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Counter-Terrorism Bill

Bill 63 of 2007-08

The *Counter-Terrorism Bill*, introduced on the 24 January 2008, contains a number of provisions which the Government state are designed to enhance counter-terrorism powers.

In particular, the Bill would: confer further powers to gather and share information for counter-terrorism and other purposes; make provision for extended pre-charge detention of terrorist suspects; and allow post-charge questioning in certain circumstances. It would impose notification requirements on persons convicted of terrorist offences and allow for enhanced sentencing of offenders who commit offences with a terrorist connection. The Bill would amend the law relating to asset freezing procedures and would make provision for inquests and inquiries to be heard without a jury.

It would amend the definition of terrorism and amend enactments relating to terrorist offences and Control Orders. It would also make provision for the recovery of costs of policing at certain gas facilities.

Alexander Horne

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Summary of main points

The *Counter-Terrorism Bill*, published on 24 January 2008, contains a number of provisions which the Government state are designed to enhance counter-terrorism powers.

Part 1 of the Bill includes (amongst other things) a new power to remove documents for examination, powers to take fingerprints and samples from people subject to control orders and data sharing powers.

Part 2 of the Bill includes a clause to introduce a reserve power to increase the length a person can be detained prior to charge, from 28 days to 42 days, by further amending the *Terrorism Act 2000*. This is likely to be the most contentious measure contained within the Bill. Part 2 also makes provision for the post-charge questioning of suspects.

Part 3 of the Bill introduces provisions for specified terrorism offences committed anywhere in the UK to be tried in any part of the UK. It also deals with sentencing for terrorist offenders, requiring courts to consider a terrorist connection as an aggravating factor. Part 4 would ensure that people convicted of terrorist or terrorism related offences, who were sentenced to more than 12 months imprisonment, would be subject to notification requirements and could be made subject of foreign travel orders. These orders would enable restrictions to be placed on the overseas travel of those persons subject to notification requirements, where there was reasonable cause to believe that they had acted in a way that made it necessary for an order to be made to prevent them from taking part in terrorist activity outside the UK.

Part 5 of the Bill relates to asset freezing proceedings and would amend the *Regulation of Investigatory Powers Act 2000* in order that intercept material could be used in asset freezing cases related to terrorism. It also provides an enabling power for the Lord Chancellor to make court procedure rules to allow the use of special advocates, closed hearings and withholding of evidence in civil court proceedings relating to asset freezing decisions.

Part 6 of the Bill, relating to inquests and inquiries, contains provisions for coroners' inquests to take place without a jury, where the Secretary of State certifies that the inquest would involve the consideration of material that should not be made public for certain reasons. It would also amend the *Regulation of Investigatory Powers Act 2000* to allow intercept evidence to be disclosed in exceptional circumstances. Parts 5 and 6 of the Bill are the only parts to make reference to intercept evidence and the Bill does not currently make any provision for the use of such evidence in criminal proceedings.

Part 7 of the Bill would amend the definition of terrorism in s 1 of the *Terrorism Act 2000* to include reference to acts made for the purpose of advancing a racial cause. It also creates an offence of communicating information relating to the armed forces, which is likely to be of use to terrorists; and, amends the offence of failing to disclose information about a suspected terrorist offence. It includes amendments to the control order regime and a new scheme relating to the recovery of the costs of policing at gas facilities.

CONTENTS

I Introduction and background

The *Counter-Terrorism Bill* was introduced on 24 January 2008. It is a wide ranging Bill which would amend the law in relation to terrorism in a number of distinct ways. It includes provisions about the detention and questioning of terrorist suspects and the prosecution and punishment of terrorist offences.

The Bill would impose notification requirements on persons convicted of terrorist offences and would amend the law relating to asset freezing proceedings under United Nations terrorism orders. It would also amend the law relating to inquests and inquiries and change the definition of terrorism. The Bill also includes powers for recovering the costs of policing at certain gas facilities. Commentators have argued that the most controversial measure in the Bill is contained in Part 2 and relates to the pre-charge detention of terrorist suspects.

Many of the measures in the Bill were trailed in consultation papers, which are discussed further below. In December 2007, prior to the publication of the most recently proposed pre-charge detention scheme, Lord Carlile QC, the Government's Independent Reviewer of Terrorism Legislation (a Liberal Democrat Peer) published a paper entitled *Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill*. He concluded that:

> The changes proposed by the Government are useful and relatively uncontroversial, apart from the proposals for longer detention between arrest and charge, intercept evidence and enhanced sentences. Of these, very prolonged and heated debate is likely on the detention issue.[1]

A number of the measures have also been considered by both the Home Affairs Select Committee and the Joint Committee on Human Rights. Their conclusions are also discussed below.

This paper does not provide analysis of every clause in the Bill, but does highlight provisions which have proved controversial and provides background information on a number of highlighted issues – particularly pre-charge detention, post-charge questioning, the potential use of intercept evidence and the amendments to the law relating to inquests and inquiries. It is important to note that the Bill does not make provision for the use of intercept evidence in criminal terrorism trials; and, following the publication of a version of the Chilcot report on 6 February 2008, the Prime Minister indicated that, while work would be taken forward to try to allow the use of such evidence, it was not expected that the work would be concluded in time to inform the *Counter-Terrorism Bill*.

The House of Commons Library has produced a Standard Note considering the UK's current counter-terrorist legislation, which provides a background in respect of the legislation introduced over the past eight years.[2]

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1 *Lord Carlile QC*, *Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill*, December 2007, Cm 7262, available at:: http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/lord-carlile-report?view=Binary (on 5 February 2008)

2 House of Commons Library, *Counter-terrorism legislation*, SN/HA/4302

The Explanatory Notes to the Bill indicate that "most of the Bill extends to the whole of the United Kingdom" although some provisions have more limited territorial extent.[3] It is worth noting that the parts of the Bill which amend the *Coroners Act 1988* would only apply to England and Wales, whilst in Part 7, there are separate clauses applicable in England and Wales and Scotland on the recovery of costs of policing at gas facilities.

II Part 1: Powers to gather and share information

[by Grahame Danby]

A government review of existing counter-terrorism legislation has identified enhanced information sharing as a key response to the terrorist threat.[4] Broadly, the measures considered necessary would aim to "enhance information sharing between those agencies involved in combating terrorism and making full use of all the available information to assist investigations and secure more prosecutions".[5] The review paper acknowledges the balancing acts attendant on the introduction of counter-terrorism legislation, not just that restricted to information processing:

> In order to protect the public it is vital that our legislation is kept under constant review to ensure that it remains adequate and proportionate to that threat. The government is always mindful of not seeking additional powers for the sake of them. It is important to achieve the appropriate balance between measures necessary to counter threats to national security and preserving the civil and human rights of the population.[6]

The gathering or sharing of information potentially impinges on the right to privacy embodied by Article 8 of the *European Convention on Human Rights*. This is a qualified rather than absolute right: the full Article comprises the substantive right with a second sub-paragraph setting out the qualifications, one of which invokes national security:

> Article 8 – right to respect for private and family life:
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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3 For full details of territorial extent, see Explanatory Notes to the Counter-Terrorism Bill, 24 January 2008, p3

4 Home Office, *Possible measures for inclusion in a future Counter Terrorism Bill*, 25 July 2005

5 *Ibid*

6 *Ibid*

The need for "proportionality" is an important restriction on the interference with an individual's rights by any public authority. While Article 8 does not explicitly state that any interference with the right to privacy should be proportionate, the case law of the European Court of Human Rights indicates that a restriction on a freedom guaranteed by the Convention must be "proportionate to the legitimate aim pursued".[7] While the Article 8 right to privacy falls within the ambit of the *Human Rights Act 1998*, it also finds practical expression, at least in so far as personal data are concerned, in the *Data Protection Act 1998*.

The *Data Protection Act 1998* regulates the processing (collection, use and disclosure) of personal information held on computer, other electronic media and, in certain circumstances, in paper files. "Data controllers" (organisations etc. which process personal information) must comply with eight data protection principles set out in Schedule 1 of the Act:

> 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
>
> (a) at least one of the conditions in Schedule 2 is met, and
>
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
>
> 2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
>
> 3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
>
> 4. Personal data shall be accurate and, where necessary, kept up to date.
>
> 5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
>
> 6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
>
> 7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
>
> 8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

The first principle requires that personal data may not be processed at all unless one of the conditions in Schedule 2 of the *Data Protection Act* is met. These conditions are

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[7] See for example *Handyside v United Kingdom (1976)* EHHR 393

quite broad. The first condition is that the individual has given consent, but there are various conditions which would enable personal information to be processed without consent. One condition is that the processing is necessary for: the administration of justice; the exercise of any functions conferred on any person by or under any enactment (such as the present Bill); the exercise of any functions of the Crown, a Minister of the Crown or a government department; or for the exercise of any other functions of a public nature exercised in the public interest by any person.

The conditions in Schedule 3 of the 1998 Act for processing "sensitive personal data" are more stringent, as one might expect. Again, there are various situations where the processing of sensitive personal data without consent could be permitted, including in the exercise of any functions conferred on any person by or under an enactment. The term "sensitive personal data" includes the racial or ethnic origin of the individual, political opinions or religious beliefs, whether he or she is a member of a trade union, physical or mental health or condition, sexual life and any information about criminal convictions or any offence he or she is alleged to have committed.

Information sharing provisions in previous Bills, such as the *Serious Crime Bill 2006-07*, attracted calls for explicit oversight by the Information Commissioner to ensure that the powers were being used reasonably.[8] The present Bill is silent on the role of the Information Commissioner, though he will retain his existing enforcement powers under the *Data Protection Act*.

Part II of the *Data Protection Act* provides data subjects with a number of rights, including the right to access data held on them and the right to correct inaccurate data. However, Part IV of the Act creates a number of exemptions from many of its provisions. For example, section 29 exempts from many of the data protection principles the processing of data for the purposes of crime prevention or detection, the apprehension or prosecution of offenders and the assessment or collection of tax. The most comprehensive exemptions come into play where they are required for the purpose of safeguarding national security.[9] In this case personal data are exempt from the following provisions of the *Data Protection Act*:

- The Data Protection Principles
- The rights of data subjects (Part II)
- The notification provisions, requiring data controllers to register with the Information Commissioner (Part III)
- Enforcement by the Information Commissioner (Part V)
- Power of the Information Commissioner to inspect some overseas information systems (section 54A)
- The offence of unlawful obtaining of personal data (section 55)

Conclusive evidence that a national security exemption is justified can be provided by a certificate signed by a cabinet Minister, the Attorney General or the Advocate General for

8 HL Deb 7 February 2007 c746

9 Peter Carey, *Data Protection: a practical guide to UK and EU law*, second edition, 2004

Scotland. An individual directly affected by the issuing of any such certificate can appeal against its application to the Information Tribunal.

In its report on the Government's counter-terrorism proposals, elucidated by the then Home Secretary in June 2007,[10] the Home Affairs Committee focused on detention powers. However, some consideration was given to data sharing and the use of DNA databases. The Committee concluded:

> 107. Although a number of witnesses shared Liberty's concerns about data protection and the retention of DNA samples in certain circumstances, these issues are much wider than the present discussion over counter-terrorism measures and need to be addressed elsewhere. We are reviewing aspects of them in relation to our concurrent inquiry into 'A surveillance society?'. We consider the Government's proposals about information sharing to be a proportionate response to the need to increase the efficiency of our counter-terrorism services.[11]

The Joint Committee on Human Rights has not yet commented substantially on either the disclosure of information or DNA retention provisions (discussed further below). In relation to the latter, a letter from the Committee to the Home Secretary commented:

> In September, the Nuffield Council on Bioethics recommended that the police should only be allowed to store permanently bioinformation from people who are convicted of a crime, with the exception of people charged with serious violent or serious sexual offences. Indefinite retention of DNA samples from persons suspected of terrorism potentially raises even more acute concerns about proportionality, because the threshold for arresting a person on suspicion of terrorism is so much lower, and the proportion of those arrested who are subsequently released without charge is correspondingly higher.[12]

A. Power to remove documents for examination

Clauses 1-9 relate to new powers to remove documents (paper or electronic) for examination in the context of a search under existing terrorism legislation. **Clause 1** would allow a constable (or, in some cases, an officer authorised by the Secretary of State)[13] to remove such documents in order to establish whether they can be formally seized. If the constable has reasonable cause to believe that an item is subject to legal privilege[14], it may not be removed unless it is impractical to separate legally privileged content from the rest (**Clause 3**). **Clause 3(5)** provides that legally privileged parts of documents must not be used in any other way but to facilitate examination of the rest of the document. A constable who removes a document under **Clause 1** must make a

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10 HC Deb 7 June 2007 cc421-3

11 Home Affairs Committee, *The Government's Counter-Terrorism Proposals*, 13 December 2007, HC 43-I, Session 2007-08

12 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, 7 February 2008, HL Paper 50, HC 199, Session 2007-08, Ev 12

13 Clause 9(2)

14 Legal professional privilege is the right to withhold documents and communications in certain situations because they relate to the giving or receiving of legal advice

written record of the removal, containing information stipulated in **Clause 4**; a person with a specified interest in the document can request a copy of this record.

Removed documents may not be retained for more than 48 hours unless a constable of the rank of chief inspector or above authorises an extension – of up to a further 48 hours (**Clause 5**). During the period of retention, **Clause 6** allows for supervised access to the documents in question by the person, or a representative, from whom they were taken. Such access could be refused in circumstances where it might prejudice an investigation, criminal proceedings, or facilitate the commission of an offence. When a document has to be returned (either because the retention period has expired or the document may not be seized) electronic copies have to be destroyed and any hard copies also returned (**Clauses 7-8**).

B. Fingerprints and samples

The *Prevention of Terrorism Act 2005* allows the Secretary of State to make "Control Orders" to restrict the movements or behaviour of suspected terrorists who cannot be prosecuted or deported, or impose obligations on them. (The Control Order regime is discussed further at Section X of this paper). **Clauses 10-13** of the *Counter-Terrorism Bill 2007-08* would extend the powers of constables to take fingerprints and non-intimate samples from individuals, without their consent, to those subject to a Control Order regime. At the moment, such powers are restricted to individuals who have been arrested for a recordable offence. A "recordable" offence is an imprisonable one, or one of over 50 non-imprisonable offences set out in regulations.[15]

Clause 10 would make amendments to the *Police and Criminal Evidence Act 1984* to widen police powers to take, and retain, fingerprints and non-intimate samples like a footprint or saliva. The latter is one source of DNA. **Clause 10(3)** would provide a constable with the power to check the fingerprints and non-intimate samples of an individual subject to a control order against a range of databases containing analogous information. These are databases held by or on behalf of "relevant law-enforcement authorities" and, by dint of an amendment in **Clause 14(2)**, the security services.[16] The definition of relevant law-enforcement authorities that already appears in the *Police and Criminal Evidence Act 1984* includes persons outside the territory of the United Kingdom whose functions correspond to those of a police force.[17]

Clause 10(4) allows for the retention of fingerprints and samples, but only for the uses specified in **Clause 14(5)**:

> The fingerprints, impressions of footwear or samples may be used—
>
> (a) in the interests of national security,

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15 Schedule 1, *National Police Records (Recordable Offences) Regulations* SI 2000/1139, as amended by SI 2003/2823, 2005/3106 and SI 2007/2121. The amendments up to 2004 are conveniently summarised in a PQ – HC Deb 10 June 2004 c528W.

16 The Security Service (MI5) and the Secret Intelligence Service (MI6)

17 Section 63A(1A), *Police and Criminal Evidence Act 1984*

> (b) for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
>
> (c) for purposes related to the identification of a deceased person or of the person from whom the material came.

The above adds national security to the existing purposes to which retained data can be put. Provisions corresponding to **Clause 10** are made for Scotland (**Clause 11**) and Northern Ireland *(***Clause 12***)* with some restrictions to take into account devolved competence. The provisions of **Clauses 10-12** would have effect from commencement, regardless of when the control order had been made (**Clause 13**).

While **Clause 14** relates to material (fingerprints, impressions of footwear or DNA samples) taken under the *Police and Criminal Evidence Act 1984*, **Clause 15** introduces analogous measures for Northern Ireland, that is: "These will permit samples and fingerprints to be checked against records held by or on behalf of the Security Service or the Secret Intelligence Service and for the use of such samples to be expanded to include when it is in the interests of national security."[18] Cross-checking of material against that obtained under other statutes, including the *Terrorism Act 2000*, is facilitated by **Clauses 16-18.**

C. Disclosure of information and the intelligence services

Clauses 19-21 relate to the disclosure of information to and by the intelligence services. Specifically, the first two subsections of **Clause 19** read:

> (1) A person may disclose information to any of the intelligence services for the purposes of the exercise by that service of any of its functions.
>
> (2) Information obtained by any of the intelligence services in connection with the exercise of any of its functions may be used by that service in connection with the exercise of any of its other functions.

The latter subsection provides an example of a potential tension with the *Data Protection Act 1998*, particularly the second data protection principle cited earlier. However, as set out above, the 1998 Act contains several exemptions at least some of which the intelligence services could invoke. This fact will limit the constraints imposed by **Clause 20** which prohibits disclosures in contravention with the 1998 Act. The overall effect of **Clause 19** may be to provide greater comfort to the intelligence services, and those who interact with them, where it comes to information sharing. The rest of the clause places limits on the purposes for which each of the three intelligence services (the Security Service, the Secret Intelligence Service and GCHQ) may disclose information. For example, the Security Service and the Secret Intelligence Service would be able to disclose information for the purpose of the prevention or detection of serious crime. **Clause 21(4)** explains the meaning of prevention and detection by reference to section 81(5) of the *Regulation of Investigatory Powers Act 2000*. Section 81(2) of that Act gives a definition of "serious crime".

