



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# **Review of Counter- terrorism Powers**

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**Eighteenth Report of Session 2003-04**





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*Report, together with formal minutes,  
appendices and minutes of evidence*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Lord Campbell of Alloway  
Lord Judd  
Lord Lester of Herne Hill  
Lord Plant of Highfield  
Baroness Prashar

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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

### Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at [www.parliament.uk/commons/selcom/hrhome.htm](http://www.parliament.uk/commons/selcom/hrhome.htm). A list of Reports of the Committee in the present Parliament is at the back of this volume.

### Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Nicolas Besly (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

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## Summary

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In February the Home Secretary published a discussion paper inviting debate on how the Government should strike the balance between security and liberty in the context of the present threat from international terrorism, and responding to the Report of a Committee of Privy Counsellors under the chairmanship of Lord Newton of Braintree on the operation of the Anti-terrorism, Crime and Security Act 2001.

The Joint Committee on Human Rights decided to hold its own inquiry into the human rights issues raised by the Home Office discussion paper. The Committee considers that long term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights. If the threat from international terrorism is to continue for the foreseeable future, the Committee considers that an alternative way must be found to deal with that threat without derogating indefinitely from important human rights obligations.

The public and parliamentary debate about responding to terrorism should take place within a human rights framework. Human rights law both requires the State to act to combat terrorism and at the same time imposes limits on the actions which it can legitimately take. It provides the framework within which the balance between the right to security and the right to liberty must be struck.

In this report the Committee therefore invites the Government to consider ways in which it could increase the independent democratic scrutiny of its claims about the level of the threat from international terrorism so as to enable Parliament to reach a better-informed assessment of whether the measures are strictly required by the exigencies of the situation.

The Committee expresses a number of concerns about the way in which Part 4 the Anti-terrorism, Crime and Security Act 2001 is operating in practice, in particular:

- the risk of the UK being in breach of its obligations under the Convention Against Torture if the Special Immigration Appeals Commission or any other court were to admit evidence which has been obtained by torture;
- the adequacy of the safeguards against injustice in the SIAC process, in light of the fact that one individual was detained without charge for fifteen months before the error in authorising his detention was established;
- the fact that special advocates are appointed by the Attorney General, who has personally represented the Government before the SIAC, and the rigidity of the rule prohibiting any contact between the detainee and the special advocate;
- the discrimination inherent in a measure which targets only non-nationals, and the disproportionate impact of the use of Terrorism Act powers on the Muslim community.

The Committee agrees with the conclusion of the Newton Committee's Report that Part 4 of the Anti-terrorism, Crime and Security Act 2001 should be replaced as a matter of urgency, and has considered a range of possible *alternatives* to Part 4, including whether there is scope for bringing prosecutions for existing criminal offences. It concludes that:

- the absolute ban on the use of intercept evidence is disproportionate to the legitimate aim of protecting intelligence sources and methods and should be relaxed;
- an examining magistrate model would be unlikely to assist with the problem of dealing with sensitive intelligence material within the criminal process, but consideration should be given to greater use of a security-cleared prosecutor with a view to facilitating greater use of material derived from intelligence sources;
- further consideration should be given to other process changes to facilitate prosecution, even if these require some modification of the ordinary criminal process in order to deal with the problem of sensitive intelligence material.

The Committee also considered other possible alternatives to Part 4 of the Anti-terrorism, Crime and Security Act 2001. It concludes that:

- it is not persuaded that a new criminal offence of acts preparatory to terrorism would facilitate prosecutions which are not currently possible;
- treating terrorism as an aggravating factor in sentencing may be an appropriate measure, subject to safeguards including retention of 'beyond reasonable doubt' as the appropriate standard of proof;
- the use of more intense overt surveillance, subject to safeguards, is preferable to indefinite detention because it is less restrictive of liberty;
- the use of civil restriction orders should be considered, accompanied by appropriate procedural safeguards including access to an independent judicial determination and a test of strict necessity.

The Committee also considers the responses of other countries to the threat from international terrorism. It finds that no other country in the world has derogated from its international human rights obligations, and no other country apart from the USA has resorted to indefinite administrative detention. The Committee concludes that the experience of other countries suggests that it must be possible to deal with the threat from terrorism by means of criminal prosecution.

# 1 Report

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## Introduction

1. On 25 February 2004 the Home Secretary published a discussion paper, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*.<sup>1</sup>
2. The discussion paper invites a wide-ranging public debate on how the Government should seek to strike the balance between security on the one hand and liberty on the other in the present context of a heightened threat from international terrorism.<sup>2</sup> It also sets out<sup>3</sup> the Government's response to the recommendations made by the Privy Counsellor Review Committee's Report on the Anti-Terrorism, Crime and Security Act 2001 ("the Newton Report").<sup>4</sup>
3. The Home Secretary has indicated that he would very much welcome the JCHR's thoughts on the ideas in his discussion paper, and expressed the hope that he would be able to engage with the Committee on the matters raised by the discussion paper, particularly in relation to Part 4 of the Anti-terrorism, Crime and Security Act 2001 ("ATCSA 2001").<sup>5</sup>
4. We strongly agree with the central conclusion of the Newton Report, that the provisions for the indefinite detention of persons suspected of terrorism under Part 4 ATCSA 2001 should be replaced with new legislation which would deal with all terrorism, whatever its origin or the nationality of its suspected perpetrators, and which would not require derogation from the ECHR.<sup>6</sup> Our reason for this view is simple. In our first report on what was then the Anti-terrorism, Crime and Security Bill we said—

As general background to our considerations, we have borne in mind that any novel powers which are proposed should be clearly directed to words combatting a novel threat, and should not be used to introduce powers for more wide-ranging purposes which would not have received parliamentary support but for current concerns about terrorism and fear of attack. The international and national law of human rights, and in particular the provisions of the Human Rights Act 1998, for which we were appointed as the parliamentary guardians, represent core values of a democratic society such as individual autonomy, the rule of law, and the right to dissent, and these must not lightly be compromised or cast away. It is precisely those values which terrorists seek to repudiate and undermine.

We have had to consider the Anti-terrorism, Crime and Security Bill at great speed. We are very conscious of the circumstances which gave birth to it, and the threat that many citizens of this country still feel to their safety after the terrible events of 11 September. However, Parliament should take a long view, and resist the temptation to

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1 Cm 6147, hereafter referred to as "the Discussion Paper".

2 Part One.

3 Part Two.

4 Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, HC 100, 2003–04, published on 18 December 2003.

5 Letter from Rt Hon David Blunkett MP, Secretary of State for Home Affairs, to the Chair, 6 February 2004 (Sixth Report, Session 2003–04, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuation of Part 4*, HL Paper 38, HC 381, Appendix 2).

6 The Newton Report, para 203.

grant powers to governments which compromise the rights and liberties of individuals. The situations which may appear to justify the granting of such powers are temporary—the loss of freedom is often permanent.

The Director-General of the Security Service, Eliza Manningham-Buller, recently stated:

I see no prospect of a significant reduction in the threat posed to the UK and its interests from international terrorism over the next five years, and I fear for a considerable number of years thereafter.<sup>7</sup>

Derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary. According to the Government and the Security Service, the UK now faces a near-permanent emergency.

5. In our view, this makes it absolutely imperative that an alternative way be found to deal with the threat that exists without derogating indefinitely from the most basic human rights obligations such as the right to liberty. Long-term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights on which the effective protection of all rights depends. They undermine the State's commitment to human rights and the rule of law, and diminish the State's standing in the international community. With imagination and sufficient commitment to the protection of human rights, alternative ways of dealing with the threat from international terrorism can be found which do not involve the UK open-endedly derogating from its human rights obligations.

6. We therefore decided to respond to the Home Secretary's invitation by publishing our own report on the human rights issues raised by the discussion paper. On 10 June 2004 we announced that we would be holding an inquiry into the Home Office review. We have taken oral evidence from the DPP, Lord Carlile of Berriew, Lord Newton of Braintree and Baroness Hayman, and received a number of written representations. We have also commissioned a comparative survey of measures taken in other countries in response to the heightened level of threat from international terrorism, and held an informal discussion with Roger Errera, Conseiller d'Etat, about some of the measures adopted in France.

## **The Human Rights Framework**

7. Political debate about the fight against terrorism is often conducted in terms of a choice between security and public safety on the one hand and human rights and the rule of law on the other. This is a false dichotomy. As the Home Secretary noted in the introduction to his discussion paper, security is itself a fundamental right, and the State is under a positive obligation under human rights law to protect it.

8. The starting point in any debate about counter-terrorism powers is therefore the State's positive obligation to take the measures necessary to protect everyone within its jurisdiction against terrorist acts. To the extent that current laws are inadequate to provide this protection against the level of threat which actually exists, the State is therefore

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<sup>7</sup> Cited by the Home Secretary in his Foreword to the Discussion Paper.

required by human rights law to enact such additional laws as can be shown to be required to protect against the current threat.<sup>8</sup>

9. The same human rights framework which requires States to act to combat terrorism also imposes certain basic requirements that all counter-terrorism measures must satisfy: for example, they must not be arbitrary, they must not involve torture or using the fruits of torture, they must respect peremptory norms such as the prohibition of discrimination on racial grounds, they must respect the basic principles of a fair trial, and they must be subject to proper judicial supervision.

10. We think it is important that both public and parliamentary debate about responding to terrorism take place within the relevant human rights law framework which both requires the State to act to combat terrorism and at the same time imposes some limits on the actions which it can legitimately take. We hope that the current consultation is treated as an opportunity to move public debate beyond the assumption that there is a choice between the necessity of security on the one hand and the luxury of human rights and the rule of law on the other.

11. Some useful guidance is now available for States on how to combat terrorism with effective measures at the same time as protecting basic human rights. The Council of Europe's *Guidelines on Human Rights and the Fight Against Terrorism*, for example,<sup>9</sup> provide a useful framework within which the debate about counter-terrorism measures should be conducted. They proceed from the premise that States are under a human rights obligation to take measures to protect the fundamental rights of everyone in their jurisdiction against terrorist acts, and that this justifies States in their fight against terrorism, but they recognise that when taking such measures States remain under a legal obligation to respect basic human rights and to act consistently with their international obligations in this respect. They reiterate the need to avoid arbitrariness and the absolute prohibition of torture. They make clear that all human rights restrictions must be defined as precisely as possible and must be necessary and proportionate to the aim pursued, and they remind States of the minimum standards for measures which interfere with such fundamentals as privacy and fair trial rights.

12. The need to locate the debate about counter-terrorism measures within a human rights framework is now widely acknowledged. On 20 January 2003 the UN Security Council in Resolution 1456, stated—

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.<sup>10</sup>

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8 For example, the first sentence of Article 2(1) ECHR states that "Everyone's right to life shall be protected by law." This has been interpreted by the European Court of Human Rights as imposing a positive obligation on States to take appropriate steps to safeguard the lives of those within its jurisdiction, including by the adoption of laws protecting life against the acts of third parties.

9 Adopted by the Committee of Ministers on 11 July 2002 at the 804<sup>th</sup> meeting of the Ministers' Deputies. Further useful guidance on the relevant international human rights standards is contained in the Report by the International Bar Association's Task Force on International Terrorism, *International Terrorism: Legal Challenges and Responses* (2003), esp. chapter 4, "Upholding Human Rights and Civil Liberties in the Fight against Terrorism."

10 Resolution 1456 (2003), para. 6.

13. The UN Human Rights Committee, which monitors states' compliance with the ICCPR, often states in its concluding observations on states' compliance reports that "The State Party must ensure that measures taken under the international campaign against terrorism are fully in conformity with the Covenant."<sup>11</sup>

14. International human rights treaties allow for derogation from some of their provisions during times of war or other public emergency: see ECHR Article 15 and ICCPR Article 4. The UK has derogated from both Article 5 ECHR and Article 9 ICCPR in respect of Part 4 ATCSA 2001. This is not, however, a power to suspend the applicable human rights standards indefinitely. It permits a departure from some of the usual standards to the extent that such departure is "strictly required by the exigencies of the situation".

### Evidence of the level of threat from international terrorism

15. In our various reports on the ATCSA 2001 we have consistently made clear that we have never been presented with the evidence which would enable us to be satisfied of the existence of a public emergency threatening the life of the nation, but have proceeded on the basis that there might be such evidence.<sup>12</sup>

16. The Government in its discussion paper correctly states that the starting point for any discussion of appropriate counter-terrorism measures must be a realistic appraisal of the threat posed by international terrorism.<sup>13</sup> The paper then sets out the Government's appraisal of the threat.<sup>14</sup> It gives examples of the terrorist attacks which have taken place since 2001 and reports the view of the Director General of the Security Service, Eliza Manningham-Buller, that "the UK and our interests overseas are under a high level of threat from international terrorism". It quotes from a taped message of Osama Bin Laden, and records Al Qaeda's methodology in previous terrorist attacks and its interest in acquiring weapons of mass destruction. It concludes that the threat is global and continuing, and that the threat is particularly high against the UK and UK interests overseas, because of the evidence and information that terrorist cells are active in the UK. The Home Secretary in his Foreword also quotes the Director General's view that there is no prospect of that threat significantly diminishing in the near future.

17. Both SIAC and the Court of Appeal<sup>15</sup> have accepted the Government's argument that the evidence demonstrates the existence of a "public emergency threatening the life of the nation" for the purposes of Article 15 ECHR.<sup>16</sup>

18. Even assuming that a public emergency exists for the purposes of Article 15 ECHR, the strength of the evidence about the nature and level of the threat from international terrorism remains important to any proper scrutiny of whether the measures adopted in

11 See e.g. *Concluding Observations: Sweden*, CCPR/CO/74/SWE (24/04/2002), para. 12.

12 Second Report of Session 2001–02, *Anti-Terrorism, Crime and Security Bill*, HL Paper 37, HC 372, para 30; Fifth Report of Session 2002–03, *Continuance in Force of Sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001*, HL Paper 59, HC 462, para 20; Sixth Report of Session 2003–04, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, HL Paper 38, HC 381, para 19.

13 Cm 6147, Part One, para 5.

14 *Ibid*, paras 5–16.

15 *A, X, Y and others v Secretary of State for the Home Department* [2002] EWCA Civ 1502.

16 The issue will be decided by the House of Lords, which is due to hear the detainees' challenge to the lawfulness of the derogation from Article 5 in October 2004; and thereafter probably by the European Court of Human Rights.

response to the emergency are “strictly required by the exigencies of the situation”, which is the other requirement imposed by Article 15 ECHR. The nature and degree of the threat provides the justification for the particular measures being considered. The proportionality of the powers in Part 4 ATCSA 2001, or of any alternative measures, can therefore only be properly assessed in the light of a proper appraisal of the nature and level of the threat.<sup>17</sup> Before we can sensibly consider proportionality, or advise Parliament about the justifiability of the measures in human rights terms, we must first be satisfied that we are in a position to make a realistic appraisal for ourselves of the degree of the threat posed by international terrorism. We have therefore asked ourselves whether we can make such an appraisal on the basis of the material presented in the discussion paper.<sup>18</sup> On the evidence which is publicly available, there can be no doubt about the *nature* of the threat: the record of Al Qaeda, in terms of methodology of attack, speaks for itself and its ambitions are also a matter of public record. The Security Service website currently states—

The threat from international terrorism remains real and serious. Usama bin Laden has in several statements publicly named Britain and British interests as a target, and encouraged attacks to be carried out against them. In March 2004, the events in Madrid demonstrated the capability of an Al Qaida affiliated terrorist group to carry out an attack without warning against a civilian target in Western Europe. Additionally, the security situation in Saudi Arabia continues to deteriorate, shown by the frequent terrorist attacks targeting Western interests. Worldwide, much has been done since 11 September 2001 to thwart attacks and to damage terrorists' capability to conduct terrorist operations, but no country is immune. Al Qaida cells and supporters of affiliated groups are known to be active in the UK. A terrorist threat to the UK may also come from overseas. It remains the Government's policy to issue warnings when the public can take action in response to a specific or credible terrorist threat. There are no such warnings currently in force. However, given the threat picture, members of the public should remain alert to the danger and report any suspicious activity to the police on the Anti-terrorist hotline: 0800 789 321. Despite the high level of threat from international terrorism, there has been no international terrorist attack on UK soil since 1994. There have, of course, been attacks on UK interests overseas, the most recent in Istanbul in November 2003.<sup>19</sup>

19. This kind of information gives some general indication of the changing levels of threat, but still seems to us insufficient for Parliament to make an assessment of the necessity or proportionality of specific measures designed to deal with an emergency when it is asked to renew them. If, as the Director General of the Security Service has indicated, the threat is likely to remain indefinitely,<sup>20</sup> then we consider that democratic legitimacy demands some

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17 As Baroness Hayman put it in oral evidence, when Parliament is asked to form a judgment about proportionality, “a lot of this flows from how strong the emergency is”: Q 66.

18 The Newton Report did not enter into this question, but proceeded on the assumption that the threat was such as to require special measures: “We took the view that it would be prudent to assume that the terrorist threat is of a nature that may warrant special legislation and that it is likely to be with us for a number of years to come”: Lord Newton, HL Deb, 4 March 2004 col. 784.

19 [www.mi5.gov.uk](http://www.mi5.gov.uk)

20 At the joint meeting of the Defence and Home Affairs Committees on 2 March 2004 (HC 417-i), this point was made to the Home Secretary by Mr. Peter Viggers MP (Q58), who asked if the nature of the counter-terrorism powers placed any additional responsibility on the Home Secretary to disclose the evidence on which his assessment was based. The Home Secretary replied to the effect that the threat was self-evident from information already in the public domain.

independent confirmation that the emergency remains at the level which justified unusual measures.

20. We recognise that there are genuine and legitimate reasons for keeping the disclosure of intelligence material, or intelligence-based material, to the minimum necessary in a democratic society. Given the importance of being able to appraise the level of the threat from international terrorism in order properly to assess the proportionality of the Part 4 measures and the possible alternatives to them, we think it is necessary to explore ways in which the Government could present for public<sup>21</sup> and/or parliamentary scrutiny more of the material on which its assessment of the threat from international terrorism is based, without prejudicing legitimate concerns about revealing intelligence sources. We also consider this to be an issue of the democratic legitimacy of counter-terrorism laws, given the existence of public concerns about both the reliability of intelligence reports and the use to which they are put.

21. We therefore invite the Government to give careful consideration to ways in which it could increase the independent democratic scrutiny of its claims about the level of the threat from international terrorism. We raise two questions for the Government to consider.

22. First, we ask whether more could not be done to provide both Parliament and the public with more of the gist of the intelligence on which the Government's assessment of the threat is based, without prejudicing legitimate security interests. We suspect that what has been described in another context as "protective anxiety"<sup>22</sup> pervades the culture of the intelligence services and prevents the disclosure of information which does not in reality pose any threat of harm to intelligence sources or working methods.

23. Second, we encourage the Government to give careful consideration to whether there is a role for the Intelligence and Security Committee to scrutinise the material on which the Government's assertions about the level of the threat are based. That Committee has a statutorily recognised role in relation to sensitive intelligence material and well-developed procedures for dealing with the protection of such information where the need to do so is made out.<sup>23</sup> In its annual reports, the ISC does include a section on "The Threat". This does not, however, specifically address the question of whether specific intelligence continues to identify an emergency threatening the life of the nation, or whether the intelligence supports the case for a continuation of measures addressed to the exigencies of a specific situation. Both Lord Newton and Baroness Hayman thought that it would be helpful for Parliament to have the benefit of the view of that Committee when deciding on whether particular measures are a proportionate response to the emergency in question.<sup>24</sup> This

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21 JUSTICE, in its written evidence (at para. 9) draws attention to the problem of lack of public and civil society participation: "the ability of civil society groups such as JUSTICE to assess either the necessity or proportionality of the government's counter-terrorism measures following September 11 is severely limited by the fact that much of the evidence used by the government to justify its decision to derogate cannot be disclosed for reasons of national security. Although we accept the government's claim (upheld by SIAC and the Court of Appeal) that disclosure of such material is not in the public interest, government secrecy remains a significant obstacle to informed public debate on counter-terrorism powers."

22 The phrase is Lord Carlile's, describing what in his view is the over-cautious attitude of the intelligence services towards relaxing the absolute ban on the use in court of intercept evidence: see Lord Carlile of Berriew QC, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003* ('the Carlile Review 2003'), at para. 82.

23 Intelligence Services Act 1994 s.10(4) and Schedule 3.

24 Q 61

would introduce, for the first time, an important element of independent democratic scrutiny by enabling that Committee to reach its own judgment as to whether the intelligence material which underlies the Government's threat assessment is sufficient to support a request to Parliament to renew emergency provisions, and to report to Parliament thereon to inform Parliament's own debate about the proportionality and necessity of the measures adopted to respond to the threat.

### The working of Part 4 ATCSA 2001 in practice

24. The discussion paper gives an account of the working of Part 4 ATCSA 2001 in practice.<sup>25</sup> Lord Carlile, working within his remit of reviewing the operation of the provisions in Part 4 on the premise that they are necessary, concluded that the present system under Part 4 ATCSA 2001 is both “workable and working reasonably well”.<sup>26</sup>

25. We have expressed concerns about the way in which Part 4 operates in practice in previous reports.<sup>27</sup> We remain concerned about a number of aspects of the operation of Part 4.

### Admissibility of torture evidence

26. In its generic determination, SIAC indicated that evidence obtained as a result of torture is admissible in SIAC proceedings, because they are not criminal proceedings: the fact that it has been obtained by that means goes to its weight not its admissibility.<sup>28</sup>

27. In a reply to a question from Lord Judd, Baroness Scotland confirmed that the Government's policy was that where national security is at stake it is the Government's duty to take all information available to it into account.<sup>29</sup> The Carlile Report notes that the authorities are working closely with foreign intelligence and police agencies, including the US.<sup>30</sup>

28. Article 15 of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, which came into force in 1987 and which the UK ratified, without any reservations, on 8 December 1988, provides—

15. Each State party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

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25 Cm 6147, Part One, paras 21–41.

26 The Carlile Review 2003, op cit., para. 123.

27 Fifth Report, Session 2002–03, *Continuance in Force of Sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001*, op cit., and Sixth Report, Session 2003–04, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, op cit.

28 *Ajouaou and A, B, C and D v Secretary of State for the Home Department*, 29 October 2003, paras 81 and 84 (Ouseley J.). For example, Amnesty International has expressed its concern that the possible use of evidence obtained under torture, including torture of a third party, is contrary to international human rights law: see evidence at Appendix 3, paras 15–18. See also Liberty *Urgent briefing: Anti-terrorism debates* (February 2004) at para. 8; Medical Foundation for the Care of Victims of Torture, Appendix 7, para.1.

29 Baroness Scotland to Lord Judd, HL Deb., 26 April 2004, c WA 71.

30 The Carlile Review 2003, para. 43.

The Council of Europe’s Guidelines on human rights and the fight against terrorism contain an important reminder of the absolute prohibition of torture—

The use of torture or inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.<sup>31</sup>

In his oral evidence to us, Lord Carlile sought to draw a distinction between “evidence” and “information” in this context. He gave an example—

Let us suppose that an interrogation takes place in some unpleasant place in which a person is tortured and, as a result of that, provides information that in Birmingham there is an al-Qaeda cell which is preparing a bomb which will go off at Villa Park on a Saturday afternoon, killing thousands of people. Acting on that information which is passed to British intelligence, the police go to a house in Birmingham and they find a bomb or bomb-making equipment which could be used to carry out that shocking plot and, acting on that information, they arrest a large number of people and bring a case to the court. Now, one is left with obvious questions arising from that set of circumstances.

He went on to say—

... we should adhere to our treaty obligations and I would be the first to say that I feel very uncomfortable about evidence being used if it has been obtained by torture, but is it reasonable to say that information which has been obtained which leads to evidence should never be used? ... The general principle must be that you never act on evidence obtained from torture, the general principle, but there may be circumstances in which one would say, ‘Well, just a moment’.<sup>32</sup>

Lord Carlile said that his understanding was that nothing obtained by torture had been used as evidence against any of the detainees, but he “could not say for certain that no evidence obtained as a result of torture has been used.”<sup>33</sup>

**29. However, the absolute nature of the prohibition of torture is a well established part of customary international law. The UK’s obligation under the Convention Against Torture, to ensure that evidence obtained as a result of torture is not admissible in any legal proceedings is unequivocal. This is not a question of a general principle subject to justifiable exceptions. There is a significant risk of the UK being in breach of its international human rights obligations if SIAC or any other court were to admit evidence which has been obtained by torture.**

### ***The adequacy of the safeguards against injustice***

30. Lord Carlile was given access to the intelligence material available to the Home Secretary and assessed for himself on the basis of that material whether the statutory

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31 Guidelines, op cit., Article IV.

32 QQ 13 and 17.

33 Q 14.

criteria for certification were satisfied.<sup>34</sup> He concluded that the Secretary of State has certified persons as international terrorists only in appropriate cases. In oral evidence to us, Lord Carlile confirmed that he was confident that each of the individuals detained poses a real threat to the safety of the public and therefore should not be at liberty.<sup>35</sup>

31. In one case, however, SIAC has quashed the certificate of one of the detainees, on the basis that “the assessments placed before us and the respondent are not reliable and that reasonable suspicion is not established”.<sup>36</sup> In his oral evidence, Lord Carlile said that this did not cause him to reassess the reliability of the intelligence material on which he made his earlier assessment of the quality of the certifications.<sup>37</sup> Both Lord Carlile and the Court of Appeal, which upheld SIAC’s quashing of the certificate, say that the quashing of the certificate in M’s case shows that the system of independent safeguards is working well.

**32. We are concerned by the fact that an individual can be wrongly detained without charge for some fifteen months before the error in authorising such detention is established. We agree with the Newton Report that the provisions of Part 4 ATCSA 2001 should be replaced as a matter of urgency by measures which do not include indefinite administrative detention.**

### *Indefinite detention and mental health*

33. We have received a number of representations raising concerns about the impact of indefinite detention on the mental health of detainees, and the adequacy of review mechanisms where a person detained under Part 4 ATCSA 2001 is transferred to hospital under the Mental Health Act 1983.

