

The Counter Terrorism Bill 2008

Outline of powers

Part 1 – Powers to gather and share information

- Removal of legally privileged documents in searches conducted under Terrorism Acts (Clauses 1-9¹)
- Retention of DNA fingerprints and other samples (Clauses 10 -18)
- Disclosure of information between police and security services (19 – 21)

Part 2 – Detention and questioning of terror suspects

- Links to Schedule 1 of the Bill which has the ‘reserve power’ to increase pre-charge detention from 28 days to 42 days. Power only to be used if there is a “compelling operational reason” (22)
- Post charge questioning of defendants to be allowed but only on the offence with which they are charged. Adverse inferences can be drawn from silence (23-26)

Part 3 – Prosecution and punishment of offences

- Specified offences committed anywhere in the UK can be tried anywhere in the UK (27)
- Specified offences committed abroad can be tried in the UK only with the permission of the Attorney General (28)

Comment: *Would this stop legal action against war criminals (there is currently a power to charge people with terror offences committed abroad not necessarily against UK interests)*

- Where a person is convicted of an offence not within the terrorism acts but offence has a ‘terrorist connection’ the this must be treated as a aggravating factor on sentencing (29-31)²
- Forfeiture of assets when convicted of terrorist offences if assets used or intended to be used as part of a plot (32-37)

Part 4 – Notification requirements for convicted terror suspects

- Applies to convictions for terrorism act offences or for offences with a ‘terrorist connection’ where individual is sentenced to 12 months or more and related civil orders – i.e. control orders (38 – 43)
- List of information to be given to the police, any change has to be notified, requirement to confirm information on an annual basis. Can be on list for life (44-53)
- Banning foreign travel for convicted persons (54)

Comment: *Can be life long requirement. Will additional conditions be attached in future bills? Applies to all people even those not considered a risk any more.*

Part 5 – Asset freezing proceedings

- New regime for asset freezing proceedings including SIAC style secrecy and special advocates. Currently applies to organisations or individuals on UN terrorism lists.
- Intercept material can be used in asset freezing proceedings

Comment; *This is the thin end of the wedge in the use of secret evidence against which there is no proper defence assisted by a lawyer of the defendant’s choice.*

¹ Clauses become sections when the bill becomes an Act

² ‘Terrorist Connection’ is to be decided by a judge.

Part 6 – Inquests and Inquiries

- **Coroners'** inquests can take place without a jury if the Home Secretary authorises it because it is in the interest of national security or the interest of the relationship between the UK and another country or in the public interest (64)
- Specially appointed coroners if a certificate under clause 64 is in effect. Powers and duties of coroner changed from Coroners Act 1988. Home Secretary can revoke appointment of Coroner in special circumstances.(65)
- Intercept evidence can be given to Coroner in clause 64 circumstances (67)

Comment; *This is a way for the police, security, and armed forces to avoid public scrutiny in cases ranging from deaths in police custody, repeats of the Jean-Charles de Menezes killing, the death of people like Baha Mousa in Iraq, and inquests into the deaths of British Service Personnel*

- Intercept evidence can be given to Inquiry panel and Counsel if an Inquiry is held under Inquiry Act 2005 (66)

Part 7 - Miscellaneous provisions

- Definition of terrorism is amended to include 'racial cause.' (68)

Comment: *This will allow cases normally prosecuted as incitement to racial hatred to be prosecuted as 'terrorist' offences.*

- New offence – Eliciting, publishing or communicating information on armed forces which is likely to be use to terrorists (69)
- Amended offences
 - Failing to disclose information about a suspected terrorist offence; expands definition of employment to include voluntary workers (70)
 - Control orders
 - Powers of entry and search (71)
 - Meaning of involvement in terrorism –related activity (72)
 - Time allowed for representations by controlled persons (73)
 - Applications for anonymity (74)
 - Forfeiture of cash (75-76)
- New Provisions
 - Policing of gas facilities and funding for that (77-82)
 - Special advocates can now be appointed in Northern Ireland (83)

