LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty and JUSTICE
Joint Report Stage Briefing on the Terrorist Asset-Freezing etc. Bill in the House of Lords

October 2010

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml

About Justice

JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.

Contact

Isabella Sankey
Director of Policy
Liberty
Direct Line: 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Dr Eric Metcalfe
Director of Human Rights Policy
JUSTICE
Direct Line: 020 7762 6415
Email: EMetcalfe@justice.org.uk

Introduction

1. The Terrorist Asset-Freezing etc. Bill gives the Treasury highly intrusive powers to freeze the assets of anyone it has reasonable grounds to suspect or believe is or has been involved in terrorist activity. In effect this means that the Executive can designate anyone to be "*subjected to a regime which indefinitely freezes their assets under which they are not entitled to use, receive or gain access to any form of property, funds or economic resources unless licensed to do so by the executive"*.[1] Just immediately prior to the Committee Stage of this Bill the Government introduced amendments to strengthen 'safeguards' as it "*took seriously the civil liberties concerns that had been raised about the terrorist asset-freezing regime*".[2] In short, the amendments passed at Committee Stage require the Executive to have a reasonable 'belief' rather than 'suspicion' before imposing final asset-freezing orders and provides for appeal mechanisms rather than judicial review. Despite these being presented as significant amendments that "*strike the appropriate balance between protecting national security and civil liberties*"[3] Liberty and JUSTICE believe that the revised Bill continues to fail to respect fundamental rights and freedoms and the due process of law.

2. In summary, the Bill as presented to the House at Report stage, presents the following major concerns:

- It gives powers to the Executive, and not the judiciary, to impose extremely harsh and effectively punitive measures that impose a badge of criminality, without the prospect of a fair trial. While the right of appeal is better than judicial review, any appeal occurs after a person's assets have already been frozen and puts the onus on the affected person to get legal advice (first asking the Treasury if they can use funds for this purpose), apply to the court, and put forward a case (often without knowing the case against them);
- It applies to persons who may never have been convicted of any offence, let alone arrested or charged with an offence. The Treasury can freeze the assets of anyone it 'reasonably suspects', or can freeze indefinitely those it 'reasonably believes', is or has been 'involved in terrorist activity'. While the

[1] See *Ahmed v HM Treasury* [2010] UKSC 2 (*Ahmed*) at [39] (Lord Walker and Lady Hale agreeing) in describing what is effectively the same regime of asset-freezing.
[2] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 120 per The Commercial Secretary to the Treasury (Lord Sassoon).
[3] Ibid.

change to reasonable 'belief' instead of 'suspicion' is an improvement, the regime remains outside the criminal justice system enabling punishment without charge or trial. Comparisons with the discredited unfair and unsafe control order regime are striking.

- The licensing regime, which the Government has said offers "*very significant safeguards*" as it "*allows proper expenditures to be made*"[4] remains at the discretion of the Treasury. Under the Bill there is no requirement on the Treasury to grant any such licence, let alone to enable reasonable funds to be provided to a person and their family.
- The Bill anticipates that even when a person is able to get to court to test the case against him or her special rules of court will apply – allowing for closed hearings, secret evidence, and the use of special advocates.

3. The fundamental issue is whether parliamentarians believe that coercive and effectively punitive measures to deprive a person of their property and livelihood, and which have an enormous impact on personal privacy and family life, should be imposed on an individual outside the normal bounds of the criminal justice system and at the behest of the Executive. Of course it is a vital task of Government to seek to protect the public from any threats to life. However, this duty is not in conflict with the duty to protect fundamental rights. Clearly having a regime to stem the flow of terrorist finance is an important part of countering terrorism – but if we are to have in place a regime that does not sweep up the innocent with the guilty and in the process become completely counter-productive, we must ensure the regime is brought in line with the rule of law and truly does strike an appropriate balance between protecting national security and upholding civil liberties. Liberty and JUSTICE do not believe that the Bill as currently drafted, even as amended in Committee, strikes this balance.

4. In this briefing we propose an alternative approach that we believe meets the concerns of both disrupting and preventing terrorist financing and respecting the importance of the separation of powers and the presumption of innocence. In summary, our suggested amendments would:

- Require that the making of a designation be in the hands of the courts and not the Executive.

