

1.4 CONTENTS

1.4.1 Terrorism Act 2000

The 2000 Act is divided into eight parts (plus 16 schedules), with the six of them reflecting its substantive themes: proscribed organisations; terrorist property; terrorist investigations; counter-terrorism powers; miscellaneous offences; and extra measures confined to Northern Ireland. The details of these themes are contained in Chapters 2 to 7 of this book. Amongst the innovations are a new definition of ‘terrorism’ which leads into the application of many powers and offences to a much wider range of terrorism, including international and non-Irish domestic terrorism. There is also an attempt to subject a wider range of measures to judicial or quasi-judicial oversight — such as through a new commission to consider proscription orders and the judicial scrutiny of detention following arrest. Next, the laws in Britain and Northern Ireland are largely harmonised — save for a temporary extra inventory (Part VII) for Northern Ireland. One consequence is that some measures previously confined to Northern Ireland are now extended to Britain; on the other hand, the measures passed in 1998 to respond to Republican splinter groups have actually now been confined to Northern Ireland. There are some novel measures — such as the seizure of cash at borders — but these are relatively few and far between, and the Act was an occasion for clearer thinking rather than new thinking.

Conversely, it is as well to note what is absent. Though the Terrorism Act 2000 is not simply a consolidation measure and makes several substantial additions to the counter-terrorism laws, its passage was also the occasion to drop some measures.

One repeal concerns exclusion orders (see Bonner, D., ‘Combating terrorism in Great Britain: the role of exclusion orders’ [1982] *Public Law* 262; Walker, C.P., *The Prevention of Terrorism in British Law* (2nd ed., Manchester University Press, Manchester, 1992), ch. 5), which had in fact already lapsed in 1998. Lord Lloyd was in favour of dropping the power (Inquiry into Legislation against Terrorism (Cm. 3420, London, 1996), paras 16.2–16.4), as was the subsequent Consultation Paper (Home Office and Northern Ireland Office, *Legislation against Terrorism* (Cm. 4178, London, 1998), para. 5.7), the latter arguing that it was more profitable to keep suspects under surveillance. However, the notion of exclusion lingers on in English law. Section 42 of the Criminal Justice and Court Services Act 2000 empowers a police constable, in order to prevent harassment, alarm or distress to a resident, to order the reasonably suspected perpetrator to leave the vicinity and to remain at a distance as specified in the order.

Another notable absentee is the power of internment without trial. This power had always been controversial, even though it had not been in use since 1975 (see Lowry, D.R., ‘Internment in Northern Ireland’ (1976) 8 *Toledo Law Review* 169; Lowry, D.R., ‘Draconian powers’ (1976–77) 8–9 *Columbia Human Rights Law Review* 185; Spjut, R.J., ‘Executive detention in Northern Ireland: the Gardiner Report and the Northern Ireland (Emergency Provisions) (Amendment) Act 1975’

(1975) 10 *Irish Jurist* 272; Spjut, R.J., 'Internment and detention without trial in Northern Ireland 1971-75' (1986) 49 *Modern Law Review* 712). It was recommended for abolition as long ago as 1990 (following the recommendation of the (Colville) Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987 (Cm. 1115, London, 1990), para. 11.10). Though a later reviewer recommended retention ((Rowe) Review of the Northern Ireland (Emergency Provisions) Act 1991 (Cm. 2706, London, 1995), para. 121), Lord Lloyd disagreed (Inquiry into Legislation against Terrorism (Cm. 3420, London, 1996), para. 16.8), and internment had long been looked on with great distaste by Labour Party spokespersons — 'internment is the terrorist's friend' (HC Debs. Standing Committee A col. 73, 25 November 1997, Adam Ingram). The power had actually been terminated by s. 3 of the Northern Ireland (Emergency Provisions) Act 1998 and now finds no place in the Terrorism Act 2000. Attempts to revive it were firmly resisted by the government, while 'It does not rule out for all time the introduction of the power to intern' (Home Office and Northern Ireland Office, Legislation against Terrorism (Cm. 4178, 1998), para. 14.2), it would be 'a significant backward step at a time when we are normalising the security situation in Northern Ireland' (HL Debs. vol. 613 col. 1054, 16 May 2000, Lord Falconer). Though the stance of the Labour Government against internment seemed very firm and principled, it has now been compromised by ss. 21 to 23 of the Anti-terrorism, Crime and Security Act 2001, as described in Chapter 8, which allow for the detention without trial of certain asylum-seekers. Moreover, in the context of the attacks on 11 September, the Home Secretary seemed more receptive to other categories of internment (HC Debs. vol. 372 col. 930, 15 October 2001):

