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The *Terrorism Bill*

Bill 10 of 1999-2000

This paper discusses the provisions of the *Terrorism Bill*, which is designed to amend and extend existing counter-terrorism 1egislation in the UK. The Bill seeks to put most of this legislation on a permanent, rather than a temporary, renewable basis and to extend it so that rather than being restricted to terrorism connected with the affairs of Northern Ireland and international terrorism it will cover all terrorism, including domestic terrorism. It also sets out a new definition of terrorism for the purposes of the exercise of the powers it contains. The Bill is due to be debated on Second Reading on 14 December 1999.

Mary Baber

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Summary of main points

This paper summarises the current framework of counter-terrorist legislation in the UK and recent recommendations for change, including those recommendations which have provided the basis for the changes set out in the *Terrorism Bill*. The Bill, which was introduced on 2 December 1999, is based on the proposals in the Government consultation paper *Legislation Against Terrorism* [CM 4178] published in December 1998. These in turn were much influenced by Lord Lloyd's report of his *Inquiry Into Legislation Against Terrorism* [Cm 3420] which was published in October 1996.

The paper sets out the arguments for and against special legislation to deal with terrorism and then goes on to consider the provisions of the Terrorism Bill itself. While the UK's current legislation has a temporary basis, in that it is subject to annual renewal, the new legislation will be permanent, apart from some temporary measures which are being retained in Northern Ireland.

The *Terrorism Bill* contains many measures which correspond to existing provisions set out in the *Prevention of Terrorism (Temporary Provision) Act 1989* and the *Northern Ireland (Emergency Provisions Act 1996.* The Bill differs from these Acts, however, in setting out a new and expanded definition of terrorism, designed to include ideological and religious motivations for acts, as well as political motives. The new definition refers to actions involving serious violence against any person or property, rather than the use of violence. The UK's current anti-terrorist legislation applies only to terrorism connected with the affairs of Northern Ireland and international terrorism. The measures in the Bill, on the other hand, are designed to apply to all forms of terrorism, including domestic terrorism.

This paper goes on to consider the new power in the Bill for the Secretary of State to proscribe organisations involved in international and domestic terrorism as well as terrorism connected with the affairs of Northern Ireland. It then considers the Bill provisions concerning the financing of terrorism, which include a new power to permit the seizure of cash at borders and its forfeiture. This section is followed by consideration of the Bill's provisions concerning police powers of entry, search and seizure and then by discussion of its provisions relating to the arrest and detention of people suspected of involvement in acts of terrorism. These include new procedures requiring the police to obtain judicial authorisation if they wish to detain a person for longer than 48 hours.

The Bill seeks to create a new offence of inciting terrorist acts abroad and this is discussed, along with the offence of providing of receiving weapons training, which is being expanded by the Bill.

This paper ends with discussion of the power currently available under the *Prevention of Terrorism (Temporary Provisions) Act 1989* for the Secretary of State to make exclusion orders excluding named individuals from the UK as a whole, from Great Britain or from Northern Ireland. This power, which is not currently in force, is not being re-enacted by the Bill and will be repealed.

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I Current counter-terrorism legislation and Government proposals for change

Several statutes currently contain measures designed to prevent terrorism in the UK and assist the investigation of terrorist crime. The principal measures are:

- the *Prevention of Terrorism (Temporary Provisions) Act 1989* [the PTA], as amended by the *Prevention of Terrorism (Additional Powers) Act 1996* and the *Criminal Justice (Terrorism and Conspiracy) Act 1998*; and

- the *Northern Ireland (Emergency Provisions) Act 1996* [the EPA] as amended by the *Northern Ireland (Emergency Provisions) Act 1998.*

The PTA was first introduced in 1974 as a temporary measure in response to a series of IRA attacks in Great Britain, including the Birmingham pub bombings. It completed most of its passage through Parliament in a single day[1]. It has been re-enacted on several occasions, most recently in 1989. Several of its provisions apply to international terrorism as well as terrorism connected with the affairs of Northern Ireland. The Act, which confers exceptional powers on the police, is subject to annual renewal by Parliament, following the publication of a report on its operation during the previous year.

The EPA was first introduced in 1973 in response to the prevailing threat from terrorism. Like the PTA, the EPA supplements the ordinary criminal law, giving additional powers to the police and security forces in Northern Ireland to deal with terrorism. The Act is subject to annual renewal by Parliament, following the publication of a report on its operation during the previous year. The Act is also of limited duration. Since 1973 the EPA legislation has been reviewed, renewed and re-enacted on several occasions. The 1996 Act, which is the fifth in the series, was amended by the *Northern Ireland (Emergency Provisions) Act 1998*. Unlike previous *Northern Ireland (Emergency Provisions) Acts* the 1998 Act did not seek to repeal and re-enact the whole of the 1996 Act. Those parts of the 1996 Act that were not specifically affected by the 1998 Act remain in force. The *Northern Ireland (Emergency Provisions) Act 1996*, is due to expire on 24 August 2000[2].

The *Criminal Justice (Terrorism & Conspiracy) Act 1998* was enacted over 2 days in September 1998 following the emergency recall of Parliament in the wake of the Omagh bombing[3]. Details of the legislation that became the 1998 Act can be found in Library Research Paper 98/97 on *The Criminal Justice (Terrorism & Conspiracy Bill*) and in a

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1 HC Deb 28 November 1974 vol 882 c 634-943; HL Deb 28 November 1974 vol 354 c 1500-1570; HL Deb 29 November 1974 vol 354 c 1573-1574

2 Section 62(10) *Northern Ireland (Emergency Provisions) Act 1996* as amended by section 1(3) *Northern Ireland (Emergency Provisions) Act 1998*

3 HC Deb 2 September 1998 vol 317 (Part I) c 712-932; HL Deb 3 September 1998 vol 593 (Part I) c 3-156

guide to the Act that accompanied the Home Office press notice announcing its implementation[4].

The Government's consultation paper *Legislation Against Terrorism*[5], published in December 1998, contained a useful summary of the current framework of legislation and its contents. This summary is reproduced as an appendix to this paper.

A. Reviews of the prevention of terrorism legislation

The prevention of terrorism legislation has been subject to a number of reviews since 1974. A review of the 1974 and 1976 *Prevention of Terrorism Acts* by Lord Shackleton was published in 1978[6]. Many, but not all, of its recommendations were accepted by the Labour Home Secretary, Merlyn Rees and his Conservative successor William Whitelaw. Changes were made without the need for primary legislation. In February 1983 the report of a review of the 1976 Act by Lord Jellicoe was published[7]. Once again many, but not all of its recommendations were accepted and enacted in the *Prevention of Terrorism (Temporary Provisions) Act 1984*, which was designed to last for 5 years only. The third major review of the prevention of terrorism legislation, carried out by Viscount Colville of Culross, was published in December 1987[8]. Those of his recommendations that were accepted by the Conservative Government were enacted in the *Prevention of Terrorism (Temporary Provisions) At 1989*. Details of the Bill that became the 1989 Act and the background to its enactment are discussed in House of Commons Library Research Note 424 on the *Prevention of Terrorism (Temporary Provisions) Bill [Bill 2 of 1988/89]*.

Viscount Colville of Culross also carried out a review of the *Northern Ireland (Emergency Provisions) Acts 1978* and *1987*, which was published in July 1990[9] and led to changes enacted in the *Northern Ireland (Emergency Provisions) Act 1991*. The 1991 Act was itself reviewed by JJ Rowe QC in February 1995[10]. Some of the recommendations of this review were enacted in the *Northern Ireland (Emergency Provisions) Act 1996*, part of which is still in force.

In December 1995 the previous Government appointed the Rt Hon. Lord Lloyd of Berwick to carry out a review of the law governing the prevention of terrorism in the UK and to consider whether there would be any need for specific counter-terrorism legislation in the UK in the event of a lasting peace in Northern Ireland. The two-volume report of Lord Lloyd's inquiry was published in October 1996[11]. Lord Lloyd concluded that there

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[4] Criminal Justice (Terrorism & Conspiracy) Act 1998 – Home Office press notice 7 September 1998
[5] *Legislation Against Terrorism* CM 4178 Home Office and Northern Ireland Office December 1998 Annex A
[6] Cmnd 7324
[7] Cmnd 8803
[8] Cm 264
[9] Cm 1115
[10] Cm 2706
[11] *Inquiry into Legislation Against Terrorism* Cm 3420 October 1996

would be a continuing need for permanent UK-wide legislation and recommended a number of changes to the existing arrangements.

On 17 December 1998 the Government published a consultation paper on *Legislation Against Terrorism*[12] which proposed new permanent UK-wide counter-terrorism legislation to replace the temporary regime currently operating under the *Prevention of Terrorism (Temporary Provisions) Act 1989* and the *Northern Ireland (Emergency Provisions) Acts*. The introductory chapter of the consultation paper stated that:

> The Government agrees with Lord Lloyd that there will be a continuing need for counter-terrorist legislation for the foreseeable future. That is regardless of the threat of terrorism related to Northern Ireland (which includes both Loyalist and Republican terrorist groups and is referred to from here on as Irish terrorism). It believes that the time has come to put that legislation onto a permanent footing. In preparing its proposals on the shape and content of that legislation, the Government has drawn heavily on Lord Lloyd's work, for which it is indebted to him.

The consultation paper went on[13]:

> The Government's aim is to create legislation which is both effective and proportionate to the threat which the United Kingdom faces from all forms of terrorism - Irish, international and domestic - which is sufficiently flexible to respond to a changing threat, which ensures that individual rights are protected and which fulfils the United Kingdom's international commitments. It recognises that it is not easy to strike the right balance in seeking to achieve these objectives. That is why it is publishing its proposals in the form of a consultation paper. It would welcome comments on what it proposes and will consider carefully all the representations received.

A Home Office press notice announcing the publication of the Paper summarised its proposals as follows:

> In particular, the document:
>
> - proposes a new definition of terrorism which will extend to domestic as well as Irish and international terrorism;
>
> - proposes that proscription should be retained for Irish terrorism;
>
> - invites views on extending proscription to international and domestic terrorist groups;

[12] CM 4178
[13] ibid. p vi paragraph 8

- proposes the abolition of exclusion order powers;

- sets out strengthened powers for dealing with terrorist fundraising;

- sets out proposals for a new judicial authority to consider applications for extensions of detention of terrorist suspects;

- reviews the provisions of the Criminal Justice (Terrorism and Conspiracy) Act 1998;

- considers a number of provisions which, depending on the security situation, could be introduced temporarily in Northern Ireland only.

The consultation period ended on 16 March 1999. The Government published an analysis of the responses to the consultation paper on 9 December 1999.

In an article in the September 1999 issue of the journal *Legal Studies* Conor Gearty, Professor of Human Rights Law at King's College London, considered the possible effect of the Human Rights Act 1998, which is to be brought into force across the whole of the UK on 2 October 2000, on the impact of legislation that might flow from the Government's proposals. He argued that many of these effects had not been anticipated by the drafters of the anti-terrorism proposals and suggested that many of their suggested changes would be vulnerable to legal challenges under the 1998 Act if they were not modified before enactment[14].

The *Terrorism Bill* [Bill 10 of 1999-2000], which was introduced in the House of Commons on 2 December 1999, is designed to implement the Government's proposals set out in the December 1998 consultation paper.

B. Why have special legislation to deal with terrorism?

"Terrorism" is not of itself a word which denotes a particular criminal offence. Men and women brought to trial in the United Kingdom in connection with major "terrorist" incidents are generally charged with ordinary criminal offences. The present prevention of terrorism legislation contains relatively few criminal offences. Such offences as there are mostly relate to the organisation and financing of particular groups and other matters peripheral, although possibly essential, to the commission of what are termed terrorist acts. It has been the intention of successive Governments as far as possible to present the perpetrators of terrorist acts as ordinary criminals, so as not to attribute any special merit to their causes. This is not to say that there has been no recognition of the particular methods that terrorist organisations are likely to use.

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[14] Conor Gearty "Terrorism and human rights: a case study in impending legal realities" – *Legal Studies* Vol. 19 No.3 September 1999

There is of course much discussion of the extent to which it should be permissible for emergency legislation to depart from the standards set by the "ordinary" law. In his 1983 review Lord Jellicoe expressed the view that special legislation[15]:

> should remain in force only while it continues to be effective, only if its aims cannot be achieved by use of the general law, if it does not make unacceptable inroads on civil liberties, and if effective safeguards are provided to minimise the possibility of abuse.

He concluded that if special legislation effectively reduced terrorism, as he believed it did, it should be continued as long as a substantial terrorist threat remained[16]. He came to the "inescapable conclusion" that terrorism associated with causes beyond the United Kingdom posed a greater threat than it had done and saw no ground for believing that it would diminish[17]. In the report of his review, published in 1987 Viscount Colville of Culross similarly saw no sign of terrorism receding, whether it was connected with Northern Ireland or international affairs[18].

One of the acknowledged purposes of bombing campaigns and other similar "terrorist acts" is to provoke strong reactions from Governments who may be persuaded to introduce stringent measures. Those responsible for the campaigns then hope that the use of these measures will alienate the general public and possibly lead to greater public sympathy for the bombers' cause. Over the years that the prevention of terrorist legislation has been in force in the UK, commentators have often argued that particular aspects which they consider to be obsolete should be removed, as a means of improving the public standing of the government, which might otherwise easily be portrayed as making unjustifiable inroads on civil liberties, a portrayal which, they suggest, could only benefit the terrorist organisations if it were to become the generally-accepted view.

In recent years there have been a number of further calls for the repeal of the prevention of terrorism legislation in general and the emergency legislation concerning Northern Ireland in particular[19]. In criticising the Government's proposals for permanent counter-terrorism the director of the civil liberties pressure group Liberty has questioned the logic of arrangements that assume that those suspects whose motivation is ideological or even religious should have fewer rights than those who commit crimes out of malice, revenge or greed[20].

