

PARLIAMENTARY SUPERVISION OF TERRORISM LEGISLATION.

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Introduction and main recommendations

If the Government is correct and the "war on terrorism" is to extend into the next two or three decades, there needs to be a stable framework which creates the necessary balance between the information needs of those involved in countering terrorism, and the protection of the public who need to be reassured that the proper safeguards are in place. In the current debate about terrorism, consideration of the structure of the current system of safeguards has been largely absent – it is assumed to be satisfactory.

My general conclusion is that the system of safeguards with respect to national security, established in the 1980s with cold-war politics as its focus, needs updating in the light of the new powers being sought to counter the terrorist menace. With this in mind:

- 1) I invite the committee to conclude that the current system for the supervision of national security issues is unfit for the purpose. Parliament needs to strengthen the safeguards in new legislation as the judiciary cannot be expected to perform this task. The role of the various Commissioners supervising the national security agencies needs to be reviewed – their powers of scrutiny need to be strengthened and the Commissioners' resourcing needs should be reassessed. These Commissioners should be independent of Government, their numbers could be reduced and their functions combined. The Commissioners could report to a revamped Intelligence and Security Committee, and Parliament should consider whether the Intelligence and Security Committee and the Commissioners should become more independent of the Prime Ministerial influence.**

- 2) I invite the Committee to conclude that it should have access to the content of the Government's legal advice pertaining to the all aspects of the Bill.**

- 3) I invite the Committee to conclude that when an amendment is tabled by parliamentarians to this Bill that parliamentarians should have access to all the**

information the Government has prepared in relation to the impact of (or deficiencies in) that amendment

Perhaps, if the recommendations identified above are implemented, then this would alleviate many of the concerns that the public might harbour in relation to the Government's proposed legislation.

SUBSTANTIATION OF THE RECOMMENDATIONS

The first ten items in the following list relate to **Recommendation 1**, the last one to **Recommendations 2 and 3**:

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1) The Courts already defer to the Home Secretary on national security issues

The starting position is that the Courts usually defer to Minister's judgement on national security issues. This deference will have broad application as "terrorism" possesses a broad definition in the Terrorism Act 2000.

Examples of expression of deference by the Courts are not difficult to find:

- “The judicial arm of government should respect the decisions of ministers” (on national security issues) (*House of Lords Appeal in “Home Department v Rehman, 2002”*);)
- “Decisions as to what is required in the interest of national security are self evidently within the category of decisions in relation to which the court is required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for” (*para 40, Court of Appeal in the case of “A, X and Y and Others v. Home Secretary”, 2002*)

2) Even when the Courts clash with the Home Secretary, it is with reluctance

The starting position of judicial deference is also self evident from comments in the House of Lords judgement last December 16th (2004) which declared that section 23 of the Anti-Terrorism, Crime and Disorder Act was incompatible with Articles 5 and 14 of the Human Rights Act. Before arriving at its conclusion (8-1 rejection of the Government's argument that the Act was compatible with the Human Rights Act), the judgement states:

- “All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility” (para 79)
- “The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded the legislature” (para 81)
- "The margin of the discretionary judgment (on national security issues) that the courts will accord to the executive and to Parliament where this right is in issue is narrower than will be appropriate in other contexts" (para 108).

The point being made here is not that deference is good or bad. It is merely to suggest that if judicial supervision of the Home Secretary's actions is proffered as a safeguard, then judicial deference to the Home Secretary serves to weaken that supervision. It follows that any safeguard based on judicial supervision is also diminished.

3) The Courts are unlikely to challenge Article 8 interference

An important consideration which follows from the House of Lords judgment is that Article 5 (*right to liberty and security*) and Article 14 (*prohibition of discrimination*) are absolute rights; for example, there is no provision in Article 14 that permits discrimination on the grounds of race – even for national security purposes. However, Article 8 (*interference with private and family life*) does not grant an absolute right; it provides a qualified right which permits interference on national security grounds if such interference is proportionate and necessary to protect society from terrorist and criminal acts.

Thus if the Courts usually defer to Ministerial judgements in cases where national security is an issue and when absolute rights are a consideration, it is reasonable to assume that in terms of Article 8 where interference is legitimate that it will become even harder for the Courts to do anything else but defer.

