

**REPORT ON PROPOSED MEASURES
FOR INCLUSION IN A
COUNTER TERRORISM BILL**

BY

LORD CARLILE OF BERRIEW Q.C.

INDEPENDENT REVIEWER OF TERRORISM LEGISLATION



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Presented to Parliament
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By Command of Her Majesty

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1. On the 25th July 2007 the Government published two consultation papers concerning changes in counter terrorism legislation. The first, *Possible Measures for Inclusion in a Future Counter Terrorism Bill*, dealt with a range of proposals, all discussed separately below. The second, *Options for Pre-Charge Detention in Terrorist Cases*, dealt with the especially sensitive subject of the period of detention of suspects in police custody between arrest and charge or release. The second paper has provoked the majority of discussion and debate since publication, and is discussed from paragraph 41 below.
2. I am in frequent contact with officials and Ministers concerning counter terrorism legislation, and at an official level was kept aware of deliberations about new legislation prior to the publication of the consultation papers. Equally, I am open to and receive representations from individuals and organizations (including some political parties) concerning the legislation, and have a substantial correspondence in that context. I am grateful to all who take the trouble to discuss these difficult issues with me.
3. In the interval between the consultation papers and the writing of this report, I have given evidence to the Select Committee on Home Affairs of the House of Commons. I have also contributed to the deliberations of the Privy Council Committee on intercept evidence, chaired by The Rt. Hon Sir John Chilcott KCB.

Legislative Changes

An Additional Suggestion: Cross-Border Jurisdiction

4. I start my review with a proposal that was not included in the consultation papers, but in my view of great importance. It arises from bombing incidents that occurred in London and at Glasgow Airport during the last weekend of June 2007. The incidents remain *sub judice* until a trial or trials take place in the coming months; what follows is material which is in the public domain.
5. A car bomb containing 60 litres of petrol, gas cylinders and nails was found in Haymarket, London. Another car bomb was found nearby. Had either or both of these detonated, it is said that carnage would have occurred at a busy night club nearby. Night clubs have long been recognised by police and security services as a target of violent Jihadists.
6. Within a few hours a Jeep Cherokee vehicle bomb, similarly armed, crashed through the pedestrian doors of the terminal building at Glasgow Airport. It burst into flames. Two men were detained at the airport. One of them, Dr Kafeel Ahmed (an aeronautical engineer with a doctorate in technology) died over a month later, without regaining consciousness, after suffering severe burns.
7. A feature of what followed the events described is that cross-border jurisdictional issues became apparent and caused some difficulties to the police and prosecution authorities. I am aware that there is continuing work at Attorney General/Lord Advocate level, and between officials, to find a permanent solution to these difficulties. The criminal law of England and Wales is substantially different from that of Scotland. A small example of the divergences is that the two countries have different Cautions, the Scots version not including the “adverse inference” warning required in the rest of Great Britain. Other problems include: arrests for offences suspected to have been committed on both sides of

the border; the location of questioning in relations to such offences (e.g. whether it should occur at Paddington Green or Govan); detention supervision and periods; and the role of the prosecution services. In terrorism cases it seems to me essential that the two systems should be wholly compatible, so that structured and strategic decisions can be made as to the location where inquiries should be held and from where they should be run.

8. It should be borne in mind that there are jurisdictional differences not only between Scotland and England and Wales, but also between those two jurisdictions and Northern Ireland. These too should be resolved for terrorism cases in forthcoming legislation.
9. It is not my role to suggest the interstices of any proposed legislative changes to meet the problems described in this section: these are for the extraordinary skills of Parliamentary Counsel on instruction by Ministers. The clear purpose must be to enable terrorism cases to be investigated, prosecuted and tried without cross-border jurisdictional difficulties.

Disclosure in relation to suspected terrorist financing

10. This is dealt with at paragraphs 21-22 of the first consultation paper. I agree with the proposal that trustees and others involved in the voluntary sector, for example in charities, should be subject to the same duties of disclosure as those in employment. This is consistent with the approach of the Charity Commission's current advice in connection with unpaid workers. It is a minor change, but one of potential importance given the risk that the charitable sector could be used as a vehicle for terrorism financing.

