

**COUNTERING TERRORISM  
AND  
PROTECTING HUMAN RIGHTS**



**NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION**

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## Introduction

The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding or “soft law” standards developed by the international human rights systems.

Ever since its inception in March 1999 the Commission has taken a very keen interest in the “emergency” anti-terrorism laws applicable in Northern Ireland. In April 1999 we submitted a detailed response to the UK Government’s White Paper “Legislation Against Terrorism” and in February 2000 we responded to the Government’s request for views on the juryless “Diplock” court system in Northern Ireland.<sup>5</sup> Later that year we lobbied the Westminster Parliament during the debates on what became the Terrorism Act 2000 and we subsequently commented on some of the draft codes of practice issued under the authority of that Act. Unfortunately the Commission was not consulted prior to the publication of what became the Anti-terrorism, Crime and Security Act 2001 – the Government’s response to the attacks carried out on 11 September 2001 – but we made it clear in material provided to Parliamentarians that we were resolutely opposed to the proposal contained in the Bill to introduce indefinite detention without trial. The Commission has since met regularly with the official reviewer of provisions in the 2000 and 2001 Acts, Lord Carlisle of Berriew QC, and he has recorded our views in his annual reports to Parliament.

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<sup>1</sup> Northern Ireland Act 1998, s.69 (1).

<sup>2</sup> *Ibid.* at s.69(3).

<sup>3</sup> *Ibid.* at s.69(4).

<sup>4</sup> *Ibid.* at s.69(6).

<sup>5</sup> These and the other Commission documents referred to in this paragraph are available on the Commission’s website, [Hwww.nihrc.org](http://www.nihrc.org), under the heading “Submissions”. Alternatively, the Commission would be happy to provide hard copies of the documents on request.

The present report reproduces the Commission's submission to the Home Office's discussion paper published in February 2004, "Counter-terrorism Measures: Reconciling Security and Liberty in an Open Society". We sent this to the Home Office on 1 September 2004. It was produced following a roundtable discussion for interested participants organised by the Commission in March 2004 and after consideration of a detailed report prepared for the Commission by a distinguished academic expert on terrorism law, Professor Clive Walker of the University of Leeds. We are making the report available in its current format in the hope that it will stimulate further debate. We would welcome comments on the views it contains.

## **Governing principles**

Lord Lloyd, in his review of anti-terrorism legislation published in 1996, set out four principles with which such legislation should comply.<sup>6</sup> The Commission believes that these are still appropriate. They are as follows:

- Legislation against terrorism should approximate as closely as possible to ordinary criminal law and procedure.
- Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.
- If additional powers are being conferred, consideration should be given to the need for additional safeguards to ensure that such powers are not abused.
- The law should comply with the UK's obligations under international human rights law.

Indeed the Commission would suggest that Lord Lloyd's tests are insufficiently demanding.

**We recommend** that one further principle be applied:

- Counter-terrorism measures and the agencies which implement them should be subjected to more effective democratic controls (**Recommendation 1**).

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<sup>6</sup> *Inquiry into Legislation against Terrorism*, Cm. 3420, London, 1996, para.3.1.

The basis for this principle is that there should be public justification for actions taken in the name of public safety, and there should be mechanisms in place for ensuring that powers will not be used arbitrarily and that the fundamental features of constitutional life will be maintained. We are of the view that specific criteria should be set out for each Part of the relevant legislation so that reviewers and courts may more easily make judgments as to the legislation's necessity and proportionality.

Information should also be more easily available about the way in which the anti-terrorist measures are operating in practice. At present a number of statistical bulletins are produced by the Home Office and Northern Ireland Office, but they are not appended to the various published reviews and are often not referred to. Nor are there cross-references between the information relating to the three jurisdictions in the UK.

**We also recommend** that when reforming this area of law the UK government should pay careful attention to the Council of Europe's "Guidelines on human rights and the fight against terrorism" (**Recommendation 2**). The Guidelines<sup>7</sup> start by emphasising the duty of states "to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life". But they give equal prominence to the need to respect human rights, to avoid any form of arbitrariness or discriminatory or racist treatment and to provide appropriate supervision. The Guidelines then list a number of more specific measures which may be adopted within this framework. Nothing we are recommending in this submission is, in our view, inconsistent with those Guidelines.

## **Indefinite detention without trial of suspected terrorists**

This Commission shares the abhorrence of many at the fact that Part IV of the Anti-terrorism, Crime and Security Act 2001 permits indefinite detention without trial of a certain category of detainee, *i.e.* non-British citizens who cannot be deported because of a legal impediment derived from an international obligation (such as the danger they might face in their home country) or because of a practical consideration.

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<sup>7</sup> Adopted by the Committee of Ministers in July 2002 and available at [www.coe.int/T/E/Human\\_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf).

Some of the disadvantages of allowing this power to persist are illustrated by the case of *G v Secretary of State for the Home Department*.<sup>8</sup> The Special Immigration Appeals Commission (SIAC) determined in January 2004, well after it had rejected the challenge to the detention certificate in October 2003, that the respondent, “G”, should be released from detention on bail under section 24 of the 2001 Act subject to strict conditions (including electronic tagging and house arrest without outside communication). This order followed evidence that the respondent’s mental and physical health had severely deteriorated as a consequence of his detention. The Court of Appeal ruled in March 2004 that it had no “appeal” jurisdiction against the grant of bail. Arising from this decision, it may turn out that the Achilles heel of detention without trial is Article 3 of the European Convention on Human Rights and not Article 5. The prospect of indefinite detention for life (in high security conditions, in a foreign country, without charge, trial or effective appeal to an independent court) is likely to have adverse effects on the mental health of detainees and is possibly “inhuman treatment” within the terms of Article 3. Indeed, the Chairman of SIAC acknowledged that “there was no doubt that G’s detention had created a mental illness and that the open-ended nature of the detention was such as to ensure that the condition did not improve”.<sup>9</sup>

In December 2003 the report of the Privy Counsellor Review Committee (the Newton Committee) viewed the system of detention under Part IV as objectionable in principle because of the indefensible lack of safeguards against injustice and also because it provides no protection against British terrorists.<sup>10</sup> Highlighting the extent to which the United Kingdom has isolated itself from the practices of all other European democracies, the report noted that no other country had seen a need to derogate from the European Convention on Human Rights and found no obvious reason why the United Kingdom should be an exception. The report argues for either a more aggressive criminal prosecution stance (perhaps aided by admissible electronic intercept evidence, new offences or enhanced sentencing provisions) or intrusive administrative restraints on movement and communications (perhaps of the kinds that were imposed in the case of *G*, above). The Home Office Discussion Paper, in response, regards Part IV as essential and depicts the alternative strategies as unworkable.<sup>11</sup>

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<sup>8</sup> [2004] EWCA Civ 265.

<sup>9</sup> *Ibid.* at para.6.

<sup>10</sup> 2003-04 HC 100, paras.185, 193.

<sup>11</sup> Cm. 6147, London, 2004, Pt.I, paras.8, 34, Pt.II, para.31.

In line with the Privy Council recommendations, **this Commission recommends** that Part IV of the Anti-terrorism, Crime and Security Act 2001 should be repealed and that instead prime regard should be had to the criminalisation approach adopted elsewhere – suspects should be tried for recognised offences, with the prosecution allowed to rely upon evidence electronically obtained (**Recommendation 3**). However, if executive measures are required over and above a prosecution strategy, then **we recommend** that less intrusive alternatives to detention be considered in priority (**Recommendation 4**). These include:

- exclusion orders – there is a long history of the use of exclusion under the Prevention of Terrorism Acts 1974-89 which allow a suspect to be confined to a given area of the country, and/or
- registration and restraint orders – the history of these is less recent, but they existed under the Prevention of Violence (Temporary Provisions) Act 1939; there are modern developments in the form of tagging which make such measures more effective.

