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Winner of the Council of Europe Human Rights Prize

CAJ's submission on possible measures for

**Inclusion in a future Counter-Terrorism Bill
Home Office consultation process**

October 2007

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The Committee on the Administration of Justice (CAJ)¹ had a representative present at the recent consultation meeting organised in Belfast by the Home Office, so the following bullet points are merely intended to serve as an aide-memoire of some of the issues raised in that session and the papers circulated in advance.

1. It is CAJ's experience that rarely is evidence produced by government when suggesting additional emergency measures. Thus, for example, we are unaware of any reliable statistical evidence confirming jury intimidation or perverse judgments. Yet these are the reasons which have been given, and which continue to be given, when arguing for continued reliance on non-jury Diplock courts in Northern Ireland. We recommend that government routinely and systematically seek to underpin any arguments for an extension of powers on the basis of clear and detailed empirical evidence. It is not enough to give vague intimations of a terrorist threat to justify undermining basic human rights protections which are society's best form of safeguard.

2. **Para 7:** We would particularly like to register our concern at the tendency in the past to fast-track important changes to well-trying democratic safeguards. CAJ would urge that all legislation be subjected to close and effective parliamentary and public scrutiny. In this context, CAJ welcomes the consultation around these specific measures and hopes that this will set the normal pattern for future such initiatives.

3. **Para 11-13 (and separate paper): on pre-charge detention** - please find enclosed a summary document of a major report CAJ will be issuing shortly (it is currently at the printers). We intend to send the report to all MPs given its relevance for all debates on counter-terrorism measures. Of particular relevance here is that fact that the Northern Ireland experience highlights the grave dangers that can flow from extended pre-charge detention. To revert to our earlier point about evidentially based legislative proposals: the examples given of the need for such a major change to UK practices are based on very few incidents. The need for the changes proposed are unconvincing when compared with the real risks that society runs by undermining the very rule of law that it is seeking to uphold against terrorist attack.

¹ The Committee on the Administration of Justice is an independent cross community human rights group which is affiliated to the International Federation of Human Rights. CAJ has worked since 1981 in Northern Ireland on a broad range of human rights concerns and has always had a particular interest in criminal justice & emergency legislation - of most direct relevance to this consultation.

4. **Paras 14-20 on intercept evidence:** As commented upon at the consultation meeting, it is particularly unfortunate that the review of the value in any change in the use of intercept evidence in court is being conducted essentially behind closed doors, at Privy Counsellor level. While we understand that some material submitted to the review may be of a particularly sensitive nature, this is no argument for limiting access to the deliberative process by NGOs, legal practitioners, academics, human rights victims and others who may have useful contributions to make.

5. **Para 22 and terrorist financing:** attached is CAJ's submission regarding proposed changes to charity law and the risk that, perhaps quite inadvertently, charities become overly 'controlled' by government (or perceived to be so). Whilst we obviously see no problem in ensuring financial probity by charities, CAJ believes that this role which should be performed primarily by the charity's members and governance structures, rather than by government. We are concerned that safeguards must be built in to avoid any real or perceived loss of autonomy and independence.

6. **Para 23-28 about DNA databases:** While we welcome the fact that these measures are intended to develop greater safeguards, CAJ would be concerned if inadvertently this effort resulted in greater government control. We have no particular expertise in this matter but feel that the area holds much potential for restricting people's liberties. Of particular concern to us would be the following kinds of issues:
 - a. The retention of DNA materials (para 24). The Northern Ireland Policing Board Human Rights Advisers recently advised the Board that the PSNI retention of DNA samples, even from children, and even when no crime had been committed, was in compliance with the Human Rights Act. We are aware that the Scottish approach to DNA retention "would be considered less intrusive than legislation in England and Wales in terms of its impact on article 8 of the ECHR" (p. 49 of Monitoring Annual Report 2007) and we would commend that to the attention of the Home Office, even while awaiting the House of Lords ruling on the matter.
 - b. Given the different practices within the UK (see above), what safeguards will apply to DNA materials secured from "international partners" (para 24)? The text makes reference to the material having to be "legally obtained from international partners", but this may be ambiguous about the standards which those partners conform to in securing the DNA materials. Presumably this measure also means that DNA materials secured by UK agencies can then be shared with their international partners, though this fact is not mentioned; nor are any safeguards cited.
 - b. Para 26 talks about streamlining definitions, so that DNA material, whether gathered under the Terrorism Act or PACE, can be 'interchangeable'. We note that there is a proposal to incorporate the all-encompassing "national security purposes" into both pieces of legislation. As CAJ has frequently

commented, the term “national security” has no definition other than that that the government of the day accords to it, and it is an extremely expansive ground which is now being applied to PACE as well as legislation aimed specifically at terrorism. This is extremely problematic and we will be urging parliamentarians to resist any such change.