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[18] Bill 63 – EN, para 50

III Pre-charge detention

A. Background

1. The current law

Once a person has been arrested, their pre-charge detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence or information with the aim of obtaining evidence. It is not the purpose of pre-charge detention to prevent terrorism – rather it is used to secure sufficient evidence for use in criminal proceedings.[19]

a. Increases in police powers, 1974–2006

The Police and Criminal Evidence Act (PACE) 1984 gives the police a power to detain those suspected of an offence under the general criminal law for up to 36 hours before charges are brought. With the authority of a magistrate, this period can be extended to a total of 96 hours. Since 1974 additional detention powers have been available to the police in respect of terrorism suspects. The *Prevention of Terrorism (Temporary Provisions) Acts* permitted police detention of a person suspected of involvement in acts of terrorism for up to 48 hours following arrest (72 hours in Northern Ireland), and for a further period of up to five days if approved by the Secretary of State.

The Terrorism Act 2000 superseded the earlier terrorism legislation. It confirmed the maximum period of detention for terrorism suspects as seven days, subject to new arrangements for judicial rather than ministerial authorisation for detention beyond the initial 48 hours, by means of a 'warrant of further detention' issued by a judicial authority. *The Criminal Justice Act 2003* amended the 2000 Act to increase the maximum period from seven to 14 days.

Sections 23-25 of the *Terrorism Act 2006*, which came into force on 26 July 2006, amended Schedule 8 of the *Terrorism Act 2000* to increase the maximum period of pre-charge detention of terrorist suspects from 14 to 28 days. The following safeguards were included in the provisions:

- Those arrested can be detained for 48 hours, after which the police or Crown Prosecution Service (CPS) are obliged to apply to a judicial authority for an extension of detention warrant;
- Applications to extend may be made for 7 days at a time, to a maximum of 28 days;
- Up to 14 days, the application is made to a designated magistrate; between 14 and 28 days it is made by a High Court judge;
- Between 14 and 28 days all applications to extend are made by the CPS (rather than the police).

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[19] Preventative detention of this sort would probably be considered a breach of Article 5 of the European Convention on Human Rights; see for example the Government's Reply to the Joint Committee on Human Rights, 19th Report of 2006-7, Cm 7215, pg 3

b. Pressures for change?

On Sunday 15 July 2007, there were a number of news reports suggesting that Ken Jones, the President of the Association of Chief Police Officers (ACPO) had asked that terrorist suspects should be detained without charge for "as long as it takes".[20] He clarified his position after civil liberties campaigners accused him of proposing internment. In the intervening period, the Metropolitan Police Association said that it had been assured by Mr Jones that he had not called for terrorists to be locked up indefinitely, adding: "Any such proposal would not have the support of the Metropolitan Police service."[21]

This incident was followed by a number of further comments on the issue. On Monday 16 July, it was reported by the BBC that the Shadow Home Secretary, David Davis MP, had stated that:

> All the evidence shows that when the police tried to claim the need for 90-day detention without charge they were wrong and Parliament's decision on 28 days was right.
>
> Since the 28-day limit was introduced neither the police or security services have produced one shred of evidence to demonstrate the need for extension, either in public or in confidential briefings.[22]

Lord Carlile QC, the Government's Independent Reviewer of Terrorism Legislation, also made a statement on the issue on 16 July. He said:

> I am saying that what parliament should do is put this in the hands of senior judges, who have a great deal of experience in analysing evidence, and that it should be subject to appeal.
>
> In that context, I think it would be extraordinary to suggest that anybody but a very, very small number of people would be detained for more than 28 days, but the judgment would be in the interests of justice.
>
> The fact is that the judgment on days is completely sterile. I would have thought that every civil liberties organisation in this country and every person detained would be happy for their case to be considered by a senior judge on an evidence basis.
>
> That would be an intelligent basis for debate, not an entirely arbitrary one of days, which provides no intelligent foundation for the discussion.[23]

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20 See for example *BBC Online* "Police Defend Longer Terror Limit" 16 July 2007; available at http://news.bbc.co.uk/1/hi/uk/6899363.stm (at 24 January 2008)

21 Press Association, 15 July 2007

22 *BBC Online* "Police Defend Longer Terror Limit" 16 July 2007; available at http://news.bbc.co.uk/1/hi/uk/6899363.stm (on 24 January 2008)

23 *The Guardian*, "Increase 28-day detention limit, says security minister", 16 July 2007

It was subsequently reported on 25 July 2007, that the Prime Minister was intending to suggest a period of 56 days detention without charge. The BBC said that:

> There may also be proposals to allow authorities to remove the passports of people suspected of wanting to travel abroad for terrorism-related purposes - closing a loophole identified by police. Mr Brown is expected to address the issue of security at ports and airports through improvements to the way passengers are monitored before they reach the UK [...] On Tuesday, Home Secretary Jacqui Smith said "the time is now right" to reconsider extending detention without charge beyond the current limit. She said that the 28 day limit was already being tested. Since the 14 day limit was extended she said one person had been charged after 15 days, four were charged after 19 and 20 days, and six were held for between 27 and 28 days, three of whom were charged.[24]

The Guardian reported that the Home Secretary, Jacqui Smith had made clear that Gordon Brown would give a "detailed analysis" of why new powers were needed 18 months after MPs had last settled the issue. In particular, she suggested that the number of terror suspects "actively engaged" in complex plots had risen from 1,600 to 2,000.[25]

The Times reported that the Prime Minister and the Home Secretary would announce "a series of options for debate", including the case for extending the period of detention before charge, plans to question suspects post-charge and strengthening of Control Orders. The proposals, in the form of a consultation paper, would also give an update on the review of the use of intercept evidence in trials and would look at other methods, such as the French system of examining magistrates, who supervise the investigation of a case:

> Ms Smith told the all-party Home Affairs Select Committee last night that alleged plots were becoming more complex, the international dimension to terror investigations was widening and the security services were now aware of 400 more terror suspects since last November's figure of 1,600.
>
> "This all gives us a strong view that the time is right to reconsider whether we should allow longer than 28 days for precharge detention," she said. Her predecessor, John Reid, rejected an extension of the 28-day limit earlier this year, saying that he had not seen evidence to justify it.[26]

On 25 July the Prime Minister outlined possible measures for inclusion in Bill in the autumn and the Home Office published two detailed documents entitled *Options for pre-charge detention in terrorist cases* and *Possible measures for inclusion in a future counter terrorism bill*.[27]

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[24] See *BBC Online* "UK to get new border force", 25 July 2007 (available at http://news.bbc.co.uk/1/hi/uk_politics/6914834.stm at 24 January 2008) and *BBC Online* "Longer Terror Detentions Opposed", 26 July 2007 (available at http://news.bbc.co.uk/1/hi/uk_politics/6917802.stm at 24 January 2008)

[25] *The Guardian*, "Smith defends new counter-terror package", 25, July 2007, (available at http://www.guardian.co.uk/terrorism/story/0,,2134100,00.html at 24 January 2008)

[26] *The Times*, "I'll deport 4,000 foreign criminals by end of year, Brown promises", 25 July 2007

[27] Home Office, *Possible Measures for Inclusion in a Future Counter Terrorism Bill*, 25 July 2007 available at: http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/ct-

In its July 2007 papers, the Government argued that the decision to increase pre-charge detention limits to 28 days had been justified by subsequent events saying that they had "been able to bring forward prosecutions that otherwise may not have been possible". The document stated that the Government believed it was right to increase the limit beyond 28 days but wished if possible to build broad agreement on the way forward.[28]

The *Options for Pre-Charge Detention in Terrorist Cases* paper argued that that there was fresh evidence for extending the limit, and set out four "serious options that should be considered": (1) legislation to extend the limit coupled with additional safeguards; (2) the same option but with the powers not coming into force until after a further parliamentary vote; (3) using powers under the *Civil Contingencies Act 2004* to authorise a temporary extension of the limit in an emergency; and (4) setting up a system of judge-managed investigations on the continental model.[29]

c. The Government's proposals

On 6 December 2007, the Home Secretary, Jacqui Smith published a paper entitled *Pre-Charge Detention of Terrorist Suspects*, proposing an extension to the current limit on the detention of terrorist suspects before they have been charged.

The proposals would increase the pre-charge detention limit beyond 28 days to 42 days for a limited period. The decision to bring a higher limit into force could only be made by the Home Secretary after receiving a joint report from the Director of Public Prosecutions and the police setting out their reasonable grounds for believing that more than 28 days would be required to obtain, preserve or examine relevant evidence and stating that the investigation is being carried out diligently and expeditiously. To emphasise that the higher limit was exceptional, it could only remain in force for a maximum of 60 days. The higher limit would need to be agreed following a debate in both Houses of Parliament within 30 days of it coming into force. If not approved, the limit would revert at that point (after 30 days) to the lower limit. Even if the agreement of Parliament was obtained, the higher limit would fall automatically after a further 30 days. The maximum amount of time that the higher limit could therefore remain in force would be 60 days and only then if it had been debated and approved by Parliament.

At the same time as she published the proposals, the Home Secretary wrote to the Home Affairs Select Committee,[30] which is conducting an inquiry into the issue (see below), to:

- set out the Government's proposals for extending pre-charge detention;[31]
- pass on a report on the proposals for the counter-terrorism bill by the independent reviewer of terrorism legislation, Lord Carlile of Berriew QC;[32]

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bill-consultation.pdf?view=Binary (at 24 January 2008); Home Office, *Options for pre-charge detention in terrorist cases*, 25 July 2007, available at: http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary (at 28 January 2008)

28 *Ibid*

29 *Ibid*

30 http://www.homeoffice.gov.uk/about-us/news/extending-pre-charge-detention (as at 28 January 2008)

31 Available at: http://security.homeoffice.gov.uk/news-publications/publication-search/general/pre-charge-detention/pre-charge-detention-proposal?view=Binary on 28 January 2008

- provide a paper summarising the results of the public consultation on the proposals for the counter-terrorism bill.[33]

d. The detailed proposals

In its paper of 6 December 2007, the Home Office stated that:

> [W]e have looked again to see if there is any way we can meet the need to protect the public without bringing in permanent powers. This approach is significantly different from the Government's original proposal – including as it does the need for a clear operational trigger and substantial parliamentary safeguards. We have considered further the option of using the Civil Contingencies Act to go beyond 28 days. We believe there are problems with using the Civil Contingencies Act […] However, we have considered if there is some way we can make use of the Civil Contingencies Act's guiding principle which makes any increase in pre-charge detention exceptional, temporary and dependent upon specific operational need.
>
> We are therefore proposing to legislate in the counter terrorism bill to increase the pre-charge detention limit beyond 28 days to 42 days only for a strictly limited period of time and in response to a specific operational situation. The higher limit could only come into force where there is a specific operation exceptionally requiring the powers, and then remain in force only where there are compelling operational reasons. The decision to bring a higher limit into force could only be made by the Home Secretary after receiving a joint report from the Director of Public Prosecutions and the police setting out their reasonable grounds for believing that more than 28 days will be required to obtain, preserve or examine relevant evidence and stating that the investigation is being carried out diligently and expeditiously.
>
> The higher limit would therefore not be made available unless the Home Secretary was satisfied it was required in relation to a specific operation and would only remain in force for a limited period.
>
> The decision to introduce a higher limit must be made by someone who is accountable to Parliament and the people for their actions, although it will, of course, need to be based on operational advice. If after considering all the relevant operational advice, the Home Secretary decides to bring into force the higher limit, it would come into effect on the day on which he or she signs the order making the higher limit available. The Home Secretary's decision could be subject to judicial review.
>
> The Home Secretary would then be required to provide a statement to Parliament within 2 days, or as soon as practicable, after bringing the higher limit into force. This statement would include statements such as that:
>
> • a terrorist investigation is occurring which has given rise to an exceptional operational need.
> • The investigation relates to the threat of serious damage as a result of terrorism.

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32 http://www.official-documents.gov.uk/document/cm72/7262/7262.pdf (at 28 January 2008)

33 Home Office, *Responses to the consultation on the counter-terrorism bill*, 11 December 2007 available at http://security.homeoffice.gov.uk/news-publications/publication-search/consultation-responses/?version=1 (on 28 January 2008)

• The higher limit is urgently needed and is necessary in order to prevent, control or mitigate terrorism.
• The higher limit is compatible with ECHR.
• The Home Secretary has received the required report from the DPP and police.

To emphasise that the higher limit is exceptional it can only remain in force for a maximum of 60 days. The higher limit would need to be agreed following a debate in both Houses of Parliament within 30 days of it coming into force. If not approved, the limit would revert after 30 days to the lower limit. Even if the agreement of Parliament was obtained, the higher limit would fall automatically after a further 30 days. The maximum amount of time that the higher limit could therefore remain in force would be 60 days and only then if it had been debated and approved by Parliament. We believe that the need for parliamentary approval at the 30 day point is a substantial safeguard which will ensure the higher limit is subject to full parliamentary scrutiny. The fact that the higher limit must fall automatically at the maximum 60 days after coming into force means that it can only ever be a temporary power. We believe this is right and that it addresses some of the main concerns about extending the pre-charge detention limit that have been raised as part of the consultation.

Under this proposal, the 14 day limit would remain the standard, permanent limit with the 28 day limit needing to be agreed annually by Parliament as now. The new, temporary, upper limit of 42 days could only become law where there was an exceptional operational need and under a 'triple lock' comprising of a report by the police and DPP on a specific operational need, the agreement of the Home Secretary and a set of strong parliamentary and judicial safeguards. The 42 day limit could only ever remain in place for a maximum of 2 months. We believe the 42 day limit, together with the proposed safeguards, balances the needs of the police against understandable concerns regarding excessive detention.

The detention of individual suspects beyond 28 days would remain a matter for judges to decide. The exceptional and temporary higher limit would be backed up by strong judicial controls and parliamentary scrutiny:

• Continued detention in individual cases beyond 28 days would need to be approved by a judge at least every 7 days – as is currently the case beyond 48 hours. Judges will only be allowed to approve the continued detention of a suspect if this is necessary to obtain or preserve evidence and where they are content that the investigation is being carried out diligently and expeditiously.
• Applications for such extensions will require the consent of the Director of Public Prosecutions.
• Parliament would be required to approve the 42 day limit 30 days after it was made available and the higher limit would apply for a maximum of 60 days.
• Parliament would be informed each time an application to hold someone for more than 28 days was approved by the courts.
• The independent reviewer of terrorist legislation would report to Parliament on the operation of the higher limit in individual cases and on the decision to bring the higher limit into force. There would be a debate in Parliament on the report.[34]

[34] Home Office, *Pre-Charge Detention of Terrorist Suspects*, December 2007, available at http://security.homeoffice.gov.uk/news-publications/publication-search/general/pre-charge-detention/pre-charge-detention-proposal?view=Binary (on 28 January 2008)

The Home Secretary promised to consult "inside Government, with the Opposition parties, and with community and civil liberty organisations" on the new proposals.[35]

The proposals were backed by ACPO President Ken Jones, who has been reported to have said that:

> There is a pressing need to consider now the best way of responding to cases likely to arise in the future where the complexities of gathering evidence mean the current limit of 28 days would prove insufficient. These proposals address these issues alongside a careful and detailed system of checks and balances, including the requirement for agreement between a chief officer and the Director of Public Prosecutions […] before a case for an extension could be made to the Home Secretary.[36]

In response to the announcement, it was reported that Shadow Home Secretary, David Davis, had said: "they [the government] are making a proposal for something they still have not proved necessary […] they have lost the argument to further extend pre-charge detention beyond 28 days again and again". Former Liberal Democrat Home Affairs Spokesman, Nick Clegg, was reported to have said: "the government is tying itself up in knots in an ever-more desperate attempt to sweeten the bitter pill of this proposal for its own backbenchers […] Frankly, what the government is now proposing is not easy to understand."[37]

The *Guardian* has also reported objections to the proposals from the former Attorney General, Lord Goldsmith QC and Liberty (the campaigning human rights and civil liberties group):

> Proposals to extend the limit for pre-charge detention to 42 days are "constitutionally illiterate" as well as dangerous, critics [Liberty] warned yesterday, because proper parliamentary scrutiny would confuse the roles of MPs and judges. The former attorney general, Lord Goldsmith, warned that such examination by MPs would be difficult, adding: "I think parliamentary scrutiny is hugely important and one of the great things we have in this country. But it isn't necessarily the right way to deal with individual cases, while they are going on." In an interview with the Guardian, he insisted he had seen no evidence for extending detention and said he would have resigned from office if parliament had approved a 42-day limit.[38]

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35 *Ibid*

36 "Challenges grow over plan to hold terror suspects for 42 days", *The Times*, 7 December 2007

37 *BBC Online*, "Smith Plans 42-day terror limit", 6 December 2007, http://news.bbc.co.uk/1/hi/uk_politics/7130072.stm (at 28 January 2008)
See also Nick Clegg, *Guardian Online* " The Answer is not 42", 6 December 2007, available at: http://commentisfree.guardian.co.uk/nick_clegg/2007/12/the_answer_is_not_42.html (at 28 January 2008)

38 *The Guardian*, "42-day detention plan attacked as constitutionally illiterate", 8 December 2007, available at http://politics.guardian.co.uk/homeaffairs/story/0,,2224185,00.html (on 28 January 2008)

In January 2008, Liberty published a fairly comprehensive paper containing quotations from leading figures who objected to the proposals.[39]

In February 2008, Liberty produced a further briefing paper on the detention proposals, arguing that:

> You might expect urgent and compelling reasons for revisiting this issue given how recently it was considered by Parliament, how controversial it was at the time and how uncomfortably it sits with the Government's broader approach to the terror threat. In reality no such justifications exist [...] Only 6 of the 71 respondents to the Government's consultation supported an extension beyond 28 days […] The proposal would certainly lead to innocent people being detained for 42 days and then released without charge.[40] Released after six weeks in police custody (the equivalent of a short prison sentence) the suspect may well have lost their job, home and the trust of their community, friends and perhaps even family. They will be powerless to rebut the inevitable suspicion that they are involved in terrorism – no jury will have declared them "not guilty". This is the reason the British legal system has for centuries required suspects to be either charge or released within a matter of days, rather than weeks or months. Indeed, in non-terror cases in the UK the limit remains 4 days and the current 28 limit in terrorism cases is already much longer than in other comparable democracies.[41]

e. Parliamentary scrutiny?

