ILPA BRIEFING ON ANTI-TERRORISM, CRIME AND SECURITY BILL

Introduction

1. Whilst unsurprising that the appalling events of 11th September should have caused some re-evaluation of the anti-terrorist measures at the Government s disposal, ILPA shares Lord Lloyd s instinctive distrust of legislation proposed under pressure of events[1]. In particular, in the Terrorism Act 2000 considered by the European Commission to be the most extensive legislation in Europe - the Government already has extremely broad powers at its disposal and there is no evidence of any shortcomings. Indeed, as recently as 15th November 2001 the Home Secretary announced the appointment of Lord Alex Carlile of Berriew QC to undertake the annual review of the Terrorism Act 2000[2]. His report is expected in the New Year and a more appropriate and measured response by the Home Secretary would have been to either await his report to seek to identify any shortcomings or to secure its earlier production if required by the pressure of events.

2. Specific concerns about various clauses in the Bill are dealt with below. However, ILPA makes two fundamental points in introduction about these measures (which of course include derogation from Article 5 ECHR as provided for in *The Human Rights Act 1998 (Designated Derogation) Order 2001*).

3. **Firstly, ILPA objects to the premise of the proposals in Part IV of the Bill which is predicated on the discriminatory treatment of non British nationals.** The exercise by the Home Secretary of the power of indefinite detention of those whom he merely *believes* to be a risk to national security and *suspects* to be international terrorists can only be exercised in respect of those subject to immigration control. For others, the normal application of the criminal law with all its attendant safeguards mean the possibility of arrest only where there is evidence which is objectively verifiable. It is important to note that this means that many Muslims who have been settled in the UK for many years could be affected by these measures, not only those who are here as visitors or for other short-term purposes.

4. **Secondly, ILPA opposes derogation from the right to liberty contained within Article 5 ECHR; this is a fundamental human right which underpins a democratic and free society.** Derogation under Article 15 is permissible only where a state of emergency threatens the life of the nation and measures taken are strictly required by the exigencies of the situation. It is precisely because of the extensive powers contained in the Terrorism Act 2000 which have not themselves been shown deficient where British citizens are concerned since the

[1] Hansard, 4th November 2001.

[2] Section 126 of the Terrorism Act 2000 requires the Secretary of State to lay a report before Parliament on the working of the Act at least once every 12 months.

scope of derogation does not apply to them - that ILPA considers derogation to be unnecessary. If persons are reasonably suspected of involvement in terrorism they must be prosecuted not indefinitely detained by administrative decision.

Part 4
IMMIGRATION AND ASYLUM

Clause 21

5. The Home Secretary is required only to believe that a person s presence is a risk to national security and to suspect that the person is an international terrorist (clause 21(1) refers).

6. ILPA is fundamentally opposed to such grounds of certification by the Home Secretary. The test is entirely subjective and there is no evidential requirement at all. Whilst a right of appeal is provided to SIAC[3] this is meaningless without there being any requirement for the Secretary of State to show that his belief or suspicion was objectively justified. It is highly unlikely that SIAC will conclude that the Secretary of State had been dishonest in stating that he had a subjective belief or suspicions. Without such an evidential requirement, the issue of the certificate itself will be incontrovertible proof of suspicion or belief. On 9th August 1971, 342 people were detained under internment in the North of Ireland. One of them turned out to be a blind man and another a man of 77, and 15 were members of a legal policityal party who had spoken out against abuses of civil rights. 116 had to be released within 48 hours as their continued detention could not be supported once objective evidence had been produced. Under the present legislation, all of these men may will have remained in detention.

7. In every other branch of the law, most noticeably in the Terrorism Act 2000, the basis of arrest in connection with terrorism is always that the constable (or whoever it may be) has reasonable grounds to suspect (or similar). The requirement of reasonable cause is firmly rooted in English common law and the requirement that a person is informed of the case being made against them, which in itself suggests that there needs to be an objective basis for such a belief. This is plainly a minimum guarantee of individual liberty, a breach of which can never be justified[4].

8. Since there is no reasonable grounds requirement the focus of enquiry will not be on the existence of evidence which founds reasonable suspicion or belief, but simply whether it is a belief or suspicion that the Home Secretary holds. As noted, it will be impossible to gainsay his assertion. In *Liversidge v Anderson*[5] the House of Lords considered the Defence (General) Regulations 1939 and the power therein of executive detention necessary for the defence of the realm, without allegation of the commission of any criminal offence. The Minister s

[3] Clause 25 refers.
[4] See for example the Northern Ireland (Emergency Provisions) Act 1996 (where the threat to the security of the country was direct) in which the safeguards were significantly greater than those provided for herein (power to detain on grounds of suspicion limited to 14 day period; thereafter only able to be continued if necessary for public safety) (schedule 3, paras. 4-9 refer).
[5] *Liversidge v Anderson* [1942] AC 206.

justification was likened by Lord Atkin to Humpty Dumpty s use of words[6]. The present proposal particularly in the context of the clause 21(4) definition of suspected international terrorist by reference to the Home Secretary s certificate - is open to similar criticism since the basis of certification amounts to no more than the Home Secretary s statement.

