouragement/inducement of terrorism) and remove what had been Clause 2. A new draft Clause 1 of the Bill incorporating these changes was attached to the Home Secretary's letter.[15] The Home Secretary made the following comments about the change:

> The effect of this is to make it an offence to make a statement glorifying terrorism if the person making it believes, or has reasonable grounds for believing, that it is likely to be understood by its audience as an inducement to terrorism. Questions about which terrorist offences are covered by the glorification offence, and from how long ago, also disappear because the tes of what constitutes a glorification offence is based on the person making the statement's belief as to its effect on the audience. I hope you will agree that this is a more satisfactory formulation.

In his letter of 6 October the Home Secretary also made the following comments about the proposals to extend the maximum period of detention without charge for terrorist suspects from 14 days to 3 months:

> Turning to the issue of the maximum pre-charge detention period, I remain convinced, for the reasons set out in my previous letter, that we need to increase the limit to three months. I would expect that limit to be erached only in the very rarest of cases but nonetheless I belive that there will in the future be such cases where the various factors which I outlined previously will mean that such a detention period is warranted. The judicial oversight which will exist will mean that detention will only be possible if it is necessary and if the investigation is being carried out as expeditiously as possible.
>
> To inform the debate I enclose some statistics which we recently sent to the Home Affairs Committee.[16] They show, I think, that the police do make sparing use of their existing detention powers and I would expect them to do likewise with the amended powers. I also attach a paper which has been prepared by the Metropolitan police which affirms the case for, and their support for, the proposed extension.[17]

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[15] The letter and the draft Clause are available on the Home Office website at http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237979?view=Binary

[16] The statistics are appended to the Home Secretary's letter at http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237979?view=Binary

[17] The Metropolitan Police paper, which is a large file, is at http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/met-letter?view=Binary

At his monthly Downing St. press conference on 11 October 2005 the Prime Minister made the following comments about the proposal to extend the maximum period of detention before charge: [18]

> These anti-terrorist measures are necessary, not in the view of myself or people in government simply, but in the view of the Police who are charged with protecting our country against terrorist activity. This terrorist activity is of a wholly different order from anything we have faced before in this country. We saw in July that these people were prepared to kill over 50 innocent people, but if it could have been 500, and it might have been by what they did, then they would have rejoiced in that. We need to make sure therefore that we give ourselves every possible opportunity to prevent such terrorist acts occurring. The Police have set out why they need these powers. I think it would be irresponsible of me if I think that the fears of the Police are well grounded about the existing law and the problems with it, I think it would be irresponsible of me not to take this forward, and that is why I am doing it. I am not doing it because I am authoritarian or don't care about the civil liberties of this country. I care deeply about the civil liberties of this country, but I care about one basic civil liberty which is the right to life of our citizens and freedom from terrorism and I think if these measures are necessary we should take them.

The Home Affairs Committee held an evidence session on the draft Bill on 11 October. In his evidence to the Committee the Home Secretary said that the three month limit was not a "God-given amount" and that he was prepared to be flexible about it.[19] The Joint Committee on Human Rights will be taking evidence from the police on detention without charge on Monday, 24 October.

III The *Terrorism Bill 2005-06*

A. New offences and court procedures

Part 1 of the Bill is designed to create a number of offences concerning the encouragement and inducement of acts of terrorism and "Convention offences", preparation of terrorist acts and terrorist training; and offences involving radioactive devices and materials and nuclear facilities and sites. The proposal for a separate offence of "glorifying terrorism has been dropped and elements of that offence have been written into the offence of encouragement and inducement of acts of terrorism.

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[18] The full text of the press conference is available at http://www.number10.gov.uk/output/Page8294.asp

[19] An uncorrected transcript of he evidence session is available at http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/uc515-i/uc51502.htm

For the purposes of the offences in this Part of the Bill, "act of terrorism" includes anything constituting an action taken for the purposes of terrorism, within the meaning of the *Terrorism Act 2000*[20]. "Convention offence" means an offence listed under Schedule 1 of the Bill or an equivalent offence under the law of a country or a territory outside the UK.[21] The offences listed in Schedule 1 of the Bill are mainly derived from legislation that enabled the UK to comply with international Conventions against particular forms of terrorist activity, such as hijacking, offences involving nuclear material, chemical or biological weapons, and so on. The Secretary of State will be able to modify the list of offences in Schedule 1 of the Bill by making orders adding or removing particular offences. Any such order will have to be laid before Parliament in draft and approved under the affirmative procedure.[22]

1. Encouragement and glorification of terrorism; and disseminating terrorist publications

Clause 1 of the *Terrorism Bill* seeks to make it an offence, punishable by up to seven years' imprisonment and a fine, for a person to publish a statement or cause another to publish a statement on his behalf if at the time he does so he:

> knows or believes, or has reasonable grounds for believing, that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences.[23]

Clause 1(2) provides that such statements will include every statement which:

- Glorifies the commission or preparation (whether in he past, in the future or generally) of such acts or offences; and
- Is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances.

These are the provisions through which the Government has sought to incorporate what was originally envisaged as a separate offence of "glorifying terrorism".[24]

Clause 1(3) provides that both the contents and the circumstances of publishing a statement will be relevant. The encouragement need not relate to a particular act of terrorism. It will also be irrelevant, whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate such an act or offence.

It will be a defence for a person charged with an offence under Clause 1 to show:

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[20] Clause 20(2)
[21] *ibid*.
[22] Clause 20(9)-(11)
[23] Clause 1(1)(b)
[24] see p. 15 above

- That he published the statement, or caused it to be published, only in the course of providing a service electronically;
- That the statement neither expressed his views nor had his endorsement; and
- That it was clear, in all the circumstances, that it did not express his views and (apart from where he had been given and failed to comply with a notice under Clause 3(3)) did not have his endorsement

For the purposes of the offence in Clause 1, references to a "statement" and "publishing" are defined as follows:

> a) references to a statement are references to a communication of any description, including a communication without words consisting of sounds or images or both;
> b) references to publishing a statement are references to publishing it in any manner to the public and to making available a facility the only or main purpose of which is to give the public access to the statement.[25]

References to the public are references to the public of any part of the UK or a country or territory outside the UK, or any section of the public.[26] References to the public in Clauses 1 and 2 include references to a meeting or other group of persons which is open to the public, whether unconditionally or on the making of a payment or the satisfaction of other conditions.[27]

The Bill's *Explanatory Notes* say of the offence in Clause 1 that:[28]

> The offence has been introduced to implement the requirements of Article 5 of the Council of Europe Convention for the Prevention of Terrorism ("the Convention"). This requires State parties to have an offence of 'public provocation to commit a terrorist offence'. This new offence supplements the existing common law offence of incitement to commit an offence.

Some commentators who have criticised the proposal for a new offence of the type set out in Clause 1 have suggested that the conduct with which it seeks to deal could equally be covered by other existing offences, such as incitement to commit an existing terrorist offence.[29] In his report on *Proposals by Her Majesty's Government for Changes to the Laws Against Terrorism*, published earlier this month, the independent reviewer of the *Terrorism Act 2000* and other related legislation, Lord Carlile of Berriew Q.C., made the following comments about Clause 1:

> In my view this proposal in its revised form is a proportionate response to the real and present danger of young radically minded people being persuaded towards terrorism by apparently authoritative tracts wrapped in a religious or quasi-

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[25] Clause 16(4)
[26] Clause 16 (2)-(3)
[27] Clause 16(3)(b)
[28] *Explanatory Notes* para.20 at http://pubs1.tso.parliament.uk/pa/cm200506/cmbills/055/en/06055x--.htm
[29] see e.g. solicitor Stephen Grosz in "British police powers toughest in Europe - Responses" – *Guardian* 13.10.2005

> religious context. The balance between the greater public good and the limitation on the freedom to publish is no more offended by this proposal than it would be by, say, an instruction manual for credit card fraud were such to be published. I believe that it is Human Rights Act compatible.[30]

Clause 2 creates an offence, punishable by up to seven years' imprisonment, and a fine, relating to disseminating or making available a "terrorist publication". "Terrorist publication" is defined in Clause 2(2) as follows:

> For the purposes of this section a publication is a terrorist publication, in relation to conduct falling within subsection (1)(a) to (f) if matter contained in it constitutes, in the context of that conduct—
>
> (a) a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism; or
>
> (b) information of assistance in the commission or preparation of such acts.

Sub-paragraphs (3)-(7) of Clause 2 elaborate further on the terms within this definition.

Lord Carlile's report includes the following comments about the offence in clause 2:

> Some have argued that this would impose an unacceptable level of censorship on bookshops and websites, far greater than any restriction on, for example, obscene publications.
>
> Analogies could be drawn with the dissemination of publications giving direct or indirect encouragement or other inducement to or information about other serious criminal acts, for example paedophile offences. There is no acceptable ground for objection to it being an offence to disseminate such publications. The defining sub clauses narrow significantly the circumstances in which an offence would be committed.[31]

Clause 2 provides a person who is providing an electronic service with a similar defence as that which will be available in respect of the offence in Clause 1. Clauses 3 and 4, which are concerned with the application of the offences set out in Clauses 1 and 2 to internet activity and other similar forms of electronic communication, are intended to prevent a person relying on the defence that he did not endorse a statement, if he has been issued with a notice by a constable and has failed to comply with it. Under subsection (4), the person against whom the notice was issued will be regarded as having endorsed repeat statements, unless he or she has taken every step he reasonably could to prevent a repeat statement becoming available to the public, and to ascertain whether it does, and

- Is not aware of the publication of the repeat statement; or

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[30] DEP 05/1221 paragraph 23
[31] *ibid*. paragraphs.24-25

- Having become aware of its publication, has taken every step that he reasonably could to ensure that it ceased to be available to the public or was modified.