A further issue which emerged almost immediately after the publication of the proposals was the level of information which would be made available to Members of Parliament, at the time Parliament was asked to approve the 42 day limit.

A newspaper article quoted a "home office spokesperson" who stated:

> "It is vital we don't prejudice prosecutions, but important that the higher limit is subject to full parliamentary scrutiny […] The home secretary's statement would include, for example, the fact that a terrorist investigation was ongoing and had given rise to exceptional operational need, that a higher limit was urgently needed to prevent, control or mitigate terrorism, and that it was compatible with human rights legislation [...] MPs do have the right to say 'No, we don't believe this is the case."[42]

The Government has yet to make entirely clear what type of evidence would be presented to Members in order for them to make an informed decision on the issue. In a recent report (discussed further below) the Joint Committee on Human Rights commented that:

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39 Liberty, *The Real Consensus, Extension Beyond 28 Days, Unnecessary and Counter-productive*, 24 January 2008, available at http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/new-terror-measures.shtml (on 29 January 2008)

40 Half of those detained for the existing maximum of 28 days have been released without charge and none have been rearrested, placed on control orders or subjected to surveillance

41 Liberty, *Second Reading Briefing on the Counter-Terrorism Bill*, *Part I – Pre-charge detention*, February 2008, available at http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml (on 25 February 2008)

42 *The Guardian*, "42-day detention plan attacked as constitutionally illiterate", 8 December 2007

> Because the power to extend will be in relation to a specific, ongoing investigation, any parliamentary debate about the justification for exercising the power will necessarily be so circumscribed as to be virtually useless as a safeguard.[43]

It has been noted by the Joint Committee on Human Rights that an individual could have been detained for the full 42 days without any parliamentary debate and that such debate could have very limited effect:

> On closer inspection, the bringing into force of the proposed 42 day limit is not really "subject to parliamentary approval" at all, despite the Home Secretary's claims in her letter of 5 December. Even if both Houses vote to disapprove the order, it will remain in force for 30 days, and therefore, assuming that the order bringing into force the 42 day maximum will only be made towards the end of the current 28 day maximum period, the order will nearly always lapse only after the relevant individuals have been detained for the full 42 days.[44]

Finally, on 26 February 2008, it was reported by the *Guardian* that the Government was considering proposals to allow a debate on the emergency powers "within 10 days of a Government decision" (as opposed to the 30 days mentioned in the legislation).[45]

2. Select Committee consideration of Counter-Terrorism proposals

a. The Home Affairs Select Committee

In July 2007, the Home Affairs Select Committee announced that it was intending to hold a short inquiry into the Government's new counter-terrorism proposals. The Committee had previously produced a report on counter-terrorism issues in June 2006. During the evidence sessions, the issue of pre-charge detention was high on its agenda. Evidence sessions commenced in October 2007.

On 22 October 2007, the Home Secretary, Jacqui Smith, indicated to the Home Affairs Committee that there had not been a single case since 9/11 when police enquiries would have been aided by holding a terror suspect for more than 28 days.[46] Nonetheless, she argued that an extension could be justified on the basis of the complexity of terrorism cases, pointing to the substantial amounts of computer data that had to be analysed.

She said that:

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43 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 42 days*, HC 156, 14 December 2007, pg 22

44 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 42 days*, HC 156, 14 December 2007, pg 23

45 *The Guardian*, "Home Secretary makes concession in terror detention row", 26 February 2008

46 See http://news.sky.com/skynews/article/0,,91211-1289318,00.html.
For the full transcripts of the Home Affairs Committee sessions see:
http://pubs1.tso.parliament.uk/pa/cm200607/cmselect/cmhaff/uc1020-iii/uc102002.htm;
http://pubs1.tso.parliament.uk/pa/cm200607/cmselect/cmhaff/uc1020-ii/uc102002.htm;
http://pubs1.tso.parliament.uk/pa/cm200607/cmselect/cmhaff/uc1020-i/uc102002.htm.
(All as at 28 January 2008)

> The first point is that I accept that there has not been a circumstance in which it has been necessary up to this point to go beyond 28 days, and I think everybody has been very open about that. We have made a case based on what I believe to be the increasing complexity, the increasing international links, the increasing challenge of the investigation of the plots that are in place. Just to give an example of the increasing complexity of the cases, in the Dhiren Barot case in 2004, for example, there were 274 computers seized, compared with 400 computers in the alleged airline plot last year. In addition, there were approximately 2,000 computer disks, CDs and DVDs in the Dhiren Barot case compared with approximately 8,000 computer disks, CDs and DVDs in the alleged airline plot last year. This year, at the time of the arrests of three men who were convicted in June this year for internet-based incitement to murder, the computers, the hard drives and the other media seized together amounted to 3 TB of data. For those members of the Committee like myself who are not IT specialists, that represents in perspective almost a third of the entire content of the US Library of Congress.[47]

Following the new proposal for 42 day detention, the Committee took further evidence from the Home Secretary on 11 December 2007.

The Committee issued its report on 13 December and concluded, *inter alia*, that:

> Neither the police nor the Government have made a convincing case for the need to extend the 28-day limit on pre-charge detention. We consider that there should be clearer evidence of need before civil liberties are further eroded, not least because without such evidence it would be difficult to persuade the communities principally affected that the new powers would be used only to facilitate evidence gathering and not as a form of internment.
>
> The DPP's evidence about the existence and use currently made of the 'reasonable suspicion' test by prosecutors convinces us that there is flexibility in the system if the police need a little extra time to gather evidence sufficient for a charge subsequently to be made with 'a realistic prospect of conviction'. We also note the implication in his words that judges will probably be increasingly sceptical about the likelihood of gathering such evidence the longer a suspect is kept in custody—which may make an extension beyond 28 days ineffective in practice.
>
> […]
>
> If, in […] exceptional circumstances, a temporary extension of the pre-charge detention period is deemed essential to secure successful prosecutions of terrorist suspects, the Government should consider building support for proposals that effectively reform the powers of the Civil Contingencies Act, secure Parliamentary scrutiny and judicial oversight, but stop short of the requirement to declare a full-scale state of emergency. We urge the Government to begin urgent discussions with other parties on this basis.

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[47] Home Affairs Select Committee, *The Government's Counter-Terrorism Proposals*, HC 1020-iii, 22 October 2007, Q177

> Although we have set this out in detail, we reiterate that we do not consider that a convincing case for an extension to the limit at present has been made out.
>
> We also heard evidence that other options, in particular the admissibility of intercept evidence in court and changes in the rules governing post-charge questioning, could make it easier for the police to gather and present evidence sufficient to convict terrorist suspects.[48]

b. The Joint Committee on Human Rights

The Joint Committee on Human Rights has also conducted a recent inquiry into this area, reporting on 14 December 2007. Amongst its conclusions, the Committee considered the Government's proposals and stated that:

> In short, any extension to pre-charge detention is a serious interference with liberty that requires a compelling, evidence-based case, and the Committee does not accept that the Government has made such a case for extending pre-charge detention beyond the current limit of 28 days, for the following reasons:
>
> i) it can find no clear evidence of likely need in the near future;
> ii) alternatives to extension do enough, in combination, to protect the public and are much more proportionate;
> iii) the proposed parliamentary mechanism would create a serious risk of prejudice to the fair trial of suspects;
> iv) the existing judicial safeguards for extensions even up to 28 days are inadequate.[49]

The Joint Committee published a further report on 7 February 2008, entitled *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter Terrorism Bill* (hereafter the *JCHR Counter-Terrorism Bill Report*). In that report, the Committee argued that:

> The Bill's provisions on pre-charge detention are substantially the same as that proposed [in the *Pre-Charge Detention of Terrorist Suspects* paper]. The Committee welcomes the provisions for limits on the scope of statements to Parliament about extended detention, but still doubts that parliamentary safeguards would be meaningful. […] The Committee reaffirms the analysis in its previous report and emphasises that, in its view, the Government's proposals for pre-charge detention are not compatible with the right to liberty in Article 5 ECHR. In particular, it considers that the proposals are in breach of the right of a detained person to be informed "promptly" of any charge against him; are an unnecessary and disproportionate means of achieving the aim of protecting the public and fail to provide sufficient guarantees against arbitrariness.[50]

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48 Home Affairs Select Committee, *The Government's Counter Terrorism Proposals*, HC 43-I, Session 2007-08, 13 December 2007, pp 24-25

49 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 42 days*, HC 156, Session 2007-08, 14 December 2007, summary

50 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eight Report): Counter-Terrorism Bill*, HC 199, Session 2007-08, 7 February 2008, p3

3. Proposals to use the *Civil Contingencies Act 2004*

Following the Queen's Speech, in November 2007, proposals relating to pre-charge detention were re-visited. The Home Secretary suggested that a proposed move to 56 days detention, which had been floated in the summer of 2007, was not fixed, stating that:

> I thought that the rapprochement between my hon. and learned Friend and me was too good to last, but I can tell him that the Government have not decided on a figure of 56 days. As I have explained, we are seeking to achieve a consensus on that. Moreover, I see the argument as being about whether, and how, we provide the ability to extend detention beyond 28 days. It is not about whether a period of 56 or 90 days, or whatever maximum might be determined, is appropriate. However, I believe that Parliament should set the final figure, and will continue to work with colleagues to find a consensus.[51]

David Davis had resisted any moves to extend pre-charge detention. In reply, he noted that in the event of an emergency, additional powers existed under the *Civil Contingencies Act 2004*:

> What has been lacking is the determination to make the full use of the law and that powers that we have already.
>
> The previous Home Secretary understood those arguments and came up with another scenario, in the earlier stage of the discussion. He said, "Okay, we can cope with one Heathrow reasonably easily, but what if we had five all at once? We'd be overwhelmed." That is the circumstance under which, we argue, the Government should invoke the state of emergency provisions in the Civil Contingencies Act 2004. The definition is very simple and involves an emergency that poses a serious threat to the public, overwhelming the Government's ability to defend the public.
>
> The powers in the 2004 Act are quite sweeping and include the power to hold without charge for up to 30 days, over and above any period under existing legislation. So, in a state of emergency—but only in a state of emergency—the Government already have the power to hold for 58 days. The scenario described by the previous Home Secretary involved 50 airliners coming under attack. That is clearly a state of emergency. Such a power would of course require the Government to justify their action after the event to both the House of Commons and the courts, but they say that they want proper scrutiny and control over the process. For such an incursion of liberty, that is a good thing.
>
> The Government complain about that process, which they designed, remember. They say that it would alarm and panic the public—this from a Government who habitually issue blood-curdling assessments of the threat, describing it as the biggest threat since the Second World War. I consider that objection to be unutterable nonsense, first, because it underestimates the British public, who withstood 3,000 deaths under the Northern Irish troubles and who faced that many deaths in a single night at the height of the blitz; secondly, because the

[51] HC Deb, 7 November 2007, c233

> public would expect a state of emergency if 50 airliners were about to be blown out of the sky; and thirdly, because there would be no immediate need to declare such a state of emergency, as the Government would have 28 days before they ran out of time under the counter-terrorism Bill. In that time the state of the nation would be all too clear to the public.
>
> The Home Secretary has suggested that that demonstrates that we accept the principle of the need to go beyond 28 days. That is a facile argument. It should be clear that we do not accept the need to extend detention without charge based on either the evidence of the operations to date or the most horrific hypothetical scenarios so far dreamt up by Ministers.[52]

The Government has, however, discounted the use of the *Civil Contingencies Act*. In its paper, *Pre-Charge Detention of Terrorist Suspects,* it said that:

> We believe that any legislation extending pre-charge detention for terrorist suspects should be done in anti-terrorism legislation. The CCA goes much wider than terrorism and we believe it would be preferable to make any changes to the law using anti-terrorism legislation rather than trying to adapt other legislation for purposes for which it was not intended. We believe the CCA option also has a number of fundamental flaws:
>
> It is not entirely certain that the CCA could be used to detain individuals as opposed to restrict their movement. This uncertainty adds additional risks to using the CCA in a context for which it was not envisaged. It is preferable for Parliament to amend the pre-charge scheme that is already specifically provided for terrorism rather than to rely on the CCA which is aimed at different circumstances.
>
> The Civil Contingencies Act (CCA) could not be used in all the circumstances where the police might need more than 28 days. Although it may be possible to use it in a 9/11 type situation where there is significant disruption to the life of the nation, it might not be possible to use it where the police have disrupted or foiled a large and complex plot where the suspects have been arrested. This is because there is some legal doubt whether such a case would meet the CCA test of an emergency where there must be a war or terrorism which threatens serious damage to the security of the UK (or the threat of serious damage to human welfare or the environment in the UK). Such an emergency must have occurred, be occurring or be about to occur. The fact that the plot was being monitored and was foiled and the suspects were in custody could be taken to mean that no such emergency had occurred, was occurring or was about to occur. There would also be a question as to whether the CCA could be used where a plot was foiled in this country which involved a conspiracy to commit a terrorist outrage overseas.

In its report, the Home Affairs Committee considered the use of the CCA, but concluded:

> We considered the proposal from Liberty, that Part 2 of the Civil Contingencies Act (CCA) 2004 could be used in exceptional circumstances where the complexity of the suspected terrorist plots was likely to overwhelm the capacity of the police and security services. However, we concluded that this was not an

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[52] HC Deb, 7 November 2007, cc163-65

> intended use of the powers under the CCA, that there were significant legal problems and that it would not be sensible for a national state of emergency to be triggered in the middle of a major investigation.
>
> If, in these exceptional circumstances, a temporary extension of the pre-charge detention period is deemed essential to secure successful prosecutions of terrorist suspects, the Government should consider building support for proposals that effectively reform the powers of the CCA, secure Parliamentary scrutiny and judicial oversight, but stop short of the requirement to declare a full-scale state of emergency. We urge the Government to begin urgent discussions with other parties on this basis.[53]

The Joint Committee on Human Rights has also expressed "grave doubts" about proposals to utilise the Civil Contingencies legislation.[54] Liberty expanded upon its arguments that the *Civil Contingencies Act 2004* could be used in a paper published in December 2007.[55] It also argued that the Government's proposals had three major weaknesses, namely: there was no need for a real emergency (as compared to the civil contingencies legislation); there would be "ineffective parliamentary oversight" (by contrast under the civil contingencies legislation, emergency powers have to be approved within seven days); and there would be no judicial oversight of the Home Secretary's powers to trigger the longer detention powers.[56]

4. Community relations

The Home Office conducted an Equality Impact Assessment on the legislation and concluded, *inter alia*, that while it did not hold statistics relating to terrorist arrests and religious beliefs, there was some concern amongst the Muslim community:

> **Qualitative Data**
>
> There is a perception that the majority of people arrested under s.41 of the *Terrorism Act 2000* (TACT) are Muslim.
>
> There are strong concerns expressed by representatives of the Muslim community that they are being targeted as a religious group rather than individuals from that group.
>
> The police noted that there was concern in the Muslim community that they are being targeted as a group rather than individual suspects.

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53 Home Affairs Select Committee, *The Government's Counter Terrorism Proposals*, HC 43-I, Session 2007-08, 13 December 2007, summary. Further debate about the use of the Act can be found between pp 20-22 of the Report.

