



Statement

on

Clause 1 of the draft Terrorism Bill of the
United Kingdom

London
October 2005

1. INTRODUCTION

“Let no-one be in any doubt, the rules of the game are changing” stated Prime Minister Tony Blair following the July 7 bomb attacks on London,¹ outlining a wide-ranging set of proposals to address terrorist threats in the UK. Since then, the Home Office has developed a new policy on the exclusion or deportation of persons from the UK on “non-conducive” grounds. Reacting to this policy, ARTICLE 19 issued a report expressing concern that these grounds had been defined so broadly and vaguely that they encompass forms of behaviours that are entirely legitimate.²

On October 6, as part of their response to terrorism, the UK Government published a draft Terrorism Bill for consultation.³ Following widespread criticism of the proposals, the Bill was revised.⁴

ARTICLE 19 is seriously concerned that this proposal, as currently drafted, violates the right to freedom of expression.⁵

Clause 1 of the draft Bill proposes to criminalise the ‘encouragement’ of terrorism, including through statements that may be understood to ‘glorify’ terrorism. (In the earlier proposal, ‘glorification’ of terrorism was to be a separate offence). While ARTICLE 19 welcomes the redraft as demonstrating the UK government’s intent to bring the Bill in line with international human rights standards, ARTICLE 19 is nevertheless concerned that the current proposal violates fundamental human rights principles for two reasons.

- First, the **offence remains too vague** and broadly stated to serve as the basis for a criminal restriction on the right to freedom of expression.
- Second, there is **no requirement to show** that there was any *actual intent* to encourage terrorism. The clause criminalises any statement that may be understood as *indirectly* encouraging terrorism. International human rights principles establish that there must be a clear, intentional call for violence before freedom of expression can be restricted.

¹ Speech made on August 5.

² See: *List of Unacceptable Behaviours: Freedom of Expression the Scapegoat of Political Expediency*, October 2005, ARTICLE 19, <http://www.article19.org/pdfs/analysis/a19-report-regarding-the-home-office-list.pdf>

³ See <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237979>.

⁴ As originally published, on 15 September 2005, the draft Bill envisaged separate offences of ‘encouragement’ and ‘glorification’ of terrorism. Following criticism that glorification was too broad a term to serve as the sole basis for a criminal offence, the revised version was published on October 6. The proposed new Clause 1 is attached as Annex 1.

⁵ Our analysis relies primarily on standards developed under the *International Covenant on Civil and Political Rights* (ICCPR) and the *European Convention on Human Rights* (ECHR). Under the Human Rights Act 1998, the latter is directly applicable in UK law and judgments by the European Court of Human Rights must be taken into account in the determination of their meaning. The United Kingdom has also ratified the ICCPR and is bound under international law to respect its provisions.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

While ARTICLE 19 strongly denounces terrorism and incitement to terrorism, it emphasises that any action taken must be consistent with the government's obligations to respect the right to freedom of expression. Under international law, any restriction on the right to freedom of expression must be clearly and unambiguously stated in law and be a proportionate response to a real threat.⁶ ARTICLE 19 does not believe that the current proposal complies with this test.

This Statement sets out ARTICLE 19's concerns with the revised draft Bill.

2. KEY PROVISIONS OF CLAUSE 1 OF THE DRAFT BILL: ENCOURAGEMENT OF TERRORISM

Clause 1 of the draft Bill states that a person commits a criminal offence if he publishes a statement, or causes a statement to be published knowing that members of the public "are likely to understand it as a direct or indirect encouragement or other inducement" to committing terrorist offences, or if he had reasonable grounds for believing so.

Under paragraph 2, any statement that 'glorifies' terrorist offences – past, present or future – is to be understood as 'encouragement' or 'inducement' if members of the public "[can] reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances."

Under paragraph 3, the public's reaction must be gauged in light of the impugned statement as a whole as well as taking into account the circumstances and manner in which it was published.

Paragraph 4 provides that it is irrelevant whether anyone is in fact encouraged to commit a terrorist offence, and that the statement can concern terrorism generally or the commission of particular terrorist offences.

Paragraph 5 states that electronic disseminators such as ISPs will not be liable if they can prove that they did not endorse the statement and that it was clear that it did not express their views.

Paragraph 6, finally, provides that a person found guilty of the offence may be imprisoned for 7 years, or 12 months on summary conviction (6 months in Scotland or Northern Ireland).

⁶ See Article 10(2) ECHR; Article 19 ICCPR, as interpreted by the European Court of Human Rights and UN Human Rights Committee: *Sunday Times v. the United Kingdom*, 26 April 1979, Application No. 6538/74, paras. 45, 49, 59 (European Court of Human Rights); *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, EHRR 407, paras. 39-40; *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88; *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

3. ARTICLE 19'S KEY CONCERNS WITH CLAUSE 1

ARTICLE 19 is gravely concerned that Clause 1 has been drafted in extremely broad and vague terms, that the proposed new criminal offence does not require any intent to incite violence or even 'glorify' terrorism, and that it proposes to criminalise statements that do not constitute direct incitement to violence. As a result, this Clause is likely to have a serious 'chilling' effect on freedom of expression, precisely at a time when it is necessary to have a public debate about terrorism and its causes. ARTICLE 19 recommends that it should not be enacted into law, particularly bearing in mind that incitement to terrorist violence is already an offence under existing UK law.