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15 Cmnd 8803 paragraph 9
16 ibid. paragraph 1
17 ibid. paragraph 23
18 Cm 264 paragraph 2.1.6
19 See eg. Conor Gearty & John Kimbell *Terrorism and the Rule of Law*, Civil Liberties Research Unit 1995; *No Emergency, No Emergency Law,* Committee on the Administration of Justice (1995); *Northern Ireland: An Emergency Ended?* Report of the International Human Rights Working Party of the Law Society of England and Wales (1995)
20 "Extension of anti-terrorism laws" – *Times* 24 November 1999

The terms of reference of Lord Lloyd of Berwick's Inquiry were:

> To consider the future need for specific counter-terrorism legislation in the United Kingdom if the cessation of terrorism connected with the affairs of Northern Ireland leads to a lasting peace, taking into account the continuing threat form other kinds of terrorism and the United Kingdom's obligations under international law…

In the report of his *Inquiry Into Legislation Against Terrorism* Lord Lloyd of Berwick summarised the case against having special counter-terrorism legislation as follows[21]:

> 5.6 It has been put to me that, however serious the effect of individual terrorist incidents may be for the victims, and accepting that the authorities must do everything in their power to prevent such incidents, nevertheless the threat from terrorism is often exaggerated when measured by the actual consequences to the public at large. Thus the number of people killed and injured in terrorist attacks bears no comparison to the numbers killed and injured on the roads or as a result of other forms of crime. And who would argue that terrorism currently presents as great a threat to the fabric of our society as, for example, the abuse of drugs?
>
> 5.7 It has also been pointed out that many of the deficiencies which existed in the ordinary law at the time when the PTA and EPA were passed have now been made good by subsequent amendments of the ordinary law and in particular by the subsequent enactment of PACE[22]. PACE itself was the considered response of Parliament to the problem of balancing the needs of law enforcement against the rights of the individual. The public are prepared to accept further encroachments on their civil liberties in order to meet the threat of terrorism but only so long as they sense an emergency. It follows (so it is argued) that once there is lasting peace in Northern Ireland the balance to which I referred in paragraph 3.1 between the needs of security and the rights and liberties of the individual will come down firmly in favour of the latter. The ordinary criminal law, and the Codes of Practice issued under PACE, should be sufficient to deal with the remaining threat of terrorism without the need for special offences or special powers.
>
> 5.8 Indeed there are those who argue - and they include a number of well-informed commentators - that the balance between the needs of security and the rights of the individual was wrong in the first place, and that there never was any justification for repressive powers such as executive detention ("internment") and the power to exclude suspects from parts of the United Kingdom ("internal exile"). They fear that permanent legislation, however well intentioned, will come to he used in circumstances for which it was never designed.

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[21] Cm 3420 paragraphs 5.6-5.9

[22] The *Police and Criminal Evidence Act 1984*

5.9 Added to these arguments there is the damage done to the United Kingdom's reputation abroad. In paragraph 3.7 I quoted from the 1995 response of the UN Human Rights Committee, calling for an end to the "apparatus of laws infringing civil liberties". It must not he forgotten that the UK is bound by treaty obligation to observe the requirements of the ICCPR. We cannot turn a blind eye. For these and other reasons, it is said that once peace is established in Northern Ireland, the time will have come to repeal the EPA and the PTA in their entirety without any legislative replacement.

He then went on to provide the following summary of the case for having such special legislation, which he considered to be more convincing[23]:

5.10 The case in favour of special anti-terrorist legislation rests largely on two propositions. The first is that terrorism presents an exceptionally serious threat to society. The second is that terrorists have proved particularly difficult to catch and convict without special offences and additional police powers.

5.11 In my discussions with those involved in the counter-terrorism effort I have attempted to establish precisely what it is about terrorism which makes it not merely more serious than other forms of violent crime, but different in kind. It appears to me that the chief distinguishing characteristics of terrorism are as follows:

(i) terrorist violence is typically directed towards members of the public or a section of the public, indiscriminately or at random;

(ii) it frequently involves the use of lethal force, and is capable of causing extensive casualties among the civilian population;

(iii) consequently, it creates fear among the public, which is precisely what it is designed to do;

(iv) its purpose is to secure political or ideological objectives by violence, or threat of violence. It therefore aims to subvert the democratic process;

(v) it is frequently perpetrated by well-trained, well-equipped and highly committed individuals acting on behalf of sophisticated and well-resourced organisations, often based overseas.

5.12 Do these distinguishing characteristics justify special legislation? I think they do. I accept, of course, that the number of incidents of international terrorism has declined and the level of domestic terrorism is still mercifully low. But the number of incidents is not the whole story. There is the fear which acts of terrorism induce in the public generally. This explains why members of the public have been willing to accept restrictions on their liberty, not to mention

[23] ibid. paragraphs 5.10-5.15

great inconveniences, which they would not otherwise have been prepared to tolerate.

5.13 I must also have regard to the potential, as well as the actual threat. As Professor Wilkinson's report brings out, the overall decline in the number of terrorist incidents in recent years has been more than off-set by the trend towards more deadly weapons and higher casualties. The risk that terrorists (in the widest sense of the word) might follow the example of the Aum Shinrikyo and deploy chemical, biological and nuclear materials presents a serious challenge to western governments.

5.14 It is true that in thirteen of the twenty-four countries surveyed, there is no special anti-terrorist legislation. Canada is the most interesting example. But others - by and large those who have suffered most from terrorism in the past - have enacted specific measures to deal with terrorist crime. The reason, 1 suspect, is because they see terrorism as presenting a peculiar threat to the institutions of government, and, potentially, to democratic government itself.

5.15 **I conclude that the propositions set out in paragraph 5.10 above are soundly based, and that there will be a need for permanent anti-terrorist legislation in the United Kingdom, continuing beyond the end of the emergency in Northern Ireland.**

II The Terrorism Bill

The *Terrorism Bill*, which was introduced on 2 December 1999, sets out a new and expanded definition of terrorism which is designed to include ideological and religious motivations for acts, as well as the political motivations used in the definitions of terrorism set out in the current anti-terrorist legislation. The new definition refers to actions involving serious violence against any person or property, rather than mere violence. The UK's current anti-terrorist legislation applies only to terrorism connected with the affairs of Northern Ireland and international terrorism. The measures in the Bill, on the other hand, are designed to apply to all forms of terrorism, including domestic terrorism.

The Bill includes a new power for the Secretary of State to proscribe organisations involved in international and domestic terrorism as well as terrorism connected with the affairs of Northern Ireland. It amends the current provisions concerning the financing of terrorism and includes a new power to permit the seizure of cash at borders and its forfeiture. It also seeks to create a new offence of inciting terrorist acts abroad.

While the UK's current legislation has a temporary basis, in that it is subject to annual renewal, the new legislation will be permanent, apart from some temporary measures which are being retained in Northern Ireland.
The power currently available under the *Prevention of Terrorism (Temporary Provisions) Act 1989* for the Secretary of State to make exclusion orders excluding named individuals from the UK as a whole, from Great Britain or from Northern Ireland, is not being re-enacted by the Bill and will be repealed.

The remainder of this paper is devoted to discussion of these various aspects of the Bill.

A. The definition of "terrorism"

Section 20 of the *Prevention of Terrorism (Temporary Provisions) Act 1989* [PTA] and section 58 of the *Northern Ireland (Emergency Provisions) Act 1996* [EPA] provide the following definition of terrorism:

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

Some of the powers set out in the PTA are only available in respect of acts of terrorism connected with the affairs of Northern Ireland, others may only be used in dealing with international terrorism, while others are available in both cases. The powers are not generally available in respect of acts of "domestic" terrorism, that is, acts of terrorism connected solely with the affairs of the United Kingdom or any part of the United Kingdom other than Northern Ireland. The powers available under the EPA are not limited in terms of the type of terrorism to which they apply but in practice they have only been used to combat terrorism connected with the affairs of Northern Ireland (referred to as "Irish terrorism" in Lord Lloyd's report and the Government's consultation paper).

In the report of his *Inquiry Into Legislation Against Terrorism*, published in October 1996, Lord Lloyd of Berwick said[24]:

> I can well understand why when the original Prevention of Terrorism Act was passed in 1974 it was thought sensible to exclude, in effect, all forms of terrorism other than Irish terrorism. The situation was one of extreme urgency. Irish terrorism presented a grave threat on the mainland. The threat from international terrorism was modest in comparison, and the threat from non-Irish domestic terrorism was non-existent.
>
> When the Act was extended to include international terrorism for the first time in 1984, it still made sense to exclude non-Irish domestic terrorism, since the domestic threat was still quite slight. There was a fear that is the powers in the Act were extended too wide, they might be used to suppress popular, but legitimate, views. This might well have delayed the passage of the legislation through Parliament. In the United States there has long been a tendency to treat all terrorist incidents as being foreign in origin. Hence the power of designation contained in the Terrorism Prevention Act 1996 is limited to *foreign* terrorist organisations.
>
> This attitude is easy enough to understand. It is more comfortable to assume that our democratic institutions are being attacked from without rather than within. Moreover in the United States there are additional problems in dealing with

24 ibid. paragraphs 5.18-5.21

> domestic terrorism in view of the constitutional restraints imposed by the First Amendment.
>
> But these arguments are almost all pragmatic. There is, in truth, no difference in principle between domestic and international terrorism. From the point of view of the innocent victim killed in a terrorist outrage in the united Kingdom, it makes no difference whether the bomb was planted by an Arab fundamentalist from the Middle East drawing attention to his cause, or a militant member of some animal rights organisation, anxious to impose his will by violence on the United Kingdom Parliament, or some half-crazed anarchist opposed to all forms of government; the terror inspired in the civilian population is the same in all three cases. Happily, the level of domestic terrorism is still quite low. But it may not always remain so. Existing pressure groups might adopt more violent means. New, and more violent pressure groups might be formed. In the well-worn phrase, they might adopt the bomb in preference to the ballot box. **For all these reasons it makes sense that the new legislation should contain a definition which covers all forms of terrorism.**

Commenting on the existing definition of "terrorism", as set out in section 20 of the PTA, Lord Lloyd of Berwick said[25]:

> This definition has served well in practice but it has been criticised as being at once too wide and too narrow. It is too wide because it covers trivial as well as serious acts of violence. It is too narrow because, being limited to political ends, it might be said not to apply to acts of terrorism perpetrated by single issue or religious fanatics. What is clear is that the definition of terrorism must encompass the use, or the threat, of serious violence in order to induce fear and that the motive must be political in a broad sense.
>
> It is not easy to produce a thoroughly satisfactory definition. No doubt partly for this reason there are few overseas countries where it has been attempted. US law, in contrast, contains at least four different definitions of terrorism, according to purpose. The definition which, I think, would best suit our purposes is modelled on the working definition used by the FBI and is as follows:
>
> "The use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives".
>
> My proposal is that the provisions of the permanent counter-terrorist legislation should apply to all circumstances covered by that definition.
>
> No doubt the wording could be improved. It has been suggested that even this is too narrow since it would not cover the terrorist who, without using violence, sets out to disrupt vital computer installations, such as air traffic control systems,

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25 ibid. paragraph 5.22-5.23

> thereby causing great danger to life. But I have not found a satisfactory way of covering this form of terrorist activity.

In its consultation paper *Legislation Against Terrorism* the Government noted that successive Governments had, rightly in its view, sought to ensure that the exceptional powers contained in the PTA and the EPA were used only as and when the security situation warranted them. Having posed the question whether the current, or probable future, threat from domestic terrorism could be such that special powers were needed to deal with it the Government went on to say that in the last 25 years the main domestic terrorist threat in the UK had come from militant animal rights activists and to a lesser extent from Scottish and Welsh nationalist extremists. The consultation paper observed that[26]:

> 3.9 Scottish and Welsh extremist nationalist groups have certainly on occasions resorted to violent means to achieve their ends. Scottish nationalist extremists have, for example, been responsible for over 40 incidents in the last 5 years including the despatch by letter or parcel of a number of real and hoax explosive devices to MPs and others. But in recent years their violent activities have considerably diminished. It may well be, moreover, that with the provision of a Parliament for Scotland and an Assembly in Wales, their respective activities - and support base - will decline still further. But, of course, there can be no absolute guarantee of this.
>
> 3.10 Animal rights, and to a lesser extent environmental rights activists, have mounted, and continue to pursue, persistent and destructive campaigns. Last year, for example, more than 800 incidents were recorded by the Animal Rights National Index (ARNI). These included attacks on abattoirs, laboratories, breeders, hunts, butchers, chemists, doctors, vets, furriers, restaurants, supermarkets and other shops. Some of the attacks were minor but others were not. Thankfully no one was killed but people were injured and the total damage done in 1997 has been estimated at more than £1.8 million. In previous years, the cost of the damage inflicted has been higher. For example in 1995, the cost of damage was estimated at nearly £4.5 million.
>
> 3.11 While the level of terrorist activity by such groups is lower, and the sophistication of their organisation and methods less well developed, than that of some of the terrorist groups in Northern Ireland, or of some of the international terrorist groups, there is nothing to indicate that the threat they pose will go away. Acts of serious violence against people and property have undoubtedly been committed in the UK by these domestic groups.
>
> 3.12 There is also the possibility that new groups espousing different causes will be set up and adopt violent methods to impose their will on the rest of society. In the United States, for example, there is an increasing tendency by individuals and groups to resort to terrorist methods. Some of those opposed to the USA's laws on

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[26] *Legislation Against Terrorism* CM 4178 Home Office & Northern Ireland Office December 1998 paragraphs 3.8-3.13

abortion have bombed clinics and attacked, and, in a number of cases, killed doctors and nursing staff employed by them. Although there have been no comparable attacks in the United Kingdom, the possibility remains that some new group or individual could operate in this way in the future, threatening serious violence to people and property here.

3.13 In the light of the above, the Government has come to the conclusion that any new counter-terrorism legislation should be designed to combat serious terrorist violence of all kinds. It proposes therefore that the powers in the new legislation should be capable of being used in relation to any form of serious terrorist violence whether domestic, international or Irish.

As far as the definition of terrorism was concerned, the Government noted the definition used by the FBI and recommended by Lord Lloyd, but went on to say[27]:

The Government agrees that the new legislation should bite only on the use of serious violence. And it agrees that if there is any doubt that the definition in section 20 of the PTA covers the use of such violence by religiously motivated terrorist groups this should be remedied. It therefore sees some attractions in the FBI's definition. But it wonders whether this definition might also, as it stands, be both too broad and too narrow. Too broad because it includes the use of serious violence for "social" objectives. The latter could, for example, include crimes committed by criminals other than terrorists such as blackmail or extortion for gain. The Government does not believe that special powers are needed to deal with matters of that sort where there is no intent to disrupt or undermine the democratic process. The FBI definition may be too narrow, however, in that it appears not to cover the damage and serious disruption which might result from a terrorist hacking into some vital computer installation and, without using violence, altering, deleting, or disrupting the data held on it. Such activity might well result in deaths and injuries and, given the increasing reliance placed on computers and electronic forms of communication, the destruction or corruption of data held in such systems could also result in extensive disruption to the economic and other infrastructure of this country. Another example of an act which could cause serious disruption and harm without necessarily in itself being an act of serious violence would be contaminating a public utility system such as a water or sewage works. The Government believes that any new definition of terrorism should be sufficient to catch the potential for these kinds of activity by terrorists.

The Government therefore suggests that terrorism should be redefined as **"the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public for political, religious or ideological ends"**. The term serious violence would need to be defined so that it included serious disruption, for instance resulting from attacks on computer installations or public utilities, as described in paragraph 3.16 above.

[27] ibid. paragraph 3.16-3.18

> The Government recognises that there is a balance to be struck between too narrow a definition of terrorism (which could exclude some serious threats which fully justify the availability of special powers) and one that is too wide (and which might be taken to include matters that would not normally be labelled "terrorist"). The Government would welcome views on whether its proposed definition succeeds in striking that balance. Violence that can be described as "politically motivated" may arise in the context of demonstrations and industrial disputes. The Government has no intention of suggesting that matters that can properly be dealt with under normal public order powers should in future be dealt with under counter-terrorist legislation.

