



# Legislation Against Terrorism

A consultation paper

*Presented to Parliament by the Secretary  
of State for the Home Department  
and the Secretary of State for Northern Ireland  
by Command of Her Majesty  
December 1998*

Cm 4178

£9.95

published by The Stationery Office

# Contents

Introduction

Chapter 1: Executive summary

Chapter 2: The terrorist threat

Chapter 3: A new definition of terrorism

Chapter 4: Proscription Consideration of the Criminal Justice (Terrorism and Conspiracy) Act 1998

Chapter 5: Exclusion

Chapter 6: Terrorist finance

Chapter 7: Powers of arrest

Chapter 8: Detention and related matters

Chapter 9: Powers to stop, question and search

Chapter 10: Powers of entry, search and seizure

Chapter 11: Ports and border controls for counter-terrorist purposes

Chapter 12: Ancillary offences

Chapter 13: Northern Ireland temporary provisions

Chapter 14: Consideration of further measures

*Annex A: The current framework of legislation*

# INTRODUCTION

1. This consultation paper sets out the Government's proposals for replacing the Prevention of Terrorism (Temporary Provisions) Act 1989 (the PTA) and the Northern Ireland (Emergency Provisions) Act 1996 (the EPA), as amended by the Northern Ireland (Emergency Provisions) Act 1998, with permanent United Kingdom-wide counter-terrorism legislation. It follows a statement on anti-terrorist provisions made to the House of Commons by the Home Secretary on 30 October last year, and takes account of the many developments since then including the Belfast Agreement, the Omagh bombing on 15 August this year and the ensuing Criminal Justice (Terrorism and Conspiracy) Act 1998 which came into force on 4 September. This paper also provides an opportunity for formal consultation on the provisions contained in that Act.
2. The Government is determined to combat terrorism by all legal means wherever it occurs and whoever it is directed against. In his speech to the UN General Assembly in September 1998 the Prime Minister said "The fight against terrorism has taken on new urgency. The past year's global toll includes Luxor, Dar es Salaam, Nairobi, Omagh and many others. Each one is a reminder that terrorism is a uniquely barbaric and cowardly crime. Each one is a reminder that terrorists are no respecters of borders. Each one is a reminder that terrorism should have no hiding place, no opportunity to raise funds, no let up in our determination to bring its perpetrators to justice."
3. In taking a fresh look at the current legislative arrangements to see how these can be improved and modernised, the Government has been greatly assisted by the work done by the Inquiry team led by Lord Lloyd of Berwick. He was asked in December 1995 to consider whether there would be any need for specific counter-terrorism legislation in the United Kingdom in the event of a lasting peace in Northern Ireland. The report of his Inquiry was published in October 1996 (Cm 3420). Lord Lloyd concluded that there would be a continuing need for permanent United Kingdom-wide legislation; and he made a number of detailed recommendations for changes to the definition of terrorism, the powers to proscribe terrorist organisations and the powers of the police to prevent acts of terrorism and to investigate and arrest those suspected of being involved in terrorism.
4. The Government agrees with Lord Lloyd that there will be a continuing need for counter-terrorist legislation for the foreseeable future. That is regardless of the threat of terrorism related to Northern Ireland (which includes both Loyalist and Republican terrorist groups and is referred to from here on as Irish terrorism). It believes that the time has come to put that legislation onto a permanent footing. In preparing its proposals on the shape and content of that legislation, the Government has drawn heavily on Lord Lloyd's work, for which it is indebted to him.
5. Lord Lloyd's recommendations were predicated on there being a lasting peace in Northern Ireland. There is no doubt that the Belfast Agreement, endorsed by 71% of the people of Northern Ireland, and the subsequent elections to the new Northern Ireland Assembly, provide the means to take Northern Ireland on the road to lasting peace. While there will be obstacles along that road, the Government is committed to making as early a return as possible to normal security arrangements. Significant steps have already been taken in that direction and more will be taken if and when the level of threat allows. The proposals in this paper directed at Irish terrorism are designed to tackle what is hoped and expected will be an ever diminishing threat.
6. But Irish terrorism forms only one element of this review. The Government is committed to changing the climate in which terrorists operate. It recognises that the threat from international terrorist groups (and to a lesser extent other groups within this country) means that permanent UK-wide counter-terrorist legislation will be necessary even when there is a lasting peace in Northern Ireland. And it also recognises that proposals for new legislation must take account of the fact that the nature of terrorism is ever changing with new methods and technologies being deployed within and across national boundaries.
7. Terrorism is a global threat and international co-operation is essential to counter it. Lessons can, and have been, learnt from the experience of other governments, and the UK and other governments and their agencies will need increasingly to exchange information and expertise in helping one another combat terrorism. The UK in its Presidencies of the EU and G8 this year has sought to encourage and reinforce the importance of such co-operation so that international terrorists cannot act

with impunity.

8. The Government's aim is to create legislation which is both effective and proportionate to the threat which the United Kingdom faces from all forms of terrorism - Irish, international and domestic - which is sufficiently flexible to respond to a changing threat, which ensures that individual rights are protected and which fulfils the United Kingdom's international commitments. It recognises that it is not easy to strike the right balance in seeking to achieve these objectives. That is why it is publishing its proposals in the form of a consultation paper. It would welcome comments on what it proposes and will consider carefully all the representations received.

9. All responses will be made available to those who ask to see them, unless contributors indicate they do not wish their response to be made public. Responses will be acknowledged and an analysis of all comments received will be made available on request along with information about how they have been dealt with.

10. Copies of this document may be printed from the Stationery Office Internet site address: <http://www.official-documents.co.uk/document/cm41/4178/4178.htm>

11. Comments should be sent by 16 March 1999 to:

Organised and International Crime Directorate  
Room 647  
Home Office  
50 Queen Anne's Gate  
LONDON SW1H 9AT

or

Security Policy and Operations Division  
Northern Ireland Office  
Room 9  
Stormont House Annex  
BELFAST BT4 3ST

# CHAPTER 1:

## Executive Summary: The Government's proposals for change

### **An overview**

1.1 The Government has examined the existing framework of the UK's counter-terrorism legislation - essentially the Prevention of Terrorism (Temporary Provisions) Act 1989 (the "PTA") and the Northern Ireland (Emergency Provisions) Act 1996 (the "EPA") as amended by the Northern Ireland (Emergency Provisions) Act 1998 (a summary of these provisions is at Annex A), along with Lord Lloyd's report of 1996 on the strengths and weaknesses of, and the future need for, such legislation. It has also considered the existing, and potential future, terrorist threat (see Chapter 2). It has concluded that there is a need to modernise and streamline the existing legislation, which will involve dispensing with some of the existing powers, retaining some as they are and strengthening others, in order to maximise the appropriateness and effectiveness of the UK's response to all forms of terrorism.

1.2 Although the current counter-terrorist legislation was designed initially to deal with the threat from Irish terrorism, much of it has been extended so that it now applies equally to international terrorism. As chapter 2 sets out, the Government believes there is a continuing need for specific powers to combat the threat from all kinds of terrorist groups both to this country and its interests, and to other countries. In response to this threat the Government proposes to repeal the PTA and the EPA and to replace them both with one piece of permanent legislation which will apply throughout the United Kingdom and to all forms of terrorism, including new forms of terrorism which may develop in the future. The proposed legislation would cover the whole of the United Kingdom. Special provisions would be necessary in some cases to reflect Scotland's separate criminal justice legislation.

### **Temporary powers for Northern Ireland**

1.3 Following the Belfast Agreement and its endorsement by the people of Northern Ireland, the Government hopes and expects that the threat of Irish terrorism will diminish to the point where no additional special powers are necessary to combat it. It is the Government's objective progressively to transform the security environment as appropriate, and achieve complete normalisation as part of the implementation of the Agreement as a whole. In such circumstances, the Government's position is that there will be no need for any temporary Northern Ireland specific powers. The Government will wish nearer the time, to make a judgement as to whether or not it might be necessary to include in the new counter-terrorism legislation a number of temporary provisions which would be specific to Northern Ireland.

1.4 The options are discussed in Chapter 13. The Government will decide, at the time, whether any, and if so which, provisions will need to be enacted depending on the circumstances on the ground. If, as the Government hopes and expects, the scenario is one in which the threat of terrorism has diminished to the point where no additional powers are necessary, then none will be introduced. However, against a worst case scenario of renewed widespread and sustained terrorist activity, it is likely the Government would decide to introduce, at least initially, the full range of temporary provisions discussed in Chapter 13. In that event, the provisions would be removed as and when they were subsequently deemed not to be necessary; as a first step the provisions might (individually) be lapsed (that is, kept on the statute book but not used). If enacted, the temporary provisions would be subject to annual independent review and to Parliament's annual approval to their remaining in force.

### **Definition of terrorism**

1.5 Chapter 3 concludes that the current definition of terrorism is too restrictive. It proposes that terrorism should be redefined as "the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or any section of the public for political, religious or ideological ends". The term "serious violence" would be defined so as to include "serious disruption" resulting, for example, from attacks on computer installations, electronic data or public utilities. Domestic terrorism (that is, terrorism by indigenous groups prepared to engage in serious violence to further their cause), as well as Irish and international terrorism, would be included. Views are invited on whether the proposed new definition strikes the right balance between being too narrow and too wide. Proscription and consideration of the provisions in the Criminal Justice (Terrorism and Conspiracy) Act 1998

1.6 Chapter 4 discusses the current powers of the Secretary of State to proscribe organisations involved in Irish terrorism. The Government intends to retain these provisions and seeks views on extending them so that proscription - or comparable powers - could also cover domestic and international terrorist groups. The chapter also considers the provisions in the new Criminal Justice (Terrorism and Conspiracy) Act 1998 and invites views on whether incitement provisions should be included in appropriate future legislation.

## **Exclusion**

1.7 Chapter 5 concludes that the (lapsed) powers in current legislation for the Secretary of State to exclude from Great Britain, Northern Ireland or the whole of the United Kingdom, a person concerned in the preparation or instigation of acts of Irish terrorism should be repealed and not replaced. The removal of these provisions would not affect the Government's ability under the Immigration Act 1971 to exclude or deport from the United Kingdom nationals of other states who are thought to be actively involved in terrorism either in the United Kingdom or overseas, subject to the exemptions which British citizens and certain others enjoy in certain circumstances.

## **Terrorist finance**

1.8 Chapter 6 outlines a number of ways in which the Government believes that the current provisions for controlling terrorist financing should be strengthened, including in relation to international terrorism. It proposes first that the existing offences in sections 9 and 11 of the PTA should be extended so as to cover the raising and laundering of funds in the United Kingdom which are intended to be used in connection with, or in furtherance of, acts of terrorism anywhere abroad. Second, the courts' powers in relation to offences of giving or receiving money for terrorism or laundering terrorist funds should be strengthened so that the courts could order the forfeiture of all money and property found to be a result of criminal activity by the person convicted. Third, the police should be given powers to seize cash which they suspect is being, or is intended to be, used for terrorist purposes pending determination by the courts as to whether the cash should be forfeited. The chapter also refers to proposals set out in the consultation paper "Criminal Assets" (published by the Home Office Working Group on Confiscation), for wider provisions on the confiscation of funds and property derived from, or intended to support, crime.

## **Power of arrest**

1.9 Chapter 7 discusses the pros and cons of retaining a similar power of arrest to the one in section 14(1)(b) of the PTA, ie. a power to arrest without warrant anyone whom the police reasonably suspect of being involved in the preparation, commission or instigation of acts of terrorism. The Government's preliminary view is that such a power should be included in the new legislation; it invites the views of others.

## **Detention**

1.10 Chapter 8 proposes that responsibility for granting extensions of detention should, under the new legislation, be transferred from the Secretary of State to a judicial authority. It explores the arguments for and against reducing from 7 days the maximum period for which a detainee may be held (though in future, this period will be subject to judicial authorisation), and invites views. The chapter goes on to argue that as far as practicable a single regime should be established across the UK for the detention of terrorist suspects and that this should be brought more closely into line with that which applies to suspects who are detained under the Police and Criminal Evidence Act 1984 (PACE).

## **Powers of stop and search**

1.11 Chapter 9 considers the various powers of the police, the Army and others to stop and search pedestrians, vehicles and their occupants. It proposes that (for the most part) the current powers in the PTA should be re-enacted and made applicable throughout the United Kingdom. This would enable some of the powers under the EPA to be repealed. If, nearer the time, it is judged that any need to be retained, they would form part of the temporary section of the new legislation.

## **Powers of entry, search and seizure**

1.12 Chapter 10 examines the provisions in the current legislation which allow the police and others to enter, search and seize property. It proposes that those in the PTA should be retained and extended to apply throughout the United Kingdom. Equivalent provisions in the EPA would be repealed and, again, any remaining EPA powers, if they are needed, would form part of the temporary section of the new legislation.

## **Port and border controls**

1.13 Chapter 11 examines the present controls at ports and borders. It proposes that the current powers in the PTA should for the most part be retained, subject to a new code of practice. It also suggests a number of ways in which the current powers could be improved, including strengthening the powers of the police to obtain access to information and to exchange information with other agencies. It seeks views on whether, if these powers are strengthened, carding should be retained.

## **Ancillary offences**

1.14 Chapter 12 looks at a number of ancillary offences in the PTA and the EPA. The Government proposes that these should form part of the new permanent legislation. It specifically seeks views on whether the section 34 EPA offence of giving or receiving training in the making or use of firearms or explosives should be retained and extended UK-wide and to cover chemical, biological and nuclear materials used as weapons.

## **Temporary Northern Ireland specific measures**

1.15 Chapter 13 describes the options for temporary Northern Ireland specific measures, some or all of which may be required if a threat of Irish terrorism remains and as a consequence the Government is prevented from delivering on its normalisation objectives. The measures might include the Diplock Court arrangements, the Army powers and the more specialised police powers under the EPA, to stop, search, enter and seize material. If any of the police or Army powers described in Chapter 13 are enacted, codes of practice would be drawn up governing the exercise of the powers, and all of the temporary provisions would be subject to annual review and to Parliament's annual agreement to their remaining in force. In addition, individual provisions could be lapsed as appropriate.

## **Consideration of further measures**

1.16 Chapter 14 discusses arguments for and against a number of suggestions for further measures against Irish terrorism put to the Government in the aftermath of the Omagh bombing, and during the drafting of the Criminal Justice (Terrorism and Conspiracy) Bill. It assesses the need for the measures suggested, given the current security climate in Northern Ireland.

## CHAPTER 2:

### The terrorist threat

2.1 When the then Home Secretary Roy Jenkins (now Lord Jenkins of Hillhead) introduced the first Prevention of Terrorism (Temporary Provisions) Act in 1974, he referred to the powers it granted as "unprecedented in peacetime" but "fully justified to meet the clear present danger". The Act was brought in soon after the Birmingham pub bombings that same year, in which 21 people died and over 180 were injured, and which gave rise to a tide of public revulsion against the terrorists behind such acts. Earlier, the Report of Lord Diplock's Commission had led to the passage of the Northern Ireland (Emergency Provisions) Act 1973. As well as providing special powers for the security forces there, the 1973 Act established different arrangements, including mode of trial, for terrorist cases. Both Acts were made subject to annual review and to renewal by Parliamentary debate. Twenty four years later, those temporary powers are still on the statute book - with a number of modifications - and successive reviewers of the Act have without exception agreed that the threat posed by terrorism has remained real and serious enough to justify renewal of the powers. The Government believes that it is time to take a serious and thorough look at what is a continuing - but changing - threat from terrorism, and to make permanent in law the powers needed to combat it.

2.2 The threat from Irish terrorism, which first gave rise to these powers, has remained for many years. Between 1969 and 30 November 1998, 3289 people have died in Northern Ireland as a direct result of Irish terrorism (including the 29 who died as a result of the Omagh bomb on 15 August this year) and between 1972 and the end of November 1998, 121 people have been killed in Britain in incidents of Irish terrorism. The peace process, the Belfast Agreement on Good Friday this year and subsequent progress including elections to the Northern Ireland Assembly mean that the outlook in Northern Ireland is changing, and suggest that the days of widespread violence and terrorism may soon be gone for good. Both the British and the Irish Governments are working hard to give lasting peace in Northern Ireland every possible chance to take root. The overwhelming majority of people in Northern Ireland and in the Irish Republic voted to support the Agreement and many terrorist groups are maintaining their ceasefires. However, there are small numbers who remain opposed to peace and wedded to violence. So, even though the context is of a general movement towards lasting peace in Northern Ireland, it is too soon to be confident that all terrorism has been abandoned. These developments must be taken into account when considering the need for special powers to combat terrorism.

2.3 What is more, although the original Prevention of Terrorism Act was a direct response to Irish terrorism, in 1984 the legislation was extended to cover the growing threat from international terrorism. That need emerged as political conflicts abroad began to impact directly on the UK to such an extent that it was judged necessary to allow the police some (though not all) of the powers to tackle international terrorism which they already had in respect of Irish terrorism. International terrorism has had a significant and continuing impact on the UK. Between 1976 and November 1998, 94 incidents of international terrorism took place in the UK. In that period the bomb planted on Pan Am Flight 103 which exploded over Lockerbie in 1988 killed 270 people, and another 26 people were killed in other incidents.

2.4 Lord Lloyd, in his report in 1996 on the future need for counter-terrorism legislation in the context of a lasting peace in Northern Ireland, was satisfied that even if peace in Northern Ireland were achieved there would remain a need for dedicated powers to counteract the terrorist threat to the UK from other sources. Appendix F of Lord Lloyd's report, prepared by Professor Paul Wilkinson, considered in detail the current and potential future threat to the UK. It draws attention to possible future changes in the terrorist threat to lives and property in the UK; changes which mirror what is happening across the world. For instance the last few years has seen a marked increase in terrorism motivated by religious idealism. One example of this is the use of Sarin nerve gas on the Tokyo underground in 1995 by the Aum Shinrikyo religious cult, which killed 12 people and affected up to 5,500. Another is the rise of Islamic extremism. As Professor Wilkinson notes in his report, today over a third of the world's active international terrorist groups are predominantly motivated by religious fanaticism. In framing future UK counter-terrorist legislation account must therefore be taken of the threat from international terrorism, whatever the motive behind it.



2.5 Professor Wilkinson's report also examines the threat from so-called "domestic" terrorist groups - that is indigenous groups prepared to engage in serious violence to further their cause (for example independence for a certain region or environmental concerns). In the UK extreme factions with Scottish and Welsh nationalist views posed a security threat during the 1970s and 80s, issuing threats and letter and parcel bombs to political figures and party headquarters. But violence by such groups has largely receded, with democratic political debate taking its place. The threat from some marginal but extreme elements of the animal rights movement continues to be of more concern to the Government. Animal rights extremists have in the past sent letter bombs to the leaders of major political parties, attacked Bristol University's Senate House with a high explosive bomb, targeted a veterinary surgeon and a psychologist with car bombs and caused millions of pounds worth of damage. Although the police have achieved a number of recent successes against them these have not deterred subsequent attacks. And "new causes" may be taken up by others to equally destructive effect. The shape of new counter-terrorist legislation needs to reflect the possible threat from indigenous groups too.

2.6 The advent of new technologies, advanced means of communication and ever-more sophisticated ways of moving money around have already influenced the way terrorists operate and will continue to do so. Terrorist organisers and fundraisers no longer have to be in the same country as their target or indeed as each other. Their communications to each other can be encrypted. And there is the potential, if the right targets are hit (such as strategic computer systems running banking or air traffic control operations), to affect thousands or even millions of people. Such technologies could not have been envisaged when the existing counter-terrorist legislation was framed over 20 years ago, but the powers made available in future must be adequate - and flexible - enough to respond to the changing nature of the terrorist threat both now and in the years to come.

## **Conclusion**

2.7 In the language of the then Home Secretary introducing the PTA legislation in 1974, the Government believes that there exists now a clear and present terrorist threat to the UK from a number of fronts and that a terrorist threat is likely to continue to exist for the foreseeable future even when a lasting peace in Northern Ireland is achieved.

