

Parliamentary Brief



The Law Society

Debate on the Report of the Privy Council Review Committee on the Anti-terrorism, Crime and Security Act 2001

House of Lords - 4 March 2004

The Law Society welcomes this debate on the report of the Privy Council Review Committee. We endorse many of its recommendations, in particular the call for Part 4 powers to be replaced as a matter of urgency.

In the immediate aftermath of the attacks of 11 September 2001 the Law Society entirely agreed that it was necessary for the Government to reassess the country's security needs. However, we argued at the time that it was essential that any emergency legislation designed to protect the country against international terrorism did not compromise the Government's democratic duty to uphold the principles of fairness and justice.

The Anti-terrorism, Crime and Security Act (the Act) received Royal Assent on 14 December 2001. Included in the Act is a provision for review of the entire Act by a Privy Council Committee (the Committee) not later than 2 years after the Act received Royal Assent.¹ The Society welcomes the Committee's comprehensive report and in particular the recommendation that there should be Parliamentary debates on the Report as a whole.²

The Act was an emergency measure rushed through Parliament in just four weeks without full debate and scrutiny. It is far-reaching and a number of the provisions are not strictly related to the emergency situation but are of wider and more general application.

¹ Section 122 of the Act

² Paragraph 12

The Law Society argued then that it was inappropriate to mix urgent counter-terrorism measures with mainstream measures covering criminal justice and other issues such as disclosure of information and communications data retention. We remain of that view.

The Act should now be repealed and replaced by more proportionate and tightly focused legislation. Any new Bill should deal exclusively with anti-terrorism measures. We very much welcome and agree with the Committee's conclusion that counter-terrorism legislation should be kept distinct from mainstream criminal law; be limited to dealing with terrorism; accompanied by tailored safeguards and consistent with collective counter-terrorism policies agreed and coordinated by the international community.³

We agree with the Committee that other measures not specifically targeted at terrorism, such as those dealing with disclosure of information, the retention of communications data and the extension of police powers, should be considered on their own merits and where appropriate enacted as part of the mainstream legislation to which they belong.

Part 4 - Immigration and Asylum

When the original legislation was going through Parliament, the Law Society accepted that, in an emergency situation such as the immediate aftermath of the September 11 attacks, derogation from the ECHR could be lawful if it was a proportionate response to an emergency situation. We welcomed the Government's assurance that its first priority was to prosecute alleged terrorists and that the power to detain indefinitely without charge would be aimed only at those who could not be prosecuted or deported. Consequently, the Law Society did not oppose the Part 4 powers at the time they were introduced.

However, the powers need to be reviewed in the light of developments since 2001. Very few people have been detained under the powers. Whilst that demonstrates that the Government has not exercised the powers in an indiscriminate way, it also shows that the scale of any problems is such that it could readily be dealt with through intensive surveillance, or using other measures suggested by the privy counsellors.

We fully support the Committee's conclusion that the Part 4 powers should be replaced as a matter of urgency⁴ and would welcome a full and open debate about alternatives to indefinite detentions.

Prosecution of alleged terrorists

We endorse the Committee's comments that 'terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism'.⁵

Considerable evidential and procedural changes were made by the Criminal Justice Act 2003, particularly in relation to admissibility of hearsay evidence and previous convictions. The Society urges the Government to take these changes into account when considering whether the criminal justice system is equipped to deal with these contentious cases.

³ Paragraph 2

⁴ Paragraph 203

⁵ Paragraph 1

The Committee makes suggestions as to how these cases might be brought into the criminal justice system and we deal with these suggestions in turn.

Intercept evidence

The Society agrees with the Committee's recommendation to make intercepted evidence admissible. We agree that the suggestion for different classes of warrant authorising the interception of communications, some allowing evidential use of the product and others not, is worthy of further exploration.

Sentencing

We recognise that there is a strong case for regarding links to terrorism as an aggravating factor, leading to a heavier sentence than would be passed on a defendant with the same previous record who had committed the offence for "ordinary" criminal motives. But it is obviously necessary as a matter of basic justice that the defendant has the opportunity to rebut any prosecution assertion of a link to terrorism. The Law Society believes these matters are best dealt with by the trial judges.