[4] Ibid, per Lord Sassoon at column 136.

- Distinguish between designations of organisations and designations of individuals – as there is a fundamental difference in freezing the funds of a group and of seriously disrupting the livelihood a person and their family.
- When designations are made against an individual (and not a group) the designation regime must be brought into the criminal justice system. Applying these coercive powers on the basis of suspicion or belief of 'involvement in terrorism' will inevitably lead to those who have never been prosecuted having an order imposed on them. The only comparable example of this approach is control orders, which have been demonstrated to be unsafe and unfair. Our suggested amendments would allow for designation post-conviction, but also importantly allow for interim designations when criminal proceedings are in train, or just immediately before an arrest is made. But importantly, criminal prosecution or conviction must be anticipated or have occurred.
- Require the courts, when making a designation, to grant a licence to enable an individual and their family to have access to such funds as is reasonably necessary for their subsistence and travel and fees for legal representation. This would ensure that a licence is made in every case (something not currently required by the Bill) and put it in the hands of the courts and not the Executive to determine (based on information given to it by the Treasury and other relevant government agencies) what is a reasonable level of funding.
- Uphold the basic principles of a fair trial by ensuring a person subject to this coercive regime knows the case against them and is able to present a full defence by removing the power to have special rules of court which allow for secret evidence, hearings which the interested person is barred from and the use of special advocates.

Background to Bill

5. The terror asset freezing regime has been put in place following a number of United Nations Security Council (UNSC) resolutions which require Member States, including the UK, to freeze terrorist assets.[5] In 2001 Regulations were introduced to freeze assets pursuant to these UNSC resolutions. Earlier this year the Supreme Court ruled that this secondary legislation was invalid – the orders were held to be ultra vires (beyond power) as they had not been properly authorised by Parliament

[5] See in particular UN Security Council Resolutions 1267 (1999), 1333 (2000) and 1371 (2001).

and did not provide effective safeguards – particularly the order allowing for the freezing of the assets of anyone on a UN list without giving any opportunity of review.[6] The Supreme Court made clear that the "*draconian*" regime had significant repercussions on the life of the people subjected to it and their family members.

6. This Bill now seeks to put on a permanent footing effectively the same regime as that set out in the orders struck down by the Supreme Court earlier this year. Following the Supreme Court decision, the *Terrorist Asset-Freezing (Temporary Provisions) Act 2010* was rushed through Parliament in February in the space of five days. This Act validated the orders which the Supreme Court had struck down. The Act was only intended to be temporary in its effect and accordingly will sunset on 31 December 2010. When that Act was making its swift passage through Parliament it was said that these temporary measures would "*provide Parliament with the proper time needed to consider and debate permanent legislation in full*".[7] The passage of the present Bill gives Parliament the time to properly scrutinise this intrusive and coercive regime and ensure appropriate safeguards are put in place.

7. As referred to above, the current drafting of the Terrorist Asset-Freezing etc Bill does not contain sufficient safeguards to ensure the regime complies with fundamental rights. In fact, it has some of the hallmarks of the profoundly unfair and illiberal control order regime currently under review. The Bill also fails to deal comprehensively with terrorist asset-freezing orders. Numerous other pieces of legislation and regulations set out separate regimes that allow for assets of individuals and groups to be frozen indefinitely on the say-so of either the Executive or the Council of the European Union. None of these regimes grant adequate safeguards to ensure innocent people are not swept up with the guilty. We believe there needs to be a wholesale review of the terrorist asset freezing regime to comply with fundamental rights and traditional notions of British justice. We welcome the Government's wider review of counter-terrorism measures which the Home Secretary announced would "*help to inform us on what additional safeguards are needed in the proposed asset freezing Bill*".[8] We are disappointed that it looks likely that the outcome of this review will not be known before this Bill leaves the House of Lords. We hope though that the Government's stated commitment to civil liberties will result

[6] See *Ahmed v HM Treasury* [2010] UKSC 2 (a case in which JUSTICE intervened).
[7] Liam Byrne MP, then Chief Secretary to the Treasury, *Hansard*, House of Commons, 8 February 2010, column 663.
[8] See statement by the Secretary of State for the Home Department (the Rt Hon Theresa May MP), *Hansard*, 13 July 2010, Column 797

in further substantial amendments to the Bill at Report stage to properly respect fundamental rights and the rule of law.