In his report on the Government's proposals for changes to the laws on terrorism Lord Carlile suggested that parliamentarians might wish to consider whether notices given by a constable under Clause 3 should be subject to judicial control or confirm, for example by a district judge (Magistrates' Court).[32]

He went on to make the following comments about Clauses 2 and 3 of the Bill:

> In my view Clauses 2 and 3 generally are proportional and a sensible part of the legal armoury. However, I have one residual concern. Much research has been done into terrorism, and it involves a high degree of co-operation between genuine and respected academics in universities and institutes around the world. In addition, my own experience as a former M.P. and my current Parliamentary life leave me in no doubt that Members of Parliament and Peers with a particular interest in the subject might themselves and with their research staff pass publications to each other for the purposes of preparing policies, speeches and correspondence. Similar comments could be applied to some serious journalists. It is important to ensure that genuine and sometimes useful research is not turned into a samizdat activity. The government should consider whether amendments might be needed to ensure that these categories of activity are not criminalised.[33]

2. Preparation of terrorist acts and terrorist training

a. Preparation of terrorist acts

The arrest provisions which apply in relation to the general criminal law under sections 24 and 25 of the *Police and Criminal Evidence Act 1984* (PACE) enable the police to arrest a person without warrant only if they have reasonable grounds for suspecting that he has committed, or is about to commit, an offence. Section 41 of the *Terrorism Act 2000* enables a constable to arrest without warrant a person whom he reasonably suspects of "being a terrorist". Section 40(1) provides that "terrorist" means a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism".[34] "Being a terrorist" and being "concerned in the commission, preparation or instigation of acts of terrorism" are not at present offences in themselves.

The power of arrest under the *Terrorism Act 2000* is therefore wider than the power of arrest under PACE, in that a police constable does not need to have reasonable grounds for suspecting that a person is, or has been, involved in a particular terrorist offence. As Lord Lloyd noted in the report of his *Inquiry into Legislation against Terrorism*, published in 1996, which referred to the version of the power which was previously set out in section 14 of the *Prevention of Terrorism Act 1989* (PTA), the power is sometimes referred to as "pre-emptive", in that it permits the police to arrest a person where they

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[32] *Proposals by Her Majesty's Government for Changes to the Laws Against Terrorism* DEP 05/1221 para.27
[33] *ibid*. para.28
[34]" Terrorism" is itself defined in section 1 of the 2000 Act

have reasonable grounds for believing that he is involved in some way in terrorist activity, even though they may not know the nature of his involvement.[35] The power of arrest under the 2000 Act enables the police to intervene before a terrorist act is committed. Lord Lloyd commented that:[36]

> If the police had to rely on the PACE power of arrest they would be obliged to hold back until they had sufficient information to link the individual with a particular offence. In some cases it would be too late to prevent the prospective crime. Given that public safety is at issue, this is a risk which neither the police nor the public can afford to take.

Lord Lloyd noted the alternative view, with which he had some sympathy, which was that the power of arrest under what was then the PTA contravened a fundamental principle that a person should be liable to arrest only when he was suspected of having committed, or of being about to commit, a specific crime.[37] He added that if the PTA powers of arrest were retained there was a risk that they would be seen to contravene Article 5(1)(c) of the European Convention on Human Rights (ECHR) once a lasting peace had been established in Northern Ireland. The Article sets out the circumstances in which a person may lawfully be deprived of his liberty and includes "the lawful arrest or detention of a person effected…. on reasonable suspicion of having committed an offence…. or when it is reasonably considered necessary to prevent his committing an offence." Lord Lloyd suggested that part of the solution to the problem of enabling the police to intervene in the preparatory stage of terrorist activity, when they may not yet have grounds for suspecting the commission of a specific criminal offence, lay in the creation of a new offence of being concerned in the preparation of a terrorist act.[38] This would mean that a suspect could be arrested on suspicion of the new offence. Lord Lloyd took the view that this change would ultimately remove the need for the special arrest powers, which were set out in the PTA and are now set out in the *Terrorism Act 2000.*[39]

In its consultation paper *Legislation against Terrorism*, published in December 1998, the Government said it had looked very carefully at the judgments of the European Court of Human Rights in relation to Article 5(1)(c) of the ECHR; at the consequences of creating an offence of the sort envisaged by Lord Lloyd; and at whether the provisions of PACE would be sufficient if the Government pursued his proposal. The Government said it was satisfied that the power of arrest in what was then the PTA, and the way in which it was used, were compatible with Article 5(1)(c) of the ECHR and that it did not believe that the right way forward was to create an offence of "being involved in the preparation etc. of acts of terrorism".[40]

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[35] *Inquiry into Legislation against Terrorism* Cm 3420 October 1996 Vol I para. 8.3
[36] *ibid*. para.8.5
[37] *ibid*. para. 8.7
[38] *ibid*. para.8.17
[39] *ibid.*
[40] *Legislation Against Terrorism: A consultation paper* CM 4178 December 1998 para.7.15

In his *Report on the Operation in 2004 of the Terrorism Act 2000* Lord Carlile of Berriew Q.C., the independent reviewer of the 2000 Act, said:[41]

> Until recently the Government view was that the absence of such an offence has stood the test of time and the courts thus far. Last year I advised that, in determining how to deal with a potentially continuing threat from Al Qaeda after the demise in November 2006 of time-limited detention powers under ATCSA 2001, further consideration might have to be given to the issue of criminalization of lower level terrorist activities and agreements. That has become more urgent since the demise of those powers following the enactment of the Prevention of Terrorism Act 2005; and as stated above the Government has undertaken to look closely with Parliament at the possibility of improving the law of terrorism offences.

In a letter of July 2005 outlining the Government's response to Lord Carlile's report the Home Secretary, Charles Clarke, said he had agreed with the Opposition spokesmen that the Government would include an offence of knowingly doing an act connected with or preparatory to terrorism in the *Terrorism Bill* and expressed his gratitude to Lord Carlile for suggesting it.[42]

Clause 5 of the Bill seeks to implement this proposal by creating an offence of the preparation of terrorist acts. The maximum sentence for the offence will be life imprisonment. The *Explanatory Notes* explain how the new offence goes beyond the existing common law offences of conspiracy to carry out terrorist acts, and attempting to carry out such acts:[43]

> Under the new offence created by this clause acts of preparation with the relevant intention will be caught, for example if a person possesses items that could be used for terrorism even if not immediately and that person has the necessary intention he will be caught by the offence.

In his report on the Government's proposals for changes to the laws against terrorism Lord Carlile of Berriew, who in his reports on the operation of the *Terrorism Act 2000* has supported the idea of an offence of acts preparatory to and connected with terrorism, said:

> Effectively this would be an offence of facilitation. It is intended to catch those who, knowing the connection with terrorism and an intention to commit terrorist acts provided the facilities so to do. Examples would include the provision of accommodation for terrorists knowing they were such, and committing credit card fraud to assist in providing a living for terrorists.
>
> Ministers should satisfy themselves that the clause is sufficient to cover the types of facilitation described. It occurs to me that the use of the words "committing" and "commit", with their direct reference to "acts of terrorism" might arguably limit the intended scope of the new offence.

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[41] *Report of the Operation in 2004 of the Terrorism Act 2000*, Lord Carlile of Berriew Q.C. para.78
[42] Letter from the Home Secretary to Lord Carlile of Berriew Q.C. 20 July 2005 Dep 05/966
[43] *Explanatory Notes*. para.49

> Subject to checking the solidity of the drafting, Clause 5 is a proportional and proper response to achieve the criminalisation of the conduct described.[44]

b. Terrorist training

Clause 6 of the Bill is designed to implement Article 7 of the *Council of Europe Convention for the Prevention of Terrorism*,[45] which requires parties to create an offence of training for terrorism. The Article is already partly implemented by section 54 of the *Terrorism Act 2000*, which sets out an offence of weapons training, involving training in the use or making of firearms, explosives and chemical, biological and nuclear weapons. The offence is punishable by up to ten years' imprisonment and a fine. Clause 6 is intended to cover matters not already dealt with in section 54, by creating an offence of giving or receiving training in certain specified skills, knowing or intending that they will be used in connection with terrorism. The skills to which these offences refer are those set out in subsection (3) of Clause 6. The *Explanatory Notes* describe them in the following terms:[46]

> The skills are split into three categories, the first is defined as the making, handling, or use of a hazardous or noxious substance. An example of this would be how to make a bomb to disperse a virus. The second is defined as the use of any method or technique for the doing of anything, other than things falling into the first category, that is capable of being done for the purposes of terrorism, or in connection with the commission or preparation of an act of terrorism or Convention offence, or with assisting the commission or preparation of such acts. An example of this would be a technique for causing a stampede in a crowd. The third is defined as the design or adaptation, for the purposes of terrorism, or in connection with the commission, preparation or instigation of an act of terrorism or Convention offence, of any method or technique for doing anything. An example of this third category would be giving instructions about the places where a bomb would cause maximum disruption.

Like the offence under section 54 of the 2000 Act, the offence under Clause 6 will be punishable by up to 10 years' imprisonment and a fine.

Clause 7 seeks to enable a court before which a person is convicted of an offence under Clause 6 to order the forfeiture of anything the court considers to have been in the person's possession for purposes connected with the offence.