Security cleared judge assembling a case

The criminal justice system does presently involve the judiciary in preparation of cases or routine examination of unused material. Involving judges in preparation of cases would inevitably affect public perception of their independence. However, CPS Special Caseworkers do deal routinely with disclosure, and with sensitive and complex matters.

The Criminal Justice Act 2003 introduces a greater role for prosecutors generally, in the early stage of criminal proceedings. The Society considers it may be preferable to extend the role of the Caseworker prosecutors rather than adopt a new role for the judiciary. Concerns over impartiality could be met by extending the pool of special caseworkers to include defence specialists.

Disclosure

We note the Committee's comment that the doctrine of public interest immunity (PII) - which enables the prosecution to withhold material where the trial judge agrees that the public interest in non-disclosure outweighs the defendant's interest in having full access to the material - is not a complete answer. In some cases a judge will order disclosure of information the prosecution consider sensitive and, in some cases, even the use of Special Counsel under PII will not satisfy the prosecutor's concerns and the case will be dropped.

Nevertheless, the Law Society considers that very careful thought needs to be given before establishing new disclosure provisions, to deal with those cases which cannot otherwise satisfy normal criminal rules, even augmented by new provisions such as the admission of intercept evidence. There is little point on using the appearance of a criminal trial if special arrangements made for disclosure in fact seriously undermine the fairness of the procedure.

Plea bargaining

We note that the Government has announced that it is in favour of allowing defendants to seek an indication of the sentence they would be likely to receive if they were to plead guilty at this

point.⁶ The Law Society supports a formal system whereby a defendant, through his or her legal representative, requests the judge give an advance indication of sentence, subject to safeguards against inappropriate pressure.

Deportation of alleged terrorists

We welcome the Government's objective⁷ that, in relation to its removal policy, it is seeking to ensure that the rights of the individual and the UK's obligations under the ECHR, are not breached. Removal may not be possible for a number of reasons, often from fear that deportation might result in deportees being subject to torture or inhuman or degrading treatment or punishment, an absolute prohibition under Article 3 of ECHR. Furthermore, the Government has acknowledged that if detainees can find a country prepared to take them to which they are prepared to go, they can be released from detention as soon as arrangements can be made for their departure from the UK⁸.

We welcome the fact that the Government is taking its obligations under Article 3 of ECHR seriously and has not sought to deport detainees to their countries of origin or third countries, in breach of it. Neither do we disagree that detainees should be free to leave the UK voluntarily.

However, we do have concerns about the suggestion that detainees may be deported against their wishes to their country of origin or a third country if framework agreements are established with those countries. Lord Carlile notes⁹ that other countries, notably France, appear to enter into discussions with third countries about the deportation of individuals. The Committee comments that they see no evidence that it would be illegal for the Government to detain the deportee while taking extra steps in good faith to reach an understanding with the destination government to ensure that the deportee's human rights are not violated on return¹⁰. We note that in response to this suggestion, the Government states¹¹, that work is underway to try to establish framework documents of the kind set out in the Privy Counsellors' report.

Nevertheless, we have serious concerns about the value of assurances given by some countries in such circumstances, particularly if a country has a poor human rights record or if the detainee has fears about their treatment in that country. The UK Government will have no control over the actions of other governments once a detainee has been returned or be able to take any action regarding any breach of assurances. Neither will there be any way of knowing whether such assurances are in fact adhered to.

Alternatives to detention

The Law Society recognises that there are persons who pose a risk to the public and to national security. However, we consider that derogation from the Human Rights Act must be a course of last resort. Liberty can lawfully be restricted by bail conditions within the context of criminal investigations or proceedings, or in some cases by a civil order issued by a court. In all cases the restriction is appealable to and reviewable by the court.

⁶ Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper page 26 paragraph 39

⁷ Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper page 29 paragraph 54

⁸ Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper page 7 paragraph 31

⁹ Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003, paragraph 96

¹⁰ Paragraph 286

¹¹ Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper page 28 paragraph 49

The Government has increased the use of injunctive measure against a whole range of persons from trespassers, those involved in violence or racist behaviour at football matches, people behaving in an anti-social manner and now, under the Domestic Violence Crime and Victims Bill, even against persons who have been acquitted of any crime. Civil orders and injunctions are part of our legal landscape.