9. The definition of terrorism in the Terrorism Act 2000 is already arguably impermissibly broad[7]. In this Bill, however, the otherwise extremely broad measures contained in that Act are further extended to include persons with links with a person who is a member of or belongs to an international terrorist group. Links are not defined, The term is plainly wide enough to include friends, relatives, neighbours, colleagues, and legal representatives as well as (of paramount importance) individuals associated by political, cultural or other social links[8].

10. A glaring omission is the absence of reference to PACE. Plainly those arrested under these provisions require protection of the Police and Criminal Evidence Act 1984.

Clause 23

11. ILPA opposes indefinite detention provided for by clause 23. The right to liberty contained within Article 5 of the ECHR is a fundamental human right which underpins a democratic and free society. It is for this reason that Article 5 only permits detention in certain narrow circumstances and that the European Court of Human Rights has jealously guarded the right to liberty for individuals.

12. ILPA is opposed to the use of long term detention and considers that it is not necessary or proportionate. A derogation under Article 15 will only be permissible where there is a state of emergency threatening the life of the nation and measures taken are strictly required by the exigencies of the situation. Parliament must scrutinise scrupulously whether there is sufficient evidence of such a state of emergency. As far as the necessity of the measures proposed, ILPA calls into question the rationale for such measures. In order to be *justified* any such detention would have to be based on cogent evidence of the terrorist links or activities. The Terrorism Act 2000 provides extensive powers for the arrest and prosecution of those reasonably suspected of involvement in terrorism[9]. As already observed, that Act s threshold of reasonable suspicion is both necessary and appropriate, lest administrative detention will come to be used in preference to trial under the Terrorism Act. The lack of evidence to sustain prosecution must

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[6] When I use a word, it means just what I choose it to mean, neither more nor less (quoted by Lord Atkin at 245.

[7] For example it includes in s. 11 the criminal offence of professed membership of a proscribed organisation without any necessary involvement in terrorist or other criminal offences and as such may be said to be too wide an extension of the common law powers of detention infringing rights of free speech and association.

[8] Anyone attending the Halkevi Community Centre or any of the many MPs who picketed the South African Embassy on Friday nights campaigning against apartheid in support of the ANC.

[9] See, for example, the power of arrest without warrant in s. 41(1): A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist .

not be the excuse for indeterminate administrative detention without trial based on mere suspicion.

13. Further, if derogation is relied on detention in such circumstances must be necessary[10]. Again, such threshold requires at the very least evidence of reasonable suspicion of the commission of terrorist offences. In these circumstances it is difficult to see how administrative detention as opposed to prosecution can ever be justified. ILPA s concern is not the prosecution of persons reasonably suspected to have committed terrorist acts; rather it is the administrative detention of such persons where there is insufficient evidence to justify prosecution.

14. It is self evident that derogation under Article 15 will not automatically render the proposed detention measures lawful. The Government will have to be prepared for a close degree of scrutiny for such a wide reaching and disproportionate measure both in the United Kingdom and in Strasbourg.

15. Parliament must ensure that whatever detention measure is enacted is accompanied by appropriate safeguards; for reasons given elsewhere ILPA has concerns about such safeguards.

Clause 25

16. By clause 25(5) the time limit on appeal runs from the date of issue of the certificate. But this date will not necessarily be the same as the date on which it is served (the Home Secretary may for example issue a certificate in respect of a particular person who is subsequently unable to be found). ILPA objects to this provision: plainly the time limit must run from the date of actual service on the person who is detained.

Clause 26

17. ILPA believes that the six monthly review power provided for by this clause does not constitute an adequate safeguard against prolonged detention and cannot be justified where that detention is premised on a state of emergency which could alter drastically within a very short period of time.

18. Furthermore, whilst the possibility of a review by SIAC given by Clause 26(3) on the basis of a change in circumstance before six months is plainly necessary, it is however wholly unacceptable that there is no possibility of independent scrutiny of SIAC s decision.

[10] It will be recalled that the UK s derogations under Article 15 have on the whole in recent times related to a limited extension of the permissible period of detention prior to charge; what appears to be presently proposed is of a wholly different order.