2.8 Having come to this conclusion, the Government believes that new counter-terrorist legislation is needed to take account of the changes in the nature of terrorism and the methods deployed. It also believes that this new legislation should be permanent - as is the case with the vast majority of criminal law. The annual renewal of current temporary anti-terrorist legislation, whilst useful in underlining the exceptional nature of the powers and the connection between their use and the prevailing terrorist threat, and providing an opportunity for annual scrutiny of the use of the powers, does not reflect the current reality that such powers are likely to be needed for the foreseeable future. The more transparent approach, which the Government proposes to adopt, is to introduce permanent legislation to apply throughout the UK to meet the general threat faced from terrorism, if necessary with additional temporary powers for Northern Ireland subject to annual review.

2.9 The rest of this paper examines the powers which the Government proposes should be contained in new counter-terrorist legislation.

## CHAPTER 3:

### A new definition of terrorism?

**This chapter discusses the current definition of terrorism and the views of Lord Lloyd on how it might be improved. It proposes a new definition of terrorism, which is wider in scope than the present one, and which includes serious violence against property as well as people. Views are sought on:**

- **the proposed new definition of terrorism, including;**
- **its application to domestic (as well as Irish and international) terrorism;**

### The current definition

3.1 Terrorism is defined in section 20 of the PTA as "the use of violence for political ends [including] any use of violence for the purpose of putting the public, or any section of the public in fear". Within this broad definition, use of the special powers the Act provides is qualified in each case. They may only be used either in relation to "terrorism connected with the affairs of Northern Ireland" (Irish terrorism) or in relation to both Irish terrorism and international terrorism. Non-Irish domestic terrorism, that is terrorism having its origins in the affairs of any part of the United Kingdom other than Northern Ireland, is excluded from the scope of the Act (this is referred to from here on as "domestic terrorism").

3.2 The definition of terrorism in the EPA is identical to that in section 20 of the PTA. The EPA does not impose any limitations on the kinds of terrorism to which it applies. But in practice, the powers have been, and are, only used to combat Irish terrorism since that has presented by far the greatest threat to security in Northern Ireland.

3.3 The limitations on the applicability of the powers in the PTA are similarly the result of previous assessments of the threat from terrorism to the United Kingdom and its interests overseas. In 1974, when the original Prevention of Terrorism Act was passed, it was designed to counter Irish terrorism in the wake of IRA bombing campaigns. The threat from international terrorism by comparison was relatively low, and the threat from domestic terrorism negligible.

3.4 The scope of many of the Act's provisions was extended to include international terrorism in 1984. This reflected the judgement that the threat to the United Kingdom and its interests abroad had increased significantly and that this would continue. The threat from domestic terrorism was considered insufficient to merit the use of special powers to combat it.

### Lord Lloyd's views on domestic terrorism

3.5 Lord Lloyd in his report criticises both the current definition of terrorism in section 20 of the PTA and the restrictions imposed throughout that Act limiting the use of the powers to certain kinds of terrorism. He suggests that there is no difference in principle, still less from the standpoint of the victim, between domestic and international terrorism given that the perpetrators use many of the same methods and inspire the same fear in those caught up in, or affected by, their activities. The police should therefore, in his view, be able to use all their counter-terrorist powers against domestic terrorists in the same way they do against Irish or international terrorists. He recommends that any new body of legislation to combat terrorism should include a definition which covers all forms of terrorism.

### The Government's approach to domestic terrorism

3.6 The Government notes that Irish, domestic, and international terrorist groups are driven by the same desire to achieve political change by violent means. The methods which they employ are those in common currency amongst terrorists everywhere - bombs, incendiaries, shootings, arson and so forth. Nor is there any difference in the fear, pain or despair felt by the victims or their families whether the bomb or incendiary which affects them is planted by a republican or loyalist paramilitary, an international terrorist or an animal rights activist. The injuries and the destruction of life and property are the same. On that view, it seems illogical to draw distinctions between these types of criminal activity and refuse to allow the police to exercise the powers conferred by the Act save in relation to Irish and international terrorism.

3.7 But successive Governments have, rightly in this Government's view, sought to ensure that the exceptional powers contained in the PTA and the EPA are used only as and when the security situation warrants them. Against this criterion, can the current, or probable future, threat from domestic terrorism be said to be such that special powers are needed to deal with it?

## Domestic terrorism

3.8 As already outlined in chapter 2, in the last 25 years the main domestic terrorist threat in the UK has come from militant animal rights activists and to a lesser extent from Scottish and Welsh nationalist extremists.

3.9 Scottish and Welsh extremist nationalist groups have certainly on occasions resorted to violent means to achieve their ends. Scottish nationalist extremists have, for example, been responsible for over 40 incidents in the last 5 years including the despatch by letter or parcel of a number of real and hoax explosive devices to MPs and others. But in recent years their violent activities have considerably diminished. It may well be, moreover, that with the provision of a Parliament for Scotland and an Assembly in Wales, their respective activities - and support base - will decline still further. But, of course, there can be no absolute guarantee of this.

3.10 Animal rights, and to a lesser extent environmental rights activists, have mounted, and continue to pursue, persistent and destructive campaigns. Last year, for example, more than 800 incidents were recorded by the Animal Rights National Index (ARNI). These included attacks on abattoirs, laboratories, breeders, hunts, butchers, chemists, doctors, vets, furriers, restaurants, supermarkets and other shops. Some of the attacks were minor but others were not. Thankfully no one was killed but people were injured and the total damage done in 1997 has been estimated at more than £1.8 million. In previous years, the cost of the damage inflicted has been higher. For example in 1995, the cost of damage was estimated at nearly £4.5 million.

3.11 While the level of terrorist activity by such groups is lower, and the sophistication of their organisation and methods less well developed, than that of some of the terrorist groups in Northern Ireland, or of some of the international terrorist groups, there is nothing to indicate that the threat they pose will go away. Acts of serious violence against people and property have undoubtedly been committed in the UK by these domestic groups.

3.12 There is also the possibility that new groups espousing different causes will be set up and adopt violent methods to impose their will on the rest of society. In the United States, for example, there is an increasing tendency by individuals and groups to resort to terrorist methods. Some of those opposed to the USA's laws on abortion have bombed clinics and attacked, and, in a number of cases, killed doctors and nursing staff employed by them. Although there have been no comparable attacks in the United Kingdom, the possibility remains that some new group or individual could operate in this way in the future, threatening serious violence to people and property here.

3.13 In the light of the above, the Government has come to the conclusion that any new counter-terrorism legislation should be designed to combat serious terrorist violence of all kinds. It proposes therefore that the powers in the new legislation should be capable of being used in relation to any form of serious terrorist violence whether domestic, international or Irish.

## A new definition of terrorism?

3.14 If the new legislation is to deal with all kinds of terrorism, the question arises as to whether the current definition of terrorism in the PTA needs to be changed to accommodate the various threats posed by different terrorist groups. Lord Lloyd

believes that it does. He suggests that the current definition is both too wide and too narrow: too wide in that it can cover the use of trivial violence which can and, he suggests should, be dealt with under the ordinary criminal law, and too narrow because it may not cover adequately the activities of religiously inspired terrorist groups. Lord Lloyd recommends that the Government remedy this by adopting the working definition of terrorism used by the FBI in the USA.

3.15 The FBI's definition of terrorism is:

"the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public in order to promote political, social or ideological objectives."

3.16 The Government agrees that the new legislation should bite only on the use of serious violence. And it agrees that if there is any doubt that the definition in section 20 of the PTA covers the use of such violence by religiously motivated terrorist groups this should be remedied. It therefore sees some attractions in the FBI's definition. But it wonders whether this definition might also, as it stands, be both too broad and too narrow. Too broad because it includes the use of serious violence for "social" objectives. The latter could, for example, include crimes committed by criminals other than terrorists such as blackmail or extortion for gain. The Government does not believe that special powers are needed to deal with matters of that sort where there is no intent to disrupt or undermine the democratic process. The FBI definition may be too narrow, however, in that it appears not to cover the damage and serious disruption which might result from a terrorist hacking into some vital computer installation and, without using violence, altering, deleting, or disrupting the data held on it. Such activity might well result in deaths and injuries and, given the increasing reliance placed on computers and electronic forms of communication, the destruction or corruption of data held in such systems could also result in extensive disruption to the economic and other infrastructure of this country. Another example of an act which could cause serious disruption and harm without necessarily in itself being an act of serious violence would be contaminating a public utility system such as a water or sewage works. The Government believes that any new definition of terrorism should be sufficient to catch the potential for these kinds of activity by terrorists.

3.17 The Government therefore suggests that terrorism should be redefined as "**the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public for political, religious or ideological ends**". The term serious violence would need to be defined so that it included serious disruption, for instance resulting from attacks on computer installations or public utilities, as described in paragraph 3.16 above.

3.18 The Government recognises that there is a balance to be struck between too narrow a definition of terrorism (which could exclude some serious threats which fully justify the availability of special powers) and one that is too wide (and which might be taken to include matters that would not normally be labelled "terrorist"). The Government would welcome views on whether its proposed definition succeeds in striking that balance. Violence that can be described as "politically motivated" may arise in the context of demonstrations and industrial disputes. The Government has no intention of suggesting that matters that can properly be dealt with under normal public order powers should in future be dealt with under counter-terrorist legislation.

## CHAPTER 4:

### Proscription

#### Consideration of the Criminal Justice (Terrorism and Conspiracy) Act 1998

**This chapter discusses the provisions in the PTA and EPA by which the Secretary of State can proscribe an Irish terrorist organisation which appears to be concerned in terrorism occurring in the UK. It proposes that proscription for Irish terrorist organisations should be retained, and also considers the case for and against proscription, or comparable powers, for international and domestic terrorist groups. The chapter outlines the new provisions contained in the Criminal Justice (Terrorism and Conspiracy) Act 1998. Views are particularly sought on:**

- **whether proscription powers should be extended to cover international and domestic terrorism;**
- **the provisions in the new Criminal Justice (Terrorism and Conspiracy) Act 1998;**
- **whether incitement measures should be included in appropriate future legislation.**

### The current law

4.1 Under section 1 of the PTA, the Secretary of State may by order proscribe any organisation which appears to him to be concerned in Irish terrorism, or in promoting it or encouraging it. The IRA and the INLA are proscribed under this section. No provision is made under the current law for proscribing international terrorist organisations active in the UK. Section 2 of the Act makes it an offence to belong to or solicit support, other than money or other property, for a proscribed organisation. (Fund-raising for, or contributing money or property to, a proscribed organisation is an offence under section 10 of the PTA - see chapter 6). Section 3 makes it an offence to display support for such an organisation in public.

4.2 Equivalent provisions in Northern Ireland are set out in sections 30 and 31 and Schedule 2 to the EPA. 12 organisations including the IRA, the INLA, the UDA, the UVF, the UFF, and most recently, the LVF and the Continuity Army Council are currently proscribed.

4.3 The Criminal Justice (Terrorism and Conspiracy) Act 1998 made further provision about the offence of belonging to a proscribed organisation, under section 2A of the PTA as inserted by the 1998 Act, so that where a person is charged with the offence of membership of a proscribed organisation, a statement of opinion from a senior police officer that the person is or was a member of a "specified" organisation can be admissible as evidence. Section 2A also provides that, where membership of a "specified" organisation is at issue, and provided that the accused has been permitted to consult a solicitor, certain inferences may be drawn from any subsequent failure to mention a fact material to the Section 2A membership offence when being questioned or charged. Neither the statement by the police officer, nor any inferences drawn, would alone be sufficient to convict an accused. Similar provisions were inserted into the EPA by the 1998 Act.

4.4 A "specified" organisation is an Irish terrorist organisation which the Secretary of State does not believe to be observing a complete and unequivocal ceasefire. The provisions of the new Act only apply to organisations which are both proscribed and specified in the relevant jurisdiction.

4.5 The Government would welcome views on the new proscription-related provisions contained in the 1998 Act, including the related forfeiture powers in section 4 (see paragraph 6.7 of this paper).

# Lord Lloyd's views on proscription

4.6 Lord Lloyd in his report acknowledges that the offences associated with the proscription powers are used relatively infrequently, but he nevertheless recommends the retention of proscription in permanent legislation, and its extension to non-Irish terrorist groups. His reasons are twofold. First, he suggests that proscription, particularly if the powers were to be extended to include international terrorist groups, would facilitate the burden of proof in terrorist related cases. This proposal stems from Lord Lloyd's argument that a specific raft of terrorist offences should be created, and is considered in chapter 7. Secondly, Lord Lloyd argues that proscription could provide a useful paving mechanism for extending the current controls on terrorist fund-raising to international groups.

## Should the proscription powers be retained in respect of Irish terrorism?

4.7 In Northern Ireland, in particular, proscription has come to symbolise the community's abhorrence of the kind of violence that has blighted society there for over 30 years. The indications are that the proscription provisions have made life significantly more difficult for the organisations to which they have been applied. Whilst the measures may not in themselves have closed down terrorist organisations, a knock on effect has been to deny the proscribed groups legitimate publicity and with it lawful ways of soliciting support and raising funds. Many activities by, or on behalf of, such groups are made more difficult by proscription, and that in itself aids the law enforcement effort in countering them. But perhaps more importantly the provisions have signalled forcefully the Government's, and society's, rejection of these organisations' claims to legitimacy.

4.8 There have been no convictions for proscription-related offences in GB since 1990, though, in the same period, 195 convictions in Northern Ireland (usually as the second count on the charge sheet). But the indications are that the provisions have produced some less quantifiable but still significant outcomes. In particular it is suggested they have led proscribed organisations to tone down overt promotion and rallies. Although it is less easy to measure what has not happened because the proscription provisions have been in place, or to calculate the numbers deterred from supporting proscribed organisations because of the penalties if convicted (up to 10 years' imprisonment and an unlimited fine), the Government still believes these factors to be very important.

4.9 One reason why there have been relatively few convictions for proscription-related offences is that they can be difficult to prove in practice. This particular concern was addressed in the recent Criminal Justice (Terrorism and Conspiracy) Act 1998 in respect of those "specified" terrorist groups not observing a full and unequivocal ceasefire, by provision for a statement of opinion of a senior police officer to be admissible as evidence in court. In the wake of the Omagh bombing, and in line with similar action by the Irish Government, the Government rapidly introduced tough additional measures to tackle the difficulty of proving membership, targeted against the Real IRA and other terrorist groups who have not satisfied the Secretary of State that their ceasefire is complete and unequivocal. The fact that the Government chose in doing so to build upon the existing proscription powers underlines its conviction that these measures are useful - both as a means to tackle membership of and support for proscribed organisations - and also as a way for society as a whole to voice its rejection of such groups and all they stand for.

4.10 Whilst optimistic that lasting peace will come to Northern Ireland, the Government does not believe that it would be right to repeal the power to proscribe Irish terrorist groups. The hope is that the existing terrorist organisations will continue to lose support and not be replaced - but there are no guarantees and the proscription measures have proved themselves to be fundamental to an effective response to the emergence of new terrorist groups. The Government therefore believes that the power of proscription in relation to Irish terrorism should be retained in future permanent counter-terrorism legislation. It proposes that, as now, the power to decide which groups should be proscribed should rest with the Secretary of State who has access to all the relevant intelligence on which decisions need to be based.

4.11 The additional proscription-related provisions introduced this summer in the Criminal Justice (Terrorism and Conspiracy) Act 1998 (outlined in Annex A) constituted a specific and tightly defined response to the threat from small splinter groups opposed to the peace process in Northern Ireland. The Government hopes that well before any new permanent counter-terrorist legislation comes into force, the threat from Irish terrorism will have continued to reduce to the extent that the need to retain these provisions will have diminished. A decision on whether or not the provisions should be retained in the new legislation will need to be taken at that time, in the light of the security situation.

# Should the proscription powers be extended to international and domestic terrorism?

4.12 Chapter 2 concludes that even if the threat from Irish terrorism diminishes significantly, the UK will need to have at its disposal the tools to combat terrorism connected with other political, religious and ideological ends, arising from both domestic and international causes. And chapter 3 goes on to argue that a new definition of terrorism in legislation is required so that it covers all organisations (or individuals) committed to serious violence against persons or property to further such ends. The question then, is whether proscription, or equivalent powers, should be one of the tools to counter such terrorism.

4.13 Experience from other countries on the issue of banning terrorist organisations does not all point in one direction. Some EU Member States rely primarily on action against individuals rather than organisations. But others have laws which allow the courts to dissolve groups which use or instigate violence or threaten public order. And some international terrorist groups and their front organisations have been banned in recent years under such legislation. The US, under the Terrorism Prevention Act 1996 has taken powers to designate international (though not domestic) terrorist groups. The effect is that it is an offence to solicit, donate, or otherwise provide money and other resources to such organisations and it empowers the authorities to seize the assets of any designated organisation. The Act does not, however, make it illegal to be a member of a designated organisation, thus the question of proving membership does not arise. Thirty organisations have been designated under the Act to date but the list was only issued in October 1997 and so it is still perhaps a little too early to judge what long-term impact the American legislation will have.

4.14 An advantage in extending the current UK proscription powers so that the whole range of terrorist groups covered by the proposed new definition of terrorism could be caught is that it would provide a mechanism to signal clearly condemnation of any terrorist organisation whatever its origin and motivation. The current provisions, under which only Irish terrorist groups can be proscribed, could be construed by some as indicating that the Government does not take other forms of terrorism as seriously. Furthermore a wider provision could deter international groups from establishing themselves in the UK. Arguably, such groups can, to a greater extent than indigenous groups, choose their centres of operation, and proscription could send an unequivocal message that they are not welcome here.

4.15 Moreover, as for Irish terrorist groups, proscription or designation could make it easier to tackle terrorist fund-raising. (Lord Lloyd placed particular weight on this point in his argument that proscription powers should be retained and extended to all forms of terrorism). It is often difficult to prove that funds are being used for terrorist purposes and even more so if they are raised in one country for a cause in another. Criminalising fund-raising activity of any kind for a particular group would remove the requirement to prove end use of funds. But, of course, the provisions could be circumvented by changing the group's name (especially in cases where the group does not have an overriding incentive to preserve that particular identity), or by creating front organisations.

4.16 Although the Government recognises there would appear to be some advantage in extending proscription-type powers to non Irish terrorist groups, it is also aware that there could be attendant difficulties. The practical and policy difficulties involved in drawing up and then maintaining an up to date list of international and domestic groups to be covered would be formidable. For a start the potential scope of the list would be very wide (literally scores of groups could be possible candidates) and there would be a real risk of the list quickly becoming out of date - particularly if, as now, additions to, or deletions from, the list could only be made after debate by, and with the explicit agreement of, Parliament. Moreover the Government might be exposed to pressure to target organisations that it might not regard as terrorist or to take action against individuals whom it would not regard as terrorists.

4.17 In the light of these considerations, the Government recognises that the arguments are finely balanced for and against including in future counter-terrorist legislation a power for the Secretary of State to proscribe or designate terrorist organisations connected with domestic or international terrorist activities. It would welcome views on whether the powers should be so extended.

## Conspiring in the United Kingdom to commit terrorist attacks abroad.

4.18 Of course, proscription and designation are not the only means by which the activities of international terrorist groups in this country could be combated. The Government condemns terrorism of any sort wherever it takes place and whatever or whoever is its target. It will take whatever steps are necessary both to prevent terrorism in the UK and abroad and to prevent people here planning terrorist acts elsewhere. That is why it took the opportunity in the recent Criminal Justice (Terrorism and Conspiracy) Act 1998 to introduce provisions to fulfil its commitment to make it an offence here to conspire to commit crimes abroad. It believes that these provisions strike the right balance between ensuring it is possible to take decisive action against those plotting terrorist and other criminal acts elsewhere from the UK, whilst building in safeguards to prevent prosecutions going ahead when broader considerations indicate that this is not in the public interest. This has been achieved by providing that the crime which it is believed is being plotted here must be a crime both under UK law and in the "target" country and by requiring that, in most cases, the Attorney General must give his personal consent, having regard to the public interest, before the case can proceed. The Government believes that these provisions on conspiracy will continue to play an important role in deterring international terrorists from using this country as a base for their operations. However, it recognises the doubts that were expressed about the breadth of the provisions in the 1998 Act, and would welcome further views in the present consultation exercise.