Measures in relation to DNA of terrorism suspects

11. This is dealt with at paragraphs 23-28 of the first consultation paper. The proposal deals only with the retention of material. The acquisition of DNA samples is already provided for by existing legislation; as a discussion of the merits or otherwise of these general

provisions is not within my remit; I merely observe that there is no proposal to extend the power of any agency to collect material in terrorism cases.

12. The purpose of the proposal is to enable the standalone *Counter Terrorism DNA Database* to function in a way more fit for purpose; and to place it on a solid legislative basis with appropriate scrutiny.
13. In my view this is an appropriate amendment to the law.

Data-sharing powers for the intelligence agencies

14. I have long been concerned that the various agencies and control authorities should be able to share knowledge needed to ensure effective counter-terrorism activity. The foundation of the proposal in paragraphs 29-31 of the first consultation paper is the provision of similar data sharing powers to those provided for the Serious Organised Crime Agency under the *Serious Organised Crime and Police Act* 2005.
15. Particularly at ports of entry, I have seen some inconsistent practices in information sharing – and occasional anomalies which plainly could inhibit effective policing of terrorism. This is unacceptable.
16. Such provisions would remove the barriers to the agencies cooperatively disclosing information that is necessary for the proper discharge of their functions. Oversight of the functions of the agencies concerned is already provided in existing legislation.
17. In my view these proposed changes are appropriate.

Collection of information likely to be of use to terrorists

18. I have reported previously that *Terrorism Act* 2000 section 103 (applicable to Northern Ireland only and repealed on the 31st July 2007) was a prudent provision criminalising the collection or recording of information likely to be of use to terrorists (covered too by

section 58). The proposed legislation will also prohibit the publishing and communicating of, or attempting to elicit, information which might allow the potential targeting of a specified person.

19. The proposal in paragraphs 32-33 of the first consultation paper is to extend section 58 so that it covers key personnel. The protection of important counter terrorism officers and others is a legitimate and important purpose. I support this proposed change.

Post-Charge Questioning

20. This proposal is summarised at paragraphs 34-37 of the first consultation paper. In terrorism cases it is rarely wise or even possible for the police to allow a conspiracy to ‘run, and then arrest at a late stage. The danger of terrorism is so unpredictable, and the potential threat so awful, that early arrest is generally regarded as safe and in the public interest. This can mean that the gathering of a substantial proportion of the evidence of guilty participation must take place after arrest. This can take months, for well-known reasons I need not rehearse here.
21. Currently suspects cannot be questioned after charge, save in very restricted circumstances. It is done very rarely. The proposal that it should be permitted in terrorism cases has won widespread support, not least because it would mean a reduction in the use of the existing, controversial powers to detain without charge for extended periods. These powers I and others have reluctantly supported in the absence of any practical or realistic alternative.
22. Whilst it is my view that it is sensible that provision should be made for suspects to be questioned further after charge in terrorism cases, it is right that I should utter a word of caution. Historically, the prohibition on post-charge questioning has existed to protect the rights of accused persons, by forcing the police to charge only where there is sufficient evidence to justify doing so, and in a timely fashion. If they are unable to do this then the

suspect must be released. An unfettered ability to question after charge might give rise to at least two possible situations, each of which is wholly foreseeable and, equally, each of which is wholly unacceptable. First, a suspect could be charged with a minor offence (such as criminal damage). He or she could then be held pending trial, with virtually no judicial scrutiny or protection, whilst the police investigated the offences in which they were really interested, with the intention of adding more serious charges at a later stage. Alternatively, a suspect could be charged with a serious offence for which the police had strong suspicion but scant evidence, hoping that the pre-trial period would permit them to discover the evidence to justify the charge. As ever, I am concerned that the effort to protect the right to safety of the law-abiding public should not remove provisions designed to protect a wrongly-accused individual. I wish to make it plain that the ability to question after charge is not of itself a panacea for the ills of extended periods of pre-charge detention. However, with proper safeguards in place, it may be a practical and effective way of balancing the two competing principles referred to above.

