Liberty’s response to Lord Carlile’s review of the definition of terrorism

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Introduction

1. Lord Carlile of Berriew QC has been charged with the task of reviewing the definition of terrorism in UK law. Liberty considers the review of the definition of terrorism to be of the utmost importance, especially given the growing range of broadly-defined criminal offences that use the definition and wide range of extraordinary powers that are triggered by it. We welcome the opportunity to respond to the review.

2. It is vital that the definition of ‘terrorism’ is drawn as tightly as possible. A number of important consequences result from the question of whether or not a particular action falls within the definition of ‘terrorism’:

   • Actions which would normally fall within the realm of criminality will constitute a more serious offence, with graver punishment, if they fall within the definition of terrorism.

   • Actions which would not normally constitute criminal behaviour will become criminal in a terrorism context: i.e. supporting a group is an offence if that group commits, supports or encourages terrorist actions.¹

   • The threat of terrorist acts triggers broad and extraordinary powers. For example, the Civil Contingencies Act 2004 creates sweeping powers for a Government Minister to pass orders without prior Parliamentary approval allowing for, among other things, the confiscation or destruction of property without compensation, forced movement to or from a place or forcing/prohibiting travel at specified times, and the prohibition of peaceful protest. To do this there must be an ‘emergency’ defined as (among other things) ‘war, or terrorism, which threatens serious damage to the security of the United Kingdom’. Stop and search without reasonable suspicion can also be authorised where considered expedient for the prevention of acts of terrorism.² Another example of such extraordinary powers is the power to make control orders under the Prevention of Terrorism Act 2005.

¹ TA 2000, part II
² Section 44 TA 2000
3. We acknowledge the considerable challenge posed by the review. Trying to define ‘terrorism’ has proved to be a global problem. The United Nations member states have failed to agree on a single definition, which is perhaps unsurprising as one publication on the subject\(^1\) identified 109 different definitions of terrorism at the time it was written. It is beyond the scope of this response and possibly, beyond the scope of this review, to provide a detailed international analysis. These difficulties would not, however, excuse retention of the current definition which, as we discuss below, is too broad, covering actions which fall far short of the public’s perception of terrorism. This is especially clear when considered in the context of offences which do not involve the commission of a terrorist act but the expression of support or encouragement of actions that might be taken in other parts of the world. We make a number of substantive recommendations about how the existing definition could be tightened.

**Context of the review**

4. The fact that Lord Carlile has been charged with the task of reviewing the definition of terrorism is, in itself, important. The review resulted from a growing awareness of the public and parliamentarians that there are problems with the current definition that need to be addressed. This became abundantly clear during the parliamentary debates surrounding the Terrorism Act 2006 (TA 2006) and the Immigration, Asylum and Nationality Act 2006 (IAN 2006). Each piece of legislation created inappropriately broad offences and powers which were parasitic upon the broad definition of terrorism contained in section 1 of the Terrorism Act 2000 (TA 2000).\(^4\) It is not the purpose of this response to reiterate our general concerns about this legislation. We do, however, discuss this legislation below to illustrate the dangers of the current broad definition.

5. The current review was instrumental to Parliament agreeing to create the powers and offences in TA 2006 and IAN 2006. The Government was forced to ask Lord Carlile to undertake this review in response to the concerns raised about the existing

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\(^1\) Political Terrorism by Schmidt and Youngman 1988

\(^4\) Cf section 1 TA 2006 and section 54 IAN 2006
definition during those the parliamentary debates. Furthermore, Government Ministers used the review to defend criticisms about the broad powers and offences created by the Bills and the fact that these would cover actions which should not be criminal and permit the exercise of powers in inappropriate circumstances. The outcome of this review will, therefore, be important to the legitimacy of those powers and offences. If the review does not make recommendations that are sufficient to allay the concerns raised during the debates on these Bills and that are implemented, Parliament can be expected to revisit its serious concerns if asked to re-enact the offences in the TA 2006 in the consolidating Terrorism Bill that is expected to be published early next year.