34. The British Psychological Society<sup>38</sup> has expressed its concern that serious harm is being done to the mental well-being of ATCSA detainees, mainly because of the psychological impact of indefinite detention without charge or trial and without being informed of the evidence against them, or even being subjected to interrogation or questioning.<sup>39</sup> It is particularly concerned about the impact on vulnerable groups such as the young, those who have previously experienced torture and detention in their country of origins, and those with existing mental health problems or physical or learning disabilities.<sup>40</sup>

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34 The Carlile Review 2003, para. 36.

35 Q 1.

36 *M v Secretary of State for the Home Department*. The Court of Appeal dismissed the Home Secretary’s appeal: [2004] EWCA Civ 324, [2004] HRLR 22 (18 March 2004). The quotation in the text from the SIAC judgment is set out at para. 28 of the Court of Appeal’s judgment.

37 Q 2. Lord Carlile understood the rationale behind the decision in *M* to be that M was a person who posed a terrorist threat, but was a member of a Libyan terrorist organisation not linked to Al Qaida and therefore outside the scope of the derogation. In fact, SIAC did not doubt that the Secretary of State was entitled to *suspect* that M was a terrorist within the meaning of the 2001 Act, but found that this view was not *reasonable* because “too often assessments have been based on material which does not on analysis support them.”

38 Appendix 5.

39 It appears that M, for example, was never interviewed during his fifteen months of detention.

40 Similar concerns have been expressed by Human Rights Watch: *Neither Just nor Effective: Indefinite Detention without Trial in the United Kingdom under Part 4 of the Anti-terrorism, Crime and Security Act 2001*, Human Rights Watch Briefing Paper (24 June 2004), pp. 14–16; by Amnesty International, Appendix 3, at para. 13, and by the Medical Foundation for the Care of Victims of Torture, Appendix 7.

35. The Mental Health Act Commission<sup>41</sup> has also raised its concern that, where an ATCSA detainee is transferred to hospital under the Mental Health Act 1983, the review mechanisms of the Mental Health Review Tribunal and SIAC are inadequate because they do not provide an opportunity to make a fair challenge to decisions over the appropriate level of security provision.

36. We note that there has been cause for serious concern over the mental health of two of the detainees. One has been transferred to Broadmoor and one has been released on bail, under conditions amounting to house arrest, because of concerns about his mental health. We also note that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, in its report on its visit to the ATCSA detainees in February 2002, found that the indefinite nature of their detention, and the belief that they had no means to contest the broad accusations made against them, were a source of considerable distress to the detainees.<sup>42</sup>

**37. We are concerned about the psychological impact of indefinite detention without charge or trial, and about the adequacy of the mechanisms for reviewing the Secretary of State’s decision that a detainee transferred to hospital should be detained in a high security hospital such as Broadmoor. Both of these considerations in our view increase the urgency of replacing Part 4 with a more acceptable alternative.**

### *The special advocate system*

38. Lord Carlile concluded that the effectiveness of the special advocates in the SIAC process had been “significant”,<sup>43</sup> and that “the special advocate system works reasonably well to achieve its purpose of assisting SIAC to reach decisions correct in fact and law.”<sup>44</sup>

39. There are concerns about the fairness of the special advocate system, however. The fact that the detainees’ special advocates are appointed by the Attorney General, who himself has personally represented the Secretary of State before SIAC, in our view, gives rise to legitimate concerns about the appearance of fairness of the process by which the detainee’s interests are represented in closed hearings.<sup>45</sup>

40. The rule that there can be no contact whatsoever between the detainee and the special advocate as soon as the advocate sees the closed material also means that there is little meaningful contact between the detainee and the representative of their interests in the closed proceedings.<sup>46</sup>

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41 See evidence at Appendix 2.

42 Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 21 February 2002 (12 February 2003), CPT/Inf (2003) 18 at para. 25. In March 2004, a delegation of the CPT carried out a six day visit to the UK, focusing on the ATCSA detainees. The Report in respect of the latest visit is not yet available.

43 *Ibid.*, para. 69.

44 *Ibid.*, para. 85.

45 Lord Carlile in his evidence to us considered this to be a difficult question, but ultimately regarded it as “part of our political tradition”: QQ 9 and 10.

46 See The Carlile Review 2003 at para.81. Our informal seminar with M. Errera suggested that there are no equivalent restrictions on the right to counsel in France.

41. We consider it a significant problem that the special advocate for the detainee is appointed by the Attorney General, who not only represents a party to the proceedings before SIAC, but is the only other legal representative present during the closed hearings, in the absence of the detainee or their legal representative. We also consider that there is a strong case for considering the scope for relaxing the rigid rule that prohibits any contact between the detainee and their special advocate once the advocate has seen the closed material.

### *Discrimination*

42. The discussion paper rejects the Newton Report's recommendation that new legislation replacing Part 4 ATCSA 2001 should apply equally to all nationalities including British citizens. It states the Government's belief that it is defensible to distinguish between foreign nationals and UK nationals because of their different rights and responsibilities.<sup>47</sup>

43. We have consistently expressed our concern that the provisions of Part 4 ATCSA unjustifiably discriminate on grounds of nationality and are therefore in breach of Article 14 ECHR. Along with Lord Newton,<sup>48</sup> we find it extraordinary that the discussion paper asserts that seeking the same power to detain British citizens would be "a very grave step" and that "such draconian powers would be difficult to justify."

44. The interests at stake for a foreign national and a UK national are the same: their fundamental right to liberty under Article 5 ECHR and related procedural rights. Article 1 of the ECHR requires States to secure the Convention rights *to everyone within their jurisdiction*. Article 14 requires the enjoyment of Convention rights to be secured without discrimination on the ground of nationality. The Government's explanation in its discussion paper of its reluctance to seek the same powers in relation to UK nationals appears to suggest that it regards the liberty interests of foreign nationals as less worthy of protection than exactly the same interests of UK nationals, which is impermissible under the Convention.

45. We note the Report of the Committee on the Elimination of Racial Discrimination, in its Concluding Observations on the UK, which states—

17. The Committee is deeply concerned about provisions of the Anti-Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non-UK nationals who are suspected of terrorism-related activities.

While acknowledging the State Party's national security concerns, the Committee recommends that the State Party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, it draws the State Party's attention to the Committee's Statement of 8 March 2002 in which it underlines the obligation of States to 'ensure that measures taken in the struggle against terrorism

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47 Cm 6147, op cit., Part One, para. 36.

48 Q 60.

do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin'.<sup>49</sup>

46. We also note that there is mounting evidence that the powers under the Terrorism Act are being used disproportionately against members of the Muslim community in the UK. According to the Metropolitan Police Service data, the stop and search rates for Asian people in London increased by 41% between 2001 and 2002, while for white people it increased by only 8% over the same period.<sup>50</sup> We are concerned that the strikingly disproportionate impact of the Terrorism Act powers on the Muslim community indicates unlawful use of racial profiling in the exercise of these powers, contrary to basic norms prohibiting discrimination on grounds of race or religion.<sup>51</sup>

47. In light of the concerns expressed by the Committee on the Elimination of Racial Discrimination, and the concerns about racial profiling in the exercise of stop and search powers, we remain concerned about the discriminatory impact of the measures which have been taken to combat terrorism. **We agree with one of the central criticisms made by the Newton Report, that the UK's response to the threat from international terrorism should not be confined to measures which target foreign nationals, but should consist of measures which apply equally to nationals and non-nationals.**

## Alternatives to Part 4 ATCSA 2001

48. The discussion paper calls for a debate about whether there are any alternative measures to Part 4 ATCSA 2001 which would be sufficient to meet the threat from international terrorism, and states the Government's willingness to consider such alternatives.<sup>52</sup>

49. The Newton Report strongly recommended the replacement of Part 4 powers with new legislation which would deal with all terrorism, whatever its origin or the nationality of its suspected perpetrators, and which would not require derogation from the ECHR.<sup>53</sup> It also set out a number of alternative approaches which, it suggested, might provide a more acceptable and sustainable approach to meeting the threat without having to derogate from the ECHR or having to discriminate on grounds of nationality.<sup>54</sup>

50. In its discussion paper the Government dismisses the alternatives suggested by the Newton Report with very little, if any, explanation as to why they do not provide a workable solution. Nevertheless, it indicates that certain ideas about criminal offences and the criminal process merit further discussion.<sup>55</sup>

51. The proper exploration of possible alternatives is extremely important in any proper assessment of the proportionality of the Part 4 measures. We have considered carefully

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49 CERD/C/63/CO/11 (18 August 2003), para. 17. See also Human Rights Watch Briefing, *op cit.*

50 Metropolitan Police Authority 2004, Report of the MPA Scrutiny on MPS Stop and Search Practice.

51 See submission from the Commission for Racial Equality, Appendix 1. See also Liberty, *The Impact of Anti Terrorism powers on the British Muslim population* (June 2004) and Human Rights Watch Briefing, *op cit.*

52 Cm 6147, *op cit.*, Part One, para 44.

53 The Newton Report, para 203.

54 *Ibid.*, paras 205–257.

55 Cm 6147, *op cit.*, Part One, para. 47.

whether any of the possible alternatives raised by the Newton Report, or any combination of them, might be viable alternatives which would enable the Government to achieve its objective of protecting the population against terrorist acts without derogating from its obligations under the ECHR. It is important, however, to be clear that these possible other measures should be considered as *alternatives* to the Part 4 powers, not as supplementary to them.

### ***Prosecution for Existing Criminal Offences***

52. The Newton Report recommends greater use of conventional criminal prosecution under the existing range of terrorism-related offences, including those under the Terrorism Act 2000. The Government accepts in its discussion paper that there is already a wide range of criminal and terrorist-related offences that can be used to bring prosecutions.<sup>56</sup> But, as the Newton Committee Report observes, the obstacle to bringing such prosecutions is that the evidence on which suspicion of involvement in international terrorism is based is usually intelligence material which would either be inadmissible as evidence in court or is the sort of material that the authorities do not wish to make available in open court because of the possible prejudice to their sources or methods.<sup>57</sup>

53. We took evidence from the Director of Public Prosecutions as to whether there is greater scope for using the normal criminal justice system by bringing prosecutions for existing criminal offences, including those under existing anti-terrorism legislation.

### ***Relaxation of ban on use of intercept material***

54. The Newton Committee Report recommended a relaxation of the statutory ban on the use of intercepted communications in court<sup>58</sup> in order to make it possible to prosecute in more cases.<sup>59</sup>

55. We have found there to be overwhelming support for this proposal. The recommendation was made as long ago as 1996 by Lord Lloyd in his review of terrorism legislation,<sup>60</sup> and again during the debates on the Regulation of Investigatory Powers Act 2000. Lord Carlile unequivocally supports the proposal.<sup>61</sup> In his oral evidence to us he described the absolute ban as “a nonsense”,<sup>62</sup> and he indicated that both the police and MI5 are in favour of relaxing the ban. The UK is the only country in the world, apart from Ireland, to have an absolute ban on the use of such material. Lord Newton told us in evidence that there was not a single member of his Committee who was not of the view that it was sensible to relax this ban.<sup>63</sup> As he pointed out, it does not follow from relaxing the ban that the prosecution will be forced to disclose material which might have damaging effects for intelligence sources or methods. The use of such evidence would also be subject

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56 Cm 6147, op cit., Part Two, para. 32.

57 The Newton Report, para 207.

58 Under s. 17 of the Regulation of Investigatory Powers Act 2000.

59 The Newton Report, paras 208–215.

60 *Inquiry into Legislation against Terrorism* (1996), Chapter 7.

61 Home Affairs Select Committee, Minutes of Evidence 11 March 2003.

62 Q 22.

63 Q 32.

to the usual safeguard of the judicial discretion to exclude under s. 78 of the Police and Criminal Evidence Act 1984.

**56. We conclude that the case for relaxing the absolute ban on the use of intercept evidence is overwhelming. It is in our view a disproportionate and unsophisticated response to the legitimate aim of protecting intelligence sources and methods. We also suspect it to be symptomatic of an over-protective approach to information which originates from intelligence material. More tailored and precise ways of protecting sources and methods should be developed which do not depend on blanket prohibitions. This over-protective attitude appears to be one of the most significant obstacles to using the criminal law against suspected terrorists.**

### *Use of a more inquisitorial approach*

57. The Newton Committee Report suggested that a more inquisitorial approach could be well suited for use in this limited context.<sup>64</sup> This would involve, for example, a security cleared judge being responsible for investigating the case, based on all the material available including the intelligence material. The case which the investigating judge assembles would then be presented for trial before an ordinary court in the usual way. Alternatively, the prosecution could be given a more pro-active, investigation-led role in preparing a case for prosecution. Despite its implicit rejection in the Discussion Paper, in parliamentary debates the Government has not expressly ruled this out as an option worth exploring.

58. We have been greatly assisted in exploring this possibility by Professor Roger Errera, Conseiller d'Etat, with whom we held an informal discussion to enable us to understand how the French system of *juges d'instructions*, or examining magistrates, works in practice. As a result of this very helpful discussion, we came to the conclusion that the French examining magistrate system does not mitigate the risk of disclosure of sensitive intelligence material in the way that the Newton Report appears to have assumed. The defence is given an opportunity to see and contest all the evidence which the examining magistrate collates and places on the file, including any sensitive intelligence material. The case which the examining magistrate presents to a court cannot be based even in part on sensitive intelligence material which the defence has not had an opportunity to contest.

59. It therefore seems to us that the DPP was correct in his oral evidence to us when he said that he did not understand how the examining magistrate model solves the problem of protecting sensitive material from disclosure.<sup>65</sup> **We conclude that the examining magistrate model does not help with the central problem identified by the Newton Report, which is how to deal with sensitive intelligence material within the criminal process.**

60. Our consideration of the examining magistrate model did, however, raise for us a further possibility that we consider to be worth exploring. It seemed to us from our discussion with Professor Errera that in the French system there is a less absolute approach

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64 *ibid.*, para. 224.

65 Oral evidence (19 May 2004) Q57. JUSTICE also opposes this proposal, partly on the basis that it is unclear how the use of security-cleared judges screening evidence would improve on the admissibility of material from the current system: JUSTICE submission, Appendix 6, para. 18.

to the non-disclosure of information originating from intelligence sources. For example, we were told that the identity of sources of intelligence material might be protected by including such information in witness statements from their superiors within the intelligence agencies. Professor Errera persuasively explained how this would still give the defence an opportunity to challenge that information, even without the opportunity to cross-examine the source of the information. He also explained that other safeguards exist, for example a conviction cannot be based on such evidence alone.

61. We have not yet had an opportunity to consider this in greater detail, but we **recommend that consideration be given to whether there is scope for a greater role for a security-cleared prosecutor to have access to the sensitive intelligence information available in respect of an individual who is suspected of involvement in international terrorism, and to have a role in translating this into evidence in a form which is sensitive to the need to protect intelligence sources and working methods, without proceeding on the assumption that evidence derived from such information must always be protected from disclosure.**

#### *Other process changes to facilitate prosecution*

62. In his oral evidence, the DPP identified a number of possible process changes which in his view would reduce the current obstacles to prosecuting for terrorism offences.<sup>66</sup> These included:

- Extending custody time limits
- Use of video evidence from abroad
- Powers to interview under compulsion
- Plea bargaining
- Immunising accomplices

63. Many of these are based on the sort of new powers which are proposed in organised crime cases in the White Paper, *One Step Ahead: 21<sup>st</sup> Strategies to Defeat Organised Crime*. In an interview with The Times on 12 July 2004, the DPP is reported as having said:

It seems a pretty strong case, if you're granting these powers for organised crime, to do so for terrorism.

64. JUSTICE has expressed the concern that fundamental principles and safeguards of existing criminal law should not be watered down in order to make it easier to prosecute terrorism offences under the ordinary criminal law.<sup>67</sup> **We share this concern but we also share the concern of the Newton Report that indefinite administrative detention of foreign nationals is not a sustainable or defensible response to the current threat from international terrorism. We believe the approach of the Newton Report, to bring terrorism back within the scope of the criminal law, is preferable in principle in human**

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<sup>66</sup> Oral Evidence (19 May 2004) Q46

<sup>67</sup> Appendix 6, para. 12.

rights terms even if this requires some modification of the ordinary criminal process in order to deal with the unique problem of sensitive intelligence material.<sup>68</sup> We welcome the DPP's broad indication of the sorts of process changes which are being contemplated and we look forward to examining their compatibility with the UK's human rights obligations when more detailed proposals are available.

### *Creation of new criminal offences*

65. The discussion paper raises the possibility of the creation of new criminal offences, such as a more broadly drawn offence of acts preparatory to terrorism (proposed by Lord Carlile),<sup>69</sup> amendments to the existing law of conspiracy,<sup>70</sup> and an offence modelled on the French crime of "association with a wrongdoer".<sup>71</sup> Lord Carlile has expressed the view that "if the criminal law was amended to include a broadly drawn offence of acts preparatory to terrorism, all could be prosecuted for criminal offences and none would suffer executive detention".<sup>72</sup> In his oral evidence to us he said that it would totally remove the need for administrative detention and it would totally remove the need for the derogation.<sup>73</sup>

66. The Newton Committee Report, however, observed that in the course of its inquiry nobody had suggested that it has been impossible to prosecute a terrorist suspect because of a lack of available offences.<sup>74</sup> It did not recommend the creation of any new criminal offences. The DPP in his evidence to the JCHR appeared to agree with this view, saying that there is an enormous amount of legislation that can be used in the fight against terrorism and that the criminal law (common law as well as statute) already covers a huge swathe of activity that could be described as terrorist.<sup>75</sup>

67. **We have considered carefully whether there appears to be a need for new criminal offences in relation to terrorism. We are not yet persuaded that a new criminal offence of acts preparatory to terrorism would be a valuable addition to the existing range of offences or a means of ensuring that the current detainees could be dealt with through the criminal process. We find it difficult to see how the existence of such an offence would overcome the obstacles to prosecution identified by the Newton Report, in particular the problem that the evidence relied on in relation to a suspected international terrorist is usually intelligence material which is either inadmissible as evidence in a criminal court, or material which the authorities do not wish to disclose for fear of compromising sources or methods. In our view, that is an obstacle which needs addressing directly, and is unlikely to be helped by the creation of still more criminal offences.**

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68 The Council of Europe's Guidelines on human rights and the fight against terrorism acknowledge, in Article IX.3, that the imperatives of the fight against terrorism may justify certain restrictions to the right of the defence, including arrangements for access to the case file and the use of anonymous testimony, provided that such restrictions are strictly proportionate to their purpose and do not impede the substance of the right to due process.

69 Cm 6147, *op cit.*, Part One, para. 48.

70 *ibid*, para. 49.

71 *ibid*, para. 56.

72 The Carlile Review 2003, para. 101.

73 Q 24.

74 The Newton Report, para. 207.

75 QQ 42 and 43.

### ***Terrorism as an aggravating factor in sentencing***

68. The Newton Report recommended that consideration be given to treating terrorism as an aggravating factor when sentencing for non-terrorist offences, so that longer sentences can be given where it is established that there are links with terrorism.<sup>76</sup> This is also a measure which has been introduced in a number of other countries, such as France.<sup>77</sup>

69. Lord Carlile has expressed his scepticism for this idea. In his review of Part 4 ATCSA 2001 he thought that the same evidential difficulties would arise in prosecuting other offences aggravated by terrorism as in prosecuting terrorist offences, because the terrorist element would have to be the major element of the crime as a whole. He also doubted whether such a proposal would be capable of commanding the support of Parliament.<sup>78</sup> In his oral evidence to us he said that it was a difficult idea to translate into substantive law, and that it placed too much power in the hands of the judge and not enough power in the legislation.<sup>79</sup> Lord Newton and Baroness Hayman, on the other hand, did not want to rule out the possibility of higher sentences being imposed where terrorism could be proved on the balance of probabilities to be an aggravating factor.<sup>80</sup>

**70. We agree with the Newton Report's conclusion that this may be an appropriate measure, depending on the safeguards which accompany it. In our view one of the necessary safeguards would be retention of 'beyond reasonable doubt' as the appropriate standard of proof for establishing a link to terrorism in order to justify a longer sentence.**<sup>81</sup>

### ***Surveillance***

71. One of the alternatives to detention canvassed by the Newton Committee Report is the use of more intensive surveillance. The Newton Committee reported that it had discussed this point with the appropriate authorities and was "not convinced that enough use is made of the surveillance of suspected terrorists".<sup>82</sup> The Report does not go into detail about the reasons why at present surveillance is not sufficiently intensive. It hints that it may be due in part to lack of resources, and in part due to room for improvement in training, the use of technology and better liaison between different agencies at ports of entry.<sup>83</sup> The Report also implies that what is envisaged is not merely more extensive use of existing surveillance techniques (for which safeguards already exist), but the use of more intrusive techniques now available through new technology.<sup>84</sup>

72. We explored this in more detail with Lord Newton and Baroness Hayman in oral evidence.<sup>85</sup> Lord Newton acknowledged that use of more intensive surveillance raised

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76 The Newton Report, paras. 216–223.

77 See further below, and Annex A.

78 The Carlile Review 2003, para. 115.

79 Q 21.

80 Q 45.

81 Appendix 6, para. 15.

82 The Newton Report, para. 248.

83 The Newton Report, paras 248–9.

84 *ibid.*, para. 247.

85 QQ 33–37.

concerns about privacy,<sup>86</sup> but he pointed out that the context in which its use was being considered was as a less restrictive alternative to indefinite detention without trial.<sup>87</sup> Provided there are proper safeguards against the abuse of surveillance powers, he thought that this could be a useful ingredient of the overall menu of possibilities, including possibly as part of a civil restriction order (discussed further below). Baroness Hayman similarly thought that, although intense surveillance was clearly an intrusion into civil liberties, in some cases it would be a more proportionate response. Intense surveillance is clearly expensive and Lord Newton indicated that a number of members of his Committee felt that insufficient resources were being devoted to surveillance.<sup>88</sup>

73. JUSTICE points out that the recent release of one of the detainees on bail<sup>89</sup> suggests that indefinite detention in a high security prison is not “strictly required”, and that it may be sufficient to address the threat by way of a series of stringent bail conditions including electronic tagging and house arrest without outside communication.<sup>90</sup>

**74. We conclude that the use of more intense overt surveillance of individuals suspected of involvement in international terrorism would be preferable to detention under Part 4, because it is less restrictive of the fundamentally important right to liberty. We emphasise, however, that intense surveillance is also a grave interference with the right to respect for private life, and should therefore only be used in cases where the only alternative would be detention. Such surveillance might include electronic monitoring, but this would of course also have to be subject to proper procedural safeguards. For example, the consent of the person being monitored would have to be obtained before they are fitted with any monitoring device.**

### *Civil restriction orders*

75. The Newton Committee Report considered that in some cases, rather than detain indefinitely without charge, it would be a more proportionate measure to impose restrictions on the liberty of the individuals concerned, for example on their freedom of movement by curfews, tagging, or daily reporting requirements, on their freedom of association, or on their ability to use financial services or to communicate freely.<sup>91</sup>

76. To some extent, a version of this is already available under Part 4 ATCSA 2001, because SIAC accepted, in its first generic judgment, that there is room for debate about the proportionality of detention even where certification as a suspected international terrorist was justified. The release of “G” on bail, under strict conditions amounting to house arrest, demonstrates this.

77. There is already a number of examples of such restriction orders in different contexts, involving a civil procedure for establishing whether certain restrictions on liberty should be

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86 *ibid.*, Q 34.

87 *ibid.*, Q 35: “the fundamental issue to me is whether this is better or worse than what we have got at least as one way of reducing the need to detain people ... indefinitely on the basis that we do at the moment.”

88 *ibid.*, Q 33.

89 *G v Secretary of State for the Home Department* [2004] EWCA Civ 265.

90 Appendix 6, para. 27.

91 The Newton Report, paras. 251–253.

imposed, followed by a criminal procedure for determining whether there has been a breach of the order, for which criminal consequences, including detention, follow: e.g. civil confiscation orders, anti-social behaviour orders,<sup>92</sup> football banning orders, and registration conditions on sex offenders.

78. In their oral evidence to us, Lord Newton and Baroness Hayman were clearly strongly in favour of civil restriction orders as a less restrictive alternative to Part 4 ATCSA 2001. Although they recognized that such orders would involve serious interferences with liberty and other fundamental rights, they considered this to be preferable to indefinite detention without charge. As Lord Newton put it—

I continue to think that for somebody to be at liberty (to whatever extent we mean in this context) but in a restricted way is probably better than being locked up in a high security prison with no knowledge as to when you are going to get out, or indeed if you are going to get out.<sup>93</sup>

He also pointed out that civil restriction orders would also have the advantage that “they would be capable of being applied to potential terrorists who are British citizens and not only to potential terrorists who are foreign citizens”.<sup>94</sup> It might also be possible for civil restriction orders to be used to deal with those who are more at the periphery of involvement with international terrorism, for example those associating with international terrorists.<sup>95</sup>

79. JUSTICE has pointed out that such measures might still require derogation from the ECHR, because there is no scope under the Convention to impose sweeping restrictions on the liberty of a person who is suspected but neither charged nor convicted of any criminal offence.<sup>96</sup> However, whether such a derogation would be required would depend on the kinds of restrictions on liberty which it is proposed to impose. On the premise that the current threat from terrorism is sufficiently serious to justify exceptional measures being taken, JUSTICE supports further consideration being given to the possibility of civil restriction orders, but emphasizes that adoption of any such scheme would have to be considered as wholly exceptional.<sup>97</sup> Such orders would have to be attended by the most stringent procedural safeguards, including a requirement that the order be made by a court after a fully adversarial procedure. We find this approach to the possible use of civil restriction orders persuasive.