4.19 In introducing the 1998 Act, the Government decided that although the original Private Members Bill on conspiracy, introduced in 1996, also included incitement provisions, it would not carry these across into the 1998 Act. It came to this view because it recognised these measures raised separate complex and sensitive issues which it would not have been possible to address adequately in the time available. These included concerns that the incitement offence could be difficult in practice to prove and concerns that in certain circumstances the effect of the creation of the offence could be to constrain freedom of expression. On the other hand, there is no question that considerable concern can be caused by the sort of statements which can currently be made with impunity, encouraging and glorifying in acts of terrorism. This can make it difficult to define where the boundary of free speech should lie. The Government will look at these, and the related, issues very carefully and will keep under review whether incitement measures should be included in appropriate legislation at some point in the future. It would welcome further comments on this point.



## CHAPTER 5:

### Exclusion

**This chapter discusses the provisions in the PTA which empower the Secretary of State to exclude from Great Britain, Northern Ireland or the whole of the UK anyone whom he is satisfied is, or has been, concerned in the commission, preparation or instigation of acts of Irish terrorism. These powers are currently lapsed, and the chapter recommends their repeal. The ability to deport or deny entry to suspected international terrorists would remain unchanged. Views are sought on:**

- **the proposed repeal of the Exclusion Order powers.**

5.1 There is power under the Immigration Act 1971 to exclude or deport from the United Kingdom certain persons on the grounds that their presence here would not be conducive to the public good. These powers may be used against those suspected of involvement in Irish, international or domestic terrorism. The Government has no plans to alter these powers. What follows relates solely to Irish terrorism.

5.2 Part II of the PTA, comprising sections 4 - 8 and Schedule 2, empowers the Secretary of State to exclude by order anyone whom he is satisfied is, or has been, concerned in the commission, preparation or instigation of acts of terrorism, if it appears to him to be expedient to do so to prevent acts of Irish terrorism. Section 5 of the PTA provides for exclusion from Great Britain, section 6 exclusion from Northern Ireland and section 7 exclusion from the whole of the United Kingdom. Section 8 makes it an offence to fail to comply with an exclusion order, or to assist someone subject to such an order to enter, or remain within, the territory from which he is excluded. The powers have always been used much more extensively in Great Britain than in Northern Ireland. British citizens are exempt from exclusion in certain circumstances; in the case of others, if they are ordinarily resident in the place from where they would be excluded, were an order to be made, that has to be taken into account.

5.3 The exclusion powers are not currently in force: they were lapsed with effect from midnight on 21 March 1998. For as long as the powers remain on the statute book, however, they can, with the approval of Parliament, be reactivated by order of the Secretary of State if he decides that it is expedient to do so to prevent acts of Irish terrorism.

### Are the powers useful and effective?

5.4 It has been suggested, most recently by John Rowe QC in his report on the operation of the PTA in 1997, that exclusion orders are effective in that they make it far more difficult for those subject to them to enter, and carry out attacks in, the territory from which they have been excluded. There is some evidence to suggest that the existence of an order has deterred a few people from making the attempt. The powers can also be effective in that they allow someone to be removed from an area in which he is thought to be engaged in terrorist activity even though there is insufficient evidence, as opposed to intelligence, to charge him with a specific offence.

### **If the powers are useful should they be re-enacted in any new legislation against terrorism?**

5.5 The Government believes that although the powers have been useful, their utility is limited. More importantly, the Government believes that the powers are fundamentally objectionable in so far as they may be used to exclude British citizens by executive order from part of the national territory. In recognition of this, the powers have been used very sparingly in recent years.

5.6 Wherever possible the police and the Security Service will keep a suspected terrorist under surveillance and investigate his activities and connections. Where appropriate, he will be charged with a specific offence. In some cases, however, consideration is given to disrupting his activities by seeking an exclusion order against him. The numbers of orders in force each year reflect an increasingly selective use of this option. In 1982 for example, there were 248 orders in force. By the end of 1990, the number had dropped to 106. By the end of 1996, the number was 24. There were only 12 in force when the Home Secretary decided in October 1997 that they were no longer expedient to prevent acts of terrorism by those excluded and revoked all those which remained.

## Conclusion

5.7 Given the arguments of principle against them and since only limited use has been made of these powers in recent years, (and recognising that the police have other means of keeping suspected terrorists under surveillance, investigating their activities and, ultimately, charging those suspected of any crime), the Government has concluded that the PTA powers to exclude should be repealed and not re-enacted.

# CHAPTER 6:

## Terrorist finance

**This chapter discusses the offences in the PTA relating to terrorist funding, the powers available to the police to investigate suspected terrorist financing and the forfeiture of terrorist-related funds. It makes proposals for revising sections 9 - 11 and 13 of the PTA, and for strengthening powers to counteract terrorist fund-raising, particularly by international groups. Views are invited on:**

- **the proposed revision of sections 9 - 11, including the extension of the powers to the financing of terrorist acts anywhere abroad;**
- **the proposed extension of the current forfeiture powers;**
- **the proposed new power to seize and forfeit cash suspected of being used, or intended, for terrorist purposes;**
- **further extension of the powers of forfeiture in terrorist cases in line with the thinking set out in the recent consultation paper on criminal assets.**

## The current legislation

6.1 The PTA contains a number of provisions which are designed to help the police and the courts deprive terrorists of the resources they need to pursue their activities.

## The fund-raising offences

6.2 Section 9 of the PTA makes it an offence in various ways to contribute money or other property for terrorist purposes. The section applies to both Irish and international terrorism but its scope in relation to the latter is limited (by subsection (4) of section 9) to those acts of international terrorism which also constitute offences triable in the UK. This means that if the terrorist act in question is, or is intended to be, committed abroad, it must, if it is to be caught by the offence in section 9, be either one of a small number of offences which are triable in the UK irrespective of where in the world they are committed (murder or hijacking are examples of these) or one of a list of offences covered by, and carried out in a country that has been designated under, the Suppression of Terrorism Act 1978. In practice this means that the offence must be carried out in a Council of Europe country or in the USA or India.

6.3 Section 10 of the PTA makes it an offence to do any of the things prohibited by section 9 for the benefit of a proscribed organisation. Only Irish terrorist organisations are affected since the Secretary of State's powers to proscribe in the PTA and the EPA do not extend to international terrorist groups. For the purposes of sections 10, 11 and 13 of the PTA, the term "proscribed organisation" includes any organisation which has been proscribed under the EPA.

6.4 Section 11 of the PTA makes it an offence to "launder" terrorist funds. The offence applies whether the funds in question are, or are intended to be, used for the commission of acts of terrorism to which section 9 applies; or are the proceeds of the commission of any such acts; or are the resources of a proscribed organisation. It is for the defendant to prove that he did not know, and could not reasonably suspect, that the funds in question were terrorist funds.

# Sanctions

6.5 Section 13 of the PTA sets out the penalties and forfeiture arrangements which may be imposed following conviction for an offence under sections 9, 10 or 11 of the PTA. It provides first, that each of the offences is punishable by up to 14 years' imprisonment, or an unlimited fine or both. And second, it empowers the courts, in addition to imposing either imprisonment or a fine or both, to order the forfeiture of any money or other property which the convicted person had in his possession or under his control at the time of the offence, provided he intended, knew, or had reasonable cause to suspect that the money would be used in connection with terrorism or for the benefit of a proscribed organisation.

6.6 Forfeiture orders are enforced in accordance with Schedule 4 to the PTA. Separate forfeiture schemes are provided for England and Wales, Scotland and Northern Ireland reflecting the differences between the different legal jurisdictions. But they all allow the courts to order that money or property be handed over to the court or to the police, or that it be disposed of as directed by the court and the proceeds of disposal paid over to the court. Schedule 4 also allows the High Court, or its equivalent in Scotland and Northern Ireland, to order that any property which is, or may be, the subject of a forfeiture order under section 13 should be restrained pending the outcome of proceedings against the individual concerned.

6.7 Section 4 of the new Criminal Justice (Terrorism and Conspiracy) Act 1998 provides that where a person is convicted of membership of a proscribed and specified organisation the court may order the forfeiture of money and other property in that person's possession or control if satisfied to the civil standard of proof that it has been used in furtherance of, or in connection with, the activities of that proscribed and specified organisation, or may be so used unless forfeited.

## Investigating terrorist funding

6.8 The PTA also contains a number of provisions which are designed to help the police investigate the financial arrangements of terrorists. Section 12 for example enables anyone who, in the course of their business, comes to suspect or believe that money or property is, or is derived from, terrorist funds, to inform the police of their suspicions. It does this by lifting any restrictions (imposed by statute or otherwise) which prevent the disclosure of such information to the police. And, section 18A, by making it an offence to fail to disclose such information, effectively requires banks and other financial institutions to notify the police of any suspicious transactions or arrangements which come to their attention and which suggest that a third party is providing some form of financial assistance to terrorism. Section 17, in contrast, makes it an offence to disclose any information which is likely to prejudice a police investigation or to dispose of material which may be relevant to that investigation. This provision too is aimed principally at banks and similar institutions. And its purpose is to prevent them from "tipping off" any of their clients that they may be the subject of such an investigation.

6.9 Additional investigative powers given to the police under section 17 and Schedule 7 to the PTA apply where a terrorist investigation, including a financial investigation, is in progress and the information and other material which is being sought is likely to be of substantial value to that investigation. The principal powers - and the ones of most use in financial investigations - enable the police in England, Wales and Northern Ireland to:

- i. apply to a justice of the peace for a search warrant in respect of material which does not include excluded or special procedure material or material subject to legal privilege (as defined by sections 10 to 14 of PACE) - paragraphs 2 and 2A of Schedule 7 refer;
- ii. apply to a circuit judge for a production order in respect of excluded or special procedure material. A production order requires the holder of the material in question to hand it over to the police or to give them access to it within a specified period - paragraph 3 of Schedule 7 refers;
- iii. apply to a circuit judge for a search warrant in relation to excluded or special procedure material. This power may only be used where a production order has been made but not complied with or where the making of such an order would be impracticable or inappropriate - paragraph 5 of Schedule 7 refers; and
- iv. apply to a circuit judge for an explanation order. An order of this sort requires an individual to provide an explanation of any material which has been found as the result of a production order or of a search under warrant under Schedule 7. As a safeguard against the abuse of this power, the Act imposes limits on the extent to which any statement may be used in evidence against the individual concerned and it also provides that material subject to

legal professional privilege is exempt from the force of the provisions. Making a false statement, however, constitutes an offence under the PTA punishable by up to 2 years' imprisonment - see paragraph 6 of Schedule 7.

6.10 There are no circuit judges in Northern Ireland. The powers conferred on circuit judges by section 17 and Schedule 7 to the PTA are exercisable in Northern Ireland by a county court judge.

6.11 Equivalent provision is made in paragraphs 11 - 17 of Schedule 7 for Scotland save for some minor adjustments to reflect the differences in the legal system there. In Scotland, for example, production and explanation orders are granted by a sheriff on an application from a procurator fiscal.

6.12 And lastly, and only in Northern Ireland, paragraph 8 of Schedule 7 empowers the Secretary of State in certain circumstances to authorise the police to carry out searches for, or require the production of, material in connection with investigations into the offences in sections 9 - 12 of the PTA and/or that of directing a terrorist organisation. (The last is an offence under section 29 of the EPA - see chapter 12.)

6.13 The investigative powers described above are modelled very closely on similar provisions in PACE. But they differ from those in PACE in three fundamental ways. First, the PTA powers do not require the police to satisfy a magistrate or judge that they have grounds for believing that a serious arrestable offence has been committed. All that is necessary is for the police to demonstrate that a terrorist investigation is being carried out; that they have reasonable grounds for believing that material which is likely to be of substantial use to that investigation may be found on the premises, and that in accordance with the relevant paragraph a warrant or production order is necessary. Second, the powers in the PTA go beyond those in PACE by empowering a circuit judge to issue an order, or a warrant as the case may be, in relation to "excluded" material. And lastly, hearings of applications for production orders under the PTA can be held ex parte and up to 28 days before the information or material comes into the hands of the individual who may be made subject to the order. These provisions together mean that the police can take action in terrorist investigations at a much earlier stage than they are able to in other kinds of criminal investigation.

## Are these provisions useful and effective?

6.14 Lord Lloyd considered this question carefully in his report. He concluded that, whilst there were some weaknesses in the current provisions, particularly in relation to fund-raising by international terrorist groups and their supporters, provisions of the sort described above would continue to be needed for the foreseeable future and should therefore be included in any new permanent counter-terrorism legislation. The Government agrees. Whilst there have been relatively few convictions in Great Britain for any of the fund-raising offences - only 4 in the last eleven years - there have been 169 convictions in Northern Ireland since 1989. There is also evidence to suggest that the existence of the offences in sections 9-11 of the PTA and the vigorous use made by the police of their Schedule 7 powers to obtain information has deterred some, and made it much more difficult for others, to raise money here and transfer it to those intent on using it to fund terrorist activities.

## The need for revision of the provisions

6.15 But this does not mean that the Government believes that all the above provisions should be re-enacted as they stand. There are, as Lord Lloyd's report makes clear, some weaknesses in the scope of the offences in sections 9-11 of the PTA and in the present arrangements for forfeiture which need to be remedied; and other areas in which the powers of the police might usefully be enhanced.

## Revision of the scope of sections 9-11 of the PTA

6.16 The first, most obvious, deficiency with the current legislation is that the offences in these sections do not apply to fund-raising for all terrorist purposes. Fund-raising for domestic terrorism is excluded altogether from their ambit, and fund-raising for international terrorism is only covered in part. It is currently illegal, for example, for the supporters of an international terrorist group to raise funds here to enable the group to carry out terrorist attacks in the UK or anywhere abroad if the attacks are prosecutable here, including in one of the 24 countries which are designated under the Suppression

of Terrorism Act 1978. But if the acts of terrorism for which they are fund-raising are to be carried out in some other country, and are not prosecutable here, those raising the necessary funds here could do so without committing any offence. This is clearly unacceptable.

6.17 Extending the Secretary of State's powers to proscribe terrorist organisations to include both domestic and international terrorist groups would help to address this deficiency. Once any such organisation had been proscribed, provisions equivalent to sections 2 and 10 of the PTA would come into force, making it an offence to be a member of such an organisation or to give or receive funds for its benefit. And an application could be made to restrain the organisation's assets pending proceedings potentially leading to their forfeiture. As Lord Lloyd makes clear in his report, a proscription-based approach could overcome some of the difficulties currently encountered under the existing legislation of establishing the links between the funds in question and any particular terrorist acts.

6.18 In chapter 4, the Government proposes that the existing proscription provisions should be re-enacted, and invites views on whether they should be extended to international and domestic terrorist groups. And it recognises that to so extend the measures could assist in tackling non-Irish terrorist fund-raising. But, as is set out in chapter 4, the Government is aware too that there are arguments against extending the proscription provisions. Moreover, proscription alone would not in any case do the trick in respect of identifying and seizing all terrorist funds (Irish, domestic or international). For instance, terrorist funds may be held by individuals who support the cause in question, but in circumstances where it is difficult to prove that they are linked to a terrorist group. They can also be laundered through legitimate businesses, charities and other institutions. Such monies are often raised for ostensibly legitimate purposes - the support of widows and orphans, or prisoners' welfare - and then secretly diverted to buy arms and ammunition or to fund some other terrorist operation. In these circumstances the link to any proscribed organisation could be very hard to demonstrate.

6.19 The Government therefore believes that any new legislation in this area should focus at least as much on the individual and his criminal activities as the proscription of particular groupings. And so it proposes to extend the offence in section 9 of the PTA to include fund-raising and related activities in connection with domestic terrorism and all international, as well as Irish, terrorism irrespective of where in the world the target of the fund-raising is. One way in which this could be done would be to repeal sections 9(3) and (4) thus removing any qualification on the nature of the acts of terrorism which would be covered by the offence. But the Government thinks that this could cause difficulties, as it could cause the offence to turn on whether the act constituted an act of terrorism in the foreign country. Not all countries share our understanding of what constitutes an "act of terrorism" or even a "terrorist". A better solution, and one which the Government favours, would be to repeal section 9(3) and to amend section 9(4) so that section 9 would apply to all funds raised for terrorist purposes irrespective of where the acts of terrorism in question were, or were intended to be, carried out provided that those acts are such that, if they were carried out in the United Kingdom, they would constitute an offence under our law.

## Forfeiture

6.20 Lord Lloyd suggests in his report that the current forfeiture provisions in section 13 are too narrow because they may only be used where someone has been convicted of an offence under sections 9, 10 or 11 of the PTA, (a "Part III offence"), and then only in relation to money or other property which the person has in his possession or under his control at the time the offence was committed and which he intended, knew, or had reasonable cause to suspect would be used in connection with terrorism or for the benefit of a proscribed organisation. To remedy these deficiencies, he recommends that the forfeiture powers should be exercisable on conviction for any "terrorist offence" and that the powers should apply to all identifiable funds in the control of the offender at the time of his arrest save that it should be open to the offender to prove, on the civil standard of proof, that the funds in question did not come into his possession as a result of any criminal activity.

6.21 The first element of Lord Lloyd's proposal is linked to his recommendation that any new legislation to counter terrorism should create a new concept of "terrorist offence". The Government is not fully persuaded that it is necessary to create a new category of "terrorist offences" - see paragraph 7.16. Nor is it persuaded that it is necessary to extend the forfeiture arrangements in any new legislation on terrorism to cover all the offences, other than the fund-raising or money laundering offences in the PTA (eg murder, manslaughter, explosives related offences, firearms offences). It appears to be implicit in the scheme of the present legislation that individuals convicted of terrorist offences other than those established in part III of the PTA are not as a rule involved in terrorist fund-raising and hence are not thought to merit the application of a special terrorist forfeiture scheme. Furthermore the Government notes that where property was obtained as a result of, or in connection with, the commission of the offence (which is how the Criminal Justice Act 1988 defines "benefitting"), the existing criminal law would permit confiscation (under the Criminal Justice Act 1988 as amended by the Proceeds of Crime

Act 1995 for England and Wales, and for Scotland and Northern Ireland respectively by the Proceeds of Crime (Scotland Act) 1995 and the Proceeds of Crime (Northern Ireland) Order 1996). The Government would, however, welcome views as to whether, and if so how, the special forfeiture scheme in the PTA should apply to persons convicted of terrorist offences generally, as well as terrorist fund-raising offences.

6.22 The Government agrees with Lord Lloyd that the forfeiture arrangements in section 13 of the PTA could benefit from amendment as they currently apply to money or other property which the court judges the convicted person knew or had reason to suspect would be used in connection with terrorism or as the resources of a proscribed organisation. The focus is thus currently on the intended use of the property (which can be difficult to prove). To deal with this difficulty the Government proposes that additional forfeiture provisions should be created which focus on the origin of the property (as opposed to its intended use) - a test which, in certain circumstances, should be easier to meet. Under the additional new arrangements the Government proposes, (which it envisages would run alongside the existing PTA forfeiture provisions), the courts would be empowered to order the forfeiture of all funds or other property in the possession of, or under the control of, anyone convicted of a Part III offence save that it would be open to the offender to prove, on the civil standard of proof, that the property did not come into his possession as the result of his criminal activity. The Government is aware that Lord Lloyd proposed the abolition of the present PTA scheme and its replacement with one based on the forfeiture of property resulting from any criminal activity - a different approach from the one proposed above, under which proposals along the lines of Lord Lloyd's would be implemented in addition to, rather than instead of, the existing powers. The Government would welcome views as to whether the existing powers should be abandoned or augmented as proposed.

6.23 The Government will develop the detail of its proposals for the forfeiture of counter-terrorist related property in the context of the wider consultation exercise now underway on the confiscation of criminal assets (see 6.30).