We do not intend to introduce internment, although if a major crisis arose from the terrorist threat, other specific measures would have to be introduced, as has always been the case since the Second World War. Governments have always held that in reserve.

The third non-appearance concerns the offence of withholding information (formerly in s. 18 in the Prevention of Terrorism (Temporary Provisions) Act 1989 and recommended for repeal by the Inquiry into Legislation against Terrorism (Cm. 3420, London, 1996), para. 14.24), and the Home Office Consultation Paper (Home Office and Northern Ireland Office, Legislation against Terrorism (Cm. 4178, London, 1998), para. 7.17), though a more focused offence dealing with financial institutions, formerly at s. 18A of the 1989 Act, is replicated as s. 19 of the Terrorism Act 2000. This particular omission was wholly reversed by s. 117 of the Anti-terrorism, Crime and Security Act 2001, as described in Chapter 4.

Fourth, the Criminal Justice (Terrorism and Conspiracy) Act 1998 provisions relating to specified organisations persist in Northern Ireland but are repealed in Britain.

It also remains a notable deficiency in a fundamental consolidation that no attention has been given to the victims of terrorism. There is a growing body of

national precedents in France (see Loi no. 86-1021 of 9 September 1986, article 9, as amended), and the USA (see Victims of Terrorism Compensation Act 1986 (5 USC ss. 5569, 5570, 37 USC ss. 559, 1013), US Patriot Act: Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism, H.R. 3162, 2001, Title VI).

1.4.2 Anti-terrorism, Crime and Security Act 2001

This substantial legislative supplement (with 129 sections and 8 schedules) is organised into 14 Parts. The first three parts deal with terrorist property. Since this is also the subject of Part III of the Terrorism Act 2000, the additions will be set out alongside the 2000 Act provisions in Chapter 3. The overlap is substantial, as Part I of the Anti-terrorism, Crime and Security Act 2001 actually replaces ss. 24 to 31 of the Terrorism Act 2000, while Part II makes amendments to other Terrorism Act measures. Only Part III of the Anti-terrorism, Crime and Security Act 2001 treads into new territory, dealing with the freezing of foreign property held by United Kingdom institutions. Next, Part IV addresses immigration and asylum matters pertaining to terrorism. There are three elements here. The most controversial is the detention without trial of foreign persons denied asylum on national security grounds or because of their international crimes. In addition, there is an attempt to short-circuit any claim to asylum by making the tribunal focus upon the Secretary of State's reasons for denying the claim. Thirdly, Part IV deals with the retention of fingerprints in asylum and immigration case. Since these are new issues not contained in the Terrorism Act 2000, they are set out in a separate Chapter 8. Likewise in a distinct chapter (Chapter 9) are the measures in Parts VI to X, dealing with dangerous substances and acute vulnerabilities. The dangerous substances include weapons of mass destruction (Part VI) and pathogens and toxins (Part VII). The acute vulnerabilities are nuclear and aviation facilities (Parts VIII and IX). The measures bolstering their security also encompass the specialist police forces assigned to their protection (Part X, ss. 98 to 101). Other aspects of Part X (ss. 89 to 97), as well as extracts from Parts XI (ss. 102 to 107) and XIII, are translated in this book into either Chapter 4 (terrorist investigations) or Chapter 5 (counter terrorist powers), since they mainly consist of amendments to Terrorism Act 2000 measures. Next, there are various new criminal offences spread around the Anti-terrorism, Crime and Security Act 2001. Some are in Parts XI and XIII of the Act. More controversial is Part V, concerning religious hatred, which is related in this book within Chapter 6 (criminal offences). Finally, incorporated within Chapter 10 are miscellaneous matters such as the implementation of European Union obligations and structural matters (taken from Parts XIII and XIV of the Act).