**80. We conclude that the use of civil restriction orders in this context is worthy of further exploration. We recognize that the use of such orders is controversial and that there are a number of continuing concerns about what sorts of risks to the public interest (for example assistance, support, incitement, association) should justify the availability of civil restriction orders and what sort of restrictions on liberty it should be possible to impose by way of a civil restriction order. However, we note that the use of**

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92 The compatibility of anti-social behaviour orders with the ECHR was confirmed by the House of Lords in *McCann*.

93 Q 55.

94 Q 57.

95 *ibid*

96 Appendix 6, para. 29.

97 *ibid.*, paras 30–32.

such civil restriction orders is not per se incompatible with the ECHR.<sup>98</sup> We consider that such orders would have to be accompanied by sufficient procedural safeguards, such as access to an independent judicial determination of whether the underlying allegation was well-founded, and the type of restrictions imposed would have to satisfy a test of strict necessity in order to be proportionate.<sup>99</sup>

## Comparison with other countries

81. The discussion paper states that the Government is willing to learn from the experience of other countries, and that it is important that the debate on alternatives to Part 4 ATCSA 2001 is informed by an analysis of the different ways in which other mature liberal democracies have addressed this issue. We asked the House of Commons Scrutiny Unit to conduct a comparative study of the ways in which other states have responded to the threat from international terrorism. The product of that research is set out at Annex A.<sup>100</sup>

82. The UK is the only country out of 45 countries in the Council of Europe to have considered it necessary to derogate from Article 5 of the Convention. It is also the only country in the world to have derogated from Article 9 ICCPR. Apart from the United States, none of the other countries surveyed has resorted to the indefinite administrative detention of foreign nationals who are suspected terrorists.

83. The comparative research found that most jurisdictions have sought to deal with those suspected of involvement in international terrorism by means of criminal prosecution. It found that in most states various special measures have been taken in order to facilitate prosecution in such cases. Such measures include the creation of new terrorism or terrorism-related offences, the adoption of new investigative techniques, new protections for sensitive information, changes to criminal procedure including longer pre-charge detention, and the imposition of higher sentences for terrorism-related offences.

**84. We commend this comparative research to the Government. We conclude from it that the central insight of the Newton Report is correct: that it must be possible to deal adequately with the threat from international terrorism by measures which enable the use of the criminal law against those suspected of international terrorism, of whatever nationality, and without the necessity of derogating from international human rights obligations.**

## Conclusion

85. We look forward now to the publication of the outcome of the Government's consultation on its review of counter-terrorism powers. We hope that it will provide evidence of a real commitment to reconcile security and liberty. We anticipate engaging further with the Home Secretary on these questions when the consultation is concluded.

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98 *R (McCann) v Crown Court at Manchester* [2002] UKHL, [2003] IAC 787.

99 JUSTICE also suggests that the reviewing court should have the power to substitute less restrictive measures where it decides that certain restrictions are disproportionate, and that the orders should be time-limited: *ibid.*, para. 19.

100 Annex A (page 25)

## Annex A: Note prepared for the Joint Committee on Human Rights by Jago Russell of the Scrutiny Unit, House of Commons

### Part IV Anti-Terrorism, Crime and Security Act 2001: Alternatives Adopted by Other Jurisdictions

#### Scope

1. The Explanatory Notes to the Ant-Terrorism, Crime and Security Act 2001 describe Part IV of the Act as containing measures to “deal with people in the UK whose presence is not conducive to the public good”.<sup>101</sup> It enables foreign nationals, who cannot be removed from the United Kingdom to be detained, potentially indefinitely, if they are reasonably believed to pose a risk to national security or suspected of involvement in international terrorism.

2. These provisions are justified on the basis that they are necessary, as a last resort, where:

(a) Prosecution is impossible, including because:

(i) The material forming the basis of their case would be inadmissible, for example because it is hearsay, or because of the way in which it was obtained, i.e. intercept evidence;<sup>102</sup>

(ii) Disclosure of information would put sources at risk, expose and limit the effectiveness of surveillance techniques, and threaten international relations;

(b) Prosecution would not address the potential risk posed by the defendant, i.e. the available maximum sentences are considered to be too short;<sup>103</sup> and

(c) It is not possible to remove the person from the UK, for example, because of the risk that they would be subjected to torture or to inhuman or degrading treatment.

3. The Government has acknowledged that “it is ... important that this debate [on alternatives to Part IV] is informed by an analysis of the different ways in which other mature liberal democracies have addressed this issue”.<sup>104</sup> The aim of this note is to provide an overview of some of the ways in which the law and legal practice of other jurisdictions address the matters used to justify Part IV. It focuses, in particular, on measures that facilitate the criminal prosecution of suspected terrorists. It does not, for example, consider the ways in which other countries have adapted their immigration laws in response to the threat of international terrorism.

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101 Anti-Terrorism, Crime and Security Act 2001: Explanatory Notes, Para. 69.

102 Prohibited by the Regulation of Investigatory Powers Act 2000.

103 Although the Government does not cite this as a justification, it was highlighted as a reason in Anti-terrorism, Crime and Security Act 2001 Review: Report, 18 December 2003, HC 100, and para. 181 (the “Newton Report”).

104 Home Office, Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper, February 2004, Cm 6147, para. 53.

## Overview

4. None of the countries surveyed (with the exception of the US) has resorted to the indefinite detention of foreign nationals who are suspected terrorists. Most jurisdictions have, instead, sought to deal with those who pose a threat to national security or who are suspected of involvement in international terrorism by means of criminal prosecution. A variety of special measures have been taken to facilitate prosecution in such cases and to overcome the difficulties cited by the UK Government to support of Part IV as an alternative to prosecution:

- *New Terrorism-related Criminal Offences:* Most jurisdictions have created new offences to enable the prosecution of suspected terrorists. Some have adopted terrorist offences for the first time (Australia, Belgium, Canada, Denmark, Finland and Sweden). Others, particularly those with a history of domestic terrorism have extended existing laws following September 11<sup>th</sup> (France, Germany, Italy, Spain and the US).
- *New Investigative Techniques:* A number of countries have extended the techniques available in the investigation of terrorist crimes. Notable examples include: (i) the use of intercept evidence (Australia, Austria, Canada, Denmark, Finland, France, Germany, Italy, Spain and the US); and (ii) extended search powers (Canada, Denmark, France, Italy, Spain and the US). Many countries have relaxed the normal procedural safeguards for such techniques in the context of terrorist investigations.
- *Protecting Sensitive Information:* The US has adopted a procedural statute providing the state with greater control over the use and disclosure of sensitive and confidential information in court. Australia is considering the adoption of a similar procedural statute, following an Australian Law Reform Commission study of measures taken by other jurisdictions. Canada has also amended its evidence laws to protect sensitive information.
- *Criminal Procedure:* Some countries have established specific judicial procedures in the context of terrorism-related prosecutions. For example, Canadian law now permits investigative hearings, which enable judges to compel even self-incriminating evidence; and France now allows videoconferencing technology for witness confrontations to avoid unnecessary transfers. Some jurisdictions have also relied on existing procedures that could potentially overcome some of the issues used to justify Part IV (such as the use of *Juge d'Instructions* in France).
- *Sentencing:* Many countries impose higher sentences for terrorism-related offences than for equivalent offences without a terrorist motivation (Austria, Belgium, Canada, Denmark, France, Italy, Spain). France, Italy and Spain also have the statutory assurance of lower sentences for those who have committed terrorist offences but who renounce terrorism and cooperate with the police.
- *Detainee's Rights:* A number of jurisdictions have permitted longer pre-charge detention and longer periods without access to legal counsel in cases of suspected terrorism (Australia, France, Spain and the US). Canada has also adopted a system of preventive detention, though this is subject to more time limits and safeguards than Part IV and does not apply solely to foreign nationals.

## Overview of the Relevant Law and Legal Practice of other Jurisdictions

### Australia

5. In 2003, the United Nations Counter Terrorism Committee (the “UN CTC”), asked “whether Australian laws dealing with terrorism provide for special courts, special conditions relating to the grant of bail to terrorists and their supporters and the use of undercover operations”.<sup>105</sup> In its Fourth Report to the UN CTC, Australia responded that: “Australia’s usual criminal justice system applies to terrorism offences.”<sup>106</sup>

#### *Terrorism-related Criminal Offences*

6. Although Australia did not have specific terrorism-related criminal offences prior to September 11, it did have a number of general criminal offences, available for the prosecution of those involved in terrorist activities.<sup>107</sup> With effect from 6 July 2002, a number of new offences were introduced into the Criminal Code Act 1995. These offences relate specifically to terrorism and use new statutory definitions of “terrorist act”<sup>108</sup> and “terrorist organisation”.<sup>109</sup> The new offences include, in summary:

- Section 101.1: Engaging in a terrorist act – (life imprisonment);
- Section 101.2: Providing/receiving training connected with a terrorist act (15 or 25 years imprisonment);
- Section 101.4: Possessing a thing connected with a terrorist act (15 or 10 years imprisonment);
- Section 101.5: Collecting or making a document connected with a terrorist act (15 or 10 years imprisonment);
- Section 101.6: Doing things in preparation for or planning a terrorist act (life imprisonment);
- Intentionally directing the activities of a terrorist organisation, knowing it is a terrorist organisation (25 years imprisonment);

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105 Following September 11th, the UN Security Council resolved to establish a special UN Counter-Terrorism Committee (the UN CTC). Security Council Resolution 1373 (2001) requires all States to report to the UN CTC on steps taken to implement the Resolution. These State Reports provide a valuable source of information on state actions to address terrorism.

106 Australia’s Fourth Report to the UN CTC, S/2003/1204, p.6.

107 For example: (i) Section 6 of the Crime (Foreign Incursions and Recruitment) Act 1978 makes it an offence to enter a foreign state to engage in hostile activity in that foreign state (14 years imprisonment); (ii) Section 7 of the 1978 Act makes it an offence to contribute to the preparation or promotion of the commission of an offence under Section 6 (10 years imprisonment); (iii) Section 8 of the 1978 Act makes it an offence to recruit persons to a group, the objectives of which include the commission of an offence under Section 6 (7 years imprisonment); and (iv) a number of other offences relating to hostage-taking, and chemical and biological weapons.

108 “Terrorist act” is defined in Section 100.1 of the Criminal Code Act 1995 as an act, or threat of action that is done or made with the intention of advancing a political, ideological or religious cause; and done or made with the intention of either coercing or influencing by intimidation an Australian government or the government of another country; or intimidating the public or a section of the public. The act must also cause a person serious physical harm or death, or involve serious risk to public health or safety, serious damage to property, or serious interference with an electronic system, or be a threat to do any of these acts.

109 “Terrorist organisation” is defined in subsection 102.1(1) of the Criminal Code Act 1995 as including an organisation which a court believes beyond reasonable doubt to be directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act; or an organisation which is specified as such by regulation. In March 2004, controversial laws were enacted extending the ability to prescribe organisations as terrorist, thereby criminalizing their members (A new Section 102 of the Criminal Code).

- Intentionally being a member of a terrorist organisation (10 years imprisonment);
- Intentionally recruiting a person to a terrorist organisation (25 years imprisonment); and
- Intentionally providing training to or receiving training from a terrorist organisation, knowing it is a terrorist organisation (25 years imprisonment).

*New investigative powers*

7. A number of new measures were introduced in Australia post-September 11 to assist in the investigation and prevention of terrorist attacks. These include:

- Increased powers for the Australian Security Intelligence Organisation (the "ASIO"),<sup>110</sup> including:
  - To question people who may have information about terrorism, even if not themselves involved in terrorist activity;
  - The power to seek and detain people for up to 48 hours without legal representation, in serious cases and where necessary to prevent a terrorist attack;
  - The power to limit the contact that a person detained or taken into custody by the ASIO may have with legal counsel. The ASIO can prevent a suspect contacting a particular lawyer where it is satisfied that allowing access may alert a person involved in a terrorism offence to the investigation or may result in the damage or destruction of things that may be required to be produced under the warrant. Contact with a legal adviser must also be made in a way that can be monitored by a person exercising authority under the warrant.

A warrant must be sought, with the consent of the Attorney General, for such powers to be used.

- The Telecommunications (Interception) Act 1979 was amended to include terrorism offences as offences for which interception warrants can be obtained. It also permits access to unread emails in some circumstances.

*Classified and Security Sensitive Information:*

8. The risk that confidential information will become public is a major disincentive against the criminal prosecution of suspected terrorists. In this context, the Australian Attorney General asked the Australian Law Reform Commission (the "ALRC") to inquire into and report on measures to protect classified and security sensitive information in the course of investigations and legal proceedings as well as in other contexts. A major focus of the inquiry was the use of such information in court, particularly in criminal prosecutions. The ALRC is expected to deliver its final report and recommendations to the Attorney General at the end of 2004.

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<sup>110</sup> The Australian Security Intelligence Organisation (ASIO) is Australia's security service. Its main role is to gather information and produce intelligence that will enable it to warn the government about activities or situations that might endanger Australia's national security. The ASIO does not investigate lawful protest activity nor does it investigate purely criminal activities.

9. As part of its inquiry, the ALRC considered the existing Australian law designed to protect confidential information and measures taken by other jurisdictions. The most relevant information regarding foreign law and practice is discussed in the context of the relevant jurisdictions (namely the USA, Canada and Germany).

#### *Existing Law*

10. The ALRC Background Document and Discussion Paper<sup>111</sup> consider the variety of legal provisions and judicial practices in Australia designed to protect classified information in criminal proceedings. These include:

- *Confidentiality Undertakings and Orders*: The ALRC reports that lawyers are frequently called upon to keep court matters confidential and can be bound by undertakings to the court.<sup>112</sup> In addition to express undertakings, parties to litigation are subject to implied undertakings to the court not to use or disclose information that they have received through the court's compulsory processes, except for the purpose of the relevant proceedings. Breach of such undertakings is punishable by the court and is also subject to procedures before disciplinary bodies.
- *Hearings "in camera"*: Section 93.2 of the Criminal Code Act 1995 allows a judge or magistrate, at any time before or after the hearing of an application or proceedings, to make any of the following orders where it is satisfied that it is in the interests of national security or defence to do so: (a) an order that some or all of the public be excluded during the whole or part of a hearing; (b) an order that no report of the proceedings be published; and (c) such order or direction as is necessary for ensuring that no person has access to documents used in the application or the proceedings. Similar powers allowing for *in camera* hearings also exist in other Australian legislation, including the Crimes Act 1914 and the Federal Court of Australia Act 1976.
- *Identity of an informant*: Section 15XT(1) of the Crimes Act 1914 requires courts to prevent the identity of an informant being disclosed by ensuring that certain parts of proceedings are held in private and by making orders relating to the suppression of the publication of evidence.
- *Public Interest Immunity*: A claim for public interest immunity is one of the most common ways in which information can be protected in Australian court proceedings.<sup>113</sup>
  - The common law formulation of public interest immunity provides that "the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to do so".<sup>114</sup> It requires the courts to operate a balancing test between the public interest and the need for disclosure, to ensure justice in a particular case.

111 Australian Law Reform Commission, ALRC Background Paper 8: Review of measures designed to protect classified and security sensitive information in the course of investigation and proceedings, 2003 (<http://www.austlii.edu.au/au/other/alrc/publications/bp/8/bp8.html>).

Australian Law Reform Commission, ALRC Discussion Paper 67: Protecting Classified and Security Sensitive Information, 2004 (<http://www.austlii.edu.au/au/other/alrc/publications/dp/67/>).

112 It reports that such undertakings are frequently used to protect commercially sensitive information.

113 It relates to both oral and written evidence.

114 *Sankey v. Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).

- The common law on public interest immunity is largely reproduced in Section 130 of the Evidence Act 1995, which applies to the admission of evidence.<sup>115</sup> Section 130(1) provides that the party arguing that the evidence is subject to public interest immunity must show that the public interest in preserving secrecy or confidentiality outweighs the public interest in admitting the information or document into evidence. Mechanisms available to protect evidence governed by the statute include: (a) evidence being taken *in camera*; (b) restriction on the publication of evidence; (c) suppressing the names of parties and witnesses; (d) limiting access to evidence to a party's legal advisors; and (e) absolute immunity.
- The DPP's Statement on Prosecution Disclosure provides that an investigating agency is to provide the DPP with a schedule of potentially disclosable material that the agency considers may be immune from disclosure to the defence on public interest grounds, together with reasons supporting that conclusion.
- *Ministerial Certificates*: Only the Northern Territory maintains the requirement for courts to accept, without question, a government-issued certificate that it is in the public interest for a document or secret not to be disclosed as evidence.<sup>116</sup> In general, the Australian courts themselves balanced the public interest in suppressing confidential information against the public interest in disclosing that information.
- *Security Clearances of Lawyers*: Between 2002 and 2003, the Australian Government attempted to introduce security clearing for lawyers "to overcome the procedural and evidentiary problems associated with prosecuting criminal offences involving sensitive or classified material".<sup>117</sup> These attempts failed and, except in ASIO cases discussed above, a defendant's choice of lawyer is unrestricted and lawyers are not required to be security-cleared.

#### *Proposed National Security Procedures Act*

11. In its Discussion Paper,<sup>118</sup> the ALRC suggested key legislative amendments to facilitate the protection of confidential information in legal proceedings (criminal, civil and administrative). It proposed is the enactment of a statutory procedural framework for the disclosure and admission of classified and security sensitive information in court. It is intended that this would apply to all stages of proceedings in which classified or sensitive national security information is used or is likely to emerge and to cover all parties to those proceedings. It would apply to both civil and criminal proceedings and to oral and written evidence. Its main objectives are to flush out issues relating to the use of classified information early in the proceedings and to enable the case to proceed, as far as possible, with all admissible evidence.

12. The ALRC has stressed that its proposals are only intended to apply to cases where classified or sensitive national security information will arise and that they are not intended to form part of the statutes that relate to the procedural and evidential rules governing Australian courts generally. It comments that:

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<sup>115</sup> Section 130 does not apply to pre-trial hearings, which are still covered by the common law.

<sup>116</sup> Section 42D of the Northern Territory Evidence Act 1939.

<sup>117</sup> The Hon Daryl Williams AM QC MP, News Release: Protecting Classified Information in Court Proceedings, 3 April 2003.

<sup>118</sup> Australian Law Reform Commission, ALRC Discussion Paper 67: Protecting Classified and Security Sensitive Information, 2004, Chapter 10.

“[t]he abridgement of human and procedural rights in order to suppress information in the interests of national security and defence should be used only in cases where that security and defence would suffer real harm if the usual practices of open justice and the full disclosure of evidence were used.”<sup>119</sup>

It also comments that the procedures should be subject to the overriding proviso that all parties are given a fair hearing or trial and that any departures from the usual standards of judicial process are limited to those strictly necessary to protect the national interest.

13. The ALRC has recommended that the US Classified Information Procedures Act (“CIPA”) should be used as a model for the Act.<sup>120</sup> There are, however, some key differences between CIPA and ALRC’s proposed legislation. The National Security Procedures Act proposed by the ALRC would:

- Cover all national security information and sensitive national security information;
- Require each party (including the defence) to any proceedings to inform the court and the other parties as soon as it becomes aware that any information covered by the new Act is likely to emerge at any stage in the case;
- Require the court, once notified, to convene a directions hearing to review the issues that arise in relation to the handling of the sensitive material;
- Require all parties to file and serve lists of all classified or sensitive national security information that they reasonably anticipate will be used in the proceedings, either in their own case or in rebuttal to the case of any other party;
- Empower the court to make directions in relation to the detail of the lists, the recipients of the lists, the use that may be made of the information contained in them and the degree of protection that must be given to them;
- Give the court power to make orders governing the handling of that information over the course of the proceedings, either on its own motion, on the motion of one of the parties or on the motion of the Attorney General. The options available to the court would include:
  - Determinations of the relevance and admissibility of sensitive information; and
  - Orders for substitution of the classified information with unclassified information; for substitution with statements of fact and statements of admission; for summaries of the sensitive information; for redacted or edited evidence; and procedures for concealing the identity of any witness or other person;
- The court may decide to hear some or all of the proceedings in the absence of the public (Under CIPA this decision would be taken by the Attorney General rather than determined by the court);

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<sup>119</sup> *ibid*, para. 10.8.

<sup>120</sup> CIPA is discussed in the context of the US below.

- Require the court to give full written reasons for the measures it takes under the Act,<sup>121</sup> as well as to prepare a full transcript of any proceedings heard in the absence of any one or more of the parties or of the public;<sup>122</sup>
- Give the Attorney-General the power to issue a certificate stipulating that certain information is not to be disclosed to any, or any specified, person in the legal proceedings;<sup>123</sup>
- Give the court the power to dismiss, stay, discontinue or strike out all or any part of a party's case, where required in the interests of justice.

14. If a party fails to comply with the requirements of the Act or of any order made under it, the court would have a wide range of powers including: preventing a party seeking to use certain information; preventing a party calling or examining certain witnesses; and staying, discontinuing, dismissing or striking out a party's case in part or whole. In addition, the ALRC recommends that the court should retain the power to require undertakings from any party to the proceedings and/or their legal representatives and that the existing law on public interest immunity should be retained.

#### *Centralised Courts*

15. The ALRC considered the option of centralising cases involving classified information in a single court (or a small number of courts) "so that expertise could be collected in one place".<sup>124</sup> It comments that this would enable court staff to be trained and security cleared. However, the ALRC concluded that geographical and constitutional difficulties<sup>125</sup> outweighed "the logical and practical attractions".<sup>126</sup>

## *Austria*

#### *Terrorism-related Criminal Offences*

16. Provisions of the Austrian Penal Code, which pre-existed September 11th, criminalize a number of acts that are characteristic of terrorism, irrespective of whether they are committed with a terrorist motivation. For example, participation in a criminal organisation is illegal and carries a sentence of 6 months to 5 years (Section 278a); and recruitment of members to an armed association constitutes a criminal offence and carries a 3-year sentence (Section 279). There are also a number of offences regarding the supply and acquisition of weapons, crimes against the person and crimes of conspiracy.

17. Post-September 11, the Austrian Penal Code was extended to include a number of specific terrorist offences.<sup>127</sup> These include the leading of and the participation in a

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121 The ALRC comments that "whenever there is any restriction on the basic principles of open courts and the right to a public hearing, the court's judgment of those issues should be set out in a statement of reasons" (Australian Law Reform Commission, ALRC Discussion Paper 67: Protecting Classified and Security Sensitive Information, 2004, para. 10.84).

122 The ALRC recommends that the court should ensure that all parties receive a copy of the transcript and of the reasons for measures taken under the Act to enable them to pursue any appeal that may be possible (Australian Law Reform Commission, ALRC Discussion Paper 67: Protecting Classified and Security Sensitive Information, 2004, paras. 10.85–10.86).

123 The court would then be required to determine whether that means that the proceedings should be stayed, discontinued, dismissed or struck out in part or in whole

124 ALRC Discussion Paper 67: Protecting Classified and Security Sensitive Information, 2004, para. 10.142.

125 Section 80 of the Australian Constitution provides that "every [criminal trial] shall be held in the State where the offence was committed".

126 ALRC Discussion Paper 67: Protecting Classified and Security Sensitive Information, 2004, paras. 10.142–10.146.

127 These came into force on 1 October 2002.

terrorist group (Section 278b) and the financing of terrorism (Section 278d). These offences apply even if no terrorist act has been committed, for example if members are recruited with a view to committing terrorist acts later on. A more general provision was also added to the Penal Code, which applies more severe penalties to existing offences where there is a terrorist element.

### *Investigative Techniques*

18. A wide range of investigative techniques is permitted under the Austrian Law on Police Practice (LPP) and the Criminal Procedure Code (CPC). Such techniques include undercover operations (Section 54 LPP), interception of communications (Sections 149a–149c CPC) and electronic surveillance (Sections 149d–149h CPC). These investigative techniques may only be used if they are necessary to prove a serious criminal offence and some of these powers, including the interception of telecommunications and electronic surveillance, would generally require a court order.

## *Belgium*

### *Terrorism-related Criminal Offences:*

19. A new terrorist law was introduced in Belgium on 19th December 2003. This added a definition of “terrorist offence” and “terrorist group” to the Penal Code and created offences of “participation in a terrorist group” and “aiding and abetting the commission of a terrorist offence” (Articles 137 to 141). These provisions criminalize the provision of information or material resources to terrorist groups or any form of financing of such groups as well as the recruitment of terrorists. The Penal Code also provides for the prosecution of attempted terrorism or the mere act of preparing for a terrorist act. Furthermore, terrorist motivation is treated as an aggravating factor in sentencing.

## *Canada*

### *Terrorism-related Criminal Offences:*

20. On 18 December 2001, a wide-ranging Anti-Terrorism Act was enacted in Canada.<sup>128</sup> The Act amended the Criminal Code, creating a number of terrorist-related offences, including:

- To harbour or conceal anyone who has carried out a terrorist act or to enable a person to facilitate or carry out a terrorist act (Section 83.23);<sup>129</sup>
- Financing of terrorism (Sections 83.02, 83.03 and 83.04);
- Dealing in the assets of an entity designated as a terrorist organisation (Sections 83.08, 83.1 and 83.11);<sup>130</sup>
- Participating in the activities of a terrorist group (Section 83.18);

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<sup>128</sup> An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism. The Act is subject to a three-year review with a mandate to recommend changes to the legislation if appropriate. It also requires the powers of preventive arrest and investigative hearings to be subject to annual reporting requirements.

<sup>129</sup> The Act defines “terrorist activity” broadly such that anyone planning, facilitating or committing terrorist activity in Canada with a view to acting against another state or its citizens would be committing an offence in Canada.

<sup>130</sup> The Act enables the Government to designate a list of terrorist groups.

- Facilitating a terrorist activity (Section 83.19); and
- Instructing the carrying out of a terrorist activity (Sections 83.21 and 83.22).

The penalties for terrorist offences are severe and range from up to ten years imprisonment to life imprisonment.