Vagueness

ARTICLE 19's first concern is with the vague nature of the terms used in the new draft Bill. International law only permits restrictions on freedom of expression that are clearly set out in law. This has been interpreted to mean not only that the restriction is based in law, but also that the relevant law meets certain minimum standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of "prescribed by law":

[A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.⁷

As currently drafted, Clause 1 of the Bill fails to comply with this basic test. Under Paragraph 2(a) and (b), any statement that 'glorifies' terrorism is actionable if "members of the public could reasonably be expected to infer that what is being glorified ... should be emulated." In many cases, it will not be possible for anyone to foresee how their comments will be interpreted by others. This is exacerbated by the draft Bill's failure to define 'glorification'. This makes it impossible for any commentator to know when they cross the line from discussing terrorist acts or even expressing sympathy with terrorist causes,⁸ to 'glorifying' terrorism. Similarly, the Bill fails adequately to distinguish between social or even academic discussions about the role of violence, on the one hand, and actual exhortations to violence, on the other. This means that the new offence could be used against any person who engages in legitimate discussion of the historical and theological bases of concepts such as jihad, precisely at a time when open discussion and critical thought in this area is required. While ARTICLE 19 appreciates that paragraph 3 attempts to address this by requiring the context and overall tone of the statement to be taken into account, we are concerned that it does not suffice to provide the legal certainty required.

Criminalisation of glorification and indirect incitement

ARTICLE 19's second concern is that Clause 1 criminalises any statement that may be understood as indirectly encouraging the commission of a terrorist offence. No intent is required, and the 'encouragement' given need only be indirect.

⁷ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para.49.

⁸ For example, the Liberal Democrat MP Jenny Tonge has expressed sympathy with the plight of the Palestinian people and expressed an understanding of the causes that lead suicide bombers to commit their acts. Such comments may well be understood by some members of the public to 'glorify' terrorism and would be actionable under draft Clause 1.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

It is fundamental to the guarantee of freedom of expression that any restriction for the purpose of national security, including preventing terrorism, is closely linked to preventing violence. One of the fundamental principles set out in the ‘Johannesburg Principles’,⁹ a set of principles on the right to freedom of expression and national security endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression¹⁰ and recommended to States for their consideration by the UN Commission on Human Rights,¹¹ is that restrictions on freedom of expression in the name of national security may be imposed only where the speech was intended to incite imminent violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. Principle 6 provides:

[E]xpression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

A similar standard has been embraced by the European Court of Human Rights. In *Karatas v. Turkey*, the applicant had been convicted by the Turkish authorities for publishing poetry that allegedly glorified violence. The Court held that ‘condoning and glorifying terrorism’ as such is a legitimate exercise of the right to freedom of expression; only when glorification constitutes a clear call for violence can it be legitimately proscribed.¹²

Clause 1 of the draft Bill fails to comply with these requirements. As currently drafted, it proposes to criminalise *any* statement that *indirectly encourages* the commission of a terrorist offence. There is no requirement for any causal link whatsoever. ‘Indirectly encouraging’ a terrorist act, which in any case is a very subjective test, is significantly different from actually provoking such an act. These terms may be contrasted with the much more specific language that the International Covenant on Civil and Political Rights¹³ employs in the context of hate speech, which calls for restrictions only where expression actually constitutes “incitement” to violence;¹⁴ or the recently concluded European Convention on the Prevention of Terrorism, under which States Parties undertake to criminalise “public provocation to commit a terrorist offence” and “[o]rganising or directing others to commit” a terrorist offence.

Recommendation:

- Clause 1 should be redrafted in clear and precise terms to criminalise only such statements that incite others to commit terrorist offences, or public provocation with the intent to incite the commission of a terrorist offence where such conduct causes a real danger that one or more such offences may actually be committed.

⁹ *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted October 1995.

¹⁰ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

¹¹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

¹² 8 July 1999, Application No. 23168/94, paras. 50-52.

¹³ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

¹⁴ Article 20(2) ICCPR.

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Make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

OFFENCES

Encouragement etc. of terrorism

1 Encouragement of terrorism

- (1) A person commits an offence if— 5
- (a) he publishes a statement or causes another to publish a statement on his behalf; and
 - (b) at the time he does so—
 - (i) he knows or believes, or
 - (ii) he has reasonable grounds for believing, 10that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences.
- (2) For the purposes of this section the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which— 15

- (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
- (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances. 5
- (3) For the purposes of this section the questions what it would be reasonable to believe about how members of the public will understand a statement and what they could reasonably be expected to infer from a statement must be determined having regard both—
- (a) to the contents of the statement as a whole; and 10
- (b) to the circumstances and manner in which it is or is to be published.
- (4) It is irrelevant for the purposes of subsections (1) and (2)—
- (a) whether the statement relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and 15
- (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.
- (5) In proceedings against a person for an offence under this section it is a defence for him to show — 20
- (a) that he published the statement in respect of which he is charged, or caused it to be published, only in the course of the provision or use by him of a service provided electronically;
- (b) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and 25
- (c) that it was clear, in all the circumstances, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement. 30
- (6) A person guilty of an offence under this section shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;
- (b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both; 35
- (c) on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.
- (7) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (6)(b) to 12 months is to be read as a reference to 6 months. 40