In his report on the Government's proposals Lord Carlile said there were clear reasons for the introduction of the offence in Clause 6, that it was in his view proportional and could make a significant contribution to the detection of potential terrorists well before operational harm was done by them. He added:

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[44] DEP 05/1221 paras 30-32.

[45] *Council of Europe Convention for the Prevention of Terrorism* Treaty No: 196 opened in Warsaw 16 May 2005

[46] *Explanatory Notes* para.53

> However, it is important that there should be the clearest understanding that this clause and clause 8 would not be misused. I question whether it is the role of our law, or even enforceable, to make it a criminal offence triable in our country to fight in a revolution the aims of which we support. The example of the ANC before the release of Nelson Mandela almost automatically springs to mind. Whether this concern is properly in the area of legislative drafting or of appropriate Ministerial statements is a matter for others.[47]

Clause 8 is designed to create a new offence, punishable by up to 10 years' imprisonment and a fine, of attending a place used for terrorist training, anywhere in the UK or abroad. Terrorist training for these purposes is defined by reference to the kind of training that may be given under the offence in Clause 6 of the Bill or section 54 of the *Terrorism Act 2000.* The *Explanatory Notes* make the following comments about the various elements of the offence:[48]

> For an offence to have been committed, all or part of the training in such a place would need to have been provided for purposes connected with terrorism or Convention offences. It is also an element of the offence that the offender either knows or believes that training for those purposes is taking place or that a person attending the place could not have reasonably failed to understand this (**subsection (2)**). **Subsection (3)** provides that the person concerned need not have received training himself in order for the offence to have been committed. It also sets out that the offence occurs whether the training is for a specific act of terrorism or Convention offence, or such acts or offences in general.

In his report on the Government's proposals Lord Carlile notes that there is an overlap between this offence and the offence of terrorist training in Clause 6, although the offence in Clause 8 is significantly wider, covering mere attendance, at any place in the world, where instruction or training of the type described in Clause 6 is going on.[49] He adds:

> In my view this proposal is in clear need of modification. Some of Britain's most respected journalists have from time to time reported in the public interest from terrorist training camps in various parts of the world. On occasion, they are the camps of fighting groups revolting against despotic regimes whose overthrow is greatly desired by the United Kingdom and others. As drafted, the law would render these journalists potential criminals, albeit subject to the ultimate discretion of the Attorney General as to whether they would be prosecuted.
>
> In my view the government should look at Clause 8 again, and possibly elide it with Clause 6. The mischief legitimately and proportionately aimed at is principally the attendance for and/or receipt of instruction and training for a terrorist purpose presenting a danger because of affiliation to Al Qaeda and similar organisations, and/or danger to UK citizens and their allies and connected interests.[50]

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[47] DEP 05/1221 para.35
[48] *ibid*. para.59
[49] DEP 05/1221 para. 37
[50] DEP 05/1221 paras. 38-39

3. Offences involving radioactive devices and materials and nuclear facilities and sites

Clauses 9-11 of the Bill are designed to create three new offences involving radioactive devices and materials and nuclear facilities. The *Explanatory Notes* say that they are needed in order for the UK to ratify the *UN Convention for the Suppression of Acts of Nuclear Terrorism*, which the UK signed in September 2005. The maximum penalty for each of the offences will be life imprisonment. Clause 9 will make it an offence for a person to make or possess a radioactive device, or to possess radioactive material, with the intention of using the device or material in the course of or in connection with the commission or preparation of an act of terrorism, or for the purposes of terrorism. It will also be an offence if the intention is to make the device or material available to be used in such a way. "Radioactive device", "radioactive material", "device" and "nuclear material" are defined in Clause 9(4)-(5).

Clause 10(1) seeks to create an offence of using radioactive material or a radioactive device in the course of, or in connection with, the commission of an act of terrorism, or for the purposes of terrorism. Clause 10(2) is intended to create a similar offence of using or damaging a nuclear facility in a manner that releases radioactive material or creates or increases the risk that such material will be released, in the course of, or in connection with, the commission of an act of terrorism, or for the purposes of terrorism. "Radioactive device" and radioactive material" have the same meanings as in Clause 9. The expressions "nuclear facility", "nuclear reactor", and "transportation device" are defined in subsections (4)-(5) of Clause 10. The *Explanatory Notes* make the following comments about the definitions:[51]

> Nuclear facility means a nuclear reactor, including a reactor installed in or on a transportation device, or a plant or conveyance being used for the production, storage, processing or transport of radioactive material. Nuclear reactor and transportation device are both defined in subsection (5). Nuclear reactor is defined by reference to the Nuclear Installations Act 1965 (c.57). Section 26 of that Act provides that the term means any plant designed or adapted for the production of atomic energy by a fission process in which a controlled chain reaction can be maintained without an additional source of neutrons. Transportation device means any vehicle or any space object. Vehicle is defined in section 121 of the TACT as including aircraft, hovercraft, train or vessel. Space object is defined by reference to the Outer Space Act 1986 (c.38). The definition of space object appears in section 13(1) of that Act and is defined to include not, only the object itself, but also its component parts, its launch vehicle and the component parts of that vehicle.

Clause 11 will make it an offence to make terrorist threats relating to radioactive devices and materials or nuclear facilities. Under subsection 1 it will be an offence for a person, in the course of, or in connection with the commission or for the purposes of terrorism, to make a demand:

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[51] *ibid*. para. 66

- For the supply to himself or to another of a radioactive device or of radioactive material;
- For a nuclear facility to be made available to himself or another;
- For access to such a facility to be given to himself or another.

if he supports the demand with a threat that he or another person will take action if the demand is not met; and the circumstances and manner of the threat are such that it is reasonable for the person to whom it is made to assume that there is a real risk that the threat will be carried out if the demand is not met. It will also be an offence for a person to make any threat from the following list, set out in Clause 11(3):

- a threat to use radioactive material;
- a threat to use a radioactive device;
- a threat to use or damage a nuclear facility in a manner that releases radioactive material, or creates or increases a risk that such material will be released,

if the circumstances and manner of the threat are such that it is reasonable for the person to whom it is made to assume that there is a real risk that the threat will be carried out, or would be carried out if the demands made in association with the threat are not met.

Clause 12 of the Bill is designed to prohibit trespass on a nuclear site. Sections 128 and 129 of the *Serious Organised Crime and Police Act 2005* (SOCAP), which came into force on 1st July 2005, create an offence of trespassing on a "designated site" in England, Wales, or Northern Ireland, and an equivalent offence in Scotland of entering, or being on, a designated Scottish site without lawful authority. The offences are punishable by up to 51 weeks' imprisonment (12 months in Scotland). Sections 128 and 129 of the 2005 Act give the respective Secretaries of State the power to designate sites for the purposes of this offence. In Scotland, under Section 129(3), the Secretary of State may designate a site for this purpose only if it appears to him that it is appropriate to do so in the interests of national security. In England and Wales and Northern Ireland, under section 128(3), the Secretary of State may only designate a site for this purpose if:

- It is comprised in Crown land; or
- It is comprised in land belonging to He Majesty the Queen in Her private capacity or to the immediate heir to the throne in his private capacity; or
- It appears to the Secretary of State that it is appropriate to designate the site in the interests of national security.

Clause 12 of the *Terrorism Bill* is designed to amend sections 128 and 129 of SOCAP by including civilian nuclear sites, such as university laboratories, within the scope of the trespass offence.

4. Increases in maximum penalties

Clause 13 of the *Terrorism Bill* seeks to increase the maximum penalty for the offence under section 57 of the *Terrorism Act 2000* of possessing articles for terrorist purposes from ten years' imprisonment to 15 years' imprisonment. Clause 14 will increase the

maximum penalty for the offences under section 2 of the *Nuclear Material (Offences) Act 1983*, involving preparatory acts and threats, from 14 years' imprisonment to life imprisonment. The *Explanatory Notes* make the following comments about the offences under section 2 of the 1983 Act:

> That section creates offences relating to receiving, holding or dealing with nuclear material, or making threats in relation to nuclear material, with intent to commit certain offences or enabling others to commit those offences. These include, among other offences, those of murder, manslaughter, culpable homicide, assault to injury, malicious mischief or causing injury, certain offences against the person, theft, or extortion.[52]

Clause 15 of the Bill is designed to amend section 53 of the *Regulation of Investigatory Powers Act 2000* by increasing the maximum penalty for contravening a notice relating to encrypted information issued under Part II of the 2000 Act from two years' imprisonment in all cases, to five years' imprisonment for contravention of a notice issued on national security grounds, and otherwise two years' imprisonment.

5. Preparatory hearings in terrorism cases

Section 29 of the *Criminal Procedure and Investigations Act 1996* (the CPIA) enables a judge to order a preparatory hearing in cases of such complexity, or where the trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing before the jury is sworn. A similar power to order preparatory hearings in cases of serious or complex fraud is set out in section 7 of the *Criminal Justice Act 1987*. The purpose of a preparatory hearing is to identify the material issues, assist the jury's comprehension of those issues, expedite the proceedings before the jury, and otherwise assist the judge's management of the trial. Section 45 of the *Criminal Justice Act 2003*, which has not yet come into force, amended the list of circumstances in which preparatory hearings may be ordered. It also provided that applications for trials to proceed without juries, which would be permissible in cases involving complex or serious fraud or in cases where there is a danger of jury tampering, should be heard and determined at preparatory hearings under the 1996 Act.