The omissions from the 2001 legislation are again significant. Aside from changes during the passage of the Bill, one prominent non-appearance concerns the introduction of identity cards. Their utility had been considered by Lord Lloyd (Inquiry into Legislation against Terrorism (Cm. 3420, London, 1996), para. 16.31)

but rejected because foreigners would not have them and because they are too easily forged or stolen. It is alleged that many of the perpetrators of the attacks on 11 September, foreign residents in the United States, had assumed false identities even though passport and travel documents are likely to be much more carefully scrutinised than identity cards. Earlier attempts to introduce such a system (see, for example, National Identity Card Bill 1988–89 HC 16) had also been rejected because the government was not persuaded that it would help to reduce crime. The administrative difficulties of not just issuing cards but in keeping the details up-to-date are also enormous. There are also worries that checks could result in racial harassment (Beck, A., and Broadhurst, K., ‘National identity cards’ (1998) 8 *Policing & Society* 40). After the attacks in September 2001, the Home Secretary professed himself as minded to introduce identity cards. However, there was never any provision in the Bill — the fear that such a controversial issue would unduly delay the Bill was a major factor, and there was an official announcement on the 8 November 2001 that the idea had been dropped (HC Debs. vol. 374 cols. 387–388w, Angela Eagle):

. . . the Government are considering whether a universal card which allowed people to prove their identity more easily and provided a simple way to access a range of public services would be beneficial. Such an entitlement card scheme could also help to combat illegal working which disproportionately affects the poorer sections of our society by undercutting the minimum wage and encouraging unscrupulous employers. It could also reduce fraud against individuals, public services and the private sector. The Government do not consider that an entitlement card scheme would have a significant effect in combating terrorism in the United Kingdom. The introduction of an entitlement card would be a major step and the Government would not proceed without consulting widely and considering all the views expressed very carefully.

Next, there is no product arising from the indications from the Home Secretary’s statement that he was examining additional powers in relation to conspiracy, evidenced through training, providing goods and services or engaging in communications networks with those involved in terrorist activities. However, in evidence to the Home Affairs Committee, the Minister of State said that the conclusion was that the existing laws, including conspiracy to commit terrorist offences in the Criminal Justice (Terrorism and Conspiracy) Act 1998, were sufficient to deal with those situations (Report on the Anti-terrorism, Crime and Security Bill 2001 (2001–02 HC 351), para. 263).

Though changes were made to the laws relating to criminal hoaxes, especially to include the possible use of biological or chemical weapons following the anthrax cases in the United States (see s. 114, as described in Chapter 6), there was no retrospective increase in penalties for existing offences, contrary to some newspaper reports (‘Hoaxers face seven years’ jail from today’, *Sunday Telegraph*, 21 October 2001) and so no apparent breach of Article 7 of the European Convention.

This omission was welcomed by the Home Affairs Committee (Report on the Anti-terrorism, Crime and Security Bill 2001 (2001–02 HC 351), para. 64).

Finally, the issue of the criminalisation of mercenary activities emanated from reports that British Muslims had travelled to Afghanistan intending to fight for the Taliban regime. The law on mercenaries is not a blank page, though it is certainly not a page which carries a clear or wholly relevant message. Mercenary activities are regulated by the Foreign Enlistment Act 1870, s. 4, by which:

If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid, he shall be guilty of an offence. . .

