



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Briefing on the Counter Terrorism Bill 2008 Second Reading, House of Commons, 1 April 2008

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ advising on legislative and other measures which ought to be taken to protect human rights,² advising on whether a Bill is compatible with human rights³ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Counter Terrorism Bill was introduced on 24 January 2008 after an unusually extensive consultation exercise conducted by the Home Office over the summer months. The impression was given that Government was committed to meaningful and positive consultation with stakeholders. The Commission therefore is disappointed that many of the provisions contained in Government's July paper 'Possible Measures for Inclusion in a Future Counter Terrorism Bill' have now been included in this Bill despite the very serious human rights concerns raised by this Commission, the Joint Committee on Human Rights and numerous other organisations. It is unfortunate that Government has not made best use of that consultation

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid.*, s.69(3).

³ *Ibid.*, s.69(4).

⁴ *Ibid.*, s.69(6).

exercise and in particular has not learned the lessons of Northern Ireland by introducing measures in 2008 that, at best, proved ineffective and, at worst, counter productive over the decades of conflict here. Northern Ireland has shown that exceptional counter terrorism measures that fail to protect fundamental human rights and that are targeted at one community exclusively cannot be effective in the fight against terrorism.

3. This briefing will concentrate on the following aspects of the Bill: pre charge detention; post charge questioning; the notification requirements; the control order regime; and the admissibility of intercept material as evidence in court. The Commission hopes to comment on additional provisions as the Bill progresses through both Houses.
4. Before exploring these in more detail the Commission would like to comment briefly on one of the provisions that from our reading will not extend to Northern Ireland, namely, the proposed changes to the conduction of inquests and inquiries in Part 6 of the Bill. Part 6 of the Bill strongly engages the obligation on states to conduct an effective investigation where an individual has been killed as a result of the use of force as enshrined in Article 2 of the ECHR and which in this Commission's view has already been compromised by the Inquiries Act 2005. It is of note that this particular measure was not alluded to in any way in the July paper. The Commission would oppose its extension to Northern Ireland and at this point expresses serious concern at the prospect of inquests being conducted without a jury under the terms outlined in the Bill.

Pre-charge detention

5. The Commission is extremely disappointed that the Bill proposes a new 'reserve power' to extend the pre-charge detention period to 42 days. The Commission believes strongly that there is much to learn from experiences in Northern Ireland and the fact that detention of persons without charge suggests disregard for human rights and may foster resentment amongst the communities whose support is vital in the fight against terrorism.
6. The Commission believes that pre-charge detention for any period beyond 28 days raises serious concerns for the protection of the right to liberty enshrined in Article 5 of the ECHR and in particular Article 5 (2) (the right to be informed

promptly of the reasons for arrest and the charge against one). The Commission wishes to comment on a number of provisions governing this particular reserve power:

New paragraph 41 of Schedule 8 of the Terrorism Act 2000 requiring the Home Secretary to make a statement to Parliament that the reserve power has been made available.

New paragraph 45 providing for the cessation of the reserve power.

New paragraph 43 extending provision to exclude the accused person and / or their legal representative from the hearing for a warrant for further detention beyond 28 days.

7. New paragraph 41 requires the Home Secretary to report to Parliament within two days or as soon practicable with a statement that the reserve power has been made available. This must state among other items that the reserve power is needed for the purpose of the investigation, that the need to make the reserve power is urgent, and that its availability is compatible with Convention rights. However, paragraph 41 (5) provides that the statement must not include the name of any person detained or any material that might prejudice the prosecution of any person. This represents a clear reflection of the Commission's concern, as expressed in July, that in the circumstances of an ongoing police investigation, there will be insufficient information available for Parliament to make a meaningful assessment of whether or not the reserve power is needed or if it is compatible with Convention Rights.
8. New paragraph 45 provides for cessation of the reserve power after 60 days or if it is rejected by either House of Parliament. If Parliamentary approval is not received before the end of 30 days, the reserve power will lapse. However, the idea that this power will cease in the absence of Parliamentary approval only after 30 days is of serious concern and again raises a question about whether or not a report to Parliament is an appropriate oversight. The result is that a person can be detained beyond the 28 day limit in circumstances where there is no Parliamentary approval of the overarching reserve power. This mechanism does not appear to be a suitable oversight to the extended pre-charge detention provision.