This is relevant in relation to the Joint Committee on Human Rights (JCHR's) consideration of the ID Card Bill (the version of the Bill which fell before the General Election). The Home Secretary wrote to the JCHR stating that "We will be under a duty, under section 6 of the Human Rights Act, to act compatibly in making the subordinate legislation and if we did not do so the courts will have the power to strike it down". (Appendix 1, 8th Report).

This reassurance will count for little if the above reasoning is correct: it is likely that the Courts will defer in the face of any interference with private and family life based on grounds of national security.

4) Both main Parties are considering removing judicial discretion in national security cases

Following July 7, the Prime Minister remarked that "the rules of the game are changing" and subsequent press reports suggest that Ministers believe that even the limited discretion of the Courts to set aside Ministerial judgements on grounds of national security should be fettered.

Lord Falconer said on the BBC Radio 4 Today's programme: "I want a law which says the home secretary, supervised by the courts, has got to balance the rights of the individual deportee against the risk to national security. That may involve an act which says this is the correct interpretation of the European [human rights] convention" (i.e. the Court is mandated to accept a particular interpretation) (BBC news web-site Friday, 12 August 2005).

Writing in "The Daily Telegraph", Michael Howard said: "Parliament must be supreme. Aggressive judicial activism will not only undermine the public's confidence in the impartiality of our judiciary. It could also put our security at risk - and with it the freedoms the judges seek to defend. That would be a price we cannot be expected to pay." . In the article, Mr Howard cites the House of Lords' ruling that it was illegal to detain foreign terror suspects in Belmarsh Prison as an example of judicial interference. He complains in particular about Lord Hoffman's comment in the Belmarsh judgement that "the real threat to the life of the nation... comes not from terrorism but from laws such as these." (BBC news web-site, Wednesday, 10 August 2005).

In the House of Lords Decision last December – the 8-1 defeat ([2004]HL 56), the Attorney General is reported to have argued that:

“The judgement on this question (on national security issues) was pre-eminently one within the discretionary area of judgement reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament” (para 25)

The above quotes serve merely to show that the fettering of judicial discretion is on the current political landscape. This is further evidence that a system built on a foundation of judicial safeguards, which can be changed, cannot form the central part of a stable structure. Judicial decisions which any future Government decides are anathema can be expected to be overturned.

This raises an important question: If the Courts are unlikely to form the main pillars of a stable system of checks and balances, what should Parliament do to establish effective scrutiny arrangements?

5) Scrutiny by Parliament of national security issues is currently limited

Although the Attorney General has referred to the scrutiny role of Parliament (see two paragraphs above) and Mr. Howard wants Parliament to be "supreme", it is clear that Parliament's scrutiny role is limited. For instance:

- Terrorism legislation is usually enacted speedily in response to events (Prevention of Terrorism Acts, Anti Terrorism, Crime and Security Act) and often with a guillotine motion. If there is any contentious issue, this is normally contested in the Lords and not the Commons.
- Parliament will naturally give Ministers a very large latitude of discretion – after all Ministers are responding to urgent events.
- There is a trend to use wide ranging statutory instruments in relation to these national security/terrorism issues (e.g. in the ID Card Bill or the proposed Draft Terrorism Bill). These Statutory Instruments (SIs) are not subject to detailed Parliamentary scrutiny and the JCHR has already remarked that the use of SIs makes their scrutiny role impossible. In its 12th Report it stated "1.4 We repeat, once again, our oft-repeated observation that such bald assertions of compatibility do not assist the Committee in the performance of its function of scrutinising Bills for human rights compatibility. This is the fifth Government Bill within a very short period of time containing information sharing provisions the Convention compatibility of which has been asserted but not explained in the Explanatory Notes. In respect of each we have commented that this is not satisfactory, but there has been no change in the Government's practice. This presents a very real obstacle to our scrutiny work". (As remarked above, I think that SIs which fall within the remit of Article 8 are very unlikely to be struck out by the Courts).
- Comments about the inability of Parliament to scrutinise Article 8 issues are not limited to the JCHR. For example, at the end of the last session of Parliament, the Science and Technology

Committee looked at the use of the DNA database by the police. It concluded that "We are concerned that the introduction of familial searching has occurred in the absence of any Parliamentary debate about the merits of the approach and its ethical implications". (Paragraph 84 of Forensic Science On Trial).