Aside from being less damaging to the rights of affected individuals, these lesser forms of intervention would probably not require notices of derogation under international human rights instruments (see *Guzzardi v Italy*<sup>12</sup>).

If, against our wishes, Part IV remains in force, **we recommend (Recommendations 5 and 6)** that:

- it be an express statutory requirement of making a detention order under Part IV that reasonable efforts have been made to identify a suitable third state willing to receive the suspect with appropriate guarantees as to treatment; and
- a review be undertaken of section 17 of the Regulation of Investigatory Powers Act 2000, which concerns the inadmissibility of electronic evidence. The use of such evidence is commonplace in, for example, the USA, especially in connection with organised crime. It is also used commonly – and in a way which is compliant with the European Convention on Human Rights – in countries such as the Netherlands. If such evidence

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<sup>12</sup> Appl. No. 7367/76, Judgment of Court Series A, No. 39.

could be used there might be a better opportunity for bringing criminal charges, such as for the extra-jurisdictional offence of conspiracy under the Criminal Justice (Terrorism and Conspiracy) Act 1998 or for the offences in the Terrorism Act 2000 (especially sections 54-63).

### *Derogation*

The persistence of the derogation under Article 15 of the ECHR is of special concern to this Commission. Much of the effort that went into designing the Terrorism Act 2000 was purposively directed at removing the need for any derogation. With the advent of the Terrorism Act in February 2001, the derogation then in place was withdrawn. But with the passage of the Anti-terrorism, Crime and Security Act 2001, in December 2001, it has reappeared with no early end in sight. The abiding nature of the declared emergency is disturbing – when will the “war” against terrorism ever be “won”? Especially in the light of the experience of derogation notices under previous forms of counter-terrorism legislation (the previous notice lasted nearly 12 years), there should be a form of regular review of the need for the derogation. **We recommend** that persons appointed to review the operation of the existing legislation should be expressly required to assess the need for the continuance of the derogation (**Recommendation 7**).

The derogation notice issued as result of Part IV of the 2001 Act was upheld in *A v Secretary of State for the Home Department*.<sup>13</sup> Whether this decision is correct or not, it is clear that the derogation must also be used proportionately by limiting the detentions under Part IV to Al Qa’ida suspects and not terrorist suspects of any different ilk. **We recommend** that it be made explicit that the power to detain under Part IV can be exercised only in connection with Al Qa’ida suspects, otherwise the exercise of the power could breach Article 5 (**Recommendation 8**).

### *Conditions of detention*

As for the conditions of detention, individuals held under Part IV of the 2001 Act are classified as Category A prisoners and serve long periods in their cells. There are no

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<sup>13</sup> [2002] EWCA Civ 1502.

provisions for legal aid or assistance. Their contacts with family members are very restricted. Restrictions are also imposed on contacts with the media.<sup>14</sup> **We recommend** that these matters should be regulated by an explicit set of rules concerning conditions for detainees held under Part IV (**Recommendation 9**). It is unlikely to be necessary at all times for every detainee to be subjected to all of the possible restrictions, and in each case the rules should be applied in a proportionate manner so as to provide the most humane and “normal” conditions of detention with security.

### *The definition of a terrorist*

Section 21(2) of the 2001 Act defines a “terrorist” as a person who:

- “(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,
- (b) is a member of or belongs to an international terrorist group, or
- (c) has links with an international terrorist group.”

Lord Carlile, the reviewer of this Part of the 2001 Act, has argued for the repeal of section 21(2)(c) or its amendment to address the uncertain meaning of “links”, and his views were supported by the Parliamentary Joint Committee on Human Rights.<sup>15</sup> The Government has objected to any change, feeling that judgments in the SIAC will ensure the need for proportionality in the application of this aspect. **We recommend** that legislative amendment along the lines suggested by Lord Carlile would provide better certainty. We are wary of legislation which could lead to people being detained or convicted “by association”. We think the rule of law is best preserved if in this context people are found guilty of offences only when there is evidence showing beyond a reasonable doubt that they have been “concerned in the commission, preparation or instigation of acts of terrorism” (**Recommendation 10**).

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<sup>14</sup> *R (on the application of A and others) v Secretary of State for the Home Department* [2003] EWHC 2846 (Admin).

<sup>15</sup> Joint Committee on Human Rights, *Fifth Report: Continuance in Force of Sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001*, HL 59 / HC 462 (2003).

## Alternatives to indefinite detention without trial

### Possible additional offences

#### *An offence of terrorism*

It is part of the criminalisation approach which has been adopted in counter-terrorism policy since 1972<sup>16</sup> that terrorists should not be treated as offenders with political motivations which mark them out as extraordinary or afford them special status or treatment. Instead they should be depicted as common criminals. Accordingly, in our view the UK government rightly resisted Lord Lloyd's call for an offence of terrorism to be created.<sup>17</sup> **We recommend** that no offence of terrorism now be enacted (**Recommendation 11**). It is worth noting that in any event the offence of possession under section 57 of the Terrorism Act 2000 has become much more commonly invoked in the last three years to serve the purposes of the wider concept of an offence of terrorism.

#### *Acts preparatory to terrorism*

A majority of the members of the Northern Ireland Human Rights Commission recommend that it would not be helpful to create an offence of "preparing acts of terrorism" (**Recommendation 12**).<sup>18</sup> They agree with the Parliamentary Joint Committee on Human Rights that such an offence is unnecessary, given the other offences that already exist. They also agree that the main problem in this context is not that there is an inadequate range of offences available to deal with terrorists but rather that the current rules on evidence do not make it easy to find people guilty of those offences.

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<sup>16</sup> See *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, Cmnd. 5185, London, 1972 (the "Diplock Report").

<sup>17</sup> HL Debs. vol.611, col.1487, 6 April 2000, Lord Bassam.

<sup>18</sup> Professor Tom Hadden is of the opposite view and has expressed this in his own personal response to the Home Office consultation paper.

## *Weapons training*

By section 54(5) of the Terrorism Act 2000 it is a defence for a person charged with an offence to prove that his action or involvement was wholly for a purpose other than assisting, preparing for or participating in terrorism. This formulation is curious: one would have expected a more positive burden on the prosecution to demonstrate that the training was not for a lawful purpose or was not otherwise lawful. Also, the defence is actually much wider and would allow, for example, a gangster training others in the use of explosives to rob a bank to escape the clutches of section 54. **We recommend** that the wording be reconsidered (**Recommendation 13**).

## **Possible alterations to the rules of evidence**

The collection and presentation of admissible evidence almost certainly constitute more serious difficulties in securing convictions than the definition of the essential elements of any of the relevant offences. The Council of Europe Guidelines recognise in express terms that in dealing with the threat of terrorism a number of special provisions to increase the capacity of the authorities to prevent attacks and to secure convictions of those involved may be justified. These include:

- the use of telephone taps and other forms of surveillance;
- the use of anonymous testimony;
- restrictions on access to the case-file by defendants;
- restrictions on access to counsel by defendants.

Although some of the Guidelines are more directly addressed to criminal procedures in civil law rather than to those in common law jurisdictions, they provide some useful indications of what may or may not be acceptable within a general human rights framework.

Telephone tapping and other forms of communication intercepts are one of the most effective means at the disposal of security authorities in identifying suspects and monitoring the activity of suspected terrorists. They are clearly acceptable under the European Convention

on Human Rights, provided they are explicitly authorised by national law and are open to challenge in the courts:

*Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism with the result that the State must be able, in order to counter such threats, to undertake secret surveillance of subversive elements operating within its jurisdiction.*

*The Court would... reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic societies as a whole.*<sup>19</sup>

The Council of Europe Guidelines reflect this approach:

*Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and the use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.*<sup>20</sup>

The current provisions of the Terrorism Act in respect of terrorist investigations and of the Regulation of Investigatory Powers Act 2000 in respect of telephone tapping and other intercepts are in compliance with these standards. The Regulation of Investigatory Powers Act, however, also provides that evidence resulting from surveillance of this kind is not admissible in criminal proceedings. There is no barrier under the European Convention to making such evidence admissible provided that there is no contravention on the facts of the more general requirement in respect of fair trial, notably equality of arms between the defence and the prosecution. This clearly involves the right of the defence to challenge prosecution evidence and therefore the right of access to all evidence that is to be put before the court. The important issue is how this is to be achieved without interfering unduly in surveillance or undercover operations of the kind that are accepted as both reasonable and necessary for the effective prevention of terrorist activity.