## A police power to seize cash in transit?

6.24 Lord Lloyd's report also suggests that the police should be empowered to seize money which is being taken out of the country where they have reasonable grounds for suspecting that it is intended for use in terrorism overseas. A power of this sort, he suggests, would give the police the opportunity to investigate the origins of the cash and, if appropriate, make an application for the money to be forfeited. The courts could be empowered to order forfeiture if they were satisfied that the money was intended for use in connection with acts of terrorism.

6.25 The Government sees considerable merit in this proposal. Terrorists frequently use cash to fund their activities because it leaves no trail. But the Government suggests that the effectiveness of the new power would be further enhanced if it were capable of being exercised by others in addition to police officers. Examining officers under the PTA at ports, for example, may include immigration officers. They would know what to look for and why any particular activity might be suspicious.

6.26 The Government also believes that the new power would be more effective if the police were able to seize cash which they believe may be being used or held for terrorist purposes, whether connected with Irish, domestic or international terrorism, wherever they find it within their jurisdiction rather than just at the point of entry or exit. The Government therefore proposes that police officers should be empowered to seize any cash which they find anywhere in their jurisdiction provided that they have reasonable grounds for suspecting that it is intended for use in terrorism or otherwise represents the subject matter of a Part III offence. The definition of cash would include cash held in any currency, postal orders, travellers cheques and similar monetary instruments.

## The form of the new power to seize cash in transit

6.27 Lord Lloyd suggests that the new power should be modelled on similar provisions in the Drug Trafficking Act 1994 which allow the police or customs to seize cash which is being imported or exported and which they have reasonable grounds for suspecting is the subject matter of, or is intended for use in, drug trafficking. The Government agrees. It therefore proposes that any new legislation should provide for cash seized under the new power to be detained for up to 48 hours on the authority of a senior officer. For longer than that, its continued detention would have to be authorised by a magistrate, or the sheriff in Scotland. The courts would have power to authorise successive periods of detention for up to three months at a time. Appropriate safeguards against abuse would be important. These might include that authorisation would not be given unless the court was satisfied that there were reasonable grounds for suspecting that the money was

being, or was intended to be, used for terrorist purposes or otherwise represented the proceeds of a Part III offence and that its continued detention was necessary whilst the origin or destination of the funds was further investigated or consideration was given to instituting criminal proceedings against anyone with whom the cash was connected. Furthermore, it would be open to anyone affected by the retention of the money to challenge its continued detention at any time.

6.28 Lord Lloyd suggests that a limit of £2,500 should be imposed below which cash would not be seized. (A limit of £10,000 applies in the Drug Trafficking legislation in relation to the seizure of suspect cash on import or export). The Government wonders, however, whether, in the particular circumstances of terrorism (where a relatively small amount of money can fund a potentially devastating attack), a constraint of this sort should be placed on the exercise of the power. It would welcome views on whether the better course might be to allow a police officer to exercise his discretion on a case by case basis.

## Civil forfeiture

6.29 The Government proposes that the forfeiture procedures for cash seized in transit should be modelled on current drug trafficking legislation. Thus the venue for the forfeiture proceedings would be the magistrates court, and the proceedings themselves would be civil. The owner of the funds would have a right of appeal to the Crown Court or, in Northern Ireland the County Court, against the magistrates' court's decision. The courts would have the power to order the forfeiture of the money if satisfied that it was being, or was intended to be, used for terrorist purposes and whether or not proceedings had been brought against any individual for an offence with which the cash in question was connected. The prosecutor would be required to prove, to the civil standard, the illegal provenance or destination of the money. The Government envisages that the provisions for civil forfeiture would run alongside the existing PTA criminal forfeiture laws, as amended in accordance with paragraph 6.22 above.

6.30 The Government is attracted too to the possibility of extending civil forfeiture powers more generally in terrorist cases in line with the thinking set out in the paper "Criminal Assets" recently issued by the Home Office Working Group on Confiscation. Among other things, the paper proposes the extension of civil forfeiture powers in non-terrorist cases to other forms of property as well as cash (for example, houses, cars, money in bank accounts) and discusses the case for the establishment of a confiscation agency. It also recognises that appropriate safeguards would be important if the powers were thus extended. The aim will be to ensure both that specific counter-terrorist powers dovetail with the general confiscation regime and that any new general civil forfeiture procedures take full account of the nature of terrorist related offences by targeting the instrumentalities of crime as well as its proceeds.



# CHAPTER 7:

## Powers of arrest

**This chapter discusses the powers of arrest available to the police for terrorist offences, in particular, the power in section 14(1)(b) of the PTA to arrest without warrant someone suspected of involvement in the commission, preparation or instigation of acts of terrorism. Views are sought on:**

- **the form which the power of arrest for terrorism should take;**
- **Lord Lloyd's proposal for the creation of "terrorist offences";**
- **the need for additional arrest powers to be available in Northern Ireland.**

## The current legislation

7.1 Section 14 of the PTA empowers the police to arrest, without warrant, anyone whom they have reasonable grounds for suspecting:

- a. is guilty of certain offences under the PTA, or offences under section 30 of the EPA - (section 14(1)(a)); or
- b. is, or has been, concerned in the commission, preparation or instigation of acts of terrorism other than domestic terrorism - (section 14(1)(b)); or
- c. is subject to an exclusion order (section 14(1)(c)).

7.2 Part II of the EPA contains powers of arrest which are supplementary to those in section 14 of the PTA. They are applicable only in Northern Ireland and they go further than those that exist in the rest of the United Kingdom. For example, a constable may arrest without warrant anyone whom he has reasonable grounds for suspecting of committing, having committed, or being about to commit, a scheduled offence or an offence under the EPA which is not a scheduled offence (section 18 of the EPA).

7.3 Additionally, and by virtue of section 19 of the EPA, a member of the armed forces on duty may arrest and detain a person for up to 4 hours on suspicion that he has committed, was committing or is about to commit any offence. The soldier is not required to inform the arrested person of the grounds of the arrest; and to effect the arrest he may enter and search any premises without a warrant.

## Is there a continuing need for the section 14 special powers of arrest?

7.4 The power of arrest in section 14(1)(b) of the PTA (and its equivalent in the EPA) has been criticised in the past on three grounds. These are:

- that the power contravenes the principle that a person should be liable to arrest only when he is suspected of having committed (or being about to commit) a specific crime;
- that the power is unnecessary; and

- that it is open to abuse.

7.5 Critics of the 14(1)(b) type power of arrest have argued that if the police have proper cause to suspect that a person is actively engaged in terrorism, they must have sufficient information to justify an arrest under PACE. And that the absence of any requirement for reasonable suspicion of a specific offence effectively allows the police free rein to arrest whomsoever they wish without necessarily having good reason, including those who should not be arrested at all.

7.6 Although the Government is not aware of any evidence to suggest that the powers of arrest in section 14(1)(a)-(c) are abused - on the contrary, successive reviewers of the operation of the counter-terrorism legislation have found that those exercising the powers have done so with care and fairness - it understands these concerns. It agrees that, wherever appropriate, arrests should be made under the ordinary criminal law. But the Government also recognises that this is not always possible or practicable when dealing with the prevention of terrorism.

7.7 The ordinary powers of arrest in England and Wales are set out in PACE. Section 24 of PACE enables the police to arrest without warrant where an arrestable offence is being or has been committed. Section 24(7) also allows arrests without warrant where such an offence is about to be committed. In Northern Ireland, there are equivalent powers in article 26(3) of the Police and Criminal Evidence (NI) Order 1989. In both cases, the legislation sets the limit on the period of police detention without charge for a serious arrestable offence at 36 hours. In Scotland, Section 14 of the Criminal Procedure (Scotland) Act 1995 empowers a constable who has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment to detain that person for the purpose of carrying out an investigation into that offence. He may, however, only detain the person concerned for a maximum of 6 hours before charging or releasing him.

7.8 Whilst the ordinary powers of arrest are extensive, the Government believes they may not be sufficient to deal effectively with all the problems posed by terrorism. Terrorist groups are frequently highly organised with well practised procedures for thwarting police actions against them. Many of those who have operated in the UK (including non-Irish terrorist groups) have been trained to evade surveillance and their operations have been meticulously planned both to minimise the risk of arousing suspicion before the terrorist act is undertaken and to minimise the chance of leaving forensic evidence. Communications may be in an encrypted form and, especially where international groups are involved, foreign languages may be deployed. Information about these sorts of techniques is increasingly available (for instance on the Internet and in exchanges between like-minded activists). The police are therefore, (and are likely to continue to be), up against groups skilled in, and dedicated to, evading detection. Although some of these factors may also apply in the disruption and investigation of serious non-terrorist crime it still remains the case that terrorist crime is often of a quite different order both in terms of the sophistication of the techniques deployed and the (potential) harm caused.

7.9 The section 14(1)(b) power is not, however, as some suggest, a carte blanche to arrest and question anyone without good reason. The arresting officer must have reasonable grounds for suspecting that the individual is involved in the commission, preparation or instigation of acts of terrorism. The power is used with a view to securing sufficient usable and admissible evidence in criminal proceedings against the person concerned (though it may also be used for the purpose of consideration of an application for exclusion or, in relevant cases, deportation), and the decision to detain the individual for questioning under arrest must be reviewed regularly by senior police officers, and after 48 hours by the Secretary of State. Given the nature of the continuing terrorist threat, and mindful that the police consider the 14(1)(b) power of arrest of particular importance in countering terrorism, the Government, while recognising the concerns surrounding a section 14(1)(b) type power of arrest, is inclined to the view that a similar power should be included in the proposed new legislation.

7.10 The Government proposes too that, because of the particular considerations that arise in dealing with terrorism, as outlined in 7.8 above, a power similar to the 14(1)(a) power should be included in any new legislation. The 14(1)(c) special power of arrest in relation to the breach of an exclusion order will fall if the exclusion powers in the PTA are repealed.

## What form could a 14(1)(b) type power of arrest take?

7.11 One possibility would be to re-enact section 14(1)(b) as it stands. It works well and, as the paper has indicated above, there is no evidence to suggest that the police have used it improperly.

7.12 But Lord Lloyd in his report of his Inquiry has suggested that the power in this form may be vulnerable to challenge under article 5(1)(c) of the European Convention on Human Rights once there is a lasting peace in Northern Ireland. He argues that simply re-enacting the power could carry with it the risk that the European Court of Human Rights might, at

some future date, find it to be incompatible with the provisions of the Convention.

7.13 Article 5(1)(c) of the Convention sets out the circumstances in which an individual can be detained. These include any lawful arrest or detention on reasonable suspicion of having committed an offence, or where it is reasonably considered that an arrest is necessary to prevent the person in question from committing an offence. Since it is not an offence "to be concerned in the preparation, commission or instigation of an act of terrorism", Lord Lloyd believes that the exercise of the arrest power in section 14(1)(b) might be challenged on the grounds that it is incompatible with article 5(1)(c). The solution, he suggests, is to create a new offence of "being concerned in the commission, preparation, or instigation of an act of terrorism". Moreover Lord Lloyd argues that if such an offence were made a serious arrestable or imprisonable offence, there would be no need for any special 14(1)(b) type power of arrest since the ordinary criminal law would suffice.

7.14 In examining this proposal, the Government has looked very carefully both at the judgements of the ECHR in relation to Article 5(1)(c) (notably that in Brogan v the U K) ; at the consequences of creating an offence of the sort envisaged by Lord Lloyd; and at whether the provisions of PACE would be sufficient were the Government to pursue this option. The Government is satisfied that the power in section 14(1)(b), and the way it is used, are compatible with Article 5(1)(c) of the Convention.

7.15 The Government does not therefore believe (although it invites views) that the right way forward is to create an offence of "being involved in the preparation etc of an act of terrorism". It takes the view that any new legislation should instead as now empower the police to arrest anyone whom they reasonably suspect of "being involved in the preparation, commission or instigation of acts of terrorism". The Government does not believe that the term "acts of terrorism" needs to be defined; the new definition of "terrorism" (see paragraph 3.17) being sufficient to indicate what is suspected.

## "Terrorist offences"

7.16 Lord Lloyd in his report also recommends, more widely, that any new permanent counter-terrorism legislation should create a new concept - that of the "terrorist offence". He suggests that any new legislation against terrorism should list all the common law and statutory offences with which terrorists are currently charged, eg murder, conspiracy to cause explosions with intent to endanger life and so forth. The listed offences would be regarded as "terrorist offences" where the necessary terrorist element was present. And if a listed offence were carried out by a proscribed organisation, the fact of proscription would, under Lord Lloyd's proposals, amount to conclusive proof of the terrorist element being present. The Government remains to be persuaded that it is necessary to create a new category of "terrorist offences". It considers the existing offences with which terrorists are commonly charged are well understood and sufficient and the sentences imposed upon conviction fully reflect the nature of the crime committed and society's abhorrence of it. However, it invites views.

## The need for additional powers of arrest in Northern Ireland?

7.17 As mentioned in paragraphs 7.2 and 7.3, the EPA contains two additional powers of arrest; one for the police and the other for the Army. The arrest power conferred on the police by section 18 of the EPA is rarely used. Prior to the enactment of the Criminal Justice (Terrorism and Conspiracy) Act 1998, the section 18 EPA arrest power was the only power of arrest available in Northern Ireland for the offence of membership of a proscribed organisation. Given the recent change to the law in that respect, and if a power equivalent to that in section 14(1)(b) of the PTA is included in any new legislation to combat terrorism, the Government's view is that the power in section 18 of the EPA could be repealed.

7.18 For as long as the armed forces are required to act in Northern Ireland in support of the police, its members will need to have a power of arrest along the lines of that provided in section 19 of the EPA. Given that a soldier's knowledge of the criminal law is not, and can not be expected to be, as detailed as that of a police officer, the power would need to be wide-ranging and not confined to the suspicion that a particular offence is being, or is about to be, committed. And it would, as now, need to carry with it a power of detention for up to a maximum of 4 hours. But the Government proposes that the use of such powers, if it is necessary to enact them, should be made subject to a code of practice covering the exercise of the powers, the rights of detainees and so forth.

7.19 Any arrest and detention powers which may be given to the Army would be included in a temporary Northern Ireland specific section of the new legislation, and be subject to annual renewal by Parliament.



# CHAPTER 8:

## Detention and related Matters

**This chapter discusses the powers and arrangements for detaining those arrested under the PTA. Against the background of Article 5(3) of the European Convention on Human Rights, it proposes the creation of an independent Commission to determine applications for extensions of detention under the new counter-terrorism legislation. Such applications are currently determined by the Secretary of State. It goes on to discuss the length of the period for which an arrestee can be detained, and other issues relating to detention of a terrorist suspect. Views are sought on:**

- **the options discussed for judicial extension of detention in terrorist cases;**
- **retaining or reducing the 7-day maximum period of detention for arrests under section 14 of the PTA;**
- **retaining the facility to deny access to a solicitor for up to 48 hours, but allowing full access thereafter;**
- **making audio-recording of interviews with terrorist suspects mandatory in the whole of the UK;**
- **retaining the special regime as regards retaining fingerprints and samples for terrorist cases;**
- **extending the PACE regime for supervising detentions to those arrested under terrorism provisions.**

## The current legislation

8.1 A person who has been arrested under section 14 of the PTA may be held by the police for up to 48 hours without charge. If the police wish to detain him for longer than 48 hours without charging him, they must apply to the Secretary of State to extend the period of detention. The period can be extended by up to a maximum of a further 5 days. Once an application has been made, the actual length of detention in any case is determined by the Secretary of State. More than one extension can be requested within the total of 5 days. The detainee must be told each time an application is made.

8.2 In 1988, the European Court found in the case of Brogan and others v United Kingdom that detention for 4 days and 6 hours without judicial authorisation breached Article 5(3) of the Convention. The then Government responded by entering a derogation under the relevant articles of the Convention and the UN International Convention on Civil and Political Rights to preserve the right to detain those suspected of involvement in Irish terrorism for up to 7 days. Consideration was given to amending the PTA to make the judiciary responsible for authorising extensions of detention but the Government concluded that no way could be found of doing so without undermining the independence of the judiciary particularly in Northern Ireland. The derogation remains in force today. It does not apply to international terrorism because the threat to the United Kingdom from such groups, although grave, was - and is - not thought to be comparable to that from Irish terrorism.

8.3 There are a number of other provisions in the PTA which are associated with the arrest and detention powers in Section 14. Section 15 for example empowers a constable to stop and search anyone whom he suspects may be liable to arrest under section 14, for documents or other articles which might constitute evidence that the person concerned is, or has been, involved in the commission, preparation or instigation of acts of terrorism. This section also makes special provision for the taking of fingerprints, blood and DNA samples from, and photographs of, the suspect for the purpose of identifying him. And Schedule 3 of the Act provides a special regime for supervising the detention of any suspect held in custody. It includes a system for the regular reviewing of his detention by a senior police officer.

## Variations which apply in Northern Ireland

8.4 Section 15(1) of the PTA, which enables a constable in Great Britain to enter any premises under a warrant in order to make an arrest under section 14, does not apply in Northern Ireland. There, section 17 of the EPA provides the police with the necessary powers to enter and search any property without a warrant for the purpose of making a section 14 PTA arrest. Similar provisions to those in the PTA apply in Northern Ireland as regards the taking and retention of fingerprints and samples although DNA samples, unlike those taken in England and Wales, cannot be retained if the suspect is not subsequently convicted of an offence. Although the detention regime in Schedule 3 to the PTA extends to Northern Ireland, the treatment, questioning and identification of persons detained there under section 14 are also governed by codes of practice made under the EPA. This has resulted in a number of differences in the regime for detained persons in Northern Ireland compared with those in England and Wales and Scotland (which are themselves different in some respects).

## Extension of detention: the need for reform

8.5 The Government is aware that some argue that the relevant provisions for detaining, and extending detention, under the PTA should simply be repealed and not replaced. Those who advance this position suggest that special arrangements are not needed because those in the ordinary criminal law are sufficient and should be applied. The Government disagrees. The threat from terrorism is such that the ordinary criminal law is not sufficient, in the Government's view, to protect either the sensitivity of the information which frequently forms a large part of the case for an extension under the PTA, or the independence of the judiciary. There are also marked differences between the criminal justice systems in the three jurisdictions. In Scotland, for example, the courts have no powers under the normal criminal law to extend detentions beyond the 6 hour limit imposed by section 14 of the Criminal Procedure (Scotland) Act 1995, a limit which would be extremely impractical in terrorist cases.

8.6 However, the Government is mindful that the current extension of detention provisions in the Act have been criticised on the grounds that they allow a suspect to be held without charge for longer than is possible under the ordinary criminal law; and that extensions are granted by the executive without reference to any judicial authority. The Government fully appreciates these concerns. It believes that any new legislation must provide new arrangements for extending detentions in terrorist cases. It has identified three models for how a new system might work:

## The options for change

### Option 1

8.7 Lord Lloyd has suggested that applications for extensions of detention in terrorist cases should be heard *ex parte* and *in camera* by the Chief Metropolitan Stipendiary Magistrate in England and Wales; by the Sheriff Principal of Lothian and Borders in Scotland, and by an equivalent officer in Northern Ireland, and that they should each be given a deputy to cover periods of absence etc. There is no equivalent post in Northern Ireland to that of the Chief Metropolitan Stipendiary Magistrate in England and Wales so if this idea were to be pursued, a new post(s) would need to be created there.

8.8 This proposal has considerable attractions. If proceedings were held *ex parte* and *in camera*, for example, there would be little difficulty in protecting the sensitivity of relevant material. But the Government thinks it questionable whether one person, even with a deputy, could deal with all the applications which might be made by the police in each of the relevant jurisdictions, particularly as there could be no guarantee that one or other would always be available. In Northern Ireland in particular, there could be difficulties in identifying individuals prepared to be singled out for the task.

8.9 A way could undoubtedly be found around the need to find more people willing and able to take on the task by looking beyond the postholders suggested. But more importantly, the Government does not believe that a system in which the procedures were wholly *ex parte* would satisfy the requirements in Article 5(3) of the European Convention on Human Rights that a detained person should be brought promptly before a judicial authority.