- There is a trend for Governments to internationalise the response to terrorism. For instance, in relation to the ID Card Bill, the Government claim that there are international obligations in relation to biometric passports which arise from UK membership of the International Civil Aviation Organization (ICAO). In relation to the retention of communications data, the Government are putting great emphasis on pushing through a measure at the Council of Ministers – even though they have powers in the Anti-Terrorism Crime and Security Act 2001 to achieve that aim. The presentation of a national security issue to Parliament as an international treaty obligation obviously minimises the degree to which Parliament can scrutinise or change a measure.
- There is the Intelligence and Security Committee (ISC) but it has limited powers (although it is always pressing at the boundaries). The Committee is usually limited to the examination of the expenditure, administration and policy of the three National Security Agencies (MI5, MI6 and GCHQ). Its membership is vetted and is appointed by the Prime Minister and not by Parliament.
- The Prime Minister has the ability to censor reports to Parliament made by the Commissioners with national security oversight and from the ISC in relation to national security issues (and a similar censoring happens with the Commissioner in relation to ID Cards, and the Regulation of Investigatory Powers Act).
- By convention Parliamentary Questions about national security are usually not answered.

The conclusion reached is that Parliament needs to establish more effective supervision of the legislation which it has enacted in the field of national security by some post-enactment mechanism. It follows that the Committees and Commissioners with oversight responsibilities have an important role.

For instance, could Parliamentary scrutiny be improved by strengthening the powers of the ISC? Could the various Commissioners who supervise national security matters report to the ISC? Could the ISC, following advice, choose what to publish in any report? Should there be a special national security mechanism whereby Parliament could require Government to propose legislative changes to strengthen the protection afforded to the public?

However, such changes should not be undertaken without first looking at the current role of the various Commissioners who supervise national security matters.

6) There are too many Commissioners in the national security protection business

The first conclusion is that there is a mish-mash of oversight arrangements. Oversight of the Intelligence Services (except interception practices) is carried out by the Intelligence Services Commissioner. Oversight of interception is carried out by the Interception of Communications Commissioner. The Office of Surveillance Commissioners is responsible for oversight of property interference under Part III of the Police Act, as well as surveillance and the use of Covert Human Intelligence Sources by all organisations bound by the Regulation of Investigatory Powers Act (RIPA) (except the Intelligence Services). To this has to be added, the Information Commissioner, the proposed National Identity Scheme Commissioner, the Commissioners who deal with Northern Ireland policing/terrorism and the Police Complaints mechanisms. The Parliamentary Ombudsman could also be drawn into the supervision business.

Whilst Government is increasingly becoming joined-up in relation to terrorism and policing, the counter-balancing safeguards represented by these Commissioners appear to be increasingly disjointed. The policy currently seems to be – "if we have a problem, let's have a Commissioner to deal with it". The result is that the role of the Commissioners appears to overlap considerably and is dependent on the techniques or technology used to monitor an individual. It is difficult to see the logic behind this – for instance, if there is personal data processed as a result of covert surveillance and telephone tapping, why should three Commissioners be potentially involved?

The Cabinet Office web-site has a helpful 16 page guide to the system of oversight (<http://www.cabinetoffice.gov.uk/publications/reports/intelligence/intel.pdf>), but one wonders whether the fact that a 16 page guide is necessary merely serves to illustrate the diversity of bodies involved in the oversight business.

It is also very difficult to get details of how the Commissioners are resourced (and the Interception of Communications Commissioner does not appear to have a web-site). However, in one answer to a PQ (18 Mar 2004: Column 494W) Harry Cohen asked the Secretary of State for the Home Department "what plans he has to increase the resources available to (a) the Surveillance Commissioner, (b) the Information Commissioner and (c) other commissioners involved in supervising the powers and operations of the home security service; and if he will make a statement". [PQ 159419]. The question was tabled after Mr. Blunkett announced 1,500 extra staff for MI5.

Mr. Blunkett, then Home Secretary, answered "There are no plans to increase the resources available to the Chief Surveillance Commissioner, who does not have oversight of the Security Service. Nor are there plans at present to increase the resources available to either the Intelligence Services Commissioner or the Interception of Communications Commissioner for their work relating to the Security Service". He added: "We are increasing the resources available to the Interception Commissioner for his work in overseeing access to communication data by public authorities including the security service".

So is the strategy of having several Commissioners the correct one? Are the Commissioners adequately resourced to provide an effective scrutiny role? Can the role of Commissioners be combined? Should there be explicit arrangements for co-operation between Commissioners? Are the Commissioners equipped to look into operational matters if this proves to be necessary? Such questions have not been addressed in the current debate about terrorism legislation– they should be.