Clause 16 of the Bill is intended to make preparatory hearings mandatory in cases involving terrorism. Subsection (2) amends section 29 of the CPIA to require a judge to order a preparatory hearing in two particular types of case involving terrorism:

- Where at least one person in the case is charged with a terrorism offence; or
- Where at least one person in the case is charged with an offence that carries a maximum penalty of at least 10 years' imprisonment and it appears to the judge that the conduct in respect of that offence had a terrorist connection.

"Terrorism offence" is defined in Clause 16(5). The definition includes a number of specified offences under the *Terrorism Act 2000* and the offences under Part 1 of the

[52] *Explanatory Notes* para.75

current *Terrorism Bill*, which include encouragement of terrorism, dissemination of terrorist publications, preparation of terrorist acts, and terrorist training. The definition also includes the offences of conspiring, attempting or incitement to commit any of these offences. Clause 16(5) also provides that conduct is to be considered to have a "terrorist connection" if "it is or takes place in the course of an act of terrorism or is for the purposes of terrorism". The definition of "terrorism" is to be the same as that set out in section 1 of the *Terrorism Act 2000*.

6. Commission of offences abroad

Clause 17 seeks to create extra-territorial jurisdiction for the UK courts for the offences in Part 1 of the Bill, which include encouragement of terrorism, dissemination of terrorist publications, preparation of terrorist acts, and terrorist training, for the offences under the *Terrorism Act 2000* of membership of proscribed organizations and weapons training, and for conspiracy, incitement, attempting, aiding, abetting, counseling or procuring the commission of any of these offences. A person who does anything outside the UK, which would have constituted one of these offences had it been done within the UK, will be liable to be convicted in the UK. This has been an increasing phenomenon, both in relation to terrorist offences and other crimes, such as sexual offences against children. The jurisdiction under Clause 17 will extend to all persons, not just British citizens or companies incorporated in a part of the UK.

In his report on the Government's proposals for changes to the laws against terrorism Lord Carlile said:

> The absence as yet of an effective and operational international criminal court has meant the inevitable increase in extra-territorial jurisdiction. In my view it could hardly be considered wrong to arrest and prosecute a major international terrorist if he happened to transit through the UK and be apprehended here; or a UK national involved in terrorism offences in other parts of the world.
>
> Of course, the discretion whether or not to prosecute is important and sensitive in this context.[53]

7. Liability of company directors

Clause 18 seeks to ensure that where offences under Part 1 of the Bill are committed by a corporate body any directors, managers, secretaries or other similar officers of the body will be criminally liable, as well as the body corporate, if the offence was committed with their consent or connivance, or on account of their neglect. This type of clause is frequently seen. The *Explanatory Notes* suggest that, of the offences in Part 1, a corporate body is most likely to be prosecuted for an offence under Clause 2 of disseminating terrorist publications.

[53] DEP 05/1221 paras 46-47

8. Requirement to obtain consents to prosecutions

Clause 19 of the Bill seeks to ensure that, as is the case with other serious offences, the prosecutions for offences under Part 1 of the Bill will require the consent of the Director of Public Prosecutions in England and Wales, or in Northern Ireland, the consent of the Director of Public Prosecutions for Northern Ireland. Where it appears to the Director of Public Prosecutions, or the Director of Public Prosecutions for Northern Ireland, that the offence has been committed for a purpose wholly or partly connected with the affairs of a country other than the UK, he will be able to give consent to prosecution only with the permission of the Attorney General or, in the case of Northern Ireland, the Advocate General for Northern Ireland.

B. Proscription

Section 3 of the *Terrorism Act 2000* enables the Home Secretary to proscribe an organisation if he believes that it is concerned in terrorism. For the purposes of this power an organisation is concerned in terrorism if it:[54]

a) Commits or participates in acts of terrorism
b) Prepares for terrorism
c) Promotes or encourages terrorism, or
d) Is otherwise concerned in terrorism.

"Organisation" is defined in section 121 of the 2000 Act as including any association or combination of persons.

Proscribing an organisation has a number of different consequences. The 2000 Act contains a number of offences that depend on an organisation being proscribed, such as the offence under section 11 of membership of a proscribed organisation, or the offence under section 12 of support for a proscribed organisation. The resources of proscribed organisations can be seized as terrorist cash under Part II of the 2000 Act and some of the other powers under the Act also become available once an organisation has been proscribed.

An order adding an organisation to the list of proscribed organisations in Schedule 2 of the 2000 Act, or removing it from the list, must be laid before Parliament in draft and approved by both Houses of Parliament under the affirmative procedure,[55] although in urgent cases the Home Secretary may make an order, which will last for 40 days and then cease to have effect unless a resolution approving the order is passed by both Houses during that period.[56] Part II of the *Terrorism Act 2000* also provides a process of review of, and appeal against, proscription after an Order has come into effect.

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[54] *Terrorism Act2000* s.3(5)
[55] *ibid* s.123(4)
[56] *ibid*. s123(5)

In March 2001 21 organisations were proscribed, following the implementation of the 2000 Act. In October 2002 4 more were proscribed, and a further 15 were proscribed in an order laid before Parliament in draft by the Home Office minister Hazel Blears on 10 October 2005 and approved by both Houses of Parliament on 13 October 2005.[57] The full list of proscribed organisations is available on the Home Office website.[58]

Clause 21 of the *Terrorism Bill* seeks to widen the grounds of proscription to include glorification of terrorism. A new subsection (5A) to section 3 of the 2000 Act provides that an organisation may be considered to "promote or encourage terrorism" if its activities

> (a) include the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism; or
>
> (b) are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification.

The glorification of any conduct would be unlawful for these purposes:

> if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as-
>
> a) conduct that should be emulated in existing conditions, or
> b) conduct of a description of conduct that should be so emulated.

"Glorification" and "statement" are defined in terms similar to those which apply in relation to the new terrorist offences in Part 1 of the Bill. Glorification is thus defined to include praise or celebration and statement includes communication without words consisting of sounds or images or both.

In his report on the Government's proposals for changes to the laws against terrorism Lord Carlile made the following comments about proscription:

> Proscription is regarded by some as something of a toothless tiger. However, after careful enquiry including discussions about the merits or otherwise of proscriptions during the worst of the troubles in Northern Ireland, I share the opposing view that it can play a role in reducing the opportunity for disaffected young people to become radicalised towards terrorism. That being so, extending the list to include the organisations envisaged in the clause is a proportional limitation on the freedom of association in relation to the greater public good. However, it is important that restraint is shown in the exercise of the power. In any event, proscription is subject to the system of law established through the Proscribed Organisations Appeals Commission [POAC].[59]

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[57] HC Deb Vol 437 c466-484 13th October 2005; HL Deb Vol 674 c490-496 13th October 2005

[58] http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/proscribed-groups?view=Standard

[59] DEP 05/1221 para.52

Clause 22 is intended to deal with cases in which an organisation is the same as one that appears in the list of proscribed organisations in Schedule 2 to the *Terrorism Act* 2000 but is operating under a name that it is different from that listed in the Schedule, or in which an organisation listed in Schedule 2 is operating under several names not all of which are listed in Schedule 2. It amends section 3 of the 2000 Act by allowing the Home Secretary to make an order to the effect that the name that is not specified in that Schedule is to be treated as another name of the listed organisation.

The effect of an order under the amendments to section 3 set out in Clause 22 will be that the organisation included in the order will be treated as if it were listed in Schedule 2 under both the name already specified for it in the Schedule and the name given in the order. This effect will persist while the order is in force and the organisation is listed in Schedule 2. Unlike orders amending Schedule 2 itself, which must be approved by both Houses under the affirmative procedure, orders made under Clause 22 will be subject to annulment under the negative procedure. The provisions of the *Terrorism Act 2000* for review of, and appeal against, proscription will apply to an order made under these amendments and the Secretary of State will have the power to revoke such an order at any time. Provisions in section 7 of the *Terrorism Act 2000* allowing appeals, following successful appeals against proscription, by people whose convictions depended on an organisation being proscribed, will also apply to people whose convictions depend on an organisation being named in an order made under the amendments in Clause 22.

C. Detention without charge of people suspected of involvement with terrorism

One consequence of the adversarial nature of the criminal process in England and Wales and elsewhere in the UK is that once a person has been charged the police and other prosecuting authorities cannot question him further about the offence with which he has been charged. The police may detain a person for questioning but once the maximum period of detention has been reached the person must either be charged or released and if he is charged he may no longer be questioned.

The criminal justice systems in most other European countries are inquisitorial, with an investigating magistrate or judge directing the investigation and proceedings from an early stage. The Home Secretary and others have noted that, in a number of other European countries, such as France and Spain, suspects can in some circumstances be detained for a number of years without trial.

Earlier this month the Foreign Office published a report entitled *Counter-terrorism Legislation and Practice: A Survey of Selected Countries*, which is available on the internet.[60] An article in the *Independent* on 13th October 2005 noted an acceptance by government officials that none of the countries surveyed had the 90-day period of detention without charge proposed in the *Terrorism Bill.* The article quoted an official who stressed the differences between the systems in France and Spain, where the person leading the investigation is a magistrate who can continue to question a suspect

[60] http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf

after they have been charged and the position in the UK, where the police can no longer question somebody once they have been charged and "the barrier comes down" in terrorist cases once the current 14-day maximum period for detention without charge is exceeded.[61]

1. Detention without charge under the general criminal law

When the police arrest a person in England and Wales in connection with an offence under the general criminal law, under the *Police and Criminal Evidence Act 1984* they may detain him for questioning for up to 36 hours. At the end of this time the person must either be charged or taken before a magistrate, who may authorise further detention for additional periods, provided that the total does not exceed 96 hours.[62]

2. Detention without charge under anti-terrorist legislation

From their original enactment in 1974 onwards the *Prevention of Terrorism (Temporary Provisions) Acts* [PTA] contained a provision permitting the detention by the police of a person arrested on suspicion of involvement in acts of terrorism for a period of up to 48 hours following his arrest by a police constable, and for a further period of up tofive days if the Secretary of State approved such an extension. This power was available to police officers anywhere in the UK. Section 11 of the *Northern Ireland (Emergency Provisions) Act 1978* gave police constables in Northern Ireland the power to detain people they suspected of being terrorists for up to 72 hours. Section 14 of the same Act gave members of Her Majesty's forces the power to detain suspects for up to four hours.