Part 8 – Supplementary provisions

- Terrorism is defined as s.1 TA 00 as amended by clause 68 of this bill
- Terrorist Connection – An offence has a terrorist connection if the offence (a) is, or takes place in the course of an act of terrorism, or (b) is committed for the purposes of terrorism

Detail

Part 1 – Powers to gather and share information (1-21)

- Removal of documents, including legally privileged³ documents, in searches conducted under Terrorism Acts (Clauses 1-9)

Power to remove documents if search is authorised under any of the current terrorism acts.(1) It is also an offence to obstruct a constable in the execution of his duties under clause 1.(2) May not remove a document if the constable reasonably believes that it is legally privileged or has a legally privileged part of it. However, if a document is taken and then found to be legally privileged he must return it as soon as is practicable.(3) A record must be made of the withdrawal.(4) Documents must not be retained for more than 96 hours.(5) Access to documents from person they were taken from or occupier of building where they were taken from authorised by Officer in Charge of the case.(6) Documents seized under (1) may not be photographed or copied unless they are electronic and then only to provide a hard copy of it.(7) Document to returned when time limit expires(8).

- Retention of DNA fingerprints and other samples (Clauses 10 -18)

Allows the taking of fingerprints and other samples including DNA, hair, footprint, nail etc from people subject to a control order. These samples can be taken without consent and reasonable force can used to take them.(10) Applies to Scotland (11) and NI (12). Transitional provision(13)

Retention of all samples (i.e. not just those taken from controlled person) is allowed and can be cross checked against all other police and both security services' records. Adds a power to use these samples in the interests of national security.(14-17)

- Disclosure of information between police and security services (19 – 21)

Any information can be given to, or disclosed by, the security services to carry out their job as set out in law, regardless of any duty to keep the information private or of any other restriction (19) other than information subject to the Data Protection Act or the Regulation of Investigatory powers Act.(20) Security agencies include MI5, MI6 and GCHQ (21)

This is to facilitate the use and expansion of the National DNA Database and other databases. Power to use samples in the interests of national security expands on the usual powers which allow the use of samples in the detection of crime etc. Therefore, they can use/check samples on the database in situations where no crime is being investigated. In addition, samples taken in normal police investigations can be checked by all other police and security agencies. Another step towards the joining up of all information databases.

³ Legal privilege protects confidential communications between the lawyer and their client or between the lawyer and a third party with a view to advising their client.

Part 2 – Detention and questioning of terror suspects (22 – 26)

- Links to Schedule 1 of the Bill which has the ‘reserve power’ to increase pre-charge detention from 28 days to 42 days. Power only to be used if there is a “compelling operational reason” (22)

The reserve power is available to the Home Secretary once the Director of Public Prosecutions and a chief officer of Police, or their equivalents in Scotland and NI, agree in a report that there is a ‘compelling operational need.’

The report must contain:

A statement from both persons that there are reasonable grounds for believing that the detention of one or more persons beyond the current limit of 28 days is necessary in order to obtain or preserve ‘relevant evidence,’ or pending the examination and analysis of relevant evidence or material (Computers, phones etc) that might give rise to relevant evidence. The report must give details for this belief. The report must also assess that the police are acting diligently and expeditiously in their investigation.

‘Relevant Evidence’ = evidence relating to commission of a terrorist offence within s.40(1)(a) by a detained person or that a detained person falls within s.40(1)(b) TA 2000⁴

Once this report is agreed the Home Secretary may make the order for the reserve power which allows the detention of any people currently detained and anyone subsequently detained to be held for up to 42 days. The power lasts for 60 days (or 30 if no vote takes place in Parliament). Applications to detain someone for up to 42 days once the power is in effect must be made on a case by case basis to a senior judge.

The Home Secretary must inform Parliament that the power is in effect within two days or as soon as reasonably practical. The statement must say that a terrorism investigation is under way or an act of terrorism has occurred and that there is exceptional operational need. The HS must say she is satisfied that the power is urgently needed for that investigation and that it is ECHR compatible. The statement may not include any detail that might prejudice the detained person or criminal proceedings.

i.e. the basis of the report and any detail put in the report will not be given to the house or anyone else. There is no indication that the report and its details will be released to the public at any stage during or after the process.