54 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 42 days*, HC 156, Session 2007-08, 14 December 2007, pp 52-58

55 Liberty, *Supplementary Evidence to the Home Affairs Select Committee*, December 2007, available at: http://www.liberty-human-rights.org.uk/publications/pdfs/home-affairs-ctte-dec-2007-response.pdf (on 30 January 2008)

56 *Ibid*, p4

> **Pre Charge Detention**
>
> Muslim groups said that pre charge detention may risk information being forthcoming from members of the community in the future.
>
> […]
>
> **Qualitative Data from Consultation**
>
> The qualitative data shows that there is a belief amongst the Muslim community that they are discriminated against by existing legislation and that there is a possibility for this to continue with the proposed legislation. To support this view references made to discriminatory media coverage and language used in regards to terrorism. Muslim community representatives expressed a concern that this may lead to an increased reluctance among there communities to provide vital cooperation and assistance to the police and security services.
>
> There was an acceptance amongst all groups involved in the consultation that the UK faced a serious threat from international terrorism and that the Government must take action. Representatives from the Muslim community accepted that action was necessary but wanted to be certain that appropriate safeguards were in place to avoid abuse of the power and that the use of powers was always proportionate.[57]

Some press coverage has suggested that the research echoes the conclusions of focus groups of young Muslim men.[58]

5. A right to compensation?

It has been reported that Trevor Phillips, the Chairman of the Commission for Equality and Human Rights, has written to the Home Secretary arguing that some provision should be made to compensation individuals who are detained for 42 days and then released without charge, particularly where this results in them losing their livelihood or their home.[59] Of the six individuals who were held for between 27-28 days, three were released without charge.[60] The Muslim Council of Britain has argued that "the effect [of the pre-charge detention proposals] on communities and family would be severe, even more so when it is the Muslims who are being disproportionately effected by the imposition of these measures."[61] The Home Office has noted that:

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57 Home Office, *Equality Impact Assessment*, January 2007, available at: http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/ct-bill-eia?view=Binary (on 1 February 2008)

58 See for example, *The Independent*, "Home Office warns Smith on detention", 25 January 2008

59 *The Guardian*, "Labour facing humiliation on terror bill", 24 January 2008, available at http://politics.guardian.co.uk/homeaffairs/story/0,,2245885,00.html (on 24 January 2008) and Equality and Human Rights Commission, *Commission expresses concern over pre-charge detention limits*, available at: http://www.equalityhumanrights.com/en/newsandcomment/Pages/concernoverdetentionlimits.aspx (on 28 January 2008)

60 HC Deb, 13 November 2007, c85W

61 Muslim Council of Britain, *MCB Response to Proposed Counter Terrorism Bill*, 1 November 2007, available at: http://www.mcb.org.uk/article_detail.php?article=features-124 (on 28 January 2008) and see

> Detainees held under terrorism legislation also receive visits from Independent Custody Visitors who, in addition to normal expectations, would need to be satisfied that the detainees had seen the forensic medical expert and been offered a shower and some outdoor exercise each day; that detainees who wish to have them have been provided with the necessary books or equipment to enable them to carry out religious observances; and that detainees are being given food which accords with their religion or medical needs. The usual checks and inspections carried out when visiting PACE detainees should also apply to high security detainees.[62]

It has added that "individuals held pre charged usually get transferred to prison after 14 days", adding that there are "safeguards against discrimination whilst being held in prison."[63]

Currently, in civil law, members of the public are protected from arbitrary arrest by the right to sue for false imprisonment, which can arise if the police, directly and intentionally, confine a person without lawful excuse. False imprisonment most commonly occurs when the police make an arrest which is not legally justified. The burden of proof is on the claimant to prove that the detention has occurred, but on the police to prove that they had lawful excuse or authority – in most cases they are likely to rely upon the fact that they were carrying out a lawful arrest.

The Legal Action Group publication, *Police Misconduct, Legal Remedies* indicates that:

> As a general principle, if someone is held after a court has ordered his or her confinement, there is no claim against the police for false imprisonment. Thus, any case against the police for false imprisonment will come to an end once the magistrates have decided to remand a person in custody. However, if there is a claim for malicious prosecution then damages can be claimed for any period spent in custody on remand.[64]

6. International comparisons

There are a number international comparators used when considering the issue of pre-charge detention. Whilst attempting to address this issue as straightforwardly as possible, it is important to stress that much of the material shows not only how long suspects can be detained, but also the other actions that States have taken to deal with the problem of terrorism.

This is often necessary to put the information in its appropriate context. There can be linguistic difficulties – in the sense that some countries may not use the word "charge" or have the same legal concepts. For example, it is suggested that in France, a person described as being 'under instruction' may be able to be detained 'indefinitely' with the regular agreement of the judge (subject to the slightly abstract protection offered by

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also *The Times* "Muslims wary of terror law extension", 25 January 2008, available at: http://www.timesonline.co.uk/tol/news/politics/article3248068.ece (on 28 January 2008)

62 Home Office, *Equality Impact Assessment*, January 2007, p13, available at: http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/ct-bill-eia?view=Binary (on 1 February 2008)

63 *Ibid*

64 4th Edition, 2005, p 177

Article 5 of the European Convention on Human Rights). Commentators have stated that, in those circumstances, a person may be detained while an investigation is still ongoing and so it is not easy to compare with the UK situation.

In a report issued in August 2004, referring to the detention of foreign terrorist suspects under the *Anti-Terrorism, Crime and Security Act 2001*, the Joint Committee on Human Rights Report *Review of Counter Terrorism Powers* indicated that:

> None of the countries surveyed (with the exception of the US) has resorted to the indefinite detention of foreign nationals who are suspected terrorists. Most jurisdictions have, instead, sought to deal with those who pose a threat to national security or who are suspected of involvement in international terrorism by means of criminal prosecution.[65]

The House of Commons Library has also previously considered the counter terrorism powers taken in foreign jurisdictions in a Research Paper on the *Prevention of Terrorism Bill*, published in 2005.[66]

A document produced by the Foreign and Commonwealth Office entitled *Counter Terrorism Legislation and Practice: A Survey of Selected Countries* also contains relevant information.[67]

More recently, the human rights group, Liberty, produced a document on 12 November 2007, considering this issue. Liberty argues that its study "demonstrates that the existing 28 day limit for pre-charge detention in the United Kingdom already far exceeds equivalent limits in other comparable democracies. These findings, based on advice and assistance from lawyers and academics in 15 countries around the world, provides further evidence that any increase beyond 28 days cannot be justified."[68]

Liberty does, however, confirm the complexities of the situation, stating that:

> It is, of course, true that no two legal systems are exactly the same and drawing comparisons between the laws in different countries inevitably poses some difficulties. These difficulties can, however, be overplayed. It should for example be remembered that the British common law system has been exported around the world and forms the basis of the legal systems in a number of other countries including the United States, Canada, Australia, New Zealand and Ireland. Some of these countries have exact equivalents to pre-charge detention making comparisons relatively straight-forward.

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65 Joint Committee on Human Rights, *Eighteenth Report of Session Review of Counter Terrorism Powers*, 4 August 2004, HC 713 2003-4

66 House of Commons Library, Research Paper 05/14, *The Prevention of Terrorism Bill* , 22 February 2005, p27-30 available at http://www.parliament.uk/commons/lib/research/rp2005/rp05-014.pdf (on 25 February 2008)

67 Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: A Survey of Selected Countries*, October 2005
Available at http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf (on 28 January 2008)

68 Liberty, *Terrorism Pre-Charge Detention :Comparative Law Study*, November 2007, Executive Summary

> Comparisons are, however, more difficult with some of the UK's geographically closest neighbours. A number of European countries like France, Italy, Germany and Spain have inquisitorial civil law systems with no concept of "pre-charge detention". Notwithstanding this, it is possible to make some meaningful comparisons by identifying the closest equivalent to pre-charge detention in these jurisdictions. At what point does the suspect learn the precise nature of the allegations against them, when are prosecutions formally initiated, and at what point does the test for detention change from police suspicion to evidence and proof considered by a judge?[69]

The Liberty report has proved to be contentious, and was criticised by Lord Carlile QC in an article in *Prospect Magazine*. He stated that:

> Liberty recently published a report comparing periods of pre-charge detention in Britain with those of other countries. Unfortunately, the report, and Liberty's presentation of it, fell below the group's high standards. Informed debate, not mere campaigning zeal, is required for matters as weighty as the increase in the maximum period of detention before charge
>
> […]
>
> Liberty's approval for French law is also misplaced. It reminds us that in France it is only possible to hold a terrorism suspect without charge for up to six days. This is strictly true, but what actually happens in France includes the detention of suspects for at least three days without the right to have a lawyer present; interviews during that period without tape recording (a French investigating magistrate described tape recording to me as "technically problematic"); and detention for periods often up to a year without any trial taking place, followed by release. Unsurprisingly, the three-day interrogation period was described to me by the same expert magistrate as "a productive period of interrogation." In 1984, the Police and Criminal Evidence Act brought that kind of interviewing to an end in this country, with the explicit support of Liberty (I was a member of its management committee at the time).
>
> The French do charge suspects after a maximum of six days' detention. They charge them with the offence of association de malfaiteur (criminal association), an offence risibly vague, which is then replaced in cases that reach trial by far more serious accusations. Liberty should regard such holding charges as totally unacceptable, and a device designed merely to keep suspects in custody.
>
> In this country, the police are expected to charge suspects with what they are believed to have done. I hope that this will continue. The police must proffer a realistic charge at the earliest possible time. Our leading civil liberties lobby group should not allow itself to diminish genuine and, it is to be hoped, informed debate by offering a false picture to the public of the very different continental system. Australia offers a fairer comparison, but the circumstances there are unlike ours.
>
> In the argument about detention periods, two measures are being offered as silver bullets which would negate any need for extended detention time. These are post-charge questioning, and the use of intercepts as evidence. As to the

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[69] Liberty, *Terrorism Pre-Charge Detention : Comparative Law Study*, November 2007, pp 8-9

> former, it might encourage holding charges; and, as the respected terrorism barrister Ali Bajwa rightly told the BBC last week, it would make little difference, as those charged may refuse (on advice) to answer such questions anyway.
>
> As to intercepts, I support their admissibility subject to the protection of national security and sound rules to govern the use of the evidence. However, almost all those with profound knowledge of the workings of terrorists expect that intercept evidence will be of material assistance in only a tiny proportion of trials.
>
> Neither of those proposals is a silver bullet. Neither displaces the essentials of the argument about longer detention.[70]

In November 2007, the human rights and law reform group, JUSTICE, released a report which argued that the US pre-charge detention limit of 48 hours was no obstacle to charging suspects in complex terrorism cases. The report, entitled *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since-9/11*, noted that under the Fourth Amendment of the US Bill of Rights, the maximum period of pre-charge detention in criminal cases was 48 hours. It examined "ten of the most high-profile terrorist cases since 9/11" and concluded that "in all ten alleged terror plots between 2002 and 2007, each suspect was charged with a criminal offence within 48 hours of their arrest."[71]

B. The clauses

As noted by the Joint Committee on Human Rights, the Bill's provisions on pre-charge detention are broadly the same as those proposed in the Government's *Pre-Charge Detention of Terrorist Suspects* paper. **Clause 22** would bring into force **Schedule 1** to the Bill. **Schedule 1** would amend **Schedule 8** to the *Terrorism Act 2000* (as amended) which currently deals with the pre-charge detention of terrorist suspects. **Schedule 1** would introduce the reserve power through which the Secretary of State could extend detention to a maximum of 42 days.

As discussed above, (at the section entitled the Government's proposals) the reserve power is subject to conditions. These are contained at **Schedule 1, paragraph 39** and would require the Secretary of State to have received a joint report from the Director of Public Prosecutions and a chief officer of police (in England and Wales); the Crown Agent and chief constable of a police force in Scotland; or the Director of Public Prosecutions for Northern Ireland and the Chief Constable of the Police Service of Northern Ireland. The report would have to state that there are reasonable grounds for believing that the detention of one or more persons for beyond the period already permitted would be necessary for one of the following reasons (**paragraph 39(3)**):

(a) to obtain relevant evidence, whether by questioning or otherwise;

(b) to preserve relevant evidence; or,

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70 Lord Carlile QC, *Prospect Magazine*, "Tacking Liberties", December 2007. Liberty's response to this criticism can be found at: http://www.prospect-magazine.co.uk/article_details.php?id=9932 (as at 28 January 2008)

71 JUSTICE, *From Arrest to Charge in 48 Hours, Complex terrorism cases in the US since 9/11*, November 2007, available at www.justice.org.uk

(c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.

Paragraph 39(5) states that the report must also indicate that "each of the persons making the report is satisfied that the investigation in connection with which the detained person or persons is or are being detained is being conducted diligently and expeditiously."

Schedule 1, Paragraph 40 indicates that the Secretary of State may "by order declare that the reserve power is available". **Paragraph 41** contains an obligation on the Secretary of State to lay a statement before Parliament where an order is made declaring that the reserve power has been made available. This statement should be laid within two days after the day on which the order was made "or if that is not practicable, as soon as is practicable". **Paragraph 41(4) and (5)** make plain that while the statement may include information as to the reasons for the decision to make the order, such information will not include the name of any person detained or "any material that might prejudice the prosecution of any person".

Paragraph 42 states that an application to authorise further detention would then have to be made "to a senior judge".[72] The judge would be able to grant an extension for a period of 7 days; to the end of the period of 42 days, or for a shorter period if satisfied that there are circumstances "that would make it inappropriate for the period of the extension to be as long as the period so required." **Paragraph 44** states that Parliament would have to be told if a court authorised detention beyond 28 days and the Secretary of State would be obliged to lay a statement "as soon as practicable after the period has been extended." The statement would include details of the date of the extension, the number of days for which the extension had been granted, the court which heard the application and the place where the person was being detained. It would not contain any details of the person being detained or "any material that might prejudice the prosecution of any person."

Paragraph 45 makes provision for the cessation of the reserve power, either 60 days after the day on which it became available, or earlier where the decision of the Secretary of State to make the reserve power available is not approved by resolution of each House. When the reserve power ceases to be available, a custody officer would be required to release a person immediately, unless his detention was otherwise authorised by law.

However, as the power could have been in place for 30 days before Parliament would have the opportunity to vote, in effect Parliament would only have a vote if the Home Secretary wanted the 42 day limit to stay in place for longer than 30 days. By this a suspect could already have been held for the 42 days period.

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[72] In England and Wales a High Court Judge, or Circuit Judge designated by the Lord Chief Justice; in Scotland, a judge of the High Court of Justiciary or the sheriff; in Northern Ireland, a judge of the High Court or a county court judge designated by the Lord Chief Justice of Northern Ireland (Schedule 1, paragraph 43(4))

At the end of any period during which the reserve power was made available, the Government's Independent Reviewer of Terrorism Legislation would be expected to conduct a review and make a report. **Paragraph 46(2)** indicates that the report "must state whether in the opinion of the person carrying out the review the decision of the Secretary of State to make the order was, in all the circumstances, reasonable."

A flow chart, taken from the Explanatory Notes to the Bill, demonstrating how the reserve power would work in practice, can be found at Annex 1 to this paper.

IV Post-charge questioning

A. Background

Under the *Police and Criminal Evidence Act 1984* (PACE), suspects can currently be questioned after charge in defined circumstances, including: "to prevent or minimise harm or loss to some other person, or the public".[73] Both the Home Affairs Select Committee and the Joint Committee on Human Rights have supported some extension of post-charge questioning.

In its report, *Prosecution and Pre-charge Detention*[74], the Joint Committee on Human Rights recommended the introduction of post-charge questioning, to reduce the need for any further extension of the period of pre-charge detention. The Committee records that in its response, the Government indicated that it would be publishing a public consultation document on a range of proposals about modernizing police powers, including proposals to provide for questioning after charge where considered necessary.[75]

The Home Office Consultation Paper, *Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984* was published in March 2007 and asked for views on the questioning of the detainee/suspect, from the decision to refer the case to the prosecutor for a charging decision, up to the decision by the prosecutor to charge; and from following the decision to charge up to the trial hearing. It is envisaged that such post-charge questioning would take place in a police station and the person would remain entitled to the full range of safeguards under PACE.

The former Home Secretary, John Reid, made an oral statement to the House of Commons about the Government's approach to counter-terrorism laws, on 7 June 2007. He said that the Government was planning to legislate so that in terrorist cases suspects could be questioned after charge "on any aspect of the offence for which they have been

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73 Section 16.5 of Code C of the *Police and Criminal Evidence Act 1984*, which also provides for such questioning to clear up an ambiguity in a previous answer or statement; or in the interests of justice to comment on information which has come to light since the suspect was charged

74 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, August 2006, HC 1576, Session 2005-06, paras 132-135, available at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/240.pdf (on 30 January 2008)

75 Home Office, *Government Response to JCHR Report on Prosecution and Pre-charge Detention*, September 2006, Cm 6920

charged." With regard to adverse inferences, he proposed to apply the same rules for post-charge questioning that currently apply to pre-charge questioning.[76]

The Home Affairs Committee has recorded that:

> The Crown Prosecution Service strongly supported the proposed change, as did Lord Goldsmith and David Davis. Nick Clegg was in favour provided that there were protections in place to prevent the use of peripheral charges as a 'hook' to keep people under detention […] JUSTICE commented that under PACE Code C, there is already limited provision for questioning of suspects post-charge. They have supported the view that these grounds could be extended to include any case in which fresh evidence came to light. They noted that questioning post-charge would have to be attended by the same safeguards that apply to pre-charge questioning, that is, the right to legal advice, the right against self-incrimination, and freedom from oppressive questioning. Subject to these safeguards, they supported the Government's proposal.
>
> The Home Secretary commented that in the responses to the Government's consultation there had been "pretty widespread support for the proposals around post-charge questioning. There have been some questions about the safeguards and the way in which it will be implemented but it has been pretty well received".[77]

a. Limitations on the proposed power

Upon the publication of the *Counter-Terrorism Bill*, Liberty welcomed the Government's introduction of new post-charge questioning measures in the anti-terror bill but indicated that it:

> [B]elieves they do not give enough powers to police and prosecutors and omit vital safeguards. Under the Government's plan, police may question suspects post-charge only about issues to do with the charge that has already been brought, rather than questions relating to possible new charges. With the proper judicial and other safeguards against abuse, police and prosecutors could have far greater powers.[78]

In an earlier report on the proposals, the Joint Committee on Human Rights also questioned their narrow ambit, stating that:

> We […] question why the proposal appears to be restricted to post-charge questioning "on any aspect of the offence for which they have been charged". This seems to us to be unnecessarily restrictive. It may be necessary to interview a person who has already been charged with one offence about fresh evidence

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76 HC Deb, 7 June 2007, c421-3

77 Home Affairs Select Committee, *The Government's Counter Terrorism Proposals*, HC 43-I, Session 2007-08, 13 December 2007, paras 89-91

78 Liberty, *Government introduces controversial anti-terror measures*, 24 January 2008, available at: http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/new-terror-measures.shtml (on 29 January 2008)

> which has come to light which may warrant slightly different or even additional charges.[79]

b. Safeguards

The Joint Committee on Human Rights (amongst others) has argued that the introduction of post-charge questioning would have to be accompanied by certain safeguards including:

> [A]ccess to legal advice, a requirement that the prosecution have already established a prima facie case, and guidance as to how judges should direct juries about the inferences that could be properly drawn from silence in response to such questioning.[80]

In a reply to a letter by the Chairman of the Joint Committee, the Home Secretary outlined further details of safeguards which would be provided, saying that:

> The proposed measures will only allow an individual to be questioned in relation to the offence for which they have been charged. We believe this is an important safeguard against a person being charged for a minor offence unrelated to terrorism with the intention of questioning them about more serious offences after charge. In such circumstances, we believe the proper course of action would be to re-arrest the person for the more serious offence if further evidence came to light and to charge them appropriately. An initial period of 24 hours to question a person after charge can be authorised by a senior police officer, thereafter any questioning after charge would be limited to a maximum period of five days and would have to be authorised by a Magistrates' Court. If there is any subsequent post-charge questioning, the police must return to the Magistrates' Court for further authorisation. The safeguards in the PACE codes will apply post charge as the do pre charge as regards the conditions of custody, questioning etc.[81]

In evidence to the Joint Committee, Professor Ed Cape[82] has described the current rationale for limiting questioning after charge as follows:

> In an adversarial system, in which (unlike some inquisitorial jurisdictions) investigation is neither conducted nor supervised by the judiciary, the coercive powers of the police to interview under detention should be subject to significant limitation. Otherwise, the principle of equality of arms, which provides a foundation for adversarialism, is severely compromised. To enable the police to interview a suspected person after the decision has been made that there is sufficient evidence to instigate criminal proceedings puts that person at a severe disadvantage, particularly if inferences may be drawn if they do not co-operate with the process. A defendant who is cross-examined at trial not only has the

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79 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, July 2007, HC 790, Session 2006-07,.para 170, available at: http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf (on 30 January 2008)

80 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, July 2007, HC 790, Session 2006-07, para 171

81 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eight Report): Counter-Terrorism Bill*, HC 199, Session 2007-08, 7 February 2008, Ev 13-14

82 Author of *Defending Suspects at Police Stations* 5th Edition, Legal Action Group, 2006 and the Police Powers Section of *Blackstone's Criminal Practice 2008*, (Oxford University Press, 2007)

> benefit of legal representation, but will also have received prior disclosure of both the evidence on which the prosecution intends to rely and "unused material". This is in recognition of the fact, incorporated into the European Convention on Human Rights article 6, that they are entitled to know the case against them. Permitting questioning after charge, especially if it goes beyond putting to the accused information that has come to light since they were charged, would seem to be a way of circumventing that right.[83]

B. The clauses

The relevant provisions can be found between **Clauses 23-26**. **Clauses 23-25** set out the different schemes to apply in England and Wales, Scotland and Northern Ireland. All three are restricted to questioning about the terrorism offence for which the suspect has already been charged.

Clause 23(6) provides that in England and Wales, s 34(1) of the *Criminal Justice and Public Order Act 1994* would be amended so that negative inferences could be drawn from an accused's silence, if interviewed after charge. **Clause 25(5)** and **(6)** make similar provision in Northern Ireland, amending the *Criminal Evidence (Northern Ireland) Order 1988*. **Clause 26** provides a detailed definition of a terrorism-related offence, which would be open to amendment by order by the Secretary of State (subject to the affirmative resolution procedure).

V Prosecution and punishment of terrorist offences

a. *UK wide jurisdiction*

Clause 27 of the Bill provides for a UK-wide jurisdiction for specified terrorism offences regardless of where in the UK the offence took place. The Explanatory Notes indicate that the purpose of this clause is to "remove the need for separate trials for connected terrorist offences which occur in different jurisdictions within the UK". The offences to which the clause would apply are set out in subsections 2 and 3. Subsections 4 and 5 would allow the Secretary of State to amend this list of offences by order (subject to the affirmative resolution procedure).

b. Consent to prosecution

Clause 28 would amend s 117(2A) of the *Terrorism Act 2000* and s 19(2) of the *Terrorism Act 2006* (cases in which permission of the Attorney General or Advocate General for Northern Ireland is required before DPP gives consent to prosecution) by adding the word "outside the United Kingdom". This would have the effect of requiring such consent, where those provisions apply, if it appeared that the offence was

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[83] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eight Report): Counter-Terrorism Bill*, HC 199, Session 2007-08, 7 February 2008, Ev 22-23. It is worth noting that the European Court of Human Rights has determined that the right to silence under Article 6 of the ECHR is not an absolute right and held that provided appropriate safeguards are in place, silence, in situations which clearly call for an explanation, could be used in assessing the persuasiveness of the evidence adduced by the prosecution (see *Murray v United Kingdom* (1996) 22 EHRR 29 at paragraph 47)

committed outside the UK. The Explanatory Notes indicate that the amendment is based on recommendation 15 of Lord Carlile's 2007 report on the definition of terrorism (discussed further at Part X of this paper).

c. Enhanced Sentences

The clauses relating to enhanced sentences for terrorist offences were trailed in the *Possible Measures for Inclusion in a Future Counter-Terrorism Bill*. The paper explained that:

> Although nearly all terrorist suspects are arrested under the powers available in the Terrorism Act 2000, they are subsequently charged with the most appropriate offence. This may be one of the terrorist-specific offences (for example, acts preparatory to terrorism, terrorist finance offences or terrorist training offences) but it may also be a range of non-terrorist offences, including conspiracy to murder, offences under the Explosives Act 1875, fraud or forgery offences. We would like to ensure that sentences for terrorists who are convicted of non-terrorist specific offences are enhanced to reflect the additional seriousness that terrorist involvement represents. There may also be a deterrent factor in doing this in relation to some of the more minor offences.[84]

The Explanatory Notes to the Bill expand upon this, stating that **Clauses 29** and **30** have been introduced in response to a suggestion by Lord Carlile QC, following his recommendation that a terrorist connection should be considered to be an aggravating factor in sentencing.

The proposal was considered by the Home Affairs Select Committee. The Committee weighed up comments by the Director of Public Prosecutions, who suggested that if the investigators did not have evidence of terrorist involvement, it would be difficult to prove that there was such an aggravating feature and, if they did have such evidence, they would probably seek a charge under the terrorism acts in the first place. However, the Committee concluded that:

> [I]f the Government can clarify that there are activities which assist terrorists but do not at present fall within the definition of acts preparatory to terrorism, or other such provisions, we accept the case for regarding the connection with terrorism as an aggravating factor that should lead to an enhanced sentence.[85]

Clause 29 applies in England and Wales, while **Clause 30** makes similar provision in Scotland. Neither clause will have retrospective effect and will only apply in relation to offences committed on or after commencement. **Clause 29(1)-(3)** makes clear that a relevant offence would have to be one specified in **Schedule 2** (offences where terrorist connection to be considered). The Explanatory Notes indicate that Schedule 2 contains offences "most frequently prosecuted in terrorism related cases" and notes that the list of offences included in the Schedule are applicable, not only in relation to the provisions in the Bill relating to aggravated offences, but also to those relating to forfeiture of property.

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[84] Home Office, *Possible Measures to be Included in a Counter-Terrorism Bill*, July 2007, pp13-14

[85] Home Affairs Select Committee, *The Government's Counter Terrorism Proposals*, HC 43-I, Session 2007-08, 13 December 2007, p30

If an offence fell within the Schedule and "it appears to the court that the offence has or may have a terrorist connection" the court would then be obliged to determine whether that was the case. If the court determined that the offence had a terrorist connection, it would then be obliged to treat that as an aggravating factor.

Clause 31 contains an order making power so that the Secretary of State would be allowed to amend the offences listed in **Schedule 2**. Any order made under this power would be subject to the affirmative resolution procedure.

VI Notification requirements

The proposals relating to notification requirements were trailed by the Government and considered by the Home Affairs Select Committee and Lord Carlile. The Committee stated that:

> The Government proposes that terrorism offenders should be required, following their release from prison, to notify the police of their whereabouts and travel plans, in the same way that sex offenders are already required to.[86] […] **Some aspects of the proposed legislation—the length of sentence and the length of the notification period—differ from the approach taken in respect of sex offenders. It would be helpful for the Government to explain its reasons for these differences. Subject to these clarifications, we recommend the imposition of a requirement for terrorist offenders to notify police of their whereabouts and travel plans.[87]**

Lord Carlile commented that:

> The proposed provisions would not affect the capacity of individuals to live their everyday lives. The information required would act as a deterrent against further terrorist activity by those concerned, who are likely to have potentially dangerous contacts. Breach of the requirements would be an indicator of possible renewed activity. Given the seriousness of terrorism offences, I consider this proposal appropriate and proportionate.[88]

The Joint Committee on Human Rights wrote to the Home Secretary in November 2007, suggesting that the notification requirements should be less restrictive and graduated, depending upon the length of the sentence received by the offender. In reply, the Home Secretary indicated that:

> The proposed notification regime mirrors that currently available for sex offenders. An important element of such regimes is that notification is an administrative requirement that flows from a conviction for a particular offence.

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86 Home Office, *Possible measures for inclusion in a future counter terrorism bill*, 25 July 2007, paras 42–48

87 Home Affairs Select Committee, *The Government's Counter Terrorism Proposals*, HC 43-I, 13 December 2007, pp31-32

88 Lord Carlile QC, *Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill*, December 2007, Cm 7262, p 9
available at: http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/lord-carlile-report?view=Binary (on 5 February 2008)

> Notification is not intended to be a penalty – its purpose is the protection of the public rather than the punishment of the offender […]. Giving judges discretion over who and how they apply the notification requirements would risk undermining the administrative nature of such schemes. The effectiveness of the requirements could be undermined if they were not mandatory […]. The period of notification is related to the seriousness of the offence for which the person has been convicted as reflected in the sentence that they gave received. Under the sex offender notification scheme a person is subject to the requirements indefinitely when they are sentenced to imprisonment for 30 months or more. We are proposing that indefinite notification should only be triggered where someone has been convicted of a terrorist related offence and sentenced to five years imprisonment or more.[89]

The relevant provisions can be found between at **Part 4** of the Bill between **clauses 38-55.** The Explanatory Notes[90] state that the notification scheme will impact on convicted terrorists, sentenced to a minimum of 12 months imprisonment; or found not guilty by reason of insanity; or found to be under a disability and made subject to a hospital order. Notification periods would apply for 10 years where a person was sentenced to less than five years imprisonment, but would be indefinite where a person was sentenced to imprisonment of detention for five years or more **(Clause 51)**. It would be an offence to fail (without reasonable excuse) to comply with the notification requirements or to provide false information, subject to a maximum sentence of five years imprisonment **(Clause 52)**.

Clause 41 makes provision for retrospective application in circumstances where an individual was convicted and given a relevant sentence prior to the commencement of Part 4 and, immediately before commencement the individual was: imprisoned; or detained; had been released on licence; or was unlawfully at large.

Clause 44 sets out the information an offender would be obliged to supply to the police when he first made a notification and the time scales within which he would be required to provide information. The information required would include the offender's date of birth; national insurance number; name (on the date on which the person was dealt with in respect of the offence); home address at that date; name on the date on which the notification was made (if the offender uses more than one name); home address on the date which the notification was made; address of any other premises in the UK at which the offender regularly resided and any other prescribed information. Home address is defined as "the address of the person's sole or main residence in the United Kingdom, or where the person has not such residence, the address or location of a place in the United Kingdom where the person can be regularly found and, if there is more than one such place, such one of those places as the person may select" (**Clause 55)**.

The Secretary of State would be able to prescribe further information by regulations (subject to the affirmative resolution procedure).

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89 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eight Report): Counter-Terrorism Bill*, HC 199, Session 2007-08, 7 February 2008, Ev 14-15

90 NB, Clause numbers in the Explanatory Notes (as published on 24 January 2008) are not in sync with the Bill between clauses 40 and 46. This has subsequently been rectified in a revised version of the notes published on 18 February 2008

Clause 44(1) indicates that an offender would be required to notify the police of the information within the period three days beginning with either (a) the day on which the person was dealt with in respect of the offence in question, or (b) where the provisions have retrospective application, within three days of the commencement of Part 4 of the Bill.

Clause 46 makes provision for changes of circumstances and requires a relevant offender to notify the police of changes to the details already notified. Under **Clause 48** a person would have to notify by attending at a police station in their local area and making an oral notification to a police officer, or other authorised person.

Clause 50 would allow the Secretary of State to make regulations to require a person under notification requirements to notify the police of their intention to travel outside the UK and notify the police upon their subsequent return.

a. Foreign Travel Restriction Orders

Clause 54 would give effect to **Schedule 5**, which would introduce foreign travel restriction orders. The Explanatory Notes state that such orders could be made on individuals subject to a notification requirement, and describes the orders as "civil preventative order[s] under which a court may prohibit [a] person from travelling abroad where and so far as it is necessary to do so to prevent the person from engaging in terrorism abroad." An order would have effect for a fixed period of not more than six months, such period to be specified in the order. It would be an offence to breach an order, without reasonable excuse.

Schedule 5, paragraph 2 sets out the conditions necessary before a court can make an order. First, a person would have to be subject to notification requirements; second, the person would have to have acted in a way which gave reasonable cause to believe that such an order was necessary to prevent him from taking part in terrorism activity outside the UK. The order would be made by the magistrates' court (in England and Wales). **Paragraph 2(5)** provides that "if on an application for a foreign travel restrictions order the court is satisfied that the conditions […] are met, it may make a foreign travel restrictions order. The Explanatory Notes assert that "[a]lthough this is a civil order, the standard of proof will be the criminal one".

The Explanatory Notes[91] suggest that the Government is relying upon an interpretation by the House of Lords of the Anti Social Behaviour Order regime contained in the *Crime and Disorder Act 1998* (in the case of *R v Crown Court of Manchester ex parte McCann* [2002] UKHL 39), which states that ASBOs are subject to a quasi-criminal standard of proof despite being civil orders. The actual Bill is silent on the point.

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[91] Explanatory Notes, p54. The notes also cite other civil order cases *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 (concerning preventative orders imposing prohibitions on sex offenders in the community) and *Gough and another v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351 (relating to football banning orders) arguing that "despite the civil classification, which means the civil rules of evidence will apply, the court will (following *McCann*) apply an exacting standard of proof, which will be hard to distinguish from the criminal standard"

Nonetheless, the test as spelled out in the Bill is rather different to that contained in the 1998 Act; and it would seem that where a person was subject to notification requirements, the court would only have to be convinced that the person to be made subject to the restriction order had acted in a way which gave "reasonable cause to believe" that such an order was necessary to prevent him from taking part in terrorism activity outside the UK.

Pursuant to **Paragraph 12** a person subject to an order would have a right to appeal to the Crown Court (in England and Wales) and to the county court in Northern Ireland (**Paragraph 14**).

VII Asset freezing procedures

In a letter to David Davis dated 10 December 2007, the Home Secretary wrote that the Government intended to include measures in the proposed counter-terrorism bill that were not mentioned in the consultation documents. These included measures to use closed source material in terrorist asset freezing cases. The Home Secretary wrote:

> Asset freezing is an important tool in the fight against terrorism. It is an executive action and is the responsibility of HM Treasury. When deciding whether to freeze the assets of a terrorist suspect, the Treasury may base its decision on all available information, including closed source material. Presently there is no mechanism in legislation to safeguard the use of closed source material in civil court proceedings relating to terrorist asset freezing cases (that is where a decision to freeze asset is challenged in court) nor may intercept product be relied upon to support the asset freezing decision. We intend to amend the Regulation of Investigatory Powers Act 2000 so as to allow reliance on intercept in such cases (as already happens in control order, proscription and deportation cases), and to put in place a procedure to govern legal challenges to asset freezing decisions, which will afford the appropriate protection to sensitive material and capabilities. This will involve statutory provision for close hearings with special advocates.[92]

These provisions are contained in **Part 5** of the Bill between **Clauses 56-63**. In particular, **Clause 57** makes general provisions for about rules of court for asset freezing provisions. **Clause 58** would require such rules to contain certain provisions relating to HM Treasury's disclosure obligations (including rules relating to applications by HM Treasury to withhold certain material from disclosure). **Clause 58(3)** would require the Treasury to be given an opportunity to apply for permission not to disclose sensitive material (such an application to be heard in private). The rules of court would have to secure that the court would be required to give permission for the material not to be disclosed if it considered that the disclosure "would be contrary to the public interest". Where the court gave permission for material not to be disclosed, it would be obliged to consider requiring the Treasury to provide a summary of the material, provided that the

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[92] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HC 199, Session 2007-08, 7 February 2008, Ev 10

summary did not contain the sensitive material. **Clause 58(5)** makes plain that if it does not grant an application to withhold sensitive material, the court must be authorised to direct either that the Treasury may not rely on the material; or, if it adversely affects their case, to make such concessions or take such steps as the court specifies.

Clause 59 makes provision for the appointment of a special advocate in asset freezing proceedings. The special advocate procedure was originally established by the *Special Immigration Appeal Commission Act 1997*. A special advocate is usually appointed to act in a defendant's interests in relation to any material which he is prevented from seeing as a result of the Secretary of State's national security and public interest objections. At the time the 1997 Bill was introduced, the Home Office Minister used the analogy of a "litigation friend" and stressed that "the Special Advocate is there to ensure that the rights of the appellant are protected. That is what he is there for".[93] Particular concerns revolve around the fact that the special advocate would not normally have any contact with his client once he has seen the closed material and it may be the case that the defendant will have no idea of the case against him, since it is contained entirely within the closed material.