9. New paragraph 43 extends paragraph 33 of Schedule 8 of the Terrorism Act 2000 allowing exclusion of the accused person and /or their representative from the hearing for further pre-charge detention. The Commission remains concerned that any attempt to exclude the accused person and their legal representative seriously restricts the right to a fair hearing within Article 6 of the ECHR. However, this is particularly the case where the outcome of the hearing may be that the accused person is detained beyond 28 days.

Post-charge questioning

10. The Commission is of the view that powers to question post-charge may be an appropriate alternative to extended pre-charge detention. However, any provision for post-charge questioning must be matched with adequate safeguards to ensure full protection of the detained person's rights under Article 6 of the ECHR (the right to a fair trial). As such, the Commission is deeply concerned that the intention is to allow post-charge questioning in addition to rather than as an alternative to extended pre-charge detention.
11. In any event, the Commission questions whether the provisions for post-charge questioning within the Bill are sufficient to ensure protection of Article 6 rights. In particular, the Commission questions the provision that post-charge questions can take place after a person has been sent for trial. This creates a rather peculiar situation where the police may question an accused person at any stage or even throughout an adversarial criminal trial. The Commission believes that the potential for police questioning during the trial process is an unacceptable burden for the accused person and their legal representative.
12. Indeed, there is no provision in the Bill to state that the detained person is permitted to consult a legal representative when post-charge questioning takes place. This entitlement should be stated clearly within the legislative framework. It is not enough if at some later stage Codes of Practice on post-charge questioning provide for the right to consult a solicitor without also ensuring statutory protection for this fundamental safeguard.
13. The importance of including the right to legal consultation within the primary legislation is even more pressing given that adverse inferences may be drawn from an accused person's

failure to mention certain matters when questioned at this post-charge stage. The Commission is of the view that the drawing of adverse inferences is not appropriate at this stressful post-charge stage.

14. However, the Explanatory Notes to the Bill refer to the case of *John Murray v UK* [1996] to highlight the fact that adverse inferences are not in themselves a violation of Article 6 of the ECHR⁵. The Commission notes that this case concerned police questioning at the pre-charge investigation stage. Furthermore, it established that adverse inferences should not be drawn if a person is interviewed without opportunity to consult a solicitor. Similarly, Article 36 of the Criminal Evidence (NI) Order 1999 provides that where an accused person is at an authorised place of detention adverse inferences will not be drawn if they have not been given an opportunity to consult a solicitor. The Commission notes not only that the right to legal consultation is absent from this part of Bill but also that there is no provision to state where post-charge questioning should occur. The Commission would be concerned if post-charge questioning was to take place other than at an authorised place of detention and if so, will the protection afforded by Article 36 of the Criminal Justice (NI) Order 1999 apply.

15. The Commission notes that post-charge questioning applies to “terrorism offences” as defined in clause 26 of the Bill. The majority of these offences are specific terrorist related offences contained within the Terrorism Act 2000, the Anti-Terrorism Crime and Security Act 2001, and the Terrorism Act 2006. However, clause 26 (1) (f) provides one further type of “terrorism offence” which is an offence relating to searches for munitions and transmitters under paragraph 8 and 9 of Schedule 3 of the Justice and Security (NI) Act 2007. The Commission is concerned that this has been included under the “terrorism offences”, as it creates an additional area for post-charge questioning that applies to Northern Ireland. In the current situation and in the move towards ‘normalisation’ of policing, the Commission questions whether continued provision for additional police powers in Northern Ireland is justified.

⁵ Paragraph 275 of the Explanatory Notes.