Clause 1 of the *Terrorism Bill* provides the following definition of terrorism for the purposes of the Bill, based on the proposals in the consultation paper:

> **1.** - (1) In this Act "terrorism" means the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which-
> (a) involves serious violence against any person or property,
> (b) endangers the life of any person, or
> (c) creates a serious risk to the health or safety of the public or a section of the public.
> (2) In subsection (1)-
> (a) "action" includes action outside the United Kingdom,
> (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, and
> (c) a reference to the public includes a reference to the public of a country other than the United Kingdom.
> (3) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

The Bill's *Explanatory Notes* comment that the wider definition adopted in Clause 1 will enable the legislation to cover actions which might not be violent in themselves but which could have a devastating impact, such as disrupting key computer systems or interfering with the supply of water or power where life, health or safety might be put at risk. They also comment that:

> Existing counter-terrorist legislation was originally designed in response to terrorism connected with the affairs of Northern Ireland ("Irish terrorism"), and some of its provisions were subsequently extended to certain categories of international terrorism. It does not apply to any other terrorism connected with UK affairs ("domestic terrorism"). Under the Bill these restrictions will be lifted, so that counter-terrorist measures will be applicable to all forms of terrorism: Irish, international, and domestic.

In a letter to the *Times* on November 24 1999 about the provisions in the *Terrorism Bill* the Director of Liberty, John Wadham made the following comments about the Bill's wider definition of "terrorism" and its consequent extension of the ambit of counter-terrorist legislation to cover "domestic" terrorism and a wider range of activities:

> Those people suspected of such offences would have fewer rights than other criminals. Surely it is wrong in principle to have a twin-track criminal justice system. It is also difficult to accept that those motivated by political or religious factors when they commit crimes should be penalised for the motives behind their crimes.
>
> Of course there is a diversity of views about the morality of damaging property to prevent a new road scheme or making threats of violence to try to halt experimentation on animals. But I cannot see the logic of a system that assumes that those suspects whose motivation is ideological or even religious should have fewer rights than those who commit crimes for revenge or greed.

B. "Temporary Provisions"

Clause 2 of the Bill is designed to repeal *the Prevention of Terrorism (Temporary Provisions Act 1989* [PTA] and re-enact those of its provisions which, in the Government's view, remain necessary, with some alterations. The present requirement that the provisions of the PTA be renewed by Parliament each year will be removed and this part of the Bill will therefore become permanent.

Clause 2 also seeks to repeal the *Northern Ireland (Emergency Provisions) Act 1996* [EPA]. Clause 2(2) and Schedule 1 are designed to ensure that certain provisions of the EPA, some of which have been amended, remain in force until Part VII of the Bill, which applies only to Northern Ireland, is brought into force. Clause 108 of the Bill is intended to ensure that the provisions of Part VII of the Bill remain "temporary provisions", subject to annual renewal by Parliament and designed to expire altogether five years from the day on which they are brought into force. The *Explanatory Notes* for the Bill comment that:

> The existing EPA would repeal itself on 24 August 2000. The consultation document expressed the Government's hope that the special provisions it makes for Northern Ireland might not be needed after that date, an objective to be kept under review in the light of developments in the security situation. The Government takes the view that the time is not yet right to remove all of these provisions. Part VII therefore provides additional temporary measures for Northern Ireland only, time-limited to 5 years.

C. Proscribed organisations

1. Current arrangements

The *Prevention of Terrorism (Temporary Provisions) Act 1989* (PTA) and the *Northern Ireland (Emergency Provisions) Act 1996* (EPA) contain a number of criminal offences relating to membership of, or support for "proscribed organisations". Those organisations which are proscribed are listed in Schedule 1 of the PTA and Schedule 2 of the EPA. The offences include making contributions of money and other property towards acts of terrorism or the resources of proscribed organisations, assisting in the retention or control of terrorist funds, or failing to disclose knowledge or suspicion that such offences are being committed and, in the case of the 1996 Act, displaying support in public for a

proscribed organisation or wearing a hood, mask or other means of concealing identity in public.

In particular it is an offence under sections 2(1) (a) of the *Prevention of Terrorism (Temporary Provisions) Act 1989*, or 30(1)(a) of the *Northern Ireland (Emergency Provisions) Act 1996* to belong or profess to belong to a proscribed organisation. These offences, which are triable either summarily or on indictment, are punishable by up to ten years imprisonment and a fine following conviction on indictment, or six months imprisonment and a £5,000 fine following summary conviction.

The following organisations are proscribed in the UK as a whole under Schedule 1 of the *Prevention of Terrorism (Temporary Provisions) Act 1989*:

i) Irish Republican Army (IRA);
ii) Irish National Liberation Army (INLA).

The following organisations are proscribed in Northern Ireland under Schedule 2 of the *Northern Ireland (Emergency Provisions) Act 1996*:

i) The Irish Republican Army (IRA);
ii) Cumann na mBan;
iii) Fianna na hEireann;
iv) The Red Hand Commando;
v) Saor Eire;
vi) The Ulster Freedom Fighters (UFF);
vii) The Ulster Volunteer Force (UVF);
viii) The Irish National Liberation Army (INLA);
ix) The Irish People's Liberation Organisation (IPLO);
x) The Ulster Defence Association (UDA);
xi) The Loyalist Volunteer Force (LVF);
xii) The Continuity Army Council
xiii) The Orange Volunteers
xiv) The Red Hand Defenders.

At present organisations can only be proscribed in the UK as a whole under the PTA if they are concerned in, or promoting or encouraging terrorism connected with the affairs of Northern Ireland. Organisations can only be proscribed in Northern Ireland under the EPA if they are "concerned in terrorism or in promoting or encouraging it"[28]. In practice proscription under the EPA has only been applied to organisations concerned in, promoting or encouraging terrorism connected with the affairs of Northern Ireland.

Section 2 of the PTA creates an offence of membership of a proscribed organisation, which is punishable following conviction on indictment by up to 10 years' imprisonment

[28] *Northern Ireland (Emergency Provisions) Act 1996* section 30(3)

and a fine. It is committed by a person who belongs or professes to belong to a proscribed organisation, solicits or invites support for a proscribed organisation other than support with money or other property, or arranges or assists in the arrangement or management of, or addresses, any meeting of three or more persons which is concerned with the activities of proscribed organisations. Section 3 of the same Act creates an offence of displaying support for a proscribed organisation in public by the wearing of any item of dress or the wearing, carrying or display of any articles in such a way or in such circumstances as to arouse reasonable apprehension that the person concerned is a member or supporter of a proscribed organisation. The offence under section 3 is punishable by up to 6 months' imprisonment and a £5,000 fine. The offences under the PTA extend to England and Wales and Scotland. For Northern Ireland, sections 30 and 31 of the EPA set out similar offences, except that the maximum penalty for the offence of displaying support in public for a proscribed organisation is 1 year's imprisonment and a fine, rather than six months' imprisonment and a £5,000 fine.

In the report of his *Inquiry Into Legislation Against Terrorism* Lord Lloyd of Berwick noted the view of some commentators that the power to proscribe organisations was largely symbolic. He added[29]:

> It is certainly true to say that there have been very few convictions under section 2 of the 1989 or any of its predecessors. Lord Colville considered, and rejected, a suggestion that proscription should be extended to cover international terrorist organisations operating in the United Kingdom. Indeed if it were possible, he would have been happy to do without proscription altogether. Lord Jellicoe was equally lukewarm.

Lord Lloyd went on to say[30]:

> 6.9 I take a rather different view. From the outset of the Inquiry, I have been inclined to regard proscription as one of the key provisions in the Act, and that provisional view has been strengthened and confirmed as I have gone on, especially in the course of my visits overseas. Thus in Germany, as we have seen, it is an offence to participate in a terrorist organisation. Under Article 129A of the German Penal Code it is illegal to form or be a member of an association which engages in murder or other specified criminal activities. Article 129A is the foundation of all terrorist prosecutions in Germany. In Italy there is a similar crime of "association with the aims of terrorism and subversion of democratic order". In the USA the new Terrorism Prevention Act empowers the Secretary of State to designate foreign terrorist organisations. The purpose of the power is to deny material support to the designated organisation, and to seize its assets. It is not an offence as such to belong to a designated organisation. But membership of a designated organisation is a ground for deportation proceedings and the denial of entry. The point for present purposes is the importance which the US administration attaches to designation. Terrorist organisations are notoriously

[29] Cm 3420 Volume One paragraph 6.8
[30] ibid paragraphs 6.9-6.11

> fissile. But this does not cause the US administration to question the need for designation, or to doubt its efficacy. They believe it will work.
>
> 6.10 Finally I should mention section 29 of our own EPA, under which it is an offence to direct a terrorist organisation at any level. This offence has not been used as much as one might have expected, no doubt because of the difficulty of proof. But it has been of real value. On at least two occasions it has resulted in the conviction of leading terrorists followed by long sentences.
>
> 6.11 Where does all this point in terms of permanent counter-terrorist legislation? It points, I think, to the terrorist organisation as being the key concept. "Terrorist organisation" will have been defined in section 1 of the new Act. It should then be made an offence under the Act to direct at any level or participate in the activities of a terrorist organisation within the United Kingdom, whether or not proscribed. The former will carry the heavier sentence. "Participation in the activities of a terrorist organisation" is, I think, a better test than membership, although I note that Gearty and Kimbell favour an offence of being a member of a proscribed organisation. Membership might be taken to include nominal membership. Nominal membership of a foreign terrorist organisation should not, I think, carry with it criminal sanctions. But taking an active part in the UK should. No doubt "membership" could be defined in such a way as to limit the offence to active participation.

He went on to reach the following conclusions about proscription in general[31]:

> 6.12 If "membership" of a terrorist organisation, whether proscribed or not, is to be the key offence where does that leave proscription? In my view there should continue to be a power to proscribe terrorist organisations as at present. It should not be limited to Irish terrorism. It should be extended to include international as well as domestic terrorism. The purpose of proscription will be twofold. First, it will furnish a conclusive presumption that an organisation which is for the time being proscribed is a terrorist organisation. This will facilitate the burden of proof in terrorist cases. Secondly, proscription will be the starting point for the creation of a number of fundraising and other offences, especially fundraising for terrorism overseas, which I shall consider in Chapter 13. It would not be right to create an offence of contributing to the resources of an organisation, which might or might not be a terrorist organisation, unless the organisation had been formally and publicly proscribed. This is the purpose of designation in the US Terrorism Prevention Act. Proscription is another word for the same thing, and will serve the same purpose.

In its consultation paper *Legislation Against Terrorism* the Government made the following comments about whether or not proscription powers should be retained in respect of terrorism in Northern Ireland[32]:

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[31] ibid. paragraph 6.12

[32] CM 4178 paragraphs 4.7-4.11

4.7 In Northern Ireland, in particular, proscription has come to symbolise the community's abhorrence of the kind of violence that has blighted society there for over 30 years. The indications are that the proscription provisions have made life significantly more difficult for the organisations to which they have been applied. Whilst the measures may not in themselves have closed down terrorist organisations, a knock on effect has been to deny the proscribed groups legitimate publicity and with it lawful ways of soliciting support and raising funds. Many activities by, or on behalf of, such groups are made more difficult by proscription, and that in itself aids the law enforcement effort in countering them. But perhaps more importantly the provisions have signalled forcefully the Government's, and society's, rejection of these organisations' claims to legitimacy.

4.8 There have been no convictions for proscription-related offences in GB since 1990, though, in the same period, 195 convictions in Northern Ireland (usually as the second count on the charge sheet). But the indications are that the provisions have produced some less quantifiable but still significant outcomes. In particular it is suggested they have led proscribed organisations to tone down overt promotion and rallies. Although it is less easy to measure what has not happened because the proscription provisions have been in place, or to calculate the numbers deterred from supporting proscribed organisations because of the penalties if convicted (up to 10 years' imprisonment and an unlimited fine), the Government still believes these factors to be very important.

4.9 One reason why there have been relatively few convictions for proscription-related offences is that they can be difficult to prove in practice. This particular concern was addressed in the recent Criminal Justice (Terrorism and Conspiracy) Act 1998 in respect of those "specified" terrorist groups not observing a full and unequivocal ceasefire, by provision for a statement of opinion of a senior police officer to be admissible as evidence in court. In the wake of the Omagh bombing, and in line with similar action by the Irish Government, the Government rapidly introduced tough additional measures to tackle the difficulty of proving membership, targeted against the Real IRA and other terrorist groups who have not satisfied the Secretary of State that their ceasefire is complete and unequivocal. The fact that the Government chose in doing so to build upon the existing proscription powers underlines its conviction that these measures are useful - both as a means to tackle membership of and support for proscribed organisations - and also as a way for society as a whole to voice its rejection of such groups and all they stand for.

4.10 Whilst optimistic that lasting peace will come to Northern Ireland, the Government does not believe that it would be right to repeal the power to proscribe Irish terrorist groups. The hope is that the existing terrorist organisations will continue to lose support and not be replaced - but there are no guarantees and the proscription measures have proved themselves to be fundamental to an effective response to the emergence of new terrorist groups. The Government therefore believes that the power of proscription in relation to Irish terrorism should be retained in future permanent counter-terrorism legislation. It proposes that, as now, the power to decide which groups should be

> proscribed should rest with the Secretary of State who has access to all the relevant intelligence on which decisions need to be based.
>
> 4.11 The additional proscription-related provisions introduced this summer in the Criminal Justice (Terrorism and Conspiracy) Act 1998 (outlined in Annex A) constituted a specific and tightly defined response to the threat from small splinter groups opposed to the peace process in Northern Ireland. The Government hopes that well before any new permanent counter-terrorist legislation comes into force, the threat from Irish terrorism will have continued to reduce to the extent that the need to retain these provisions will have diminished. A decision on whether or not the provisions should be retained in the new legislation will need to be taken at that time, in the light of the security situation.

The Government went on to set out its view of the advantages and disadvantages of extending the power to proscribe organisations to international and domestic terrorism[33]:

> 4.14 An advantage in extending the current UK proscription powers so that the whole range of terrorist groups covered by the proposed new definition of terrorism could be caught is that it would provide a mechanism to signal clearly condemnation of any terrorist organisation whatever its origin and motivation. The current provisions, under which only Irish terrorist groups can be proscribed, could be construed by some as indicating that the Government does not take other forms of terrorism as seriously. Furthermore a wider provision could deter international groups from establishing themselves in the UK. Arguably, such groups can, to a greater extent than indigenous groups, choose their centres of operation, and proscription could send an unequivocal message that they are not welcome here.
>
> 4.15 Moreover, as for Irish terrorist groups, proscription or designation could make it easier to tackle terrorist fund-raising. (Lord Lloyd placed particular weight on this point in his argument that proscription powers should be retained and extended to all forms of terrorism). It is often difficult to prove that funds are being used for terrorist purposes and even more so if they are raised in one country for a cause in another. Criminalising fund-raising activity of any kind for a particular group would remove the requirement to prove end use of funds. But, of course, the provisions could be circumvented by changing the group's name (especially in cases where the group does not have an overriding incentive to preserve that particular identity), or by creating front organisations.
>
> 4.16 Although the Government recognises there would appear to be some advantage in extending proscription-type powers to non Irish terrorist groups, it is also aware that there could be attendant difficulties. The practical and policy difficulties involved in drawing up and then maintaining an up to date list of international and domestic groups to be covered would be formidable. For a start the potential scope of the list would be very wide (literally scores of groups could be possible candidates) and there would be a real risk of the list quickly becoming

[33] ibid paragraphs 4.14-4.17

> out of date - particularly if, as now, additions to, or deletions from, the list could only be made after debate by, and with the explicit agreement of, Parliament. Moreover the Government might be exposed to pressure to target organisations that it might not regard as terrorist or to take action against individuals whom it would not regard as terrorists.
>
> 4.17 In the light of these considerations, the Government recognises that the arguments are finely balanced for and against including in future counter-terrorist legislation a power for the Secretary of State to proscribe or designate terrorist organisations connected with domestic or international terrorist activities.