- c. To indicate how little the extension appears to have been thought out, we would draw your attention to para 27. Apparently the reader is meant to be assured by the safeguard that the Security Service will only have access to the DNA sample if they can “show the request is justified in the interests of national security”. It is difficult to imagine a situation in which the Security Service (as opposed to the police or other law enforcement agencies) would not cite national security, since the safeguarding of national security is surely their singular role. So, with the exception of preventing Security Service personnel access the database for totally improper reasons (eg personal searches) how does this ground constitute a safeguard?
 - d. It is presumably needless to say that a DNA database that is, or perceived as, preponderantly “Muslim” will feed concerns about discrimination and injustice that will make good intelligence gathering about potential sources of political violence that much more difficult (see on regarding EQIA).
7. **Para 32: information likely to be of use to terrorists** – This provision was frequently abused in Northern Ireland and led to charges being laid against people who had political biographies in their houses or other publicly available material. On occasion, the whole criminal justice system was brought into disrepute because of the specious grounds cited. The risk of this power being abused is all the greater when combined with extended pre-trial detention, post-charge questioning, DNA seizure and retention, sharing of such information with international partners etc.... To cite a solicitor testifying to the Eminent Jurists Panel last year in Belfast, it was not the Diplock system *per se* that undermined the rule of law in Northern Ireland, but the cumulative impact of a wide range of measures. The practitioner noted that whereas each one of the emergency provisions might possibly have been justified on their own, in combination they proved totally counter-productive.
 8. **Para 34 on – post charge questioning:** The Home Office representative at the Belfast meeting did seek to explain why post charge questioning was not to be considered as an option instead of extending pre-trial detention: it seems that government is considering introducing both measures. The argument was not convincing. It also appears that the right to silence is not being reinstated, but further undermined (para 35). We note again the lack of an evidential basis for the continuation and extension of this practice – can the authorities point to an evidence base for asserting that the right to silence must be further constrained?
 9. **Para 38 enhanced sentences** – as indicated at the meeting, CAJ would not be opposed in principle to enhanced sentences being given for offences deemed to be terrorist in nature. This would bring such offences in line with hate crimes. The advantage of this approach is that murder, attempted murder, or other such

serious crimes are treated as crimes, and it is the sentencing that denotes society's particular disapproval of such crimes being motivated by hate crime and/or by terrorist motives. As with hate crime, CAJ would argue that the terrorist motivation of an offence should be recorded from the outset, so that evidence to be adduced to the motivation is gathered. As suggested at the meeting, the more that terrorist crime can be treated like other crimes the better; the enhancing of sentences is a much better option than distorting the whole criminal justice system to penalise "terrorist" murders, "terrorist" attempted murders etc. CAJ notes that introducing the concept of enhanced sentences would also assist the UK comply with its European obligations.

10. **Para 42 on: Terrorist Notification Requirements:** the exchanges at the meeting made it clear that there were many problems related to this proposed measure. To cite some examples:
 - a. The motivation of those involved in terrorist activities is entirely different from those involved in sexual offences, and the analogy is therefore an entirely unhelpful one.
 - b. Many potentially minor offences (eg having information likely to be of use to terrorists) are being drawn into the web which might lead to someone being placed on the terrorist notification requirement. An initial minor offence could well encourage rather than discourage further alienation and radicalisation
 - c. If any minor offenders are caught up in the process this will feed alienation in the wider community from which they are drawn
 - d. The burden on the police to maintain the system will be very great (especially given the onerous requirements of checking foreign travel) - is this the best use of limited resources?
 - e. The practice inhibits people from leaving behind their past behaviours and may ensure that they remain radicalised
 - f. The practice does not recognise and even discourages the trend towards rehabilitation.

11. **Para 54 – forfeiture of assets:** CAJ is pleased that the "forfeiture of assets" measure is being reconsidered given the potential for damage that this could cause to completely innocent victims (children, partners and other family members of suspected terrorists).

12. **Para 59 – extra measures:** We refer you to the attached summary of the counter productive nature of much counter-terrorist legislation; and would urge against extending powers in Northern Ireland to the UK as a whole. We also refer to our earlier comments about the need for an evidence-base for any increase in powers. To what extent have the NI measures proved of value, and why should they be considered necessary in Britain?

13. **Para 66 (terrorism definition):** Presumably this change will mean that the British National Party or other fascist parties could be described as “terrorist”? It is not self-evident that this is a positive measure in countering racism. Moreover, this highlights the endemic problem of seeking to define “terrorism” without according it the very legitimacy and even dubious credibility that its proponents seek.

14. CAJ looks forward to studying the **EQIA** on these proposals – see the attached summary about the discriminatory impact that the emergency powers were seen as having on the Catholic nationalist community. Given the current international climate, it is difficult to imagine that the measures cited here will not fall disproportionately on the British Muslim community – with dire effect.