Both houses must have a vote and approve of the power within 30 days or it lapses. If one house of parliament votes against the power then it must lapse immediately.

If the power is ordered close to the 28 day limit then Parliament may not have time to vote the power down before a person is held for more than 28 days. If Parliament is in recess then the HS can recall Parliament but it is not a requirement. In addition, will MPs have a free vote on the power?

⁴ Need to check TA 00 to see what are the implications of this.

Any person detained under these powers when the power lapses due to a negative vote or at 30 days where no vote has taken place or at 60 days on expiry of the power, must be released immediately.

Applications on a case by case basis to a senior judge (High Court or above) made every 7 days for a maximum 7 day extension (up to the 42 day limit). Judge can decide to extend detention for less time than asked for. Applications must give notice to the detainee, grounds for extension, representation and any information that is to be withheld.

If a person is held for more than 28 days then the HS must lay a statement before parliament as soon as is reasonable practicable. Statement does not say anything more than the perfunctory procedural information about when the detention was extended beyond 28 days, how long it will be extended for, the court that extended detention and where the person is being held.

After the reserve power period has ended, a review must be carried out by the Government's independent reviewer of terrorism legislation (Lord Carlile QC). The review must include whether the power should have been granted in the circumstances, whether the procedure was properly followed, and whether it was justified in each individual case. Report sent to HS within 6 months of the power lapsing and then HS must lay report before Parliament.

- Post charge questioning of defendants to be allowed but only on terrorism offence with which they are charged or summonsed to appear or if charged with an offence that has a terrorist connection. Adverse inferences can be drawn from silence (23-26); i.e. if a detained person makes no comment in interviews, after they have been charged with an offence, and then brings forward a defence in court, then the court may believe that the person has made up the defence or that defence they had at the police station would not stand up to questioning.

Post charge questioning can be initiated on the basis that the person has been charged with a 'terrorism offence' and may continue for as long as the police want to up to trial. The police do not have to comply with codes of practice under the Police and Criminal Evidence Act 1984 which guarantee minimum standards in questioning and detention.

In normal circumstances it is possible for the police to question a suspect after charge but only if the interview is necessary 1) for preventing or minimising harm to a person or the public; 2) to clear up ambiguity in answers from pre-charge interviews; 3) if new information comes to light after charge and it is in the interests of justice. The change means that there does not have to specific reason for post charge questioning and failure to answer questions could act against an individual at trial.

The potential for relentless questioning leading to faulty information or false confessions will increase. Although the police should only question an individual about the offence in question, it is very likely that these interviews will become a 'fishing exercise' and will require a very experienced and resolute legal advisor to protect the interests of a suspect.

Part 3 – Prosecution and punishment of offences (27-37)

- Specified offences committed anywhere in the UK can be tried anywhere in the UK (27). Procedural point. If an offence is committed in Scotland or NI, for instance, then they could be tried in an English court and vice versa.⁵
- Specified offences committed abroad can be tried in the UK only with the permission of the Attorney General (28)

The AG must consent before the DPP can bring a prosecution against a person for an act committed abroad. This amends s.117(2A) of TA00 and s.19(2) of TA 06. The list of offences that can be tried in this way are any of those in the TA 00 and part 1 of TA06.

The question must be asked why there is any need for political involvement in a decision to prosecute. Can the DPP not be trusted? Will this mean that any action by lawyers on behalf of campaign groups to try Israeli war criminals or the like be politically vetoed? This is based on Lord Carlile's recommendations.