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<sup>19</sup> European Court of Human Rights, Judgments in *Klaas v Germany* (1978) and App.No. 14310/88 *Murray v the United Kingdom* (1994) EHRR 39 (28 October 1994), para.58.

<sup>20</sup> Guideline VI (1).

The major concern of the security authorities in this respect appears to be the risk that the full extent of their methods of operation and their knowledge and penetration of terrorist networks might have to be disclosed, for example the existence or identity of undercover agents or complete transcripts of telephone taps or other intercepts. But this would not necessarily be required. The recent analysis of the relevant case-law of the European Court of Human Rights undertaken by the House of Lords in *R v H*<sup>21</sup> makes it clear that reasonable limitations on the disclosure of sensitive evidence in the interests of national security is acceptable. It also confirms that the principle of equality of arms in respect of the decision on what is to be disclosed may in exceptional circumstances be met by the appointment of “special counsel” who may represent the defence in a preliminary or separate hearing on the issue without disclosing the nature of the information to the defendant or their ordinary legal representatives. It further confirms that the judge is required to order disclosure only in respect of material that will be helpful to the defendants and that the full range of evidence of their guilt need not be disclosed. In this way the security authorities and the prosecution can retain control over what evidence pointing to the guilt of the defendant is or is not disclosed since the trial may proceed on the basis of sufficient evidence of guilt rather than the full range of sensitive information.

Experience in Northern Ireland may be of some assistance in this respect. Due to the introduction of non-jury courts for scheduled (*i.e.* terrorist or paramilitary) offences, the courts have had to develop procedures to protect judges who are combining the roles of both judge and jury from becoming aware of prejudicial material which would not have been admissible in a jury trial. Although there is no legislative provision for this, it has been decided that a different judge should deal with issues of admissibility so that the trial judge does not see any material of this kind. One aspect of this is a practice under which the depositions are scrutinised by one judge in advance of the trial by another with a view to excluding any prejudicial material. Another is a procedure for issues of admissibility on what would otherwise be heard in the absence of a jury on a *voir dire* to be heard before a second judge. A similar approach has been taken for reviews of decisions by the prosecution not to disclose sensitive or irrelevant material to the defence and for requests by the defence for disclosure of what may be relevant. Following recent practice in England and Wales to the effect that the trial judge may be asked to rule on what should or should not be disclosed, the

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<sup>21</sup> [2004] 2 WLR 335.

Court of Appeal in Northern Ireland, in a case in which the defence sought the disclosure of an intelligence file, has suggested that this too should be dealt with by a second judge:

*Therefore, if [the defence] is not willing to accept [the prosecution] statement that [it] has considered the intelligence file and related documentation and is of the view that there is nothing material in the file and related documentation which would be of help to the defence, having regard to what the interviewing officers have already said in evidence on the voir dire as to their knowledge of the defendant's association with suspected loyalist paramilitaries and their suspicions as to his involvement in terrorist offences, it will be necessary for the court to examine the file and related documentation to determine whether they contain entries which are material and would help the defence...If the view is taken by the Crown (and also in some cases, such as the present one, by the defence where the defence has some knowledge of the nature of the document) that the trial judge should not see the document because it is prejudicial to the defendant, then it will be necessary for another judge to rule on the issue of materiality or of public interest immunity and, if necessary, the trial judge will have to adjourn the hearing until the other judge has given his ruling.<sup>22</sup>*

This practice suggests a possible solution to the concern of the security authorities over the disclosure to the defence in a terrorist case of the full extent of their intelligence or intercept information. Provision could be made, whether by statute or otherwise, for a review by an independent judge of the security file with a view to establishing whether any of the material in it is relevant to the defence. Provision might also be made, if it were thought necessary, for special counsel to represent the defendant in any such review under similar conditions to those applying when special counsel are appointed to represent the applicant before the Special Immigration Appeals Commission. This form of restriction on access to the case-file, together with the safeguard of a special counsel, should fall squarely within the terms of the Council of Europe "Guidelines on human rights and the fight against terrorism". **We therefore recommend** that provision should be made to permit the admission in evidence of telephone taps and other intercept evidence, subject to a formal procedure by which the relevance of intelligence material of this kind to the conduct of the defence in terrorist cases

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<sup>22</sup> *R v Harper* [1994] NI 199.

can be decided at a separate judicial hearing at which the defence would be represented by special counsel on similar conditions to those in SIAC cases (**Recommendation 14**).

It is essential to bear in mind, however, that there are certain limits in this field which must on no account be overstepped. We have in mind, in particular, the green light which was recently given by the Court of Appeal in England for courts there to rely upon evidence which was obtained as result of torture committed abroad.<sup>23</sup> The Northern Ireland Human Rights Commission is absolutely opposed to any such slackening of the prohibition of torture, which is a crime under both international and domestic UK law. We very much hope that the House of Lords will reverse this decision on appeal, but to avoid any doubt **we recommend** that statute law be amended to make it crystal clear that no court anywhere in the United Kingdom can consider as admissible evidence which the prosecution cannot show to have been obtained without the use of torture (**Recommendation 15**).

### **Possible incentives for informers, accomplices and agents**

An equally important means of obtaining information on terrorist activity is the use of informers and under-cover agents. It is often difficult, however, to persuade informers or agents to give evidence in court, since they naturally fear reprisals or even death at the hands of their terrorist or criminal organisations. Since most will have been personally involved in criminal activity, there is a further concern over the charges or sentences they may receive if their participation in serious criminal offences becomes known. And their handlers will often prefer to maintain their position within a terrorist organisation or network as a source of information rather than bring it to an end by revealing the existence and identity of the informer. There are some additional legal barriers to the use of evidence of this kind. Although there is now no general requirement for corroboration of the evidence of accomplices, judges may need to give themselves or juries a special warning if the evidence is likely to be unreliable on the ground, for example, that it may be embellished or otherwise suspect because of the accomplice's self-interest. And the defence of entrapment poses further difficulties in respect of prosecutions for offences which may have been encouraged or facilitated in any way by under-cover agents.<sup>24</sup>

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<sup>23</sup> *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123.

All of this contributes to the difficulty in relying on the evidence of informers and agents in securing convictions against those involved in terrorist activity and to the resulting temptation to use powers of administrative detention. Serious consideration must therefore be given to the development of acceptable protections and incentives for informers and agents who are prepared to assist the authorities in securing convictions. This will involve action in three general areas:

- protection and anonymity for witnesses;
- explicit incentives for those prepared to give evidence against former colleagues; and
- less restrictive rules in respect of infiltration by state agents.

In each area the objective should be to assist the authorities in achieving effective justice by securing convictions against those actively involved in terrorist activities while maintaining effective safeguards against unjust convictions and other potential abuses.

Witnesses, especially those associated in any way with the defendants, are often reluctant to give evidence in open court against members of terrorist groups, since they are naturally fearful of reprisals. It is therefore essential to provide effective protection which does not involve undue disruption with their current and future lifestyles. In the case of reformed or penitent members of terrorist groups who have acted as informers, the only solution may be to provide them with new identities and to resettle them in other areas. But extreme measures of this kind are unlikely to be acceptable for other potential witnesses. It is already accepted practice in Northern Ireland to grant anonymity to witnesses in public inquiries and inquests and to screen them from public view, and this is not, without more, a breach of the European Convention.<sup>25</sup> In criminal trials the principle of equality of arms clearly requires that their evidence should be subject to cross-examination by the defence.<sup>26</sup> But there may be some scope for the development of other mechanisms that would allow cross-examination, but would provide greater protection, such as video-links of the kind used for child witnesses or the use of sound distortion technology to prevent voice recognition. None of these can

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<sup>24</sup> *Edwards and Lewis v UK*, European Court of Human Rights, decision of 22 July 2003.