7) The current complaints system does not appear to be credible

Study of the annual reports of the various Commissioners (usually High Court judges) involved with national security matters show that the Commissioners appear to be mainly concerned with structural matters associated with the warrants signed by the relevant Cabinet Minister (e.g. Home Secretary). Additionally, in relation to wider issues such as inspection of public authorities authorised to use powers under RIPA, the Surveillance Commissioner seems to be limited to inspections which focus on non-operational matters.

For example, on his web-site the Commissioner notes that "inspections will vary according to the authority to be visited and will generally take one day to complete. However all inspections include the following:

- interviews with key personnel from a number of departments
- an examination of RIPA applications and authorisations for directed surveillance and Covert Human Information Source
- an examination of the central record of authorisations
- an examination of policy documents
- an evaluation of processes and procedures
- feedback to the Chief Executive (or nominee).

Recent Parliamentary Questions show that there have been around 1,100 complaints about the operations

of GCHQ and the Security and Intelligence Services since 1989 (responses to Parliamentary Questions 13170 and 13171; Harry Cohen MP, July 2005). Not one complaint has been upheld – a statistic which defies credence especially as a sample of over 1,000 is not a small one.

The complainants who use the current system are those people who became aware of the fact they could have been under surveillance. Most people under surveillance are generally unaware of this and therefore cannot be in a position to complain. It follows that the statistics published by the Government and Commissioners cannot provide the true picture as to the effectiveness of the complaints or supervisory system.

Finally, it is very important that the public have assurance that judicial deference on national security matters is not applied by the Commissioners in their oversight work. This raises the question of whether the Commissioners should report to Parliament (e.g. the ISC) about their work – or possibly, a Commissioner should be someone other than a senior judge (e.g. a recently retired senior manager from MI5 who is security cleared and knows the system and who can explore operational matters).

Distance from the Prime Ministerial influence is an important component. Appointments for Commissioners could follow the model in the USA: for instance, an individual could be proposed by the Prime Minister and approved by Parliament (or the ISC). Similarly publications and Annual Reports could be from the ISC to Parliament following consultation with the Prime Minister.

8) There is a conflict of interest surrounding national security/policing issues

There is an inherent conflict of interest possessed by all Ministers, in particular the Home Secretary, when devising legislation which affects human rights issues. For example, the Home Secretary is also politically responsible for the public bodies (e.g. police, Security Service) which want to interfere with private life. Consequently, it is difficult to avoid the conclusion that there appears to be an in-built bias, in any Home Office legislation, in favour of interference.

Parliament needs to consider how this conflict of interest can be addressed. The Lindop Report (Cmnd 7341, 1979) solved this dilemma by proposing a statutory code of practice produced by a Data Protection Authority, and a person within the Authority who was cleared to deal with security issues. Lindop stated that this would help to ensure that Security Service would be "open to the healthy - and often constructive - criticism and debate which assures for many other public servants that they will not stray beyond their allotted functions" (paras 23.21-23.24).

9) There is uncertainty in the borders between policing and national security

According to the Security Service Act 1989: "It shall also be the function of the Service to act in support of the activities of police forces, the National Criminal Intelligence Service, the National Crime Squad and other law enforcement agencies in the prevention and detection of serious crime".

So if personal data are held by the Security Service in relation to supporting the serious crime purpose – are these data subject to section 28 of the Data Protection Act (national security) or section 29 (policing)? The difference is profound: the former is exempt from much of the Act and the Information Commissioner's powers; the latter is fully included and subject to the Information Commissioner's powers (although particular exemptions apply on a case-by-case basis).

Ministers have determined that the answer is "national security" and this can be deduced from a number of answers to Parliamentary Questions – most recently on 18 Mar 2004 (Column 494W; Harry Cohen; Question 159419). Mr. Blunkett responded that "The Information Commissioner's remit extends to the Security Service in so far as it is a data controller under the Data Protection Act 1998. Most of the information held by the Service falls under the national security exemption of that Act or the Freedom of Information Act 2000".

The Security Service also has a registration under the Data Protection Act with the Information Commissioner (reference Z8881167). It does not contain a description of any processing performed for the purpose of crime prevention – this contrasts with the various police forces who each carry this purpose in their notifications.