In the report of his *Inquiry into Legislation against Terrorism*, published in October 1996, Lord Lloyd of Berwick, who was envisaging a situation in which lasting peace had been established in Northern Ireland, recommended that the police retain the power to detain terrorist suspects for a maximum of 48 hours following their arrest and that if a further period of detention was required in any case they should seek judicial authorisation to extend the period of detention for up to two days, making four days in all.[63] This would have brought the provisions governing detention without charge in terrorist cases into line with the equivalent provisions under the general criminal law. In its consultation paper *Legislation against Terrorism*, published in December 1998, the Government suggested that Lord Lloyd's views might have been influenced by the fact that the practice had been that extensions in international terrorist cases had not exceeded a total of four days. While recognising that this was the case, the Government added that there was no guarantee that the four day period would always be sufficient.[64] The consultation paper noted that:

> The police currently apply for extensions of detention for a variety of reasons. These include the checking of fingerprints; the completion of forensic tests; finding and interviewing witnesses; searching the suspect's home address; conducting searches of garages, storage facilities and other non-residential

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[61] "90 days – plans to lock up terror suspects without charge provoke outcry" – *Independen*t 13.10.2005
[62] *Police and Criminal Evidence Act 1984* s.41-44
[63] *Inquiry into Legislation against Terrorism* Cm 3420 October 1996 Vol. I p.45
[64] *Legislation against Terrorism: A consultation paper* CM 4178 December 1998 p.36 paras.8.21-8.24

> premises which he may have used to hide arms, explosives or other materials; translating documents; checking alibis; making and analysing the results of financial and other enquiries and putting the results of all the above to the suspect at interview. Enquiries of this nature can be very time-consuming particularly if more than one person has been arrested in any case or if enquiries have to be made of the police or others abroad or through a foreign Government's embassy. Terrorists, moreover, are increasingly trained to resist interrogation and often refuse to answer questions or otherwise co-operate with police enquiries. These features have applied in international terrorist cases as well as in Irish cases. [65]

Referring to an assessment earlier in the consultation paper of the terrorist threat to the UK, the Government said that terrorism in the future was likely to become more sophisticated, with terrorists working across international boundaries and time zones and communicating in encrypted forms. It took the view that, against this background, the maximum period for which a terrorist suspect could be detained, subject to new arrangements for judicial authorisation rather than ministerial consent, should be seven days.[66] This new time limit was duly incorporated into the *Terrorism Act 2000.*

Under section 41 of the *Terrorism Act 2000,* the police may detain terrorist suspects for up to 48 hours from the time of their arrest (or from the time of their detention for questioning by an examining officer at a British port under Schedule 7 of the 2000 Act). The police must keep the person's detention under review and may authorise a person's continued detention only if satisfied that it is necessary:[67]

- To obtain relevant evidence whether by questioning him or otherwise
- To preserve the relevant evidence
- Pending a decision whether to apply to the Home Secretary for a deportation notice to be served on the person, the making of such an application and its consideration by the Home Secretary
- Pending a decision whether or not the detained person should be charged with an offence

The police officer reviewing the person's detention must also be satisfied that the investigation in connection with which the person is being detained, or the process pending completion of which the person is being detained, is being conducted diligently and expeditiously.[68]

Within the initial 48-hour detention period, or within six hours of the end of this time,[69] a police officer of at least the rank of superintendent may apply to a judicial authority for a warrant of further detention. A warrant may be issued only if the judicial authority is satisfied that:

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[65] *ibid.* para.8.23
[66] ibid. para.8.24
[67] *Terrorism Act 2000* Schedule 8 paragraph 23
[68] *ibid*.
[69] *ibid.* Schedule 8 paragraph 30(1)

- there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain relevant evidence whether by questioning him or otherwise or to preserve relevant evidence, and
- the investigation in connection with which the person is detained is being conducted diligently and expeditiously.[70]

Further extensions of the period specified in a warrant of further detention may be sought, again on an application to a judicial authority by a police officer of at least the rank of superintendent. Under the *Terrorism Act 2000* as originally enacted, the maximum period of detention without charge was a total of seven days from the time of a suspect's arrest or detention.[71]

An amendment inserted into the 2000 Act by the *Criminal Justice Act 2003* increased the total possible period of detention without charge to 14 days from the time of arrest or detention.[72] This amendment came into force on 20th January 2004. The amendment was introduced during the report stage in the House of Commons of the Bill that became the 2003 Act.[73] The then Home Office minister, Beverley Hughes, gave the Government's reasons for increasing the period of maximum detention as follows:

> The Government new clause will allow detention for up to a maximum of 14 days. Its provisions come to us from the police and are considered essential by them, based on their experience of the practicalities of dealing with a suspected terrorist once in police custody. There are circumstances under which the current seven-day maximum may be insufficient to enable the police fully to investigate the offences in respect of which the individuals are detained.[74]

Beverly Hughes noted that only a small proportion of people detained under the 2000 Act were detained for extended periods (only 16 of the 212 detained in the first there months of 2003 went into the sixth day as a result of extensions). She added that the police had conducted a review of all significant operations over recent times and had concluded that more than seven days might be needed in specific cases. She set out some of the reasons why this might be so:

> In dealing with some of the examples that the police are encountering, in particular and increasingly frequently there may be occasions when it is necessary to examine substances that are thought to be dangerous, and which are found on or with detained individuals, to determine whether they are chemical, biological, radiological or nuclear. This is a very time-consuming process that needs to be carried out with particular attention, and often in stages. As hon. Members will appreciate, the substances have to be retrieved in accordance with forensic procedures. Very detailed health and safety provisions exist to protect the people doing that work. I am told that the forensic retrieval itself can take up to five days. Clinical procedures then have to be applied to the analysis. This often involves a staged process, in which one stage of the analysis has to be completed and the results obtained before a decision can be taken on

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[70] *ibid.* paragraph 32(1)
[71] *ibid*. paragraph 36(3)
[72] *ibid.* paragraph 36(3A), inserted by the *Criminal Justice Act 2003* s.306(1)(4)
[73] HC Deb Vol 405 c940-954, 20th May 2003
[74] *ibid* c941

> the further direction of the analysis, in order to determine what the substance might be. The issue of dangerous substances provides a powerful example, and I readily appreciate the arguments that the police are using as to why extended periods beyond seven days might be necessary.
>
> Another example that the police are dealing with concerns the use of personal computers and the requisition of hard drives, after searches of premises and arrests have been made. It can take several days for material from a hard drive to be extracted, analysed and used in the questioning of a suspect. As Members will readily appreciate, in the case of a network of computers or computers that have been used to communicate with each other, the process of analysing the content of several hard drives and cross-referencing and matching communications before such information can be used in the questioning of suspects takes time. [75]

The new Clause extending the maximum period of detention for terrorist suspects was agreed to without a division.

In its report on the *Criminal Justice Bill 2002-03* the Joint Committee on Human Rights took the view that the conditions laid down in the Bill's amendment to the *Terrorism Act 2000* authorising extended detention for up to 14 days satisfied the requirements of Article 5.1 of the European Convention on Human Rights, which is concerned with the right to liberty of the person. The committee did, however, raise concerns about whether there were adequate grounds for thinking that it was necessary to extend a time limit which had been set after careful policy and parliamentary consideration less than three years previously. The committee quoted from, and referred to, a letter sent to it by the Home Secretary, explaining the need for the extension of the time limit on a number of grounds, including the increasing sophistication of terrorist technology since September 11 2001.[76]

> *105. Secondly*, we have considered whether there are sufficient safeguards against abuse of the power, particularly in cases where evidence said to support the application for a further warrant of detention is withheld from the detainee and his or her legal advisers. There is power to withhold such evidence in certain circumstances, going well beyond circumstances in which national security is likely to be affected by disclosure. Unlike the position in proceedings before the Special Immigration Appeal Tribunal, there is no provision to appoint a special advocate to make submissions on undisclosed material to protect the detainee's interests in the absence of the detainee and his or her legal representative. This might make it hard to ensure that the procedure is fair enough to be 'lawful' within the meaning of ECHR Article 5.1. **We draw the potential for a lack of fairness in the decision-making system, and the risk of a violation of Article 5.1, to the attention of each House.**

Under the new arrangements, following the initial detention of up to 48 hours, the first warrant of further detention can extend the period of detention up to the maximum period of seven days, but could extend it for a shorter period. If the police consider that more time is needed, a further application can be made for a period not exceeding another

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[75] *ibid*. c942-3
[76] *Joint Committee on Human Rights Eleventh Report 2002-2003* paragraphs 100-105 at http://pubs1.tso.parliament.uk/pa/jt200203/jtselect/jtrights/118/11806.htm

seven days. Each time an application is made, the court will have to be satisfied that the conditions for an extension of detention have been met. During the debate on this provision the Home Office minister, Beverley Hughes, suggested that it would be "perfectly routine" if the courts granted further extensions in periods of only 24 or 48 hours.[77]

3. Detention without charge: The *Terrorism Bill 2005-06*

Clauses 23 and 24 of the *Terrorism Bill* seek to amend the provisions in Schedule 8 of the *Terrorism Act 2000* concerning the extension of detention without charge for those people arrested under section 41 of the 2000 Act. The background to the introduction of these provisions is discussed in Part II of this paper.