#### *Investigative Tools*

21. The Act provides law enforcement and national security agencies with new investigative tools. The Criminal Code allows the police to gather information and criminal intelligence by technical means for the express purpose of pursuing a criminal prosecution. Available techniques include electronic surveillance (Criminal Code, Part VI), search and seizure (Criminal Code, Part XV), personal surveillance and anonymous informants. In terrorist cases, the normal restrictions on the use and duration of electronic surveillance are relaxed.<sup>131</sup>

22. The use of these tools is subject to substantive and procedural safeguard and is subject to the safeguards contained in the Canadian Charter of Rights and Freedoms.<sup>132</sup> Search or surveillance operations must, except in emergency situations, be authorised in advance by an independent judicial officer.

#### *Criminal Procedure*

23. The Anti-Terrorism Act restricts the right to silence and to a public hearing in some circumstances.<sup>133</sup>

- *Investigative Hearings:* The Act created a form of “investigative hearing” which was entirely new in Canadian law. The new section 83.28 of the Criminal Code authorizes an officer, who has obtained the Attorney General’s prior consent, to apply *ex parte* to a judge for an order that a certain individual or individuals attend a hearing at which they are obliged to answer questions or produce evidence. These hearings may only be held where a judge is satisfied that there are reasonable grounds to believe that a terrorism offence has been or will be committed. They are held *in camera*. Those compelled to give evidence need not themselves be suspected of terrorist activities.
- *Evidence under Compulsion:* The aim of the investigative hearing is to permit the state to compel testimony from a witness during the fact-finding stage of an investigation into a terrorist offence. Subsection 83.28(10) of the Criminal Code removes the general right to refuse to testify or otherwise provide evidence on grounds of self-incrimination in the context of investigative hearings. However, those compelled to give evidence are immune from any criminal prosecution arising from that evidence, other than for perjury or giving inconsistent testimony. Information given at such proceedings can be used in civil proceedings.

The Supreme Court of Canada heard a constitutional challenge to these provisions at the end of last year. The Court reserved judgment which is expected to be announced later this year.

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131 Other investigative techniques are allowed pursuant to warrants under the Canadian Security Intelligence Act but these cannot be used in criminal cases.

132 The procedures differ according to whether the investigation is conducted by a law enforcement agency for the purposes of prosecuting a criminal case or by a security agency for national security purposes.

133 These provisions have received much attention. See, for example:  
<http://www.nacdl.org/public.nsf/0/394ea3fc15e467e285256e760071baf2?OpenDocument>

*Classified and Security Sensitive Information*

24. The Act contains a number of measures specifically designed to control the disclosure of confidential information during criminal prosecutions:

- Clause 34 amends subsection 486(1) of the Criminal Code to permit a judge to exclude members of the public from a court if it is “necessary to prevent injury to international relations”;
- Clause 43 of the Act adds several provisions to the Canada Evidence Act:
  - Subsection 38.06(1) permits a judge to order public disclosure of information arising from a judicial proceeding provided “such disclosure is not injurious to international relations or national defence or security”;<sup>134</sup>
  - Subsection 38.13(1) allows the Attorney-General to issue a certificate ordering non-disclosure at any time “for the purposes of protecting international relations or national defence or security”;
  - Subsection 38.13(2) provides that, in cases involving the National Defence Act, the Attorney-General can only order disclosure with the approval of the Minister of National Defence; and
  - Section 37.21 provides that hearings to determine objections and appeals in relation to court orders authorising disclosure of information are to be heard *in camera* and that the court may give any person an opportunity to make representations *ex parte*.

25. Where necessary, the anonymity of informants can be achieved in a number of ways:

- Canadian law requires disclosure of information held by prosecutors to defence counsel to ensure a fair trial, but identities and other details of human sources who provide information are protected from disclosure unless the informant actually testifies in court;
- Legal counsel would normally have a right to review sworn documents and examine the principal informant, however, there is no right to cross-examine a confidential informant;
- A document used to obtain warrants and authorisation under the Criminal Code can be ordered sealed by a court and, if given to the defence, are edited by the judge to remove the identities and other information about the confidential informants; and
- The Criminal Code contains provisions allowing the court, in certain cases, to order that a witness testify outside the courtroom, if the judge thinks that the order is necessary to protect the safety of the witness.

26. Where non-disclosure of sensitive information means that those accused of a criminal offence would not have a fair trial, the remedy would not be disclosure of the information but the discontinuance of proceedings. The Canada Evidence Act provides that a judge presiding at a criminal trial can make any order that s/he considers appropriate in the

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<sup>134</sup> This creates a presumption against public access, permitting a judge to order disclosure only when satisfied that there is no threat to international relations, national defence or security.

circumstances to protect the right of an accused to a fair trial, including: (a) an order dismissing specified counts or permitting the case to proceed only in respect of a lesser offence; (b) an order to stay the proceedings; and (c) an order finding against any party on any issue relating to information which cannot be disclosed.

*Preventive Arrest:*

27. The Anti-Terrorism Act provides a power to arrest and detain, on a preventive basis, where there are reasonable grounds to suspect that the arrest and detention is necessary to prevent a terrorist activity. This power is subject to significant safeguards and limits. Warrantless arrest is permitted, but only in exigent circumstances – otherwise, arrest requires the consent of the Attorney General as well as an arrest warrant. Following arrest, the subject must be brought before a judge, normally within 24 hours, and the State must show cause why s/he should not be released. If the decision is against release, the court would impose reasonable supervisory conditions. If the subject agrees to the recognisance, they must be released, otherwise they can be held in custody for a maximum of one year.<sup>135</sup>

## Denmark

*Terrorism-related Criminal Offences*

28. In June 2002 a new anti-terrorism law was enacted amending a variety of existing Danish laws (Law No. 378, 6 June 2002). This created a special section on terrorism in the Danish Criminal Code (*straffeloven*), containing terrorism-related offences. Such offences include very serious existing offences committed with the aim of disturbing the established order and intimidating the population, the maximum sentence for which are life imprisonment. It also created a separate offence of financing terrorism, carrying a penalty of up to 10 years imprisonment.

*Investigative Powers*

29. Chapter 71 of the Administration of Justice Act permits the police to intercept telephone calls or other communications to obtain information about the destination and source of communications and to intercept and read letters and other mail deliveries. These powers may only be used where they are of crucial importance for the investigation of a serious crime. They also require a court order, which sets limits on the scope and timescale of the interceptions.

30. The June 2002 law introduced amendments to Section 786 of the Administration of Justice Act, aimed at ensuring rapid and effective police access to the information provided by the interception of communications. They require telecommunications companies and internet service providers to record and store information on telecommunications and internet communications, which are of relevance to police investigation, for 12 months. These requirements do not, however, extend to the content of communications. The law also permits law enforcement agencies to install monitoring software on the computers of persons suspected of serious crimes, subject to the issue of an interception warrant.<sup>136</sup> Other investigative powers which were enhanced include a right to make secret searches in some serious cases, the right to carry out several individual

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<sup>135</sup> The Canadian Government is required to report to Parliament annually with respect to the use of these powers of preventive arrest. It reported that between 2001 and 2002 there were no instances in which this power was used (see: [http://www.psepc-sppcc.gc.ca/publications/national\\_security/ARC36\\_2002\\_e.asp](http://www.psepc-sppcc.gc.ca/publications/national_security/ARC36_2002_e.asp)).

<sup>136</sup> This enables the capture of data without being present at the location where a computer is used.

searches over a period of up to four weeks and a power to order a third party to surrender documents.

## Finland

### *Terrorism-related Criminal Offences:*

31. A number of terrorist offences have been introduced into Finnish law since September 11:

- An Act on the implementation of the Convention for the Suppression of the Financing of Terrorism was approved by Parliament in June 2002. Amongst other things, it amended Section 34 of the Penal Code to establish the financing of terrorism as a criminal offence.
- In January 2003, the Finnish Parliament passed a Bill, inserting a number of new terrorist offences into the Penal Code. The new chapter 34a of the Penal code sets out the sentences to be applied to terrorist offences and their planning. It contains offences of directing a terrorist group and of promoting a terrorist group.<sup>137</sup>

### *Investigative Techniques*

32. The Finnish Coercive Measures Act has been amended to increase the means available to the police in the context of criminal investigations. A general condition for the use of these investigative methods is that the information obtained can be assumed to be significant in the investigation of the offence. Many of these methods also require court authorisation. Two key means of acquiring information in the context of suspected terrorism include:

- Telecommunication interception and monitoring; and
- Technical listening, viewing and homing, which may, in limited circumstances, be used in homes.

33. The Office of the Prosecutor General, the central administration for the prosecuting service, is responsible for the prosecution of terrorist offences. In 2003, the Office designated one of its state prosecutors as responsible for the prosecution of offences relating to organised crime and terrorism. Finland has reported to the UN CTC that that prosecutor regularly participates in strategy and investigation meetings organised by the police.<sup>138</sup>

### *Classified and Security Sensitive Information*

34. The Code of Judicial Procedure provides that a witness or injured party may be heard in court without the presence of a party or the public if the court deems this appropriate and necessary, *inter alia*, to protect the person against a threat to life or health. In such cases, a witness may also be heard in the main hearing by means of video or other applicable technical means. The Criminal Procedure Act and the Code of Judicial Procedure lay down certain restrictions on the disclosure of the contact information of parties and witnesses.

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<sup>137</sup> It is interesting in the context of the French "association with a wrongdoer" provision (discussed below) that the Finnish parliament added a requirement that the main offence must actually be committed or its planning or attempt actually be effected. This had not been a requirement of the Government Bill but was not thought by the Parliamentary Constitutional Law Committee to be sufficiently clear to satisfy international human rights law.

<sup>138</sup> Fourth Finnish report to the UN CTC, S/2004/118.

35. The Police Act provides for the right of police officers to remain silent. When being heard as a witness or otherwise, police officers are not obliged to reveal the identity of any person who has provided them with confidential information during their employment or to reveal confidential tactical or technical methods. Nor are police officers under an obligation to reveal the identity of a person who was involved in undercover activities if the disclosure of the information would endanger the undercover activities concerned or would significantly endanger the handling of similar future duties.

### France

36. Since September 11, France has built upon its extensive, pre-existing anti-terrorism legislation, the cornerstone of which is Law No 86-1020 passed on 9 September 1986. The 1986 Law contains a body of substantive legislation and procedural measures designed to counteract terrorism.

#### *Terrorism-related Criminal Offences*

37. French law provides for the prosecution of all terrorist acts. These are defined as independent offences and carry heavy penalties. The offences normally consist of an existing criminal offence, committed “in relation to an individual or collective undertaking that has the aim of seriously disrupting public order through intimidation or terror”. The French definition of a terrorist offence is, therefore, wider than an actual terrorist attack. The list of basic offences was extended throughout the 1990s to include deliberate attacks upon the life or physical integrity of the person, abductions, hijacking, theft, extortion, destruction, damage or deterioration, certain computer related crimes, offences in relation to combat groups and the manufacture or possession of weapons. Insider trading and money-laundering were also added by an Act of 15 November 2001.

38. Some offences have an autonomous legal definition including, since 1994, environmental terrorism. The financing of terrorism is also a stand-alone criminal offence under Article 41-2-2 of the Penal Code, making it possible for the offence to be prosecuted as a separate case and processed more quickly.

#### *“Association with a wrong-doer”*

39. Act 96-647 of 22 July 1996 created a new and controversial terrorist offence in France. Article 421-2-1 of the Penal Code was modified to state that: “[t]he following shall also constitute a terrorist act: participation in a group or an understanding established for the purpose of preparing, by means of one or more material actions, one of the aforementioned terrorist acts”. The offence has been described as consisting:

“of preparatory participation; participation in a group or an understanding; preparation of a subsequent or ecological act of terrorism. The association therefore remains independent of the actual commission of the offences, which are its object. This is significant since it means that, as long as it is sufficiently realised, the preparation alone is enough to constitute the punishable offence”.<sup>139</sup>

There is no requirement to link the alleged participation with any actual execution of a terrorist offence or even with a verifiable plan for the execution of an offence.<sup>140</sup> The offence is sufficiently widely defined to allow the prosecution of someone with only a

<sup>139</sup> Yves Mayaud, *le Terrorisme*, Dalloz 1997, p. 29, cited in International Federation of Human Rights Leagues (FIDH), *International Mission of Inquiry: France: Paving the way for arbitrary justice*, January 1999, paras. 3–6.

<sup>140</sup> The Finnish Parliament has rejected a Government proposal to introduce a comparable offence.

passing interaction with a terrorist group. This is not counted as a serious offence and is subject to a maximum sentence of 10 years and to the jurisdiction of the *Tribunal Correctionnel* rather than the *Cour d'Assises*. Nevertheless, as it is a terrorist offence, it is subject to the same procedural rules and investigative techniques discussed below.

### *Sentencing*

40. The statute of limitation on prison sentences is extended in the case of terrorist offences (to life where the sentence was previously 30 years, from 20 to 30 years for serious crimes and from 15 to 20 years for other offences).<sup>141</sup> Rules of ordinary criminal law concerning aggravating circumstances are also applicable. Under the rules relating to the criminal responsibility of accomplices or of those who attempt to commit serious terrorist offences, life sentences are often imposed on those prosecuted for their participation in terrorist acts such as assassination, murder, serious attacks or abduction (Article 706-25-1 of the Code of Criminal Procedure).

41. A special mechanism is also available for “reformed” terrorists. This involves the remission of sentences for terrorists who change their minds and help to prevent a terrorist act, and the halving of sentences for terrorists who enable the authorities to prevent illegal activities or help the authorities prevent an offence causing loss to life.

### *Criminal Procedure*

42. *Centralised agencies*: The 1986 Anti-Terrorism Law centralised the agencies responsible for counter-terrorist action within the penal system (Articles 106-16ff of the Code of Penal Procedure). The powers in question relate to the prosecution, investigation and trial of terrorist offences as defined by Articles 421-1 to 421-5 of the Penal Code.

43. Total control of the counter-terrorist offensive is concentrated in the Paris judiciary. The bodies involved include:

- The *Procureur de la République* (the prosecuting authority);
- The *Juge des Libertés et de la Détention* (which decides whether to detain the suspect at the request of the investigating magistrate);
- The *Juge d'Instruction* (the investigating magistrate)—the role of the *Juge d'Instruction* is discussed below; and
- *Le Tribunal Correctionnel* and *la Cour d'Assises* (the two higher criminal courts).

44. *Juges d'Instruction*: The examining magistrate (*juge d'instruction*) hears witnesses and suspects, orders searches and authorises warrants. The magistrate's duty is to look for both incriminating and exculpatory evidence and their role is independent (*Code de la Procédure Pénale, art. L81*). The *Juge d'Instruction* works in close liaison with the Public Prosecutor in the 14<sup>th</sup> Section of the Paris Court and prepares a case dossier to which both the prosecution and defence have access. As the investigation proceeds, both the defence and prosecution may request actions from the magistrate.<sup>142</sup>

<sup>141</sup> The statute of limitation on bringing actions is also extended from 10 to 30 years for serious crimes and from 3 to 20 years for other offences.

<sup>142</sup> The role and independence of the *Juge d'Instruction* has been criticised. See, for example: International Federation of Human Rights Leagues (FIDH), International Mission of Inquiry: France: Paving the way for arbitrary justice, January 1999.

45. If the *juge d'instruction* decides that there is a valid case against a suspect he puts the case to court (presided over by a different judge). On the basis of the *Juge d'Instruction's* case dossier, the *Procureur* or *Avocat Général* prepares a "*Réquisitoire*" which is presented to the court of trial. The case is then argued on the basis of the evidence which the examining magistrate has assembled and which the parties have had the opportunity to contest.

46. *Rights of suspect*: The special procedural regime developed in the context of the investigation and prosecution of terrorist offences has the following characteristics:<sup>143</sup>

- Extension to four days maximum duration of police custody without charge, following which they must be presented to a judge who can extend the detention for a week (Article 706-23);
- The right to see a lawyer only after 72 hours have passed (twice the time which applies under ordinary legislation);
- Once the case is passed to a *juge d'instruction* the suspect can be detained 'indefinitely' with the regular agreement of the judge; and
- The application of provisions designed to deal with the criminal trial of military matters in peace time. These remove the right to a trial by jury. For example, when the *Cour d'Assises* hears terrorist cases, there are seven professional judges and six assessors. Furthermore, decisions of the court are reached by a simple majority (Article 706-25).

#### *Investigative Techniques*

47. Under an Act of 10 July 1991, interceptions by security forces are authorised for the purposes of preventing terrorism. These must be carried out under the supervision of the National Commission for the Monitoring of Security Interceptions.

48. The *Loi sur la Sécurité Quotidienne* extended the investigative techniques available in the context of terrorism.<sup>144</sup> The Act:

- Requires internet service providers and telecommunications companies to retain data-traffic for one year for law-enforcement purposes;
- Requires that the government be given access to cryptography keys upon request;
- Provides that video recordings can be made during interviews;
- Provides that videoconferencing technology may be used for witness confrontations for offences relating to terrorism, in order to ensure rapid transmission of information to the investigating magistrate and to avoid unnecessary transfers;
- Extends search powers in relation to vehicles and unoccupied premises;

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<sup>143</sup> References to Articles are to Articles of the Code of Penal Procedure.

<sup>144</sup> This legislation was originally designed pre-September 11th but a raft of anti-terrorism changes were presented and approved by Parliament in November 2001.

- Gives investigating magistrates unlimited discretion to issue search warrants - but these require the *juge d'instruction* to provide written reasons for authorising such searches (Article 706-24-1); and
- Increases the power of private security firms.

49. Internal Security Law (*Loi Pour La Sécurité Intérieure*) became law on 12 Feb 2003. This gives the police the power to remote access, monitor and seize computers. The power is restricted to use in official investigations and requires the authorization of a magistrate. It also permits the development of a national DNA database of ordinary criminals, allows data sharing between security forces and gives foreign law enforcement agencies access to police databases.

#### *Protection of Witnesses*

50. In cases involving an offence punishable by at least three years' imprisonment, where the hearing of a witness may endanger the life or physical integrity of the witness or of his/her family members, the magistrate can authorise the person's statements to be taken without his/her identity appearing in the case file. The defendant may question the witness using a device that renders the witness' voice unidentifiable.

## Germany

#### *Terrorism-related Criminal Offences*

51. In Germany there is a general offence of terrorism. It is also a criminal offence to be a member of any terrorist association, including foreign terrorist associations; to form a terrorist association; to be a member of a terrorist association; and to support or recruit members or supporters of a terrorist association. Supporting a terrorist who is not a member of an officially proscribed group can be punished under the provisions on aiding and abetting.<sup>145</sup> Anyone accused of participating in terrorist activities can also be punished according to the underlying criminal provisions, depending on what specific crimes have been committed (i.e. murder, manslaughter, kidnapping). In deciding the sentence, the German courts will take the terrorist motivation of a crime into account as an aggravating factor.

52. A number of changes have been made to German terrorism laws since September 11<sup>th</sup>. The criminal offence of forming terrorist organisations has been extended to organisations based outside the country (Section 129a of the Penal Code).<sup>146</sup> The law on private associations has also been amended to enable religious or ideological groups to be banned.

#### *Investigative Techniques*

53. Since September 11, the investigative powers of the security authorities have been extended:

- The Federal Criminal Police Office has the power to initiate investigations in serious cases of data sabotage;

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<sup>145</sup> Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper, Home Office, February 2004, Cm 6147, paras. 63–64.

<sup>146</sup> The previous law had required the existence of an independent branch organisation within Germany.

- The power to gather banking and telecommunications information has been accorded to the Federal Intelligence Service;
- Personal and biometric data may be collected by the Government;
- Surveillance regulations have been passed designed to facilitate government surveillance of fixed-line and mobile telephone calls, email, fax and SMS; and
- Telecommunications operators are required to install and maintain electronic bugging equipment that can be accessed by law enforcement agencies wishing to obtain traffic data relating to named individuals, for which a court order is required.

#### *Protection of Witnesses*

54. German courts have devised a way of dealing with evidence provided by informants who have been given a new identity and can no longer appear in court. Courts accept the non-availability of these witnesses, do not require disclosure of their identity and accept, in substitution, written statements made by them combined with the in-court testimony of the police officers that interrogated them. If the court requires additional information, it formulates written questions, which are answered by the declarants without disclosing their identity to the court or the judge.

55. The Federal Constitutional Court has found this practice to be constitutional and set out requirements for the validity of a conviction based on the procedure. These include that: (a) the decision about non-availability must be made at the highest level; (b) full reasons must be given as to the non-availability; (c) evidence is required to corroborate the hearsay evidence; and (d) in evaluating the evidence the court must take account of the fact that hearsay evidence is less reliable than evidence heard in court. It is worth noting that the German civil law system is non-adversarial and that Germany does not have a hearsay rule.<sup>147</sup>

## *Ireland*

#### *Terrorism-related Criminal Offences*

56. Irish law has not defined terrorism. Instead, terrorism is addressed through the general criminal law, in particular the *Offences against the State Acts 1993- 1998*. These Acts, *inter alia*, made it an offence to be a member of an unlawful organisation (7 years imprisonment). They also make specific provision in relation to evidentiary matters connected with the question of membership of such organisations. The *Criminal Law Act 1976* makes it an offence to recruit another person to an unlawful organisation or to incite or invite another person to join an unlawful organisation or to take part in or support or assist its activities (10 years imprisonment). Other relevant offences include directing an unlawful organisation (10 years imprisonment) and making use of firearms or explosives (10 years imprisonment). Other general offences that could be applicable to terrorism include murder, explosives and firearms offences, hijacking as well as the criminal law governing conspiracy, aiding and abetting, and attempting to commit offences.

57. The Government introduced a Bill in 2002, which would, for the first time, provide for terrorist offences as a separate and distinct category of offence under Irish law and also

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<sup>147</sup> Australian Law Reform Commission, ALRC Background Paper 8: Review of measures designed to protect classified and security sensitive information in the course of investigation and proceedings, 2003, pp. 51–52.

provide for enhanced penalties for these offences. The Bill contains definitions of “terrorist activity”, “terrorist-linked activity” and “terrorist group”. An offence of engaging in terrorist activity would be created as well as an offence of attempting to engage in terrorist activity or terrorist-linked activity. These offences would require an underlying offence in Irish law to be committed with specific intent for that to become a terrorist offence or terrorist-linked offence. This legislation has not yet been enacted and the Bill is currently at the Committee stage.

## Italy

58. Under Law No. 375 of 18 October 2001, Italy expanded its existing Anti-mafia Act (Law 575/1965) to cover international terrorism.

### *Terrorism-related Criminal Offences*

59. The Italian Penal Code has been amended to establish criminal liability for involvement in an “association with the purpose of international terrorism” (enacted as Law No. 438 of 15 December 2001). The sentence for promoting, establishing, organizing and financing terrorist associations is 7–15 years imprisonment. Participation in such an association carries a penalty of 5–10 years imprisonment and provision of transport, refuge and/or communication to such associations carries a punishment of up to 4 years imprisonment. The 2001 Law also makes it a crime merely to take part in any preparatory activities in association with others for the commission of acts of terrorism. Article 270-ter of the Penal Code introduces the crime of aiding and abetting conspirators, punishable with imprisonment for up to 4 years.

### *Sentencing*

60. The seriousness of terrorism-related offences is indicated by the length of the maximum sentences, the fact that the Court of Assizes has jurisdiction, the fact that attenuating circumstances to reduce penalties are applicable to a lesser extent and the fact that sentences are served in high-security prisons.

61. Sentence reduction in return for co-operation (*misura a favore di chi si dissocia dal terrorismo*— “measures in favour of those who dissociate from terrorism”), was created in Italy in 1987 (Law of 18<sup>th</sup> February 1987, no. 34). This law provides for substantial reductions of penalties for those criminals who dissociate themselves from terrorist organisations and who give evidence to support a prosecution and cooperate with judicial enquiries. Italy has commented that “[s]uch collaboration, and what in Italy is known as “repentance”, have made a fundamental contribution to combating domestic terrorism”.<sup>148</sup>

### *Investigative Techniques*

62. In their Second Report to the UN CTC, Italy commented that:

“Particularly important among the new legislative provisions in terms of prevention is the fact that during the course of investigations into terrorist crimes, it is now possible to carry out undercover operations under the control of the courts. The right to carry out preventive wire-tapping, under the responsibility of the Public Prosecutor and for

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<sup>148</sup> Second Italian Report to the UN CTC, S/2002/8, p. 11.

an appropriate period of time, allows the collecting of intelligence with respect to situations which may pose a serious threat to domestic and international security.”<sup>149</sup>

63. Law No. 375 of 18 October 2001 extends the investigative powers of the police, including as follows:

- Article 3 expands the application of the regime for judicial wire-tapping and the searching of buildings or blocks of buildings to cover cases of crimes committed for the purposes of terrorism;
- Article 4 introduces *ad hoc* provisions to permit undercover operations, to delay the issue of arrest warrants, as well as other provisions relating to the arrest of individuals and the seizure of property;
- Article 5 permits “preventive surveillance”/wiretapping of communications for up to 40 days when necessary in order to prevent a crime; and
- Article 6 permits the interception of communications between persons present in the same place, in connection with the search for fugitives from the law.

64. *Wiretapping*: The provisions with respect to wiretapping fall into two categories:

- The first applies only to preventive or pre-emptive purposes, i.e. gathering intelligence and information. Evidence obtained pursuant to this set of powers cannot be used in criminal proceedings.
- The second applies to the investigation and prosecution of crimes and is an instrument used to gather evidence to be used in a criminal trial. Wiretapping in the context of criminal investigations requires an order issued by the Investigating Magistrate. Section 3 of the Law of 2001 relaxes the normal rules on wiretapping (under Articles 266 *et seq* of the Penal Code), where the proceedings relate to crimes connected with terrorism. The amount of evidence needed in support of the wiretapping order is lower in the case of a terrorism related investigation. The evidence required to obtain an order in relation to the interception of communications in private houses is also significantly lower and, with the authorisation of the courts, it is possible to hack into computer systems or networks or intercept data exchanges between several systems.