We think there may be scope to consider whether a tribunal similar to SIAC could issue time limited and tightly defined civil injunctions with tagging and surveillance in exceptional cases where a threat to national security is evidenced. This could give some freedom to the suspect.

Other issues

Parts 1 and 2 – Terrorist Property and Freezing Orders

The Society expressed concern about seizure and restraint powers being dealt with by lay benches and District Judges in the Magistrates Courts. We welcome the Committee's conclusion that 'open hearings in an ordinary Magistrates' Court are not the appropriate forum for handling cash seizures in terrorist cases'.¹²

Terrorism is a sensitive and complex matter and in the Law Society's view issues around seizure and restraint should be dealt with in the High Court.

Part 3 – Disclosure of Information

The Act extends existing disclosure powers, which permit public authorities to disclose information where there are criminal proceedings, to include any criminal investigations. The Society welcomed the inclusion of a proportionality test but we raised concerns about the operation of the test in practice. We welcome the Committee's recommendation that the Government should 'legislate to provide independent external oversight of the whole disclosure regime' and that the independent overseer should publish statistics twice a year on the use of Part 3.¹³

Any Act replacing the current legislation should ensure that provisions of this kind should be restricted to cases where terrorism is an issue.

Part 5 - Race and Religion

We welcomed the Government's concern about potential attacks on Muslims and other religious groups following the events of September 11. However, we would have preferred to see a generic 'hate crime' introduced which would apply to all offences motivated by hatred of a group of persons. We support the Committee's conclusion that 'the case for offences aggravated by religious hatred should be re-considered in the context of broader mainstream legislation designed to protect the range of targets of hate crime'.¹⁴

Part 10 - Police Powers

Part 10 amends several areas of police law and police powers are extended in ways which appear to be entirely unconnected to the investigation of terrorists' activities. These include

¹² Paragraph 124a

¹³ Paragraph 166

¹⁴ Paragraph 270

powers to insist on the removal of a head covering when a photograph is taken of the suspect and to insist on the removal of any garment reasonably thought to be a disguise when in a pre-designated area or time (eg in a demonstration).

The Society notes the Committee's conclusion that most of the reported uses of Part 10 powers have not been related to counter terrorism, and we agree with the conclusion that 'whilst some of the measures have intrinsic merit, they should be submitted again when the underlying legislation is next revised. Other provisions present an intrusion into individual rights which are not justified by any counter-terrorist benefits and should be either repealed or significantly amended'.¹⁵

In addition, we agree with the observation of the Committee that the precedent that fingerprints might be retained in cases where the persons concerned have not been found guilty of any offence ought not to have been extended in emergency legislation¹⁶.

Part 11 – Retention of communications data

The Law Society raised a number of concerns about the communications data provisions in the Act – in particular that while the Act ensures that communications data can be retained for national security purposes, the Regulation of Investigatory Powers Act allows a wide range of public authorities access to retained data for other purposes.

We agree with the Committee's observations that it would be beneficial both for users and subjects of the data if retention and access were based on a coherent statutory framework.¹⁷

We support the Committee's conclusion that Part 11 should be replaced with 'a mainstream communications data retention regime which limits in primary legislation the longest retention period which the Government can impose to one year'.¹⁸ We also agree with the Committee's conclusion that the whole retention and access regime should be subject to unified oversight by the Information Commissioner.¹⁹

Part 14 – Supplemental

Section 124 gives the Government extensive powers to amend and supplement the Act and other legislation by statutory instruments. Although the powers have not so far been used we agree with the Committee that the powers are 'inappropriate and unwelcome in an Act where so many provisions were known to be controversial, raising a number of civil liberties issues'²⁰ and we agree with the conclusion that 'the powers of amendment set out in section 124 are particularly unwelcome in emergency legislation of this kind, and they should be repealed'.²¹

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¹⁵ Paragraph 334

¹⁶ Paragraph 344

¹⁷ Paragraph 391

¹⁸ Paragraph 401

¹⁹ Paragraph 405

²⁰ Paragraph 441

²¹ Paragraph 442