Notification requirements

16. The provisions in Part 4 of the Bill requiring notification by persons dealt with for certain terrorist related offences are extremely onerous and questions arise as to whether or not they represent a proportionate and legitimate restriction against the right to private life contained in Article 8 of the ECHR as well as Article 10 (right to freedom of expression) and Article 11(right to freedom of assembly).
17. In addition, the Commission suggests that the terminology in this section of the Explanatory Notes is perhaps inappropriate. The terms used such as "offender" and "convicted terrorists" are unhelpful bearing in mind that in general notification requirements come into effect only once a person has been dealt with and concluded their sentence. This conveys a rather worrying message possibly indicative of the underlying implications of notification that persons convicted of terrorist related offences are unable to reintegrate following completion of their sentence. The experience of Northern Ireland has shown that that is in fact not the case and that those convicted of terrorist offences like those convicted of any other criminal offence are, capable of rehabilitating and reintegrating.
18. The Commission is concerned that the notification requirements apply to persons found not guilty by reason of insanity or found to be under a disability and to have done the act charged and made subject to a hospital order. The Commission asks if it would be appropriate to hear medical evidence on the feasibility of notification requirements in these cases. Indeed it would appear that such persons are in need of therapeutic care rather than being subject to the notification requirements outlined in the Bill.
19. The Commission is seriously concerned at the fact that notification applies to children and young people. Notification for children and young people engages the UN Convention of the Rights of the Child (CRC) and the Beijing Rules. Article 40 of the CRC in particular provides that state parties must recognise the right of every child in conflict with the law to be treated in a manner which takes into account their age and the desirability of promoting reintegration. The Commission believes that the notification requirements for children and young people do not afford full respect for the rights of children and young people and that they are potentially harmful and against the ethos of reintegration.

20. The requirement to notify changes requires persons to notify an address that they stay at for 7 days or for two or more periods within 12 months that amount to 7 days. The Explanatory Notes envisage that this will require persons to notify the addresses of family and friends. The Commission is concerned that this may have a disproportionate impact on the Article 8 rights not only of the person subject to notification but also the Article 8 rights of their family and friends. Moreover, it may serve to isolate the person subject to notification and weaken important social supports, which are known to be important for reintegration and reducing re-offending.
21. The Commission is concerned that on notifying their details to the local police station a person can be required to provide fingerprints and photographs for the purpose of verifying identity. The Commission notes that there is already provision for the taking of fingerprints and photographs under PACE and would therefore question whether or not it is necessary to make this additional provision.
22. Clause 50 permits the Home Secretary to make Regulations restricting travel outside the UK for "different descriptions or categories of person". These Regulations are subject to Affirmative Resolution. The Commission is concerned that such a restrictive measure is anticipated for notification requirements and fears that this type of Regulation will have the potential to discriminate contrary to Article 14 of the ECHR (the non-discrimination clause).
23. The Commission is concerned at the length of the notification period provided for in Clause 51. In particular, persons sentenced for life or for 5 years or more in prison are required to notify for an indefinite period. There is no provision in the Bill to state what this indefinite period might mean and how and by whom its end will be assessed. The Explanatory Notes state that in practice it is for life. This is a severe requirement in any case and for those sentenced to life imprisonment it overlaps with current licensing provisions. The Commission is also concerned that 10 years is an extremely lengthy period for notification for all other persons. In all instances, the periods for notification are inappropriate for children and young people.
24. Schedule 4 provides for Notification Orders for "corresponding foreign offences". The Commission is concerned that the definition of a "corresponding foreign offence" is too broad. It

includes the specific terrorist related offences under clause 39 of the Bill but also an act that "...takes place in the course of an act of terrorism". The Commission notes that there is no offence of "terrorism" and the definition of terrorism is extremely wide. Further, this new provision does not contain any mechanism to take account of convictions obtained through torture or acts that constitute legitimate opposition to oppressive or undemocratic regimes. The Commission also asks if legal aid is available for a person to appeal a Notification Order under this Schedule.