Overlap with other terrorist asset-freezing measures

8. It is useful to set out the current terrorist asset-freezing regime and what is proposed by the Terrorist Asset-Freezing etc Bill. The power to freeze assets of a person suspected of involvement in terrorism include:

- Part 2 of the *Anti-Terrorism, Crime and Security Act 2001* (ACTSA) which provides that the Treasury may make a freezing order when action which constitutes a threat to the life or property of UK nationals or residents has been or is to be taken by a non-national (or government of another country);
- The *Al-Qaida and Taliban (Asset-Freezing) Regulations 2010*[9] which prohibit anyone (such as banks, building societies etc) from providing access to money or assets belonging to anyone who has been designated in a list attached to an EU Council Regulation[10] (such listed persons are those deemed to be members of Al-Qaida or the Taliban as well as the groups themselves);
- Part 6 of the *Counter-Terrorism Act 2008* which provides that a person affected by a decision of the Treasury made under the 2010 Regulations, or Part 2 of ATCSA, can apply for judicial review of the decision (which can take place in closed court with the use of special advocates – see more on this below).[11]

Under the Terrorist Asset-Freezing etc. Bill as currently drafted the Treasury will have the power to designate anyone it has reasonable grounds for suspecting or believing is or has been involved in terrorist activity. Under clause 1, any person, group or entity included on an EU Council Regulation[12] list will automatically have their assets frozen. The EU list implements UN Security Council resolution 1373 (2001) which requires the assets to be frozen of persons "*who commit, or attempt to commit, participate in or facilitate the commission of terrorist acts*".

[9] SI 2010/1197 made 7 April 2010 under section 2(2) of the *European Communities Act 1972*.
[10] See Council Regulation (EC) No. 881/2002 of 27 May 2002 (as amended).
[11] Note also Part 3 of the *Terrorism Act 2000* which contains a series of measures relating to terrorist financing.
[12] See Council Regulation (EC) No 2580/2001 of 27 December 2001.

9. It is clear then that this Bill does not purport to set out a comprehensive scheme in relation to terrorist asset-freezing orders. If this Bill is passed as currently drafted there will be three primary pieces of legislation dealing with asset-freezing and a number of pieces of secondary legislation. As Lord Mance noticed in his judgment in *Ahmed*: "*One can certainly feel concern about the development and continuation over the years of a patchwork of over-lapping anti-terrorism measures, some receiving Parliamentary scrutiny, others simply the result of executive action*".[13] As the law currently stands, a number of people have been designated under both regimes which, as the House of Lords Select Committee on the Constitution has said, suggests "*that the two regimes are in practice closely inter-twined and it raises the question of whether it would be more satisfactory to have both the regimes governed by a single Act of Parliament*".[14] The Committee went on to express its concerns "*that the partial coverage of the Bill, and the maintenance of other terrorist asset-freezing measures under separate statutory regimes, makes the law unnecessarily complex*".[15] The complexity created by these separate regimes will only be exacerbated if this Bill is enacted as currently drafted. We agree with the Committee's conclusion that:

> *it would be preferable for Parliament to be presented with a clear and comprehensive account of the full range of asset-freezing powers contained in the UK's counter-terrorism law, so that it can understand which powers are necessary and useful, and which not. To present to Parliament a Bill which covers only one aspect of these powers, without a full explanation of how those powers relate to other regimes (including those contained in Part 2 of ATCSA and in Schedule 7 to the CTA) risks presenting an account of the law that is partial.*[16]

We call on the Government to approach this issue in the broadest possible way and bring forward a fair and comprehensive regime to deal with all types of terrorist asset-freezing measures. If wholesale reform in this way is not possible the Government should, at the very least, commit itself to bringing forward a consolidation Bill on this issue in 2011. In the meantime, as a bare minimum, we urge Parliament to consider the amendments proposed below to ensure the procedure by which a person is

---

[13] *Ahmed* at [220].
[14] House of Lords Select Committee on the Constitution, Terrorist Asset-Freezing etc. Bill, 2nd Report of Session 2010-11, 22 July 2010, HL Paper 25, paragraph 10.
[15] Ibid.
[16] House of Lords Select Committee on the Constitution, Terrorist Asset-Freezing etc. Bill, 2nd Report of Session 2010-11, 22 July 2010, HL Paper 25, paragraph 16.

designated as one to whom the terrorist asset-freezing regime applies is as fair and transparent as possible.