6. We acknowledge that a number of commentators have put forward convincing arguments that terrorism should be dealt with under the general criminal law. We also note that a number of states do not have specific terrorist offences but instead either rely on the general criminal law (i.e. Germany) or define a terrorist purpose and treat this as an aggravating factor in the commission of a general criminal offence (i.e. Spain). We agree that the question of whether or not specific terrorist offences are needed would provide a valuable line of inquiry. We do not, however, explore that question in this response for the following reasons:

- These questions are outside the scope of the current review which focuses on the “definition of terrorism in UK law.”
- In practice, numerous laws already exist which are built around a definition of terrorism. The amount of parliamentary time that would need to be devoted to reworking this existing legislation is likely to make this option unrealistic at this particular moment.
- Terrorist offences are considered to be more serious then general criminal offences. The higher level of revulsion associated with terrorism might result from the fact that terrorism undermines the use of democratic processes to influence Government, frequently involves large-scale and indiscriminate casualties, and is particularly terrifying and intimidating for the general public.

5 HC Deb, 10 Nov 2005, col 496
6 Since 2000, for example, there have been four pieces of specific terrorism legislation: TA 2000, the Anti Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and TA 2006.
Given this, it is arguable that a special/higher category of criminal offence is appropriate.

- It may be legitimate to criminalise some acts in the context of terrorism but unjustified to criminalise them in other contexts. Examples from the TA 2006 might include the offences of Attendance at a Place used for Terrorist Training (section 8) and Training for Terrorism\(^7\) (section 6). Both of these offences would be hugely problematic if the focus were not tightly defined simply to cover terrorism rather than criminal acts generally.

**Current Definitions of Terrorism**

7. Lord Carlile has been charged with the task of reviewing “the definition of terrorism in the UK.” Section 1 TA 2000 provides the template definition of terrorism in domestic law. Numerous pieces of legislation rely on the definition provided in section 1.\(^8\) For convenience, the abridged text of section 1 is provided in an Annex to this response. The following features of the definition are particularly noteworthy:

- It does not only cover the actions listed in subsection 2 but also the threats of such actions;
- Any use of firearms or explosives for the purpose of advancing a political, religious or ideological cause is covered by the definition even if the action is not designed to influence the government or intimidate the public;
- The actions covered are very wide and include actions which “involve serious damage to property” and which are “designed to interfere with or seriously to disrupt an electronic system”; and
- The definition is not restricted to actions, property, public or government within the UK.

8. It should, however, be noted that section 1 TA 2000 is not the only definition of terrorism in UK law. Section 2(2) of the Reinsurance (Acts of Terrorism) Act 1993

\(^7\) We would emphasise that Liberty expressed concerns about the breadth of drafting of these offences but not with their creation in principle.

\(^8\) Cf s74 Anti-Terrorism, Crime and Security Act 2001, s.54 IAN 2006, s65 Police and Criminal Evidence Act 1984, s.15 Prevention of Terrorism Act 2005
also contains a definition of ‘acts of terrorism’. It defines acts of terrorism as ‘acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any other government de jure or de facto’. The existence and form of this additional definition is noteworthy for the following reasons:

- It demonstrates that it may be possible to define ‘terrorism’ more succinctly than in s.1 TA 200;
- It only covers actions that are directed towards the overthrowing or influencing of governments and would not, therefore, include public intimidation if this was not directed towards the specified ends;
- The existence of the definition demonstrates that it is not impossible to have more than one definition of terrorism in UK law which, therefore, supports suggestions that different definitions may be needed depending on the context in which they are used; and
- It does not include threats of actions or specify the need for a political, religious or ideological cause.

The problems with the current definition

9. The problems with the current definition of terrorism were evident in the parliamentary debates on the TA 2006 and IAN 2006. The breadth of a number of the provisions contained in the legislation caused significant concern in itself. These concerns were exacerbated by the fact that the over-broad powers and offences relied upon the broad and uncertain definition of terrorism in s.1 TA 2000. This is most clearly demonstrated by the offence of encouragement of terrorism now contained in s1 TA 2006 which applies to any “statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.”9 Our general and continuing concerns about the fact

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9 Other examples include the extension of the grounds of proscription in TA 2006. The effect of the extension was to allow the outlawing of groups whose activities include ‘the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism’.
that the offence criminalises reckless speech are outside the scope of this response. The concerns about the vague definition of “acts of terrorism”, raised by Liberty and others, are, however, directly relevant.

10. During the passage of the Bill a strong consensus emerged that the definition of terrorism in s.1 TA 2000 was too broad and unjustifiable in the context of the offence of encouragement of terrorism. Liberty suggested that a more tightly defined variation of the definition contained in section 1 TA 2000 be adopted in this context. This approach was also suggested in a variety of amendments put down by leading Labour backbenchers\(^{10}\) and the Conservative and Liberal Democrat front benches. At the heart of the concerns were the following aspects of the definition of terrorism in s.1 TA 2000:

- **First**, the fact that section 1(2) includes actions which are not serious enough to constitute acts of terrorism; and

- **Secondly**, the failure of the definition to address the fact that some violence, such as that used against a despotic regime might have sufficient justification to take those acts outside of the definition of terrorism.

