

<b>Institution: University of Leeds</b>
<b>Unit of Assessment: 20 Law</b>
<b>Title of case study: 4. Embedding constitutionalism in the Review of Counter-Terrorism Laws</b>
<p><b>1. Summary of the impact</b></p> <p>The problem of how to combat terrorism while respecting fundamental values has become increasingly acute. The research has addressed this problem by influencing the formation, design, development, and governance of counter-terrorism laws through recommendations for legal and policy reform directed at promoting and strengthening key values which cohere around the concept of 'constitutionalism' (defined in 2 below). The recommendations have been endorsed by policy reviewers primarily in the UK but also in Australia.</p>
<p><b>2. Underpinning research</b></p> <p>The analysis of laws, policies and legal practices in relation to counter-terrorism has long been the core of the research of <b>Professor Walker</b> (appointed to the University of Leeds in 1983, and Professor of Criminal Justice Studies since 1993). Since its elaboration in 1997 in a major paper in a leading US journal [1], Walker's key theme of 'constitutionalism' has been developed within more specific studies published in prime UK law journals [2]. 'Constitutionalism' is the collection of values which foster state legitimacy in extreme situations, principally comprising transparency and legality; effectiveness and accountability; and enhanced respect for individual rights. The interdisciplinary research has explored from political, historical and comparative perspectives how such values may be maintained while effectively responding to terrorist threats, leading to specific recommendations to the legislature and executive on the design of counter-terrorism laws.</p> <p>A feature of the research has been fieldwork involving contacts with government officials, law enforcement bodies, and other agencies in the criminal justice system. This fieldwork approach has been facilitated by a Major Fellowship grant from the AHRC (2009-11: see section 3). The grant enabled the further development of contacts with senior police officers, policy-makers, lawyers, and judges. The outcomes of the fellowship are reflected in a major monograph [3].</p> <p>The subject matter of the research ranges from issues affecting terrorism suspects, for example the nature of interrogation regimes and the length of police detention periods, through to collective security of systems and installations within the Critical National Infrastructure i.e. essential facilities and services. The research has been deepened and its scope extended following the rapid and substantial growth of laws since September 11, 2001. The critique of legal developments, such as an analysis of three seminal House of Lords judgments issued in 2007 and concerning control orders [4], has involved recommendations that influenced reviewers of that system. Field research into the practices of police and prison governors [5], undertaken amidst participation in policy debates and Parliamentary scrutiny of the Counter-Terrorism Act 2008, has also led to concrete recommendations, for example, around post-charge questioning.</p>
<p><b>3. References to the research</b></p> <p>[1] <b>Walker, C.</b> (1997) 'Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts', <i>Columbia Journal of Transnational Law</i>, 35: 1-62. Available from the University on request.</p> <p>Explores and explains the normative framework of constitutionalism within the context of anti-terrorism orders. This publication appears in a leading US law journal and demonstrates the international reputation of the body of work and its sustained development.</p> <p>[2] <b>Walker, C.</b> (2008) 'The Governance of the Critical National Infrastructure' <i>Public Law</i> 323-352. Listed in REF2 and available from the University on request.</p> <p>Explores constitutionalism in the contemporary setting of the Critical National Infrastructure ('CNI' - essential facilities and services). The paper, informed by two conference papers at the Royal United Services Institute is the first, and only, substantial UK law journal analysis of the CNI.</p>

## Impact case study (REF3b)

**[3] Walker, C.** (2011) *Terrorism and the Law*, Oxford: Oxford University Press (978-0-19-956117-9, Hardback, 632 pages). Listed in REF2 and available from the University on request.

This research monograph is published by the leading academic law publisher. The Independent Reviewer of the Terrorism Legislation, the former Director of Public Prosecutions, and the former Security and Intelligence Co-ordinator in the Cabinet Office acted as consultants (see p. viii). The book has received highly favourable reviews: *Howard Journal* (2013) 52, 116–117; *Perspectives on Terrorism* (2013) 6.3, 108-109; *Public Law* [2012] 377-380; *Legal Studies* (2012) 32, 166-172.

**[4] Walker, C.** (2007) 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' *Stanford Law Review* 59: 1395-1463. Submitted to RAE 2008 and available from the University on request.

This output is published in leading peer-reviewed international law journal and arose from a highly prestigious and exclusive invitation to participate in a Symposium in 2007, hosted by the Stanford Constitutional Law Center, entitled 'Global Constitutionalism'.

**[5] Walker, C.** (2008) 'Post-Charge Questioning of Suspects' *Criminal Law Review*: 509-524. Listed in REF2 and available from the University on request.