### Option 2

8.10 An alternative approach would be to create an independent Commission along the lines of that established by the Special Immigration Appeals Commission Act 1997, to examine and determine applications for extensions of detention under the new counter-terrorist legislation. This new Commission would not however be an appellate body; rather it would be given sole authority to extend detentions or order release.

8.11 The Government believes that the members of such a Commission would need to be legally qualified or have other relevant experience of the criminal justice system if new arrangements of this sort are to meet the requirements of the Convention and operate effectively. One solution might be to appoint serving members of the judiciary and/or the magistracy to membership of the Commission. But if this were done, additional measures would be needed to ensure that those on the Commission who were party to the decision in any case took no further part in any proceedings against the individual concerned. This could give rise to practical difficulties, particularly in Northern Ireland where the number of judges and magistrates is relatively low. Alternatively, retired judges and/or magistrates might be appointed to serve on the Commission. They would have the required legal knowledge and experience; they could not take any further part in proceedings against the individual concerned; and since they would be retired, their presence on the Commission could not be held to compromise the role of the judiciary. But again the numbers available to act in Northern Ireland might be relatively low. To overcome this difficulty, it might be possible to broaden the field of those eligible to serve on the Commission to include retired solicitors and barristers as well as retired judges and magistrates.

8.12 If Option 2 is pursued, the Government believes that the members of the Commission should be appointed by the Lord Chancellor. The members of the Commission would need to be drawn from all three jurisdictions and, to ensure maximum flexibility and consistency of decision-making, ready and able to serve in any of the three.

8.13 The new legislation would also need to make provision for the procedures before such a Commission. These would need to be sufficient both to protect the sensitivity of the information which forms part of most applications for extensions of detention, and to comply with the requirements of the Convention. The Government believes that here too the Special Immigration Appeals Commission Act 1997 provides a potentially useful model.

8.14 A Commission might operate in the following manner. Each application for an extension would be considered by a single member of the Commission at an oral hearing at which the detainee could be legally represented by a person of his choice. The police could also be legally represented in the same way as they are in magistrates' courts when seeking extensions of detention under PACE. The hearing would be held in private. The detainee would be given a summary of the case against him: neither he nor his representative would be given access to any sensitive intelligence material. He would also be given the police's reasons for seeking an extension of detention in his case. The proceedings would be *inter partes*. But they could move *ex parte* on the application of the police and with the agreement of the Commission if the police wished to put sensitive intelligence material before the Commission. The examination of any such material would then take place in the absence of the detainee and his legal representative. Where this occurred, the Government believes that the legislation should also provide, in the interests of fairness, for a security cleared special advocate to be appointed to represent the detainee's interests by assisting the Commission to test the strength of the police case for an extension, and for a summary of the evidence taken in the detainee's absence to be given to him wherever possible.

8.15 The Commission would have the power to order release or grant extensions of detention for up to the maximum permitted in any new legislation.

8.16 The Government recognises that the Commission could not always give full reasons for its decisions given the sensitivity of much of the material which it would be considering, but where it could not, the Government believes that it should give the detainee a general indication of the reason for the decision in his case.

### **Option 3**

8.17 Another approach might be to provide for different arrangements for granting extensions in each of the three jurisdictions. Clearly the procedures for considering an application for an extension, and the grounds on which one could be granted would have to be the same in each jurisdiction. But the actual decision on whether any application should be granted could be taken by different bodies in each jurisdiction. The Government believes that the independent Commission proposed in option 2 above may provide the most practical solution to the problems identified in relation to Northern Ireland. But it recognises that different arrangements might well be possible in England and Wales and in Scotland given that the number of

applications in both jurisdictions is likely to continue to be relatively low. The size of the judiciary and the magistracy in Great Britain means too that it would be easier to involve serving members of either in the extension of detention process without casting doubt on their independence from the Executive. A panel of stipendiary magistrates in England and Wales, or their equivalent in Scotland, could, for example, be appointed to consider applications for extensions of detention in their respective jurisdictions. Each application could be considered by one of the panel. The process would otherwise be the same as that proposed for hearings before the Commission. If this option were to be pursued the legislation would need to contain additional measures precluding the magistrate or other judicial figure hearing the application from taking any further part in any subsequent proceedings against the detainee.

8.18 The Government believes that the introduction of arrangements along the lines of Options 2 and 3 would satisfy the requirements of Article 5(3) of the Convention and enable the United Kingdom to withdraw its current derogation. On balance the Government favours Option 2 - an independent Commission serving the whole of the United Kingdom. It would provide the most flexible solution to the problems outlined above and would enable the Government to draw on the widest pool of appropriately qualified people for the new Commissioners. But the Government would welcome comments on what is proposed generally, on the composition and scope of the proposed Commission, and on whether the role of the Commission should be undertaken by a panel of a different sort in England and Wales and Scotland.

## Time limits

8.19 Making an application to the Commission or other judicial authority, and its being heard, would take time. Given the tight constraints within which the police will be working, this could give rise to difficulties. The Government would therefore welcome views on whether the legislation should also provide for applications to be considered in an emergency on the papers alone. If this were to be possible one option would be that the detainee would have to be brought before the Commission or other judicial authority within 12 hours of any decision to extend detention which was taken on the papers, for the decision to be confirmed or overturned. An alternative option would be to provide for a detainee to be held for up to 12 hours beyond the initial 48 hours, or any subsequent time limit imposed on his detention, for the sole purpose of bringing him before the Commission or other judicial authority. The Government envisages that an arrangement of this sort would operate in much the same way as happens under section 43(5) of PACE where a detainee can be held in custody whilst awaiting an appearance before a magistrates court. Of the two options, the Government favours the second.

## Length of period of detention

8.20 Lord Lloyd suggests that the police should continue to have the right to detain a suspect arrested under any new counter-terrorist legislation for up to 48 hours on their own authority. Where they wish to hold a suspect for longer than 48 hours they should seek judicial authorisation for an extension of his detention. Lord Lloyd rejects the possibility of bringing the maximum initial period of detention into line with the 36 hours permitted under PACE as impracticable in view of the time needed to transfer those detained to high security facilities for questioning and to carry out the necessary reception and identification procedures following arrest. The Government agrees.

8.21 While Lord Lloyd acknowledges that there have been occasions on which the police might have found it more difficult to bring charges had they not been able to detain the suspect for longer than 4 days, he suggests that, once there is a lasting peace in Northern Ireland, it ought to be possible to reduce the maximum period for which a suspect could be detained under the new legislation to a total of 4 days - ie. 2 days on the authority of the police plus 2 days with judicial authorisation before charge or release. His views may well have been influenced by the fact that the practice has been that extensions in international terrorist cases have not exceeded a total of 4 days.

8.22 The Government recognises that in international cases detainees have either been released, charged or the decision taken to deport them within the 4 day period, but there can be no guarantee that this period will always be sufficient, particularly given the Government's intention to introduce new arrangements for the granting of extensions of detention, as set out above. The attendance of a detainee at an oral hearing before a judicial authority will inevitably reduce the time available to the police for making further enquiries and questioning him about the results.

8.23 The police currently apply for extensions of detention for a variety of reasons. These include the checking of fingerprints; the completion of forensic tests; finding and interviewing witnesses; searching the suspect's home address;



conducting searches of garages, storage facilities and other non-residential premises which he may have used to hide arms, explosives or other materials; translating documents; checking alibis; making and analysing the results of financial and other enquiries and putting the results of all of the above to the suspect at interview. Enquiries of this nature can be very time-consuming particularly if more than one person has been arrested in any case or if enquiries have to be made of the police and others abroad or through a foreign Government's embassy. Terrorists, moreover, are increasingly trained to resist interrogation and often refuse to answer questions or otherwise co-operate with the police enquiries. These features have applied in international terrorist cases as well as in Irish cases.

8.24 Chapter 2 suggests that terrorism in the future is likely to become more sophisticated, with terrorists working across international boundaries and time zones and communicating in encrypted forms. Against that background the Government invites views on whether the maximum period for which a terrorist suspect could be detained subject to judicial authorisation should be 7 days (as it currently is under existing detention powers), whether it should be reduced to 4 days as suggested by Lord Lloyd, and whether a common maximum period should apply to all forms of terrorism.

## CHAPTER 9:

### Powers to stop, question and search

**This chapter discusses the special powers to stop and search pedestrians, vehicles and their occupants contained in the PTA and EPA and assesses the necessity for them in the future. It considers options for improving the arrangements by which the Secretary of State authorises the use of the powers in Great Britain. It proposes that the stop and search powers available in Northern Ireland be aligned with those in England and Wales and made subject to statutory codes of practice. Views are sought on:**

- **the retention of the stop and search powers;**
- **the authorisation arrangements;**
- **the proposed codes of practice for Northern Ireland, including what their contents might be.**

### The current legislation

9.1 The main police powers to stop and search pedestrians, vehicles and their occupants are contained in PACE, the Road Traffic Act 1988 and the Criminal Justice and Public Order Act 1994 and their respective Scottish and Northern Ireland equivalents. Section 1 of PACE for example empowers a police officer to detain a person or a vehicle and to search him or it for stolen or prohibited articles provided that he has reasonable grounds for suspecting that he will find such items. Section 4 of PACE enables the police to use their Road Traffic Act powers to set up road blocks and to stop and search any vehicle to see whether it contains a wanted person. And section 60 of the Criminal Justice and Public Order Act 1994 enables a police officer of Superintendent rank or above to authorise his officers to stop and search pedestrians and vehicles within a specific locality for offensive or dangerous weapons. Authorisations may only be given where the senior officer reasonably believes that incidents involving serious violence may take place in any locality in his force area. The maximum period for which the authorisation may be given is 24 hours.

9.2 Although these powers have proved sufficient to deal with other types of criminality they have not been thought sufficient to enable the police to deal effectively with terrorism. This is why the PTA, and more particularly the EPA, contains specific powers to enable the police, and others, to stop, question and search pedestrians and vehicles for articles of use in carrying out acts of terrorism and to prevent terrorist attacks.

### The PTA powers

9.3 Sections 15(3) and (4) of the PTA empower a police officer to stop and search anyone who appears to him to be liable for arrest under section 14 of that Act and to search him to see if he is carrying anything which might confirm the officer's suspicions that he is involved in terrorism. Section 13A enables a police officer of ACPO rank to authorise his officers to stop and search vehicles and their occupants if he considers it expedient to do so to prevent acts of terrorism. The authorisation must stipulate both the area to which it applies and the period not exceeding 28 days for which it will remain in force. Authorisations may be renewed for a further period or periods of up to 28 days at a time. Section 13B makes similar provision for the stopping and searching of pedestrians for the same purpose. Authorisations under this section however must additionally be notified to the Secretary of State as soon as possible. The Secretary of State may cancel the authorisation; otherwise he must confirm it within 48 hours or it will lapse automatically. If confirmed, it remains in force for the period stipulated in the authorisation (of up to 28 days in total) or for such shorter period as the Secretary of State directs. There are

also powers in section 16 of and schedule 5 to the Act which empower the police and others to stop, question and search people, vehicles and unaccompanied freight which are about to enter or leave Great Britain or Northern Ireland to determine whether they have been concerned in the commission, preparation or instigation of acts of terrorism. The last form part of the "ports and border controls" contained in the PTA and as such are discussed in Chapter 11 below.

9.4 The provisions of sections 13A and 13B, unlike those in sections 15 and 16 of and Schedule 5 to the Act, do not extend to Northern Ireland because the EPA contains equivalent or very similar powers.

## The EPA powers

9.5 The EPA's powers to stop and search pedestrians and to stop and search vehicles and their occupants in circumstances other than in connection with a section 14 PTA arrest, provide that constables and members of HM Forces on duty may stop anyone at anytime:

to ask him questions about his identity and his movements and whether he knows anything about a recent terrorist incident (section 25(1)); and/or

to search for, and seize munitions and transmitters (section 20(6)).

9.6 These powers further differ from those of the police under the PTA in two important respects. First the powers may be exercised on the individual's own authority. And second, the use of the powers need not be reported back to a senior officer. These powers have been used extensively and have proved useful for stopping people and vehicles in order to check identities and movements, particularly after an incident.

9.7 The EPA also empowers a duly appointed explosives inspector to stop any person in a public place in order to search him for explosives (section 22(2)). And lastly, section 28 of the EPA provides that any power to stop a person and to search him under the Act includes the power to stop and search a vehicle.

## Are these powers still necessary?

9.8 Given the continuing threat to the United Kingdom and its interests from international and other forms of terrorism, the Government believes that the PTA powers outlined above are still necessary. But the Government also believes there is scope for some rationalisation of the provisions and for minimising the departures they contain from PACE or its equivalents.

## Sections 15(3) and (4) of the PTA

9.9 The Government considers these powers are useful and sensible and should continue to be available as now to the police throughout the United Kingdom. It therefore proposes to include such powers in any new legislation.

## Sections 13A and 13B of the PTA

9.10 Lord Lloyd looked very carefully at whether these powers would be needed in future. He concluded that they would and suggested they be extended to apply throughout the United Kingdom. The Government agrees. There are indications that their regular use in the 18 months prior to the IRA's ceasefire in July 1997 made it much more difficult for terrorists to move both themselves and their equipment around at will, and that the powers are effective as a deterrent. By extending them to Northern Ireland, albeit perhaps with different authorisation arrangements, depending on the security situation there (see paragraph 9.15 below), the need for the police powers in sections 20(6), and 28 (in so far as it applies to section 20(6)) of the EPA would fall away.

## Could the powers in section 13A and 13B be improved?

9.11 Lord Lloyd has suggested that the provisions of section 13A might be improved by extending to them the requirement which currently exists in section 13B to obtain the Secretary of State's approval for any authorisation. He considers that this would constitute an additional safeguard against any abuse which might be made of the powers.

9.12 The section 13A powers have been used much more extensively than those in section 13B. The Government is not aware of any improper use which has been made of them nor that their use has occasioned complaint. On the contrary, the use of the power to stop and search vehicles entering the City of London and elsewhere has been widely welcomed as a prudent and effective safety measure - and one well worth having notwithstanding the slight inconvenience and delay which can result from being stopped. The police are moreover fully alive to the damage which could result from heavy handed or inappropriate use of the powers. And Lord Lloyd himself notes that they have used the powers with great care and discretion. There seems no reason to believe that this will cease in future.

9.13 That said, the Government would welcome views on Lord Lloyd's proposals and more generally on whether additional safeguards are required in connection with these powers. One alternative which the Government has been considering would be to require the police to notify the Secretary of State of all authorisations given under either section 13A or 13B as soon as is reasonably practicable, and certainly within 48 hours. The Secretary of State could be empowered to cancel any authorisation with immediate effect or to shorten the period for which it may run. But all authorisations would continue to run unless the Secretary of State directed otherwise within 24 hours of having been notified of the authorisation. The Secretary of State would not be required to confirm any authorisation but he would be aware of all of those which had been given and would be able to cancel, or shorten the time periods specified in the authorisation, if he thought that appropriate.

## Should the use of the powers in Northern Ireland be subject to the same authorisation procedures as will apply in Great Britain?

9.14 The Government believes that the system in place in Great Britain is sensible and appropriate. It works well and it is not too cumbersome. This is not least because the scale of terrorist activity in Great Britain has been much lower than in Northern Ireland. However, pending full implementation of the Belfast Agreement and while a terrorist threat remains, the Government takes the view that it would be impracticable similarly to constrain the use of the powers in Northern Ireland.

9.15 In the event that the sections 13A and 13B powers were extended to Northern Ireland, and it transpired that they were required initially to be in immediate, continuous and widespread use, an officer of ACPO rank would have to authorise the use of the powers for successive periods of 28 days at a time. Whilst this would not be particularly arduous, it could be argued that continued renewals would undermine the integrity of the authorisation procedures. Therefore, depending on progress made towards implementation of the Agreement, and towards normalisation, the authorisation procedures in sections 13A and 13B could be disapplied in Northern Ireland. (If such a course proves necessary, the disapplication provisions would be included in a temporary part of the new legislation, and be subject to annual independent review and annual renewal by Parliament.) The Government further suggests that the use of the powers in Northern Ireland should be subject to statutory codes of practice. It is envisaged that in Northern Ireland the codes of practice would be similar to the PACE code and cover the full range of police, and any Army, stop, entry, search and seizure powers, and the Army's power to arrest (if indeed it is necessary to enact any Army powers). The codes could provide guidance on the stop and search powers including the extent and conduct of searches; the requirement to keep written records of searches, documents which have been examined, etc.

## The remaining police and Army powers, etc?

9.16 The remaining police powers in the EPA to stop and question individuals about their identities and movements and the Army's powers to do the same will continue to be needed only until the Agreement is implemented and normalisation is achieved. Similarly, the EPA power which enables an explosives inspector to stop and search an individual for explosives will not be needed beyond that point. In the event that these powers are enacted they would be subject to the same safeguards as are described in paragraph 9.15 above.

## CHAPTER 10:

### Powers of entry, search and seizure

**This chapter discusses the PTA and the EPA provisions relating to entry, search and seizure of property. It proposes ways in which the provisions could be rationalised and improved, and considers further provisions which might need to be retained temporarily in Northern Ireland. It proposes that if any such temporary provisions are needed, they should be subject to a code of practice. Views are sought on:**

- the proposals for rationalising the entry, search and seizure provisions;
- the contents of the proposed code of practice covering any temporary police and Army powers in Northern Ireland.

### The current legislation

10.1 The police powers in England and Wales to enter property with or without the consent of its owner, and to search that property either for a particular individual or for evidence or other material are principally contained in PACE. Under PACE, the police have powers to enter and search any premises in order to execute an arrest warrant; to make an arrest without warrant for an arrestable offence or for certain specified offences; to recapture someone who is unlawfully at large; and to prevent a breach of the peace. A police officer may only exercise these powers of entry and search if he has reasonable grounds for believing that the person sought is on the premises and he can only search them to the extent that is reasonably required for that purpose. Part II of PACE also makes provision for a police officer to enter and search any premises under a warrant for "relevant evidence" of a serious arrestable offence and to obtain confidential material on application to a circuit judge. Equivalent provision is made for Northern Ireland in Part III of the PACE (NI) Order 1989.

10.2 In Scotland, however, powers of entry, search and seizure are generally covered by the common law. Warrants authorising an arrest or search contain, or imply, powers to open, shut or lock places where this is necessary for their execution. Authority to search a person, his possessions, house or other property is given routinely when an arrest warrant is granted. And at common law a Procurator Fiscal or a police officer can apply to a Sheriff or a justice of the peace (JP) for a warrant to enter and search any premises where there are reasonable grounds for believing that an offence has been committed and that evidence relating to that offence is to be found there. Where the police arrest without a warrant they may search the person of the detainee, and his house or vehicle depending on the circumstances of the arrest.

10.3 The PTA and the EPA build on these provisions by providing the police (and others in the case of the EPA) with additional powers to enter and search property and collect evidence in the course of carrying out a terrorist investigation. Many of the additional PTA powers are modelled on the provisions set out in PACE and their exercise is governed by the relevant PACE code of practice or its Scottish or Northern Ireland equivalent. But there is no equivalent code of practice governing the use of the EPA powers of entry, search and seizure in Northern Ireland at present.

### The PTA: entry, search and seizure under warrant

10.4 The PTA provides the police with two sets of additional powers of this sort. First, section 15(1) empowers a police officer in Great Britain, on obtaining a warrant, to enter premises to make an arrest under section 14(1)(b) and to search those premises to the extent necessary to make that arrest.

10.5 And second, section 17 and Schedule 7 provide a range of powers which enable the police to apply for a warrant to search premises for material which may be of use in investigating either an individual's involvement in acts of terrorism or in certain offences created by the PTA. For example paragraph 2 of Schedule 7 empowers the police to enter and search premises (under a warrant issued by a magistrate) for material other than excluded or special procedure material (such material is hereinafter referred to as "ordinary" material). And paragraph 2A of Schedule 7 empowers the police to search a number of non-residential premises for ordinary material likely to be of substantial use to a terrorist investigation. Under this last provision, the police are not required to specify in which of the premises listed in the warrant the material for which they are looking may be found. (The powers in this paragraph are not applicable in Northern Ireland. There the police use their powers under section 20 of the EPA (see below) to carry out searches of this sort).