The scheme was extended for use with control orders under the *Prevention of Terrorism Act 2005*. It has also been proposed for use for a number of other purposes such as parole board hearings.[94] The use of special advocates has been contentious – in 2005, the Constitutional Affairs Committee (as it then was) concluded that:

> Although the use of Special Advocates is being extended in the UK, we believe that it is one which should only be operated under the most exceptional circumstances which call for material to be kept closed.[95]

The Joint Committee has been critical of the fairness of the special advocate system in relation to the Control Order scheme.[96] On 31 October 2007, the House of Lords handed down a judgment in the case of *Secretary of State for the Home Department v MB* [2007] UKHL 46 and other linked cases. In her judgment in that case, Baroness Hale indicated (in circumstances where an appellant wished to challenge a control order made on the basis of closed material) that she was not confident that the European Court of Human Rights would hold that every control order hearing in which the special advocate procedure was used would be sufficient to comply with article 6 of the *European Convention on Human Rights*. She considered, however, that with strenuous effort it should usually be possible to accord the controlled person a substantial measure of procedural justice, but that this might require a more robust level of inquiry and disclosure.[97]

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93 HC Deb, 30 October 1997, c1071

94 See for example *Roberts v Parole Board* [2005] UKHL 45

95 Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission and the use of Special Advocates*, HC 323-I, Session 2004-05, 22 March 2005, p23

96 See for example Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-terrorism Bill*, HC 199, Session 2007-08, 7 February 2008, p17-21

97 [2007] UKHL 46, paras 62-76

Special advocates are appointed by the law officers, and **Clause 59(1)** provides that the relevant law officer may appoint a person to represent the interests of a party to asset freezing proceedings or proceedings on appeal relating to asset freezing proceedings.

Clause 59(2) states that "a person appointed as a special advocate is not responsible to the party to the proceedings whose interests the person is appointed to represent".

Clause 60 would amend s 18 of the *Regulation of Investigatory Powers Act 2000* to enable the disclosure of intercepted communications in asset freezing proceedings.

VIII Intercept evidence

Subject to a limited number of exceptions, evidence from intercepted communications or any related communications data is inadmissible in criminal proceedings under provisions currently set out in section 17 of the *Regulation of Investigatory Powers Act 2000.*[98] A similar prohibition was previously set out in section 9 of the *Interception of Communications Act 1985*, which was repealed by the 2000 Act.

On 2 February 2006, Charles Clark, then Home Secretary, made an oral statement about the renewal of the *Prevention of Terrorism Act 2005*. In it, he said the Government was seeking to find a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence.[99]

On 28 February 2006, the then Assistant Commissioner of the Metropolitan Police, Andy Hayman, gave oral evidence to the Home Affairs Committee in connection with the Committee's inquiry into terrorism detention powers. In the course of his evidence, Assistant Commissioner Hayman noted that his view, and those of the Association of Chief Police Officers (ACPO), on the use of intercept evidence in court had changed over time. In particular, he said that while he originally had concerns that use of such evidence would disclose methodology, he had concluded that that argument was "well and truly worn out". He added that

> I think I am moving, as I know ACPO is, to a conclusion that in a selected number of cases, not just for terrorism but also for serious crime, it would be useful. I think also it does make us look a little bit foolish that everywhere else in the world is using it to good effect.[100]

In October 2006, JUSTICE published a report entitled *Intercept Evidence: Lifting the Ban.* It argued that:

> The report details how prosecutors in Australia, Canada, New Zealand, South Africa and the United States regularly use intercept evidence in prosecuting

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98 See for example, *Archbold*, Sweet and Maxwell, 2008, paras 25-349-25-380

99 HC Deb, 2 February 2006 c479

100 Home Affairs Committee, *Terrorism Detention Powers*, 28 February 2006, HC 910-iii, available at: http://pubs1.tso.parliament.uk/pa/cm200506/cmselect/cmhaff/uc910-iii/uc91002.htm (on 31 January 2008)

> serious organised crime and terrorist offences. It also shows how principles of public interest immunity are used in those countries to protect sensitive intelligence material from being disclosed in criminal proceedings.[101]

Nonetheless, the then Interception of Communications Commissioner,[102] Sir Swinton Thomas said in 2007:

> In my last Report I said that the question of the admission of intercept material in criminal proceedings had been discussed at some length in Parliament, the media and beyond. The aim of all concerned in the intercepting agencies is to use the material to best advantage to detect and prevent terrorism and serious crime. If it was a simple matter to change the law to allow intercept to be used evidentially without losing the very substantial benefits delivered by the existing intelligence only regime, I have no doubt that it would have been done many years ago. The truth is that there is no simple way of achieving this. I concluded by saying that I had no doubt that the balance of argument fell firmly against any change in the law, and that any change in the law, would, overall, be damaging to the work of the security, intelligence and law enforcement agencies.[103]

In his report reviewing the operation of the *Prevention of Terrorism Act 2005* in 2006, which was published on 19 February 2007[104], Lord Carlile QC noted that much of the information on which decisions concerning Control Orders were based was derived from intelligence. He went on to say:

> The sources and content of such intelligence in most instances demand careful protection in the public interest, given the current situation in which a concerted and strategic response to terrorism (and especially suicide bombings) is needed. The techniques of gathering intelligence, and the range of opportunities available, are wide and certainly in need of secrecy. Human resources place themselves at risk – not least, by any means, those who offer unsolicited information out of disapproval of conduct and events at which they may have been and might continue to be present.
>
> That is not to say that there might possibly be a few cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and converted into criminal evidence. Although the availability of such evidence would be rare and possibly of limited use, I restate that it should be possible for it to be used and that the Law should be amended to a limited extent to achieve that.[105]

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101 JUSTICE, *Intercept Evidence: Lifting the Ban*, October 2006, available at www.justice.org.uk

102 The Interception of Communications Commissioner reviews the issue and operation of warrants permitting the interception of mail and telecommunications and the acquisition of communications data by the intelligence and security agencies, Ministry of Defence and law enforcement organisations, and the arrangements for handling the material

103 Sir Swinton Thomas, *Report of the Interception of Communications Commissioner for 2005-2006*, HC 315, 19 February 2007, available at: http://www.official-documents.gov.uk/document/hc0607/hc03/0315/0315.pdf (on 31 January 2008)

104 Lord Carlile QC, *Second report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* 19 February 2007, available at: http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/Lord-Carlile-pta-report-2006.pdf?view=Binary (on 5 February 2008)

105 *Ibid*, paras 34-35

During the *Serious Crime Bill's* proceedings in Committee in the House of Lords, the former Law Lord, Lord Lloyd of Berwick (who had carried out the review of anti-terrorist legislation which had preceded the introduction of the *Terrorism Act 2000*) sought to introduce an amendment that would have provided for the admissibility of intercept evidence in cases involving serious crime. In opposing Lord Lloyd's amendment, the then Home Office minister Baroness Scotland said the Government's position had always been that lifting the ban on intercept evidence would be an advantage of it could be safely deployed. She went on to echo the view of the then Interception of Communications Commissioner, Sir Swinton Thomas, that lifting the ban in the way proposed by Lord Lloyd's amendments would cause grave damage to the UK's capability and that protection was vital.[106]

Baroness Scotland concluded by seeking to reassure peers that the issue had been rigorously examined and would continue to be rigorously examined during the continuing review. Lord Lloyd of Berwick subsequently withdrew his amendment but said he would bring the matter back at a later stage.[107] When the Bill was considered on Report in the House of Lords on 25 April 2007, Lord Lloyd again moved amendments designed to enable the admission of intercept evidence in cases involving serious crime. His amendments were again opposed by the Government but they were agreed to on division by a majority of 61.

On 7 June 2007 the then Home Secretary, Dr John Reid, published the *Government Discussion Document Ahead of Proposed Counter Terror Bill 2007* in which he made the following comments about intercept evidence:

> The Government's position on intercept as evidence has consistently been that we would only change the law to permit intercept evidence if the necessary safeguards can be put in place to protect sensitive techniques and the potential benefits outweigh the risks.
>
> The right approach is to address this carefully and fully before deciding on whether to use intercept as evidence. That is what we are doing. However we believe that we now need to reach a conclusion on this issue. Therefore, subject to further discussions to agree the structure and timescale, I am today announcing that we will commission a review of intercept as evidence on Privy Counsellor terms.[108]

Lord Lloyd's amendments on intercept evidence were removed in the Commons.

In January 2008, it was reported that Sir Paul Kennedy, the current Interception of Communications Commissioner, had concluded that "the benefits of any change in the law [to intercept evidence] are heavily outweighed by the disadvantages."[109]

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106 HL Deb, 7 March 2007, c302-303

107 *Ibid*, c314

108 Home Office, *Government Discussion Document Ahead of Proposed Counter Terror Bill 2007*, June 2007, p4

109 *The Guardian*, "Watchdog sides with MI5 to reject phone-tap evidence", 29 January 2008, available at http://politics.guardian.co.uk/terrorism/story/0,,2248601,00.html (on 29 January 2008)

The Privy Counsellor Review, led by Sir John Chilcot, reported on 6 February 2008, concluding that intercept evidence should be used subject to a number of important conditions. The Prime Minister made a statement on that date, saying:

> Briefly, the report examines in detail both the potential benefits of accepting intercept as evidence and the risks that might arise from such acceptance. However it concludes that it should be possible to find a way to use some intercept material as evidence, provided – and only provided, that certain key conditions can be met. […] The report sets out nine conditions in detail. They relate to complex and important issues and include: giving the intercepting agencies the ability to retain control over whether their material is used in prosecutions; ensuring that disclosure of material cannot be required against the wishes of the agency originating the material; protecting the current close co-operation between intelligence and law enforcement agencies, which is crucial; and ensuring that agencies cannot be required to transcribe or make notes of material beyond a standard of detail that they deemed necessary. The committee that reported to us acknowledges that further extensive work is needed to see whether and how those and other conditions – intended to protect sensitive techniques, safeguard resources, and ensure that intercept can still be used effectively for intelligence – can be met. That is a unanimous recommendation that the Government accept, so we will proceed to develop a detailed implementation plan under which material might be made available for use in criminal cases in England and Wales. […] Designing a regime to meet the Chilcot conditions will require, as the committee notes, a substantial programme of work, covering legal, operational and technical issues. The work must involve and engage the intelligence agencies, Government Departments, the legal system, and those responsible for communications. […] The Chilcot team also told me they would not expect the work to be concluded in time to inform the Counter-Terrorism Bill currently before Parliament.[110]

In answer to a question by Andrew Dismore, the Chairman of the Joint Committee on Human Rights, as to whether the Government would consider including enabling powers in the *Counter-Terrorism Bill*, the Prime Minister responded:

> That was not the recommendation of the Chilcot report. When I met the membership of the committee, we had a detailed discussion about some of those issues. If we said the enabling legislation could be introduced before we had reached a solution to some of the problems that had been raised, we would raise false expectations that we had such solutions. Those solutions still have to be found, and the legal and technical work must still be done.[111]

Moves to allow intercept evidence were immediately welcomed by the Law Society[112], JUSTICE[113], and, Liberty[114], all of whom argued that the Government's decision to allow

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[110] HC Deb, 6 February 2008, c959-961

[111] *Ibid*, c968

[112] Law Society Press Release, *Law Society supports prime minister's decision to use phone tap evidence in court*" , 6 February 2008, available at: http://www.lawsociety.org.uk/newsandevents/pressreleases/view=newsarticle.law?NEWSID=384305 (on 8 February 2008)

the use of intercept evidence in court should help to reduce the length of time suspects need to be detained pre-charge.

The *Counter-Terrorism Bill* does not contain many provisions relating to intercept evidence, save in respect of **Clause 60** (discussed above) and the use of such evidence in inquests and inquiries, which is discussed below.

IX Inquests and inquiries

[by Catherine Fairbairn]

A. Background

a. Inquests

The *Coroners Act 1988* requires coroners to hold an inquest where there is reasonable cause to suspect that the deceased died a violent or unnatural death, a sudden death of which the cause is unknown, or has died in prison.[115] The purpose of an inquest is to establish who the deceased was, where and when the deceased died, and how the deceased came by his or her death.

An inquest is a court proceeding and must be held in public unless the coroner directs that the public be excluded from the inquest or any part of it in the interests of national security.[116] The procedure is inquisitorial (as opposed to being adversarial as in other court cases where there are contending parties). The primary purpose of the inquest is to find facts rather than to attribute blame or liability. The coroner decides which documents should be produced, which evidence will be heard at the inquest and the order in which witnesses give evidence. At the inquest, representatives of the family and certain other interested parties may ask questions of witnesses.

b. Juries

Section 8(3) of the *Coroners Act 1988* requires the coroner to sit with a jury in certain circumstances. The Coroner must summon a jury if it appears to him, either before he proceeds to hold an inquest or in the course of an inquest begun without a jury, that there is reason to suspect that the death:

- occurred in prison or in such a place or in such circumstances as to require an inquest under any other Act
- occurred while the deceased was in police custody, or resulted from an injury caused by a police officer in the purported execution of his duty
- was caused by an accident, poisoning or certain notifiable diseases or

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113 JUSTICE press release, *JUSTICE welcomes PM's announcement on intercept evidence*, 6 February 2008

114 Liberty Press Release, *Liberty welcomes move to allow intercept evidence in court*, 6 February 2006, available at: http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/welcome-intercept-evidence.shtml (on 8 February 2008)

115 Section 8

116 *Coroners Rules 1984,* Rule 17, SI 1984/552

- occurred in circumstances prejudicial to the health or safety of the public or any section of the public.

According to statistics produced by the Department for Constitutional Affairs (as it was then), jury inquests in 2006 accounted for just 2% of the total number:

> As in previous years, nearly all inquests in 2006 were held without juries (some 27,900, representing 98 per cent of the total number of inquests). The number of inquests held with juries in 2006 was 570, a modest rise of 50 from 2005, when the lowest figure was reported since these particular figures were first collected around thirty years ago.[117]

c. Human rights

Article 2 ECHR establishes the right to life and imposes on the state both negative obligations not to take life intentionally and positive obligations to protect life. The positive duty to protect life implies a duty to investigate unnatural deaths, including but not confined to deaths in which state agents may be implicated.[118] In 2004, the Joint Committee on Human Rights considered the compatibility with Article 2 of current systems of investigation, in relation to deaths in custody:

> 32. Article 2 also places a positive duty on the state to investigate following any death in state custody, whether or not involving agents of the State (Edwards v UK). In order to satisfy Article 2, the investigation must be effective. The ECtHR has held that it must be—
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> - on the state's own initiative (e.g. not civil proceedings);
> - independent, both institutionally and in practice;
> - capable of leading to a determination of responsibility and the punishment of those responsible;
> - prompt;
> - allow for sufficient public scrutiny to ensure accountability;
> - allow the next of kin to participate.
>
> These principles have now been approved by the House of Lords in the case of ex parte Amin (the Zahid Mubarek case).[119]

If the family of the deceased are unable to participate effectively in any inquiry into the death, the investigation may fail to comply with the requirements of Article 2. In a 2002 case, *Edwards v United Kingdom*, an inquiry into the death of the applicants' son sat in private, during its hearing of evidence and witnesses. The applicants were only able to

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[117] Department for Constitutional Affairs, *Statistics on Coroners Statistical Bulletin*, April 2007, http://www.dca.gov.uk/statistics/cb2007-part1.pdf

[118] *McCann v UK* (1996) 21 EHRR 97; *Ergi v Turkey* (2001) 32 EHRR 18; *Yasa v Turkey* (1999) 28 EHRR 408, Joint Committee on Human Rights, *Scrutiny: First Progress Report,* 24 January 2005, HL Paper 26 HC 224, p48, http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/26/26.pdf (at 7 February 2008)

[119] Joint Committee on Human Rights, Scrutiny: *Deaths in Custody*, 14 December 2004, HL Paper 15 HC 137, p14-15, http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/15/15.pdf (at 7 February 2008)

attend three days of the inquiry when they were giving evidence. They were not represented and were unable to put any questions to witnesses. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. The European Court of Human Rights found that they could not be regarded as having been involved in the procedure to the extent necessary to safeguard their interests. The Court also concluded that the lack of power to compel witnesses and the private character of the proceedings failed to comply with the requirements of Article 2 to hold an effective investigation into the deceased's death and that accordingly there had been a violation of the procedural obligation of Article 2.[120]

d. The death of Azelle Rodney

Azelle Rodney was fatally wounded in the course of a police operation in 2005. The Independent Police Complaints Commission referred its investigation report to the Crown Prosecution Service. In July 2006, the Crown Prosecution Service announced that there was insufficient evidence to disclose a realistic prospect of conviction against any officer for any offence in relation to the fatal shooting.[121]

In August 2007, a coroner, Andrew Walker, said that an inquest into the death of Azelle Rodney was impossible because of evidence from police that could not be made public. Apparently a number of redactions (passages crossed out) had been made under the *Regulation of Investigatory Powers Act 2000* (RIPA). The solicitor acting for the deceased's family was quoted as saying that he had written to the Home Office and Ministry of Justice asking them to change the law so that the coroner could proceed with the inquest. He said he had warned them that if they refused to legislate he would take the matter to the High Court and seek to obtain a declaration of incompatibility to show RIPA was in breach of the *Human Rights Act*.[122]

A Ministry of Justice spokesman has been quoted as saying: "The Government is aware of the issues raised by this inquest and it recognises that in a very small number of inquests a change to the law may be required. It is proposing to legislate as soon as is practicable."[123]

e. Coroner reform

The Government is proposing generally to reform the law relating to coroners and published the draft *Coroners Bill* in June 2006.[124] A separate Library standard note (SN/HA/4075) deals with the draft Bill.