This output, published in a prime UK academic journal which is also the top specialist journal for criminal law practitioners, arose from involvement in debates around the Counter-Terrorism Act 2008, including oral evidence (17 December 2007) to the Joint Committee on Human Rights.

A major part of the research was funded by a Major Fellowship grant from the AHRC, no.AH/G00711x/1, 'Terrorism and the Law: The Construction and Application of Laws and Legal Policies in the United Kingdom (2009-11)'; AHRC contribution £39,442, full economic cost £49,302 rated 'outstanding' following evaluation under the Research Council's review process. See for further details <http://www.leeds.ac.uk/law/staff/law6cw/AHRC.pdf>.

#### 4. Details of the impact

The research has influenced the review of counter-terrorism legislation in the UK between 2008 and 2013, at legislative and executive levels. As the current Independent Reviewer of Terrorism Legislation explains: 'Professor Walker's work – exemplified by his authoritative *Terrorism and the Law*, OUP 2011 – is without doubt the most influential of any academic working in this increasingly crowded field ... his work has a unique influence on the formulation of policy' **[A]**. The Director General of the Home Office's Security and Counter Terrorism Office stated '[Walker's] research has undoubtedly influenced the development of counter terrorist legislation, during its passage through Parliament, Select Committee scrutiny and through direct and indirect engagement with Home Office policy officials' **[B]**.

##### i) Influenced legislative debates on Counter-Terrorism Laws

- During the passage of the Counter-Terrorism Act 2008 and the Coroners and Justice Act 2009, the research into the treatment of terrorist detainees **[5]** was utilised to lobby for augmented oversight by a new inspector of terrorist detainees in police custody. This concept was proposed in House of Lords debates by Lord Lloyd who stated 'The amendment is based almost word for word on Sir Louis Blom-Cooper's terms of reference, but there are some important additions, which have been suggested by Professor Clive Walker of the University of Leeds, who is the leading academic authority on terrorism' (Hansard (House of Lords) vol 705, col.160, 4<sup>th</sup> November 2008) **[C]**. The government conceded the argument, and new inspections were established by the Coroners and Justice Act 2009, section 117.
- Influence was exerted during the passage of the Counter-Terrorism Act 2008 through research about the post-charge questioning of persons charged with terrorist offences and awaiting trial. Professor Walker's arguments were recited by the then chair of the Joint Committee on Human Rights: 'In particular, [Lord Carlile] mentioned the importance of judicial supervision of the exercise of the power and the need to amend the code to include protection against repetitive or oppressive questioning. ... That view was shared by the eminent Professor Clive Walker and Professor Ed Cape [University of the West of England], .... They

both expressed their strong concerns about the need for a number of detailed safeguards, particularly because the situation is different after charge, when the accused is in a particularly vulnerable position compared with the position pre-charge' (Hansard (House of Commons) vol 477, col 189 10 June 2008). The design of the regime was then altered considerably (reflected in the Counter-Terrorism Act 2008, sections 22-27), by dropping the prison governors as primary gatekeepers and by substituting court-based checks.

#### ii) **Contributed to Parliamentary Select Committees**

Parliamentary impact has also sustained within select committees inquiries:

- In the report of the House of Lords Select Committee on the Constitution on *Fast-track Legislation: Constitutional Implications and Safeguards* (2008-09 HL 116) there are references to Professor Walker's submissions on eight distinct topics (paras. 65, 68, 72, 79, 143, 145, 159, 181) all of which concern the structuring and review of legislation which deals with emergencies, thereby reflecting the author's various works on constitutionalism.
- Following evidence given by Walker concerning post-charge question to the Joint Committee on Human Rights (*Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill* (2007-08) HL 50/HC 199, 30 January 2008, paras. 29-36), the Committee commented at para.36: 'We found Professor Walker's evidence compelling on the question of the detailed safeguards which should accompany post-charge questioning.'
- Official reviews have adopted an overall framework based on 'constitutionalism' as advocated by Walker such as in his written and oral evidence to the Joint Committee on the Draft Detention of Terrorist Suspects in 2011 (Temporary Extension) Bills 2011]. His argument that detention periods in excess of four days should be viewed as extraordinary is repeated *verbatim* (*Report on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills 2011* (2010-12 HL 161/HC 893) para 19).