We consider each of these problems below.

**Which actions should be covered?**

11. Some of the actions covered by the definition of terrorism are uncontroversial. For example ‘serious violence against persons’ (s1(2)(a)) is clearly of sufficient seriousness to be included within the definition of a terrorist act. There are also good grounds for including action that ‘endangers a person’s life’ (s.1(2)(c)). If there were a thwarted attempt to copy Tokyo underground gas attacks then it might be a moot point as to whether this constituted ‘serious violence’. However, it would clearly endanger a person’s life.

\(^{10}\) Lead by Chair of the Parliamentary Home Affair Committee John Denham

Glorification is defined as including ‘any form of praise or celebration, and cognate expressions are to be construed accordingly’. Section 54 IAN 2006 provided that people, who would otherwise fall within the definition of refugee under the 1951 Convention, would be excluded from refugee status where they have carried out “acts of committing, preparing or instigating terrorism” and “acts of encouraging or inducing others to commit, prepare or instigate terrorism”.
12. We do not, however, accept that some of the other actions covered by the definition are justified. We are particularly concerned about the inclusion of:

- Action which creates a substantial risk to the health or safety of the public or a section of the public (s.1(2)(d));
- Action which involves serious damage to property (s.1(2)(b)); and
- Action which is designed seriously to interfere with or seriously to disrupt an electronic system (s.1(2)(e)).

Our major concern about the concept of risk to the health and safety to the public is its uncertainty. TA 2000 does not provide any definition of the actions that this would cover. If an action creates a genuine danger to individuals this would be covered by the s.1(2)(c).

13. We are particularly concerned that the definition includes not only violence against persons, but also violence against property\(^{11}\) and action designed to seriously disrupt an electronic system.\(^{12}\) We would not dispute that disrupting an electronic system or seriously damaging property could have a sufficiently grave impact to warrant inclusion in the definition of a terrorist act. It might, for example, be appropriate to cover damage to property where this could endanger a person’s life, i.e. disruption to the electricity supply to a hospital. This would, in any event be covered by s.1(2)(c). However, such damage to property or disruption of electronic systems should not, in and of itself, constitute a terrorist act.

14. Whether justifiable or not, there is a tradition of attacks on property for political purposes in the UK that does not sit easy with the concept of ‘terrorism’. Examples include:

- The Luddite machine breakers of the early nineteenth century who destroyed textile machines which they believed threatened their livelihood.
- During the Parliamentary debates on the TA 2000 the Labour MP Alan Simpson made a similar point about the 1984 miners’ strike when he said ‘People

\(^{11}\) S 1 (2) (b) TA 2000

\(^{12}\) S. 1 (2) (e)
participating in the miners' strike...were responsible for serious damage to property. Their motivation was undoubtedly political or ideological’.13

- Environmental protestors, such as those who campaigned against the Newbury bypass in the mid 1990s, considered damage to property to be legitimate tools to influence decision-makers but would never have considered injuring persons to be acceptable.

- Modern forms of political protest have included hacking onto a government website to make a political statement and creating and releasing a computer virus for a political purpose.14

15. Few people would accept that these activities should fall within the definition of terrorism; that the luddites or striking miners were terrorists. The crucial point is that attacks on property, whatever the motivation, should be subject to the existing criminal law which is quite capable of dealing with even the most serious criminal damage appropriately. If a person damages a building containing people, they are endangering life and would be covered by TA 2000 s.1(2)(c). If a person damages an uninhabited building, their act should not be considered that of a terrorist. Such actions fall far outside of the public’s normal perception of terrorism. Their inclusion within the definition of terrorism also undermines the seriousness of the label of ‘terrorism’.

16. Having considered which action should be covered by the definition of terrorism, the question then arises as to whether the ‘threat’ of those actions should be included as well as the actions themselves. If the inclusion of a distinct action is justified then it seems reasonable that it should include the threat of, for example, serious violence against people for an ideological cause intended to influence or intimidate. The person who threatens to set off bombs on the London Underground may not be as culpable as the person who does bomb. However, their actions are within the realm of what can legitimately be called terrorism.