- Where a person is convicted of an offence not within the terrorism acts but offence has a 'terrorist connection' this must be treated as an aggravating factor on sentencing (29-31).⁶

Again, this is a Lord Carlile recommendation. Some Judges have been also lobbying for tougher sentences in their summing up at the end of trials. Judge Fulford has been at the forefront of this attitude. The issue of the terrorist connection will be hugely contentious. Deciding whether something is part of a terrorist will be left for a judge after hearing evidence and representations from the Prosecution and Defence. There will be no need to prove it beyond a reasonable doubt. Judges already have discretionary powers to take into account the circumstances of an offence when deciding the appropriate sentence.

Offences where Terrorist Connection to be considered (Schedule 2 of CT Bill 08)

Standard offences such as Homicide offences, explosives, kidnapping, poisons etc but others that stand out as having possible protest or other implications.

- s. 2 Aviation Security Act 1982, Destroying, damaging or endangering safety of aircraft – Damaging Aircraft nose cones like Ploughshares activists
- s.1 Aviation and Maritime Security Act 1990, Endangering safety at aerodromes – Fairford protests etc
- s.10 of the same act, seizing or exercising control of fixed platforms – Environmental protests
- An offence under Channel Tunnel (Security) Order 1994, safety of tunnel safety – illegal immigration now a terrorist offence?

⁵ Further analysis needs to be done by someone versed in Scottish law to see how this would affect a Defendant.

⁶ Further analysis needed to see what sentences for the list of 'terrorist connection' offences are already available and really see what the impact of this could be.

The explanatory notes say that these offences are the ones most frequently prosecuted in terrorism cases, but has there been a single prosecution related to terrorism for endangering fixed platforms?

HS has the power to add offences to the list that could have terrorist connection, if approved by parliament.(31)

- Forfeiture of assets when convicted of terrorist offences if assets used or intended to be used as part of a plot (32-37)

Person convicted of Terrorist Financing offences⁷ may have money or property forfeited if it had been used for the purposes of terrorism or they intended that it should be used or had reasonable cause to suspect it might be used for terrorist purposes.

Applies to other terrorist offences as well (s.54 TA00 weapons training, ss.57,58,58A possession of things or information for the purposes of terrorism, ss.59,60,61 inciting terrorism outside of the UK, s.2 TA06 terrorist publications, s.5 preparation for terrorist acts, ss9&11 radioactive devices and all terrorist connection offences, and offences of incitement, aiding and abetting, encouraging any of the above offences⁸.) however, the conditions from Terrorist Financing are slightly different. The conditions are that it had been used for the purposes of terrorism or they intended that it should be used **or** the court believes that it would be used for terrorism unless forfeited.

Clause 35 allows a court to compensate a victim of a terrorist act if they have suffered a personal injury, loss or damage. Anyone who has an interest in a property that potentially will be forfeited can make representations to court.

There is no definition of person and so this clause may apply to a company; on the basis that Companies have legal personality and therefore are treated as individuals. The compensation would come from money/property forfeited.

Does this mean that a family could lose their house because of the action of another? In addition, could someone in joint possession of property lose it because that they had 'reasonable cause to suspect' even if they are not convicted of failing to disclose information to the police.

⁷ Applies to ss.15 to 18 of TA 00 – Terrorist Financing provisions.

⁸ It does not seem to include other terrorist offences. The legislation is very clear as to which offences it applies to further analysis is needed to be sure.

Part 4 – Notification requirements for convicted terror suspects (38 – 55)

- Applies to convictions for offences under the terrorism acts or for offences with a 'terrorist connection' where an individual is sentenced to 12 months or more⁹ and related civil orders – i.e. control orders (38 – 43)

HS can amend list of offences if approved by parliament and amend the sentence threshold if approved by Parliament (*i.e. reduce the length of sentence required before these provisions will apply.*)

This clause is retroactive and will apply to anyone convicted and sentenced in relation to a terrorism offence (but not terrorist connection) before commencement of the CT Act 08 if immediately before commencement they are imprisoned, on licence, unlawfully at large.

- List of information to be given to the police, any change has to be notified, confirm information on an annual basis. Can be on list for life (44-53)

Must give the following information within 3 days of being sentenced:

DOB, NI Number, the person's name(s) on the date that they were sentenced, home address(es), addresses where the person regularly stays (7 days or more, or 2 or more periods within 12 months which would amount to 7 days) any proscribed information (regulations made by HS approved by parliament). All changes must be notified within 3 days of the change.