In an article entitled "Terrorism and human rights: a case study in impending realities" published in the journal *Legal Studies* in September 1999 Conor Gearty, Professor of Human Rights Law at King's College, London, commented on the Government's consultation paper in the light of the imminent implementation of the *Human Rights Act 1998*[34]. The Act requires public authorities to act in a way which is compatible with the European Convention on Human Rights and enables arguments based on the Convention rights, which are set out in Schedule 1 of the Act, to be used in the UK courts. It is already in force in Scotland and will come into force in the rest of the UK on 2 October, 2000. Article 11 of the European Convention on Human Rights, which is concerned with freedom of assembly and association, provides that:

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Professor Gearty commented that the question of whether or not the power to proscribe organisations would be compatible with Article 11 was not mentioned in the consultation paper. He suggested that the point was not clear-cut, even in respect of the current proscription power, much less the new expanded power being considered by the Government. He went on[35]:

> The key question is as to the inextricability of any such proscribed groups in campaigns of violence and terror. This probably what makes the current proscriptions both in Britain and Northern Ireland secure from review, at least until the current cease-fires are firmly embedded, but what of the "literally scores

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34 Conor Gearty, "Terrorism and human rights: a case study in impending realities" *Legal Studies* Vol 19 No.3 September 1999

35 ibid

> of groups" that could potentially be brought within the remit of the new power? It is not obvious that there are this many IRA-style organisations currently operating within Britain. But the more attenuated the connection between a proscribed group and violence is, the greater the likelihood that the control on association entailed in any such ban would be found wanting under art. 11, as not being based on a sufficiently pressing need or as being disproportionate to the aim that the ban pursues. Particularly vulnerable would be bans on ostensibly political associations that the authorities decide are in fact "terrorist" according to its expanded meaning of the term.

Professor Gearty noted[36] that in two recent European Court of Human Rights cases involving Turkey the point of principle had been developed in the context of illegitimate attempts to ban two political organisations, the United Communist Party and the Socialist Party[37].

2. Proscription under the Terrorism Bill

Part II of the *Terrorism Bill* is designed to merge the two separate lists of organisations proscribed under the PTA and EPA into a single list and establish a proscription regime that will apply across the whole of the UK. It is also designed to extend the ambit of proscription by making it possible for organisations concerned with international or domestic terrorism to be proscribed, as well as those concerned with terrorism connected with the affairs of Northern Ireland.

Schedule 2 of the Bill lists those organisations that are currently proscribed under the PTA and EPA. **Clause 3** seeks to enable the Secretary of State to make orders adding or removing organisations from the list in Schedule 2 or amending the Schedule in some other way. By virtue of **Clause 118** these orders will be subject to the affirmative procedure and will therefore require the approval of both Houses of Parliament. The Secretary of State will only be able to exercise his power to add an organisation to the list of proscribed organisations under Schedule 2 if he believes that it is concerned with terrorism. **Clause 3 (5)** provides that an organisation is concerned in terrorism if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism or is otherwise concerned in terrorism. "Terrorism" is defined in **Clause 1**, which has been discussed earlier in this paper[38].

Decisions to proscribe organisations under the PTA or the EPA may currently only be challenged by way of application for judicial review. The *Explanatory Notes* for the *Terrorism Bill* say that no proscribed organisation has ever done this. **Clauses 4-6** of the Bill set out a procedure to be followed by an organisation which thinks it should not be proscribed, or an affected individual, who is seeking a remedy. It is intended that this procedure should begin with an application to the Secretary of State under **Clause 4**, asking him or her to exercise the power under **Clause 3 (3)(b)** to remove an organisation

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[36] ibid

[37] *United Communist Party of Turkey v. Turkey (1998) 26 EHRR 121* and *The Socialist Party of Turkey v. Turkey (1998) 27 EHHR 51*

[38] see Part A of this Chapter

from the list of proscribed organisations set out in Schedule 2. The Secretary of State will be able to make regulations, which will be subject to the negative procedure, setting out the procedure for applications. These regulations will have to include time limits for the determination of applications and provisions requiring applications to state the grounds on which they are being made.

Where an application under Clause 4 is refused, the applicant will be able to appeal under **Clause 5** to the Proscribed Organisations Appeal Commission, a body the members of which will be appointed by the Lord Chancellor under **Schedule 3**. **Schedule 3** also sets out the procedure to be followed by the Commission in considering appeals, including arrangements for providing representation, by individuals with appropriate legal qualifications, for organisations and individuals appearing before the Commission. There is no requirement that the members of the Commission should have legal qualifications.

Schedule 3(8) is designed to prevent section 9(1) of the *Interception of Communications Act 1985* from applying to proceedings before the Proscribed Organisations Appeal Commission. Section 9(1) of the 1985 Act prohibits the use in proceedings of material obtained through intercepts. Schedule 3(8) (2) seeks to ensure that evidence admitted as a result of the disapplication of section 9(1) of the 1985 Act is not disclosed to the organisation concerned, its legal representatives (other than those appointed for it under paragraph 7 of Schedule 3) or the applicant (where the organisation is not also the applicant).

The Government's June 1999 consultation paper on *Interception of Communications in the United Kingdom*, on which its forthcoming legislation amending the 1985 Act is to be based, noted that there were strong arguments for both the repeal and retention of section 9 of the *Interception of Communications 1985*. It added that the Government welcomed suggestions for a regime which would enable intercept material to be used in evidence and to make appropriate disclosures to the defence, bearing in mind the effects upon sensitive information, resources and the efficient operation of the criminal justice system[39].

Clause 5(3) provides that:

> The Commission shall allow an appeal against a refusal to deproscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.

The *Explanatory Notes* make the following comments about this provision:

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[39] *Interception of Communications in the United Kingdom: A consultation paper* Home Office June 1999 Chapter 8

> The reference to "the principles applicable on an application for judicial review" allows that once the Human Rights Act 1998 is fully in force, it will be possible for an appellant to raise points concerning those rights under the European Convention on Human Rights which are "convention rights" under the 1998 Act.

It is intended that where the Commission allows an appeal in respect of an organisation it should be able to make an order under **Clause 5(4)**. The Secretary of State will then be required to give effect to the Commission's decision. The procedure used will depend on the urgency of the situation. Under the first procedure, the Secretary of State will lay before Parliament a draft order under the affirmative procedure, removing the organisation from the list in Schedule 2. In urgent cases, the Secretary of State will make an order removing the organisation from the list. If the latter procedure, which is provided for under **Clause 118(4)** is used, the order will lapse within 40 days unless a resolution is passed by each of the Houses of Parliament during that period.

Clause 6 is designed to allow an appeal from a decision of the Proscribed Organisations Appeal Commission on a point of law, to the Court of Appeal in London, the Court of Session in Edinburgh or the Court of Appeal in Northern Ireland, depending on whether the first appeal was heard in England and Wales, Scotland or Northern Ireland. An appeal to any of these courts will require the leave of the Commission or the Court to which the appeal would be brought. The Secretary of State will not be required to take any action under an order issued under **Clause 5(4)** until after the final determination or disposal of an appeal under **Clause 6**, including any subsequent appeal to the House of Lords.

If an appeal to the Proscribed Organisations Appeal Commission is successful and an order is made deproscribing the organisation, **Clause 7** is intended to enable anyone convicted, in respect of that organisation, of any one of a number of specified offences committed after the date of the refusal to deproscribe, to appeal against his conviction to the Court of Appeal. The offences are:

- being a member of a proscribed organisation (under **Clause 10**);
- inviting support for a proscribed organisation (under **Clause 11**);
- wearing the uniform of a proscribed organisation (under **Clause 12**);
- terrorist fund-raising (under **Clause 14**);
- the use or possession of money or other property for the purposes of terrorism (under **Clause 15**);
- entering into funding arrangements for the purposes of terrorism (under **Clause 16**);
- money-laundering terrorist property (under **Clause 17**);
- failing to disclose information on which a belief or suspicion that another person has committed an offence under clauses 14 to 17 is based (under **Clause 18**); or
- directing the activities of a terrorist organisation (under **Clause 54**).

Section 7(1) of the *Human Rights Act 1998* provides that a person who claims that a public authority has acted, or proposes to act, in a way which is unlawful because it is

incompatible with a Convention right[40] may bring proceedings against the authority under the 1998 Act in the appropriate court or tribunal, or rely on the Convention right or rights in any legal proceedings. Section 7(2) provides that "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules. The *Explanatory Notes* for the *Terrorism Bill* state that the Lord Chancellor intends to make rules under section 7(2) of the 1998 Act so that proceedings under section 7(1) of that Act can be brought before the Proscribed Organisations Appeal Commission. **Clause 8** of the Bill appears to be intended to apply provisions in **Clause 5(4)** and **(5), Clause 6**, **Clause 7** and parts of **Schedule 3**, which are concerned with appeals to the Commission, to proceedings under the 1998 Act and thereby enable the Commission to determine, for example, that an action by the Secretary of State is incompatible with a Convention right. As with **Clause 5(3)**, the Bill provides, in **Clause 8(3)**, that the Commission should decide proceedings brought before it under the *Human Rights Act 1998* "in accordance with the principles applicable on an application for judicial review". An applicant who was dissatisfied with a decision made by the Commission in such proceedings would then presumably be able to refer the matter to the courts by making an application for judicial review.

Clause 9 is designed to prevent evidence of anything done in relation to deproscription applications to the Secretary of State and appeals to the Proscribed Organisations Appeal Commission being admissible as evidence, except on behalf of the accused, in proceedings for the offences set out in **Clauses 10-12**, **14-18** and **54** of the Bill. This provision is intended to prevent individuals who might seek deproscription, or institute proceedings under the *Human Rights Act 1998* in relation to deproscription, from being discouraged by the risk of prosecution for an offence, such as the offence under **Clause 10** of membership of a proscribed organisation.

Clauses 10, 11 and 12 of the *Terrorism Bill* are designed to create offences, applicable throughout the UK, based on the offences of membership of a proscribed organisation, inviting support other than money or other property (including arranging meetings etc.) and wearing items of clothing or wearing, carrying or displaying articles in such a way as to arouse reasonable suspicion of membership or support for a proscribed organisation. The offences are based on the existing offences under the PTA and EPA. The maximum penalties for the offences of membership and support will be 10 years' imprisonment. The maximum penalty for the offence of wearing items of clothing etc. will be 6 months' imprisonment and a £5,000 fine. This will mean a reduction in the maximum penalty for this offence where Northern Ireland is concerned.

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[40] that is, one of the rights under the European Convention on Human Rights set out in Schedule 1 of the *Human Rights Act 1998*

D. Terrorist Finance, Property and Fund-Raising

1. Financing acts of terrorism

Terrorist finance is discussed in Chapter 13 of Lord Lloyd's report of his *Inquiry Into Legislation Against Terrorism*[41]. The Government set out its view of the matter in Chapter 6 of the consultation paper *Legislation Against Terrorism*[42].

Part III of the *Terrorism Bill* (**Clauses 13-30**) seeks to restrict or prevent the financing of acts of terrorism. It largely replicates provisions in Part III of the PTA dealing with the use of money and other property in the service of terrorism, but extends them, in that while the provisions of Part III of the PTA apply only to terrorism connected with the affairs of Northern Ireland and certain kinds of international terrorism, Part III of the *Terrorism Bill* will apply to all forms of terrorism, as defined in Clause 1 of the Bill. This will therefore include domestic terrorism, as well as all international terrorism.

Clauses 14, 15 and **16** are designed to correspond to sections 9 and 10 of the PTA. They create offences of fund-raising for the purposes of terrorism, the use of money or other property for the purposes of terrorism and entering into or becoming concerned in funding arrangements for the purposes of terrorism. Clause 1(3) provides that references to action taken "for the purposes of terrorism" includes a reference to action taken for the benefit of a proscribed organisation. The maximum penalties for these offences following conviction on indictment will be 14 years' imprisonment and a fine. **Clause 17** corresponds to section 11 of the PTA by creating an offence of money laundering, involving the laundering of money and other types of terrorist property. The maximum penalty following conviction on indictment for this offence is also 14 years' imprisonment and a fine. "Terrorist property" is defined in **Clause 13** of the Bill as follows:

> 1) In this Act "terrorist property" means-
> (a) money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation),
> (b) proceeds of the commission of acts of terrorism, and
> (c) proceeds of acts carried out for the purposes of terrorism.
> (2) In subsection (1)-
> (a) a reference to proceeds of an act includes a reference to any property which wholly or partly, and directly or indirectly, represents the proceeds of the act (including payments or other rewards in connection with its commission), and
> (b) the reference to an organisation's resources includes a reference to any money or other property which is applied or made available, or is to be applied or made available, for use by the organisation.

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[41] Cm 3420
[42] CM 4178

2. Duty to disclose information about terrorism or terrorist property.

Clause 18, which is based on section 18A of the PTA, seeks to require banks and other businesses to report suspicions they may have that individuals are laundering terrorist money or committing and of the other offences under Clauses 14 to 17. A person who has such a suspicion will commit an offence punishable by up to 5 years' imprisonment and a fine if he does not disclose his belief or suspicion and the information on which it is based to a constable as soon as is reasonably practicable. It will be a defence that the person had a reasonable excuse for not making the disclosure or that he or she disclosed information to his employer in accordance with a procedure established for the purpose. Professional legal advisers who obtain information in privileged circumstances or whose beliefs or suspicions are based on information obtained in privileged circumstances will not be subject to the duty to disclose. **Clause 18(6)** provides that information is obtained by an adviser in privileged circumstances if it comes to him, otherwise than with a view to furthering a criminal purpose-

> (a) from a client or a client's representative, in connection with the provision of legal advice by the adviser to the client,
> (b) from a person seeking legal advice from the adviser, or from the person's representative, or
> (c) from any person, for the purpose of actual or contemplated legal proceedings.

Section 18 of the PTA provides a general offence, punishable by up to 5 years imprisonment and a fine, of failing to disclose information about terrorism. In the report of his *Inquiry into Legislation Against Terrorism* Lord Lloyd noted concerns that the offence was little used and appeared to be of little practical value in increasing the flow of information to the police, but had a chilling effect on the reporting of terrorism by the media. He observed that in their review of the PTA both Lord Colville and Lord Shackleton had recommended the repeal of section 18, although Lord Jellicoe recommended that it should stay, after examining it at some length. Lord Lloyd said[43]:

> The provision is commonly criticised on two grounds. First, there is the point of principle that, while every citizen has a moral obligation to help the police, the state should be reluctant to transform this into a legal duty. The second argument is a practical one; that prosecutions under section 18 are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties.