23. For these reasons, this innovation would require careful amendment to the current *Police and Criminal Evidence Act 1984 Codes of Practice*, or an additional and specific Code. It would be necessary to provide clarity for the particular threshold for such questioning, limitations on its extent, and other provisions to ensure protection of the suspect from arbitrariness. The Government should consider judicial supervision of the exercise of the power, perhaps making provision for judicial examination at an early stage of the evidence said to be sufficient to justify charge. However, judicial supervision should not extend to judicial presence at the questioning itself.
24. My early reaction to this proposal included misgivings about the availability in court of an adverse inference against a defendant in the event of a failure to answer questions asked in post-charge police interviews. I have some doubts, founded on experience of court cases,

of the efficacy of the adverse inference provisions. On reflection I have concluded that where post-charge questioning takes place on matters to which a defendant, properly advised by lawyers, could reasonably be expected to reply, an adverse inference should be available where there is a refusal. However, the new or amended Code must include protection against repetitive or oppressive questioning.

Enhanced sentences

25. This proposal is described in paragraphs 38-41 of the first consultation paper, and was recommended by me in a report published on the 15th March 2007.
26. One of my responsibilities as independent reviewer is to review all the control order cases in which orders have been issued under the *Prevention of Terrorism Act 2005*. In that context I have concluded that there may be some cases in which lower level crimes than provable terrorism conspiracies and attempts can be proved beyond reasonable doubt, and proved to have been committed in a terrorism context. Hypothetical examples could include telephone card and credit card fraud, committed in general terms for the benefit of violent Jihad but without any specific terrorism incidents or purposes in mind; criminal damage committed with a terrorist motive at otherwise legitimate public protests (such as at anti-airport expansion demonstrations by someone taking photographs within the airport security perimeter); and forgery of documents. Other examples could be given.
27. The suggestion is that judges should be able to pass sentences enhanced to take into account the terrorism connection or purpose, after conviction of the primary criminal offence and subject to the criminal standard of proof. I have considered carefully the role of a jury in this process. It is my certain view that it is preferable that decisions as to facts which are capable of constituting a seriously aggravating feature of the offence are customarily best made by juries. Examples which come to mind are racially aggravated

crimes, or the carrying of a firearm during a robbery (which is always charged as a separate offence so that the judge only sentences on the basis of the facts found by the jury). However, after anxious thought I have concluded that for terrorism offences only, the better system is that of so-called *Newton* Hearings. In these hearings a judge sitting alone hears evidence where there is a disputed basis for sentence after a plea of guilty. An important reason for my view is that in the cases under discussion is that in these cases evidence will have national security implications such that it cannot be placed before a jury. It may require the use of special advocates. The protection for the defendant would be that a reasoned judgment is required (unlike the verdict of a jury, which permits of no oral or written reasons) and that an automatic right of appeal would be provided, for both sides.

28. In my view this type of procedure is entirely compatible with the *European Convention on Human Rights*. Judicial fact finding is the norm in many European jurisdictions.
29. I do not think that the proposed provisions would be used often. However, in addition to other cases, their availability might occasionally allow the proposed subject of a control order to be prosecuted for a lower level offence but sentenced within a terrorism context if proved to the criminal standard. Prosecution for an offence is always preferable to the making of a control order and would be widely welcomed.
30. The knowledge that relatively low level crime could be subject to enhanced sentencing could prove to be one of the relatively rare areas in which deterrence may be effective.
31. I remain in favour of an enhanced sentencing provision.

Terrorist notification requirement

32. This proposal is covered in paragraphs 42-48 of the first consultation paper.
33. It would require persons convicted of terrorism to provide notification of their circumstances and any changes in them. The analogy is with the requirements placed on those convicted of sexual offences.
34. The proposed provisions would not affect the capacity of individuals to live their everyday lives. The information required would act as a deterrent against further terrorist activity by those concerned, who are likely to have potentially dangerous contacts. Breach of the requirements would be an indicator of possible renewed activity.
35. Given the seriousness of terrorism offences, I consider this proposal appropriate and proportionate.