10.6 Under paragraph 3 of Schedule 7 the police may apply to a circuit judge for a warrant to require the production of material which consists of, or includes, excluded or special procedure material - see Chapter 6. And the police may in certain circumstances apply ex parte to a circuit judge for a warrant to enter and search certain premises with a view to seizing any excluded or special procedure material which they may find on the premises and which may be of use to their investigation.

## The PTA: powers of entry, search and seizure without warrant

10.7 The Act provides for this in a number of circumstances. Section 16C of and Schedule 6A to the Act empower a police officer to impose a temporary cordon on a specific area from which he can exclude pedestrians and motorists if he thinks it expedient to do so in connection with an investigation into the commission, preparation or instigation of an act of terrorism. Schedule 6A gives police officers within the cordon additional powers to remove vehicles, search premises, and to seize any material (other than material which is subject to legal privilege), which is likely to be of substantial value to a terrorist investigation. The exercise of the last power must be authorised in writing by a senior police officer of at least Superintendent rank. These powers have been principally used when a bomb threat has been received and it has been necessary to close an area in order to search for devices, investigate any which may be found or cope with the aftermath of an explosion. But they could be used in relation to the investigation of other types of terrorist incident such as a shooting in the street. Linked to these powers are those found in section 16D, which empower the police to impose parking restrictions (and to remove vehicles which have been parked in contravention of any such restrictions) where this is necessary to prevent acts of terrorism. Restrictions imposed under section 16D must be authorised by a police officer of ACPO rank and can be imposed for up to 28 days at a time. The powers in section 16C, D and Schedule 6A do not extend to Northern Ireland, the police there having powers under the EPA to close roads in the pursuit of a terrorist investigation or for the preservation of peace and maintenance of order.

10.8 In addition to these powers, paragraph 7 of Schedule 7 empowers an officer of at least Superintendent rank, in cases of great emergency, to authorise searches and/or require persons to give explanations of the material found or seized without warrant save for that covered by professional legal privilege. Where this power is exercised, the police must notify the Secretary of State as soon as may be.

10.9 Paragraphs 1 - 7 and 9 - 10 of Schedule 7, which contain provisions relating to warrants and production of material, do not extend to Scotland. The police there are given equivalent powers in paragraphs 11 to 17 of Schedule 7 save for some minor modifications to reflect the differences in the Scottish legal system.

10.10 And lastly, and in Northern Ireland only, the Secretary of State, under paragraph 8 of Schedule 7 may authorise the police to carry out searches for, or require the production of, material in connection with investigations into the terrorist finance offences contained in sections 9 - 13 of the PTA and/or directing a terrorist organisation.

10.11 Although closely modelled on similar provisions in PACE, the above powers differ from those in PACE in that the police are not required to satisfy a magistrate or judge that they have grounds for believing that a serious arrestable offence has been committed. All that is necessary is for the police to demonstrate that a terrorist investigation is being carried out; that they have reasonable grounds for believing that material which is likely to be of substantial use to that investigation may be found on the premises, and that a warrant or production order is necessary.

## The EPA: powers of entry, search and seizure without warrant

10.12 The EPA empowers the police, and others, to enter and search premises for a variety of reasons. Sections 17 and 18 for example enable a police officer to enter and search any premises in order to make an arrest under section 14(1)(b) of the PTA or section 18 of the EPA respectively. An officer may also seize anything which he finds in the course of his search and which he suspects may have been used in the commission of a scheduled offence under the EPA. Members of the armed forces are also empowered to enter and search premises in order to arrest someone whom they believe is committing, has committed, or is about to commit any offence (section 19), and similarly to seize any articles found.

10.13 Police officers and members of the armed forces may also enter and search premises:

to preserve the peace or maintain order (section 26(1)(a));

if authorised to do so by the Secretary of State for certain stated purposes (section 26(1)(b) - see also paragraph 10.15 below;

to search for munitions and transmitters (section 20) and;

to rescue someone whom they believe may be being held against their will and in danger of death (section 23).

10.14 Where the premises in question is a dwelling house, entry and search may be made only with the authority of a senior police officer or a commissioned officer. The EPA also empowers an explosives inspector to enter any premises other than a dwelling house to search for, and seize, explosives (see section 22(1)).

10.15 Where the Secretary of State has authorised the police or a member of the armed forces to enter any premises, authority may also be given to take possession of the land in question; to seize or destroy property on it; to prohibit or restrict any rights of access or ways or usage of the property; to close or divert highways; and to remove any item which has been used, or is intended for use in the commission of an offence or is interfering with a lawful road closure or is creating a by-pass around such a road closure (sections 26 and 27).

10.16 And lastly, section 24 empowers any police officer or member of the armed forces who is searching premises under the above provisions to examine any documents or records (save those subject to legal privilege) found in the course of that search and to remove them for examination if necessary.

## Are these powers still necessary?

10.17 Lord Lloyd, in his report, concluded that the PTA powers described above, save that in paragraph 8 of Schedule 7, would be needed for the foreseeable future. The Government agrees and proposes that the powers should be applicable throughout the UK. In enabling the police and others to act quickly in an emergency and by empowering the police to obtain information and other material about suspected terrorist activities at an earlier stage than would otherwise be possible under the ordinary criminal law, these powers have proved themselves to be vital weapons in combating terrorism.

10.18 Lord Lloyd did not suggest that the EPA powers form part of any permanent counter-terrorist legislation; the need for them, in his view, would fall away once there was a lasting peace in Northern Ireland. The Government agrees they will not be needed once that state of affairs has been achieved.

## Potential for reform and improvement?

10.19 But this does not mean that the Government believes that the powers to be retained should be re-enacted as they stand. There is a good deal of overlap between the various powers, and scope therefore for rationalisation and improvement.

## Entry, search and seizure on arrest

10.20 The Government took the preliminary view in chapter 7 that a power of arrest along the lines of section 14(1)(b) of the PTA should be included in any new legislation to combat terrorism. If the police retain a power of that sort, and given the section 3 provision in the Criminal Justice (Terrorism and Conspiracy) Act 1998, the Government believes that the powers of

arrest, entry, search and seizure in section 18 of the EPA could be repealed.

10.21 The Government believes that the powers of entry, search and seizure in section 15 of the PTA which are associated with an arrest under section 14 of that Act should form part of any new permanent legislation and apply throughout the UK. This would allow the powers to enter, search etc in section 17 of the EPA to be repealed. Section 15(1), however, provides that a police officer must obtain a warrant before entering any premises to make a section 14 arrest. The Government recognises that this would not be practicable in Northern Ireland until such time as there is a lasting peace there. It may therefore be necessary to disapply the requirement there on a temporary basis.

## Entry, search etc for other purposes

10.22 The Government inclines to the view that the separate police powers to search and seize munitions and transmitters, or examine documents (see sections 20(1) and (2) and 24 of the EPA) may not be needed in future given the width of the present provisions in paragraphs 2, 2A and 7 of Schedule 7 to the PTA. The EPA powers are used principally to allow the police to carry out rummage searches and to examine documents and other material found as a result. The Government suggests that if the police powers in Schedule 7 to the PTA are re-enacted as it proposes, and made applicable throughout the UK, the police powers in sections 20(1) and (2) and 24 could be repealed, but it invites views. Again, it may be necessary, depending on the circumstances, to disapply in Northern Ireland the warrant requirements in paragraphs 2 and 2A of Schedule 7.

## EPA powers which may need to be retained

10.23 The Government believes that all the Army's entry, search and seizure powers under the EPA, and the police powers to restrict movement during a search of any premises; to enter and search any premises to rescue someone unlawfully detained; and to enter and interfere with rights and property and highways need to be retained until such time as there is a lasting peace and the Army's presence in support of the police in Northern Ireland has been withdrawn. The Government believes too that the entry and search powers given to explosives inspectors in section 22(1) of the EPA would need to be retained for the same period. Such powers, if they are necessary, would be included in a package of Northern Ireland temporary measures, subject to annual review and to Parliament's agreement each year to their remaining in force.

10.24 The exercise of any "temporary" powers by both the police and the Army would be subject to statutory codes of practice as indicated in paragraph 9.15 above.



# CHAPTER 11:

## Ports and border controls for counter-terrorist purposes

**This chapter discusses the powers available under the PTA to stop, examine and detain people at ports in connection with terrorism. It proposes the retention of the majority of the current powers and makes suggestions for strengthening and improving them. Views are particularly sought on:**

- **the contents of the proposed code of practice for examining officers;**
- **reducing the time allowed for examination at a port to 9 hours;**
- **whether aircraft not carrying passengers for reward should be allowed to use non-designated airports;**
- **strengthening the powers for the police to obtain relevant information from carriers and to exchange the information with other agencies;**
- **whether, if powers to obtain and exchange information are strengthened, carding should be retained or repealed.**

## The powers in the PTA

11.1 Section 16 and Schedule 5 provide the police and others with a variety of powers to monitor and control the entry and departure of people and goods into this country for counter-terrorist purposes. Paragraph 5 of Schedule 5 for example provides that anyone embarking or disembarking from a ship or aircraft in Great Britain which has come from or is going to Northern Ireland or the Republic of Ireland or the Isle of Man or one of the Channel Islands must complete a landing or disembarkation card - whichever is appropriate - if required to do so by an examining officer. Examining officers are usually police officers but immigration officers, and customs officers carrying out the functions of an immigration officer, may also carry out the duties of an examining officer under the PTA at ports. Paragraph 2 of Schedule 5 enables an examining officer to examine any person who is about to enter, or leave, Great Britain or Northern Ireland to see whether:

- i. they are, or have been, concerned in the commission, preparation or instigation of acts of terrorism;
- ii. they may be subject to an exclusion order; or
- iii. there are grounds for suspecting that they are in breach of an exclusion order or are assisting someone who is excluded to enter the territory from which they are banned.

11.2 In Northern Ireland members of the Army may also perform the functions of an examining officer if required to do so by an order made by the Secretary of State.

11.3 Reasonable suspicion is not required before a stop can be made. The powers can be used in connection with Irish and international terrorism.

11.4 An examination may not last for more than 12 hours unless the examining officer decides that he has reasonable grounds for suspecting that the person is, or has been, involved in terrorism, and issues a written notice requiring the detainee to submit to further examination. Once the notice is issued, the examining officer may hold the individual concerned for up to a further 12 hours. The detainee may not however be held for more than a maximum of 24 hours unless he is formally detained under paragraph 6 of Schedule 5.

11.5 Paragraph 6 of Schedule 5 gives examining officers the same powers to detain for up to 48 hours and to apply for extensions of detentions up to a total of 5 days beyond the initial 48 hour period, as allowed under section 14 of the PTA. As in section 14, the decision whether to grant an extension of detention is a matter for the Secretary of State.

11.6 The vast majority of examinations last only a few minutes. In 1997 for example, out of nearly 1 million passengers who were stopped, only 803 were examined for more than one hour. Of these only 10 were detained beyond the 24 hour point. Of the 10, 7 were suspected of involvement in Irish terrorism and 3 of international terrorism, and one of the latter was held for more than 48 hours.

11.7 Paragraph 3 of Schedule 5 requires anyone undergoing examination to provide the examining officer with information or relevant documents which he requests. The examining officer may search the individual and his baggage to see whether he is, or has been, involved in terrorism or is subject to an exclusion order. He may also, under paragraph 4 of Schedule 5, search any ship, aircraft, train or other vehicle and anything loaded or about to be loaded or unloaded for persons liable for examination. By virtue of paragraph 4A of Schedule 5, an examining officer may also search unaccompanied goods entering or leaving, or about to enter or leave Great Britain or Northern Ireland to determine whether they may be involved in the commission, preparation or instigation of acts of terrorism.

11.8 Persons detained at ports under the provisions of Schedule 5 have the same rights as those arrested under section 14 to contact a lawyer and to inform their relatives or some other interested person of what has happened to them. Access to legal advice etc in such circumstances may be denied for the same length of time, and on the same grounds, as applies to those arrested under section 14 of the PTA. Their continued detention is also reviewed in the same way.

11.9 Schedule 5 also contains a series of measures which require the owners or operators of ports, ships and aircraft to co-operate with the authorities to ensure that passengers can be properly examined, and do not evade the controls. In particular, Schedule 5 stipulates that ships carrying passengers for reward within the Common Travel Area (the CTA) - that is Great Britain, Northern Ireland, the Republic of Ireland, the Isle of Man and the Channel Islands - may only use those ports formally designated for the purpose by order of the Secretary of State. Aircraft are subject to the same requirements whether carrying passengers for reward or not. The purpose of these provisions is to ensure that, as far as possible, CTA traffic uses ports where an examining officer is, or can be, present. A list of the ports currently designated is set out in Schedule 6 to the Act. An examining officer may allow an operator or owner of a vessel or aircraft to use a non-designated port but since his approval for this has to be obtained in advance, an examining officer can meet the sailing or flight if appropriate.

## Is there a continuing need for these powers?

11.10 Lord Lloyd considered whether these powers would be required in the event of a lasting peace in Northern Ireland in some detail in his report. He came to the conclusion that they would. They provided, in his view, an essential first line of defence against the terrorist trying to enter the United Kingdom or operate within it. The Government agrees that the powers are effective both as a deterrent, and in practice. There is ample evidence to suggest that the ability of examining officers to stop and search at random and, without the need for reasonable suspicion, has disrupted both Irish and international terrorist operations; and explosives, guns and ammunition and other terrorist equipment have been recovered through the use of these powers. The Government has therefore concluded that similar powers should be included in any new permanent counter-terrorist legislation.

## Could the powers - or their exercise - be strengthened and improved?

11.11 Again the Government believes the answer is yes. The powers have been, and continue to be, criticised on the grounds that:

- they are applied disproportionately against those travelling to, or from, the Irish Republic or Northern Ireland;
- they are unnecessarily restrictive in that they prevent the owners of small aircraft from using airfields which are not designated, except with the approval of an examining officer, whether or not they are not carrying passengers for reward; and that

- their use imposes delays on passengers and freight to the detriment of the smooth flow of traffic.

11.12 The Government acknowledges that the use of the powers can sometimes result in some inconvenience and delay to passengers and freight traffic. But it does not believe that the powers have been, or are used, improperly or in a discriminatory fashion. It is true, however, that the vast majority of stops and examinations are carried out on people and goods travelling within the CTA. As Irish terrorism has thus far posed the greatest threat to the security of the United Kingdom, this is inevitable.

11.13 This does not mean, however, that the present arrangements cannot be improved. Lord Lloyd makes four recommendations in this respect. He suggests that:

- examining officers should be required to operate under a published code of practice issued by the Secretary of State governing the exercise of the powers to stop and examine, and that the code of practice should allow such examinations to be conducted only in accordance with targeting guidance or in response to specific intelligence needs;
- the police should be required to hand the person being examined a notice of his rights after half an hour, rather than one hour at present, and to report details of all examinations lasting for more than half an hour;
- an examination should be limited to a maximum of 6 hours rather than 24 hours at present; and that if more time is needed the passenger should be detained formally; and
- the requirement that aircraft not carrying passengers for reward within the CTA use only designated airports should be repealed.

11.14 The Government agrees that examining officers should operate under a published code of practice. The code would set out procedures for the exercise of the examination power. It would reflect the increased emphasis placed on intelligence in the targeting of ports policing activities whilst allowing stops and searches to be made as and when it was judged necessary on operational grounds.

11.15 The Government also sees merit in reducing the length of the examination period. But it remains to be convinced that a period of 6 hours would be sufficient to enable all the necessary checks for identification purposes to be carried out. It therefore proposes that any new legislation should give examining officers a specific power to detain anyone entering, or leaving, Great Britain or Northern Ireland for a maximum of 9 hours for the purposes of examining him to see whether he is, or has been, concerned in the preparation, commission or instigation of acts of terrorism. The power would be exercisable whether or not the examining officer had formed a reasonable suspicion. Although most stops last for only a few moments, the Government believes that the individual concerned should be made aware of his rights to telephone someone to notify them that he has been delayed or to consult a solicitor over the telephone as soon as is practicable.

11.16 If as a result of the examination, or at any time within the 9 hour period, the examining officer has reasonable grounds for suspecting the individual under examination is involved in terrorism, the Government believes the proper course would be for a police officer to arrest the person under section 14 (or its equivalent in the new legislation). It therefore proposes that the new legislation should not contain any separate arrangements for the arrest and subsequent detention of individuals by examining officers.

11.17 As to Lord Lloyd's last recommendation, the Government would welcome views on whether the requirement that aircraft not carrying passengers for reward use only designated airports should be repealed. It has been suggested that this requirement infringes on the freedom of movement of pilots and their passengers. The Government acknowledges that the provision may on occasion cause inconvenience. But it notes that the police and the Security Service regard it as a useful measure in controlling and monitoring traffic within the CTA. An alternative to the complete repeal of the provision might be to remove the current rights of examining officers to veto a pilot's choice of airport where he proposes to use a non-designated airport - see paragraph 11.9 above - provided that the pilot in question had given the examining officer advance notification of his intention to land at a particular, non-designated, airfield. Notice would need to be given sufficiently in advance to allow the examining officer the opportunity to meet the flight if he wished to do so.

## Could the ports powers be strengthened in other ways?

11.18 The Government has already concluded in Chapter 6 that examining officers should be empowered to seize cash and other monetary instruments which are being brought in, or taken out of Great Britain or Northern Ireland. But there are other ways in which the powers could be improved and enhanced in the Government's view.

## Carding

11.19 A particular cause of concern to some travellers is the use made of the power to require those travelling within the CTA to complete a landing or disembarkation card - "carding". The procedures are used selectively but from time to time particular attention may be paid to certain flights or sailings and delays can occur. The police are well aware of the need to use these powers carefully and sensitively but the existence of these powers has been criticised, and some have argued that they are used in a discriminatory manner.

11.20 Having considered the matter carefully, the Government has come to the provisional conclusion that if the statutory powers of the police to obtain full clear and accurate information from carriers on passengers in advance were strengthened, there might be no need to for the police to retain their carding powers. The Government therefore proposes to strengthen the police powers to obtain relevant information from carriers in any new legislation on terrorism; and to place the operators of ferries, aircraft and other vessels under an obligation to supply details of passengers etc in advance of any sailing or flight. It would welcome views on whether, in these circumstances, the current carding powers should be retained or repealed.

## Obtaining and exchanging information

11.21 The Government believes that the present arrangements for obtaining and exchanging information between the police, the Immigration Service, Customs and other agencies could be enhanced and proposes to introduce legislation to allow easier exchange of information between agencies.

# CHAPTER 12:

## Ancillary offences

**This chapter discusses a number of ancillary offences in the PTA and EPA, and whether they should be included in new counter-terrorist legislation. Views are welcomed on the retention or otherwise of each of these offences, and also on:**

- **whether the offence of giving or receiving training in the making or use of firearms or explosives should be extended to include chemical, biological and nuclear materials as weapons.**

12.1 The PTA and the EPA contain a number of ancillary offences which could be included in the proposed new legislation.

## Section 16A of the PTA

12.2 Section 16A of the PTA makes it an offence in England and Wales and in Scotland to possess any article in circumstances which give rise to a reasonable suspicion that it is to be used in connection with terrorism. This section applies to both Irish and international terrorism. The section does not extend to Northern Ireland. Section 32 of the EPA creates the equivalent offence in Northern Ireland.

12.3 Lord Lloyd recommends that a provision equivalent to that in section 16A should be included in any new legislation against terrorism. The Government agrees for the offence has proved particularly useful in Northern Ireland where there have been several prosecutions. Most terrorist groups use homemade or improvised weaponry of one sort or another. Bombs and other devices can be constructed relatively easily from ordinary everyday materials. In allowing the police to take action against someone found in possession of such materials in highly incriminating circumstances, these provisions have enabled the police to prevent acts of terrorism which might otherwise have taken place.