Lord Lloyd recommended that the offence under section 18 of the PTA should not appear in the new legislation and the Government agreed. Instead, Clause 18 replicates only section 18A of the PTA, focusing on beliefs and suspicions which people acquire as a result of information coming to their attention in the course of their work.

Clauses 19 and 20 of the Bill correspond to section 12 of the PTA and are designed to enable people to disclose information about terrorist property to the police, notwithstanding any restriction on the disclosure of information imposed by statute or

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[43] *Inquiry into Legislation Against Terrorism* Cm 3420 Volume One paragraph 14.21

otherwise. Clause 20(1) is also intended to protect informants and others by providing that a person does not commit an offence under Clauses 14 to 17 if he is acting with the express consent of a constable.

3. Forfeiture of terrorist funds

At present, if a person is convicted of one of the offences under sections 9-11 of the PTA concerning terrorist fund-raising and money-laundering, the court may use section 13 of the PTA to order the forfeiture of any money or property which the person had in his possession or under his control at the time of the offence and which he intended, knew or had reasonable cause to suspect would be used in connection with terrorism or for the benefit of a proscribed organisation. The power to order forfeiture under the PTA is only available in respect of the offences under the PTA involving terrorist finance and is only available following conviction. Provisions concerning the enforcement of forfeiture orders under the PTA are set out Schedule 4 of the Act.

Section 4 of the *Criminal Justice (Terrorism and Conspiracy) Act 1998* also provides that where a person is convicted of membership of a proscribed and specified organisation the court may order the forfeiture of money and other property in that person's possession or control if it is satisfied to the civil standard of proof that it has been used, or may be used, in furtherance of, or in connection with, the activities of that proscribed an specified organisation.

Lord Lloyd set out proposals for new powers to order the forfeiture of terrorist funds in Chapter 13 of his report[44]. The Government commented on these in Chapter 6 of the consultation paper *Legislation Against Terrorism*[45]. The Government added that it would develop the detail of its proposals for the forfeiture of terrorist property in the context of the wider consultation exercise it was carrying out on the confiscation of criminal assets. This is a reference to consultation in which the Home office has been engaged since the publication in November 1998 of a report from the Home Office Working Group on Confiscation Legislation entitled *Criminal Assets*[46].The report called for a substantial extension of the United Kingdom's existing limited powers for confiscation without a criminal conviction, and for the creation of a national confiscation agency. The Working Group's proposal that the assets of people suspected of having committed criminal offences should be confiscated through civil rather than criminal proceedings provoked some controversy[47]. The consultation period following the publication of the Working Group's report closed at the end of February 1999. The Government is still considering the responses to the consultation. In a written answer to a question from Mr Davidson on 1 November 1999 the Home Office minister Charles Clarke said[48]:

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[44] Cm 3420 Volume 1 paragraphs 13.23-13.24

[45] CM 4178 paragraphs 6.20-6.23

[46] *Working Group on Confiscation Third Report: Criminal Assets* - Home Office (November 1998)

[47] "The criminal, the solicitor and the loot" - *New Law Journal* 20.11.1998; "Confiscation without conviction" - *New Law Journal* 4.12.1998

[48] HC Deb 1 November 1999 vol 337 c 56-57W

> While the courts already have extensive powers to require disclosure of assets following a conviction, and to order confiscation, the Government are preparing a package of measures to strengthen further the investigation, tracing and confiscation of criminal proceeds. The proposals will take account of the Home Office Working Group on Confiscation, whose report was published in November and is available in the Library, and of a recently initiated study by the Cabinet Office's Performance and Innovation Unit, which will be completed early next year.

Clause 22 and Schedule 4 of the *Terrorism Bill* are based on the forfeiture provisions of section 13 of the PTA and are intended to have a similar effect, enabling a court before which a person is convicted of an offence under Clauses 24 to 17 to make a forfeiture order in respect of money or other property which the person knew or had reasonable cause to suspect would or might be used for the purposes of terrorism. Once difference between the arrangements under the PTA and those under Clause 22, other than those which will result from the new, wider definition of terrorism used in the Bill, is described in the *Explanatory Notes* as follows:

> *Subsection (6)* allows for forfeiture of the proceeds of a terrorist property offence. This could arise in a case where an accountant prepared accounts on behalf of a proscribed organisation - thus facilitating the retention or control of the organisation's money - and was paid for doing so. The money he received in payment could not be forfeited under section 13(2) of the PTA because it was not intended or suspected for use in terrorism. It could not be confiscated under the Criminal Justice Act 1988 because that confiscation regime excludes terrorist property offences. Subsection (6) closes this loophole between the confiscation scheme in the 1988 Act and the counter-terrorist forfeiture scheme.

Schedule 4 sets out the procedures to be followed in the implementation of forfeiture orders made under Clause 22, including the making of restraint orders by the High Court in England and Wales and Northern Ireland or the Court of Session in Scotland.

4. Seizure and detention and forfeiture of terrorist money at borders

In the report of his *Inquiry Into Legislation Against Terrorism* Lord Lloyd recommended that the police be given powers to seize cash in transit where they had reasonable grounds for suspecting that it was intended for use in terrorism[49]. In its consultation paper the Government said it saw considerable merit in this proposal, which it felt should also be capable of being exercised by others in addition to police officers, such as immigration officers[50]. The Government also agreed with Lord Lloyd's suggestion that the new power be modelled on similar provisions in *the Drug Trafficking Act 1994*. It added that the forfeiture procedures for cash seized in transit should also be modelled on current drug trafficking legislation[51].

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[49] Cm 3420 Volume 1 paragraphs 13.33-13.35
[50] CM 4178 paragraphs 6.24-6.28
[51] ibid. paragraphs 6.29-6.30

Clauses 23-30 of the Bill are based on provisions in sections 42-48 of the *Drug Trafficking Act 1994*, which permit the seizure of drug trafficking money being imported or exported in cash, without the need for a criminal conviction. The Bill's provisions apply to cash which any of the agencies operating at border - police constables, customs officers or immigration officers - have reasonable grounds for suspecting is intended to be used for the purposes of terrorism, forms the whole or part of the resources of a proscribed organisation, or is "terrorist property" as defined in Clause 13(1)(b). While the powers under the *Drug Trafficking Act 1994* are only available in respect of cash being imported into or exported from the UK, the powers in the *Terrorism Bill* will also be available in respect of cash being moved between Northern Ireland and Great Britain.

Once cash has been seized under **Clause 24**, it is intended that it should be able to be detained for an initial period of 48 hours, during which time the authorities will either have to seek further detention under **Clause 25** or apply for a forfeiture order under **Clause 27**. If neither of these steps is taken within the first 48 hours the cash will have to be returned. **Clause 25** is intended to enable a magistrates' court, or a sheriff in Scotland, to authorise continued detention of the cash for up to 3 months, and thereafter for subsequent periods of 3 months up to a maximum of 2 years. Clause 25(3) provides that further detention may be granted only if the court is satisfied that there are reasonable grounds to suspect that the cash is terrorist cash as defined by section 24(1), and that the continued detention of the cash is justified pending completion of an investigation of its origin or derivation or pending a determination whether to institute criminal proceedings, whether in the United Kingdom or elsewhere, which relate to the cash.

Cash detained for more than 48 hours under Clause 25 will have to be held in an interest bearing account. **Clause 26** is designed to enable applications for the release of cash detained under Clause 24 to be made to a magistrates' court, or in Scotland, a sheriff, by the person from whom the cash has been seized, the person by or on whose behalf it was being imported, exported or moved, or any other person. The magistrate or sheriff will be able to grant the application if he or she is satisfied that the grounds for its detention no longer apply or that the detention of the cash for any other reason is no longer justified. Police constables, customs officers or immigration officers will also be able to release cash detained under Clause 24 if they are satisfied that the detention is no longer justified and they have notified the magistrates' court or sheriff who made the order under which the cash is being detained. Cash will not be released while proceedings on an application for its forfeiture under Clause 27, or proceedings in the UK or elsewhere which relate to it, have not been concluded.

5. Forfeiture of cash seized at borders

Clauses 27 and 28 are intended to enable magistrates' courts, or sheriff courts in Scotland, to make orders forfeiting cash being detained under Clause 24. The forfeiture proceedings will be civil proceedings and the standard proof will be the civil standard, that is, that the magistrates court or sheriff is satisfied "on the balance of probabilities" that the cash is terrorist cash as defined in Clause 24(1). The courts concerned will be able to make forfeiture orders whether or not criminal proceedings are brought against any person for an offence with which the cash is connected. Clause 28 seeks to enable any party to proceedings in which a forfeiture order is made to appeal to the Crown Court where the order was made in England and Wales, the county court where it was made in

Northern Ireland, or the Court of Session where it was made in Scotland. Where an appeal is successful the cash will be released, along with any accrued interest.

Cash which is forfeited under Clause 27 and any interest accrued on it will be paid into the Consolidated Fund.

E. The Investigation of Terrorist Activity and Police Powers of Entry, Search and Seizure

Part IV of the Bill seeks to provide certain specific powers to be used by the police in a terrorist investigation, which is defined in **Clause 31** as an investigation of:

- the commission, preparation or instigation of acts of terrorism,
- an act which appears to have been done for the purposes of terrorism,
- the resources of a proscribed organisation,
- the possibility of making an order proscribing or de-proscribing an organisation, or
- the commission, preparation or instigation of an offence under the Bill.

Clauses 32-35 of the Bill are designed to provides corresponding provisions to those currently in sections 16C and Schedule 6A of the PTA, which were added to that Act by the *Prevention of Terrorism (Additional Powers) Act 1996*. They are intended to enable the police to set up cordons for limited periods in designated areas for the purposes of terrorist investigations. It will be an offence punishable by up to 3 months' imprisonment and a £2,500 fine for a person to fail to comply with an order from a constable in uniform to leave a cordoned area or move a vehicle from a cordoned area, or to disobey a police prohibition or restriction on access to a cordoned area.

Clause 36 and **Schedule 5** are concerned with police powers of entry, search and seizure in the context of terrorist investigations. The provisions in them are based on those currently in Schedule 7 of the PTA. They were discussed in Chapter 11 of Lord Lloyd's report[52] and in Chapter 10 of the Government's consultation paper[53].

Under these provisions the police in England and Wales and Northern Ireland will be able to apply to a justice of the peace, and the procurator fiscal will be able to apply to a sheriff in Scotland, for a warrant authorising the police to enter and search premises for the purposes of a terrorist investigation and seize and retain any relevant material found there. Such warrants will not authorise the seizure and retention of items that are subject to legal privilege. Where material which constitutes "excluded material" or "special material" as defined by sections 11 and 14 of the *Police and Criminal Evidence Act 1984* is concerned, the police will have to apply to a Circuit judge for a warrant to search for it,

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[52] Cm 3420
[53] CM 4178

or for an order that it be produced or made available to the police. In Scotland such applications will have to be made to a sheriff by the procurator fiscal.

The police in England and Wales and Northern Ireland will be able to apply to a circuit judge for an explanation order requiring a specified person to provide an explanation of any material seized in pursuance of a warrant issued under any of these provisions or produced or made available under them. In Scotland it will once again be for the procurator fiscal to seek such an order from a sheriff. The *Explanatory Notes* on the Bill make the following comments about the provisions concerning explanation orders:

> These paragraphs correspond to paragraph 6 of Schedule 7 of the PTA. There is one change in effect. A person's response to an explanation order represents information given under compulsion and cannot normally be used in evidence against him, as this would be a breach of the right against self-incrimination (or "right to silence"). The PTA provided two exceptions to this general principle.
> The first is if the criminal trial in question is for the offence of giving a false or misleading answer to the explanation order itself (at sub-paragraph 6(3)(a) in the PTA).
> The second is in a trial for any other offence, if in that trial the person makes a statement inconsistent with his response to the explanation order (at sub-paragraph 6(3)(b) in the PTA).
> The first of these exceptions is replicated in the Bill (at sub-paragraph 13(4)) but the second has been dropped.

Paragraphs 15, 16, 28 and 29 of Schedule 15 will enable police officers of the rank of superintendent or above to issues warrants and explanation orders where they have reasonable grounds for believing that the case is one of great emergency. The Bill's *Explanatory Notes* make the following comments about paragraphs 15-16:

> These paragraphs correspond to paragraph 7 of Schedule 7 of the PTA and have similar effect. They provide that in urgent cases a police superintendent may issue warrants and explanation orders, so long as he notifies the Secretary of State. The condition in paragraph 7(1) that the action must be "in the interests of the State" has been dropped. This is because the Bill applies to all forms of terrorism: the power might therefore be used in a case where the terrorism was directed against another country.

Clause 37 of the Bill, which is intended to correspond to section 17(2)-(6) of the PTA, makes it an offence punishable by up to 5 years' imprisonment and a fine, for a person to disclose to another anything which is likely to prejudice a terrorist investigation which he knows, or has reasonable cause to suspect, is being conducted, or is about to be conducted, by the police.

F. Arrest, Detention and Powers to Stop and Search

Where a person is arrested they will become subject to powers of detention under Clause 39 and Schedule 7 of the Bill. **Clauses 39-41** are designed to make similar powers of arrest and search to those currently set out in sections 14 and 15 of the PTA. These powers were discussed in chapter 8 of Lord Lloyd's report[54] and Chapter 7 of the Government's consultation paper[55]. The powers of detention under the PTA were discussed in Chapter 9 of Lord Lloyd's report and Chapter 8 of the Government's consultation paper.

1. Arrest

Section 14 of the PTA currently enables a police constable to arrest without warrant a person whom he has reasonable grounds for suspecting to be:

> a) guilty of certain offences under the Act; or
>
> b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism; or
>
> c) a person subject to an exclusion order

The provisions of the PTA concerning exclusion orders are being repealed by the Bill and therefore the ground for arrest provided by section 149(c) will no longer be relevant if the Bill is enacted.

The ordinary powers of arrest available to the police under the *Police and Criminal Evidence Act 1984* require them to have reasonable grounds for suspecting that the person concerned has committed or is about to commit an offence. Being concerned in the commission, preparation or instigation of acts of terrorism, which provides grounds for an arrest under section 14(b) of the PTA, is not in itself a criminal offence. Lord Lloyd considered that the "pre-emptive" power of arrest under section 14(b) was useful, because it enabled the police to intervene before a terrorist act was committed. He felt that if the police had to rely on their general powers of arrest under the, which, they would be obliged to hold back until they had sufficient information to link the individual with a particular offence. In some cases, that would be too late to prevent the prospective crime[56]. Lord Lloyd was concerned, however, by arguments put to him that section 14(b) contravened a fundamental principle that a person should be liable to arrest only when he was suspected of having committed, or being about to commit, a specific crime. He suggested[57] that once a lasting peace had been established in Northern Ireland there was a

54 Cm 3420
55 CM 4178
56 Cm 3420 Volume 1 paragraph 8.5
57 ibid paragraph 8.13

risk that the power of arrest under section 14(b) might be considered to contravene Article 5(1)(c) of the European Convention on Human Rights, which provides that:

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

The *Human Rights Act 1998*, which will be implemented in full on 2 October 2000, will require public authorities in the UK, including the police, to act in a way which is compatible with the rights under the European Convention set out in Schedule 1 of the Act. It will also enable these rights to be asserted in proceedings in the UK courts. The rights set out in Schedule 1 of the 1998 Act include Article 5. In its consultation paper the Government said[58]:

> 7.14 In examining this proposal, the Government has looked very carefully both at the judgements of the ECHR in relation to Article 5(1)(c) (notably that in Brogan v the U K) ; at the consequences of creating an offence of the sort envisaged by Lord Lloyd; and at whether the provisions of PACE would be sufficient were the Government to pursue this option. The Government is satisfied that the power in section 14(1)(b), and the way it is used, are compatible with Article 5(1)(c) of the Convention.