Terrorist travel overseas

36. These proposals are contained in paragraphs 49-53 of the first consultation paper. They are intended to supplement *Terrorism Act* 2000 Schedule 7 paragraph 11(2), which allows short-term detention at ports in limited circumstances.
37. The temporary seizure of travel documents for sufficient time for investigations to continue would assist in the prevention of travel abroad for terrorism purposes. However, in my view it would be essential to set quite a high evidential hurdle to avoid the power being used in response to what can be sometimes unobvious 'profiling'. The removal of travel documents undoubtedly is a significant invasion of personal liberty, and should never be done without a real basis of evidence and within a clear Code of Practice.
38. The imposition of foreign travel banning orders on convicted terrorists seems to me an entirely proportionate proposal, in the public interest. However, I have real concerns about

the suggestion that *suspected* terrorists should be subject to such orders – of course unless they have been charged, when their travel will be supervised by the courts under the bail provisions. It is common for bail orders in various types of case to include a requirement that travel documents be surrendered.

Forfeiture of terrorist assets

39. At paragraphs 54-56 of the first consultation paper it is suggested that the powers under *Terrorism Act 2000 section 23* be extended to make forfeiture orders possible against anyone convicted of a serious terrorism offence, not merely those convicted of a terrorism finance offence. This would include the possibility of forfeiture of assets used in connection with terrorism, such as houses and flats.
40. Subject to the proper consideration of the interests of others who may have interests in such property, the proposed changes are appropriate.

Pre-charge detention

41. This issue has been debated more than any other legal procedural issue in recent years. The Government's second consultation paper is a helpful contribution to that debate, in that it argues for an extension of the current limit of 28 day's detention and offers four alternatives.
42. I hesitate to repeat the skeleton of the debate. The current limit for detention after arrest but before charge is 28 days. This is already an exceptional provision for terrorism cases. The 28 day limit has not been reached absolutely so far: 6 suspects have been held for more than 27 days, but less than 28. Of these, three have been charged and three released without charge. There has been no case so far in which it has been shown clearly that more than 28 days' detention would have been likely to result in charges which in fact were not made, although there remain many terrorist cases which are yet to be tried.

43. The other side of the argument is compelling too. I share the view of the police that there may well arise in the future a very small number of extremely important cases in which 28 days would prove insufficient. The reasons for this are recited frequently – including the difficulties of bringing together secured computer evidence, forensic science delays, language problems, and the difficulties caused if a large group of suspects are held together. An additional problem may arise if a suspect is injured at the time of arrest, and is unfit for interview until recovery several days, weeks or months later. The circumstances of Dr Kafeel Ahmed (see paragraph 6 above) provide an all too real illustration of what can occur. Is it reasonable that there should be no opportunity to interview a suspect who for a substantial part of the 28 day period is unfit to be interviewed, but then becomes fit? Dr Ahmed was not formally arrested, but in law might have been found to be under arrest whilst in hospital had the point ever been litigated in the courts – given that any attempt to remove him by his family would certainly have been prevented.
44. It should be remembered that the current 28 day limit is not solely at the discretion of the police. On the contrary, it is assiduously supervised within the legislation by specialist District Judges, that is to say professional Magistrates' Courts judges. If there were to be an extension beyond 28 days, in my view it should be supervised by Senior Circuit Judges specialising in crime – such as the judges at the Central Criminal Court (The Old Bailey). I would expect their remit to be wider than those of the current District Judges. A system of law could be devised in which they scrutinised and supervised detentions, on a fully informed evidence basis, from an early stage. They should have the power to ask questions, to receive written representations, and oral representations at their discretion. Clear rules could be prepared to ensure that their powers and discretion were clear. Their sole aim would be to ensure that the interests of justice were served. They would be

required to act on the basis that pre-charge detention can only be justified by necessity in the interests of justice.