#### iii) **Informed the Home Office's development and review of Counter-Terrorism Laws**

Influence on the Home Office has especially occurred through its Independent Reviewer of the Terrorism Legislation who produces annual reviews for the Home Secretary. Examples include:

- The research [4] has influenced the review of control orders, as confirmed by the then Independent Reviewer of the Terrorism Legislation [D] who states that: 'Following the Home Secretary's letter set out in Annex 1, I have received the utmost assistance from officials with whom I have raised various questions about control orders. In addition, I have enjoyed significant advice from others, notably Professor Clive Walker of Leeds University.' [E] Walker's representations about the duration of orders helped to bring about a change of mind by the Reviewer, reflected now in the Terrorism Prevention and Investigation Measures Act 2011, section 5, whereby orders must normally expire after two years.
- Further influence is evident from the reports of the current Independent Reviewer of the Terrorism Legislation who stated that he had relied on Professor Walker's work [3] in his *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) at para.1.15, and the *Report on the Operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (Home Office, 2011) at para.1.22.
- Professor Walker was specially invited to meet with the Home Office review team in order to discuss his submission to Lord Macdonald's review of counter-terrorism in 2011 [F]. Executive reviews now regularly commence with a statement of values along 'constitutionalist' lines [F].
- Sustained influence over, and collaboration with, successive Independent Reviewers of the Terrorism Legislation has been uniquely formalised by a research contract with the Home Office as from 1 January 2012. The current Independent Reviewer of the Terrorism Legislation has commented that '... I am delighted that Professor Clive Walker of the University of Leeds has agreed to act as Special Adviser to the Independent Reviewer. In that capacity he will ensure that I am aware of the wealth of research and scholarship, across several disciplines, that is most relevant to my responsibilities. He may also put his

considerable expertise to the service of specific projects, if so requested' [G] (para.1.22).

**iv) Played an important and direct role in equivalent international reviews of Counter-Terrorism Laws**

The research [3] has been the principal commentary informing the Australian debates on the proposed emulation of the UK office of the Independent Reviewer of Terrorism Legislation or of UK legislation on executive control orders [H]. This work has been followed in December 2012 by an invitation to address a symposium of key stakeholders held at the New South Wales Bar Association, Sydney (see <http://www.nswbar.asn.au/cpdattachs/Clive%20Walker.pdf> and Walker, C., 'The reshaping of control orders in the United Kingdom: Time for a fairer go, Australia!' (2013) 37 *Melbourne University Law Review* 143). Key attendees were the Australian Independent National Security Legislation Monitor and the Chair of the Council of Australian Governments (COAG) panel to review counter-terrorism legislation. Their reports issued in 2013 by both make reference to the impact of Professor Walker's research [I]. The Australian Independent National Security Legislation Monitor confirmed that '*Terrorism and the Law* [3] (2011) ... was of special importance in informing my review work given the influence of the UK laws on the development of Australia's CT [counter-terrorism] laws' [J].

**5. Sources to corroborate the impact**

[A] Letter from Independent Reviewer of Terrorism Legislation England and Wales dated 18<sup>th</sup> January 2013 in relation to [i], [ii], [iii].

[B] Letter from Director General, Office for Security and Counter-Terrorism, Home Office dated 20<sup>th</sup> December 2012 in relation to [i], [ii], [iii].

[C] Letter from member of House of Lords and former Law Lord dated 10<sup>th</sup> January 2013 in relation to [i].

[D] Letter from member of House of Lords and Independent Reviewer of Terrorism Legislation (2001-11) dated December 2012 in relation to [iii].

[E] Independent Reviewer of the Terrorism Legislation, *Fifth Report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (Home Office, 2010) para 12 in relation to [iii].

[F] Lord Macdonald's *Review of Counter Terrorism and Security Powers* (Cm.8003, London, 2011) and *Review of Counter-Terrorism and Security Powers: Summary of Responses to the Consultation* (Cm 8005, London, 2011) p.4 (these are part of the same exercise and should be read as one) in relation to [iii].

[G] Independent Reviewer of the Terrorism Legislation, *Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (Home Office, 2011) para.1.22 in relation to [iii].

[H] (Australian) Senate Standing Committee on Legal and Constitutional Affairs, *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (Canberra, 2008) para.3.24 referring to Law Council of Australia, *Inquiry into the National Security Legislation Monitor Bill 2009* (Canberra, 2009) p.26 and drawing on Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (Department of the Prime Minister and Cabinet, Canberra, 2013) (p.57, fns.192, 193, 364); Council of Australian Governments Review of Counter-Terrorism Legislation, *Report* (Attorney-General's Department, Canberra, 2013) (paras. 12, 190, 221) in relation to [iv].

[I] Council of Australian Governments, *Review of Counter-Terrorism Legislation* (Attorney-General's Department, Canberra, 2013); *Independent National Security Legislation Monitor — Declassified Annual Report, 20 December 2012* (Department of the Prime Minister and Cabinet, Canberra, 2013) in relation to [iv].

[J] Letter from Independent National Security Legislation Monitor, Australian Government, dated 30<sup>th</sup> January 2013 in relation to [iv].

All letters are available on request from the University of Leeds.