The consultation paper went on[59]:

> 7.15 The Government does not therefore believe (although it invites views) that the right way forward is to create an offence of "being involved in the preparation etc of an act of terrorism". It takes the view that any new legislation should instead as now empower the police to arrest anyone whom they reasonably suspect of "being involved in the preparation, commission or instigation of acts of terrorism". The Government does not believe that the term "acts of terrorism" needs to be defined; the new definition of "terrorism" (see paragraph 3.17) being sufficient to indicate what is suspected.

Clause 39(1) therefore provides that a constable may arrest without warrant a person whom he reasonably suspects to be a terrorist. “Terrorist” is defined in Clause 38 as a person who:

- has committed an offence under certain specified provisions of the Bill, or
- is or has been concerned in the commission, preparation or instigation of acts of terrorism

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58 CM 4178

59 ibid

Clauses 40 and 41 are intended to give the police powers to search people liable to arrest under clause 39.

2. Detention

At present a person arrested by the police under section 14 of the PTA may be detained for up to 48 hours without charge. If the police wish to detain him for a further period they must apply to the Secretary of State to extend the period of detention. The Secretary of State may extend the detention for a period of up to 5 days. A person arrested under section 14 may therefore be detained for up to 7 days without charge.

Article 5(3)-(5) of the European Convention on Human Rights [ECHR] provide that:

> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

In 1988 the European Court of Human Rights held in the case of *Brogan v. UK* that there had been a breach of Article 5(3) of the European Convention of Human Rights [ECHR] where a person had been detained for 4 days and 6 hours without judicial authorisation under what is now section 14 of the PTA. In its consultation paper *Legislation Against Terrorism* the Government explained the steps taken by the Government in the wake of that decision[60]:

> The then Government responded by entering a derogation under the relevant articles of the Convention and the UN International Convention on Civil and Political Rights to preserve the right to detain those suspected of involvement in Irish terrorism for up to 7 days. Consideration was given to amending the PTA to make the judiciary responsible for authorising extensions of detention but the Government concluded that no way could be found of doing so without undermining the independence of the judiciary particularly in Northern Ireland. The derogation remains in force today. It does not apply to international terrorism because the threat to the United Kingdom from such groups, although grave, was - and is - not thought to be comparable to that from Irish terrorism.

[60] CM 4178 paragraph 8.2

In the White Paper *Rights Brought Home: the Human Rights Bill* the Government made the following remarks about the derogation in respect of Article 5(3), which is the only derogation from the ECHR that the UK has in place[61]:

> 4.3 We are considering what change might be made to the arrangements under the prevention of terrorism legislation. Substituting judicial for executive authority for extensions, which would mean that the derogation could be withdrawn, would require primary legislation. In the meantime, however, the derogation remains necessary. The Bill sets out the text of the derogation, and Article 5(3) will have effect in domestic law for the time being subject to its terms.
>
> 4.4 Given our commitment to promoting human rights, however, we would not want the derogation to remain in place indefinitely without good reasons. Accordingly its effect in domestic law will be time-limited. If not withdrawn earlier, it will expire five years after the Bill comes into force unless both Houses of Parliament agree that it should be renewed, and similarly thereafter. The Bill contains similar provision in respect of any new derogation which may be entered in future.

Section 16 of the *Human Rights Act 1998* accordingly provides that if it has not already been withdrawn by the United Kingdom, the UK's derogation from Article 5(3) of the ECHR will cease to have effect for the purposes of the Act, that is, for the purpose of the incorporation of the ECHR into the UK's domestic law, at the end of the period of 5 years beginning with the date on which section 1(2) of the Act came into force. At any time before this 5 year period comes to an end the Secretary of State will have powers under section 16(2) of the 1998 Act to extend it by a further 5 years. The *Human Rights Act* 1998 is due to be implemented across the whole of the UK on 2 October 2000.

In its consultation paper *Legislation Against Terrorism* the Government set out its views on possible changes to the powers of detention under section 14 of the PTA as follows[62]:

> 8.5 The Government is aware that some argue that the relevant provisions for detaining, and extending detention, under the PTA should simply be repealed and not replaced. Those who advance this position suggest that special arrangements are not needed because those in the ordinary criminal law are sufficient and should be applied. The Government disagrees. The threat from terrorism is such that the ordinary criminal law is not sufficient, in the Government's view, to protect either the sensitivity of the information which frequently forms a large part of the case for an extension under the PTA, or the independence of the judiciary. There are also marked differences between the criminal justice systems in the three jurisdictions. In Scotland, for example, the courts have no powers under the normal criminal law to extend detentions beyond the 6 hour limit

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[61] *Rights Brought Home: the Human Rights Bill* CM 3782 paragraphs 4.3-4.4

[62] CM 4178 paragraphs 8.5-8.6

> imposed by section 14 of the Criminal Procedure (Scotland) Act 1995, a limit which would be extremely impractical in terrorist cases.
>
> 8.6 However, the Government is mindful that the current extension of detention provisions in the Act have been criticised on the grounds that they allow a suspect to be held without charge for longer than is possible under the ordinary criminal law; and that extensions are granted by the executive without reference to any judicial authority. The Government fully appreciates these concerns. It believes that any new legislation must provide new arrangements for extending detentions in terrorist cases.

The government identified three possible options for change[63]:

- A suggestion by Lord Lloyd[64] that applications for extensions of detention in terrorist cases should be heard ex parte and in camera by the Chief Metropolitan Stipendiary Magistrate in England and Wales; by the Sheriff Principal of Lothian and Borders in Scotland, and by an equivalent officer in Northern Ireland

- The creation of an independent Commission along the lines of that established by the Special Immigration Appeals Commission Act 1997, to examine and determine applications for extensions of detention under the new counter-terrorist legislation.

- The introduction of different arrangements in each of the three jurisdictions for judicial authorities to grant extensions.

The consultation paper went on to say that it believed the introduction of arrangements along the lines of the second or third of these options would satisfy the requirements of Article 5(3) of the Convention and enable the United Kingdom to withdraw its current derogation.[65] It went on to say that on balance the Government favoured Option 2 [66].

Under Clause 39 and Schedule 7, it is intended that the police should be able to detain a person arrested under section 39 for an initial period of up to 48 hours. A person's detention will have to be periodically reviewed by a review officer, who will be an officer who has not been directly involved in the investigation in connection with which the person has been detained. The review officer will only be able to authorise a person's continued detention if satisfied that it is necessary to obtain relevant evidence, whether by questioning him or otherwise, to preserve relevant evidence, or pending a decision whether to apply to the Secretary of State for a deportation notice to be served on him. The detained person, or his solicitor if he or she is available at the time of review, will be

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63 ibid. paragraphs 8.7-8.18

64 Cm 3420 Volume 1 paragraphs 9.19-9.20

65 CM 4178 paragraph 8.18

66 ibid

able to make oral or written representations about the detention. The review officer will have to make a written record of the outcome of the review, including the grounds on which any continued detention is authorised. Unless the detained person is incapable of understanding what is said to him, is violent or likely to become violent, or is in urgent need of medical attention, the record will have to be made in his presence and he will have to be informed about whether the review officer is authorising continued detention and if so, on what grounds.

If the police wish to detain a person beyond the 48 hour period specified in Clause 39(3) paragraph 24 of Schedule 7 of the Bill aims to permit an officer of at least the rank of superintendent to apply, to a judicial authority for the issue of a warrant of further detention. "Judicial authority" is defined in paragraph 24(4) of Schedule 7 as:

> (a) in England and Wales, the Senior District Judge (Chief Magistrate) or his deputy, or a District Judge (Magistrates' Courts) who is designated for the purpose of this Part by the Lord Chancellor,
> (b) in Scotland, the sheriff, and
> (c) in Northern Ireland, a county court judge, or a resident magistrate who is designated for the purpose of this Part by the Lord Chancellor.

The application to extend a person's detention will have to be made within the initial 48 hour period after their arrest or within 6 hours of the end of that period. The judicial authority will be permitted to issue a warrant of further detention only if satisfied that:

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

Paragraph 28 of Schedule 7 is designed to give the detained person an opportunity to make representations about the application to extend his detention. He will also be entitled to be legally represented at the hearing, although the judicial authority will have powers to exclude both the detained person and his legal representative from any part of the hearing. The officer applying for the warrant of extension will also be permitted to apply to the judicial authority for an order that specified information upon which he intends to rely be withheld from the detained person or his representative and paragraph 2992) sets out various grounds on which the judicial authority may grant such an order.

The total period for which it will be possible to detain a person without charge under Clause 39 and Schedule 7 will be 7 days from the time of their arrest, or, of they were arrested while being detained under provisions in Schedule 6 concerning port and border controls, 7 days from the time when their examination under that Schedule began.

3. Powers to stop and search

Section 13A of the PTA, which was inserted by the *Criminal Justice and Public Order Act 1994* and section 13B of the PTA, which was inserted by the *Prevention of Terrorism (Additional Powers) Act 1996*, give senior police officers powers to authorise that powers to stop and search vehicles and their occupants, and pedestrians, be exercisable, in order to prevent acts of terrorism, without the requirement, that otherwise applies to stop and search powers under the *Police and Criminal Evidence Act 1984,* that police officers have reasonable cause to suspect that they will find stolen or prohibited articles. Authorisations extend to a specified area and may be made for up to 28 days, although that period may be renewed. Clauses 42-45 of the *Terrorism Bill* are based on these provisions, with the additional requirement that authorisations be confirmed by a Secretary of State within 48 hours of their being made. If the authorisation is not confirmed by the Secretary of State it will cease to have effect.

Clauses 46-50 are designed to incorporate into the Bill the provisions of section 16D of the PTA, which was inserted by the *Prevention of Terrorism (Additional Powers) Act 1996* and enables the police to restrict or prohibit parking for periods of up to 28 days in specified areas in order to prevent acts of terrorism. The provisions also make it an offence to park in or refuse to move from such an area.

Clause 51 brings Schedule 6 into effect. This Schedule is concerned with port and border controls. It is designed to make similar provision to that currently contained in section 16 and Schedule 5 of the PTA, which was considered in chapter 10 of the report of Lord Lloyd's inquiry[67] and chapter 11 of the Government's consultation paper[68]. The consultation paper summarised the detailed powers in Schedule 5 of the PTA as follows[69]:

> 11.1 Section 16 and Schedule 5 provide the police and others with a variety of powers to monitor and control the entry and departure of people and goods into this country for counter-terrorist purposes. Paragraph 5 of Schedule 5 for example provides that anyone embarking or disembarking from a ship or aircraft in Great Britain which has come from or is going to Northern Ireland or the Republic of Ireland or the Isle of Man or one of the Channel Islands must complete a landing or disembarkation card - whichever is appropriate - if required to do so by an examining officer. Examining officers are usually police officers but immigration officers, and customs officers carrying out the functions of an immigration officer, may also carry out the duties of an examining officer under the PTA at ports. Paragraph 2 of Schedule 5 enables an examining officer to examine any person who is about to enter, or leave, Great Britain or Northern Ireland to see whether:

[67] Cm 3420 paragraphs 10.26-10.57
[68] CM 4178
[69] ibid paragraphs 11.1-11.9

i) they are, or have been, concerned in the commission, preparation or instigation of acts of terrorism; or

ii) they may be subject to an exclusion order; or

iii) there are grounds for suspecting that they are in breach of an exclusion order or are assisting someone who is excluded to enter the territory from which they are banned.

11.2 In Northern Ireland members of the Army may also perform the functions of an examining officer if required to do so by an order made by the Secretary of State.

11.3 Reasonable suspicion is not required before a stop can be made. The powers can be used in connection with Irish and international terrorism.

11.4 An examination may not last for more than 12 hours unless the examining officer decides that he has reasonable grounds for suspecting that the person is, or has been, involved in terrorism, and issues a written notice requiring the detainee to submit to further examination. Once the notice is issued, the examining officer may hold the individual concerned for up to a further 12 hours. The detainee may not however be held for more than a maximum of 24 hours unless he is formally detained under paragraph 6 of Schedule 5.

11.5 Paragraph 6 of Schedule 5 gives examining officers the same powers to detain for up to 48 hours and to apply for extensions of detentions up to a total of 5 days beyond the initial 48 hour period, as allowed under section 14 of the PTA. As in section 14, the decision whether to grant an extension of detention is a matter for the Secretary of State.

11.6 The vast majority of examinations last only a few minutes. In 1997 for example, out of nearly 1 million passengers who were stopped, only 803 were examined for more than one hour. Of these only 10 were detained beyond the 24 hour point. Of the 10, 7 were suspected of involvement in Irish terrorism and 3 of international terrorism, and one of the latter was held for more than 48 hours.

11.7 Paragraph 3 of Schedule 5 requires anyone undergoing examination to provide the examining officer with information or relevant documents which he requests. The examining officer may search the individual and his baggage to see whether he is, or has been, involved in terrorism or is subject to an exclusion order. He may also, under paragraph 4 of Schedule 5, search any ship, aircraft, train or other vehicle and anything loaded or about to be loaded or unloaded for persons liable for examination. By virtue of paragraph 4A of Schedule 5, an examining officer may also search unaccompanied goods entering or leaving, or about to enter or leave Great Britain or Northern Ireland to determine whether they may be involved in the commission, preparation or instigation of acts of terrorism.

> 11.8 Persons detained at ports under the provisions of Schedule 5 have the same rights as those arrested under section 14 to contact a lawyer and to inform their relatives or some other interested person of what has happened to them. Access to legal advice etc in such circumstances may be denied for the same length of time, and on the same grounds, as applies to those arrested under section 14 of the PTA. Their continued detention is also reviewed in the same way.
>
> 11.9 Schedule 5 also contains a series of measures which require the owners or operators of ports, ships and aircraft to co-operate with the authorities to ensure that passengers can be properly examined, and do not evade the controls. In particular, Schedule 5 stipulates that ships carrying passengers for reward within the Common Travel Area (the CTA) - that is Great Britain, Northern Ireland, the Republic of Ireland, the Isle of Man and the Channel Islands - may only use those ports formally designated for the purpose by order of the Secretary of State. Aircraft are subject to the same requirements whether carrying passengers for reward or not. The purpose of these provisions is to ensure that, as far as possible, CTA traffic uses ports where an examining officer is, or can be, present. A list of the ports currently designated is set out in Schedule 6 to the Act. An examining officer may allow an operator or owner of a vessel or aircraft to use a non-designated port but since his approval for this has to be obtained in advance, an examining officer can meet the sailing or flight if appropriate.