45. I believe that an enhanced system of scrutiny as outlined above would ensure fairness, and would be likely to reduce the period of detention of some suspects compared with the present position.
46. As to the maximum number of days, there is no logical answer. Nobody can say that 30, 42, 56, or 90 days is a more appropriate maximum than any other arbitrary number. The protection to be provided by the judges is far more real than any maximum number of days. However, I recognise that political reality will lead to a maximum being specified, if the current maximum is increased. As that is a political decision, I do not feel that I should express a numerical preference.
47. In their second Consultation paper at pages 10-11 the Government set out four options. In general the first option concurs with my views, save that I consider that the judicial supervision should be at the senior non-appellate level rather than by High Court judges. Senior Circuit judges may well possess more relevant experience for the role; and there is greater pressure and less flexibility in terms of availability of High Court judges. The additional elements of Option 1, including review and Parliamentary reporting and debate, are purposeful and potentially informative.
48. Options 2 and 3 appear to me to be unfit for the intended purpose. Option 2 envisages a debate in Parliament before extended detention powers could be used. This might involve the recall of Parliament during a recess to deal with a single case which in itself was not the cause of a national emergency. This could prove extremely impractical. Further, the potential unfairness to the uncharged suspect of a Parliamentary debate on his/her case is self-evident.

49. Option 3 involves the concept of emergencies. In this country we are unused to the declaration of states of emergency used elsewhere, in which extensive executive powers are handed to government. The Option has been thought out poorly and is in my view wholly unrealistic and undesirable.
50. Option 4 involves the introduction of a judge as an investigating magistrate, along the lines of the French and Spanish systems. I have examined those systems, which certainly have considerable merit but equally notable deficiencies. Many suspects spend far longer in custody, before release without trial, than would be permitted in this jurisdiction. There would have to be very wide changes to the system of investigation and prosecution if this system was introduced, including a considerable reduction in the role of cross-examination – seen by jurists elsewhere in Europe as a strength of the Common Law system. A developed version of Option 1 would provide sufficient judicial scrutiny combined with the best elements of our existing system, and would in my view be fuller and fairer than Option 4.
51. There has been some criticism of the proposals to extend the 28 day limit as being the introduction of ‘internment’. I regret the use of this language. Genuine differences of opinion exist about the best way to balance the broad interest of the public in national security, and the individual interest of the suspected individual, who may be innocent. To describe one part of this argument as being in favour of internment diminishes a serious discussion. Anything that could be described accurately as internment is to be avoided at all costs.

Intercept as evidence

52. As mentioned above, I have co-operated with and provided suggestions to Sir John Chilcott's Privy Council Committee.
53. In general terms, I favour providing for the admissibility of intercept evidence. However, this is no 'silver bullet' for terrorism cases. I have no doubt that intercept material, which is already a prime investigative tool in the detection of many serious crimes where the perpetrators may not be security sensitive, could become an effective prosecution tool too. However, trained terrorists tend to be very security aware. I suspect that, if admitted, intercept evidence would be of value only occasionally, albeit in possibly very serious terrorism trials.
54. I have urged upon the Privy Council Committee that, as in other comparable countries, there should be a protection for material the admission of which could damage national security. The defence should not be deprived of intercept evidence or a sufficient summary if it fulfils the normal disclosure test of materially undermining the prosecution case or materially assisting the defence. The prosecution should never be compelled to use it unless it is exculpatory. These principles mean that a specific and clear set of rules of court and procedure should be created to control and ensure fair and proper disclosure and use of such material. This presents the Committee with a difficult task, and the development of any changes to actual use may take some time.

Additional measures for the control orders system

55. I support the conclusion of paragraph 57 of the first consultation paper that a self-standing system of powers of entry, search and seizure should be attached to the system for the enforcement of control orders. The enforcement of the system is difficult, and the existing

powers are not entirely adequate where there is not suspicion of a breach of the control order conditions, but there is a suspicion of other terrorism activities.