It is also an offence under s. 5, to induce another to go abroad in order to accept any military commission or engagement. At the same time, the 1870 Act has its shortcomings in the modern age. The definition in section 4 of 'foreign State' includes any foreign prince, colony, province or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people. It does not include non-state groups like Al Qa'ida, and so the question arises as to whether any reforms would be helpful. The issue of private military companies, whether active or passive, was considered recently by the Legg Report (Report of the Sierra Leone Arms Investigation, 1997–98 HC 1016), though it mainly concerned their relationship with government (arising out of the role of Sandline (see <http://www.sandline.com/>) as a surrogate for British policy in Sierra Leone). Perhaps more relevant was the report on the Sierra Leone affair by the Foreign Affairs Committee (1998–99 HC 116; see also (Diplock) Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries (Cmnd. 6569, London, 1976) which pointed to the Foreign Enlistment Act 1870 as an 'antiquated piece of legislation . . . passed on the outbreak of the Franco-Prussian war' (para. 92). Apparently, there has never been a successful prosecution under the Act in connection with illegal enlistment or recruitment. The Report notes (para.93) that there is a UN Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 (A/RES/44/34). However, the government regards the definition of 'mercenary' used in the Convention as impossible to use in British courts since it is too vague (for example, a 'mercenary' is one 'motivated to take part in the hostilities essentially by the desire for private gain') (Foreign Office, Private Military Companies: Options for Regulation (2001–02 HC 577), para. 68).

The government has now responded to these concerns by the publication of the a consultation paper, Private Military Companies: Options for Regulation (2001–02

HC 577), the focus of which is commercial military services and their uses and relations with governments and multi-national corporations.

1.4.3 Other anti-terrorism laws

The Terrorism Act 2000 was envisaged as the primary code relating to domestic counter-terrorism powers. In the press release accompanying the giving of Royal Assent, the Home Secretary, Jack Straw, commented that (Home Office Press Release, 21 July 2000):

This new Act responds to the need for specific powers to combat the wide ranging and evolving threats from terrorism, yet properly ensures that the individual's rights are preserved.

However, the Terrorism Act 2000 was never intended as the only source of legislation against terrorism, nor does it operate in this way even in conjunction with the Anti-terrorism, Crime and Security Act 2001. Many of the offences directly relating to terrorist actions, whether in domestic law, such as the Explosive Substances Act 1883, or in international law, such as the Aviation and Maritime Security Act 1990 (see Wilkinson, P., and Jenkins, B.M., *Aviation Terrorism and Security* (Frank Cass, London, 1999); Plant, G., 'Legal aspects of terrorism at sea' in Higgins, R., and Flory, M., (eds), *Terrorism and International Law* (Routledge, London, 1997)) remain unincorporated. There is a growing body of international process law. The trial of the Lockerbie suspects in the Netherlands shows the law against international terrorism cannot operate in isolation but may be moderated by the demands of politics and practicalities (see Klip, A., and Mackarel, M., 'The Lockerbie trial' (1999) 70 *Revue Internationale de Droit Penal* 777; Lockerbie Trial Briefing, <http://www.ltb.org.uk/>; Lockerbie Trial, <http://www.thelockerbietrial.com/>). The International Criminal Court, founded by the Rome Convention, cannot deal directly with 'terrorism' (see McGoldrick, D., 'The permanent International Criminal Court' [1999] *Criminal Law Review* 627; International Criminal Court Act 2001). The government views it as unsuitable because of difficulties of definition and the production of sensitive evidence (Government Response to the Foreign Affairs Committee, Foreign Policy and Human Rights (Cm. 4299, London, 1999), p. 3). Nevertheless, the deeds of terrorists may fall within admissible heads, such as crimes against humanity. Issues of sentencing are also found elsewhere (especially in the Northern Ireland (Remission of Sentences) Act 1995 and the Northern Ireland (Sentences) Act 1998 and in the practice of the courts in cases such as *R v Hindawi* (1988) 10 Cr App R (S) 104). There has been no response to the ideas put forward by Lord Lloyd of a clearer statement of deterrence in terrorist sentences and of the possibility of sentence discount for those who give information (Inquiry into Legislation against Terrorism (Cm. 3420, London, 1996) ch.15). Next, the laws relating to the use of force, especially lethal force, remain unchanged for the present, despite concerns from the European Court