The Government agreed with Lord Lloyd's view that these powers were effective both as a deterrent and in practice and that they would still be required in the event of a lasting peace in Northern Ireland. It added that there was ample evidence to suggest that the ability of examining officers to stop and search at random and, without the need for reasonable suspicion, had disrupted both Irish and international terrorist operations; and that explosives, guns and ammunition and other terrorist equipment had been recovered through the use of the powers[70]. The Government also agreed with Lord Lloyd's conclusion that the powers could be strengthened and improved. It said:

> The powers have been, and continue to be, criticised on the grounds that:
>
> - they are applied disproportionately against those travelling to, or from, the Irish Republic or Northern Ireland;
> - they are unnecessarily restrictive in that they prevent the owners of small aircraft from using airfields which are not designated, except with the approval of an examining officer, whether or not they are not carrying passengers for reward; and that their use imposes delays on passengers and freight to the detriment of the smooth flow of traffic.
> - their use imposes delays on passengers and freight to the detriment of the smooth flow of traffic.

[70] ibid. paragraph 11.10

> 11.12 The Government acknowledges that the use of the powers can sometimes result in some inconvenience and delay to passengers and freight traffic. But it does not believe that the powers have been, or are used, improperly or in a discriminatory fashion. It is true, however, that the vast majority of stops and examinations are carried out on people and goods travelling within the CTA. As Irish terrorism has thus far posed the greatest threat to the security of the United Kingdom, this is inevitable.

The Government went on to suggest a number of possible changes to the current arrangements for port and border controls. Those that have been incorporated into Schedule 5 are summarised in the Bill's *Explanatory* Notes as follows:

- The maximum period that a person may be detained at a port for questioning, whether or not the examining officer has a reasonable suspicion that the person is or has been concerned in the commission, preparation or instigation of acts of terrorism, is reduced from 24 hours to 9 hours (paragraph 6);
- Captains of aircraft carrying passengers other than for reward may allow their passengers to embark from, or disembark at, non-designated airports provided they give 12 hours notice to an examining officer (paragraph 12);
- The provision allowing an examining officer to require certain passengers leaving or entering Great Britain or Northern Ireland to complete cards will be subject to the affirmative resolution procedure and may be lapsed or repealed (paragraph 16 and Clause 118); and
- The information relating to passengers, crews or their vehicles which examining officers will be able to request will be set out in a separate order subject to the negative resolution procedure (paragraph 17).

G. Additional Terrorist Offences

1. Weapons Training

Section 34 of the EPA currently provides for an offence of instructing or training another, or receiving instruction or training, in the making or use of firearms, explosives or explosive substances. This offence only applies in Northern Ireland. Clauses 52-53 of the *Terrorism Bill* are designed to create a similar offence which will apply across the whole of the UK. The definition of the offence has been extended to cover chemical, biological or nuclear and to cover recruitment for training, including recruitment for training that is to take place outside the United Kingdom. The offence will be punishable following conviction on indictment by up to 10 years' imprisonment and a fine. It will be a defence for a person to prove that his action or involvement was wholly for a purpose other than assisting, preparing for or participating in terrorism.

Lord Lloyd noted that the offence under section 34 of the EPA was difficult to prove and said he had been informed that there was no record of any prosecutions having been brought since it was introduced. He said that in the absence of any evidence that such a provision would be of substantial value in tackling terrorism in the longer term he would

not recommend its incorporation into the new counter-terrorism legislation[71]. In its consultation paper the Government said[72]:

> The police and the security forces consider this to be an important measure in the fight against terrorism although they acknowledge that the offence can on occasion be difficult to prove. With domestic and international terrorist groups looking increasingly to recruit and train those willing to help them carry out terrorist attacks both in the United Kingdom and abroad, the Government is minded to include such an offence in the new permanent legislation and to make it applicable throughout the United Kingdom.

2. Directing a terrorist organisation

Section 29 of the EPA makes it an offence punishable by up to life imprisonment for a person to direct, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism. Like the offence of weapons training, this offence is currently only available in Northern Ireland. Clause 54 of the *Terrorism Bill* is designed to create a similar offence that will be available throughout the UK. The offence will apply to any organisation which is concerned in acts of terrorism as defined in Clause 1 of the Bill.

In the consultation paper the Government described the use currently made of the offence and gave its reasons for extending it to the whole of the UK:[73]:

> "Directing" is not defined. The word is regarded as having the usual meaning of giving orders or authority for actions to be taken. The offence is aimed at the strategists - those who plan campaigns and order them to be carried out, but who do not normally themselves take any part in the detailed planning or execution of the individual attacks which make up the campaign. There have been 2 convictions for this offence and long sentences were imposed in each case - the maximum sentence which can be given on conviction for the offence is life imprisonment.
>
> 12.9 The nature of the offence means that it is difficult to get evidence to support a charge; witnesses are particularly reluctant to make statements implicating people who hold positions of authority within terrorist organisations. But given the nature of the offence, where a conviction is obtained, it is likely to be of some significance and to have a major impact on the terrorist organisation in question. Lord Lloyd considered that the offence had been of real value. He supported its retention in permanent legislation and its extension to cover the whole of the United Kingdom and all forms of terrorism.

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[71] Cm 3420 Volume 1 paragraphs 14.26-14.28
[72] CM 4178 paragraph 12.12
[73] ibid. paragraph 12.10

> 12.10 The Government agrees and proposes that the offence should be included in new counter-terrorist legislation extending across the UK and applying to all forms of terrorism.

3. Possessing articles and collecting information for terrorist purposes

Clauses 55 and 56 of the Bill are designed to incorporate in the new legislation two offences, currently set out in sections 16A and 16B of the PTA, which were inserted into that Act by the *Criminal Justice and Public Order Act 1994*. The provisions had previously been set out in sections 30 and 31 of the *Northern Ireland (Emergency Provisions) Act 1991*.

Clause 55 is intended to make it an offence, punishable by up to 10 years' imprisonment and a fine following conviction on indictment, for a person to possess an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of acts of terrorism. It is a defence for a person charged with the offence to prove that his possession of the article was not for such a purpose. If it is proved that an article was on premises at the same time as the person accused of the offence, or that it was on premises of which he was the occupier, or which he habitually used other than as a member of the public, the court will be entitled to assume that he possessed the article, and the onus will be once again be on the accused person to prove that he did not know of its presence on the premises or that he had not control over it.

Clause 56 is designed to make it an offence for a person to collect or make a record of information likely to be useful to a person committing or preparing an act of terrorism, or to possess a document or record containing information of that kind. The offence is punishable by up to 10 years' imprisonment and a fine following conviction on indictment and the court may order the document or record to be forfeited. It is a defence for a person accused of this offence to prove that he had a reasonable excuse for his action or possession.

At the time of its incorporation into the PTA by *the Criminal Justice and Public Order Act 1994* some commentators expressed concern that the offence of possessing information of use to terrorists had a wide potential application, given the many types of information that might be useful to terrorists.

In the recent case *of Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others [1999] 4 All ER 801*, decided by the House of Lords on 28 October 1999, it was argued on behalf of a number of individuals charged with offences under section 16A of the PTA that the offences breached Article 6(2) of the European Convention on Human Rights, which provides that:

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The House of Lords held that it was not clear that section 16A was inconsistent with article 6(2) of the convention. It was arguable that section 16A did not reverse the legal burden of proof, but instead simply placed an evidential burden on the defendant. Also, once the *Human Rights Act 1998* came into force (which is due to happen on 2 October 2000) defendants might be able to rely on section 3(1) of the 1998 Act, which provides that so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. Lord Hope and Lord Hobhouse also commented that article 6(2) had not been regarded by the European Court of Human Rights as imposing an absolute prohibition on provisions that reversed the onus of proof. Instead, the test in each case was whether the presumption was confined within reasonable limits.

4. Inciting terrorism overseas

Generally speaking, the jurisdiction of the UK criminal courts is territorial and is thus restricted to offences committed here, although there are some notable exceptions to this rule. In recent years there have been calls for the jurisdiction of the criminal courts to be extended and this has taken place in the context, for example, of sexual offences committed overseas by people from the UK. At the same time, a number of overseas governments, including the governments of Egypt, Algeria and India for example, have complained that the UK has been harbouring individuals who are involved in inciting or conspiring to commit acts of terrorism in their countries.

The previous Government carried out an interdepartmental review of extra-territorial jurisdiction in respect of criminal offences, which was published in July 1996[74]. A private Member's Bill to give UK courts jurisdiction over acts of conspiracy and incitement in the UK relating to offences committed or intended to be committed abroad, the *Jurisdiction (Conspiracy and Incitement) Bill* [Bill 19 of 1996/97], was introduced by Nigel Waterson, with the support of the previous Government, shortly before the General Election. The Bill covered all types of offences. It received a Second Reading on 31 January 1997. Introducing the Bill, Nigel Waterson said:[75]

> Lest anyone believes that my Bill is of academic interest only, let me give a concrete example. Hon. Members will recall the recent trial at the Old Bailey of those responsible for bombing the Israeli embassy in London. One of the defences put forward by learned counsel was that the defendants were indeed planning to cause explosions - however, not in Britain, but abroad. The time has come to end such legalistic nonsense. If my Bill becomes law, it will be significantly less likely that defendants will claim that as a defence.

[74] Dep/3 3796
[75] Ibid, c 577

The Bill received support from the Labour Opposition as well as from the Government, subject to the hope that "the powers in the Bill will be used with the discretion that hon. Members on both sides of the House seek".[76] During the passage of the Bill, some Members raised fears that adoption of the Bill could give rise to the imprisonment of those who fight against despotic governments overseas. Donald Anderson said during the Second Reading debate:[77]

> There are many dictatorships and tyrannical Governments in this world. Are we to say that someone who has fled to this country from that tyranny is stopped thereby from seeking to overthrow by word or action that tyrannical Government? Let us think of this country's traditions and of people who are now considered as great patriots in their own countries. Kossuth, the Hungarian patriot, who was in London after the 1848 revolution, conspired against his Government.
>
> I shall give a more up-to-date example. Nelson Mandela was a leading member of the African National Congress and, in the 1950s, sought by all means possible to moderate and influence the stance on racial discrimination of South Africa's white Government - after the change to the National Government in 1948, the regime was increasingly repressive. From its formation, the African National Congress had a tradition of non-violent opposition to the Government. Then, we had Sharpeville and a number of other incidents. After Sharpeville, Nelson Mandela - now President Mandela - made a magnificent speech at the Rivonia trial, demonstrating the long tradition of non-violence. The only way that appeared open to people such as Nelson Mandela was to involve themselves in acts of terrorism, directed not against individual citizens but against pylons and other such installations.
>
> Had Nelson Mandela escaped to this country, he would have been caught by the provisions in the Bill if he had communed with members of the Umkhunte Ya Sizwe, or MK, the military arm of the ANC, who were blowing up pylons in desperation, having tried unsuccessfully again and again to change their repressive Government by peaceful means. South Africa was considered a friendly country. The case of Nelson Mandela, who is now rightly eulogised and who was forced into extremely limited acts of terrorism, gives cause for concern about the extensive nature of the provisions.
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> …I may well come to the view, with reluctance, that the Bill is a way [of tackling the problem of those who abuse our hospitality] which has to be made available, but it brings with it certain implications and responsibilities which I hope will be fully considered.

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[76] Ibid, c 624, Alun Michael

[77] Ibid, cc 585, 589

Edward Leigh said[78]:

> Being a country whose citizens have an instinct for free speech, it has always been the case that some of those who come here hold very strong views and continue to oppose the regime from which they fled. However, the trouble is that there is a very narrow line between opinion and incitement. For example, the giving of a person's honest opinion, which will reach an audience in a foreign country - although there may be difficulties in that - may, as a consequence, cause some form of political activity there. That political activity may start as a peaceful expression of views, but may then lead to street demonstrations, which become violent and get out of hand, which then leads to the violent overthrow of an autocratic regime that does not allow any normal expression of political oppression. There could be that sort of activity in this country.
>
> There is another form of activity, which is the direct conspiracy or incitement that leads to terrorism or revolution in another country. We could all unite behind the proposition that we should not harbour that sort of terrorist. However, it is a narrow and difficult line, and we are now proposing to give the courts the difficult job of interpreting that. It is made all the more difficult because political traditions in other countries are so very different from those in this country.
>
> My hon. Friend the Member for Eastbourne will say that the Bill would ban only conspiracy or incitement leading to terrorism. However, we are, in a Second Reading debate, entitled to ask how the courts will deal with the reality. The line is narrow. One man's free speech is seen by another man as fomenting terrorism. In considering the proposals and striking at terrorism, we must all bear it in mind that the Bill should not be able to be used as a vehicle by a foreign country that does not like the views being expressed in Britain. We cannot allow our tradition of free speech to be subverted by commercial considerations.

During the Third Reading debate on 14 February 1997, George Galloway expressed his outright opposition to the Bill, which in his view would "change political asylum in this country in a profound and dangerous way".[79] The Bill failed to receive a Third Reading on that occasion as fewer than forty Members were present for the division. On 28 February it was blocked by a procedural device: Mr Galloway moved that strangers do withdraw, and there being fewer than forty Members present, the Bill was again stood over. No further opportunity to debate the Bill presented itself before Parliament was dissolved for the General Election, so the Bill was lost.

Following the Omagh bombing on 25 August 1998 Parliament was recalled for 2 days on 2 and 3 September to consider new anti-terrorist legislation, which was subsequently enacted as the *Criminal Justice (Terrorism and Conspiracy) Act 1998* The provisions of the Bill that became the 1998 Act, which provoked some controversy, were considered in

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[78] ibid. c 617

[79] HC Deb vol 290, c 527

Library Research Paper 98/87 on *The Criminal Justice (Terrorism and Conspiracy) Bill*, which also set out the background to the various measures contained in the Bill

Sections 5-7 of the *Criminal Justice (Terrorism and Conspiracy) Act 1998* made it an offence for a person to conspire in the UK to commit an offence abroad. The act or event which is to take place outside the UK must constitute an offence both under the law of the UK and under the law of the country in which it is or was to be committed. In England and Wales and Northern Ireland, the consent of the Attorney-General is generally required before any prosecution can go ahead. In its consultation paper *Legislation Against Terrorism* the Government said[80]:

> The Government believes that these provisions on conspiracy will continue to play an important role in deterring international terrorists from using this country as a base for their operations. However, it recognises the doubts that were expressed about the breadth of the provisions in the 1998 Act, and would welcome further views in the present consultation exercise.