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120 *Paul and Audrey Edwards v. The United Kingdom,* (2002) 35 EHRR 487 http://www.echr.coe.int/eng/Press/2002/mar/Edwardsjudepress.htm (at 7 February 2008)

121 CPS statement:, *Fatal shooting of Azelle Rodney,* 4 July 2006, http://www.cps.gov.uk/news/pressreleases/archive/2006/142_06.html (at 6 February 2008)

122 "Shot man's family want law change", *BBC News,* 5 November 2007, http://news.bbc.co.uk/1/hi/uk/7076326.stm (at 6 February 2008)

123 "Shot man's family back law change", *BBC News,* 3 December 2007, http://news.bbc.co.uk/1/hi/uk/7125038.stm (at 6 February 2008)

124 *Coroner Reform: The Government's Draft Bill,* CM 6849, http://www.dca.gov.uk/legist/coroners_draft.pdf (at 6 February 2008)

The draft Bill includes a provision which would enable coroners to ban publication of the name of the deceased or any information that might identify that person.

However, following consultation, Bridget Prentice, Parliamentary Under-Secretary, Ministry of Justice, announced that this clause would be removed from the Bill:

> The Government published a draft Coroners Bill in June 2006 in which it proposed to give coroners discretion to impose on the media anonymous reporting in some inquest cases. Since the Bill was published, this strand of policy has been subject to extensive consultation with all those with an interest. Those consulted include the voluntary sector, bereaved families and media organisations, as well as coroners and others who work within the service. As a result of the consultation, the Government have reconsidered the policy and decided to remove this clause from the Bill, and retain the current rules about the reporting of inquests. The Bill will be brought before Parliament as soon as time allows.[125]

B. The Bill

Part 6 of the Bill, **Clauses 64 to 67**, deals with inquests and inquiries.

1. Inquest without jury

Clause 64 would insert a new section 8A into the *Coroners Act 1988* and would enable the Secretary of State to certify, in relation to an inquest, that in her opinion, the inquest would involve the consideration of material that should not be made public:

- in the interests of national security
- in the interests of the relationship between the United Kingdom and another country or
- otherwise in the public interest.

The certification could be made in respect of an inquest which had not yet started or at any time before an inquest was concluded. The effect of such a certificate would be that the inquest would be held without a jury (and any jury already summoned would be discharged). The Secretary of State would have power to revoke a certificate at any time before the conclusion of the inquest.

2. Specially appointed coroners

Clause 65 would insert new sections 18A to 18C into the *Coroners Act 1988* and would enable the Secretary of State to appoint a "specially appointed coroner" to hold an inquest which is the subject of a certificate under section 8A, instead of the coroner who would otherwise have jurisdiction. The specially appointed coroner would have to be a coroner already or someone qualified to be appointed as a coroner (that is, a lawyer or a medical practitioner, in either case of not less than 5 years standing). New section 18B(4) would enable the Secretary of State to make regulations (subject to the negative

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[125] HC Deb, 25 October 2007, c20WS

resolution procedure) to provide for the Bill and the law relating to coroners and coroners' inquests to have effect in relation to specially appointed coroners "with such modifications as may be specified in the regulations". New section 18C would enable the Secretary of State to revoke the appointment of a specially appointed coroner in specified circumstances.

3. Intercept evidence

a. Inquiries

Clause 66 would amend section 18(7)(c) of RIPA to allow disclosure of intercept material to a person appointed as counsel to an inquiry held under the *Inquiries Act 2005*, in addition to the panel of an inquiry.[126] Section 18(8A) of RIPA already provides that the panel of an inquiry shall not order a disclosure under subsection (7)(c) except where it is satisfied that the exceptional circumstances of the case make the disclosure essential to enable the inquiry to fulfil its terms of reference.

b. Inquests

Clause 67 would also further amend section 18(7)(c) of RIPA, in this case to allow disclosure of intercept material to a coroner or to a person appointed as counsel to an inquest where a certificate has been issued under section 8A of the *Coroners Act 1988*. A coroner (including a specially appointed coroner) would only be able to order disclosure if (s)he is satisfied that the exceptional circumstances of the case make the disclosure essential to enable the matters that are required to be ascertained by the inquest to be ascertained.

C. Report of the Joint Committee on Human Rights

In their February 2008 report[127], the Joint Committee on Human Rights criticised the late introduction of the clauses relating to inquests, which it said "could compromise the independence of controversial inquests into the deaths of terrorism suspects in police operations or the deaths of service personnel in Iraq".[128] The Government had previously consulted on other measures which might be included in the Bill but not on the measures concerning coroners' inquests.

In a press release which accompanied publication of the report, Andrew Dismore, the Chair of the Joint Committee, said:

> We are seriously alarmed at the prospect that under these provisions inquests into deaths occurring in circumstances like that of Jean Charles de Menezes, or British servicemen killed by US forces in Iraq, could be held by a coroner

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126 A separate Library standard note, *Investigatory inquiries and the Inquiries Act 2005* SN/PC/2599 sets out general information about inquiries

127 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill,* 7 February 2008, HL Paper 50, HC 199, Session 2007-08, available at: http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf (at 7 February 2008)

128 Joint Committee on Human Rights press notice, *Committee rejects 42-day pre-charge detention period for terrorism suspects and proposes alternative procedures,* 7 February 2008

> appointed by the Secretary of State sitting without a jury. Inquests must be, and be seen to be, totally independent, and in public to secure accountability, with involvement of the next of kin to protect their legitimate interests. When someone dies in distressing, high profile circumstances their family need to see and feel that justice is being done, and where state authorities are involved there is a national interest in accountability as well.[129]

In the Report, the Joint Committee set out concerns about the human rights implications of the proposed clauses and particularly the implications for the UK's obligations under Article 2 European Convention on Human Rights:

> The Bill provides for the Secretary of State herself to appoint a "specially appointed coroner" and to require the inquest to be conducted without a jury where, in her opinion, the inquest will involve the consideration of material that should not be made public in the interests of national security, in the interests of the relationship between the UK and another country, or otherwise in the public interest.[3] We are disappointed to note that the Explanatory Notes to the Bill contain no analysis of the human rights implications of these provisions. A letter from the Home Secretary dated 21 January 2008, however, claims that "the proposed changes are necessary in order to ensure that we are able to comply with our Article 2 obligations while protecting the integrity of the material in question."[4]
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> **6. On first inspection we find this an astonishing provision with the most serious implications for the UK's ability to comply with the positive obligation in Article 2 ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents.**
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> 7. It is well established in both ECHR and UK case law that Article 2 requires, for example, that the person carrying out the investigation must be independent from those implicated in the events, there must be a sufficient element of public scrutiny to secure accountability in practice as well as theory, and the investigation must involve the next of kin of the deceased to the extent necessary to protect their legitimate interests.[5] We are alarmed at the prospect that under these provisions inquests into the death of Jean Charles de Menezes, or British servicemen killed by US forces in Iraq, could be held by a coroner appointed by the Secretary of State, sitting without a jury.
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> 8. We will be writing to the Home Secretary about the compatibility of these provisions with the UK's obligations to investigate deaths in Article 2 ECHR and will be reporting to Parliament in due course. We think that the significance of the provision in the Bill concerning coroners' inquests warrants it being drawn to the attention of both Houses at the earliest possible stage.[130]

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[129] *Ibid*

[130] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill,* 7 February 2008, HL Paper 50, HC 199, pp 5-6, http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf (at 7 February 2008)

The letter from the Home Secretary to the Shadow Home Secretary, David Davis, dated 21 January 2008, which is referred to by the Joint Committee, is set out in Appendix 2 to the Report. The Home Secretary sets out the Government's view of how the legislative proposals would ensure compliance with Article 2 and how the interests of bereaved families could be represented:

> It may … be necessary in some cases for coroners' inquests to consider material that could not be disclosed publicly without harming the public interest (for example, for reasons of national security or international relations). But material that cannot be disclosed publicly could not be shown to the jury, as the finders of fact. This creates the potential for coroners' inquests to be incompatible with Article 2 of the ECHR where the sensitive material is central to the inquest. In order to remove this potential, we have developed two legislative proposals which will ensure that coroners' inquests in England and Wales can always comply with Article 2 of the ECHR.
>
> First, it is proposed that coroners should be required to hold inquests without juries in all cases which the Secretary of State has certified will involve consideration of material that could not be disclosed publicly without damaging the public interest for reasons of national security, international relations or for other public interest reasons. Sitting without a jury, suitably trained and cleared coroners, as the finders of fact in these inquests, will be able to see the material in question. It will be possible for coroners in certified cases to invite suitably trained and cleared counsel to assist the inquest. Counsel to the inquest, one of whose functions will be to represent the interests of bereaved families, will also be able to see the material in question.
>
> Second, we also propose to add coroners presiding over such inquests, and counsel appointed for the purpose of assisting them, to the tightly drawn list of exceptions in section 18 of the Regulation of Investigatory Powers Act 2000 which would allow material derived from intercept to be disclosed to them where the exceptional circumstances of the case make the disclosure essential.
>
> We propose to make a corresponding amendment to section 18 of the Regulation of Investigatory Powers Act 2000 to permit intercept material to be disclosed, in exceptional circumstances, to counsel to an inquiry held under the Inquiries Act 2005. The panel to an inquiry can already seek disclosure of intercept in exceptional circumstances. The Government is firmly of the view that the proposed changes are necessary in order to ensure that we are able to comply with our Article 2 obligations while protecting the integrity of the material in question. We are working with colleagues to consider whether equivalent provisions should be made for Northern Ireland and Scotland.[131]

[131] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill,* 7 February 2008, HL Paper 50, HC 199, Session 2007-08, Ev 10-11, http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf (at 7 February 2008)

D. Comment from interested parties

INQUEST

INQUEST is a charitable organisation which states that it provides "a specialist, comprehensive advice service to bereaved people, lawyers, other advice and support agencies, the media, MPs and the wider public on contentious deaths and their investigation".[132] INQUEST has condemned the proposals in the *Counter-Terrorism Bill* which it said "give unprecedented powers to the Secretary of State to intervene in death in custody inquests where issues of state intelligence are involved":

> INQUEST has written today to Bridget Prentice MP, Parliamentary Under Secretary of State responsible for coroners to express its extreme concern that this measure has been introduced without any consultation. (…)
>
> The family of Azelle Rodney, shot seven times by police in a pre-planned surveillance operation in April 2005, have already been told that their case will be subject to the new measures.
>
> Daniel Machover, solicitor for Susan Alexander, Azelle Rodney's mother said:
>
> "These proposals mean that Ministers and those responsible for intelligence gathering will never be held properly to account for the validity of their tactics. It is a fiasco, bearing no resemblance to a fair system of justice. Presented with the problem of what to do with sensitive material that is relevant to the circumstances of how and why a person was killed by a state agent, the government proposes to remove the vital democratic accountable layer of a jury and hide away from the bereaved family crucial evidence about the death. My client, Susan Alexander, is very distressed that having expected a new law which would finally enable her to see and question the key evidence that led to the police shooting of her son, she will end up being worse off than before."[133]

Press coverage

Press coverage of Part 6 of the Bill includes:

- "Backlash over jury ban proposals", *BBC News,* 3 February 2008[134]
- "Fears over jury ban in 'secrecy' inquests", *Daily Telegraph,* 4 February 2008,[135]
- "Outcry over plan to hold controversial inquests in secret", *Daily Mail,* 4 February 2008,[136]
- "Is secret justice really justice?", *BBC News,* 4 February 2008,[137]

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[132] http://inquest.gn.apc.org/about_us.html (at 6 February 2008)

[133] INQUEST press release, *INQUEST condemns Government proposals for "secret" death in custody inquests*, 25 January 2008, http://inquest.gn.apc.org/pdf/2008/INQUEST_press_release_secret_custody_inquests.pdf (at 6 February 2008)

[134] http://news.bbc.co.uk/1/hi/uk_politics/7225090.stm (at 6 February 2008)

[135] http://www.telegraph.co.uk/news/main.jhtml;jsessionid=QIOBMG5YFOVKRQFIQMFSFF4AVCBQ0IV0?xml=/news/2008/02/04/njury104.xml (at 6 February 2008)

[136] http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=512155&in_page_id=1770 (at 6 February 2008)

- "Terrorism bill opens way for secret inquests", *Guardian,* 4 February 2008,[138]
- "MPs' anger over jury ban plans" *BBC News,* 7 February 2008,[139]

X Definition of terrorism, policing gas facilities and other miscellaneous provisions

A. Definition of terrorism

During the debate on the third reading in the House of Commons of the Bill that became the *Terrorism Act 2006*, Charles Clarke, who was then Home Secretary, said he had asked Lord Carlile to carry out a review of the definition of terrorism. Lord Carlile published his report on 15 March 2007.[140] His main conclusions were as follows:

> (1) There is no single definition of terrorism that commands full international approval.
>
> (2) The risks posed by terrorism and its nature as crime are sufficient to necessitate proportional special laws to assist prevention, disruption and detection.
>
> (3) A definition of terrorism is useful as part of such laws.
>
> (4) The current definition in the Terrorism Act 2000 is consistent with international comparators and treaties, and is useful and broadly fit for purpose, subject to some alteration.
>
> (5) Idiosyncratic terrorism imitators should generally be dealt with under non-terrorism criminal law.
>
> (6) The discretion vested in the authorities to use or not to use the special laws is a real and significant element of protection against abuse of rights.
>
> (7) The exercise of such discretion requires especial care by those in whom the discretion is vested.
>
> (8) New sentencing powers should be introduced to enable an additional sentence for ordinary criminal offences, if aggravated by the intention to facilitate or assist a terrorist, a terrorist group or a terrorist purpose.
>
> (9) Offences against property should continue to fall within the definition of terrorist acts.
>
> (10) Religious causes should continue to fall within the definition of terrorist designs.

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137 http://news.bbc.co.uk/1/hi/uk/7225830.stm (at 6 February 2008)
138 http://politics.guardian.co.uk/terrorism/story/0,,2251930,00.html (at 6 February 2008)
139 http://news.bbc.co.uk/1/hi/uk_politics/7231260.stm (at 7 February 2008)
140 Lord Carlile QC. *The Definition of Terrorism*, Cm 7052, March 2007

> (11) The existing law should be amended so that actions cease to fall within the definition of terrorism if intended only to *influence* the target audience; for terrorism to arise there should be the intention to *intimidate* the target audience.
>
> (12) The existing definition should be amended to ensure that it is clear from the statutory language that terrorism motivated by a racial or ethnic cause is included.
>
> (13) Extra-territoriality should remain within the definition in accordance with international obligations.
>
> (14) A specific statutory defence of support for a just cause is not practicable.
>
> (15) A new statutory obligation should require that the exercise of the discretion to use special counter-terrorism laws in relation to extraterritorial matters should be subject to the approval of the Attorney- General having regard to (a) the nature of the action or the threat of action under investigation, (b) the target of the action or threat, and (c) international legal obligations.
>
> (16) The law should not be amended to enable the use in the United Kingdom of the special laws against persons subject to diplomatic immunity.[141]

The civil liberties pressure group JUSTICE described Lord Carlile's report as "disappointingly narrow", arguing that some form of "just cause" exception should be considered to ensure different treatment for supporters of Al Qaeda than for supporters of the ANC under Apartheid.[142]

The need for a "just cause" defence and whether the definition of terrorism contained in the *Terrorism Act 2000* was compatible with the *European Convention on Human Rights* was recently tested in the case *R v F*.[143] In that case, the defendant was charged under s 58 of the *Terrorism Act 2000*, with two counts of being in possession of a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. The defendant accepted possession of one document; but argued that it was targeted at removing the Libyan Government, which, being an oppressive regime, was not included in the ambit of the 2000 Act. The Court of Appeal rejected this submission on the basis that the phrase "a country other than the UK" in s 1(4)(d) of the 2000 Act was plain and there was no reason why the legislation would support a distinction between oppressive and other regimes as it did not contain what some might describe as a "just cause" defence. The current Bill does not deal with this contentious question, but does seek to amend the definition of terrorism.

The Explanatory Notes to the Bill indicate that **clause 68** gives effect to Lord Carlile's 12th recommendation. The clause would amend the definition of terrorism contained in s 1(1) of the *Terrorism Act 2000*, to include within its ambit the use or threat of actions for the purpose of advancing a racial cause. Similar amendments are made to other legislation where the definition is used, including section 21 of the *Criminal Justice Act*

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141 *Ibid*, pp.47-48
142 See press notice available at www.justice.org.uk
143 [2007] EWCA Crim 243

2003, which makes provision in relation to the minimum term for mandatory life sentences.

The Explanatory Notes state that "although a racial cause will in most cases be subsumed within a political or ideological cause, this amendment is designed to put the matter beyond doubt".