<sup>25</sup> *R v Murphy and Maguire* [1990] NI 306 (Court of Appeal); *Doherty v Ministry of Defence* [1991] 1 NIJB 68 (Court of Appeal).

<sup>26</sup> *Windisch v Austria* (1990) 13 EHRR 281.

guarantee absolute anonymity. But they may act as a significant encouragement for witnesses to agree to give their evidence.

Further incentives may be needed to encourage informers and other reformed or penitent members of terrorist groups who may have been guilty of serious offences to give evidence against their former colleagues. The current practice in respect of informers is that the police or security services usually make undercover cash payments in return for information. This does not render any evidence they might give inadmissible, but it would allow the defence to question its reliability on the ground that it has been tainted by an inducement. And in most cases of this kind it is assumed on both sides that the informer will not be called on to give evidence in court. Alternatively a member of a terrorist group may offer to give evidence either on his or her own initiative or in response to requests or inducements from police interrogators. It is less clear in cases of this kind what kind of incentive may properly be offered. There is no formal provision for the police or prosecutors to offer a lower sentence or immunity from prosecution in respect of any offences which the informer or accomplice may have committed. In practice it is usual for charges to be brought and for the police or prosecutor to indicate that a lesser sentence or early release will be granted and for this to be conveyed informally to the judge. The formal basis for this is the accepted practice of imposing a lesser sentence in recognition of a plea of guilty and/or more general co-operation. This is also the formal basis for any plea bargain in respect of a plea of guilty to a lesser charge. It is standard practice in such cases, however, for the defence to seek an informal indication from the judge as to what reduction in sentence might be expected, although the Court of Appeal in Northern Ireland has recently stressed that to comply with Article 6 of the European Convention there should be as little private discussion as possible between lawyers and judges in the judges' chambers, and it set out new guidance on the matter.<sup>27</sup>

This is not a very satisfactory set of procedures for dealing with informers and accomplices. Money payments and other inducements in kind for informers are not subject to any form of public supervision and in cases where they are made there is a tendency to conceal the process from the courts and to avoid calling the informer to give evidence. Where an informer or accomplice is potentially willing to give evidence, on the other hand, there is no

way in which the eventual outcome can be promised or predicted with any certainty. This is alleged to be in the interests of preserving the integrity of the criminal process by denying the possibility of doing deals with criminals. But in practice deals seem regularly to be done behind the scenes. And if preserving the appearances discourages the use of the evidence of informers and accomplices and prevents charges being laid and convictions obtained against the leaders of terrorist groups, it is doubtful whether it is in the best interests of justice in a broader sense. In some other jurisdictions where terrorism or organised crime is prevalent, more detailed statutory provisions have been introduced to provide stronger and clearer incentives for those who are in a position to assist the authorities in bringing serious offenders to justice. Provided appropriate safeguards are put in place, not least by requiring some form of corroboration of the evidence of informers or accomplices, it may be preferable to subject the process of granting immunity or a reduction of sentence to judicial control subject to the overriding principles of fair trial and the interests of justice.

There may also be a case for clearer and less restrictive rules in respect of prosecutions based on the infiltration of terrorist groups by under-cover state agents. This is, however, an area where there is considerable potential for negative consequences, in legal and human rights terms, from recklessness or incompetence on the part of those charged with controlling such infiltration. There have been a number of recent cases in England where prosecutions in respect of drug trafficking based on evidence of this kind have collapsed on the ground of “entrapment”, *i.e.* the suspects had been assisted or facilitated by state agents in committing their offences.

Given recent experience in Northern Ireland, where there is increasing evidence of collusion by under-cover state agents in terrorist activities up to and including murder (whether this was uncontrolled, tolerated or even officially sanctioned), it is particularly important that appropriate oversight and control mechanisms be in place to ensure that any such agents are prevented from participating in or instigating the most serious crimes. In particular, no under-cover operation should be allowed to proceed to the point where there is a risk of serious injury or loss of life, and no person infiltrated into a terrorist organisation should be permitted to instigate serious crime. It ought to go without saying in a democratic state, but may need to be reinforced in the light of UK experience in various counter-insurgency

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<sup>27</sup> *A-G for Northern Ireland's Reference (No.3 of 2000) (Rogan)* [2001] NI 366.

contexts, that the security forces, police and intelligence agencies must also refrain from encouraging the development of “counter-gangs”, that is, terrorist organisations operating against other terrorist organisations with the encouragement or tolerance of the state. Indeed, the state should anticipate, and do everything possible to prevent, discourage and disrupt, any such development.

While it is clearly unacceptable for under-cover agents of the state to promote or encourage illegal or terrorist activity, it is also important not to make it impracticable for convictions to be obtained on the evidence of under-cover agents who have managed to infiltrate terrorist or other organised criminal activity; it must also be accepted that such infiltration is virtually impossible to achieve without the agent at some point doing things that would, in the absence of a defence, amount to committing criminal offences. As in the case of the evidence of informers and accomplices, it may be better to discuss and develop appropriate statutory guidelines and safeguards than to maintain formal principles which effectively rule out reliance on the work of under-cover agents in securing prosecutions and convictions.

**The Commission therefore recommends** that consideration should be given to the enactment of statutory rules or codes of practice governing the conditions and safeguards under which prosecutions and convictions may be based on the evidence of anonymous witnesses, informers, accomplices and under-cover state agents (**Recommendation 16**).

### **Possible alterations to court structures and procedures**

It has been suggested that some form of special court might be established to deal with terrorist cases. This could include provision for non-jury trials and thus, it is argued, better enable the authorities to maintain the confidentiality of sensitive intelligence material. Provision might also be made for the appointment of special counsel, with appropriate security clearance, and for other procedural rules for the protection of witnesses which might not be acceptable or appropriate on a general basis. Reference can be made in this context to the non-jury “Diplock” courts for the trial of scheduled offences by a single judge in Northern Ireland and to the non-jury three-judge Special Criminal Court in the Irish Republic, both of which were established and have been maintained to deal with terrorist and paramilitary cases primarily with a view to eliminating any possible intimidation or prejudice on the part of juries.

Experience in Northern Ireland and the Irish Republic indicates that measures of this kind can work reasonably well.<sup>28</sup> Some have argued that there have been fewer proven miscarriages of justice in high profile cases in either system than in jury trials of Irish defendants in Britain and that the requirement on judges to give reasons for their verdicts and the automatic right of appeal has provided adequate safeguards against unfair convictions.<sup>29</sup> On the other hand there has been sustained political and legal opposition to these special courts on the general grounds that they have been established only to make it easier to obtain convictions and that they provide a lesser and discriminatory system of justice for “political” suspects.<sup>30</sup> Complaints have also been made on the more specific ground that the provisions have been systematically abused by prosecuting authorities to deal with ordinary non-terrorist cases. This has resulted from the wide definition of scheduled offences in Northern Ireland and the unfettered power of the prosecuting authorities in the Irish Republic to refer cases to the Special Criminal Court in the interests of justice. The most recent empirical survey of jury service suggests that greater understanding of, and confidence in, the criminal justice system is enhanced by jury service.<sup>31</sup>

It is clear that there is nothing in the European Convention on Human Rights or other international human rights conventions to prevent the establishment of non-jury courts of this kind, provided the judge or judges are clearly independent of the executive and any special procedures meet the requirements for a fair trial. The more important question is whether there would be any advantage in introducing special non-jury courts of this kind to deal with terrorist cases throughout the United Kingdom.