The Government went on to make the following comment about the possibility of extending the jurisdiction of the UK criminal courts to cover inciting the commission of criminal offences overseas[81]:

> In introducing the 1998 Act, the Government decided that although the original Private Members Bill on conspiracy, introduced in 1996, also included incitement provisions, it would not carry these across into the 1998 Act. It came to this view because it recognised these measures raised separate complex and sensitive issues which it would not have been possible to address adequately in the time available. These included concerns that the incitement offence could be difficult in practice to prove and concerns that in certain circumstances the effect of the creation of the offence could be to constrain freedom of expression. On the other hand, there is no question that considerable concern can be caused by the sort of statements which can currently be made with impunity, encouraging and glorifying in acts of terrorism. This can make it difficult to define where the boundary of free speech should lie. The Government will look at these, and the related, issues very carefully and will keep under review whether incitement measures should be included in appropriate legislation at some point in the future.

Clauses 57-59 of the *Terrorism Bill* are designed to make it an offence for a person to incite another person to commit an act of terrorism wholly or partly outside the United Kingdom where the act would, if committed in the UK, constitute:

- the offences in England and Wales and Northern Ireland of murder, offences under the *Offences Against the Person Act 1861* of wounding with intent,

[80] Cm 4178 paragraph 4.18
[81] ibid paragraph 4.19

poisoning, causing bodily injury through explosions or causing explosions, or the offence of endangering life by damaging property

- the offences in Scotland of murder, assault to severe injury, and reckless conduct which causes actual injury

It will be immaterial whether or not the person incited is in the UK at the time of the incitement. As with many of the other offences set out in the Bill, Clause 112 seeks to ensure that the consent of the Director of Public Prosecutions is obtained before any prosecution takes place in England and Wales and that the consent of the Director of Publications for Northern Ireland is obtained prior to prosecution in Northern Ireland.

The maximum penalty for the offence of incitement will be the same as that which would be available if a person were convicted of one of these substantive offences. This would be life imprisonment in the case of murder, the offences under the 1861 Act involving explosions, or the offence of endangering life by damaging property.

In an article in the *Guardian* of 7 December 1999 criticising the Bill in general and these Clauses in particular, Richard Norton-Taylor suggested that had this offence been in place at the time the law would have caught Nelson Mandela, Chilean exiles and their supporters who backed resistance to General Pinochet in the 1970s and 1980s, those who defended Palestinian attacks against Israeli forces in the occupied territories or the opposition to the Indonesian occupation of East Timor, dissidents opposed to the Saudi regime, Islamic militants, or Britons of Pakistani origin supporting fighting in Kashmir[82].

5. Terrorist Bombing Offences.

Clauses 60 and 61 of the Bill are designed to enable the UK to ratify the UN Convention on the Suppression of Terrorist Bombings. They will amend the *Extradition Act 1989* and enable the UK to extradite any person alleged to have done anything which, had it been done in the UK by a person as an act of terrorism or for the purposes of terrorism, would have constituted one of these offences:

(a) an offence under section 2, 3 or 5 of the Explosive Substances Act 1883 (causing explosions, etc.),
(b) an offence under section 1 of the Biological Weapons Act 1974 (biological weapons), and
(c) an offence under section 2 of the Chemical Weapons Act 1996 (chemical weapons).

[82] "Down by law" *Guardian* 7 December 1999

If the UK Government does not wish to extradite such a person, Clause 60 seeks to enable the Government to bring criminal proceedings against the person in this country instead. It makes it an offence for a person to do anything outside the UK as an act of terrorism or for the purposes of terrorism, if his action would have constituted one of the offences listed in paragraphs (a) to (c) above had it been done in the UK.

H. Additional measures relating only to Northern Ireland

The *Explanatory Notes* for the *Terrorism Bill* comment that:

> The existing EPA would repeal itself on 24 August 2000. The consultation document expressed the Government's hope that the special provisions it makes for Northern Ireland might not be needed after that date, an objective to be kept under review in the light of developments in the security situation. The Government takes the view that the time is not yet right to remove all of these provisions. Part VII therefore provides additional temporary measures for Northern Ireland only, time-limited to 5 years.

The Government considered the temporary provisions for Northern Ireland in Chapter 13 of its consultation paper[83].

The *Northern Ireland (Emergency Provisions) Act 1996* and the *Northern Ireland (Emergency Provisions) Act 1998* will be repealed by the *Terrorism Bill.* Part VII of the Bill is designed to enable those provisions of the 1996 and 1998 Acts which are not being extended across the whole of the UK by provisions elsewhere in the Bill to be continued in force in Northern Ireland, subject to annual renewal, for a further five years from the date on which Part VII is brought into force. These provisions include those providing for the trial of "scheduled offences" (those listed in Schedule 8 of the Bill) in non-jury "Diplock courts", named after the chairman of the Commission whose 1972 report recommended their introduction[84]. Most of the offences set out in Schedule 8 of the Bill, like those currently in Schedule 1 of the 1996 Act, will be capable in any particular case of being "certified out" by the Attorney-General for Northern Ireland and tried by jury. The provisions to be continued through inclusion in Part VII of the Bill also include those concerning remission of sentences of imprisonment, which are themselves affected by changes introduced by the *Northern Ireland (Remission of Sentences) Act 1995*.

The powers of arrest and seizure conferred on the army, which are set out in Clause 80, contain the following provision in Clause 80(2):

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[83] CM 4178

[84] *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* Cmnd 5185 December 1972

> A person making an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is making the arrest as a member of her Majesty's forces

Clause 80(6) provides, however, that:

> The reference to a rule of law in subsection (2) does not include a rule of law which has effect only by virtue of the Human Rights Act 1998.

This is intended to ensure that the power in Clause 80(2) is not seen as legalising an act which would be unlawful under the *Human Rights Act 1998* because it contravened a right under one of the articles of the European Convention on Human Rights. Article 5(2) of the European Convention provides that:

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

Other provisions of the EPA which are to be continued under the Bill include those which were introduced by the *Criminal Justice (Terrorism and Conspiracy) Act 1998. These* include the admissibility of oral evidence from senior police officers as evidence of a person's membership of a proscribed organisation which is specified under these provisions, and inferences to be drawn from a person's silence in the context of the offence of membership of a proscribed organisation.

I. Exclusion Orders

Part II of the *Prevention of Terrorism (Temporary Provisions) Act 1989* currently contains powers enabling the Secretary of State to make exclusion orders excluding named individuals from the UK as a whole, from Great Britain or from Northern Ireland. The power applies only to acts of terrorism connected with the affairs of Northern Ireland. The powers are not currently in force. They were lapsed with effect from midnight on 21 March 1998 and the Government does not intend to re-introduce them.

In his report Lord Lloyd noted that the power to exclude British citizens from part of the UK was particularly controversial and sometimes referred to as "internal exile". He took the view that it should not be carried forward into permanent legislation[85]. In its consultation paper the Government made the following comments about the use and effectiveness of the orders[86]:

> It has been suggested, most recently by John Rowe QC in his report on the operation of the PTA in 1997, that exclusion orders are effective in that they make it far more difficult for those subject to them to enter, and carry out attacks

85 Cm 3420 Volume 1 paragraphs 16.2-16.4
86 CM 4178 paragraph 5.4

> in, the territory from which they have been excluded. There is some evidence to suggest that the existence of an order has deterred a few people from making the attempt. The powers can also be effective in that they allow someone to be removed from an area in which he is thought to be engaged in terrorist activity even though there is insufficient evidence, as opposed to intelligence, to charge him with a specific offence.

The Government went on to say[87]:

> 5.5 The Government believes that although the powers have been useful, their utility is limited. More importantly, the Government believes that the powers are fundamentally objectionable in so far as they may be used to exclude British citizens by executive order from part of the national territory. In recognition of this, the powers have been used very sparingly in recent years.
>
> 5.6 Wherever possible the police and the Security Service will keep a suspected terrorist under surveillance and investigate his activities and connections. Where appropriate, he will be charged with a specific offence. In some cases, however, consideration is given to disrupting his activities by seeking an exclusion order against him. The numbers of orders in force each year reflect an increasingly selective use of this option. In 1982 for example, there were 248 orders in force. By the end of 1990, the number had dropped to 106. By the end of 1996, the number was 24. There were only 12 in force when the Home Secretary decided in October 1997 that they were no longer expedient to prevent acts of terrorism by those excluded and revoked all those which remained.

The Government concluded that the PTA powers to exclude should be repealed and should not be re-enacted. There are therefore no such powers in the *Terrorism Bill*. The Home Secretary will still have powers under the *Immigration Act 1971* to exclude or deport people from the UK on the grounds that their presence here is not conducive to the public good.

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87 ibid. paragraphs 5.5-5.6

Appendix[88]

The current framework of legislation

1.1 The principal legislative measures in the United Kingdom for countering terrorism are contained in the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA), and the Northern Ireland (Emergency Provisions) Act 1996 (EPA), as amended by the Northern Ireland (Emergency Provisions) Act 1998.

The Prevention of Terrorism (Temporary Provisions) Act 1989

1.2 The PTA extends with some important exceptions to the whole of the United Kingdom. (The exceptions are generally provisions which do not extend to Northern Ireland because equivalent or other provision is made for such matters in the EPA.) Part I, comprising sections 1 - 3 and Schedule 1, provides for the proscription of terrorist organisations. Sections 2 and 3 make it an offence to belong to, or solicit support, other than money or property, for a proscribed organisation or to display support for such an organisation in public. Part II, comprising sections 4 - 8 and Schedule 2, enables the Secretary of State to make an order excluding an individual from entering, or remaining in, either Great Britain, Northern Ireland or the whole of the United Kingdom, where it appears to him to be expedient to prevent acts of terrorism. Part III, comprising sections 9 - 13 and Schedule 4, deals with financial assistance for terrorism, including making it an offence to solicit money or property intending that it be used to commit or further acts of terrorism and to solicit, or contribute, money or other property to any proscribed organisation.

1.3 Part IV of the PTA, comprising sections 13A - 16 and Schedule 5, gives the police special powers to stop, search, arrest, and detain those suspected of being involved in the commission, preparation and instigation of acts of terrorism. Part IVA, comprising sections 16A and B, creates offences of possessing articles intended for terrorist purposes, and collecting information likely to be useful to terrorists. Part IVB, consisting of sections 16C and D and Schedule 6A, empowers the police to set up cordons in order to investigate the commission, preparation and instigation of acts of terrorism and to impose parking restrictions to prevent acts of terrorism. Part V of the Act, comprising sections 17 - 19 and Schedule 7, gives the police special powers to investigate terrorist activities, including powers to examine financial and other records held by third parties, and to enter and search property.

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[88] Taken from *Legislation Against Terrorism* CM 4178 Home Office and Northern Ireland Office December 1998 Annex A

1.4 Sections 1 - 8, 10 and 18 apply only in relation to Irish terrorism. The remainder of the PTA applies to Irish and international terrorism.

The Northern Ireland (Emergency Provisions) Act 1996

1.5 Part I of the EPA, consisting of sections 1 - 16, creates the system of Diplock Courts for the trial of certain offences by judges alone. These offences are known as "scheduled offences" and are set out in Schedule 1 to the Act. Part II, comprising sections 17 - 28 gives the police and members of Her Majesty's Forces general powers of stop, search and arrest. Part III and Schedule 2 make provision for the proscription of terrorist organisations in Northern Ireland. Sections 30 and 31 make it an offence to belong to, or display or solicit support, other than money or other property, for a proscribed organisation.

1.6 Part IV, comprising section 36 and Schedule 3, which contained the Secretary of State's powers to detain without trial persons suspected of being terrorists, was repealed by the Northern Ireland (Emergency Provisions) Act 1998, which came into force on 8 April 1998.

1.7 Part V (sections 37 - 44) covers the regulation of private security services. Part VI, consisting of sections 45 - 48, gives those detained under the PTA in Northern Ireland the right to have a friend or relative informed of their detention and to have access to legal advice. Parts VII and VIII contain various miscellaneous provisions. These include a power for the Secretary of State to issue codes of practice in connection with the detention and questioning of persons under the PTA in Northern Ireland. Section 53 makes provision for the silent video-recording of interviews.

1.8 Although the EPA contains a number of provisions which refer to, or amplify, the powers contained in the PTA as they apply in Northern Ireland, the EPA itself extends only to Northern Ireland.

The Northern Ireland (Emergency Provisions) Act 1998

1.9 The Northern Ireland (Emergency Provisions) Act 1998, which came into force on 8 April 1998, extends the life of the EPA 1996 by 2 years. It makes provision for the introduction of audio-recording of police interviews with terrorist suspects, and for a code of practice to be made governing audio-recording. It also makes it possible for more offences to be certified out of the list of scheduled offences, at the Attorney General's discretion, thus allowing them to be tried by jury in the ordinary way. The 1998 Act repealed the power of executive detention (internment) which had been available under previous Northern Ireland (Emergency Provisions) Acts.

1.10 Both the PTA and the EPA define terrorism as the "use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear".

New provisions - the Criminal Justice (Terrorism and Conspiracy) Act 1998

1.11 The Criminal Justice (Terrorism and Conspiracy) Act 1998 was introduced as emergency legislation on 2 September 1998 following the Omagh bomb of 15 August and bombings in Kenya and Tanzania the same month. It received Royal Assent and came into effect on 4 September.

1.12 Sections 1 and 2 of the Act provide, by amendment of the PTA and the EPA respectively, that where an accused is charged with the offence of membership of a proscribed organisation, a statement of opinion from a police officer of or above the rank of Superintendent that the accused is or was a member of a specified organisation (that is, a proscribed organisation which is not maintaining a complete and unequivocal ceasefire) shall be admissible as evidence. They also provide that where the question of whether the accused belonged to a specified organisation is being considered, certain inferences may be drawn from the accused's failure to mention, when being questioned or charged, any material fact which he could reasonably have been expected to mention. These extended inferences can only be drawn where the accused was permitted to consult a solicitor before being questioned.

1.13 The Act specifically provides that an accused cannot be committed for trial or be found to have a case to answer or be convicted on the basis of inferences allowed by the Act alone, or the statement of a police officer alone.

1.14 Section 3 amends the Prevention of Terrorism (Temporary Provisions) Act 1989 so as to enable the arrest and detention under that Act of persons suspected of certain offences in Northern Ireland relating to proscribed organisations. It brings the law on such arrests and detentions in Great Britain and Northern Ireland into line.

1.15 Section 4 confers power on the courts to order the forfeiture of property of a person convicted of the offence of membership of a proscribed organisation which is also a specified organisation. The property in question must have been in the possession or control of the convicted person and been used in relation to the activities of the specified organisation, or the court must believe it may be so used unless forfeited. This section also provides that, before making a forfeiture order, the court must give an opportunity to be heard to anyone other than the convicted person who claims to have an interest in the property that is liable to be forfeited.

1.16 The above provisions, since they form part of, or are closely aligned with, the PTA or EPA, are subject to annual renewal in the same way as those Acts. In addition, the Secretary of State is required by the legislation to submit to Parliament at least once every year a report on the working of the whole of the Act.

Conspiracy

1.17 Sections 5 - 7 make it an offence to conspire in the UK to commit an offence abroad. The Act provides that the substantive act must constitute an offence both under the law of the UK and under the law of the country in which it is or was to be committed. The consent of the Attorney General will generally be required for proceedings under this part of the Act to be instituted.