13 http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000315/debtext/00315-30.htm
14 It is fair to point out that there are other requirements under the act that must be satisfied in order to declare an emergency. However, Liberty has expressed concerns over the robustness of these safeguards. Briefings on the Civil Contingencies Bill are available on Liberty’s website www.liberty-human-rights.org.uk
17. Restricting the types of actions covered by the definition of terrorism was suggested by various parliamentarians in proposed amendments to the TA. For example in the Committee Stage of the Bill in the House of Commons John Denham and several other MPs tabled an amendment that sought to restrict several of the bills offences to actions ‘intended to cause death or serious bodily harm’, leaving out damage to property and disruption to electronic systems. We also proposed an amendment to the Bill which removed these actions from the definition of terrorism which applied to sections 1 and 2.  

Legitimate actions

18. The definition also runs into difficulty when applied to acts of violence against despotic regimes, particularly in the context of offences of encouraging acts of terrorism or supporting organisations that are proscribed due to their encouragement of acts of terrorism. As we have commented elsewhere, we have serious concerns about the broad speech offences and the extension of the grounds of proscription under TA 2006.16 Our general concerns would not be allayed by restricting the definition of terrorist acts in this context. As the following discussion demonstrates, the problems with these over-broad provisions are, however, exacerbated by the fact that they use the broad s.1 TA 2000 definition of terrorism.

19. As a number of parliamentarians highlighted during parliamentary debates on TA 2006, given the breadth of the definition of ‘terrorism’ under section 1 TA 2000, the offence of ‘encouragement of terrorism’ would criminalise calls to overthrow oppressive regimes. When giving evidence to the Home Affairs Select Committee on 11 October 2005 the former Home Secretary Charles Clarke was asked whether the offence would apply to those who called for the overthrow of the despotic regimes in North Korea, Zimbabwe and the Ceausescu regime in Romania.17 The Home Secretary’s response was that this would not be criminal, commenting:

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16 Cf http://www.liberty-human-rights.org.uk

17 Draft Terrorism Bill, Oral Evidence, HC 515-I, Q35 (Mr Clappison MP)
“In fact, I think the Romanian change illustrates my point extremely clearly. What actually happened at the process of change in Romania was precisely as you said, millions of people coming on to the streets and it leading, as a result, to a change in loyalty for the army and so on.”

We believe he was mistaken and that the actions taken during the course of the overthrow of the Ceausescu regime would fall within the definition in section 1 TA 2000. The storming of the Communist Party HQ by demonstrators demanding the overthrow of the regime was, for example, well-publicised. This involved the breaking of windows and doors, destroying files, throwing portraits of Ceausescu and Communist literature onto a bonfire and tearing the communist logo out of Romanian flags. These actions would constitute serious damage to property, designed to influence the Ceausescu government and to advance democracy (a political cause). These actions and similar actions taken against repressive regimes elsewhere in the world would, therefore, fall within the definition of terrorism. Encouragement of these actions would, accordingly, constitute an offence under TA 2006.

20. The TA 2006 also extended the powers to proscribe terrorist organisations so that groups could be outlawed if their activities include ‘the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism’. Glorification is defined as including ‘any form of praise or celebration, and cognate expressions are to be construed accordingly’. The provisions of TA 2006, which extend the powers to proscribe organisations, received less attention during parliamentary debates than the encouragement of terrorism offence. The same concerns as those outlined above do, however, apply to these provisions. The extended proscription powers could be used to outlaw organisations that encouraged action against the oppressive regimes in apartheid South Africa, the Ceausescu government or which encourage action to overthrow the Mugabe government in Zimbabwe.

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18 Ibid
19 S.21Terrorism Act 2006 which amends S. 3 (5) Terrorism Act 2000. Even before the TA”006 was passed the grounds for proscription were quite broad, covering organisations that ‘promote or encourages terrorism’
21. As these examples demonstrate, it is inappropriate to apply the same broad definition of terrorism in the context of offences which relate to supporting or encouraging actions by others as that which applies to offences involving direct action by the offender. Applying the section 1 definition in the context of proscription and broad speech offences criminalises expressions of support for those who take action to oppose repressive regimes. As the parliamentary debates demonstrate, many people consider it justified for those living under dictatorships to take some of the actions which are defined as terrorism for the purposes of section 1. Unlike in democratic counties, these people are denied mechanisms to affect political decisions other than direct actions such as threats of violence or the destruction of property. This is not to say that calling for the violent overthrow of regimes might not be objectionable. However, it is not appropriate to apply the stigma of ‘terrorism’ and serious criminal sanction to such groups and to those that encourage them directly or indirectly.