25. Schedule 5 provides for foreign travel restriction orders. The Commission has several concerns about foreign travel restriction orders. The orders may apply to a person subject to notification if they have acted in a way giving reasonable cause to believe it is necessary for an order to prevent them taking part in terrorism outside the UK. The Commission is concerned that this is an extremely burdensome civil measure so that it is similar in effect to a criminal penalty. Arguably, this view is supported in the Explanatory Notes, which state that although this is a civil order a heightened burden of proof will apply. In addition, the Commission is worried that the operation of foreign travel restriction orders may result in discrimination under Article 14 in conjunction with Article 8, Article 9 (the right to freedom of thought, conscience and religion) and Article 11 (the right to freedom of assembly) ECHR particularly when certain countries might be targeted in terms of intended destination of travel.

Control Orders

26. This Commission has opposed the system of control orders because of its implications for individuals' rights under Articles 3, 5, 6, 8, 9, 10 (the right to freedom of expression) and 11 of the ECHR. In a case involving nine men placed under control orders the High Court and Court of Appeal have ruled that control orders under the Prevention of Terrorism Act 2005 are too restrictive and breached the suspects' right to liberty under Article 5. The Commission was disappointed by the House of Lords decision in relation to the system of control orders.
27. A number of the Commissions core concerns were set out in our briefing for the Second Reading (Lords) of the Terrorism Bill 2005 namely:
 - a. -the low level of proof ("reasonable suspicion of involvement in terrorism- related activity") needed to justify a control order,

which may result in serious curtailment of civil liberties and human rights;

- b. -the fact that 'non-derogating' control orders which do not require judicial authorisation or confirmation may seriously infringe freedom of movement, expression and association under Articles 5, 10 and 11 of the ECHR;
 - c. -the fact that the impact of the control orders makes them equivalent to criminal penalties but that they can be imposed without the benefit of the essential safeguards of a fair trial required by Article 6 of the ECHR;
 - d. -the provision under paragraph 8 of the Schedule to the Bill that new control orders 'to the same or similar effect' may be imposed by the Secretary of State following a judicial quashing of a previous order.
28. The Commission is disappointed that the proposals set out in the Counter Terrorism Bill do not address any of the above issues. The Commission is opposed to Control Orders and hence is opposed to all measures designed to 'bed-in' or improve efficiency of control orders as an instrument. These measures are effectively to deal with problems created by the control orders regime itself.
29. The proposals set out to allow powers of fingerprinting/ samples and entry/search would appear to be a direct consequence of the anomaly of the creation of a pseudo-judicial system outside of the criminal law process. Police would effectively already have these powers if the state were to use the criminal justice system, rather than control orders, to tackle alleged perpetrators of terrorism. Allowing criminal justice policing powers to be used for non crime purposes would be a significant change in the power of the state and a dangerous precedent. The Commission is also concerned about the potential for the retrospective application of these measures to persons subject to ongoing Control Orders before the time the legislation reaches statute.
30. In relation to the other three measures proposed in relation to the definition of support for terrorist related activity, amending the time period for the seven day period and the anonymity of individuals the Commission notes the Joint Committee on Human Rights opinion that these matters are beneficial and minor tidying up amendments. We would urge scrutiny in the case of the latter amendment on anonymity and the reasoning behind it to ensure that no measures would prevent public

disclosure by the person subject to a control order or their representatives of their circumstances.

31. The Commission would therefore reiterate its opposition to control orders and would urge the consideration of a more radical overhaul of the regime through this Bill.

The Admissibility of Intercept

32. The Commission is disappointed that the Bill does not contain a wider relaxation of the ban on the admissibility of intercept evidence in proceedings for terrorism offences but understands that this relaxation may now enter the Bill by way of amendment at a later stage. The Commission would support such a relaxation as an alternative to extending the pre-charge detention period to 42 days. The Commission's evidence to the Joint Committee on Human Rights on how such a relaxation might operate in practice is also enclosed.
33. As already stated, the Commission hopes to provide further briefings to Parliament as the Bill progresses. In the meantime please direct any further queries, without hesitation, to: Nazia Latif or Roisin Devlin

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