So suppose the police and security services hold the same personal data about a suspect who is wrongly identified as being involved in serious crime. Suppose further the inaccuracy in the personal data is recognised to the satisfaction of the agencies involved. The current arrangement means that the same personal data are subject to different data protection rules in relation to the police and security service. With the former, the Information Commissioner has the ultimate power to order the personal data to be deleted by the police and possesses powers to check whether this has been done. With the national security agencies there is no such obligation to delete and there is no supervision by the Commissioner.

The Government wants data retention on a massive scale (e.g. communications data, ID Card database, DNA profiles) mainly on crime prevention and national security grounds. Much of these retained personal data will relate to those who are not suspect nor have a criminal record. If data protection legislation creates the environment for good practices in relation to the processing of personal data which are acceptable to the policing bodies (even to criminal intelligence held by the police), it is difficult to see

why the national security agencies should be exempt from these obligations. Such obligations to good data protection practice would serve to reassure the public.

10) The recommendations arising access to information

It will be convenient to repeat these:

- a) I invite the Committee to conclude that it should have access to the content of the Government's legal advice pertaining to the all aspects of the Bill.**

- b) I invite the Committee to conclude that when an amendment is tabled by parliamentarians to this Bill that parliamentarians should have access to all the information the Government has prepared in relation to the impact of (or deficiencies in) that amendment**

In relation to recommendation(a) and the forthcoming anti-terrorism legislation, one can expect that it will carry a statement of Human Rights compatibility. However, the last piece of anti-terrorism legislation carried a similar statement which now sits uneasily with a heavy 8-1 defeat in the House of Lords (last December). An 8-1 defeat is not a narrow defeat where opposing propositions are finely balanced – it is a crushing defeat.

As Home Office Ministers assured Parliament that the legislation complied with all Human Rights obligations – it is reasonable to conclude that this an example of where serious misjudgements **have been** made. Parliament, if it adopted my recommendation, would be able to obtain any relevant policy document including any legal advice to find out the detail of Ministerial assertions of human rights compatibility. Of course, this does not mean the legal advice will be automatically published – that should be a decision of the Committee and its assessment of where the public interest lies.

In relation to recommendation(b) any information in relation to the effect of proposed amendments to anti-terrorism legislation tabled for debate should be available to Parliament. The objective is to improve legislative scrutiny. It is also important to note that the information falling within the scope of this request **is limited** and obviously **does not include ALL information provided to a Minister in relation to an amendment.**

However, in the vast majority of cases, the set of limited but disclosable information in relation to an amendment would include:

- any recorded information given to a Minister which describes the impact or practical effects of that amendment.
- any recorded information given to a Minister which describes the technical or drafting deficiencies in that amendment.
- any recorded information, given to a Minister, which could be used in Parliament and which relates to the impact of, or deficiencies in, an amendment (e.g. that information which was provided to Ministers for use in foreseeable debating circumstances and thus possessed the potential to be read into the Parliamentary record even though the foreseeable circumstances did not arise during the debate).
- any recorded information which relates to the location of reference material relevant to the impact of, or deficiencies in, an amendment.
- any recorded information which was provided to Ministers for the purpose of reading into the Parliamentary record, but was not read into the record for whatever reason (e.g. no time; amendment not selected).

The cause of effective scrutiny would be served by this limited disclosure because the provision of the above classes of information relating to any amendment will:

- provide Parliament with a more effective means of scrutinising Government Bills as the information relating to an amendment will be extended well beyond the few sentences Ministers usually make for the record in response to amendments.
- improve the quality of debate on proposals by making available fuller descriptions of any failing in any amendment.
- permit substantive defects with early drafts of amendments to be addressed so that they can, if necessary, be resubmitted at a later Parliamentary stage; this possibility would improve the quality of scrutiny of any substantive issue.

- facilitate access to high quality information produced by civil servants which becomes available to elected representatives and Peers; Parliament would then become less reliant on information of unknown quality provided by ad-hoc pressure groups.
- encourages those with no direct lobbying access to Westminster to engage, via their elected representatives, in detailed consideration of issues associated with any Bill under scrutiny.

Obviously the above assumes that an amendment does not deal with the detail of a particular operational matter which relates to national security or serious crime issues.

In conclusion, I think that access to the information described above (i.e. recommendations (a) and (b)) would serve to improve Parliamentary scrutiny of any Government Bill. I also should add, that I have an FOI request in relation to information which falls within these two recommendations and which relates to the version of the ID Card Bill which fell before the General Election.

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