## Section 16B of the PTA

12.4 Section 16B of the PTA makes it an offence in England and Wales and in Scotland to collect, record or possess any information which might be useful to terrorists. This provision too applies to both Irish and international terrorism. Equivalent provision is made for Northern Ireland in section 33 of the EPA. This offence is designed principally to catch those compiling or possessing targeting information. Lord Lloyd notes that the police have found the offence particularly useful in Northern Ireland and he recommends that a similar offence be included in any new legislation against terrorism. Again the Government agrees. As terrorist groups try to obtain information on the movements of their potential and actual targets and to gather any other information which might assist them in mounting an attack, the existence of this offence can help the police and the security forces to disrupt such terrorist attacks.

## Section 18 of the PTA

12.5 Section 18 of the PTA makes it an offence to fail to report information to the police etc which might be of material assistance in preventing an act of terrorism or in arresting someone carrying out such an act. It applies only to Irish terrorism and it extends throughout the United Kingdom.

12.6 The offence is one of the most controversial in the PTA for it is aimed particularly at those who may have helped someone whom they subsequently learn may be actively engaged in terrorist-related activities or who may be living with, or related to, someone who is active in this way. The latter in particular may be placed in a difficult position of conflicting loyalties if they learn of something the disclosure of which to the police could render them liable to reprisal.

12.7 Having looked at the provision, Lord Lloyd questions its practical value. He recommends that an offence of this sort should not be included in any permanent legislation. The Government has some sympathy with this view-point. Limited use is made of the existing offence. And the Government is not wholly persuaded that the existence of the offence increases the likelihood that someone in possession of information of the kind covered by the offence would pass it on to the police. However, it is mindful that the Irish Government decided to include such an offence in the emergency legislation it introduced in the wake of the Omagh bombing, and recognises the clear signal such a provision can give. It would welcome views on whether, in these circumstances, the offence should be retained in new UK-wide counter-terrorist legislation.

## Section 29 of the EPA

12.8 Section 29 of the EPA makes it an offence to direct "at any level" a terrorist organisation. There is no equivalent provision in the PTA. "Directing" is not defined. The word is regarded as having the usual meaning of giving orders or authority for actions to be taken. The offence is aimed at the strategists - those who plan campaigns and order them to be carried out, but who do not normally themselves take any part in the detailed planning or execution of the individual attacks which make up the campaign. There have been 2 convictions for this offence and long sentences were imposed in each case - the maximum sentence which can be given on conviction for the offence is life imprisonment.

12.9 The nature of the offence means that it is difficult to get evidence to support a charge; witnesses are particularly reluctant to make statements implicating people who hold positions of authority within terrorist organisations. But given the nature of the offence, where a conviction is obtained, it is likely to be of some significance and to have a major impact on the terrorist organisation in question. Lord Lloyd considered that the offence had been of real value. He supported its retention in permanent legislation and its extension to cover the whole of the United Kingdom and all forms of terrorism.

12.10 The Government agrees and proposes that the offence should be included in new counter-terrorist legislation extending across the UK and applying to all forms of terrorism.

## Section 34 of the EPA

12.11 Section 34 of the EPA makes it an offence to give or receive training in the making or use of firearms or explosives. This provision builds on other firearms and explosives legislation by making it an offence to train anyone with licensed weapons or with dummy articles or to train someone in the theory of how to make or use such weaponry.

12.12 The police and the security forces consider this to be an important measure in the fight against terrorism although they acknowledge that the offence can on occasion be difficult to prove. With domestic and international terrorist groups looking increasingly to recruit and train those willing to help them carry out terrorist attacks both in the United Kingdom and abroad, the Government is minded to include such an offence in the new permanent legislation and to make it applicable throughout the United Kingdom.

12.13 The Government would also welcome comments on whether the offence should be widened to cover training in the manufacture or use of chemical, biological and nuclear materials as weapons. The Kurdistan Workers Party poisoned the water supply of a Turkish military base in 1992 and the Aum Shinrikyo cult used Sarin gas in its attack on the Tokyo underground system in 1995. And there is some intelligence to suggest that other terrorists are exploring the use of chemical and biological agents in mounting attacks.

# CHAPTER 13:

## Northern Ireland temporary provisions

**This chapter sets out the options for a limited range of provisions to be available in Northern Ireland while a terrorist threat remains and until lasting peace is established. The Government hopes it will not be necessary to enact any temporary Northern Ireland provisions. It will make a judgement at the appropriate time, and taking into account the prevailing level of terrorist threat, as to which additional provisions, if any, need be enacted. Views are particularly sought on:**

- **how the Diplock trial system and attendant arrangements might be gradually phased out;**
- **the proposal to adopt the PACE standard for admissibility of confession evidence in terrorist cases.**

### Introduction

13.1 The Government believes that the prospects for the creation of a normal peaceful society in Northern Ireland have been greatly enhanced by the political will as exemplified in the Belfast Agreement, and reinforced by the support which the people of Northern Ireland have given to the Agreement. It is the Government's objective progressively to transform the security environment as appropriate as part of the implementation of the Agreement as a whole. In such circumstances the Government's position is that there will be no need for any temporary Northern Ireland specific powers. The Government has already taken steps to improve the safeguards in the existing EPA. For example, provision has been made for the introduction of audio-recording of police interviews with terrorist suspects, and for a code of practice to be made governing audio-recording; and following changes made in April this year, more offences may be certified out of the list of scheduled offences at the Attorney General's discretion, thus allowing them to be tried by jury in the ordinary way. Furthermore, the power of detention without trial (internment) has been removed.

13.2 The Government continues to respond to changing circumstances in Northern Ireland. However, not all terrorist groups which exist in Northern Ireland have declared ceasefires; and some have yet to convince the Government they are observing a full and unequivocal ceasefire. Where appropriate, the Government has eased certain provisions. But it has also, where necessary, fine tuned provisions to make them more effective and more clearly targeted against the remaining terrorist threat. The Government will continue to respond positively in the future in line with its commitments under the Belfast Agreement. Progress towards fulfilling those commitments will depend on political progress and on events on the ground.

### Possible temporary provisions for Northern Ireland

13.3 It is the Government's hope that it will not be necessary to enact any temporary Northern Ireland specific provisions. However, the Government has a duty to ensure that the community is protected from terrorist attack, from whatever quarter, and that the security forces have the powers they need to counter any threat. If there is a continuing threat from some groups in Northern Ireland, it may be necessary to include in the new UK-wide legislation a Part containing a limited range of powers, temporary in nature and applying only in Northern Ireland, which would continue in force until lasting peace is established there and the Army's presence is no longer required in support of the police. If enacted, the temporary provisions would be subject to annual renewal; and any provisions that were needed initially would be phased out, individually if appropriate, as soon as the security situation allows. This chapter sets out options for what those provisions might be under a variety of future circumstances, and invites views.

### Scheduled offences and non-jury courts

13.4 In Northern Ireland terrorist and security-related offences are known as scheduled offences and are listed at Schedule 1 to the EPA. Most of the offences there listed can be certified out of the Schedule at the Attorney General's discretion. In practice the Attorney General certifies out an offence if he is satisfied in the individual case that it was not terrorist or security-related, although this test is not specified in statute. Where a scheduled offence is certified out, it is treated as an ordinary criminal offence and subject to normal procedures. Otherwise, the offence is tried by a single judge sitting without a jury. These arrangements have their origin in Lord Diplock's 1972 Report, (Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland: Cm 5185) which found that the jury system as a means of trying terrorist crime in Northern Ireland was under strain and in danger of breaking down.

13.5 The Government is committed to move as quickly as circumstances allow to jury trial for all offences. Lord Lloyd advocated a return to jury trial but recognised that it could not be achieved overnight. He pointed out that, even against a background of lasting peace, cases of terrorist-related offences committed during the campaign of violence would continue to come before the courts; and it may take some time to re-establish confidence in the jury system. The Government agrees and accepts the continued need for Diplock type trials for a transitional period.

13.6 Along with the Diplock arrangements and the scheduled offences there exist a number of attendant arrangements and provisions. For example, in the case of scheduled offences, bail applications must be dealt with by a High Court Judge or a Judge of the Court of Appeal, while in ordinary criminal cases bail applications are dealt with by a Resident Magistrate. This provision owes its origin to the fact that prior to its introduction, when magistrates were dealing with bail applications in terrorist cases, the courts became crowded with persons who tried to intimidate the Court and created a threatening atmosphere. Restrictions are placed on the availability of bail in terrorist cases. Under the ordinary law, however, there is a right to bail, subject to certain exceptions, as opposed to a power to grant bail.

13.7 Special provisions apply to confession evidence in terrorist cases, which are not as strict as the equivalent PACE provisions, so in theory a confession could be admitted under the EPA standard which would not be admissible under PACE. And special provisions apply in respect of the onus of proof in relation to offences of possession: where it is established that the item and the accused were both present in any premises at the relevant time, or that the item was in premises of which the accused was the occupier, the court may accept the fact proved as sufficient evidence of possession, unless the accused can prove he had no knowledge or control of the item.

13.8 The Government would welcome any suggestions aimed at gradually phasing out the Diplock system, including the scheduled offences and the attendant arrangements, for example, for bail and for onus of proof in possession cases. The Government will be considering in consultation with the practitioners where it might be possible to implement any transitional measures ahead of the proposed new legislation. It would welcome suggestions which would assist in the phasing out of the Diplock system, for example, witness and jury protection schemes, and how such schemes might work in practice. On the matter of confession evidence, the Government notes Lord Lloyd's conclusion that the argument for maintaining the EPA standard is weakened by the creation of the PACE standard and it proposes that the PACE standard should apply to all criminal offences, including terrorist offences. Views are invited.

### **Possible additional powers for the police and others, and for the Secretary of State**

13.9 The Government restates its commitment to establishing a normal framework of law in Northern Ireland. That means where possible aligning the various powers of arrest, entry, search and seizure so that as far as possible police forces across the United Kingdom will operate on the basis of comparable powers - see chapters 9 and 10. How far it is possible to achieve such uniformity will depend on the prevailing level of threat; the Government will make a judgement at the appropriate time as to what additional powers if any might be required.

13.10 A range of options is available depending on the circumstances on the ground. If, as the Government hopes and expects, the scenario is one in which the threat of terrorism has diminished to the point where no additional powers are necessary, then none will be introduced. However, against a worst case scenario of renewed widespread and sustained terrorist activity, it is likely the Government would decide to introduce, at least initially, the full range of temporary provisions currently available. These would include:

- the Army powers (see paras 13.12 to 13.15);

- a power, equivalent to that currently in section 25 of the EPA, for a member of the security forces to stop and question



any person as to identity, movements or knowledge of any recent incident endangering life;

powers broadly equivalent to those currently in section 20(4) of the EPA, to enable the security forces, when carrying out a search of premises (for any type of terrorist material), to be able to restrict the movement of persons present;

powers, equivalent to those currently in section 23 of the EPA, for a member of the security forces to enter premises to search for persons believed to be unlawfully detained in circumstances where their life is in danger (the EPA provision is wider than its PACE equivalent, which permits entry and search for the purpose of saving life or limb);

a power, equivalent to that in section 22 of the EPA, for appointed explosives inspectors to enter without warrant a non-dwelling or to stop a person in a public place to search for explosives;

powers equivalent to those in sections 26 and 27 of the EPA to enable any member of the security forces to enter and interfere with rights of property and with highways; and to enable the Secretary of State to direct the closure etc of roads. (These powers have been used in the past to protect security force bases, to secure sectarian interfaces; to set up vehicle checkpoints; to requisition land for security purposes; and to allow helicopters to land in fields.);

a power, equivalent to that currently in section 49 of the EPA, to enable the Secretary of State to make regulations for the preservation of the peace and the maintenance of order. (This power has been used in the past to create vehicle control zones.);

a power, equivalent to that currently in section 50 of the EPA to extend the grounds on which the Secretary of State may reject an application for a licence to manufacture explosives and magazines to include the interests of national security and the protection of public safety;

a power, equivalent to that in section 35 of the EPA to make it an offence for any person, without lawful authority or reasonable excuse, the proof of which lies on him, to wear in a public place or dwelling house other than his own, any hood or mask which conceals his identity or features.

13.11 In making its judgement at the appropriate time, the Government's aim will be to ensure that any additional Northern Ireland powers which it is necessary to enact are kept to a minimum and that they are governed by tightly drawn statutory codes of practice. The existing arrangements in Northern Ireland for the payment of compensation in respect of property lawfully taken, occupied, damaged or destroyed by members of the security forces or other authorised persons will be preserved as necessary. And in line with the proposed temporary disapplication in Northern Ireland of the need to obtain a warrant for the use of common police powers (see Chapter 10), the Government envisages that there would be no requirement for a warrant for the use of any additional Northern Ireland powers.

## The Army powers

13.12 In a scenario where an Army presence continues to be necessary in Northern Ireland to support the police, the Government's position is that members of HM Forces should retain the powers currently conferred on them by the EPA.

13.13 These include the power while on duty to arrest without warrant and detain for not more than 4 hours anyone they have reasonable grounds to suspect is committing, has committed or is about to commit any offence. In making such an arrest a soldier would need to state only that he was effecting the arrest as a member of HM Forces. For the purpose of making such an arrest he would have the power to search any premises or other place and to seize and to hold for up to 4 hours anything which he reasonably suspected was being used for terrorist purposes.

13.14 A member of HM Forces on duty should also have the powers conferred on a police constable to stop and search; to stop and question; to enter and search; to examine documents; to search for persons unlawfully detained; and to interfere with rights of property and highways.

13.15 In short, the Government proposes, while military support of the police remains necessary, to maintain the Army's existing powers; no new powers would be added. For the first time, however, the use of the powers would be subject to a comprehensive statutory code of practice; and while the Army's operational role remained there would continue to be a requirement to provide for the post of Independent Assessor of Military Complaints Procedures (see section 51 of the EPA).

**Provisions recommended for retention/transfer to the ordinary criminal law, if suitable alternative legislative vehicles can be identified**

13.16 Part V of the EPA provides for the regulation of private security services in Northern Ireland; it aims to prevent paramilitary/criminal organisations from setting up security firms in order to raise funds, or infiltrating security firms to gain information of use to them. The Government sees merit in the provisions and wishes to retain them, but to transfer them to the ordinary criminal law if possible.

13.17 Other provisions currently in the EPA which the Government wishes to retain and suggests might be transferred to the ordinary law are: the provisions to enable time limits to be set up for the stages of proceedings leading up to trial; and the provision which fixes a maximum period for remands in custody after charging.

# CHAPTER 14:

## Consideration of further measures

**This chapter addresses suggestions put to the Government in the aftermath of the Omagh bombing to strengthen the law against terrorism (and specifically the law against Irish terrorism). The Government does not rule out seeking further powers were they to be effective and proportionate to the level of threat. At this stage, it is not convinced that those circumstances pertain, particularly in view of the recent strengthening of the law in the Criminal Justice (Terrorism and Conspiracy) Act 1998; and the comparatively low level of current terrorist activity.**

**Against that background views are sought on whether any of the proposed changes described in this Chapter can be justified.**

## Internment

14.1 The Northern Ireland (Emergency Provisions) Act 1998 removed the power for the Secretary of State for Northern Ireland to introduce detention without trial (internment). The Government took that step because it doubted whether internment could ever be effectively introduced. Since the Omagh bombing, there have been a number of calls to reinstate that power (as well as some to take a further step and introduce internment itself).

14.2 The Government recognises the reasons behind these calls. It does not rule out for all time the reintroduction of the power to intern, but the setting aside of the criminal law in favour of executive action could only be contemplated exceptionally, where the Government were convinced that the measure was likely to prove effective; and it would require the Government to enter a derogation under article 15 of the European Convention on Human Rights (ECHR). Joint action by the UK and Irish Governments might increase the likelihood of effectiveness, but the Government remains to be convinced of the practical merits of such a measure. At present, the Government has no plans to reintroduce the power of internment.

14.3 There have been suggestions put to the Government to **change the definition of admissible evidence and to make changes to the law to allow:**

- i. that accomplice statements should be admissible as evidence against co-accused:

The use of accomplice evidence was a main feature of the controversial "supergrass" trials of the 1980s (when the uncorroborated evidence of individuals themselves involved in terrorist crimes, against others they had worked with, led to convictions). The subsequent overturning of convictions in these cases has meant that it is now very difficult to obtain a conviction on the basis of uncorroborated accomplice evidence. It is suggested that the difficulties associated with those trials could be avoided if corroboration could be provided by inferences from silence and admissions from other co-accused.

The present position is that if a defendant gives evidence in a joint trial, what he says is evidence for all purposes of the case and can be used against his co-defendant. Subject to that it is, however, a firm rule of evidence that statements made by one defendant, for example under police questioning, are a form of hearsay and cannot be used against a co-defendant unless that co-defendant effectively adopts them. It is far from clear what weight courts would be prepared to give to statements from a co-accused if the rule were changed.

The Government would welcome views on this proposal generally.

- ii. that previous terrorist convictions should be admissible as evidence in serious scheduled offences:

This suggestion would allow the Court to take account of previous convictions for terrorist offences. This would mirror practice in countries like Austria and France. In Diplock trials, the judge would be well placed to assess the weight to be attached to that record, but past guilt has not previously been used in British law as part of a case about subsequent responsibility for crime except in defined circumstances where evidence of past conduct proves system or design or rebuts a defence such as accident or mistake. The question is whether the rule should be changed and evidence of propensity to crime itself made admissible to prove guilt. The Government notes that the Law Commission has been examining this issue; it will want to take into account any conclusions which the Commission reaches.

- iii. that the refusal to answer questions in defined circumstances should be an offence:

The current law allows inferences to be drawn from silence in defined circumstances. The recent Criminal Justice (Terrorism and Conspiracy) Act 1998 extends the provisions by allowing inferences to be drawn in connection with membership of a specified proscribed organisation; but even there that is insufficient in itself to secure a conviction. The proposal would create an additional offence of refusing to answer questions, modelled on a power currently given to investigators in a range of cases such as serious fraud investigations, and customs and licensing enquiries.

There are, however, serious ECHR constraints on this option. If it is an offence not to answer questions the resulting evidence, whether answers or silence, cannot be used in a subsequent case against the individual concerned.

- iv. that the burden of proof is invariably placed on the accused in cases concerning the possession of specific items likely to be of use to terrorists (such as guns and explosives). (Currently, where it is established that the item and the accused were both present in any premises at the relevant time, or that the item was in premises of which the accused was the occupier, the court may accept the fact proved as sufficient evidence of possession unless the accused can prove he had no knowledge or control of the item. This provision, which applies in Northern Ireland only, is one of the range of provisions attaching to the Diplock Courts arrangements, in respect of which transitional arrangements may be required while a terrorist threat remains until lasting peace is established - see Chapter 13):

This suggestion could either make the prosecution only need to prove guilt on the balance of probabilities or reverse the burden by requiring the Court to accept the fact proved as sufficient evidence of possession unless the accused can prove he had no knowledge or control of the item. The suggestion is made as a result of the Appeal Court judgement in Killen which held that, under the existing law although the fact of possession constituted a *prima facie* case, the guilt of the accused still had to be proved beyond all reasonable doubt.

The Government does not think it right to contemplate a requirement on the defendant to prove his or her innocence. This would be to depart from the fundamental presumption of innocence in our law. It would, however, welcome views on whether the standard of proof in this category of case should be adjusted in any way and, in particular, whether the offence should be triable on the civil, as opposed to the criminal, standard.

14.4 These proposals are all intended to increase the potential for convictions against members of sophisticated terrorist groupings and reflect difficulties faced. The Government is aware of certain types of cases in which the prospects of a conviction would be enhanced if these changes were introduced, but, as with anti-terrorist powers more widely, wishes to retain a balance between securing the safety of its citizens and protecting human rights.

14.5 The Government believes these proposals would, taken together, mark a significant departure from the established criminal law, but is interested in views on the individual merits. It is conscious that any change to the law would need to comply with the ECHR and, in particular, the requirement for a fair trial in any particular case.