At present only a police officer of at least the rank of superintendent may make an application under Schedule 8 of the 2000 Act for a warrant extending a person's detention under the 2000 Act. Clause 23(2) seeks to enable various officials other than police officers to make such applications. The officials are, in England and Wales, a Crown Prosecutor; in Scotland, a procurator fiscal; or in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.

Under paragraph 37 of Schedule 8 of the 2000 Act the police officer having custody of a person detained under a warrant of extended detention must release the person if the grounds upon which the judicial authority authorised his continued detention have ceased to apply. Clause 23(6) amends paragraph 37 of Schedule 8 to involve other people who are in charge of the detained person's case in bringing about the release of a person if it appears to them that the grounds for detention have ceased to apply.

Subsection 5 of Clause 23 seeks to amend the provisions in paragraph 36 of Schedule 8 of the 2000 Act concerning the time limits for warrants of further detention. The intended effects are these:

- Each period of extension granted would have to be for seven days, not less, unless a shorter period had been applied for or there were special circumstances
- The maximum period of extension would be three months rather than 14 days, in steps of seven days at a time
- For all but the first 48 hours, detention would be authorized by a judicial authority

Clause 24 seeks to amend the grounds for authorising extended detention under Schedule 8 of the 2000 Act, whether by review officers, during the first 48 hours of detention, or by the judicial authority after that point. It will enable extensions to be authorised where the review officer or judicial authority is satisfied that further detention is necessary pending the result of an examination or analysis of any relevant evidence or an examination or analysis that may result in relevant evidence being obtained. The *Explanatory Notes* (para.111) comment that such an examination or analysis would include a DNA test.

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[77] *ibid.* c945

As has been noted in the discussion of the background to the *Terrorism Bill* in Part II of this paper, the Government's proposal to further increase the maximum period of detention for terrorist suspects, from the 14 days agreed in 2003 and implemented in 2004 to 3 months, has provoked considerable political controversy. In advancing its case the Government has particularly stressed the views of some of the agencies involved in dealing with terrorism, particularly the police. The Home Secretary's letter to the Opposition spokesmen David Davis MP and Mark Oaten MP on 15 September included an annex setting out arguments put forward by the police and the Crown Prosecution Service (CPS) in support of the change. The letter and the annex are available on the Home Office website. [78] The Home Secretary's subsequent letter to the two spokesmen on 6 October also included a paper which had been prepared by the Metropolitan Police setting out their case for the proposed extension. This letter and the attached paper are also available on the Home Office website.[79]

In his letter to the Opposition home affairs spokesmen on 6 October the Home Secretary enclosed the following statistics on arrests and charges under the *Terrorism Act 2000* and outcomes:

> **Arrests and charges made under the Terrorism Act 2000**
>
> 895 people were arrested under the Terrorism Act 2000, 11 September 2001 until 30 September 2005.
>
> Of these 895:
>
> - 23 were convicted of offences under the Terrorism Act
> - 138 charged under the Act, 62 of these were also charged with offences under other legislation
> - 156 were charged under other legislation. This includes charges for terrorist offences that are already covered in general criminal law such as murder, grievous bodily harm and use firearms or explosives.
> - 63 transferred to Immigration Authorities
> - 20 on bail to return
> - 11 cautioned
> - 1 received a final warning for non-TACT offences
> - 8 dealt with under mental health legislation
> - 1 dealt with under extradition legislation
> - 1 returned to Prison Service custody
> - 1 transferred to PSNI custody
> - 496 released without charge[80]

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[78] http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237936

[79] the Home Secretary's letter is at http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237979

the letter from the Metropolitan Police is at http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/met-letter

[80] These statistics are also available on the Home Office website, and will be updated there, at http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/?version=1

Ministers have noted that the full 14-day detention period under the *Criminal Justice Act 2003*, which came into force on 20 January 2004, is rarely used. The statistical appendix to the Home Secretary's letter to Opposition spokesmen on 6 October 2005 noted that between 20 January 2004, when the 14 day maximum detention came into force, and 4 September 2005, 357 people had been arrested of whom 36 had been held in excess of 7 days. The appendix included the following breakdown of these cases in 2004 and 2005, including the number of detainees who were subsequently charged:[81]

2004

Period	Number held for this period	Charged	Released without charge
7-8 days	3	1	2
8-9 days	0		
9-10 days	11	6	5
10-11 days	1	0	1
11-12 days	0		
12-13 days	0		
13-14 days	9	9	0

2005

Period	Number held for this period	Charged	Released without charge
7-8 days	1	1	0
8-9 days	0		
9-10 days	5	4	1
10-11 days	1	1	0
11-12 days	1	1	0
12-13 days	2	1	1
13-14 days	2	2	0

[81] The Home Secretary's letter is on the Home Office website at: http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237979

This information was also provided in a written answer from the Home Office minister, Hazel Blears, to a question from Mr Khan on 12th October 2005.[82]

The Home Secretary's attempts to achieve cross-party consensus on the extending the maximum period of detention for terrorist suspects appear to have been unsuccessful, as the Government's proposals have been criticised by the Opposition parties as well as by a number of senior judges and civil liberties organisations. The Conservative Party leader, Michael Howard, accused the Government of being muddled in its thinking and said the extension to three months was probably too simplistic and not the most effective way of dealing with the problem. He also said that it was obviously not the duty of a politician simply to say yes to whatever demand came from the police.[83] An article published on the *BBC News* website on 12 October quoted the Liberal Democrats as suggesting that suspects could be held on lesser offences, such as the new offence under the Bill of committing acts "preparatory to terrorism", while investigations were carried out, as an alternative to extending detention without trial. The article quoted the views of a number of other Members of Parliament about the extension as follows:

> Conservative home affairs spokesman David Davis said that he had been briefed by the police on their need for the new powers, but had not been persuaded. He said that he would prefer a change in the law so that suspects could still be questioned even after being charged with an offence.
>
> And John McDonnell, chairman of the Campaign Group of left-wing Labour MPs, said: "This is an unacceptable undermining of civil liberties in the New Labour tradition of knee-jerk legislation."[84]

A joint analysis by a number of organisations, including Liberty, of the Government's anti-terrorism proposals, notes that the three month detention period would be the equivalent of a six month custodial sentence being imposed on a person who had not been charged with any offence.[85] Six months' imprisonment is the current maximum custodial sentence that a magistrates' court can impose. An article in the *Guardian* on 13 October 2005 quoted the Law Society's chief executive, Janet Paraskeva, as saying the Government should provide more resources to the police and security services rather than extend detention to a length of time "tantamount to internment".[86]

A number of commentators have questioned whether the proposed new maximum period of three months detention without charge would be compatible with the European Convention on Human Rights, which was incorporated into UK law by the *Human Rights Act 1998.* Concern has particularly been expressed about the compatibility of a long period of detention without charge with Article 5 of the Convention, which sets out a right to liberty and security. Article 5 is set out in full in an appendix to this paper. The front

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[82] HC Deb Vol 437 c495W 12th October 2005
[83] "Ministers to publish terror plans" *BBC News* 12.10 2005 at http://news.bbc.co.uk/1/hi/uk_politics/4333180.stm
[84] *ibid.*
[85] http://www.statewatch.org/news/2005/sep/protectourrightsbriefing.pdf
[86] " British police powers toughest in Europe – Responses" – *Guardian* 13.10.2005

page of the Bill includes the Home Secretary's statement that in his view the Bill's provisions are compatible with the Convention rights.

The Attorney-General, Lord Goldsmith, has been quoted as saying that he does not believe the Government has made the case for extending the time limit to three months.[87]In his report on the Government's proposals for changes to the laws against terrorism the independent reviewer, Lord Carlile, said that views on the proposed new three month limit on detention without charge had polarised into strong support or stark opposition. He expressed the view that the level of public information about the proposal had been poor and that the problem being tackled had been explained badly.[88]

The section of Lord Carlile's report dealing with the Government's proposals for extending the maximum period of detention without charge, which includes a discussion of the reasons why a longer period might on some occasions be necessary, is reproduced in full in an appendix to this paper.[89] He commented that the proposal of a maximum of three months was founded on "nothing more logical than the suggestion that it seems a reasonable maximum in all the circumstances" and considered that it would be an insufficient maximum period for a very few cases, but that a period of more than 3 months would certainly be unacceptably draconian.[90]

As far as the question for suspects against arbitrary or over-long detention was concerned, Lord Carlile questioned whether what was being proposed in the Bill would be proof to challenge under the *Human Rights Act* given the length of extended detention envisaged.[91] He said he regarded the current clauses as providing too little protection for the suspect, although he was concerned that extended periods of detention should be available for some investigations.[92]

Lord Carlile suggested that the Government should look again at the proposals of the *Privy Counsellor Review Committee into the Anti-Terrorism, Crime and Security Act 2001* (known as the Newton Committee, after its chairman, Lord Newton of Braintree), which reported in December 2003.[93] The Newton committee recommended the introduction of a system of examining magistrates along continental European lines. Lord Carlile felt that a system of security-cleared, designated senior circuit judges, acting as examining judges and judicial authority under the legislation, would "gain sufficient confidence and would be sufficiently robust, to meet all exigencies" and be compatible with human rights legislation.[94]

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[87] 90 days – plans to lock up terror suspects without charge provoke outcry" – *Guardian* 13.10.2005
[88] DEP 05/1221 para.55
[89] *ibid*. paras 55-23
[90] *ibid*. para.62
[91] ibid. para 64
[92] ibid. para.69
[93] HC 100 December 2003
[94] DEP 05/1221 para. 68

D. The *Terrorism Bill 2005-06*: Other provisions

1. "All Premises Warrants"

Paragraph 1 of Schedule 5 to the *Terrorism Act 2000* enables a constable to apply to a justice of the peace for a warrant to enter and search premises for the purposes of a terrorist investigation. At the moment that application and warrant must specify the set of premises to which it relates. In addition, paragraph 11 of Schedule 5 enables a constable to apply to a Circuit judge for a warrant to enter and search premises for "excluded" and "special procedure" material. These terms are defined in paragraph 4 of Schedule 5 and have the same meaning as they have in the *Police and Criminal Evidence Act 1984*. Broadly speaking, the terms cover different types of information which is held in confidence, such as medical information, personal and business records, journalistic material and so on. As with a warrant under paragraph 1, at present a warrant in relation to excluded or special procedure material must relate to specific premises.