## *The Netherlands*

### *Terrorism-related Criminal Offences:*

65. Recruitment to a terrorist group is dealt with under criminal law in the Netherlands as incitement to a criminal offence or violent action against public authorities (Articles 131 and 132 of the Criminal Code). It can also be prosecuted as actual or attempted incitement to commit a criminal offence (Articles 46a and 47 of the Criminal Code). Under Article 140 of the Criminal Code it is an offence to participate in a criminal organisation (this includes organisations that commit offences outside of the Netherlands).

66. Under a Terrorism Bill, which is currently before the Dutch Parliament, a separate criminal offence of participation in a terrorist organisation would be created under Article 140a of the Criminal Code, the penalty for which is more severe than the basic Article 140

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<sup>149</sup> Second Italian Report to the UN CTC, S/2002/8, p. 10.

offence. In addition, the maximum sentences for major offences such as murder would be increased by 50% where committed with a terrorist aim.<sup>150</sup>

## Spain

### *Terrorism-related Criminal Offences*

67. The Spanish Penal Code (approved pursuant to Organic Law 10/1995 of 23 November) contains a number of offences that would apply to terrorist activities. For example:

- Article 576 makes it an offence to collaborate with armed groups or terrorist organisations or groups (this would include recruitment of members); and
- Article 573 creates an offence of storing or possessing weapons or explosives at the service of or in collaboration with armed groups, organisation or terrorist groups.

### *Sentencing*

68. Terrorist offences are specifically defined in the Penal Code. The penalties for those offences are more severe than for the underlying offences, committed without a terrorist purpose (i.e. Normal Murder is 15-20 years and Murder for terrorist ends is 20-30 years).

69. Article 579 of the Spanish Penal Code also provides for sentence reductions in return for co-operation.

### *Criminal Procedure*

70. Prosecution for terrorist offences may be carried out through either ordinary or summary proceedings, depending on the penalty imposed for the act. The Organic law of the judiciary branch assigns responsibility for considering terrorist offences to a judicial body that has competence throughout Spain (the *Audiencia Nacional*).

71. The Spanish Criminal Prosecution Act relaxes a number of fair trial guarantees in the context of investigations pertaining to terrorism, including:

- Detention by the police may be extended 48 hours beyond the initial 72 hours, provided that this is authorised by the judge (art 520 *bis* of the Criminal Prosecution Act);
- Detainees may, by court order, be kept *incommunicado* (art 520 *bis* of the Criminal Prosecution Act);
- Police authorities may detain suspected terrorists in whatever place or domicile they may be hiding or taking refuge and, in connection with the detention, may conduct searches in those places and seize effects and instruments which might be linked to the offence committed (Art 553 of the Criminal Prosecution Act); and
- The interception of communications is permitted when ordered by the Minister of the Interior, provided that the relevant order is immediately transmitted in writing to the competent judge, who must either revoke or confirm it with a maximum of 72 hours and give reasons for his decision.

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<sup>150</sup> Third Report of the Netherlands to the UN CTC S/2003/897.

72. In addition, the Law on Information Society Services and Electronic Commerce (approved 27 June 2002) requires registration of all websites from which the operator derives some income. Article 12 requires communications data to be collected and automatically retained in a form to which the network provider does not have access but which can be used by law enforcement agencies if necessary for a criminal investigation.

## Sweden

### *Terrorism-related Criminal Offences*

73. Prior to the Swedish *Antiterrorism law no.146 2003*, Swedish legislation contained no reference to terrorist acts as special criminal offences. Persons committing terrorist acts would have been punished in accordance with the general provisions of the Penal Code, for example murder, hijacking, kidnapping, arson. The *Anti-Terrorism Law of 2003* sets a distinct tariff of sentences for “ordinary” offences when there is a terrorist link.

## United States

74. The American treatment of suspected terrorists is well documented. There follows a brief discussion of some of the legal measures taken by the US to address the issues used to justify Part IV. This note does not discuss the development and application by the United States of “enemy combatant” and “unlawful combatant” status or the use of military tribunals.

### *Terrorism-related Criminal Offences*

75. In October 2001, America introduced the USA PATRIOT Act<sup>151</sup> as a response to the September 11<sup>th</sup> attacks. The Act creates the following criminal offences:

- Harbours or concealing terrorists: if a person harbours or conceals a person he knows or has reasonable grounds to believe has committed, or is about to commit, certain terrorist offences (10 years imprisonment); and
- Providing material support for terrorism: this prohibits the provision of material support or resources where it is known and intended that it be used to prepare for, or carry, out certain terrorist related crimes.

76. The Act broadens the definition of “terrorist organisation” to include a group of two or more people, whether organised or not, that commits or incites terrorist activity with intent to cause death or serious injury or prepares or plans terrorist activity or gathers information about potential targets.<sup>152</sup>

77. The USA PATRIOT Act also extends the provisions of the Racketeer Influenced and Corrupt Organisations Law to federal terrorist crimes, enabling multiple acts of terrorism to be dealt with as a form of racketeering. This enhances range of investigative powers (and sentences) available and can avoid the need to use sensitive material during prosecution.<sup>153</sup>

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151 The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.

152 *Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper*, Home Office, February 2004, Cm 6147, para. 77.

153 *ibid.*, para. 78.

78. The Home Office has reported that the US also makes use of “material witness” status. This allows a person to be detained indefinitely as a witness to offences. Some argue that material witness warrants have been used as a form of preventive detention when authorities lack sufficient evidence that an individual committed a crime or immigration violation.<sup>154</sup>

#### *Suspected Foreign Terrorists*

79. Section 412 of the USA PATRIOT Act amends the US Immigration and Nationality Act, permitting the Attorney General to certify foreign nationals as “suspected terrorists” or a threat to national security if they are deportable or inadmissible. Suspects can be detained for 7 days after which they must be released, charged or deportation proceedings must be commenced. Certification decisions are subject to judicial review. The Act requires that the Justice Department report to Congress on the use of certification every six months. If the person cannot be removed, the Attorney General must review his detention every six months. The detention is only permitted to last as long as the person is judged to be a threat.<sup>155</sup>

80. On 17th September 2001 the Immigration and Naturalization Service (INS) issued regulations doubling the period for which the INS could detain a person without charge from 24 to 48 hours.<sup>156</sup> It also permits the INS “in the event of an emergency or other extraordinary circumstances” to detain someone for an additional “reasonable period of time”. No criteria are given as to the meaning of these terms. These regulations permit the INS to detain foreign nationals indefinitely without charge, without the protections afforded to those detained in connection with a criminal offence. A detainee can apply to an immigration judge for release on bond or file a *habeas corpus* petition in a federal court. There is, however, no right to a state-appointed lawyer. This power has been far more frequently used than the certification power under Section 412 of the USA PATRIOT Act.

#### *Investigative Techniques*

81. Newton reports that the USA “has published details of its intercept capability of landlines, mobile phones, satellite phones, diplomatic correspondence, and satellite intercept of foreign communications”<sup>157</sup>

82. The USA PATRIOT Act enhanced the wiretapping and other surveillance powers of the FBI. It also extended the use of “Pen registers” which are orders allowing the source and destination of calls to and from a particular telephone to be monitored without the need for a court order or “probable cause”. The “probable cause” requirement was also removed for e-mail monitoring. In addition, wiretaps authorised by a court in other jurisdictions can be used in the US and US courts can issue “roving wiretaps” which apply to an individual rather than a communications device.<sup>158</sup>

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154 *ibid.*, para. 80.

155 *ibid.*, para. 79.

156 8 CFR 287, INS No. 2171-01.

157 Anti-terrorism, Crime and Security Act 2001 Review: Report, 18 December 2003, HC100, Para. 211.

158 See International Helsinki Federation for Human Rights (IHF), *Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11 April 2003*, pp. 205–206.

*Classified and Security Sensitive Information*

83. The USA has enacted a procedural statute called the Classified Information Procedures Act ("CIPA"). CIPA is designed to prevent unnecessary or inadvertent disclosures of classified information and to ensure that the Government is in a position to assess the national security "cost" of proceeding with a legal case. It does not change the substantive rights of defendants or the discovery obligations of the Government and does not curtail the admissibility of classified information. Instead, it aims to balance the rights of a defendant with the interest of the state to know in advance the extent of the potential threat to its national security from pursuing a case. For example, to the extent that the court rules that certain classified material is discoverable, the prosecutor may seek the court's approval to use alternative measures such as deletion of sensitive information, substitution of summaries, closing the court, allowing witnesses to remain anonymous, requiring the defence to make its case known earlier in the process, and only allowing the defendant's security-cleared counsel to have access to the sensitive material.<sup>159</sup> The requirement to know the defence case in advance can also facilitate plea-bargaining.

84. The procedure set out under CIPA includes the following steps:

- The Court must be satisfied that classified information is discoverable;
- On the Government's request, the court is required to issue an order to "protect against the disclosure of any classified information disclosed by the United States to any defendant in a criminal case" (Section 3). The US Department of Justice has noted that the "protective order must be sufficiently comprehensive to ensure that access to classified information is restricted to cleared persons";<sup>160</sup>
- The court may (a) authorise the Government to delete specified items of classified information from discoverable documents; (b) substitute summaries of information; (c) substitute a statement admitting relevant facts that the classified information would tend to prove. The Government can demonstrate that the use of such alternatives is necessary in an *in camera* or *ex parte* submission to the court (Section 4);
- The defendant must notify the Government and the court in writing if they reasonably expect to disclose classified information at trial or in pre-trial proceedings. This must specify in detail the classified information on which the defendant intends to rely. Failure to comply with this procedure may lead to the court precluding the disclosure of classified information that was not the subject of prior notification and preventing the defendant examining any witness in relation to such information (Section 5);<sup>161</sup>
- If the Government so requests, the court must hold a hearing to determine the use, relevance and admissibility of classified evidence by the defence (to be held *in camera* if the Attorney General certifies that a public hearing may lead to a disclosure of classified information) (Section 6);
- Following the court's findings on admissibility, as an alternative to declassification and release of the information by the defendant, the Government may move an order permitting (*in lieu* of full disclosure) either substitution with a statement admitting relevant facts that the classified information would tend to prove or

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159 Anti-terrorism, Crime and Security Act 2001 Review: Report, 18 December 2003, HC100, paras. 237–238.

160 Department of Justice (USA), Criminal Resource Manual, 2054.

161 This imposes an unusual level of disclosure on the defence.

substitution with a summary of the classified information. The court is required to grant such an order if it considers that the alternative information “will provide the defendant with substantially the same ability to make his defence as would disclosure of the specific classified information”;

- If the defendant is able to use classified information in his defence, the Government is required to provide the defendant with the information that it anticipates it will use to rebut such information; and
- In addition, under CIPA, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. The court must then take action to determine whether the response is admissible to safeguard against the compromise of any classified information. This could include the US providing the court with a proffer of the witness’ response to the question or line of enquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit (Section 8(c)).

#### Main Sources:

State reports to the Counter-Terrorism Committee of the United Nations (“UN CTC”) pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001.

*Anti-terrorism, Crime and Security Act 2001 Review: Report*, 18 December 2003, HC100 (The “Newton Report”).

*Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper*, Home Office, February 2004, Cm 6147.

Australian Law Reform Commission, *ALRC Background Paper 8: Review of measures designed to protect classified and security sensitive information in the course of investigation and proceedings*, 2003. (<http://www.austlii.edu.au/au/other/alrc/publications/bp/8/bp8.html>)

Australian Law Reform Commission, *ALRC Discussion Paper 67: Protecting Classified and Security Sensitive Information*, 2004. (<http://www.austlii.edu.au/au/other/alrc/publications/dp/67/>)

*Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11*, International Helsinki Federation for Human Rights, April 2003.

International Human Rights Law Institute, DePaul University, “National Laws and Measures for Counter-Terrorism and Regulation of Biology”. ([http://www.law.depaul.edu/institutes\\_centers/ihrl/publications/national\\_laws.asp](http://www.law.depaul.edu/institutes_centers/ihrl/publications/national_laws.asp))

International Federation of Human Rights Leagues (FIDH), *International Mission of Inquiry: France: Paving the way for arbitrary justice*, January 1999.

International Helsinki Federation for Human Rights (IHF), *Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11*, April 2003.

4 June 2004

## Annex B: Extract from Minutes of evidence taken before the Committee on 19 May 2004

Witnesses: Mr Ken Macdonald QC, Director of Public Prosecutions and Head of the Crown Prosecution Service, Mr Philip Geering, Director of Policy, and Mr Chris Newell, Director of Casework, Crown Prosecution Service, examined.

\* \* \* \* \*

Q42 Chairman: *If we may, we will move on now to the review of counter terrorism powers. Mr Macdonald, you will be aware that in February of this year the Home Office published its discussion paper Counter Terrorism Powers: Reconciling Security and Liberty in an Open Society calling for a debate on whether there were any alternative measures available to replace Part 4 of the 2001 Act, and of course the Newton Report has strongly recommended the replacement of Part 4 with comprehensive, overarching legislation to deal with terrorism. Given the breadth of terrorism offences which already exist what would you say are the main obstacles to bringing prosecution for existing criminal offences?*

*Mr Macdonald:* We have had some input into the legislation, the two most recent statutes in this area, and I think we did quite a lot of work on those. As you say, the criminal law covers a huge swathe of activity that could be described as terrorist, and it is not just the terrorism statutes, common law does it, and various other statutes do. Just as an example, the Terrorism Act proscription offences include membership, inviting support, addressing meetings, wearing clothing or displaying items. Terrorist property is controlled by making it an offence to fund raise or invite somebody else to use money or other property for terrorist purposes, to enter in or be concerned in an arrangement as a result of which money or property is made use of; money laundering; the disclosure of material by the banks; interfering with information. Then terrorist offences themselves include: providing or receiving or inviting others to receive training or instruction in firearms; directing a terrorist organisation; possession of arms for a terrorist purpose; collecting or possessing a document or record likely to be useful to a terrorist; inciting acts of terrorism overseas. There is a jurisdiction section so that if you are involved in terrorist activity outside the UK and if is justiciable here it is an offence here, and added to by the Anti Terrorism Crime and Security Act is providing material information about acts of terrorism. We also have the common law and a large range of other criminal offences. There is an enormous amount of legislation that can be used in the fight against terrorism. Our interest as prosecutors is to prosecute criminal offences in the criminal arena according to the code tests and according to normal criminal trial rules. That is what we are paid to do and that is what we do.

Q43 Chairman: *So you are effectively saying there are not enough laws at all?*

*Mr Macdonald:* No, what I am saying is at the moment there is a great deal of legislation available to us. If you are asking me whether there are changes that can be made in the process, I think we may be getting into areas of policy which it is difficult for me to comment upon. If you are asking me whether, as I understand it, the legislation which exists at the moment provides us with weapons to fight terrorism, it certainly does. Whether Parliament thinks there are other weapons which we ought to be given to use in the fight against terrorism, if it is appropriate (as I am sure it is) to discuss it in the context of the fight against terrorism, if Parliament wants to do that then we will happily use any tools which we are given.

*Q44 Chairman: There does seem to be quite a considerable discrepancy between the number of people arrested under the legislation and those who are ultimately convicted. Between 11 September 2001 and 31 January this year, as I understand it, 544 people were arrested under the 2000 Act, 98 of them were charged with offences, and six were convicted. Now, this does suggest there may be problems. I wondered whether this was due to evidential or any other problems you may wish to highlight?*

*Mr Macdonald:* I think these are figures from the Home Office. As far as the six convictions are concerned that is six convicted so far. There are a large number of outstanding cases so it could potentially be misleading to be talking about 500 arrested, 98 prosecuted and only six convicted. There are a pretty large number of cases pending and, indeed, there are one or two cases going on at the Old Bailey at the moment. So far as the discrepancy between the number of people arrested and the number of people charged is concerned, as a prosecutor that does not surprise me at all. The test for arresting someone is reasonable suspicion on the part of the police officer. We are always consulted by the police as to what the charge should be. The test we apply to prosecute is the code test which is a much higher test. There is always going to be some wastage at that point. Indeed, one of the reasons we were given powers to select charges was to ensure that only the right cases were prosecuted. There is an additional factor as well. Quite often people who are arrested for terrorist offences are then prosecuted under other legislation. I am thinking in particular of a fairly large number of cases which have occurred throughout the jurisdiction in recent years of individuals who are arrested for terrorist offences, the terrorist aspect cannot be demonstrated to the satisfaction of the code tests but they are then prosecuted for various false document offences or credit card frauds and other related offences of fraud and theft and so on. So I am just urging you to treat with caution both the figures of 98 prosecuted because there will be many others prosecuted who were arrested for terrorist offences and prosecuted for something else, and particularly to treat with caution the figure of the six convicted because there are many people currently awaiting trial.

*Q45 Chairman: Okay. You referred just now to the police responding to reasonable suspicion. How would you say this could apply in the case of a legitimate public protest like somebody wanting to demonstrate against an arms exhibition and then being arrested under the terrorism legislation?*

*Mr Macdonald:* We do not tell the police who to arrest and who not to arrest. In the case that you are talking about the divisional court, the higher court, the administrative court indicated that the use of the arrest power was appropriate in that case. I do not think it is for me to comment on whether it is appropriate for the police to arrest or not arrest particular people. Once the police arrest people and bring the case to us we will then make a decision about whether it is appropriate to charge individuals and we will advise the police about what steps they might take to secure evidence, but I would be very reluctant to answer questions about whether it is appropriate for the police to arrest people in particular circumstances.

*Q46 Chairman: And could you just tell us what you would say were the obstacles to prosecuting these offences, given the scope that you have just talked about?*

*Mr Macdonald:* There are one or two areas one could look at. Custody time limits are difficult in terrorist cases because, as you know, custody time limits require someone to be brought to trial within a period of time unless that is extended. We have lost cases from time to time when we have not been able to prepare them within what the court tells us is reasonable time because of the sheer bulk of work involved. Some of these are massive, massive investigations. I have been in these cases myself when I was at the bar and these are huge cases and they are very complex. The new sort of terrorist cases are much more

complex than the old IRA cases. They contain a lot of evidence from abroad, a lot of evidence of card transactions, and a lot more circumstantial evidence. They are more complicated to investigate and they are more complicated to prosecute so the custody time limits are things we sometimes find difficult to meet in these cases. I think the use of video evidence from abroad would be something that if it were available and it is not for me to say whether it should be available prosecutors would be perfectly content to use. A lot of these cases have international links and you will have a group of people prosecuted in this country who have links with people all over Europe and sometimes in North America, and sometimes there are people in custody in other jurisdictions who could potentially be witnesses in our cases, and sometimes we cannot get them into this country. I think the real answer to your question is that the sort of new powers which are proposed in serious crime cases in the SOCA White Paper, *One Step Ahead: 21st Century Strategies to Defeat Organised Crime*. Terrorism is organised crime and amongst the powers which again it is not for me to say whether they should be introduced or not but which we would be content to use if they were would be powers to interview under compulsion, by which I mean powers such as the Serious Fraud Office have to interview individuals and to have them produce documents on the Strasbourg principles so that the material cannot be used against that individual but can be used to gain evidence against others. That sort of power would certainly, if Parliament thought it appropriate to enact it, be used by prosecutors. I think we need to think much more about plea bargaining in these sorts of cases. I think we need to think more about the possibilities of immunising accomplices, offering immunity in exchange for evidence. I think these sorts of process changes and again it is not for me to say whether they should be enacted—if Parliament were persuaded they should be enacted, in my judgment as a prosecutor, they would be things we would be content to use in these cases.

Q47 Lord Judd: *Intercepted communications obviously play a major part in this action against terrorism. Would a relaxation of the current absolute ban on the use of intercept material enable more prosecutions to be brought successfully for terrorism offences?*

Mr Macdonald: There is a review going on at the moment. There is review to which the Home Office is contributing, various agencies are contributing, we are contributing, and other interested parties are as well, and we will obviously await the results of that review with interest. I think what I can say is if there is in existence probative and admissible evidence prosecutors always want to use it. Whether that evidence which you describe ought to be admissible is a matter on which Parliament will have to decide. We recognise as prosecutors that there are genuine competing interests on both sides of this argument and there are strong arguments on both sides. Prosecutors of course will always use probative, admissible evidence if it is available.

Q48 Lord Judd: *Is there a problem about reliability of evidence of this kind and is there an issue of the protection of sources?*

Mr Macdonald: I think there are various arguments being deployed. Obviously protection of sources is an argument being deployed. There is a policy review going on into this at the moment and we are contributing to it so I am reluctant to get, if I can avoid it, too much into this debate. All I can really say is where there is probative and admissible evidence we use it.

Q49 Lord Judd: *You do.*

Mr Macdonald: Well.

Q50 Lord Judd: *My first question was do you think if we move forward in this area this would bring more cases to a satisfactory and positive conclusion?*

*Mr Macdonald:* I would have to analyse intelligence data to answer that question and give you an answer based upon that, and I do not think it would be proper to do that.

Q51 Lord Judd: *Right. Do you think looking at how this might be done it would be possible to modify the rules governing disclosure of evidence so that the prosecution would not be obliged to disclose intercept evidence or its existence unless they chose to rely on it, or would this be an insuperable obstacle to relaxing the absolute ban?*

*Mr Macdonald:* The way the system works at the moment under the Criminal Procedure and Investigations Act (CPIA) is that we disclose to the defence all the material upon which we intend to rely in the trial. We also disclose to them any material which, in our judgment, undermines our case or supports their case. So if we have material that we do not intend to rely on but which does not undermine our case or support their case, it is not discloseable under statute. The reality of the situation is that one would be considering material which was material that we would be intending to rely on, I suppose, otherwise it is of no interest to us. Equally, if we are not intending to rely on it and it does not help the defence or undermine our case, it is of no interest to the defence either. It is simply irrelevant to any issue in the case.

Q52 Lord Judd: *I understand the embarrassment with which you are faced and I use that word in the technical sense of embarrassment, but would it be right to say that there is a sense of frustration sometimes because you are fairly convinced that successful prosecution is possible but under the rules as they obtain at the moment you cannot reach that successful prosecution?*

*Mr Macdonald:* All I can say is that we are contributing to this review as an independent prosecuting authority and expressing our views as persuasively as we can.

Q53 Lord Judd: *What about hearsay evidence in this context?*

*Mr Macdonald:* The rules relating to hearsay evidence have been relaxed by the Criminal Justice Act 2003 and I think the clauses which deal with that will be implemented next year. I cannot remember which clause it is but effectively the judge is going to be given much more power to introduce hearsay evidence in circumstances where the maker of the statement which is sought to be introduced is not available for a variety of reasons and where the judge thinks it is appropriate and fair to do so. As prosecutors we feel that this will broaden the extent to which hearsay evidence can be used in criminal trials and I think what we want to do is to see the effect of that before we rush out and make statements about further reform. I think you will find the rules relating to hearsay are relaxed to quite a degree by the statutory change. As I say, I do not think it is going to be implemented until next year but I think it will make a change and of course that will give us the possibility of introducing pieces of evidence which we would not.

Q54 Lord Judd: *It sounds to me as if you as a lawyer have certain anxieties about this?*

*Mr Macdonald:* About what?

Q55 Lord Judd: *About the relaxation.*

*Mr Macdonald:* I did not say that.

Q56 Lord Judd: *You did not say that; you said something that made me feel that. You do not?*

Mr Macdonald: No.

Q57 Lord Lester of Herne Hill: *As you know, the Newton Committee of Privy Councillors looked into this on the part of Parliament and faced the same dilemma as the Home Secretary as to how one could possibly avoid detaining people indefinitely without trial derogating under the European human rights legislation rather than modifying our procedures in order to be able to bring effective prosecutions using sensitive intelligence material of a kind that could not be shown to the accused. The recommendation that the Newton Committee made unanimously was that we should be a bit less common law minded and think more about an inquisitorial approach, at any rate at the initial stages. Although they did not say this there were two options that we have been thinking about, and I am hoping I can coax out of you something other than it is a matter for Parliament because I think in this area your expertise, both as a distinguished member of the Bar in your past incarnation and now would be really helpful. The first of the two options that were being suggested was French - I hope none the worse for that—where there would be an independent security-cleared judge as the investigator, the juge d’instruction (which happens not only in France but elsewhere on the Continent) and the second is the Scottish model of a more proactive investigation led role for the procurator fiscal or your own office. Do you consider first of all either option would somehow be incompatible with the glory of the English common law system or could it be grafted upon our system without tearing the fabric of it? The next question I will ask is which of those two options, if you were asked by Parliament to choose, would you think was the more compatible with the traditional role of the English prosecutor, the idea of a juge d’instruction or the idea that you would be more like the procurator fiscal in Scotland?*

Mr Macdonald: As I have said, we are moving to a system of giving prosecutors more power in the system to the extent they do in other jurisdictions. When I say prosecutors I mean the prosecuting authority, not barristers. Traditionally we have given the prosecuting authority a very passive role since its creation in 1986. The initial idea was that the police would investigate a case, charge the suspect, pass the file to the CPS, the CPS would review it, and if there was a more than 50 per cent chance of conviction pass it to a barrister. We have moved on a lot from there and we are going to move much more quickly in a fundamental way to giving prosecutors more power to be making the decisions which lawyers ought to make. I do not think there is anything inconsistent between that and an adversarial system; indeed it is perfectly consistent with it. Some of what you may be looking for will come out of that. If we get the powers to be a bit more involved in plea bargaining, to immunise witnesses, to conduct interviews under compulsion, the power to interview witnesses pre-trial, all these directions in which we are moving will have, if we get that process, some benefit. So far as the juge d’instruction is concerned I am not an expert on French law. I have to say I do not understand how that system would protect from disclosure the material which it is intended to. As I understand the idea of this it is to protect sensitive material from disclosure to the defence. As I understand the French system, and I am not an expert, the defendant in the French system is entitled to see the file, the dossier, and it is difficult to imagine a system in which you could have a dossier that simply did not contain sensitive material but which then went to a trial judge and he or she saw it without the defendant ever seeing it. I have to say it is a matter for Parliament, Lord Lester, but I am not sure I understand how this model solves the problem which it is designed to solve, that of protecting sensitive material from disclosure.