The best approach to this question may be to consider whether there is any advantage in creating a system of special courts which cannot be achieved by general legal provisions of the kind discussed earlier in this submission. The answer would seem to be that any possible advantage would be outweighed by the political, communal and international criticism which

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<sup>28</sup> A non-jury court was also agreed to in the Lockerbie trial in the Netherlands.

<sup>29</sup> See Dickson, B. ‘Miscarriages of justice in Northern Ireland’ in Walker, C. and Starmer, K. *Miscarriages of Justice*, Blackstone Press, London, 1999.

<sup>30</sup> As this Commission has itself previously stated: “To maintain the Diplock system is to perpetuate two criminal justice systems in Northern Ireland, with the inevitable charge of inequality under the law that such duality invites.” See *Response to Diplock Review*, 2000, para.2.

<sup>31</sup> Matthews, R., Hancock, L. and Briggs, D. *Jurors’ perceptions, understanding, confidence and satisfaction in the jury system*, Findings 277, Home Office, London, 2004.

would undoubtedly result if special courts were established. To begin with there would be considerable difficulty in specifying the particular cases or categories of offences that would be dealt with in a special court. Experience in Northern Ireland is that any list of scheduled offences is likely to be too broad and that neither “scheduling in” nor “scheduling out” of particular cases is very satisfactory. “Scheduling in” carries with it an implication of association with terrorism and “scheduling out” would involve the consideration of a huge number of cases. There may also be less concern in Great Britain than in Northern Ireland over the possibility of bias or intimidation on the part of individual members of a jury. In the view of the Northern Ireland Human Rights Commission, any such concerns are probably best dealt with by permitting a trial to be halted and continued or restarted without a jury if there is clear evidence of intimidation or potential bias. And any concerns about the disclosure of sensitive security or intelligence information would be better dealt with by provisions for the screening of relevant evidence by a pre-trial consideration involving a different judge and special counsel, as suggested above, since the general principle of equality of arms under the European Convention on Human Rights would make it difficult to deny the defence or a jury access to evidence on which a conviction is to be based. **We therefore recommend** that no form of special court be created to deal with terrorist offences (**Recommendation 17**).

There are many intermediate arrangements between the cherished trial by jury and the unloved single-judge court, and some are both practicable and preferable<sup>32</sup> and in the Commission’s view there remains much validity in the arguments we have previously put as to how juries could be protected and encouraged. These include ending the right to peremptory challenges, keeping identities secret, providing physical privacy at court and making use of alternate jurors.

Recently a new way of plotting a path to the “normalisation” of trials on indictment in Northern Ireland has been suggested through sections 44 and 46 of the Criminal Justice Act 2003, which allow for applications by the prosecution for trials to be conducted without a jury where there is evidence of a real and present danger of jury tampering and the likelihood that such tampering would take place is so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury. Section 44(6) even gives examples of

where there may be evidence of a real and present danger. These changes follow the Home Office White Paper, *Justice for All*,<sup>33</sup> but depart from the consensual proposal expressed by the (Auld) Review of the Criminal Courts in England and Wales.<sup>34</sup>

It has to be admitted that these measures are not seen by many in England and Wales as progressive reforms, especially as greater care is now taken in court buildings to keep defendants away from witnesses or jurors. Other concerns revolve around the absence of a definition of “jury tampering” and the fact that section 46 permits a trial to continue in front of a judge who has already heard evidence of tampering. Nevertheless, Parliament was reluctantly convinced to deal with an indisputable problem. There was evidence from the police that the problem affects around four or five trials per year in London (at a cost of £9 million to the Metropolitan Police), plus a range of other trials in Liverpool and the West Midlands. The relevance of the measures to terrorist cases may be illustrated by the English cases of Baghdad Meziane and Brahmin Benmerzouga, who were convicted of terrorist-related activities such as raising funds and supplying funds to groups associated with Al Qa’ida.<sup>35</sup> The conviction, in Leicester Crown Court, followed two aborted trials when juries were dismissed after expressing fears about their personal safety. This case suggests that the Criminal Justice Act 2003 might well be used in terrorist cases. To date the reform has not been extended to Northern Ireland. **We recommend** that serious consideration be given to extending the anti-jury-tampering measure to Northern Ireland (**Recommendation 18**).

## **The general power to detain without charge**

The most recent important development in the arrest powers under Part V of the Terrorism Act 2000 is the extension of the maximum permissible detention period from seven days to 14 days by section 306 of the Criminal Justice Act 2003. The main arguments for the change were marshalled by Lord Carlile,<sup>36</sup> but these were later challenged by Lord Lloyd.<sup>37</sup> The

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<sup>32</sup> See Jackson, J.R., Quinn, K. and O’Malley, T. “The jury system in contemporary Ireland” (1999) 62 *Law & Contemporary Problems* 203).

<sup>33</sup> Cm. 5563, 2002, paras.4.32, 4.33.

<sup>34</sup> 2001, para.118.

<sup>35</sup> *The Times*, 2 April 2003, p.11.

<sup>36</sup> HL Debs, vol.653, col.957-9, 15 October 2003.

<sup>37</sup> HL Debs, vol.653, col.955, 15 October 2003. He later described the change as “an over-reaction, out of all proportion to the present danger from terrorism” (HL Debs, vol.654, col.1299, 11 November 2003).

Parliamentary Joint Committee on Human Rights advised that the extended period did not *per se* breach Article 5 of the European Convention, but it did suggest that more reasons for detentions should be forthcoming and that there was obviously a risk of feelings of isolation during detention.

The Commission can appreciate that international terrorism has brought added difficulties for police investigators which were unforeseen when the period of seven days was set in 1974, although it might be added that there is a plentiful history of terrorist suspects in Northern Ireland remaining wholly silent and uncooperative while in detention, for whatever period. We therefore continue to have doubts over whether a 14-day maximum detention period is necessary and **we recommend** that there should be an amendment to keep the provision in force only while the derogation notice is in force (**Recommendation 19**). While it is accepted that the 14-day period does not *per se* breach Article 5, it is closely associated with the “emergency” created by Al Qa’ida terrorism and should therefore lapse when that emergency lapses. **We also recommend** that the conditions of detention should be subject to much closer regulation. Once the normal Police and Criminal Evidence Act period of four days has passed, a new regime with greater attention to the detail of rest, amenities and contacts should be triggered (**Recommendation 20**).

The criteria for continued detention under the Terrorism Act 2000 are expressed in Schedule 8, paragraphs 23 and 34. The judicial authority must be satisfied (a) that there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain relevant evidence (relating to proof that he or she is a “terrorist” within section 40), whether by questioning or otherwise, or to preserve relevant evidence, and (b) that the investigation in connection with which the person is detained is being conducted diligently and expeditiously. The statement of these criteria is an improvement over the predecessor legislation (which contained none), but they remain opaque compared with the “Colville criteria” used under the pre-2000 legislation. **We recommend** that the documentation used for authorising an extension to initial detention should expressly refer to the various criteria and should require not only grounds based on the Colville criteria but also reasons for those grounds (**Recommendation 21**).

The detainee and any representative are automatically excluded from the hearing of an application under paragraph 34 of Schedule 8. **We recommend** that the exclusion be made, if at all, on specified grounds (**Recommendation 22**).

The system of formal police reviews comes to an end under paragraph 22(4) of Schedule 8 once a warrant extending detention has been issued under Part III of Schedule 8. It is regrettable that in this respect the Terrorism Act, unlike the Police and Criminal Evidence legislation, does not recognise the need not only for occasional judicial oversight but also for more formal police vigilance over the behaviour of investigative officers who are often working under considerable pressure and tension. **We recommend** that the police be placed under a continuing statutory duty to review detentions until release (**Recommendation 23**).