Person must re-notify the police of all this information on an annual basis. The person will be fingerprinted, photographed and iris scanned on re-notification.

If sentenced to over 5 years (or an Indeterminate sentence for Public Protection¹⁰) then the notification scheme applies for life. If sentenced to less than 5 years then scheme applies for 10 years post release.

These provisions also apply to any person found not guilty by reason of insanity or disability but who is found to have done the act that would attract a sentence of over 12 months.

Failure, without reasonable excuse, to comply or providing false information is an offence which could attract a maximum five year sentence.

With regard to addresses where somebody regularly stays; this could mean that you would have to give the names of all family or friends or hotels where an individual may stay the night. It will lead to the further isolation of people as their friends or family may not want to have that kind of attention from the authorities.

⁹ Further analysis needed to find out how many offences have starting sentences of less than 12 months imprisonment.

¹⁰ An IPP sentence could be 2 years but with the IPP addition means that the person has to complete courses that show they are no longer 'dangerous.' Therefore, their sentence is indeterminate. Enormous controversy on these sentences due to lack of provision of courses that allow someone to prove they are no longer dangerous.

There are many ways in which the person could commit a notification offence unintentionally, and the capacity for confusion as to when they must notify the authorities is large, e.g. if a hotel booking goes wrong and s/he has to stay somewhere else, or if s/he has to change travel plans due to some weather emergency, should the person notify.

There is no opportunity for the person's inclusion in the list to be reviewed or appealed.

Notification Orders can apply to a foreign national who was convicted of a "corresponding foreign offence" but is in the UK, and can apply to a UK national convicted abroad who returns/ is deported to the UK. (53) A 'corresponding foreign offence' is one that would fall under terrorism laws in the UK or the offence took place in the course of an act of terrorism or was for the purposes of terrorism. The person must receive a sentence of 12 months or more or would have done in the UK. It is possible to appeal against the decision to make a notification order for a "corresponding foreign offence," on the basis that the facts are wrong or that there is not a corresponding offence or puts the prosecution to proof.

The definition of corresponding foreign offence is so wide that normal acts of political activism could come within its ambit.

- Foreign travel for convicted persons (50 and 54)
Anyone subject to the notification scheme must notify the police if they intend to travel abroad including date of departure, the country(ies) they are travelling to, their point of arrival and any other information about the **person's** departure or movements outside the UK as required by regulations (as yet not made but must be approved by parliament). If they return, they must notify the police.

Specific to each individual, Foreign Travel Restrictions (54) can be ordered which ban a person from travelling to certain countries or only allowing them to travel to certain countries or even ban them from travelling outside the UK at all.

The first two parts would only work if the person returned to the UK and it could be proved they went somewhere they should not. Will MI6 track people or will they ask foreign governments to track individuals?

Part 5 – Asset freezing proceedings (56-63)

- New regime for asset freezing proceedings including SIAC style secrecy and special advocates.

This new regime currently only applies to UN terror lists of designated organisations or individuals. *(Will this be amended at a later date to include US Treasury or UK lists.)*

In deciding how the proceedings should be formulated the Judge should balance the need for the subject of proceedings to be 'properly reviewed' (i.e. fair proceedings) AND that information should not be disclosed that is contrary to the public interest. *(Note public interest not national security)*

The following parts that can be varied when balancing these two things:-

- a. The mode of proof (beyond reasonable doubt or balance of probabilities) and evidence (burden of proof)
- b. Enabling the proceedings to happen with out a hearing
- c. Legal representation
- d. Enabling the proceedings to take place without full disclosure (to the person or their legal rep) as to why a person is subject to the proceedings
- e. Enabling the hearing to take place without the person who is subject to it or their legal representatives
- f. Appointment of special advocates
- g. If proceedings take place without the person subject to it, then they can receive summaries of the evidence

The first time the power is to be used the Lord Chancellor should decide how the proceedings should be formulated. The LC must then lay this before parliament and they must be approved by both houses within 40 days (not including recess etc). The LC must consult the Lord Chief Justice first.