Q58 Lord Lester of Herne Hill: *I think the notion is that it should be a two part process, that an investigating judge, who is entirely independent and therefore commands public confidence, should see the entire dossier including material that may not be able to be used in a criminal process and, having done that, should then pass it to the second stage of the trial and that would provide greater confidence in the ability of the prosecution to go forward. Then there would be the problems about public interest immunity and what the accused could see and whether there could be a SIAC type procedure and so on. That is the notion—that one way of making it a bit easier and to command confidence would be to have that ability, either in your office or with an independent judge at that stage.*

*Mr Macdonald:* I certainly do not take the view that because something comes from another jurisdiction it cannot be fitted into ours. I am sorry to be unhelpful but I am reluctant to express a view in a hearing like this about this because we simply have not had enough time to think about it and to tease out what the pros and cons are. As prosecutors we are always open to process changes and, I repeat, just because something comes from another jurisdiction does not mean it cannot work here. We are open to all constructive debates. I agree with what Roger Smith, the Director of Justice, said when the Home Office announced this consultation that he thought debate was a good thing. We as prosecutors think debate is a good thing, too. The Home Office has announced, as I understand it, an inquiry or review of international practice to see whether there are foreign models which we could usefully employ here. We are not resistant to that at all. If models can be found which help to ease this situation, then so much the better.

Q59 Lord Campbell of Alloway: *It is worth considering. Your answers have been most interesting and helpful. Going back to Lord Judd's problem with the intercept evidence, which will not be admissible certainly because unless it was disclosed to the accused he could not be cross examined on it, at the initial stage in France it would not be quite as we propose because the judge would be security cleared. If you are going to have a first stage rather akin to the French system you are going to have a security cleared judge who will see all the evidence and interrogate the accused but perhaps not expressly referring to it. Then when he has made his recommendation to proceed and if there is a case, then it goes to another judge who does not see that evidence. Therefore, it is a very complicated affair and it is very difficult to deal with it unless one has a clear pattern as to what is to happen because Lord Judd was on to something of some considerable importance but does not know how it works in the public interest applications and one thing and another, but you have got to take that on board and you have to have (and you have in a sense) a new procedure under the SIAC Trust.*

*Mr Macdonald:* There is a complexity arising in this respect, it is true. I think there are two things to say. First of all, I stressed under CPIA we do not disclose and we should not disclose to the defence material upon which we do not intend to rely unless it undermines our case or helps theirs. There can be a wealth of sensitive material which we simply do not disclose. Prosecutors in making these decisions are making quasi judicial decisions. They are independent of government, they are not controlled by politicians, and they are making decisions about what to give the defence and what not to give the defence routinely. Thus not all sensitive material which is unearthed in an investigation has to be given to the defence under our system; it is only that which either proves the prosecution case and is going to be relied upon or undermines it or assists the defence case as set out in the defence case statement. So far as public disclosure is concerned the House of Lords in H and C has stressed again the golden thread of disclosure of material to defendants. Lord Steyn said that the defendant's right to disclosure is an inseparable part of his right to a fair trial. We are living in very difficult times but we must not lose sight of that principle. We as prosecutors are loyal to that principle in criminal trials and we are rigidly loyal to due process in that sense, which is why it is important for us to maintain our independence and important for us to remember our independence and adhere to our

principles of impartiality and fairness when we are making all these new legal decisions we are being called upon to make. We as prosecutors are interested in safe convictions in which the public can have confidence.

*Q60 Chairman: Are there any other ways in which you think there is scope for enhancing or developing your role which might help overcome the obstacles to prosecuting terrorist offences?*

*Mr Macdonald:* I have already highlighted the procedural changes which I think will help us to do that. By that I mean the enhancement of the prosecutor's role and the handing over to the prosecutor of all the legal decisions which obviously should be made by lawyers and in the past have not been. If Parliament decides to enact the sorts of powers which are thought appropriate in the case of the fight against organised crime, I think all of these are ways of giving prosecutors potentially the ability to do their job better and more effectively and are as relevant to terrorism as they are to other forms of serious crime.

*Chairman: Thank you very much for coming before us today. Thank you, Mr Geering and Mr Newell. Order, order.*

# Formal Minutes

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**Wednesday 21 July 2004**

Members Present:

Jean Corston MP, in the Chair

Lord Bowness

Mr David Chidgey MP

Lord Campbell of Alloway

Mr Kevin McNamara MP

Lord Judd

Lord Lester of Herne Hill

The Committee deliberated.

\* \* \* \* \*

Draft Report [Review of Counter-terrorism Powers], proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 85 read and agreed to.

*Resolved*, That the Report be the Eighteenth Report of the Committee to each House.

*Ordered*, That certain papers be appended to the Report.

*Ordered*, That the Chairman do make the Report to the House of Commons and that Lord Bowness do make the Report to the House of Lords.

[Adjourned till Wednesday 8 September at a quarter past Four o'clock.]

# Appendices

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## 1. Submission from Commission for Racial Equality

### 1. Introduction

1.1 The Commission for Racial Equality (CRE) welcomes this opportunity to respond to the above discussion paper, and the accompanying document 'Part Two: Government Response to Privy Counsellor review of the Anti-Terrorism, Crime and Security Act 2001'. In submitting a response we have not attempted to address all the issues raised in the documents. Instead we have focussed on issues we consider to have particular relevance for the purposes of racial equality.

### 2. The role and the remit of the CRE

2.1 The CRE is charged with three duties under the Race Relations Act, 1976:

- working towards the elimination of racial discrimination;
- promoting equality of opportunity and good race relations between persons of different racial groups generally; and
- keeping under review the working of the Act.

### 3. The race equality duty

3.1 Under the Race Relations (Amendment) Act 2000 (RR(A)A), named public authorities (listed in schedule 1A of the RR(A)A 2000) are subject to a general statutory duty to ensure that in carrying out their functions, they give due regard to the need to eliminate unlawful racial discrimination, to promote equality of opportunity and good relations between persons of different racial groups.

3.2 Listed public authorities are responsible for ensuring that the duty is an integral part of any function where racial equality is relevant. The Home Office and all criminal justice agencies are subject to this duty.

3.3 In addition to the general duty, listed public authorities are also subject to specific duties in relation to their policy and service delivery, which include the requirement to produce a Race Equality Scheme (RES). The RES should set out those of its functions and policies or proposed policies which that person has assessed as relevant to its performance of the general duty and should contain details of the arrangements made for:

- i) assessing and consulting on the likely impact of proposed policies on the promotion of racial equality
- ii) monitoring its policies for any adverse impact on the promotion of race equality
- iii) publishing the results of such assessments, consultations and monitoring with respect to the above
- iv) ensuring public access to information and services which it provides, and
- v) training staff in connection with the duties imposed by section 71 (1) of the RR(A)A 2001 and associated orders

3.4 An authority must within a period of 3 years from the 31 May 2002, and within each further period of three years, review the assessment referred to in (i) above.

3.5 The provisions of the Act and its amendment will be relevant to all service providers.

#### *4. Adverse or negative impact of policy*

4.1 We expect that all planned policies and proposals for new pieces of legislation are subject to a race equality impact assessment, (as outlined in i, para 3.3). We would like to know whether such an assessment took place prior to the introduction of the Anti-Terrorism Crime and Security Act 2001 (ATOS Act). We would add that even for those public authorities subject only to the general duty, carrying out a race equality impact assessment is crucial in establishing how the general duty has been met.

4.2 Further, in relation the ATCS Act, we expect that if the race equality duty is being adhered to, then arrangements for ethnic monitoring are in place (as outlined in ii, para 3.3). However the discussion paper: 'Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society' contains no reference to any reporting or monitoring for any adverse impact. Further, having studied the relevant data that has been made available publicly,<sup>162</sup> we are concerned about the absence of any ethnic monitoring statistics. This makes it impossible to assess the impact that the legislation is having on different racial and faith groups. Nor does the data, in its current format, allow us to assess the extent to which the legislation may have a differential impact on particular racial groups.

4.3 In view of this, we would ask if the original datasets (used to produce the existing statistics for arrests, charge, detention and stop and searches) could be re-examined, in order to produce race and faith breakdowns?

4.4 We would also like to stress that any proposed changes to counter-terrorism legislation in Britain, following the current review taking place, must be subject to a race impact assessment, prior to implementation.

4.5 Where negative impact is identified, agencies are required to examine alternative means of achieving the desired policy goal, which will not have a negative impact on race equality. Where adverse impact has already occurred, it is necessary to either justify such policy or consider alternative policies for the future and also take action to mitigate the negative effects.

#### *5. Impact on Muslim communities*

5.1 We are conscious of increasing concerns amongst Muslim communities of the impact of anti-terrorism legislation and are concerned about the impact this may have on good race relations. As the powers of the ATCS Act are particularly directed at terrorists, with explicit reference to Al-Qaida and the network of terrorist groups associated with it, we believe that it is vital that the Home Office considers the implication of such a policy on Muslim communities in Britain, in particular. We would also point out that any adverse impact on community confidence would be contradictory to the Home Office's public service agreements (PSAs) on increasing confidence, including that of ethnic minority people.

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<sup>162</sup> Public data available: Terrorism Act 2000: Arrest and Charge Statistics (Home Office); ATSC Act: Detainees under Part 4 (Home Office); and Terrorism Act 2000: Stop and searches carried out under section 44 (Home Office).

## 6. *Ethnic monitoring of suspects*

6.1 We are concerned that the Home Office has not been collecting data, at the very least by race, and ideally, by race and faith. In a response to a parliamentary question (House of Commons Hansard Written Answers for 18 November 2003), the Home Secretary stated that this data could only be collated and verified at disproportionate cost.<sup>163</sup>

6.2 The view of the CRE is that we recommend that this cost should be balanced and justified against the damage to community relations resulting from the belief that policies of conscious or unconscious religious profiling of Muslims are standard practice amongst officers involved in counter-terrorism operations.

6.3 In a recent report from the Metropolitan Police Authority (MPA) ('Report of the MPA Scrutiny on MPS Stop and Search Practice', May 2004), there is discussion on the negative impact that stop and search is having on community relations. The report cites evidence from the Home Office (2004) stating that black and Asian people are stopped eight and three time more often than white people (page 5).

6.4 Whilst we recognise that stop and search is a necessary tool for combating crime, the current levels of disproportionality, are unjustifiable. The MPA Scrutiny Panel also reported that current stop and search practice has created deeper racial tensions and has severed valuable sources of community information and criminal intelligence (page 10).

6.5 It is up to the courts to decide whether disproportionate stop and search figures could amount to unlawful discrimination under the provisions of the RR(A)A (section 1 9B). In view of our concerns about this disproportionately, we are actively seeking cases to the test the law in this area.

## 7. *Recommendations*

### *Comprehensive monitoring*

7.1 In order to effectively monitor any adverse impacts, we recommend that arrangements are put in place for a comprehensive system of collecting data on suspects under the Terrorism Act 2000 and the ATCS Act. In order to establish the real impact on Muslim communities it is critical that data is collated by race and faith, for all of the following activities:

- Instances of stop and search (including a breakdown of stop and search carried out under the Police and Criminal Evidence Act 1984 and Section 44 (I) and (II) of the Terrorism Act 2000);
- Arrests;
- Convictions leading from all arrests connected with anti-terrorism legislation;
- Detentions and certifications; and
- Release without charge.

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<sup>163</sup> David Blunkett: "The data collected on stops and searches made under section 44 of the Terrorism Act 2000 is not automatically cross-referenced with data on the ethnicity and gender of those stopped. This information could be collated and verified only at disproportionate cost", 18 November 2003.

7.2 We believe that the urgency of the need to collect data on faith cannot be underestimated, if the Home Office and relevant criminal justice agencies are to begin to assure Muslim and other affected communities that they are not being targeted on grounds of race or religion. Further such data must be made available to the public, on a regular basis.

7.3 Whilst a number of community sources (e.g. Forum Against Racism and Islamophobia, Muslim News, Muslim Safety Forum) are currently involved in the collection of case information on the categories listed above (para 7.1), the information gathered lacks comparability (due to differing sources of origin), is hard to validate and cannot be used to identify trends over time. We therefore suggest that consideration should be given to the means to resourcing the most effective methodologies for gathering such data. Options to enable this to be achieved include:

- Resourcing a consortium of community-based agencies to regularly collate information on stop and search, anti-terrorism led investigations and unacceptable police practice which can be fed back to i) the Government ii) relevant agencies and other stakeholders. (The CRE believes that community-based agencies are best placed to gather this information as they often have the closest links to local people and are more likely to be trusted by community members than official data gathering agencies).
- Funding for a consortium of legal representatives to have an information sharing arrangement for cases concerning anti-terrorism related charges.

#### *Community involvement*

7.4 In addition to comprehensive monitoring, we believe that Muslim and other affected communities, need to be consulted and involved in relevant fora concerning anti-terrorism investigations.

7.5 An excellent example of such an approach is the forthcoming meeting between the Crown Prosecution Service and representatives of the Muslim Community, due to take place at the end of this month. However, we recommend that more needs to be done - there are not enough opportunities for discussion on such matters between government agencies and the Muslim communities. There may be a significant role for community-based agencies to play in facilitating such dialogue.

7.6 Further, Police authorities need to balance the requirements of effective policing and at the same time ensuring that unnecessary race or faith bias in stop and search is tackled. We feel that this is crucial because community confidence in processes and powers to fight terrorism are only achievable through open and transparent mechanisms and a belief within communities that adequate safeguards are in place to ensure the fair treatment of suspects.

7.7 It is also important to consider the impact of these issues on matters of citizenship and integration, as there is a danger that some individuals of Muslim faith may feel less a part of British society as a result of being perceived as a security threat. We are concerned about the impact that this is having on race relations in Britain. We believe that individuals who do not feel that they belong in society find it difficult to participate or contribute to their full potential. Indeed some recent accounts (anecdotally and from the media), of increasing radicalisation and affiliation to groups representing extremist ideologies amongst some cohorts of Muslims, are a concern for us all.

We hope that the points made are useful and look forward to the JCHR response to the Home Office concerning these matters. Please note that we will be sending a copy of this letter to the Home Office, the Independent Police Complaints Commission, the Association of Community Police Officers and the HM Inspectorate of Constabulary, for their reference.

*24 June 2004*

## 2. Submission from the Mental Health Act Commission

Since the passing into law of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), two persons detained under that Act who have been found to be suffering from mental disorder have been transferred from prison to high secure psychiatric facilities using powers of the Mental Health Act 1983. The care and treatment of these patients subject to powers of the Mental Health Act 1983 falls within the overview of the Mental Health Act Commission. We have met with the patients in private and discussed their concerns and complaints, referring complaints to the hospital management for resolution through NHS procedures where appropriate.

The case of one transferred detainee, Mr Abu Rideh, has received considerable national publicity. The Commission is concerned at the appropriateness of Mr Rideh's placement within the high security services of Broadmoor Hospital and recognises that this concern is shared by a number of other parties including the patient, his family, civil liberties organisations such as Amnesty International, and a number of the hospital's clinical and managerial team. The Commission does not dispute that hospital-based treatment for mental disorder may be appropriate in Mr Rideh's case, but it seems highly possible that the clinical requirements for such treatment would be better served in conditions of lesser security. It is of great concern to us that continued detention in a high security hospital may be detrimental to Mr Rideh's mental state.<sup>164</sup>

The Secretary of State for the Home Department determined that Mr Rideh should be transferred to Broadmoor Hospital in 2002. In exercising his powers relating to the transfer under the Mental Health Act 1983 of sentenced or unsentenced prisoners, and in determining appropriate levels of security in hospital accommodation for such transferred prisoners, the Home Secretary is entitled to consider issues unrelated to a patient's mental disorder or clinical needs—such as whether a patient requires high security provision for reasons unrelated to his illness.<sup>165</sup> The Home Office has recently stated to the media that 'Broadmoor is an appropriate setting for Mr Abu Rideh, taking into account his clinical needs and the risk that he presents to the public' and that Mr Rideh 'is detained in a high security hospital because he is a risk to national security'.<sup>166</sup>

The Commission has written to the Home Office seeking reassurance as to the necessity of detention at this level of security on non-clinical grounds. We asked whether it was Home Office policy to insist on high security hospital accommodation for any hospital transfer under the 1983 Act of a person certified under Part 4 of ATCSA, or whether each case is considered individually. We have received a response that each case is assessed on the basis of individual needs, and that the initial assessment of the Home Secretary is ensured regular review through the mechanisms of the Special Immigration Appeals Commission (SIAC) and Mental Health Review Tribunal (MHRT). Our concerns are not wholly assuaged by this, however.

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164 Mr Rideh was granted refugee status (now rescinded under ATCSA) in 1997. He has been diagnosed with post-traumatic stress disorder relating to detention and alleged torture overseas. It has been alleged that detention in conditions of high security and isolation at Belmarsh Prison have contributed to his mental deterioration by inducing flashbacks (Amnesty International (2002) Rights Denied: the UK's Response to 11 September 2001, September 2002, AI Index EUR 45/016/2002, page 15).

165 Section 48 of the Mental Health Act 1983 allows the transfer of unsentenced prisoners to hospital at the Secretary of State's discretion, where the prisoner is suffering from mental illness or mental impairment of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and is in urgent need of such treatment. This threshold is considerably lower than that for detention in hospital under the civil powers of the 1983 Act, which also requires that treatment must be necessary for the health and safety of the patient or for the protection of others and that such treatment cannot be given unless the person is so detained.

166 Quoted in Audrey Gillan 'Give me an injection and I will be dead', *The Guardian* 5/5/04

Any mentally disordered prisoner who meets the basic criteria for transfer to hospital under the 1983 Act could be transferred to high secure provision for reasons, such as public safety or national security, that are unconnected with his or her mental disorder. But prisoners detained under the ATCSA appear to be unusually disadvantaged in terms of the transparency of such transfer decisions. Primarily, of course, this may be a reflection of the conditions for detention under ATCSA itself, which have been the subject of sustained criticism from civil liberties groups,<sup>167</sup> but we also question whether existing review mechanisms can ensure that the justification for particular placements can be thoroughly addressed.

One criticism of ATCSA, presented by Amnesty International as a memorandum to the UK Government in September 2002, contended that 'ATCSA detainees are not afforded the opportunity to challenge, in the context of fair proceedings, any decisions pursuant to the ATCSA which negatively affects their status or rights as recognised refugees or asylum-seekers in the UK.'<sup>168</sup> We are concerned as to whether a similar criticism is viable in relation to decisions over the transfer of mentally disordered ATCSA detainees to hospital under the Mental Health Act 1983. It seems questionable whether the review mechanisms of the MHRT and SIAC can provide an opportunity for a fair challenge of decisions over the appropriate level of security provision. In part, this is simply because the patient and his legal adviser will not be party to all of the evidence available to the judicial body, at least in the case of SIAC hearings. In the case of the MHRT, the judicial body itself cannot be a party to all the evidence that has been presented as justification of the patient's certification under Part 4 of ATCSA, and has no business in considering whether such certification is valid. We presume that SIAC hearings regarding transferred prisoners do not adopt the evidential and procedural focus on clinical appropriateness of the MHRT. In theory, the two judicial bodies have discrete roles, with SIAC reviewing certification under ATCSA and the MHRT reviewing detention under the Mental Health Act 1983, but in reality it is not a simple matter to disentangle one legal mechanism, or the justification for its use, from the other, particularly when the justification for placement in high secure provision is argued on non-clinical grounds.

The Commission has not been a party to either SIAC or MHRT hearings in the case of Mr Rideh, and our request to the MHRT for information on the Tribunal's ruling has been declined. However, from the limited information available to the Commission at this time, we understand that the last SIAC hearing upheld the certification of Mr Rideh under Part 4 of ATCSA whilst recommending consideration of lesser secure psychiatric provision, whereas the more recent MHRT hearing confirmed that he met the criteria for detention in hospital under the powers of section 48, but made no recommendation regarding security levels. The apparent divergence of judicial bodies' recommendations, and the curious fact that the body reviewing ATCAS has commented upon appropriate hospital environments whereas the body responsible for reviewing detention under the 1983 Mental Health Act appears not to have done so, raises with us questions about the scope and focus of these reviews. The Commission is clearly not entitled to examine the working of SIAC, and does not extend its monitoring to the functions of the MHRT.<sup>169</sup> Consequently

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167 In particular, we have in mind the criticisms of ATCSA Part 4 certification as a form of detention without charge or trial, without legal representation of choice and without disclosure of evidence to the accused.

168 Amnesty International (2002) Amnesty International's Memorandum to the UK Government on Part 4 of the Anti-Terrorism, Crime and Security Act 2001. AI Index EUR 45/017/2002, page 2.

169 Some legal commentators argue that the 1983 Act does, in fact, place the Commission under a legal obligation to review the operation of the MHRTs as they relate to detained patients by virtue of the lack of specific exclusion (i.e. Jones, R (2003) *Mental Health Act Manual*, Eighth Edition, p461). At the request of the Secretary of State, and because of the supervision of the Council of Tribunals and the mechanisms of legal appeal against the judicial decisions of the MHRT, the Commission has throughout its existence confined its observations on MHRTs to the general. The Commission has suggested to the Secretary of State that this arrangement may be less tenable under proposed reform of the Mental Health Act (MHAC (2003) *Placed Amongst Strangers*; Tenth Biennial Report 2001–03, p283).

it has neither resources nor access to investigate this question fully. Furthermore, we understand that the MHRT decision is now the subject of judicial review proceedings in which permission has been granted and a hearing date is awaited.

The Mental Health Act Commission functions as a safeguard for patients detained under the 1983 Act, through its monitoring of the use of powers and discharge of duties of that Act, and in its visiting of such patients in their hospital environments. The fact that large areas of the justification for the detention of transferred ATCSA patients remain closed to our scrutiny provides us with considerable disquiet, particularly as it seems possible that the structures of formal review for such detention may also have similar limitations imposed by levels of proof, availability of evidence and transparency of process. We hope that in drawing our disquiet to the attention of the Joint Committee on Human Rights we have been of help in its inquiry.

*18 June 2004*

### 3. Submission from Amnesty International

1. Amnesty International is a world-wide membership movement. Our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights. We promote all human rights and undertake research and action focussed on preventing grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination.

#### *Purpose*

2. On 13 May 2004, the Joint Committee on Human Rights invited written submissions for a response to the Home Secretary's discussion paper on *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* (Cm 6147). This submission sets out some key concerns of Amnesty International on the existence and use of the internment powers under Part 4 of the Anti-terrorism Crime and Security Act 2001 (ATCSA).<sup>170</sup>

#### *Key points*

3. Both prior to and in the wake of the ATCSA's enactment, Amnesty International expressed grave concern that some of its emergency provisions were draconian and would have far-reaching repercussions for the protection of human rights in the United Kingdom (UK).

4. The ATCSA was enacted on 14 December 2001, barely a month after draft legislation had been laid before Parliament. Such a rushed legislative process raises doubts as to the thoroughness, adequacy and effectiveness of the legislative scrutiny that the ATCSA was afforded by the UK Parliament. At the time of debating the draft legislation, Amnesty International expressed concern at the extraordinarily short time made available for parliamentary and public scrutiny of the complex draft legislation, particularly as most of its provisions were permanent, and the temporary provisions allowed for potentially indefinite deprivation of liberty without charge or trial.

5. Amnesty International continues to be concerned about serious human rights violations that have taken place in the UK as a consequence of the implementation of ATCSA since its enactment on 14 December 2001.

6. Amnesty International believes that Part 4 of the ATCSA is inconsistent with international human rights law and standards, including treaty provisions by which the UK is bound.

7. Under the ATCSA, non-UK nationals, whose removal or deportation from the UK cannot be effected, can be certified as "suspected international terrorists" by the Secretary of State and immediately detained without charge or trial—that is, interned—for an unspecified and potentially unlimited period of time, principally on the basis of secret evidence.

8. Amnesty International opposes detention under Part 4 of the ATCSA. It is detention ordered by the executive, without charge or trial, for an unspecified and potentially unlimited period of time, principally on the basis of secret evidence which the people

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<sup>170</sup> For more information about the ATCSA and Amnesty International's concerns in relation to serious human rights violations that have taken place as a consequence of its enactment, see, *inter alia*, "UNITED KINGDOM - Justice perverted under the Anti-terrorism, Crime and Security Act 2001" published by the organization on 11 December 2003 and copy of which is attached to this briefing for ease of reference. In addition, see "Amnesty International's Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001" and "UNITED KINGDOM - Rights Denied: the UK's Response to 11 September 2001", both published on 5 September 2002.

concerned have never heard or seen, and which they were therefore unable to effectively challenge.

9. Amnesty International has repeatedly expressed concern that Part 4 of the ATCSA has created a shadow criminal justice system devoid of a number of crucial components and safeguards present in both the ordinary criminal justice system and national procedures for the determination of refugee status.

10. Amnesty International continues to express concern that proceedings under the ATCSA fall far short of international fair trial standards, including the right to the presumption of innocence, the right to present a full defence and the right to counsel.

11. In the course of the appeals brought by ten individuals against their certification as “suspected international terrorists” under the ATCSA the individuals concerned did not benefit from the presumption of innocence, given that the Special Immigration Appeals Commission (SIAC), disconcertingly, ruled that under the ATCSA the standard of proof that the Home Secretary has to meet to justify internment is not the criminal standard of “beyond reasonable doubt” but, instead, is even lower than that in a civil case. This means that anyone involved in a civil claim to recover damages (for example as a result of a car accident) must prove their case to a standard higher than that required of the Home Secretary under the ATCSA in order to have his decision to intern people—potentially indefinitely—confirmed by the SIAC.