The right of access to a lawyer under paragraph 7 of Schedule 8 is subject to a direction under paragraph 9 (paragraph 17 in Scotland) to the effect that a detained person may consult a solicitor only in the sight and hearing of a “qualified officer” (an inspector). In the opinion of this Commission, it is very doubtful whether access to legal advice under these circumstances can meet the standards of Article 6 of the European Convention. In *Brennan v UK*,<sup>38</sup> the presence of the police during a consultation session with the detainee’s solicitor was held to amount to a breach of Article 6. If there is concern about either intentional collusion or the relaying of unwitting messages, then some kind of firewall must be inserted between the lawyer-client consultation and the police, rather than allowing police oversight of the consultation. **We recommend** that this provision be reformulated or repealed (**Recommendation 24**).

Whilst access to lawyers by suspects in police custody has improved substantially over the past decade, it is less clear that some of these improvements are also reflected in police attitudes to lawyers. A picture of past harassment, intimidation and threats has been provided by the Police Ombudsman for Northern Ireland in *A Study of the Treatment of Solicitors and Barristers by the Police in Northern Ireland*.<sup>39</sup> The cases of Pat Finucane and Rosemary Nelson are further testaments to serious errors in police attitudes to lawyers. The Commission acknowledges the changes reflected in a recent PSNI General Order on treatment of defence lawyers.

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<sup>38</sup> App. No.39846/98, (2001) *The Times*, 22 October.

The Independent Commissioner for the Holding Centres in Northern Ireland (re-designated as the Independent Commissioner for Detained Terrorist Suspects in 2001) has had an important and beneficial influence, so it is disappointing that this office is still not provided for by statute and that a similar office has not been established elsewhere in the United Kingdom. The Commission does not understand why the Independent Assessor of Military Complaints Procedures in Northern Ireland is provided for the Terrorism Act 2000,<sup>40</sup> while the inspector of terrorist detentions is not. Parliament should also forge relations with the office through its select committee system. **We recommend** that the office of Independent Commissioner for Detained Terrorist Suspects should be provided for by statute for both Northern Ireland and for Great Britain and that his or her jurisdiction should cover not just detainees held under the 2000 Act but also those held under the 2001 Act (**Recommendation 25**).

## Stop and search powers

The powers of search in section 44 of the Terrorism Act 2000 can be randomly exercised. Section 46 requires the police to inform the Secretary of State of their exercise as soon as is reasonably practicable and, if they are to continue, the authorisation must be confirmed within 48 hours. The power was the subject of litigation when it was invoked against demonstrators outside an arms sales exhibition in Docklands in 2003. There was some dispute over which powers were actually being applied but, after Liberty lodged an action for judicial review in the names of Kevin Gillan and Pennie Quinton, the Home Secretary and Metropolitan Police admitted that the Terrorism Act had been in play.<sup>41</sup> The litigation also revealed that, unbeknownst to the general public, section 44 has been in continuous use in London since February 2001.

In the Docklands case the application failed. It was held that Parliament had clearly granted powers which could cover wide as well as specific locations – possibly an entire police area or district. The discretion to use the power was also wide – “expedient” was not viewed as restrictive. As ever, the assessment of risk to the public safety and to national security and the formulation of measures to safeguard the public and national security were primarily for

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<sup>39</sup> Belfast, 2003.

<sup>40</sup> S.98.

<sup>41</sup> *The Times*, 11 September 2003 p.9, 13 September p.4. *R (on the application of Gillan and another) v Metropolitan Police Commissioner and another* [2003] EWHC 2545 (Admin).

the police and Home Secretary, who had responsibility, information sources and experience, rather than for the judges. Despite this judicial hesitation about becoming involved, **the Commission recommends** that the confirmation of section 44 orders be required from a judicial officer (**Recommendation 26**). Whilst one might expect continued deference on the part of the judges, the prospect of regular judicial audit is an important safeguard against executive abuse of power.

As for the exercise of the section 44 power, the courts warned that if it were kept in force year on year, the police should exercise particular care to ensure that it was not used arbitrarily or against any particular group of people. The existing guidance in the Police and Criminal Evidence Act Code of Practice A (as revised in 2003) was therefore found to be wanting. In particular, by paragraph 2.25:

*The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).*

In the Docklands case, there was “just enough evidence” to convince the court that sufficient need and care had applied. Lord Justice Brooke was not overly impressed:

*But it was a fairly close call, and the Metropolitan Police would do well to review their training and briefing and the language of the standard forms they use for section 44 stop/searches if they wish to avoid a similar challenge in future. We have already called attention to the need to revise Note 13 to PACE Code A, so that section 44 considerations are not mixed up with considerations relevant to section 60 of the 1994 Act...*<sup>42</sup>

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<sup>42</sup> Para.58.

Following this case Lord Carlile suggested that written guidance should be given to operational officers, reminding them of available powers within and without the anti-terrorism laws and the possibility of switching between them.<sup>43</sup> **We recommend** that the relevant codes of practice should be amended accordingly (**Recommendation 27**).

## **Fingerprints**

The Asylum and Immigration Appeals Act 1993 created a power to require asylum seekers and their dependants to provide fingerprints. Under section 3(2), any fingerprints which are taken must be destroyed within a month of the person being given indefinite leave to remain in the United Kingdom or within 10 years. Section 141 of the Immigration and Asylum Act 1999 provides instead that fingerprints may be taken in certain circumstances, such as where the person's identity is in doubt or there is a suspicion that, if granted temporary admission, he or she may not comply with immigration conditions. Section 143 stipulates that the destruction of the fingerprints must be brought about as soon as reasonably practicable after the person's identity as a British citizen or Commonwealth citizen with right of abode has been established or he has been given leave to enter or indefinite leave to remain in the United Kingdom or a deportation order against him has been revoked. Where the retention period is not otherwise specified, it is 10 years. Section 36 of the Anti-terrorism, Crime and Security Act 2001 removes that time-limit both for prints on record and for those yet to be taken. But whether indefinite retention of prints, especially without any form of review, can meet the standards of the protection of privacy in Article 8 of the European Convention must be doubted. **We recommend** that a time limit for the retention of fingerprints be restored, that a form of review as to the necessity for retention be instituted and that a statutory commitment to the application of the Data Protection Act 1998 in this context be made (**Recommendation 28**).

## **Support for victims of terrorism**

The two schemes for dealing with personal injuries in Great Britain and in Northern Ireland are neither generous nor wholly appropriate when dealing with the victims of terrorism. For

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<sup>43</sup> Lord Carlile, *Report on the Operation in 2002 and 2003 of the Terrorism Act 2000* (Home Office, 2004) para.86.

example, the victim must be in the United Kingdom at the time the injury was sustained and he or she must be injured seriously enough to qualify for at least the minimum award available. In relation to property or other financial loss, the Northern Ireland scheme does allow for compensation for terrorist acts, but there are again limits, such as that the terrorism must arise from activities by or on behalf of an unlawful association. The Great Britain Scheme provides no compensation whatsoever where the property or other financial loss is unrelated to personal injury. In such cases, the only state aid is by way of the “Pool Re” Scheme, which is designed to ensure that, unlike in Northern Ireland, insurance cover remains available. The Pool Re scheme does not cover losses occurring outside Great Britain; nor are lone terrorists within it and it does not cover the use of violence designed to put the public or any section of the public in fear. Far more has been done in the USA in recent years to improve the position of victims of terrorism.

The rights of victims of terrorism is a topic which was largely ignored during the recent years of conflict in Northern Ireland. Only now is it being addressed – much too late for many victims and their families. The Steering Committee for Human Rights in the Council of Europe is also working on new guidelines for the victims of terrorism. **The Commission recommends** that greater consideration be given to the rights of victims of terrorism throughout the United Kingdom and that the UK Government should pay close attention to developments at the level of the Council of Europe (**Recommendation 29**).