## Operational improvements

14.6 Suggestions have also been made that arrangements between the RUC and An Garda Síochána could be improved operationally through, for example, the introduction of hot pursuit, and through better administrative arrangements in joint training arrangements.

14.7 Whilst these non-legislative proposals are not part of the remit of this consultation paper, it is the Government's view that co-operation between the United Kingdom Police Services and that of the Republic of Ireland is at its highest ever level. Naturally, efforts to improve that still further continue, and the RUC Chief Constable and Garda Commissioner have established a joint working group after the Omagh atrocity to examine what more can usefully be done. The Government does not rule out developments such as those proposed, but believes, currently, that the operational judgement of the senior police officers concerned should be the determining factor in operational co-operation between the two police services.

# ANNEX A

## The current framework of legislation

1.1 The principal legislative measures in the United Kingdom for countering terrorism are contained in the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA), and the Northern Ireland (Emergency Provisions) Act 1996 (EPA), as amended by the Northern Ireland (Emergency Provisions) Act 1998.

## The Prevention of Terrorism (Temporary Provisions) Act 1989

1.2 The PTA extends with some important exceptions to the whole of the United Kingdom. (The exceptions are generally provisions which do not extend to Northern Ireland because equivalent or other provision is made for such matters in the EPA.) Part I, comprising sections 1 - 3 and Schedule 1, provides for the proscription of terrorist organisations. Sections 2 and 3 make it an offence to belong to, or solicit support, other than money or property, for a proscribed organisation or to display support for such an organisation in public. Part II, comprising sections 4 - 8 and Schedule 2, enables the Secretary of State to make an order excluding an individual from entering, or remaining in, either Great Britain, Northern Ireland or the whole of the United Kingdom, where it appears to him to be expedient to prevent acts of terrorism. Part III, comprising sections 9 - 13 and Schedule 4, deals with financial assistance for terrorism, including making it an offence to solicit money or property intending that it be used to commit or further acts of terrorism and to solicit, or contribute, money or other property to any proscribed organisation.

1.3 Part IV of the PTA, comprising sections 13A - 16 and Schedule 5, gives the police special powers to stop, search, arrest, and detain those suspected of being involved in the commission, preparation and instigation of acts of terrorism. Part IVA, comprising sections 16A and B, creates offences of possessing articles intended for terrorist purposes, and collecting information likely to be useful to terrorists. Part IVB, consisting of sections 16C and D and Schedule 6A, empowers the police to set up cordons in order to investigate the commission, preparation and instigation of acts of terrorism and to impose parking restrictions to prevent acts of terrorism. Part V of the Act, comprising sections 17 - 19 and Schedule 7, gives the police special powers to investigate terrorist activities, including powers to examine financial and other records held by third parties, and to enter and search property.

1.4 Sections 1 - 8, 10 and 18 apply only in relation to Irish terrorism. The remainder of the PTA applies to Irish and international terrorism.

## The Northern Ireland (Emergency Provisions) Act 1996

1.5 Part I of the EPA, consisting of sections 1 - 16, creates the system of Diplock Courts for the trial of certain offences by judges alone. These offences are known as "scheduled offences" and are set out in Schedule 1 to the Act. Part II, comprising sections 17 - 28 gives the police and members of Her Majesty's Forces general powers of stop, search and arrest. Part III and Schedule 2 make provision for the proscription of terrorist organisations in Northern Ireland. Sections 30 and 31 make it an offence to belong to, or display or solicit support, other than money or other property, for a proscribed organisation.

1.6 Part IV, comprising section 36 and Schedule 3, which contained the Secretary of State's powers to detain without trial persons suspected of being terrorists, was repealed by the Northern Ireland (Emergency Provisions) Act 1998, which came into force on 8 April 1998.

1.7 Part V (sections 37 - 44) covers the regulation of private security services. Part VI, consisting of sections 45 - 48, gives

those detained under the PTA in Northern Ireland the right to have a friend or relative informed of their detention and to have access to legal advice. Parts VII and VIII contain various miscellaneous provisions. These include a power for the Secretary of State to issue codes of practice in connection with the detention and questioning of persons under the PTA in Northern Ireland. Section 53 makes provision for the silent video-recording of interviews.

1.8 Although the EPA contains a number of provisions which refer to, or amplify, the powers contained in the PTA as they apply in Northern Ireland, the EPA itself extends only to Northern Ireland.

## The Northern Ireland (Emergency Provisions) Act 1998

1.9 The Northern Ireland (Emergency Provisions) Act 1998, which came into force on 8 April 1998, extends the life of the EPA 1996 by 2 years. It makes provision for the introduction of audio-recording of police interviews with terrorist suspects, and for a code of practice to be made governing audio-recording. It also makes it possible for more offences to be certified out of the list of scheduled offences, at the Attorney General's discretion, thus allowing them to be tried by jury in the ordinary way. The 1998 Act repealed the power of executive detention (internment) which had been available under previous Northern Ireland (Emergency Provisions) Acts.

1.10 Both the PTA and the EPA define terrorism as the "use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear".

## New provisions - the Criminal Justice (Terrorism and Conspiracy) Act 1998

1.11 The Criminal Justice (Terrorism and Conspiracy) Act 1998 was introduced as emergency legislation on 2 September 1998 following the Omagh bomb of 15 August and bombings in Kenya and Tanzania the same month. It received Royal Assent and came into effect on 4 September.

1.12 Sections 1 and 2 of the Act provide, by amendment of the PTA and the EPA respectively, that where an accused is charged with the offence of membership of a proscribed organisation, a statement of opinion from a police officer of or above the rank of Superintendent that the accused is or was a member of a specified organisation (that is, a proscribed organisation which is not maintaining a complete and unequivocal ceasefire) shall be admissible as evidence. They also provide that where the question of whether the accused belonged to a specified organisation is being considered, certain inferences may be drawn from the accused's failure to mention, when being questioned or charged, any material fact which he could reasonably have been expected to mention. These extended inferences can only be drawn where the accused was permitted to consult a solicitor before being questioned.

1.13 The Act specifically provides that an accused cannot be committed for trial or be found to have a case to answer or be convicted on the basis of inferences allowed by the Act alone, or the statement of a police officer alone.

1.14 Section 3 amends the Prevention of Terrorism (Temporary Provisions) Act 1989 so as to enable the arrest and detention under that Act of persons suspected of certain offences in Northern Ireland relating to proscribed organisations. It brings the law on such arrests and detentions in Great Britain and Northern Ireland into line.

1.15 Section 4 confers power on the courts to order the forfeiture of property of a person convicted of the offence of membership of a proscribed organisation which is also a specified organisation. The property in question must have been in the possession or control of the convicted person and been used in relation to the activities of the specified organisation, or the court must believe it may be so used unless forfeited. This section also provides that, before making a forfeiture order, the court must give an opportunity to be heard to anyone other than the convicted person who claims to have an interest in the property that is liable to be forfeited.

1.16 The above provisions, since they form part of, or are closely aligned with, the PTA or EPA, are subject to annual renewal in the same way as those Acts. In addition, the Secretary of State is required by the legislation to submit to Parliament at least once every year a report on the working of the whole of the Act.

# Conspiracy

1.17 Sections 5 - 7 make it an offence to conspire in the UK to commit an offence abroad. The Act provides that the substantive act must constitute an offence both under the law of the UK and under the law of the country in which it is or was to be committed. The consent of the Attorney General will generally be required for proceedings under this part of the Act to be instituted.



## Matters associated with detention

8.25 The rest of this chapter considers the procedures that should apply for those detained under counter-terrorist legislation. The proposals are designed, where appropriate, to bring procedures for dealing with terrorist suspect detainees in England and Wales and Northern Ireland more in line with PACE. There are, of course, marked differences between the criminal justice systems in England and Wales, Northern Ireland and Scotland with different policing procedures flowing from these different criminal justice systems. The Government recognises that in these circumstances it may be necessary for different arrangements to apply in each of the jurisdictions on the detail of detention-related procedures under future counter-terrorist legislation, reflecting the procedures which apply in criminal cases in these jurisdictions. But it believes that it is desirable to move where possible towards a unified approach across the UK for dealing with these matters.

## Access to a solicitor, etc.

8.26 Where a person is arrested under PACE or the PTA in England and Wales, he has the right to consult a solicitor and to have that solicitor present during the interview. He also has the right to have someone he knows and who is likely to take an interest in his welfare, informed of his arrest. Annex B to PACE Code C provides that these rights may be delayed on the authority of a Superintendent if he reasonably believes that such communication might lead to:

- interference with, or harm to, evidence connected with a serious arrestable offence;

- interference with or injury to other people;

- the alerting of others also suspected of having committed such an offence but not yet arrested;

- interference with the recovery of property obtained as a result of such an offence;

- interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or

- making it more difficult to prevent an act of terrorism or apprehend and prosecute the perpetrators of any such act.

8.27 The first three conditions apply equally to arrests under PACE and the PTA, the last two to arrests under the PTA alone.

8.28 The maximum period during which a detainee may be held incommunicado currently equates with the length of time during which he can be held without further authority. Under PACE, therefore, access can be delayed for up to 36 hours; under the PTA it can be delayed for up to 48 hours.

8.29 The relevant provisions of the PTA apply equally in Scotland although those in PACE do not. In Scotland, anyone detained or arrested under the ordinary criminal law is entitled to have a solicitor and a named person notified of his detention without delay, or with no more delay than is necessary for the purpose of investigating or preventing crime or apprehending offenders. Anyone arrested is also entitled to have a private interview with his solicitor before appearing in court but has no right to an interview with his solicitor before he is questioned by the police or to have his solicitor present during the interview. Anyone arrested under the PTA has broadly similar rights. He must, however, have access to a solicitor without delay. But the rights of notification and access may be delayed for up to 48 hours on the authority of a Superintendent in accordance with section 3A of the Criminal Justice (Scotland) Act 1980; and an Assistant Chief Constable may direct that any consultation with a solicitor must be carried out in the presence of a uniformed Inspector who is unconnected with the case. This action may be taken where it appears to the respective officers to be necessary either in the interests of the investigation or prevention of crime or of the apprehension, prosecution or conviction of offenders.

8.30 The position in Northern Ireland is different again. The EPA and codes of practice made under it contain broadly equivalent powers to delay access etc to those which apply in England and Wales for those held under the PTA. But there are some significant differences. Under the EPA codes, the police may, having once granted access, impose further subsequent

delays of up to 48 hours before allowing the detainee to have a further interview with his solicitor. And the detainee has no absolute right to have his solicitor present during the police interviews.

8.31 In practice, access to a solicitor is rarely denied in Great Britain - certainly the Government is not aware of any case in the last 2 years in which the power to delay access has been exercised. Even in Northern Ireland where the powers were, in the past, used more frequently, they are now used much more sparingly. The latest figures available show that in 1997 access was denied in only 33 cases out of 512 requests made. In the period to the end of September 1998, access was denied in only 3 cases out of 445 requests made. (It is more common, however, in Northern Ireland to refuse to allow a solicitor's presence at police interviews, notwithstanding the fact that initial access to the solicitor has been permitted.)

8.32 The Government accepts that there will still be occasions when access, or notification, or both should be delayed. Sources of support for Irish and international terrorists are often close at hand; co-conspirators still at large could be warned and disappear before they can be arrested; or key witnesses might be identified and harmed, or frightened into silence if word of a particular arrest leaks out too soon. But the Government has reservations about the existence of different regimes in each of the jurisdictions for governing the delay of access. As far as practicable it would like to see a single regime in place right across the UK.

8.33 The Government therefore proposes that for England, Wales and Northern Ireland, where PACE based regimes apply, the reasons for delaying access to a solicitor under any new legislation should be the same as those under the PTA at present and that, as now, the maximum period during which a suspect could be held incommunicado should be for 48 hours (that is in line with the period a person may be held by the police under the PTA without further authority). It also proposes that once access has been granted it should not subsequently be withheld and that, once granted, all suspects would have the right to have their solicitor present during police interviews. While recognising the different criminal justice system in place in Scotland, the Government sees attractions in moves being made towards the establishment of similar arrangements there, in so far as these are consistent with other aspects of Scottish criminal law and procedure.

## Silent video-recording and audio-recording of interviews

8.34 It was agreed in Northern Ireland in 1996 that a system of silent video-recording of police interviews with terrorist suspects should be introduced. In the absence (at that time) of any arrangements to audio record interviews in Northern Ireland, it was felt that silent video-recording would provide additional safeguards for detainees and protect police officers against malicious claims of ill-treatment. Audio-recording was resisted in Northern Ireland because of the fears that it might inhibit detainees from talking, the tapes being disclosable if criminal or civil proceedings ensued. Where this occurred, the terrorist organisations would know what suspects had said and there could be serious consequences for those who co-operated with the police. The issue was reviewed last year in conjunction with the Chief Constable of the Royal Ulster Constabulary and a decision taken to introduce audio-recording. The Northern Ireland (Emergency Provisions) Act 1998 makes audio-recording of interviews with those detained under the PTA mandatory. Audio-recording will be introduced formally in early 1999, when all the necessary consultative and Parliamentary procedures have been completed. The systems for silent video-recording and audio-recording will run side by side.

8.35 Interviews with terrorist suspects in Scotland are generally not recorded. The police in England and Wales are not required by statute to audio-record interviews of suspects held under the PTA although they do so voluntarily. The Government recognises that audio-recording of such interviews may be an important protection for both the detainee and the police. It therefore proposes that audio-recording of all interviews of terrorist suspects should be made mandatory in England and Wales and Scotland as is the case in Northern Ireland.

8.36 Silent video-recording has developed as a result of particular problems which have been experienced in Northern Ireland. It will continue there for the protection of terrorist suspects and the police alike whilst these issues remain a factor. Similar problems have not been encountered in England and Wales and Scotland but the Government would welcome comments on whether there is a need to extend such facilities to these jurisdictions.

## Fingerprints, photographs and samples

8.37 Sections 15 (9), (10) and (11) of the PTA and sections 54 - 59 and Schedule 10 (62) of the Criminal Justice and Public

Order Act 1994 modify and extend the PACE provisions relating to the taking of fingerprints and samples for forensic analysis with a view to assisting the police in establishing the identity of a person whom they have arrested under section 14. An officer of Superintendent or more senior rank may (as in PACE) authorise the taking of fingerprints and non-intimate samples without the consent of the detainee, and may authorise the taking of intimate samples with the necessary consent, if he is satisfied that it is necessary to do so in order to assist in determining whether the detainee is, or has been, involved in terrorism; has committed an offence under certain specified sections of the Act, or is subject to an exclusion order.

8.38 Section 64(7) of PACE allows the police in England and Wales to retain fingerprints and other samples taken from persons arrested under section 14 of the PTA, even if they are not charged with an offence, or are subsequently cleared of an offence. This provision has proved invaluable in allowing the police in England and Wales to build up a database of fingerprints and samples taken from suspected terrorists.

8.39 The PTA provisions relating to the taking of fingerprints and samples do not apply to Northern Ireland. Their equivalent provisions are included in the Police (Amendment) (NI) Order 1995; the main difference between the two sets of provisions is that the Northern Ireland Order does not allow DNA samples taken from terrorist suspects to be retained indefinitely, but a database of fingerprints of terrorist suspects has been established.

8.40 Different arrangements again apply in Scotland. There a constable has power under section 18 of the Criminal Procedure (Scotland) Act 1995 to take fingerprints, palm prints and other prints and impressions of an external part of the body of a person who has been arrested or detained, and a constable may, with the authority of an Inspector or more senior rank, take samples of hair, nail, saliva, blood or other bodily fluid etc from someone who is so detained. Section 18(3) of the 1995 Act, however, requires that all prints, impressions and samples etc which are taken must be destroyed as soon as possible following a decision not to institute criminal proceedings against the person or on the conclusion of such proceedings otherwise than with a conviction or absolute discharge. So no terrorist suspect database exists in Scotland.

8.41 Lord Lloyd suggests that once there is a lasting peace in Northern Ireland, the need for any departures from the normal procedures laid down in PACE (or its equivalent in Scotland) will fall away. He acknowledges that the exemption in section 64(7) of PACE which allows the police to retain fingerprints has proved useful particularly when dealing with large indigenous terrorist groups such as the IRA. But he feels that the power might be less useful when there is a lasting peace in Northern Ireland.

8.42 The need for a special regime for taking fingerprints etc. where someone is suspected for example of being excluded will fall away with the repeal of the Secretary of State's powers to exclude. But, as chapter 2 highlights, there is ample evidence that international terrorist groups have sought to operate within the United Kingdom, or to use it as a base to raise funds, recruit and to launch attacks abroad. In these circumstances, the Government does not believe it would be right to deprive the police of a facility which has proved successful in identifying people and linking them to their crimes. And, if the legislation is to be extended as the Government proposes to include domestic terrorism, the police may well need to extend their database with a view to containing fingerprints and samples from extremists within the animal rights movements and others.

8.43 Given this the Government would welcome views on whether the current provisions in PACE, as amended by the PTA, which apply to England and Wales, should be re-enacted in any new legislation to combat terrorism and whether they should be amended to apply in all three jurisdictions.

## Supervision of detention

8.44 Schedule 3 to the PTA sets out a regime for the supervision of any detention under the PTA. It applies in all three jurisdictions, is modelled on the regime in PACE and like the regime in that Act it provides for:

- a person's detention to be reviewed at regular intervals;
- the reviewing officer to authorise continued detention provided he is satisfied that certain conditions are met;
- the reviewing officer to investigate the reasons for any delay in allowing a detainee access to a solicitor and to have someone informed of his detention; and

- the detainee to make representations about his detention.

8.45 The regime in the PTA differs from that in PACE in three important respects. These are:

- i. the time at which the reviews begin and are conducted thereafter;
- ii. the rank of the officer carrying out the reviews; and
- iii. the purpose of the reviews.

## Timescales

8.46 Under PACE, the first review must be held 6 hours after detention and thereafter at 9 hour intervals throughout the period of detention. Under the PTA, this first review should take place as soon as possible after the beginning of the detention and thereafter at 12 hour intervals until the person is charged or released or an application is made to the Secretary of State for an extension of detention. No further reviews are required once an application has been made for an extension of detention.

## The rank of officer carrying out the review

8.47 Reviews under both regimes are initially carried out by an Inspector but at the 24 hour point, a Superintendent must authorise the continued detention under PACE, and under the PTA, he must himself take on the role of reviewer.

## Purpose of the reviews

8.48 An arrest under PACE is based on the suspicion that a particular offence has been, or is about to be, committed. The purpose of a review under PACE reflects this for it is designed to establish whether sufficient evidence exists to charge the person with that offence or whether it is necessary to continue to hold him in order to obtain, secure or preserve such evidence. If it is not, the person must be released. Where the detention continues beyond the 24 hour point, the Superintendent must also be satisfied that the investigation is being conducted diligently and expeditiously. In Scotland, detention under Section 14 of the Criminal Procedure (Scotland) Act 1995 is on the basis of reasonable grounds for suspecting that a person has committed an offence punishable by imprisonment. The detention is, however, limited to a maximum of 6 hours.

8.49 With an arrest under the PTA, the detainee need not be suspected of a specific offence. The reviewing officer's function reflects this. His role is to determine whether the person's continued detention is necessary in order to obtain or preserve evidence which indicates that he is, or has been, involved in terrorism; has committed an offence under the Act; or is subject to an exclusion order. The reviewing officer must also, and from the outset, satisfy himself that the investigation is being conducted diligently.

8.50 Since the PTA allows the police to hold a suspect for longer than is possible under PACE and the Government intends that this should continue to be the case, there is a greater need to ensure that the investigation is being conducted expeditiously. But the Government thinks it questionable whether there is still a case for maintaining separate review regimes. The Government believes that the more sensible course would be to repeal Schedule 3 to the PTA and to extend, as far as possible, the regime provided in PACE to include arrests under the PTA. Equivalent provision to that in PACE as amended would need to be provided in Scotland and Northern Ireland. It invites views.