12. The organization believes that, for all intents and purposes, under the executive’s application of Part 4 of the ATCSA people have been effectively “charged” with a criminal offence, and have been “convicted” and “sentenced” to an indefinite term of imprisonment without a trial. In addition, in light of the fact that these powers can only be applied to non-UK nationals, Amnesty International considers that Part 4 of the ATCSA violates the prohibition of discrimination enshrined in international law. In August 2003 this was echoed by the UN Committee on the Elimination of Racial Discrimination which expressed deep concern about provisions of the ATCSA targeting exclusively foreign nationals.

13. In February 2003, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published the report of its February 2002 visit to the UK to review the detention conditions of those held under the ATCSA in two high-security prisons. The CPT noted allegations of verbal abuse; expressed concern about the detainees’ access to legal counsel; and remarked that the detention regime and conditions of ATCSA detainees should take into account the fact that they had not been accused or convicted of any crime and the indefinite nature of their detention. The CPT expressed concern about the fact that secret evidence may be considered in hearings under the ATCSA and that detainees and their legal representatives of choice can be excluded from such hearings. In addition, the CPT expressed concern that since at least some of the internees were victims of torture, the “belief that they had no means to contest the broad accusations made against them also was a source of considerable distress, as was the indefinite nature of detention”. The prospect of indefinite detention without charge or trial, principally on the basis of secret evidence, has had a profoundly debilitating effect on the internees’ mental and physical health.<sup>171</sup>

14. In addition, the internees’ chances of getting bail are next to nil. Under the ATCSA, the SIAC is empowered to grant bail to the ATCSA detainees. However, having monitored bail proceedings before the SIAC in the past, Amnesty International is concerned about the

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<sup>171</sup> In particular, see the case of Mahmoud Abu Rideh and of an Algerian man, known as “G”, in the background section below.

content of the right to bail under the ATCSA which is more restrictive than that provided for under international law. The organization understands that under the ATCSA, bail could only be granted if the detention conditions were such as to fall within the ambit of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the prohibition of torture or other ill-treatment.

15. Amnesty International is also profoundly concerned at the likely reliance by the UK executive on “evidence” that was procured under torture of a third party (i.e. not the appellants), in the UK executive’s presentation of such “evidence” in ATCSA proceedings before the SIAC. This “evidence” is said to have been obtained at Guantánamo Bay, Bagram and possibly in other undisclosed locations where people are held in US custody purportedly in the so-called “war on terror”.

16. Amnesty International continues to express concern that the UK authorities have taken advantage of the legal limbo and the coercive detention conditions in which UK nationals, and possibly others, were and have been held at Guantánamo Bay to interrogate them and extract information for use in ATCSA proceedings before the Special Immigration Appeals Commission (SIAC) here in the UK.

17. In this connection, Amnesty International is also deeply disturbed at the recent reiteration by Baroness Scotland of Asthal on behalf of the UK government in the House of Lords on 26 April 2004. Baroness Scotland stated that the UK authorities stand by their approach to “evidence which may have been obtained elsewhere through the use of torture—save for the evidence that is obtained from a party (usually the defendant in a criminal trial), [and that] all evidence is admissible, however unlawfully obtained”.<sup>172</sup>

18. Amnesty International has continued to remind the UK authorities, including the judiciary, of the fundamental prohibition on accepting evidence in any judicial proceedings if obtained as a result of torture, enshrined, *inter alia*, in Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which the UK is a State Party. Article 4 of the same instrument states that state parties must criminalize all acts of torture, as well as any acts which constitute complicity or participation in torture. The organization considers that the use of evidence obtained under torture undermines the rule of law and makes a mockery of justice. Torture not only debases humanity and is contrary to any notion of human rights, but it can also lead to decisions based on totally unreliable evidence. The willingness of the UK authorities to rely on evidence extracted under torture fundamentally undermines any claim to legitimacy and the rule of law and contravenes international human rights law and standards. Amnesty International has continued to express concern that in showing such a willingness to rely on evidence extracted under torture the UK government and the SIAC have given a green light to torturers world-wide.

19. Amnesty International notes the UK authorities’ dismissal of the recommendation of the Privy Counsellor Review Committee (also known as the Newton Committee) to replace, as a matter of urgency, existing “anti-terrorism” powers with new legislation which should “deal with all terrorism, whatever its origin or the nationality of the suspected perpetrators” and “will not require derogation from the European Convention on Human Rights” (para 25 of the report).

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<sup>172</sup> Monday, 26 April 2004, House of Lords Written Answer, [HL2060]: Column WA71.

*Amnesty International's recommendations to the UK authorities*

20. The UK authorities should heed the considered views of the Joint Committee on Human Rights that "there are serious weaknesses in the protection of human rights under the detention provisions of Part 4 of the Act" (6th report).

21. Amnesty International urges the UK authorities to listen to the growing volume of criticism being expressed by eminent religious leaders, parliamentarians, members of the legal profession and non-governmental organizations over the continuing use of Part 4 powers. The Law Society of England and Wales, for example, has endorsed the Newton Committee's recommendation that Part 4 powers of the ATCSA should be replaced as a matter of urgency.<sup>173</sup>

22. Amnesty International continues to call for the repeal of Part 4 of the ATCSA.

23. Amnesty International continues to call on the UK authorities to release all persons detained under the ATCSA unless they are charged with a recognizably criminal offence and tried by an independent and impartial court in proceedings which meet international standards of fairness.

24. Amnesty International continues to call for an outright ban on the admissibility of any evidence extracted under torture and for full compliance with relevant international law in this respect.

*Background*

25. Under Part 4 of the ATCSA the Secretary of State can certify a non-UK national as a "suspected international terrorist" if s/he "reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist". The basis for these determinations may include secret information that is never revealed to the person concerned or their lawyer of choice. In addition, under the powers granted to the executive in Part 4 of the ATCSA, it can order the detention without charge or trial, i.e. internment, exclusively of people who are non-UK nationals.

26. Since internment in these circumstances is inconsistent with the right to liberty and security of the person guaranteed under international human rights treaty provisions by which the UK is bound, the UK government has derogated from (i.e. temporarily suspended) its obligations under these provisions. The UK remains the only country that has derogated from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in the aftermath of 11 September 2001. In particular, the UK has derogated from Article 5(1) of the ECHR and Article 9 of the International Covenant on Civil and Political Rights.

27. To date, the Home Secretary had certified 17 people—all non-UK nationals—as "suspected international terrorists". There have been a total of 16 people detained under Part 4 of the ATCSA in the UK. The 17th individual has been certified under Part 4 of the ATCSA but has been detained under other powers. Out of the total of 16 people detained under Part 4, two of the 10 whose appeals were dismissed in October 2003 by the SIAC and who were among the first people detained under the ATCSA on 19 December 2001 have since "voluntarily" left the UK as they were able to go to another country, and preferred doing so rather than facing potentially indefinite detention in the UK under the ATCSA.

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<sup>173</sup> See the Parliamentary Brief of the Law Society of England and Wales prepared on the occasion of the House of Lords Debate on the Report of the Privy Council Review Committee on the Anti-terrorism, Crime and Security Act 2001, 2 March 2004.

28. In July 2002, Mahmoud Abu Rideh, a Palestinian refugee and torture victim interned under the ATCSA in Belmarsh high-security prison, London, since December 2001, was transferred to Broadmoor high security mental hospital. In addition, in March 2004, a Libyan man, known as "M", was released from detention under the ATCSA after the SIAC ruled that the case for detaining him as a "suspected international terrorist" was "not established". Also, in April 2004, the SIAC granted bail to another detainee, an Algerian former torture victim, known as "G", since it was persuaded that G's mental and physical health had seriously deteriorated as a result of his detention under the ATCSA. G was released on bail under strict conditions amounting to house arrest.

29. There are currently 12 people who are interned under the ATCSA in the UK. Most of the internees have been in detention for more than two years. They have been detained in two high security prisons (Belmarsh and Woodhill) and a high security mental hospital (Broadmoor) under severely restricted regimes.

30. Last year, the SIAC heard appeals brought by 10 individuals against their certification by the UK Home Secretary as "suspected international terrorists and national security risks", and against the consequent detention under the ATCSA of eight of them. Judgments handed down in October 2003 confirmed the certification of each individual concerned as a "suspected international terrorist" and dismissed his appeal.

31. Amnesty International considers that the proceedings before the SIAC fall far short of international fair trial standards, including the right to the presumption of innocence, the right to a defence and the right to counsel. The Special Advocates appointed to "represent the interests" of ATCSA detainees are no substitute for legal counsel of one's choice. They are restricted in what they can and cannot do and are unable to discuss secret "evidence" with the individuals concerned, undermining the detainees' ability to challenge "evidence" and the Special Advocate's ability to represent his or her interests.

32. Amnesty International is gravely alarmed at the SIAC's reliance on secret "evidence" in secret hearings.

*18 June 2004*

#### 4. Submission from Brethren (Christian Group)

May we respond to your call for written evidence.

- We represent a Christian group known as Brethren. We support Government as Government is of God (Romans 13 v.1).
- The Government has taken a stand along with the USA and others against outbreaks of terrorism. Anti-terrorist legislation has been passed, military action has been taken in Afghanistan and Iraq and much activity is currently taking place to 'win the peace' and set up fair and stable Government. We would urge that this be not undermined.
- It is right that Government should do all it can to protect all citizens. We should be able to go about our daily lives and travel internationally without fear of violence.
- Our criminal justice system is a good system and based on Biblical principles which must be upheld.
- Terrorism has been combated in a most pro-active manner and we support the Prime Minister's Sedgefield speech of 5 March 2004. New offences, new powers of detention, new rules of evidence, new intelligence powers, new court procedures and the revision of International Law must be considered. If Terrorists can 'play the system' to their own advantage, lives will be lost.
- We are extremely mindful of the verse of Holy Scripture—Romans 13 v. 4; 'But if thou do that which is evil, be afraid for he (Government) beareth not the sword in vain for he is the minister of God, a revenger to execute wrath upon him that doeth evil'.

15 June 2004

## 5. Submission from The British Psychological Society

The British Psychological Society welcomes the opportunity to contribute to the annual review process of alternatives to Part 4 of the Anti-Terrorism, Crime and Security Act (2001), which makes provision for detention without trial of suspected international terrorists.

The British Psychological Society agrees with Lord Chief Justice Woolf's recent statement<sup>174</sup> that—

“... the need for society to protect itself against acts of terrorism today is self evident [but] it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained ... that an individual should have access to an independent tribunal or court which can adjudicate upon the question of whether a detention is lawful or not”.

The British Psychological Society believes that this question of lawfulness includes the extent to which such detention without trial is compatible with the basic principles of Human Rights, endorsed by the UK both in the signing of the European Convention on Human Rights and through the provision of specific UK legislation under the Human Rights Act (1998). We also note the conclusions of the Privy Council review of the Anti-Terrorism, Crime and Security Act (2001),<sup>175</sup> which strongly recommended that the powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency, and in a manner that does not require a derogation from the European Convention on Human Rights.

In response to the Joint Committee on Human Rights Report on the Case for a Human Rights Commission, the British Psychological Society stated that we believe that a commitment to the promotion and protection of Human Rights should be a priority for government. Psychological science offers a valid basis for the consideration of Human Rights.<sup>176</sup> As psychologists, we are also closely involved in the care of people whose human rights have been infringed. We are very aware of the very grave psychological consequences of such infringements. Psychologists work within various statutory services (e.g. NHS, Social Services) and in the voluntary sector (e.g. Medical Foundation for the care of victims of torture and Amnesty International) providing services to victims of human rights abuses.

In our opinion there are profoundly important arguments for an urgent review of the powers in the Terrorism Act, 2000, and the Anti-Terrorism, Crime and Security Act 2001. We intend to comment on Police powers separately. This comment refers specifically to the provision for detention without trial of persons suspected to be involved in international terrorism. One of the effects of this provision is that many people are detained for indefinite periods. This can have a number of very serious psychological consequences.

### 1. Psychological damage

The Joint Committee will be well aware of recent legal action concerning the mental health of detainees. The British Psychological Society is extremely concerned that the

174 Court of Appeal (2004) Case No: C2/2004/0516 In the Supreme Court Of Judicature Court of Appeal (Civil Division) on Appeal from the Special Immigration Appeals Commission. Neutral Citation No. [2004] Civ 324. Royal Courts of Justice Strand, London, WC2A 2LL, 18th March 2004.

175 *Anti-terrorism, Crime and Security Act 2001 Review*: Report presented to Parliament pursuant to Section 122(5) of the Anti-terrorism, Crime and Security Act 2001, HC 100, London: The Stationery Office.

176 Kinderman P. (2001) *Mental Health and Human Rights*. Science and Public Affairs, December 2001, pp. 14–15.

circumstances and nature of the detention of terrorist suspects may be extremely harmful to their mental health.

In the UK, applied psychologists are closely involved in offering psychological therapies for people who have been damaged by torture and other abuses of human rights. The British Psychological Society therefore represents practicing clinical psychologists professionally involved in assessing and caring for people who either are, or may become, psychologically damaged by the nature and circumstances of detention under the Anti-terrorism, Crime and Security Act (2001).

Four main aspects of this detention particularly concern psychologists: the indefinite term of imprisonment, imprisonment without proper charge or trial, and the nature of any interrogation or treatment experienced during detention and its impact on detainees' health, and the impact of the above on particularly vulnerable groups, such as the young, those who have previously experienced torture and detention in their country of origins, those with existing mental health problems and those with physical or learning disabilities.

The British Psychological Society has received evidence given in confidence by its members of the serious harm done to the mental well-being of detainees currently held in the UK under the Anti-terrorism, Crime and Security Act (2001). We also note the well-publicised conclusions of recent court cases in this regard, about which no doubt the Joint Committee will be well informed.

Indefinite detention without charge and with neither the detainee nor their legal team being informed of the evidence against them has been described as "the toxic element" causing serious mental health problems. Such psychological damage consequent upon indeterminate detention can also be seen in the experience of patients in special hospitals or secure mental health services. Members of the British Psychological Society have a range of experience in dealing with patients in the secure mental health services in circumstances of indefinite detention. It is worth noting two crucial differences between these two cases. First, patients in such secure services have either committed an actual offence (as opposed to simply being suspected of having committed an offence) or otherwise have been detained as a result of a recognised mental health problem. Secondly, such patients have access to regular tribunals in which they have an opportunity for a public and judicial review of their cases.

It is the understanding of the British Psychological Society that many people currently detained under the Anti-terrorism, Crime and Security Act (2001) are rarely, in practice, subjected to interrogation or questioning. Indeed, this may exacerbate their distress, in that it may indicate that they are indefinitely forgotten and disposable. Nevertheless, any information received by the British Psychological Society as to the nature of such any interrogation is at best informal, and psychologically coercive questioning techniques (including but not limited to practices such as sensory deprivation techniques) can be extremely damaging to people's mental health.

#### *Recommendation 1*

The British Psychological Society recommends that the Joint Committee gives serious consideration to methods of removing the potentially indefinite nature of detention under the Anti-terrorism, Crime and Security Act (2001).

#### *Recommendation 2*

The British Psychological Society recommends that the Joint Committee investigates the nature of any interrogation and investigation techniques employed with persons detained

under the Anti-terrorism, Crime and Security Act (2001) and the impact of any such methods on detainees' health, particularly their mental health.

### *Recommendation 3*

The British Psychological Society recommends that the Joint Committee gives consideration to alternative provisions and access to professional psychological services for particularly vulnerable groups, such as the young, those who have previously experienced torture and detention in their country of origins, those with existing mental health problems and those with physical or learning disabilities.

#### *2. Human rights, reciprocity and the powers under the Terrorism Act, 2000, and the Anti-Terrorism, Crime and Security Act 2001.*

Section 1 of the Terrorism Act 2000 identifies as 'terrorist' any act or threat of action which involves serious violence against a person or serious damage to property, endangers a person's life (but not just the life of the person committing the act), creates a serious risk to the health or safety of the public or, finally, is designed to seriously interfere with or disrupt an electronic system. Any such act must furthermore be "designed to influence the government or to intimidate the public or a section of the public", and to further the advancement of a "political, religious, or ideological cause".

This definition of terrorism is extremely vague in that it is capable of encompassing activities, which, whilst unlawful, cannot properly be regarded as terrorism e.g. animal rights activism, certain forms of civil disobedience or even some forms of industrial action.

As previously expressed,<sup>177</sup> a psychological perspective on human rights sees such rights as expressions of normative social representations—representations of our relationships and obligations to one other and how these are used to negotiate the meeting of human needs—embedded in institutional juridical definitions. Such a notion incorporates a principle of reciprocity; in this case that powers of arrest and detention are justified in response to specified threats. There is a clear possibility that the breadth of the definition of 'terrorist' may therefore fail the test of reciprocity, and may therefore fail to accord with normative social rules.

Secondly, Section 40 of the Terrorism Act (2000) defines "a terrorist" as "a person who (a) has committed an offence under any of [specified sections] or (b) is or has been concerned in the commission, preparation or instigation of acts of terrorism". This has a psychological implication in that it no longer describes the act, but describes the person. This is a significant issue, in that the attachment of a label to an individual has profound psychological consequences. Section 41 of the Terrorism Act (2000) then allows a police constable to arrest without a warrant a person whom he reasonably suspects to be a terrorist. Instead of focussing on the actions of the person—engaging in or having engaged in terrorism—the Act focuses on the identity of the person as a terrorist.

There is a clear difference, in psychological terms, between permitting the arrest without warrant of "a person whom a constable reasonably suspects to have been concerned in the commission, preparation or instigation of acts of terrorism" and permitting the arrest of a "terrorist", even if that person may then be described in these terms. For psychologists, the use of a personalised definition runs the risk of exacerbating the tendency to see terrorism as a characteristic located within the person rather than terrorist acts as criminal and immoral responses to a complex political and social situation. The practical result is likely

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<sup>177</sup> British Psychological Society submission to JCHR's Consultation A Human Rights Commission: Structure, Functions and Powers.

to be that perceptions will be biased to give increased salience to factors that would normally be given less emphasis, and which otherwise may be seen as legally irrelevant. People are much more likely to be found guilty by association with a personal definition of "a terrorist" as opposed to "a terrorist act".

*Recommendation 4*

The British Psychological Society recommends that the Joint Committee give consideration to possible alternatives to the definition of terrorism in Section 1 of the Terrorism Act, 2000. Specifically, we recommend that such powers should only apply where the criminal activity threatens the foundations of the democratic state.

*Recommendation 5*

The British Psychological Society recommends that the Joint Committee give consideration to possible alternatives to the definition of terrorist in Section 40 of the Terrorism Act (2000). Specifically, we recommend that the term 'terrorist' be limited in statute to describe acts rather than people and that accordingly other sections of the Terrorism Act (2000) and the Anti-terrorism, Crime and Security Act (2001) be reworded.

*21 June 2004*

## 6. Submission from JUSTICE

### Summary

1. JUSTICE is an independent all-party human rights and law reform organisation. It is the British section of the International Commission of Jurists.

2. JUSTICE welcomes the Joint Committee's review of counter-terrorism powers, particularly its focus on potential alternatives to Part 4 of the Anti-Terrorism Crime and Security Act 2001 ('ATCSA').

3. JUSTICE supports:

- the repeal of indefinite detention without trial under Part 4 of ATCSA;
- dealing with persons suspected of terrorism offences by way of the mainstream criminal justice system;
- lifting the ban on the use of intercept evidence in criminal proceedings to enable more prosecutions to be brought for terrorism offences; and
- having terrorism as an aggravating factor in sentencing.

4. JUSTICE is prepared to support in principle:

- the creation of an offence of acts preparatory to terrorism.

5. JUSTICE would support consideration of:

- the use of restriction orders on terrorist suspects but only *if such measures were shown to be strictly required; proportionate to an identified threat and subject to tight judicial control and close parliamentary scrutiny.*

6. JUSTICE doubts the benefit of:

- the use of security-cleared judges in inquisitorial proceedings as part of the prosecution of terrorism offences;
- promoting greater court involvement in plea-bargaining.

### Background

7. When Part 4 was first put forward in November 2001, JUSTICE said that the courts were likely to accept the government's assessment<sup>178</sup> that the threat of terrorism from Al-Qaeda amounted to a 'public emergency threatening the life of the nation'.<sup>179</sup> This prediction has so far proved accurate, with the government's finding having been upheld by both the Special Immigration Appeals Commission<sup>180</sup> and the Court of Appeal.<sup>181</sup>

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<sup>178</sup> See Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 3644).

<sup>179</sup> See JUSTICE opinion on the proposed derogation from Article 5 of the European Convention on Human Rights by David Anderson QC and Jemima Stratford (November 2001): we did note that the original scope of the derogation extended to even those 'international terrorists' who did not threaten the UK, e.g. Tamil Tigers, and would not be lawful to that extent. However, the Attorney-General subsequently gave an undertaking that the powers under Part 4 of the Act would be only used for the emergency which was the subject of the derogation.

<sup>180</sup> *A, X, Y and others v Secretary of State for the Home Department* (unreported, 30 July 2002).

8. At the same time, we cautioned that any exceptional measures that the government adopted under its derogation from Article 5(1)(f) of the European Convention on Human Rights must be 'necessary and proportionate' to the particular situation at hand.<sup>182</sup>

9. However, the ability of civil society groups such as JUSTICE to assess either the necessity or proportionality of the government's counter-terrorism measures following September 11 is severely limited by the fact that much of the evidence used by the government to justify its decision to derogate<sup>183</sup> cannot be disclosed for reasons of national security.<sup>184</sup> Although we accept the government's claim (upheld by SIAC and the Court of Appeal)<sup>185</sup> that disclosure of such material is not in the public interest, government secrecy remains a significant obstacle to informed public debate on counter-terrorism powers. Bearing in mind these limits on effective public scrutiny, JUSTICE has had particular regard to judicial scrutiny of Part 4 by SIAC and the Court of Appeal, as well as independent assessment of its operation by the section 28 reviewer Lord Carlile of Berriew QC and the Privy Counsellor Review Committee chaired by Lord Newton.

10. JUSTICE therefore welcomed the report of the Newton Committee in December 2003, particularly its recommendations that:

- Provisions for the indefinite detention of persons suspected of terrorism under Part 4 of the Act should be replaced as a matter of urgency;<sup>186</sup>
- Terrorism should be dealt with, as far as possible, by way of the mainstream criminal justice system;<sup>187</sup>
- The blanket ban on the use of intercept evidence should be lifted so that more prosecutions for terrorist offences can be brought within the mainstream criminal justice system;<sup>188</sup>
- Special counter-terrorism legislation should not be mixed with mainstream criminal justice legislation;<sup>189</sup> and
- The government should seek to avoid, so far as possible, any measures that would require it to derogate under Article 15(1) of the European Convention of Human Rights ('ECHR').<sup>190</sup>

11. JUSTICE has also considered various alternatives to Part 4 suggested by the Newton Committee (see below). In general, it is fair to say that, while we welcome new ideas, we are sceptical about alternatives that represent a significant departure from established procedures and principles of criminal justice. In particular, we would only be prepared to

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181 *A, X, Y and others v Secretary of State for the Home Department* [2002] EWCA Civ 1502.

182 Article 15(1) ECHR states that a derogation is only permitted 'to the extent strictly required by the exigencies of the situation'.

183 As well as the subsequent decisions to indefinitely detain particular individuals as suspected terrorists under Part 4.

184 See e.g. the Chairman of the Special Immigration Appeals Commission in *A, X, Y and others v Secretary of State for the Home Department* (see FN 180 above), para 14: "It is obvious that the closed material is most relevant to the issue whether there is such an emergency".

185 See e.g. *A X Y and others*, FN 181 above, para 87, per Brooke LJ: "if the security of the nation may be at risk from terrorist violence, and if the lives of informers may be at risk, or the flow of valuable information they represent may dry up if sources of intelligence have to be revealed, there comes a stage when judicial scrutiny can go no further".

186 The Newton Report, para. 203.

187 The Newton Report, para. 205.

188 The Newton Report, para. 208.

189 The Newton Report, para. 115.

190 The Newton Report, para. 185.

support ‘restriction orders’<sup>191</sup> in the most exceptional circumstances and with tight safeguards governing their use.

*Bringing the prosecution of terrorist offences within the mainstream criminal justice system (Newton Report, para 205)*

12. While the Newton Report rightly stressed the importance of addressing terrorism within the context of the ordinary criminal law (on the basis that terrorist acts are crimes), we feel it is important to emphasize the corollary of that principle: that existing safeguards should not be watered down to make it easier to prosecute terrorism offences under the ordinary criminal law than it would be to prosecute other similar criminal offences. In other words, if the basis for treating persons suspected of terrorism on the same basis as other suspected criminals is because they are equally suspects, then it follows that they are equally entitled to the same protections and safeguards as exist in the criminal justice system in general. It is particularly important to bear this in mind in the context of reports of ministerial comments suggesting that the standard of proof in criminal cases (‘beyond reasonable doubt’) could be lowered to allow the prosecution of terrorist offences in ordinary courts.<sup>192</sup>

*Removing the self-imposed blanket ban on the use of intercepted communications as evidence in criminal cases (Newton Report, para 208)*

13. In our view, lifting the ban on the use of intercept evidence in criminal proceedings (currently contained in section 17(1) of the Regulation of Investigatory Powers Act 2000) would allow for an increase in the number of prosecutions that could be brought for terrorist offences and other serious crimes.<sup>193</sup> As the author of the 1996 review of counter-terrorism legislation,<sup>194</sup> the former Law Lord, Lord Lloyd of Berwick noted during debates on RIPA:<sup>195</sup>

“We have here a valuable source of evidence to convict criminals. It is especially valuable for convicting terrorist offenders because in cases involving terrorist crime it is very difficult to get any other evidence which can be adduced in court, for reasons with which we are all familiar. We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; and we are the only country in the world to do so.”

14. Lifting the ban on admitting intercept evidence would also bring UK criminal procedure into line with that of the great majority of common law jurisdictions, including Canada, Australia, South Africa, New Zealand and the United States.<sup>196</sup> If the use of intercept evidence is admissible on a regular basis in these other jurisdictions, it seems

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191 The Newton Report, para. 251.