Clause 25 of the *Terrorism Bill* seeks to change the position in respect of both paragraph 1 and paragraph 11 of Schedule 5 of the 2000 Act by amending the Schedule to allow "all premises warrants" to be issued in both types of cases, as well as warrants relating to specified premises. "All premises warrants" are warrants authorising the searching not just of named premises but also any premises occupied or controlled by a specified person. The *Explanatory Notes* comment[95] that the provisions of Clause 25 are based on the provisions in sections 113 and 114 of the SOCAP, which amend the *Police and Criminal Evidence Act 1984* to allow all premises warrants to be granted under that Act.

Clause 25 (4) amends paragraph 1(5) of Schedule 5 of the 2000 Act to provide that an all premises warrant may only be granted where it is not reasonably practicable to specify in the application for the warrant all the premises which the person to which the application relates occupies or controls and which might need to be searched.

Clause 26 is designed to enable similar changes to those made in clause 25 to provide for all premises warrants in terrorist investigations in Scotland.

Lord Carlile considered that the proposals in Clauses 25 and 26, which will simplify the law on search warrants in terrorism cases, were proportional and necessary to reasonable operational requirements and the public interests.[96]

2. Search, seizure and forfeiture of terrorist publications

Clause 27 of the Bill is designed to create powers of seizure and forfeiture in relation to terrorist publications within the meaning of clause 2. Schedule 2 sets out the procedure for forfeiture of terrorist publications seized under clause 27 of this Bill. Schedule 2 is closely based on the forfeiture provisions in Schedule 3 to the *Customs and Excise Management Act 1979*.

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[95] *Explanatory Notes* para. 114
[96] DEP 05/1221 para.71

In his report on the Government's proposals for the Bill Lord Carlile made the following comments about this provision:

> There is a degree of concern that this provision may be used more than necessary, and could be seen as a form of censoring of bookshops, and bookstalls in mosques and other places where publications are made available.
>
> The power is necessary; indeed the scheme of the Bill could hardly function without it. Without in any way questioning the excellent job done by lay justices all over the country, in this jurisdiction there may be subtle judgments of law to be made.
>
> I suggest that the jurisdiction should rest in the hands of a professional judge accustomed to the issue of warrants of various kinds. The appropriate level might be district judge (Magistrates' Courts) or equivalent.[97]

3. Power to search vehicles under Schedule 7 to the *Terrorism Act 2000*

Clause 28 of the Bill seeks to extend paragraph 8(1) of Schedule 7 of the *Terrorism Act 2000*, which is concerned with searches of people at ports or in the Northern Ireland border area to determine whether they are or have been concerned in the commission, preparation or instigation of acts of terrorism. The Clause will enable a constable, immigration officer or customs officer (an "examining officer") to search a vehicle at a port which is on a ship or aircraft, or which the examining officer reasonably believes has been or is about to be on a ship or aircraft. Examining officers do not currently have the power to search vehicles in these circumstances, although they do have the power to search vehicles in the Northern Ireland border area.

4. Extension to internal waters of authorisations to stop and search

Section 44 of the *Terrorism Act 2000* enables authorisations to be given for particular police areas or parts of police areas which enable police constables to stop vehicles in the area and search the vehicle, the driver, a passenger in the vehicle and anything on or in the vehicle or carried by the driver or a passenger of the vehicle. Under section 45 of the 2000 Act a constable may seize an article found during a search under section 44. Clause 29 of the Bill seeks to amend section 44 by enabling an authorisation to include internal waters adjacent to any area or place specified under section 44(4) or part of such internal waters. The Clause also seeks to amend sections 44 and 45 to ensure that the definition of "driver" in those sections makes sense in cases where a vehicle is not a car.

In his report on the Government's proposals Lord Carlile noted that much controversy surrounded the use of section 44 of the 2000 Act. He went on:

> In previous reports I have recommended that there be a strong programme of training and comprehension of the use and limits of the section. The Metropolitan Police have taken very seriously the concerns expressed by myself and others.

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[97] DEP 05/1221 paras. 73-75

> Mistakes are still being made. Training programmes are being developed around the country to achieve more effective use of a sometimes important power. The Home Office is scrutinising authorisations more rigorously than used to be the case, and by no means is every authorisation being approved. In some cases the geographical limit of applications is being confined by the Secretary of State. In Scotland section 44 was not used before the G8 Summit in 2005, other powers being regarded as adequate. However, in the immediate aftermath of the 7th July events and those of the 21st July, the section was necessary and well used.
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> In my work as reviewer the illogicality of section 44 powers being available on a road but not on an estuary or river nearby has been the subject of repeated frustration expressed by police officers. I share their view that the proposal in the clause is sensible and improves the law.[98]

5. Investigatory powers of the intelligence services[99]

The United Kingdom has three intelligence and security services: the Secret Intelligence Service (SIS, commonly known as MI6); Government Communications Headquarters (GCHQ); and the Security Service (MI5). The main statutes governing the agencies are:

- the *Security Service Act 1989* (which put MI5 on a statutory basis)
- the *Intelligence Services Act 1994* (which did the same for SIS and GCHQ);
- the *Regulation of Investigatory Powers Act 2000* (RIPA – which updated the law on the interception of communications, and put other intrusive investigatory techniques on a statutory footing).

The *Terrorism Bill 2005-06* makes changes to the issuing of certain types of warrant issued by these services.

a. Amendments to the Intelligence Services Act 1994

Sections 5 and 6 of the 1994 Act deal with the way in which the three services should obtain authorisation for actions such as entering or interfering with property or with wireless telegraphy. Under section 5 they must apply to the Secretary of State for a warrant for such activity.

Under Section 6, warrants can be issued only by the Secretary of State, or in an urgent case (where the Secretary of State has expressly authorised it and endorsed a statement of that fact) by a senior official. Warrants authorised by officials cease to have effect within two working days, unless the Secretary of State personally renews them. Clause 30 of the Bill would grant the Secretary of State the power to nominate specified senior officials who would then be entitled in urgent cases to issue warrants under section 5 without getting express authorisation for each one. However, the kinds of warrants they could issue would be limited to those acts which, had they been done

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[98] *ibid*. paras 77-78

[99] this section contributed by Pat Strickland, Home Affairs Section

abroad, would have been covered by a Secretary of State's general authorisation.[100] In addition, the Secretary of State would have to be informed as soon as practicable after the warrant was issued. Clause 30 would also extend the maximum duration of the warrant from two to five working days.

In his review of the Government's proposals, Lord Carlile commented that, while this did not fall within his usual range of review, it seemed "a sensible and practical change to the law and subject to appropriate controls and limitations".[101]

b. Amendments to RIPA

The main aim of the *RIPA* was to ensure that investigatory powers are used in accordance with human rights law. This followed the case of *Halford v United Kingdom* at the European Court of Human Rights.[102] Alison Halford, formerly Assistant Chief Constable for Merseyside, successfully argued that intercepting calls from her office telephone, as part of gathering evidence against her in a sex discrimination case, violated her right to private and family life under Article 8 of the Convention.

Part 1 of the Act deals with interception of communications. This can be done under a warrant, or in a limited number of other circumstances such as under international mutual assistance agreements. Interception warrants can be issued by the Secretary of State, or in urgent cases by a senior official.

Clause 31 of the Bill amends the time limits for warrants. Under the current rules, new warrants authorised by the Secretary of State are valid for three months. After this, those which are considered necessary for national security reasons or to safeguard the UK's economic wellbeing can be renewed for six months. By contrast, warrants considered necessary for the prevention and detection of serious crime, can be renewed for three months only. Where authorisation is by an official under the emergency procedure, the warrant will last for only five days, after which it may be renewed for three months by the Secretary of State.

Clause 31 would change the initial period for a warrant issued for national security reasons or to safeguard the UK's economic wellbeing, so that in these cases the initial warrant would last for six months, as well as the renewed warrant. The three-month limit remains for warrants necessary to prevent or detect serious crime, as does the five-day limit for warrants authorised by officials. Clause 31 also makes changes to the provisions governing the modification of warrants by officials.