Clause 28

19. This clause provides that the Bill's provisions will remain in force for 15 months (subject only to the Home Secretary's repeal discretion contained in clause 28(2)(a)). For reasons given herein ILPA opposes these measures (in particular the indefinite detention provision and consequential derogation from Article 5). But whatever view be taken of the appropriateness of these provisions, their wide scope is obvious. In such circumstances ILPA considers it wholly inappropriate that there be no review by Parliament until 15 months have passed. As stated, derogation under Article 15 ECHR is permissible only "in time of war or other public emergency threatening the life of the nation". For reasons given in relation to clause 26 above, such state of grave emergency may quickly change – or at the very least it may change sufficiently to raise a very real question whether such state continues to exist. Parliament should not be required to rely solely on the Home Secretary's discretionary power of repeal; rather it should be required to review the matter within a much shorter time-frame. Second, under the Prevention of Terrorism (Temporary Provisions) Act 1974 the corresponding provision was initially six months (section 12 of that Act refers - although this was subsequently extended). The scope of these powers (and in particular breadth of the derogation) are even more far reaching and ILPA urges *at least* a similarly short review period.

Clause 29

20. Provisions which purport to exclude the jurisdiction of the Courts have – for good reason - traditionally been unsuccessful[11], since they ignore both our constitutional history and the separation of powers. These principles vouchsafe the right of the Court to protect the individual's rights against the State and apply with the greatest force in circumstances such as the present where the fundamental common law right to liberty is at stake. This clause is profoundly objectionable on this ground alone. It seeks to destroy the right of habeas corpus.

Clauses 33 and 34

21. The combined effect of these clauses is to preclude consideration of what as a matter of refugee law is the primary question where a person makes an asylum claim, namely whether s/he has a well founded fear of persecution for a refugee convention reason[12]. This question must always first be scrupulously examined in a full, fair and transparent determination procedure. Only thereafter do questions of exclusion properly arise.

22. ILPA considers there to be no justification for this approach. The assessment of the primary question may be relevant to exclusion – whether under Article 1F and/or under Article 33(2).

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[11] See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, HL; *R v SSHD, ex p Fayed* [1998] 1 WLR 763, CA.

[12] Namely for reasons of race, religion, nationality, political opinion or membership of a particular social group.

23. More important, the consequence of these clauses as drafted may prevent the putative refugee from being able to contest that their removal would be to face persecution. Take the following example: *X* claims asylum and the Home Secretary certifies that he is excluded by Article 1F. *X* is detained because removal is not practical since he has no travel document and there are no flights to his country of nationality. His appeal to SIAC is dismissed because SIAC considers him to be excluded yet by the terms of clause 33 there has been no risk assessment. Three months later a travel document has been obtained and there are flights. He has no outstanding appeal and faces return without the merits of his asylum claim having been considered.

24. Further, whether or not the Home Secretary considers the asylum claim, ILPA objects to SIAC being precluded from considering whether the appellant has a well founded fear of persecution.

25. ILPA objects also to clause 34 since this precludes any role for proportionality. This concept underpins all decision making and is plainly potentially relevant where exclusion is sought to be relied upon.

PART 13
MISCELLANEOUS

Clause109

26. This clause provides for the implementation of the Third Pillar measures by regulation. ILPA strongly opposes this clear attempt to circumvent the scrutiny of Parliament. Measures falling within the ambit of Title VI of the Treaty on European Union are extremely broad and include matters relating to cross border policing, judicial co-operation and criminal law. ILPA considers that it is entirely wrong that legislation in this area, and particularly the creation of criminal laws and criminal procedure, escape proper examination and debate at national level. ILPA considers that this clause constitutes a fundamental constitutional change. ILPA fails to see how this is related to the events of 11 September 2001 and considers that it is an example of legislating under pressure of events (criticised by Lord Lloyd[13]) without regard for the future consequences (as is much of this Bill). European Union legislation already receives precious little debate or scrutiny by Parliament, and it is objectionable that the Government should seek to curtail that debate further.

27. The Home Secretary has recently called on European States to pass legislation on **European arrest warrants**. Clause 109 would clearly enable the Home Secretary to adopt that legislation in the United Kingdom without any further examination of the proposal at national level. ILPA is opposed to the proposal on European arrest warrants. The proposal seeks to abolish any extradition procedures between European countries and thereby abolish any judicial controls of the extradition of a person from one Member State to another. ILPA would not object to the speeding up of procedures, but it is essential that certain safeguards are retained and that a person should be able to question the evidence against him or her;

[13] See footnote 1 above.

question the fairness of the trial and procedures he or she would be subjected to in the receiving country; and rely on certain defences[14] before being transferred to a country whose laws and language may be entirely alien to him or her.

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[14] As for example the restrictions on extradition contained in s. 6(1) Extradition Act 1989 (a) that the offence of which that person is accused or was convicted is an offence of a political character; (b) that it is an offence under military law which is not also an offence under the general criminal law; (c) that the request for his return (though purporting to be made on account of an extradition crime) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or (d) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.