192 See for example ‘Nothing must be ruled out in fight against terror’, *Daily Telegraph*, 18 February 2004; ‘Tougher terror law not ruled out’, *The Guardian*, 18 February 2004; ‘New terror rules may breach obligations’, *The Times*, 12 February 2004.

193 JUSTICE previously argued in our 1998 report, *Under Surveillance: Covert Policing and Human Rights Standards*, that the ban on intercept evidence should be lifted, see p. 76, “There is a growing consensus that [the] restriction is now unsatisfactory and that material lawfully obtained through an interception should be *prima facie* admissible evidence, subject to the usual judicial discretion under section 78 [of the Police and Criminal Evidence Act 1984] on fairness grounds”.

194 Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, 30 October 1996 (Cm 3420). The report identified at least 20 cases in which the use of intercept evidence would have allowed a prosecution to be brought, see vol 1, p. 35.

195 Hansard, HL Deb, 19 June 2000, cols. 109–110.

196 See Lord Lloyd, *ibid*, col. 106: ‘evidence of telephone communications of that kind is admissible in court in every country in the world as I am aware. The countries I visited during my inquiry into terrorism—France, Germany, the United States and Canada—regard such evidence as indispensable. They were astonished to hear that we do not use it in this country’.

difficult to conceive of a compelling reason for the government to maintain the current self-imposed ban while at the same time seeking to justify a departure from ordinary criminal principles in other areas. We therefore welcome media reports that the Home Office review currently underway on the use of intercept evidence will recommend lifting the current ban.<sup>197</sup>

*Terrorism as an aggravating factor when sentencing (Newton Report, para 216)*

15. JUSTICE agrees that this is an appropriate measure. However, we are concerned at any suggestion that the standard of proof for establishing a link to terrorism may be less than the standard for any other element of a criminal offence (i.e. ‘beyond reasonable doubt’). We also agree with Lord Carlile’s analysis that, since “the terrorist element factually and logically would have to be the major element of the crime as a whole”, the prosecution of offences aggravated by terrorism will likely encounter similar evidential difficulties as the prosecution of other terrorist offences.<sup>198</sup>

*The creation of an offence of ‘acts preparatory to terrorism’*

16. Along with the recommendations of the Newton Report, we also note the suggestion of Lord Carlile that the creation of an offence of acts preparatory to terrorism may help overcome some of the current obstacles to effective prosecution of terrorist offences.<sup>199</sup>

17. JUSTICE notes that the Terrorism Act 2000 already contains a very broad range of offences, including support for terrorism.<sup>200</sup> There is also the law on attempted offences,<sup>201</sup> which greatly increases the scope for criminal prosecution, as well as the offence of conspiracy.<sup>202</sup> Accordingly, it is at first glance difficult to see how the creation of an additional offence covering ‘preparatory acts’ would overcome either the current evidential problems in prosecuting terrorist offences or the legal difficulties of prosecuting inchoate ones. Nonetheless, JUSTICE would be prepared to support the creation of such an offence if it were shown that it would meet a genuine gap in the law.

*The use of an investigative approach, e.g. security-cleared judges to assess evidence on a more inquisitorial basis (Newton Report, paras 224, 228)*

18. While we agree with the Newton Committee’s call for a more structured system of disclosure of evidence,<sup>203</sup> it is wholly unclear how the use of security-cleared judges screening evidence<sup>204</sup> would improve on the admissibility of material from the current system. It is particularly unclear what weight the ‘fair answerable case’ assembled by one

197 See for example, *The Times*, 28 May 2004, ‘Blunkett seeks change in intercept law after Hamza case’.

198 See Lord Carlile of Berriew QC, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003*, para. 115.

199 See for example, Lord Carlile, *Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2002*, para 6.5: “if the criminal law was amended to include a broadly drawn offence of acts preparatory to terrorism, [all those detained under Part 4 of ATCSA] could be prosecuted for criminal offences and none would suffer executive detention”. See also Lord Carlile’s earlier report, *Report on the Operation in 2001 of the Terrorism Act 2000*, para. 5.4: “It remains a puzzle to some seasoned observers and experts to whom I have spoken as to why government has resisted unifying practice and principle by making it a specific offence to act as described in section 40(1)(b) [of the 2000 Act], namely to be or to have been concerned in the commission, preparation or instigation of acts of terrorism .... [T]he conduct described there falls comfortably within any empirical and logical category of criminality. I tend to agree with the view that making such conduct a specific criminal offence would tidy up the law and clarify an ECHR issue that has caused difficulty, without in any way weakening the effectiveness of [the 2000 Act]”.

200 Section 12.

201 Criminal Attempts Act 1981.

202 Section 1, Criminal Law Act 1977, codifying the common law offence of conspiracy.

203 The Newton Report, paras. 236–239.

204 *Ibid.*, para. 231: “An investigative approach would address the disclosure problem by putting a security-cleared judge in control of assembling a fair, answerable case”.

judge would have in full criminal proceedings before another, particularly if the preliminary hearing were conducted on an inquisitorial rather than adversarial basis. The findings of a judge (particularly one who has seen evidence not disclosed at trial) are likely to carry great weight with a subsequent judge and jury, and would effectively preempt much of what ought properly to be determined in-trial. The unfairness of determining guilt or innocence, be it by a judge or jury, on evidence that is not disclosed to an accused and upon which he or she cannot make comment or challenge should be manifest and is likely to breach the right in Article 6(3)(d) ECHR to “examine or have examined witnesses against him”.

19. We also note the Canadian system of using judges to hold investigative hearings under the Anti-Terrorism Act 2001 prior to criminal charge has raised significant concerns under the Canadian Charter of Rights and Freedoms,<sup>205</sup> particularly the right against self-incrimination.<sup>206</sup>

*Promoting greater involvement of the court in plea-bargaining cases (Newton Report, para 240)*

20. JUSTICE opposes any suggestion that the courts should become more involved that they are at present in assisting with, or entering into, agreements about the appropriate criminal charge. Plea-bargaining can be seen as a system of incentives and rewards for a guilty plea, one which arguably serves the interests of speed and efficiency of administration ahead of the interests of justice. To formally involve the judicial branch in such arrangements would potentially compromise its integrity.

*Alternatives to indefinite detention without trial*

21. JUSTICE welcomes the conclusion of the Newton Committee that the powers under Part 4 for the indefinite detention of suspected international terrorists ‘should be replaced as a matter of urgency’.<sup>207</sup>

22. We also agree its recommendations that the government should ideally:<sup>208</sup>

- deal with all terrorism, whatever its origin or the nationality of its suspected perpetrators; and
- not require a derogation from the European Convention on Human Rights

23. As noted above, it has been difficult for civil society groups to second-guess the assessment of the government that a derogation is necessary, given that much of the evidence for its decision to derogate is secret. We note that the Newton Committee had access to that evidence, as has Lord Carlile and SIAC.<sup>209</sup> The Newton Committee’s recommendation is therefore slightly ambiguous, as it does not address the question of necessity directly. On one view, saying that the government ‘should not require a derogation’ is possibly otiose: the scheme of Article 15(1) ECHR makes clear that a government can only derogate to the extent ‘strictly required by the exigencies of the

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205 See for example, Jeremy Millard, ‘Investigative Hearings under the *Anti-Terrorism Act*’ [2002] 60 *University of Toronto Faculty of Law Review* 79–88.

206 The right against self-incrimination is protected under section 7 of the Charter, which protects ‘life, liberty and security of the person’: see *R v RJS* [1995] 1 SCR 451 at para. 28.

207 *ibid*, para. 203.

208 *ibid*

209 *ibid.*, para. 74: “We have seen a small sample of the ‘closed’ material on the basis of which the suspected international terrorists have been detained; we have attended both open and closed sessions of the Special Immigration Appeals Commission”.

situation' (and compatibly with its other international obligations). As such, if a measure were 'strictly required' by the existence of an emergency then it would be arguably irrational for the government not to adopt it. We do not take the Newton Committee to be stating the obvious on this point. Rather, we understand the Committee as indicating they do not regard the measures under Part 4 (indefinite detention without trial) as strictly required by the current emergency.

24. While the evidence justifying the derogation is closed, the logic of the government's scheme of indefinite detention remains open to question. First, indefinite detention under Part 4 applies only to foreign nationals and yet it is apparent from the SIAC proceedings that the threat of terrorism comes from UK and foreign nationals alike. Indeed, it was on this point that SIAC found the derogation to have breached Article 14 ECHR as discriminatory on the ground of national origin:<sup>210</sup>

There are many British nationals already identified – mostly in detention abroad – who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined.

25. Thus, if terrorist suspects who are UK nationals pose the same threat as those terrorist suspects who are foreign nationals and the government does not consider it necessary to detain the suspects who are UK nationals, then it becomes impossible to see how the detention of only foreign suspects can be justified as 'strictly necessary'. The Court of Appeal disagreed with this conclusion, noting as follows:<sup>211</sup>

As the [detainees] accept, the consequences of their approach is that because of the requirement not to discriminate, the Secretary of State would, presumably, have to decide on more extensive action, which applied to both nationals and non-nationals, than he would otherwise have thought necessary. Such a result would not promote human rights, it would achieve the opposite result. There would be an additional intrusion into the rights of nationals so that their position would be the same as non-nationals.

26. The difficulty with this reasoning is that it cuts both ways: if one agrees that it was not necessary to detain certain suspects (i.e. those who are UK nationals) and it is conceded that they pose the same risk as suspects who were detained (i.e. foreign nationals), then this invites the conclusion that it was not strictly necessary to detain the foreign suspects in the first place. For his part, the Home Secretary has not conceded that UK terrorist suspects pose the same risk,<sup>212</sup> but it appears to be one of SIAC's findings of fact and not in itself disputed by the Court of Appeal.

27. Secondly, the recent release of one of the Part 4 detainees on bail<sup>213</sup> also seems to undermine the government's claims that indefinite detention is 'strictly required' in the circumstances. For if it is possible to effectively address the threat of terrorism posed by G and others by way of a series of stringent bail conditions (including "electronic tagging and house arrest without outside communication") then this suggests that indefinite detention in Belmarsh is not necessary. It may be that the surveillance required in such

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210 *A and others* (SIAC, 30 July 2002, unreported) at paras. 95.

211 *AX and Y and others v Secretary of State for the Home Department* [2002] EWCA Civ 1502.

212 See *Counter-Terrorism Powers: Reconciling Liberty and Security in an Open Society* (Cmnd 6147: Home Office, February 2004), Part 1, para. 7: 'International terrorists can be foreign nationals or British citizens. The Government's assessment in 2001 was that the threat came predominantly but not exclusively from foreign nationals. That remains the case'.

213 *G v Secretary of State for the Home Department* [2004] EWCA Civ 265.

situations is more resource intensive than incarceration in Belmarsh, but if it avoids the UK having to maintain a system of indefinite detention without trial then it seems surely a price worth paying.

28. In this light, should Parliament consider that the current threat of terrorism is sufficiently serious to justify exceptional measures being taken, we consider that the Newton Committee's suggestion of imposing 'restriction orders' on terrorist suspects may be an appropriate way forward. Specifically, we note the Committee's observation that:<sup>214</sup>

It would be less damaging to an individual's civil liberties to impose restrictions on:

- a. the suspect's freedom of movement (e.g. curfews, tagging, daily reporting to a police station); and
- b. the suspect's ability to use financial services, communicate, or associate freely (e.g. requiring them to use only certain specified phones or bank or internet accounts, which might be monitored

subject to the proviso that if the terms of the order were broken, custodial detention would follow.

29. In our view, the extent to which a scheme of restriction orders could be sustained without derogation depends very much on the kinds of restrictions imposed (e.g. reporting requirements, electronic tagging, or full-scale house arrest) and its overall scope (i.e. whether it applies only to foreign nationals or to foreign nationals and UK nationals alike). It seems to us that restriction orders could, in general, be imposed without derogation on those subject to immigration control. To a lesser extent, certain restrictions could be placed on UK nationals (e.g. movement restrictions) without derogation, on a similar basis to the use of anti-social behaviour orders.<sup>215</sup> However, we note that the more serious restrictions on liberty currently applied under UK law are done so by way of a punishment for a criminal offence (e.g. football banning orders).<sup>216</sup> As such, we doubt that UK nationals not charged or convicted of a criminal offence could ever be subjected to the kinds of sweeping restrictions applied in the case of G without further derogation from Article 5 ECHR being sought.

30. JUSTICE considers that the adoption of any scheme of restriction orders would be wholly exceptional. As noted before, the only circumstances in which we might be prepared to support the introduction of such orders is if Parliament was satisfied that such measures were strictly required by the terrorist threat facing the UK, proportionate in all the circumstances having regard to fundamental rights, and that the same aim could not reasonably be achieved by less intrusive means. Such a scheme would have to be attended by strict safeguards. As a bare minimum, we would suggest the following:

- Application procedure: a restriction order should be made by the High Court<sup>217</sup> on application by the Secretary of State. This is in contrast to the current procedure under Part 4 whereby SIAC merely reviews the legality of a certificate issued by the Secretary of State. The application procedure must be adversarial, allowing suspects to challenge the legality of any order sought and the evidence upon which it is based. Evidence established to have been obtained as a result of torture would not be admissible.

<sup>214</sup> The Newton Report, para. 251.

<sup>215</sup> See Crime and Disorder Act 1998, section 1.

<sup>216</sup> See Football (Offences and Disorder) Act 1999, section 6.

<sup>217</sup> Or specialist tribunal chaired by a High Court judge, along the lines of SIAC.

- Powers of the court: the court must have the power to dismiss any application. The court should also have the power to assess the proportionality of specific restrictions sought by the Secretary of State in respect of a suspect, and substitute less restrictive measures than those sought where justified by the evidence.
- Breach of order: where an order is breached, the court should have the power to determine the appropriate sanction, including imprisonment. The appropriateness of the sanction should be governed only by the seriousness of the breach itself, rather than any other considerations.
- Order time-limits: any order made by the court must be time-limited, so that its effect will lapse after a certain period unless renewed (preferably not more than 12 months). Renewal proceedings should be subject to the same procedures and safeguards as an original application.
- Sunset clause: the statutory scheme for any such restriction orders would itself have to be subject to regular parliamentary review and independent scrutiny, and the legislation itself subject to a sunset clause of a maximum of 3 years.

31. As an aside, we note one objection raised by the Home Office to less restrictive measures is that it may not prevent terrorist suspects from using telephones or computers.<sup>218</sup> While provision could be made in the most exceptional circumstances—as in G’s case—for closer regulation of communication (e.g. use of specified devices), it seems difficult to square such objections with the Home Office’s willingness to allow the voluntary removal of terrorist suspects to their home country or a safe third country where their access to telephones and computers, etc would presumably be unimpeded and unmonitored.

32. JUSTICE wishes to make clear that our support at this stage is for consideration of the idea of restriction orders only, and not the implementation of any such scheme. Support for restriction orders themselves will depend on the particular proposals brought forward, certain conditions being met (i.e. the ending of provision for indefinite detention, Parliament being satisfied that the measures are strictly required and proportionate to an identified threat), and detailed discussion of proposed safeguards.

*23 June 2004*

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<sup>218</sup> See Consultation Paper, Part 2, para 45: “The government does not believe that tagging or the other measures suggested offer sufficient security to address the threat posed by international terrorists. Modern technology such as pay as you go mobiles, easy access to computers and other communications technology mean that tagging by itself would not prevent these individuals from involvement in terrorism and the Government cannot guarantee the success of such an approach’.

## 7. Submission from the Medical Foundation for the Care of Victims of Torture

The Medical Foundation for the Care of Victims of Torture (the “Medical Foundation”) is a human rights organisation that works exclusively with survivors of torture and organised violence, both adults and children. It has received more than 38,000 referrals since it began in 1985. The Foundation offers its patients medical and psychological treatment and documentation of the signs and symptoms of torture—providing some 1,000 forensic medical reports each year—as well as a range of therapeutic services.

1. The Medical Foundation is concerned by the decision of SIAC in the case of *Jamal Ben Miloud Amar Ajouaou v. Secretary of State for the Home Department*, 29th October 2003, and in particular, by the Commission’s seeming willingness to accept and consider in its deliberations evidence which had been obtained through the use of torture. The UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (the “UN Convention”), to which the UK is a signatory, provides at Article 15 that “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.” The decision of SIAC in this case is therefore in clear contravention of international law.

Furthermore, Article 55 of the United Nations Charter obliges all States party to promote universal respect for, and to observe, human rights and fundamental freedoms. The acceptance and use of evidence obtained through torture is inconsistent with this obligation, since rather than condemn the practice, the effect may be one of implicit endorsement.

Finally on this point, evidence obtained by torture is notoriously unreliable. This was demonstrated most recently in the case of the British and Canadian expatriates Sandy Mitchell and William Sampson, who were wrongly accused of the murder of a second Britain in a bomb attack in Saudi Arabia. The two were convicted and sentenced to death solely on the basis of false confession evidence extracted under torture, and were held in prison for nearly three years before their convictions were quashed. A further four Britains and a Belgian national were arrested and convicted at the same time, again solely on the basis of false confession evidence extracted under torture, following separate bombing incidents in Riyadh. All of the convictions have now been quashed and the accused released. It is clear from this that evidence obtained by torture is both legally and ethically unsound, and its use must be prohibited in all circumstances.

2. In addition, the Medical Foundation is concerned about the negative mental health consequences of indefinite detention without trial, as has already been, in part, illustrated by the case of “G”. The Medical Foundation believes that the nature of detention under the Anti-terrorism, Crime and Security Act 2001 is particularly likely to cause psychological problems:

- i. Indefinite detention with limited communication about the progression of the case is more difficult to endure. A report by the Human Rights and Equal Opportunities Commission of Australia has suggested that both indeterminacy and lack of control over the legal case can act as risk factors for mental distress.<sup>219</sup>
- ii. Detention without proper trial can increase feelings of injustice, frustration and despair, thereby impacting on mental health.

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<sup>219</sup> Human Rights and Equal Opportunities Commission 1998, Canberra HREOC 1998: 167, 153, 154, 218.

- iii. Prolonged periods of detention (over months) increase the risk of adverse and disabling psychological consequences.
- iv. Detention under anti-terrorism legislation is subjecting individuals to being labelled a "terrorist" without first establishing that conviction. Such a label can in itself do harm.

### 3. Recommendations:

- i. The UK Government should legislate to prohibit the use in any UK court of any information obtained under torture, whether confessions or intelligence information.
- ii. The UK Government should ensure that no prisoners held under UK jurisdiction, in the UK or abroad, are kept in secret locations or are not notified to the appropriate independent inspectorate, whether HM Chief Inspector of Prisons in the UK or, with reference to prisoners held by British armed forces abroad, the International Committee of the Red Cross.
- iii. Prisoners held under anti-terrorism legislation who are subject to indefinite detention without trial should have access to psychiatric assessment and treatment from an independent psychiatrist or psychologist of their own choosing.
- iv. All prisoners held under anti-terrorism legislation should have their detention subject to meaningful, substantive and regular review by the courts. Such review should include consideration of information provided on the mental health and well being of the detainee.
- v. Mechanisms should be put in place to identify those detainees who have previously been subject to torture in other countries. This group is at increased risk of mental ill health, and as such should be monitored and measures taken to protect their health. This would include access to appropriate treatments.

*28 June 2004*

# Witnesses

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## Wednesday 19 May 2004

**Mr Ken Macdonald QC**, Director of Public Prosecutions and Head of the Crown Prosecution Service, **Mr Philip Geering**, Director of Policy, and **Mr Chris Newell**, Director of Casework, Crown Prosecution Service: **published as HL Paper 151/HC 619-i**

**[The relevant passages are published as Annex B to the Report, see pages 50 to 56]**

## Wednesday 16 June 2004

**Rt Hon Lord Carlile of Berriew QC**, a Member of the House of Lords

**Ev 1**

**Rt Hon Lord Newton of Braintree**, a Member of the House of Lords, and  
**Rt Hon Baroness Hayman**, a Member of the House of Lords

**Ev 7**

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The following reports have been produced

## Session 2003–04

First Report	Deaths in Custody: Interim Report	HL Paper 12/HC 134
Second Report	The Government's Response to the Committee's Ninth Report of Session 2002-03 on the Case for a Children's Commissioner for England	HL Paper 13/HC 135
Third Report	Scrutiny of Bills: Progress Report	HL Paper 23/HC 252
Fourth Report	Scrutiny of Bills: Second Progress Report	HL Paper 34/HC 303
Fifth Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HL Paper 35/HC 304
Sixth Report	Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4	HL Paper 38/HC 381
Seventh Report	The Meaning of Public Authority under the Human Rights Act	HL Paper 39/HC 382
Eighth Report	Scrutiny of Bills: Third Progress Report	HL Paper 49/HC 427
Ninth Report	Naval Discipline Act 1957 (Remedial) Order 2004	HL Paper 59/HC 477
Tenth Report	Scrutiny of Bills: Fourth Progress Report	HL Paper 64/HC 503
Eleventh Report	Commission for Equality and Human Rights Structure, Functions and Powers	HL Paper 78/HC 536
Twelfth Report	Scrutiny of Bills: Fifth Progress Report	HL Paper 93/HC 603
Thirteenth Report	Scrutiny of Bills: Sixth Progress Report	HL Paper 102/HC 640
Fourteenth Report	Asylum & Immigration (Treatment of Claimants, etc.) Bill: New Clauses	HL Paper 130/HC 828
Fifteenth Report	Civil Partnership Bill	HL Paper 136/HC 885
Sixteenth Report	Commission for Equality and Human Rights: The Government's White Paper	HL Paper 156/HC 998
Seventeenth Report	Scrutiny of Bills: Seventh Progress Report	HL Paper 157/HC 999

**Session 2002–03**

First Report	Scrutiny of Bills: Progress Report	HL Paper 24/HC 191
Second Report	Criminal Justice Bill	HL Paper 40/HC 374
Third Report	Scrutiny of Bills: Further Progress Report	HL Paper 41/HC 375
Fourth Report	Scrutiny of Bills: Further Progress Report	HL Paper 50/HC 397
Fifth Report	Continuance in force of sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 59/HC 462
Sixth Report	The Case for a Human Rights Commission: Volume I Report	HL Paper 67-I HC 489-I
Seventh Report	Scrutiny of Bills: Further Progress Report	HL Paper 74/HC 547
Eighth Report	Scrutiny of Bills: Further Progress Report	HL Paper 90/HC 634
Ninth Report	The Case for a Children’s Commissioner for England	HL Paper 96/HC 666
Tenth Report	United Nations Convention on the Rights of the Child	HL Paper 117/HC 81
Eleventh Report	Criminal Justice Bill: Further Report	HL Paper 118/HC 724
Twelfth Report	Scrutiny of Bills: Further Progress Report	HL Paper 119/HC 765
Thirteenth Report	Anti-social Behaviour Bill	HL Paper 120/HC 766
Fourteenth Report	Work of the Northern Ireland Human Rights Commission	HL Paper 132/HC 142
Fifteenth Report	Scrutiny of Bills and Draft Bills: Further Progress Report	HL Paper 149/HC 1005
Sixteenth Report	Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 181/HC 1272
Seventeenth Report	Scrutiny of Bills: Final Progress Report	HL Paper 186/HC 1278
Eighteenth Report	The Government’s Response to the Committee’s Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child	HL Paper 187/HC 1279
Nineteenth Report	Draft Gender Recognition Bill Vol I: Report	HL Paper 188-I/HC 1276-I
Nineteenth Report	Draft Gender Recognition Bill Vol II: Evidence	HL Paper 188-II/HC 1276-II

**Session 2001–02**

First Report	Homelessness Bill	HL Paper 30/HC 314
Second Report	Anti-terrorism, Crime and Security Bill	HL Paper 37/HC 372
Third Report	Proceeds of Crime Bill	HL Paper 43/HC 405
Fourth Report	Sex Discrimination (Election Candidates) Bill	HL Paper 44/HC 406
Fifth Report	Anti-terrorism, Crime and Security Bill: Further Report	HL Paper 51/HC 420
Sixth Report	The Mental Health Act 1983 (Remedial) Order 2001	HL Paper 57/HC 472
Seventh Report	Making of Remedial Orders	HL Paper 58/HC 473
Eighth Report	Tobacco Advertising and Promotion Bill	HL Paper 59/HC 474
Ninth Report	Scrutiny of Bills: Progress Report	HL Paper 60/HC 475
Tenth Report	Animal Health Bill	HL Paper 67/HC 542
Eleventh Report	Proceeds of Crime: Further Report	HL Paper 75/HC 596
Twelfth Report	Employment Bill	HL Paper 85/HC 645
Thirteenth Report	Police Reform Bill	HL Paper 86/HC 646
Fourteenth Report	Scrutiny of Bills: Private Members' Bills and Private Bills	HL Paper 93/HC 674
Fifteenth Report	Police Reform Bill: Further Report	HL Paper 98/HC 706
Sixteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 113/ HC 805
Seventeenth Report	Nationality, Immigration and Asylum Bill	HL Paper 132/ HC 961
Eighteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 133/ HC 962
Nineteenth Report	Draft Communications Bill	HL Paper 149 HC 1102
Twentieth Report	Draft Extradition Bill	HL Paper 158/ HC 1140
Twenty-first Report	Scrutiny of Bills: Further Progress Report	HL Paper 159/ HC 1141

Twenty-second Report	The Case for a Human Rights Commission	HL Paper 160/ HC 1142
Twenty-third Report	Nationality, Immigration and Asylum Bill: Further Report	HL Paper 176/ HC 1255
Twenty-fourth Report	Adoption and children Bill: As amended by the House of Lords on Report	HL Paper 177/ HC 979
Twenty-fifth Report	Draft Mental Health Bill	HL Paper 181/ HC 1294
Twenty-sixth Report	Scrutiny of Bills: Final Progress Report	HL Paper 182/ HC 1295