56. There are three significant gaps in the ability of the police to enter and search the property of an individual subject to a control order for the purposes of monitoring compliance and enforcing the order.
57. Firstly, when an individual has absconded, police powers of entry and search are restricted by the requirement under the Police and Criminal Evidence Act 1984 [PACE] for *'reasonable grounds for suspecting there is [relevant evidence] on the premises'*. In the case of an abscond, the police may lack such reasonable grounds (they may wish to search for such items as ticket stubs, for instance) but have no grounds for suspecting such evidence is on the premises. To address this gap, and given the potential danger posed by some individuals, it would be reasonable to provide the police with powers to enter and search premises, where there is reasonable suspicion that the individual has absconded.
58. Secondly, there are situations where the controlled person is obliged to be at his residence by virtue of a curfew yet when the police try to gain access to the residence the door is not answered or somebody tells them that the controlled person is not present. At present PACE powers would only allow police access if they reasonably suspected that the controlled person was in fact on the premises. In practice, it may be very difficult for the police to have the requisite suspicion and therefore they could not enter and search the residence in order to ensure compliance with obligations under the control order. To address this gap it would be reasonable to provide the police with powers to enter and search the premises when they have reasonable suspicion that the individual is not granting entry to the premises required under the order at a time when the individual is obliged to be at the premises.

59. Thirdly, at times when an individual is not subject to a curfew, he is in the position to dictate the timings of any police searches by seemingly remaining outside of the residence and not contactable by the police. The ability to make unannounced visits is vital to maintaining the integrity of the control order system. This is a real and practical problem. It is proposed to provide the police with the power to apply to a magistrate for a warrant to enter and search premises. The magistrate should only grant the application if satisfied that it is *necessary* for the purposes of monitoring or ensuring compliance with the control order.
60. Such warrants would be granted only where the police have previously attempted to conduct unannounced visits which have failed due to the apparent absence of the individual.

Power to remove a vehicle and power to examine documents

61. Such powers, referred to at paragraphs 59-64 of the first consultation paper, existed in Northern Ireland under *Terrorism Act 2000* Part VII. My findings over the past 6 years have supported the conclusion that the powers were useful and well administered and supervised in Northern Ireland. Part VII has been repealed as part of the normalisation process there. The proposal has been made that the provisions should be revived, but for the whole of the United Kingdom.
62. These powers were indeed useful in the particular circumstances of Northern Ireland. They enabled officers carrying *out a lawful* search of a vehicle to remove it elsewhere for a specialist search by forensic science staff and vehicle specialists. They enabled officers to take documents found in vehicles (e.g. hidden in the bodywork) and examine them in a laboratory or similar setting.
63. Powers to take the actions described above do not presently exist, save where there is a reasonable belief that the item concerned has been obtained in connection with the

commission of an offence or is evidence of an offence. Given the sophistication of terrorist planning, and the success of the powers under Part VII, their addition for the purposes of terrorism investigations is in my opinion proportionate and reasonable.

Definition of terrorism

64. As stated in paragraph 66 of the first consultation paper, I favour the inclusion in the definition of terrorism of actions amounting to terrorism and motivated by a racial or ethnic cause. This change would clarify the existing law.
65. I proposed in my report on the definition of terrorism published on the 15th March 2007 that the definition of terrorism should be more narrowly focused to what most citizens would regard as terrorist purposes. I suggested that actions or threats of actions should be regarded as terrorism only if designed to *intimidate* the government, rather than *influence* the government. I am disappointed that this proposal is not included in the consultation papers.

Increased security at key gas sites

66. I consider that the existing *de facto* arrangements for key gas supply sites should be placed on a clear legal footing.

Transfer of functions to the Advocate General (Northern Ireland)

67. The changes suggested in paragraph 69 of the first consultation paper are necessary technical amendments of the law, required to take into account recent legislative changes in Northern Ireland.

Minor technical amendments to the *Anti Terrorism Crime and Security Act 2001*

68. The amendments proposed in paragraph 70 of the first consultation paper are appropriate, proportional and necessary.

Conclusion

69. The changes proposed by the Government are useful and relatively uncontroversial. apart from the proposals for longer detention between arrest and charge, intercept evidence and enhanced sentences. Of these, very prolonged and heated debate is likely on the detention issue. I hope that I shall be forgiven for taking advantage of my position of independent reviewer, to express the hope that this difficult issue can be decided by Parliament on the merits, rather than merely by party division in the normal political hostilities.

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