B. Control Orders

The Bill that became the *Prevention of Terrorism Act 2005* was introduced in the House of Commons following a successful challenge to the human rights compatibility of the provisions for detaining foreign terrorist suspects previously contained in Part 4 of the *Anti-terrorism, Crime and Security Act 2001.* The 2005 Act was aimed at preventing terrorism-related activity by individuals, irrespective of their nationality or terrorist cause, through the use of two kinds of civil order, known as derogating and non-derogating Control Orders. These terms refer to the Government's view of the compatibility of the orders with the right to liberty and security set out in Article 5 of the European Convention on Human Rights (ECHR).[144]

Changes to the Control Order regime were suggested by the Government in its July 2007 paper. In particular, additional powers were sought to allow the police to enter premises and search premises (by force if necessary). These proposals were considered by Lord Carlile QC, who observed that:

> I support the conclusion of paragraph 57 of the first consultation paper that a self-standing system of powers of entry, search and seizure should be attached to the system for the enforcement of control orders. The enforcement of the system is difficult, and the existing powers are not entirely adequate where there is not suspicion of a breach of the control order conditions, but there is a suspicion of other terrorism activities.
>
> There are three significant gaps in the ability of the police to enter and search the property of an individual subject to a control order for the purposes of monitoring compliance and enforcing the order.[145]

The proposals are being implemented in the Bill, the relevant provisions being contained in **Clauses 71-74**. The Explanatory Notes to the Bill explain that **Clause 71** would add three new sections after s 7 of the *Prevention of Terrorism Act 2005*. These would provide constables with the power to enter and search the premises of individuals subject to control orders who were reasonably suspected of absconding or of failing to grant access when required to do so. The provisions would also allow a constable to apply to a justice of the peace for a warrant to enter and search premises for the purpose

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[144] Further information on the control order regime can be found in the Library Standard Note, *Control Orders and the Prevention of Terrorism Act 2005*, SNHA 3438. In particular, it is worth noting that there have been a number of legal challenges to the regime and the House of Lords has ruled in favour of the controlees in a number of these cases.

[145] Lord Carlile QC, *Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill*, December 2007, Cm7262, p14-15, available at: http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/lord-carlile-report?view=Binary (on 5 February 2008)

of monitoring compliance with a control order. **Clause 71(2)** would make it an offence to obstruct a police officer acting under any of the new sections, punishable upon conviction by a fine not exceeding level 5 on the standard scale (currently £5,000) or a prison sentence of up to 51 weeks (in England and Wales) or six months (in Scotland or Northern Ireland). The amendments would have effect on all existing persons subject to a control order, regardless of when the control order was made.

The Joint Committee on Human Rights has argued that the "amendments to the control order regime […] are largely in the nature of relatively minor "tidying up" amendments in the light of the first few years of the regime's operation".[146] It has stated that the measures:

> Do not address at all the most controversial aspects of the control orders regime which have been the subject of intense parliamentary debate, frequent adverse comment by us; and now, important judgments of the House of Lords […]. In our view […] the Bill provides an opportunity for Parliament to rectify some of the most significant defects in the control order regime which have been identified in the course of the many legal challenges to that regime and to particular orders under it.[147]

The Committee issued a further report on Control Orders in February 2008[148] in which it indicated that modifications to the Control Order regime should be taken forward in the *Counter-Terrorism Bill*. On 18 February 2008, Lord Carlile published his Third Report into the operation of the *Prevention of Terrorism Act 2005*. One issue which he picked up on was the "endgame" for Control Orders. He observed that there had to be "an end of the order at some point, in every case" and went on to say that:

> 49. Last year, I advised that, as a matter of urgency, a strategy is needed for the ending of the orders in relation to each controlee: to fail to prepare for this now, whether on a case by case basis or by legislation (if appropriate) would be short-sighted.
>
> 50. It is now my view that it is only in rare cases that control orders can be justified for more than two years. After that time, at least the immediate utility of even a dedicated terrorist will seriously have been disrupted. […]
>
> 51. I advise that there should be a recognised and possibly statutory presumption against a control order being extended beyond two years, save in genuinely exceptional circumstances. However, if a former controlee brings him/herself within the legislation thereafter, I do not suggest that they could not be made the subject of a fresh control order, on the basis of new material and a change in circumstances.

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146 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eight Report): Counter-Terrorism Bill*, HC 199, Session 2007-08, 7 February 2008, p17

147 *Ibid*

148 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation*, HC 356, Session 2007-08, 20 February 2008, available at: http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/57/57.pdf (on 25 February 2008)

C. Terrorist offences

Clause 69 would amend Section 58 of the *Terrorism Act* 2000, to introduce new terrorist offences relating to the eliciting, publishing or communication of information about members of the armed forces where that information "is of a kind likely to be useful to a person committing or preparing to commit an act of terrorism".

It would be a defence for a person charged with the offence to prove that they had a "reasonable excuse" for their actions. The Explanatory Notes indicate that.

> A person who is able to prove that he had a reasonable excuse for his actions is able to rely on this as a defence. This must be read with s 118 of the 2000 Act (as amended by clause 69(3)), the effect of which is to limit the burden on the accused, in respect of certain provisions in the Act, to prove a particular matter if the accused wishes to rely on proof of that matter as a defence. If the accused adduces evidence which is sufficient to raise an issue with respect to a particular matter, the prosecution must then prove beyond reasonable doubt that it does not exist.

The offence would be punishable with a maximum sentence of 10 years imprisonment.

Clause 70 is what the Government describes as a "clarifying amendment" to s 19(1) of the 2000 Act. This relates to terrorist property and the disclosure of information about possible offences. The amendment is designed to make it clear that the offence in s 19 of the 2000 Act of failing to disclose a belief or suspicion of an offence under sections 15-18 of that Act (a terrorist finance offence) applies to all persons in employment, whether or not they are employed in a trade, profession or business.

D. Costs of policing at gas facilities

[by Brenda Brevitt, Science and Environment Section]

Part 7 of the *Counter-Terrorism Bill* includes measures to fund increased security at gas facilities, which are part of the critical national infrastructure. The measures in **Clauses 77 to 82** of the Bill would allow the Secretary of State to recover all or part of the costs of additional policing at the sites from designated gas transporters.

The United Kingdom is heavily dependant on imported gas to meet its current and future energy needs. There has been considerable planning and expenditure to build resilience into the gas supply and distribution system; including the negotiation of additional supplies of gas from countries such as Norway; new infrastructure for the import of liquefied natural gas from across the world, and increased storage capacity at landing sites around the UK. In addition, the Government's energy policy is based around maintaining diversity across the UK's energy supply mix. At the same time, natural gas is heavily used for both domestic and industrial heating and energy generation; it is likely that severe and prolonged disruption to the supply and distribution network would have a destabilising effect on the economy and society.

a. Gas distribution Network

National Grid Gas plc operates a 6,000 km network of high-pressure gas pipelines known the National Transmission System. There are eight gas distribution networks (GDNs), which each cover a separate geographical region of Britain. In addition there are a number of smaller networks owned and operated by Independent Gas Transporters (IGTs).[149]

In order to be able to distribute gas on the distribution systems, a GDN and IGT must hold a licence. Standard Licence Conditions are placed upon licensed gas distributors under the terms of the *Gas Act 1986*, as amended by the *Utilities Act 2000.* These are administered by the energy regulator, Ofgem (Office of Gas and Electricity Markets) and require, amongst other things that the company has in place adequate measures to ensure security of supply, including protection of the critical national infrastructure. Part of the costing arrangements includes an element for policing arrangements. The licences contain conditions which also limit the amount of revenue which these companies can recover from their customers.

b. Consultation phase

The measures were proposed by the Government in the Home Office document published in July 2007.

> Increased security at key gas sites
>
> 67 There is an ongoing operational requirement to provide appropriate security measures at key gas supply sites, including the deployment of additional police services, in order to counter the potential risks of disruption to the national gas supply. Secure gas supplies are essential for heating our homes, for business and public life, and for electricity generation. It is vital that the key infrastructure to deliver gas supplies is appropriately protected.
>
> 68 We have deployed armed police to guard key gas supply sites because we take protection of critical national infrastructure very seriously. The Bill will put funding of this dedicated extra policing onto a clear legal footing. We are confident deployment of this additional policing is a proportionate measure.[150]

The *Summary of Responses to the Counter Terrorism Bill* Consultation noted that the measure received support as it would ensure that police forces would not be burdened with the additional costs of policing these installations:

> Funding of Increased security at key gas sites

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[149] See: National Grid distribution webpage accessed 25 January 2008 http://www.nationalgrid.com/uk/Gas/About/How+Gas+is+Delivered/ National Gas Distribution webpage accessed 25 January 2008 http://www.nationalgrid.com/corporate/Our+Businesses/gas_distribution/; Northern Gas website accessed 25 January 2008 http://www.northerngasnetworks.co.uk/cms/36.html; Wales and West Utilities webpage accessed 25 January 2008 http://www.walesandwestutilities.co.uk/network_overview.asp?GroupKeyPos=02,01,08;

[150] Home Office, *Possible measures for inclusion in a future Counter Terrorism Bill*, 25 July 2007

> 88. This measure would ensure funding for appropriate security measures at key gas supply sites, including the deployment of additional police services, in order to counter the potential risks of disruption to the national gas supply should there be an attack. This proposal did not receive any major concerns.
>
> 89. This proposal received support on the basis that it will ensure police forces are not burdened with the cost of policing such installations. It was also suggested that this proposal should be extended to other critical national infrastructure sites.

ACPO (the Association of Chief Police Officers) responded to the consultation:

> ACPO is supportive of this proposal as it is a realistic scenario that as the national threat level picture has increased across the country, so too has protective security measures at key economic sites. ACPO believe it would seem eminently sensible to maintain/ increase the levels of awareness and security at these sites. Consideration should be given to include remote/rural oil installations and other sites, which are considered equally vulnerable. The need to provide appropriate security at all key sites should be a legal requirement for site owners. ACPO welcome the proposal to legislate for the funding of increased security.[151]

The Ministry of Defence Police and Guarding Agency[152] is responsible for policing key infrastructure sites. The Bill will place on a statutory footing funding arrangements already in operation through a Memorandum of Understanding to recoup these costs via gas transmission charges.

c. The Clauses

Explanatory Notes published with the Bill set out in detail the intended purpose of **Clauses 77 to 82**.[153] In essence:

> 304. Clauses 77 to 82 make provision for the payment of costs incurred in providing extra police services at key gas sites. Costs incurred by the Ministry of Defence or by a police authority on or after 16 January 2007 in policing, at the Secretary of State's request, key gas sites with a view to their increased protection will be funded, with effect from the commencement of these provisions, by gas transporters who may pass on the costs to gas consumers in accordance with arrangements made by the Secretary of State.
>
> 305. The funding arrangements can apply where the Secretary of State considers that the provision of extra police services at the site is necessary because of a risk of loss of or disruption to the supply of gas connected with it; and that such loss or disruption would have a serious impact on the UK or any part of it.[154]

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151 ACPO response to possible measures for inclusion in a future CT BIll

152 http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/SecurityandIntelligence/MDPGA/

153 Counter Terrorism Bill Explanatory Notes Bill 63-EN http://www.publications.parliament.uk/pa/cm200708/cmbills/063/en/2008063en.pdf

154 *Ibid*

The Explanatory Notes explain that, in the opinion of the Secretary of State, the provisions do not engage the European Convention on Human Rights.

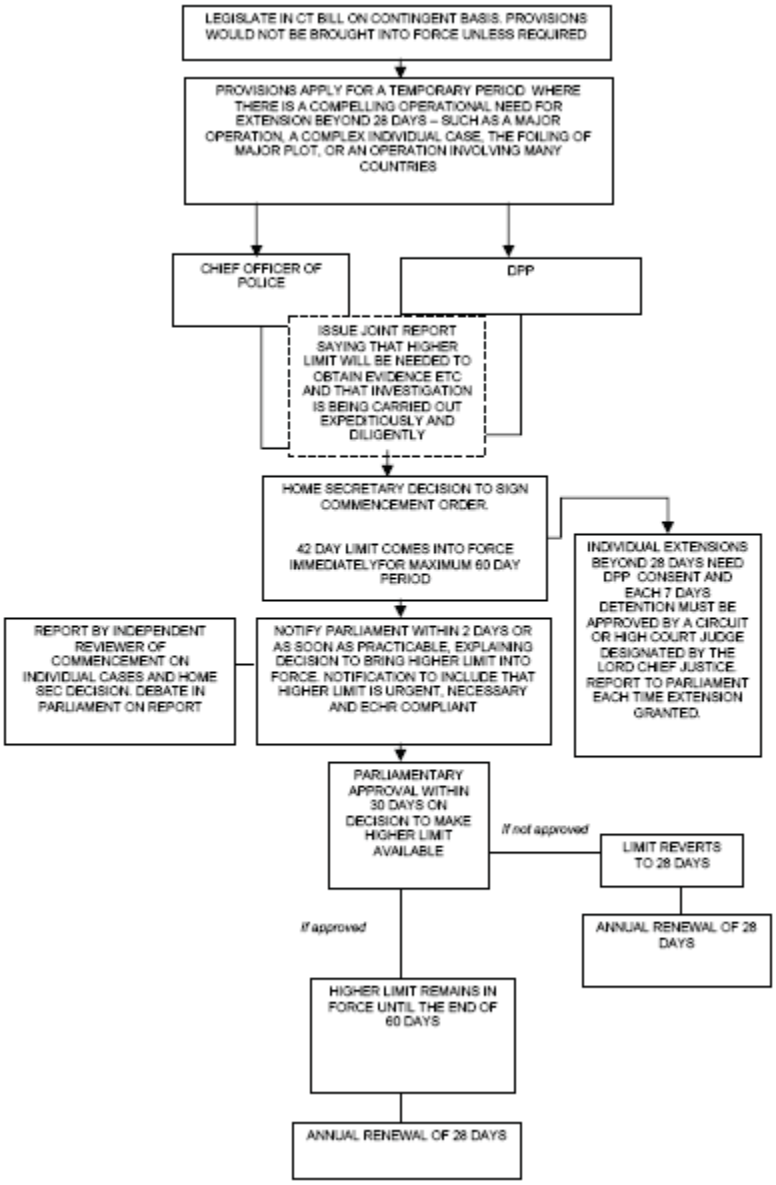
> The State, not the gas transporter, has responsibility for determining when, where and how extra policing should be provided at key gas sites. Accordingly, the proposal cannot be considered as involving the determination of either the gas transporter or the gas consumer's civil rights or obligations.
>
> However, even if Article 6 were found to be engaged, the Secretary of State also considers that the gas transporter and consumers rights are safeguarded by the availability of judicial review, by which means these persons can challenge the Secretary of State's decision. These provisions would therefore be compatible with Article 6(1).[155]

It notes that whilst the provisions may involve interference with either the gas transporter's licence or the gas transporter's economic interest "in the view of the Secretary of State, such interference is justified [...] and proportionate."

> Firstly the Secretary of State's power to put the funding arrangements in to place is limited to particular the existence of particular circumstances. Secondly, the gas transporter must be consulted before being required to pay any costs. Thirdly, the gas transporter is able to recover all reasonable costs incurred or payments made and will not end up out of pocket. The Secretary of State is able to direct the Gas and Electricity Markets Authority to ensure that there is no impediment to the recovery of the gas transporters costs.

[155] *Ibid*

XI Annex 1 – Flow chart (pre-charge detention)



Source: Counter-Terrorism Bill Explanatory Notes (24 January 2008)

XII Annex 2 – Statistics on terrorist offences, control orders and pre-charge detention

[by Gavin Berman, Social and General Statistics Section]

Pre-charge detention

The 14 day detention period came into effect on 20 January 2004 and the maximum period of detention pre-charge was extended to 28 days with effect from 25 July 2006. The following table provides details, as at 13 November 2007, of the numbers of individuals charged or released and held from between 14 to 15 days and through to 27 to 28 days.

Terrorism Act pre-charge detention statistics

25 July 2006 - November 2007

	Number of persons held	Charged	Released without charge
14 to 15 days	1	1	0
18 to 19 days	1	1	0
19 to 20 days	3	3	0
27 to 28 days	6	3	3

Source: HC Deb 19 November 2007 c505-6w

Control Orders

The *Prevention of Terrorism Act 2005* came into force on 11 March 2005. The available statistics relating to control orders are reported to Parliament in quarterly written statements, with the first issued in June 2005. To date there have been 11 such statements with the latest released in December 2007.[156] The figures provided here are taken from each of the individual written statements.

Since the Act came into force 43 control orders have been made on individuals, 15 of these in respect of British citizens. In some instances an order may be revoked and a new one made on the same individual, so it is not the case that 43 different individuals have been issued with Control Orders.

Control Orders may be revoked or expire. In the latest statement it was announced that 14 control orders were still in force, eight of which were in respect of British citizens, four of whom live in the Metropolitan police force area.

[156] HC Deb 12 December 2007 c38-40WS

Terrorism Act 2000

The UK police terrorism arrest statistics (excluding Northern Ireland) from 11 September 2001 – 31 March 2007 show 1,228 arrests were made:

- 1,165 under the *Terrorism Act 2000*
- 63 under legislation other than the Terrorism Act, where the investigation was conducted as a terrorist investigation

The table below shows how many charges were made in the 1,228 cases.

Persons charged having been arrested under Terrorism Act 2000

	Numbers charged under the Act	Number of persons charged under the Act and other legislation	Number of persons charged under other legislation
2001 [1]	4	3	11
2002	29	8	44
2003	24	29	54
2004	9	17	26
2005	8	22	33
2006	43	25	18
2007 [2]	15	5	9
Total	132	109	195

Notes
[1] From 11 September 2006
[2] To 31 March 2007

Sources:
HC Deb 19 December 2006 c1983w
HC Deb 9 July 2007 c1347w
http://www.homeoffice.gov.uk/security/terrorism-and-the-law/

In addition to those charged:

- 669 released without charge
- 76 handed over to immigration authorities
- 15 on police bail awaiting charging decisions
- 1 warrant issued for arrest
- 12 cautioned
- 1 dealt with under youth offending procedures
- 11 dealt with under mental health legislation
- 4 transferred to Police Service of Northern Ireland custody
- 2 remanded in custody awaiting extradition proceedings
- 1 awaiting further investigation

Of those charged:

- 41 *Terrorism Act* convictions to date
- 183 convicted under other legislation: murder and explosives offences (including conspiracies), grievous bodily harm, firearms offences, fraud, false documents offences, etc (this includes the 12 cautions detailed above)
- 114 at or awaiting trial