22. Liberty has consistently argued that the offence of ‘encouragement of terrorism’ is fundamentally flawed. It criminalises people not only for what they intend but also for ‘reckless’ speech. Recklessness can be a legitimate element in offences involving action. If I assault someone and they die as a consequence it is reasonable to consider the recklessness of my actions as well as my intent. The same is not true of speech where there is not the same link between my words and others interpretation of them. Some of the amendments proposed in the context of the speech offences in the TA 2006 sought to address the problems inherent in the offence of ‘encouragement of terrorism’ by applying a more restrictive definition of terrorism. For example, in the Committee Stage of the Bill in the House of Commons, John Denham and several other MPs tabled an amendment that sought to restrict the offence of encouragement in the Bill to encouraging ‘any action that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate the population, or to compel a government or an international organisation to do or to abstain from doing any act’ (emphasis added). This would have meant that only encouragement of acts aimed at causing harm or death to non-state agents to intimidate the population or to compel a government would be
covered.\textsuperscript{20} The definition suggested by Denham \textit{et al} would have meant that no offence would have been committed if a person advocates the overthrow of Saddam Hussein’s Iraq, or calls for the forced removal of the regimes in Zimbabwe or North Korea.\textsuperscript{21} Actions taken to achieve the forcible removal of any regime might result in death or injury to the innocent. However, so long as a person is not calling for action where this is the result \textit{intended} no offence would be committed. The problem with this definition, however, is that it does not distinguish between those regimes against which such action might be justified and democratic states in which the democratic process could be used to influence politics. It would, for example, be wrong to argue that the definition should not apply to action designed to kill members of the UK government.

23. Another amendment to the definition of terrorism, laid in the context of the TA 2006, sought to draw this distinction by excluding from the definition of terrorism, actions in relation to any governments that had been persistently responsible at that time for acts that are in breach of the Universal Declaration of Human Rights.\textsuperscript{22} This approach would ensure that only a small number of states could be considered. It would, however, mean that acts of extreme violence against an innocent population in those countries would be excluded from the definition of terrorism as it fails to distinguish between civilians and the military or government.

24. We would suggest that a combination of these proposals for changing the definition of terrorism should be applied in the context of offences and powers which relate to the encouragement of actions in other countries. At the heart of the Denham amendment was the need to distinguish the population as a whole from military or state figures. The purpose of the Marshall-Andrews amendment was to ensure that only calls for action against countries that have persistently breached the Universal Declaration of Human Rights could avoid criminalisation. A combination of these would mean that, provided that innocent civilians were not targeted, those who call

\textsuperscript{20} However, senior figures in a despotic regime do not have to be members of the military or non combatants. Rather than referring to ‘civilians or non combatants’ the definition should more properly refer to ‘persons not connected to the military, governmental or other state function’.

\textsuperscript{21} We appreciate these comments were made in relation to the offence of Encouragement of Terrorism rather than to the extension of proscription. However we believe the same principle applies to both.

\textsuperscript{22} Such as that submitted by Robert Marshall Andrews and five other Labour MPs for Committee on 3 November 2005
for the overthrow of military or government figures in despotic regimes would escape
the offence of ‘encouragement of terrorism’; that groups calling for such action could
not be proscribed; and, if also applied to section 54 IAN 2006, that refugees involved
in such action overseas could not be denied asylum on the basis of that action.

25. There are admittedly flaws with this approach. For example, the concept of
‘persistent’ breaches of the UN Declaration is not specific and the distinction between
who is and who is not a civilian is not always precise. We do, however, believe that
for the purposes of this review the limitations this would provide a framework which
should be given further consideration. This discussion demonstrates that it might be
appropriate to adopt different definitions of terrorism in different contexts. This would
help to limit the risk of inappropriate criminalisation and to preserve the stigma of
“terrorism” for actions that seek to coerce democratic governments by terrorising the
population and killing or harming the innocent for ideological purposes.

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Annex – Abridged Text of Section 1 Terrorism Act 2000

1. (1) In this Act ‘terrorism’ means the use or threat of action where-
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied …

(4) In this section-
(a) ‘action’ includes action outside the United Kingdom,
(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
(d) ‘the government’ means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.”