### **Special measures in Northern Ireland**

There seems little prospect that the special problems concerning the use of politically motivated violence in Northern Ireland will be resolved in the very near future. The First Report of the International Monitoring Committee (which was established following a supplementary Anglo-Irish Agreement in 2003) reveals that it is “deeply concerned” about the level of paramilitarism.<sup>44</sup> The Government is nevertheless to be applauded for still professing itself “keen to drop the powers” in Part VII of the 2000 Act,<sup>45</sup> and in that spirit the suggestions below seek to provide substantial diminutions in these provisions while fully recognising the persistent difficulties of the situation.

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<sup>44</sup> 2003-04 HC 516, para.2.1.

<sup>45</sup> First Standing Committee on Delegated Legislation, col.3, 11 February 2002, Jane Kennedy.

## Remand periods

The Secretary of State is empowered to impose maximum periods either for specific processes or for the overall period of custody on remand. These provisions are now in sections 72 and 73 of the Terrorism Act 2000 but have never been activated because the dire consequences of failure to meet the deadlines – that the accused shall be treated for all purposes as having been acquitted of the offence to which the proceedings relate – are seen as unacceptable. The failure to exercise the power has been accepted as a valid exercise of discretion in *Re Shaw*,<sup>46</sup> but it makes a mockery of law to pass these powers and then to ignore them for nearly two decades. **We recommend** that these provisions be activated – the issue is one of resources, which can surely be provided within a given time-scale and should have been provided by now. If this is deemed not to be feasible, the sections should be reformulated to allow for the issuance of guidelines which would not have the sanctions currently provided for (**Recommendation 30**).

## Bail

There have been several challenges to the special rules about the grant of bail in terrorist-related cases in Northern Ireland. In the case of *In the matter of an application by Martin McKay for judicial review*<sup>47</sup> the applicant unsuccessfully argued that section 67(2) of the Terrorism Act 2000 is in breach of Articles 5 and 14 of the European Convention on the grounds that taking away the power from magistrates lacked compelling reasons, resulted in undue delay and was discriminatory compared with the treatment of those members of the security forces who were to be refused bail. The decision in *McKay* was attacked in *R v McAuley*,<sup>48</sup> but the High Court again emphasised that, subject to undue delay, the remanding court need not be the one seized with the bail power. The discrimination challenge in this case subtly shifted to a comparison with terrorist suspects in England and Wales, who are not subjected to any special criminal process, including special rules on bail. The response was in two parts. First, it was accepted that all was being done to avoid delay. For example, in response to Lord Carlile's call for the use of Resident Magistrates, an affidavit from the Northern Ireland Office pointed to the dangers of intimidation. Second, the High Court relied

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<sup>46</sup> [2002] NIJB 147.

<sup>47</sup> [2002] NI 307.

<sup>48</sup> [2004] NIQB 5.

upon the case of *Magee v UK*,<sup>49</sup> which had highlighted differences in treatment between the jurisdictions concerning access to solicitors. Further to these challenges, **we recommend** that further consideration be given to empowering Resident Magistrates to grant bail since at least a couple are now involved in reviews of detention under section 41 and so presumably have some degree of enhanced security arising out of that judicial business (**Recommendation 31**).

### **Policing powers**

By section 89 of the Terrorism Act 2000 soldiers and police officers may exercise a power to stop and question any person. The purpose is to ascertain (a) the person's identity and movements, (b) what he or she knows about a recent explosion or another recent incident endangering life, or (c) what he or she knows about a person killed or injured in a recent explosion or incident. The incidental detention may persist "for so long as is necessary". This phrase must be read as subject to reasonable limitations, but an attempt to impose a specific time-limit (such as 15 minutes) failed during the parliamentary debates.<sup>50</sup> In the opinion of this Commission, the breadth of the power to stop and detain – without any requirement of reasonable suspicion – may fall foul of Article 5 of the European Convention, depending on, in any individual case, on whether there is reasonable suspicion and on the length of the detention. Furthermore, although only punishable by summary conviction, the breadth of the possible questioning, the absence of any legal advice and the possible seriousness of the issues involved surely cast doubt on whether the requirements under (b) and (c) can withstand challenge under Article 6(2) of the Convention as a breach of the privilege against self-incrimination in the event that evidence from such questioning were later to be presented in court. **We recommend** that section 89 be amended to stipulate a maximum period of detention and that any statements made during the questioning are inadmissible in evidence (**Recommendation 32**).

Section 90 deals with powers of entry if considered "necessary in the course of operations for the preservation of the peace or the maintenance of order". Again, the wording of the power does little to discourage disproportionate intrusions into property and privacy. **We recommend** that the wording be reviewed (**Recommendation 33**).

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<sup>49</sup> App. No.28135/95, 2000-VI.

A similar set of powers to search premises exists under section 86 in relation to a person who, it is reasonably believed, is unlawfully detained in such circumstances that his or her life is in danger. The requirement of reasonable belief of the detention is a change from 1996, but there is still no requirement for reasonable suspicion in relation to the detained person being located in the premises to be searched – it follows that area searches are still possible under section 86. The absence of reasonable suspicion and judicial oversight must render the power vulnerable to challenge under Article 8 of the European Convention. **We recommend** that the wording be reviewed (**Recommendation 34**).

Lord Carlile has called for the repeal section 108 (the use of police assertions as evidence of membership of a specified organisation) because of its non-use to date.<sup>51</sup> It has been shown to be unworkable both in practice and in law and **we too recommend** that it be repealed in their entirety (**Recommendation 35**).

### **The format of the legislation, the regulation power and the review process**

The result of the passage of the Anti-terrorism, Crime and Security Act 2001 is once again a legislative morass. Although the Act is in some ways an advance on the Terrorism Act 2000 in that it provides for a full and independent review (under section 122), the overall result is that measures are spread across two pieces of legislation, with inconsistent timetables for renewal and forms of review. The anticipated gains from consolidation envisaged by the Lloyd Report have been lost.

**We recommend** that early consideration be given to the production of consolidated legislation (**Recommendation 36**). It would be helpful if the opportunity were taken to consolidate not only the 1998, 2000, and 2001 Acts, but also legislation based on international law, such as Acts dealing with hijacking, internationally protected persons, hostage taking, and the protection of nuclear materials. A good example of how this might be achieved is provided by the South African Law Commission's Project 105, *Report on Review of Security Legislation* (2002).

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<sup>50</sup> HC Debs. Standing Committee D, col.282, 3 February 2000, Adam Ingram.

<sup>51</sup> Report on the Operation in 2003 of Part VII of the Terrorism Act 2000 (2004), para.19.7.

The Newton Committee called for the repeal of the wide regulation-making power in section 124 of the Terrorism Act 2000,<sup>52</sup> but the Home Office Discussion Paper rejects this restraint. **The Commission recommends** that, in view of the necessity of upholding the rule of law at all times, the approach of the Privy Council should be adopted (**Recommendation 37**).

Perhaps most confusing of all are the various systems of legislative review which work to different agendas and timetables. These include:

- An annual review by a Home Office appointee (currently Lord Carlile) under section 126 of the Terrorism Act 2000.
- An annual review by a Home Office appointee (currently Lord Carlile) of the operation of the provisions in Part VII of the 2000 Act (the provisions applying only in Northern Ireland); this is not strictly required by statute but fits with the requirement of annual renewal under section 112.
- An annual review by a Home Office appointee (currently Lord Carlile) under section 8 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (though we note that a recommendation by Lord Carlile that this review be subsumed within the Part VII review has been accepted).
- An annual review by a Home Office appointee (currently Lord Carlile) of the detention powers provided for by Part IV of the Anti-terrorism, Crime and Security Act 2001.
- A once-and-for-all review, by a Committee of Privy Counsellors, of the Anti-terrorism, Crime and Security Act 2001, completed within two years of enactment in December 2003.

The appointment of an independent reviewer under the Terrorism Act is an extra-statutory concession. This still represents a significant diminution in scrutiny – there is no certainty of a debate or of full public answers to queries raised by the reviewer or others. No concession was made that there would be a debate on the floor of the House – the Minister pointed rather to possible Select Committee scrutiny. This stance, although in accord with the *Inquiry into*

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<sup>52</sup> Privy Counsellor Review Committee, Anti-Terrorism, Crime and Security Act 2001 Review, Report (2003-04 HC 100) para.4.42.