Treasury can make an application in private to not disclose evidence. Special advocates would represent the other side. If a judge agrees not to disclose evidence then he may ask the Treasury to provide a summary of the evidence for the defence. If the judge refuses to agree to a Treasury application and the Treasury elect not to disclose that evidence or to provide a summary, then the judge can direct that the Treasury cannot rely on the evidence.

However, where there is evidence that would undermine the Treasury's case or support the defence's case, the judge has no power to compel the Treasury to disclose evidence that he knows exists and that undermines the Treasury's case.

- Intercept material can be used Asset Freezing Proceedings (60)

Part 6 – Inquests and Inquiries¹¹

- **Coroners'** inquests can take place without a jury if the Home Secretary authorises it because it is in the interest of national security or the interest of the relationship between the UK and another country or in the public interest (64)

Note that the reasons for secret inquests are extremely broad and includes diplomatic considerations. This is a way for the police, security, and armed forces to avoid public scrutiny in cases ranging from deaths in police custody, repeats of the Jean-Charles de Menezes killing, the death of people like Baha Mousa in Iraq, and inquests into the deaths of British Service Personnel.

This clause will apply to all inquests that have started when the legislation is passed and all future inquests. The specially appointed coroner can be 'parachuted' into any ongoing inquest and take over proceedings.

- Specially appointed coroners if a certificate under clause 64 is in effect. Powers and duties of coroner changed from Coroners Act 1988. Home Secretary can revoke appointment of Coroner for misbehaviour.(65)

'Activist' coroners (like the coroner currently conducting inquests in the deaths of British soldiers) could be dismissed by the Home Secretary. Will this amount of Interference in the judiciary?

- Intercept evidence can be given to Coroner in clause 64 circumstances (67) only if the Coroner deems it necessary.
- Intercept evidence can be given to Inquiry panel and Counsel if an Inquiry is held under Inquiry Act 2005 (66)

¹¹ See INQUEST http://inquest.gn.apc.org/pdf/2008/INQUEST_press_release_secret_custody_inquests.pdf

Part 7 - Miscellaneous provisions

- Definition of terrorism is amended to include 'racial cause.' (68)

This will allow cases normally prosecuted as incitement to racial hatred etc, to be prosecuted as 'terrorist' offences.

- New offence – Eliciting, publishing or communicating information on armed forces which is likely to be use to terrorists (69)
- Amended offences
 - Failing to disclose information about a suspected terrorist finance offence now applies to all persons in employment, paid or unpaid.(70)

The definition has been expanded to include voluntary workers, trustees of charities, and even people on work experience. This may have been designed to catch people working for small charities that send aid to, or conduct development work in, conflict areas.

- Control order¹²
 - a. Powers of entry and search expanded to include allowing a constable to enter (with force) a controlled person's house or property if they are reasonably suspected of absconding or of failing to allow access to their home. Can also enter to ensure compliance with conditions with the order. (71)
 - b. Meaning of involvement in terrorism-related activity (72)
 - Commission, preparation, or instigation of acts of terrorism
 - Conduct which facilitates the above
 - Conduct which gives encouragement to the above
 - Conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism related activity
 - c. Time allowed for representations by controlled persons (73)
 - d. Applications for anonymity (74)
- Forfeiture of cash seized under ACTSA 2001 (75-76)
- New Provisions
 - Policing of gas facilities and funding for that (77-82)
 - Special advocates can now be appointed in Northern Ireland (83)

Part 8 – Definitions

- Terrorism is defined as s.1 TA 00 as amended by clause 68 of this bill
- Terrorist Connection – An offence has a terrorist connection if the offence (a) is, or takes place in the course of an act of terrorism, or (b) is committed for the purposes of terrorism

¹² Further analysis of these provisions is needed by a person versed in control order legislation.