of Human Rights (*McCann, Savage and Farrell v United Kingdom*, App. no. 18984/91, Ser. A. vol. 324, (1996) 21 EHRR 97), but may face some reform whenever the Bloody Sunday Inquiry (<http://www.bloody-Sunday-inquiry.org.uk/>) produces its report (see also Ni Aolain, F., *The Politics of Force* (Blackstaff, Belfast, 2000); Walsh, D., *Bloody Sunday and the Rule of Law in Northern Ireland* (Gill & MacMillan, Dublin, 2000)). In addition, plans were afoot even at the time of passage of the Terrorism Act 2000 to strengthen counter-terrorism laws. For example, there were proposals to improve extradition procedures, especially in the context of western Europe (see Home Office, *The Law on Extradition: A Review*, London, 2001). These ideas were raised again at the time of the Anti-terrorism, Crime and Security Act 2001 (HC Debs. vol. 372 col. 675, 4 October 2001, Tony Blair), but again were not included, save that they may be implemented by order under s. 111 if agreed at a European level. Another Home Office paper, *Animal Rights Extremism: A strategy document* (London, 2001) promised further reforms to deal with tactics designed to intimidate the officers and employees of companies or units (such as at universities) involved in research which harms animals. These measures duly appeared in the Criminal Justice and Police Act 2001. By s. 42, the police are given broad powers to direct protestors (or perhaps journalists — see Hickman, L., ‘Press freedom and new legislation’ (2001) 151 *New Law Journal* 716) away from the residence of another where it is reasonably believed that the presence of the protestors amounts to harassment or is likely to cause alarm or distress. In this way, there is a summary police power to go alongside the more formal process of obtaining a court order under the Protection from Harassment Act 1997. Next, s. 45 allows for ‘confidentiality orders’ to be issued by the Secretary of State (for Trade and Industry) under an amendment to the Companies Act 1985. By an inserted s. 72B, the normal access to information about the addresses of directors and secretaries of companies on companies registers can be forbidden where the Secretary of State is satisfied that there is a serious risk that the officer will be subjected to violence or intimidation. In addition to these legal changes, there has been a reorganisation of policing of animal rights extremists by the setting up of a new unit in the National Crime Squad (*The Times*, 27 April 2001, p. 2).

1.5 CONCLUSIONS

None of the major political parties in Parliament opposed the passage of the Terrorism Act 2000 in principle, so the debates were rather low key and very few significant amendments were made. The Act received the Royal Assent on the 20 July 2000 and came into force on the 19 February 2001. It was further implemented by the Home Office, Circular 03/01: Terrorism Act 2000 (Home Office, London, 2001). By s. 2(1) it wholly replaces the Prevention of Terrorism (Temporary Provisions) Act 1989 and most of the Northern Ireland (Emergency Provisions) Act 1996 (see further Chapter 7) and so forms a permanent monument to the fragmented risk of terrorism in the late modern, globalised world.

By contrast, the Anti-terrorism, Crime and Security Bill produced some well-publicised debates, and some of its contents had to be dropped to secure an early passage through Parliament despite the handicap of severe time restraints on debate (see HC Debs. vol. 375 col. 121, 19 November 2001; vol. 376 col. 841, 12 December 2001). But it was again not opposed in principle, and the legislative process took just four weeks, so the extent of Parliamentary and public scrutiny should not be exaggerated.

It would be a fine development if, having been fortified with these sweeping powers, the United Kingdom Government and its security forces could have the confidence and ability to rely primarily on 'normal' policing powers and upon its extensive contingency planning and networks (see Civil Contingencies Committee and Secretariat, <http://www.co-ordination.gov.uk/terrorism.htm>). However, as they perceive themselves to live in threatening and troubled times, the legislation can probably look forward to a long and active life. Attention will now be turned towards its contents.