6. Disclosure notices for the purposes of terrorist investigations

Part 2, chapter 1 of the *Serious Organised Crime and Police Act 2005* (SOCAP) sets out arrangements under which the Investigatory Authority dealing with a particular offence

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[100] Under section 7 of the 1994 Act the Secretary of State has a power to issue general authorisations for "necessary" acts done abroad

[101] Lord Carlile of Berriew, *Proposals by her Majesty's Government for changes to the laws against terrorism*, October 2005, paragraph 79

[102] *Halford v the United Kingdom* (1997) European Court of Human Rights (73/1996/692/884)

(the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, or the Lord Advocate) may issue a disclosure notice requiring those on whom the notice is served to provide specific information. Refusal to provide information is an offence, punishable by imprisonment for up to 51 weeks, or a fine. Providing false or misleading information is also an offence, punishable by imprisonment for up to two years, or a fine, or both. At present disclosure notices can only be issued in connection with the investigation of specific offences.

Clause 32 of the Bill seeks to extend the powers of the Investigating Authority to enable the issuing of disclosure notices in terrorist investigations. It will permit a disclosure notice to be given where the Investigating Authority believes that a person has information that relates to a terrorist investigation. The Investigatory Authority will need to have reasonable grounds for believing both that the person to whom the notice is issued has relevant information and that any information provided is likely to be of substantial value to that investigation. Lord Carlile considered that this provision was in the public interest and proportional.[103]

7. Amendment of the definition of "terrorism"

Clause 33 of the Bill is designed to amend the definition of "terrorism", in section 1 of the *Terrorism Act 2000* so that it includes not just, as at present, the use or threat of certain types of action where the use or threat is designed to influence the government, or to intimidate the public or a section of the public, but also the use or threat of those types of action where the use or threat is designed to influence an international governmental organisation. The *Explanatory Notes* set out the Government's reason for introducing this change:

> These amendments are required to eliminate the disparity between definitions of terrorism in UK law and the equivalent definitions in various international Conventions which the UK aims to implement. Examples of international agreements in which the disparity exists are the EU Framework Decision of 13 June 2002 on Combating Terrorism, and the International Convention for the Suppression of Acts of Terrorism. These Conventions allow for actions to be termed as terrorist if, among other tests, the use or threat of action is designed to influence international governmental organisations (such as the United Nations), in addition to State parties' governments. [104]

The clause also amends section 113 of the *Anti-terrorism, Crime and Security Act 2001* (ATCSA) in a similar way.

8. Applications for extended detention of seized cash

Clause 34 of the Bill seeks to amend amends Schedule 1 of the *Anti-terrorism, Crime and Security Act 2001* (ATCSA), which provides for the forfeiture of terrorist cash (that is, cash that is intended to be used for terrorist purposes, cash which consists of is the resources of a proscribed organisation and property that is earmarked as terrorist

[103] ibid. para.81
[104] *Explanatory Notes* para. 152

property). Under paragraph 2 of Schedule 1 of ATCSA an authorised officer may seize any cash if he has reasonable grounds for suspecting that it is terrorist cash. Once it has been seized, paragraph 3 of the Schedule provides that the cash can be detained for 48 hours after which an application must be made to a justice of the peace (or the sheriff in Scotland) to extend the period of detention.

Clause 34 of the Bill amends the current arrangements for applying to extend the period of detention. It would allow hearings to be in private without the affected person being present or even notified, although they could bring a challenge once the order was made.

In his report on the Government's proposals as set out in the Bill, Lord Carlile said he could see sound operational reasons for this provision.[105]

[105] DEP 05/1221 para.83

Appendix I: Proposals by Her Majesty's Government for Changes to the Laws Against Terrorism – Report by the independent reviewer, Lord Carlile of Berriew Q.C. [DEP 05/1221] paragraphs 55-69

55. **Clauses 23 and 24: extension of the period of detention by judicial authority**. This proposal, to allow a maximum detention period of three months before charge, has provoked considerable political controversy. By the time of writing this report in early October 2005 views seem to have polarised into strong support or stark opposition – though in his letter of the 15th September to Mr Davis and Mr Oaten the Home Secretary made it clear that there was room for discussion about this proposal. Unfortunately the level of public information about this proposal has been poor, and the problem being tackled has been explained badly.

56. Currently the police investigate terrorism offences using what one might call traditional detective techniques, amply augmented by the work of the security services and deploying such technical skills as are relevant. Typically these control authorities may obtain tentative evidence of a terrorist cell, and piece by piece build up a case. There may be a huge amount of surveillance involved, and sometimes they have to play a patient waiting game against often extremely counter-surveillance skilled suspects.

57. In serious non-terrorist crime it is occasionally possible for the police to wait for the crime to be committed, and catch the criminals red-handed. This occurred with a major bullion robbery at Heathrow Airport for which the culprits were sentenced in September 2005. That approach is very rarely possible with terrorist crime, because of the potentially dreadful consequences of a terrorist act being brought to fruition. There have been occasions when, because of the nature of the threat, arrests have had to take place at an early stage to avoid the possibility of nervous terrorists acting earlier than might otherwise have been intended.

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

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

· Decryption of computers: this sometimes requires expertise from abroad

· Other code breaking

· Analysis of recorded telephone product from home and abroad, sometimes very large in quantity

· Searches of large numbers of premises and vehicles

· Interviewing of many potential witnesses

· Discussions and cooperation with foreign police and security services where considered reliable

· Analysis of private libraries, offices and personal correspondence

· Translation of manuscript material, some in languages for which quality interpretative services are at a premium

· Giving adequate opportunity for suspects who wish to provide information to the authorities to do so discreetly and in a safe situation

· Obtaining carefully considered and good quality legal advice.

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

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

62. The question then arises as to how much extra time should be permitted, and how it should be controlled. It would be wholly unacceptable for the extra time to be unrestricted, or in any way to be a form of internment. The proposal of a maximum of three months is founded on nothing more logical than the suggestion that it seems a reasonable maximum in all the circumstances. It is true to say that it is the maximum I have heard mentioned in several meetings I have attended. It would probably be an insufficient maximum period for a very few cases, but more than three months would certainly be unacceptably draconian. Almost all cases could be processed well within that period, most in far, far less time. I share the view that as a maximum three months is probably a practicable and sensible option, all other things being equal. I recommend that the proposal for that maximum should be so regarded.

63. Having said that, the question arises as to the protection to be offered to suspects, against arbitrary or over-long detention.

64. Clauses 23 and 24 enlarge the existing judicial scrutiny of applications to extend detention periods. Put simply for the purposes of this report, on the application of at least a police superintendent an application would be placed before a "judicial authority". For this purpose currently that is a district judge (Magistrates' Courts), though the phrase is not exclusive to that. A cadre of district judges with great experience deals with all such

applications now. I believe that they do so carefully and fairly, thoroughly scrutinising what is placed before them. They do an excellent job. Nevertheless the system of law they apply was designed to deal with short periods of detention up to seven days, now extended to fourteen. Inevitably the material they see is likely to be one-sided, and they have only modest opportunity for in-depth scrutiny. Though they can ask questions and do seek further information, they have no role in the inquiry under way and they have no independent advice or counsel before them. The procedure before district judges in my view has characteristics suited to short interference with liberty, and I should regret seeing it extended further. A more searching system is required to reflect the seriousness of the State holding someone in high-security custody without charge for as long as three months. I question whether what is proposed in the Bill would be proof to challenge under the Human Rights Act given the length of extended detention envisaged.

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

66. The Newton Committee said:

> *The merits of using an investigative approach in this specialised context*
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> 224. **Another approach to the problem of confronting the suspect with specific accusations and evidence, without damaging intelligence sources and techniques, would be to make a security-cleared judge responsible for assembling a fair, answerable case, based on a full range of both sensitive and non-sensitive material. This would then be tried in a conventional way by a different judge. In our view this approach could be well suited for use in this limited context.**
>
> 225. Variations on this approach are used in other countries. For example, in France the examining magistrate (*juge d'instruction*) hears witnesses and suspects, orders searches and authorises warrants. The magistrate's duty is to look for both incriminating and exculpating evidence.[106] Both the prosecution and the defence see the case file as the investigation proceeds and may request actions from the judge. If the *juge d'instruction* decides there is a valid case against a certain suspect, he puts the case to a court (presided over by a different judge). The case is then argued on the basis of evidence which the examining magistrate has assembled and which the parties have had the opportunity to contest. There are also hybrid systems. For example, in

[106] *Code de la procedure penale*, art L81.

> Scotland the procurator fiscal has an investigatory role as well as a prosecutorial one.
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> 226. We do not envisage seeking to replicate another system in its entirety, but to use the underlying principles to devise a system that works in the context of the British legal system (just as the Special Immigration Appeals Commission was inspired by, and arguably improved on, a Canadian model).
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> 227. This system could mitigate two problems that arise in this context under the current system:
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> a) the risk that the process of prosecution will lead to the need to disclose sensitive material;
> [*sic.*]

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

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

· That judge to be provided with a full and continuing account of all matters involved in the investigation in question

· The introduction of a security-cleared special advocate, also fully briefed as to the investigation, to make representations on the interests of the detained persons and to advise the judge

· The judge to have the power to require specific investigations to be pursued if reasonably necessary for the proper exercise of his/her jurisdiction

· Suitable opportunity for written and oral defence representations against extended detention, with oral hearings at the discretion of the judge

· Weekly decisions with reasons if extended detention granted

· The keeping of a written record (if necessary protected from disclosure for the purposes of any subsequent trial) of the judge's activities in a case

· Appeal with permission to the High Court.

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

increased by recent appointments. Steps have already been taken to improve their training to meet concerns expressed by me and others.

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

Appendix II: European Convention on Human Rights

Article 5: Right to Liberty and Security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.