*Legislation against Terrorism*,<sup>53</sup> means that an annual parliamentary review is no longer needed.

Extraordinary powers should be subjected to extraordinary scrutiny. **We therefore recommend** that steps should be taken to ensure that the reviews are consistent in format, that they take due account of one another and that the 2001 Act is further reviewed before it comes up for possible renewal (**Recommendation 38**). **We also recommend** that consideration should be given to establishing an independent standing committee (not just one individual) to investigate and report on any proposed introduction of anti-terrorist legislation, how it is operating in practice, whether it should be renewed and whether it is compatible with all of the United Kingdom's international human rights obligations (**Recommendation 39**). Such an independent standing committee could better build up expertise in this field and could feed from one review to another. It would also avoid the danger of a single reviewer becoming stale over time. The House of Commons Select Committee on Home Affairs should also consider this issue from time to time.

Though significant changes have been made to the draft Civil Contingencies Bill in order to reflect various human rights concerns, it will be necessary to ensure that regulations yet to be issued under the primary legislation also comply with human rights standards. **We recommend** that the review mechanisms put in place for anti-terrorist legislation should also have a remit over contingency planning in so far as it relates to counter-terrorism planning (**Recommendation 40**). This Commission has recently met with the Omagh Support and Self-Help Group (set up after the Real IRA bomb which killed 29 people in Omagh in 1998), which has done extensive research purporting to show that contingency planning in Northern Ireland for bomb evacuations, despite the long history of troubles here, is still inadequate when compared with that in other jurisdictions.

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<sup>53</sup> Cm.3420, London, 1996, para.17.6.

## Summary of recommendations

- 1 Counter-terrorism measures and the agencies which implement them should be subjected to more effective democratic controls.
- 2 When reforming this area of law the UK government should pay careful attention to the Council of Europe's "Guidelines on human rights and the fight against terrorism".
- 3 Part IV of the Anti-terrorism, Crime and Security Act 2001 should be repealed and instead prime regard should be had to the criminalisation approach adopted elsewhere – suspects should be tried for recognised offences, with the prosecution allowed to rely upon evidence electronically obtained.
- 4 If executive measures are required over and above a prosecution strategy, less intrusive alternatives to detention should be considered in priority.
- 5 It should be an express statutory requirement of making a detention order under Part IV of the Anti-terrorism, Crime and Security Act 2001 that reasonable efforts have been made to identify a suitable third state willing to receive the suspect.
- 6 A review should be undertaken of section 17 of the Regulation of Investigatory Powers Act 2000, which concerns the inadmissibility of electronic evidence.
- 7 Persons appointed to review the operation of Part IV of the Anti-terrorism, Crime and Security Act 2001 should be expressly required to assess the need for the continuance of the derogation under the European Convention on Human Rights.
- 8 The law should be amended it be made explicit that the power to detain under Part IV of the Anti-terrorism, Crime and Security Act 2001 can be exercised only in connection with Al Qa'ida suspects.
- 9 Conditions of detention for detainees held under Part IV of the Anti-terrorism, Crime and Security Act 2001 should be regulated by an explicit set of rules.

- 10** Section 21(2)(c) of the Terrorism Act 2000 should be repealed.
- 11** No offence of “terrorism” should be created.
- 12** It would not be helpful to create an offence of “preparing acts of terrorism”.
- 13** The wording of section 54(5) of the Terrorism Act 2000 (defence to a charge of weapons training) should be reconsidered.
- 14** Provision should be made to permit the admission in evidence of telephone taps and other intercept evidence, subject to a formal procedure by which the relevance of intelligence material of this kind to the conduct of the defence in terrorist cases can be decided at a separate judicial hearing at which the defence would be represented by special counsel on similar conditions to those in SIAC cases.
- 15** Statute law should be amended to make it crystal clear that no court anywhere in the United Kingdom can consider as admissible evidence which the prosecution cannot show to have been obtained without the use of torture.
- 16** Consideration should be given to the enactment of statutory rules or codes of practice governing the conditions and safeguards under which prosecutions and convictions may be based on the evidence of anonymous witnesses, informers, accomplices and under-cover state agents.
- 17** No form of special court should be created to deal with terrorist offences.
- 18** Serious consideration should be given to extending the anti-jury-tampering measures in the Criminal Justice Act 2003 to Northern Ireland.
- 19** There should be an amendment to the law to ensure that the normal 14-day maximum detention period under the Terrorism Act 2000 is kept in force only while the derogation notice under the European Convention is valid.

- 20** Conditions of detention for those detained under the Terrorism Act 2000 should be subject to much closer regulation.
- 21** The documentation used for authorising an extension to initial detention under the Terrorism Act 2000 should expressly refer to the relevant criteria and should require not only grounds based on the criteria but also reasons for those grounds.
- 22** The exclusion of the detainee and of any representative of the detainee from the hearing of an application under paragraph 34 of Schedule 8 to the Terrorism Act 2000 should be made, if at all, on specified grounds.
- 23** The police should be placed under a continuing statutory duty to review detentions under the Terrorism Act 2000 until release.
- 24** Paragraph 7 of Schedule 8 to the Terrorism Act 2000 (right of access to a solicitor) should be reformulated or repealed.
- 25** The office of Independent Commissioner for Detained Terrorist Suspects should be provided for by statute for both Northern Ireland and for Great Britain and his or her jurisdiction should cover not just detainees held under the Terrorism Act 2000 but also those held under the Anti-terrorism, Crime and Security Act 2001.
- 26** Confirmation of orders under section 44 of the Terrorism Act 2000 (stop and search powers) should be required from a judicial officer.
- 27** The relevant codes of practice should be amended to explain more clearly when powers under section 44 of the Terrorism Act 2000 should and should not be used.
- 28** A time limit for the retention of fingerprints should be restored, a form of review as to the necessity for retention should be instituted and a statutory commitment should be made to the application of the Data Protection Act 1998 in this context.

- 29** Greater consideration should be given to the rights of victims of terrorism throughout the United Kingdom and the UK Government should pay close attention to developments in this regard at the Council of Europe.
- 30** Sections 72 and 73 of the Terrorism Act 2000 (maximum periods for remands and other court processes) should be activated in Northern Ireland. If this is deemed not to be feasible, the sections should be reformulated to allow for the issuance of guidelines which would not have the sanctions currently provided for.
- 31** Further consideration should be given to empowering Resident Magistrates to grant bail in Northern Ireland.
- 32** Section 89 of the Terrorism Act 2000 should be amended to stipulate a maximum period of detention and that any statements made during such detention in response to questioning are inadmissible in evidence in Northern Ireland's courts.
- 33** The wording of section 90 of the Terrorism Act 2000 (powers of entry) should be reviewed.
- 34** The wording of section 86 of the Terrorism Act 2000 (searches of premises for detained persons) should be reviewed in the light of the European Convention on Human Rights.
- 35** Section 108 of the Terrorism Act 2000 (the use of police assertions as evidence of membership of a specified organisation) should be repealed.
- 36** Early consideration should be given to the production of consolidated legislation on terrorism.
- 37** Section 124 of the Terrorism Act 2000 (power to make regulations) should be repealed.

- 38** Steps should be taken to ensure that reviews of anti-terrorist legislation are consistent in format, that they take due account of one another and that the 2001 Act is further reviewed before it comes up for possible renewal.
- 39** Consideration should be given to establishing an independent standing committee to investigate and report on any proposed introduction of anti-terrorist legislation, how it is operating in practice, whether it should be renewed and whether it is compatible with all of the United Kingdom's international human rights obligations.
- 40** The review mechanisms put in place for anti-terrorist legislation should also have a remit over contingency planning in so far as it relates to counter-terrorism planning.