Impact of a terrorist asset-freezing order

10. Before turning to our specific concerns in relation to the Bill, it is important to consider the very real human effect the terrorist asset-freezing regime has on those individuals subject to it. Any person (be they an individual or group) designated as one to whom this regime has applied has no access to any of their assets unless this is authorised by the Executive. It is an offence for anyone, be it a bank or friends or family, to provide that person (directly or indirectly – which includes providing assistance to the person's immediate family) with any financial assistance or funds of any kind. Such a regime can be applied indefinitely to persons who may never have been convicted, charged, or even arrested in respect of any offence.

11. As Lord Brown said in the recent Supreme Court case of *Ahmed*:

> *The draconian nature of the regime imposed under these asset-freezing orders can hardly be over-stated. Construe and apply them how one will – and to my mind they should have been construed and applied altogether more benevolently than they appear to have been – they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing.*[17]

12. Lord Hope agreed with Sedley LJ in the Court of Appeal, that people designated in this way "*are effectively prisoners of the state*".[18] As money is required in order to take any form of transport, effectively such people's freedom of movement is in the hands of Treasury officials who can decide whether money for such travel should be dispensed. And of course, finding or maintaining any employment is effectively discouraged given any monies earned will be immediately frozen. In addition, for any small business owners, a freezing order will effectively shut down the business. The effect on a person's spouse or partner is also likely to be huge as joint assets are targeted in the same way as individually owned assets – a factor that undoubtedly would heavily impact on personal relationships. The day to day reality

[17] *Ahmed* at [192].
[18] See *Ahmed* at [4].

for someone subject to such a regime was vividly set out in *Ahmed*. In this case, one of the people subjected to such a regime had never been told the reason for his inclusion on the list and was required to subsist on his wife's social security payments. For many years the family was required to list and inform the Treasury of every last penny spent during the month,[19] including on food, school uniforms, toiletries and medical expenses. It is clear that such requirements imposed on individuals have a severe impact, not just on personal property, but on a person's family and private life. In fact, in *Ahmed*, two of the designated men were said to have had significant mental health difficulties and marriage break-ups as a result of the burden imposed on them and their wives by this regime.[20] As Lord Hope pointed out:

> *The overall result is very burdensome on all the members of the designated person's family. The impact on normal family life is remorseless and it can be devastating...*
>
> *…the restrictions strike at the very heart of the individual's basic right to live his own life as he chooses… It is no exaggeration to say … that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.*[21]

13. There is no doubt that this is a harsh and coercive regime that has severe implications for a designated person and their family. In this respect, as in many others, the regime is comparable to control orders. Those subjected to it may well be innocent of any offence, and may not necessarily know why they have been subjected to the regime. As Lord Rodger in *Ahmed* noted "*the harsh reality is that mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right*."[22]

---

[19] See *Ahmed* at [37].
[20] See Ahmed at [31}.
[21] See *Ahmed* per Lord Hope (DP) (with whom Lord Walker and Lady Hale agreed) at [38] and [60].
[22] *Ahmed* at [182].

14. It is also of interest to note that although the freezing of the assets of those who have committed or attempted to commit terrorist acts is an important element of broader counter-terrorism measures, the amount of funds currently frozen are certainly not huge. As recently as 30 June 2010, Parliament was informed that a total of 202 accounts of "*suspected terrorist funds*" were frozen in the UK, containing a total of "*just under £360,000*".[23] This averages out at £1,782 per account.

Designation by the Treasury and not the court

15. One of the major problems with the terrorist asset-freezing regime as set out in this Bill is that any designation – with all the coercive measures that flow from it – is made by the Executive and not the judicial branch of government. The Government has said that it this should be a ministerial decision with the designated person now given the chance to appeal the decision. The Commercial Secretary to the Treasury, Lord Sassoon, said at Committee stage that this is a matter best left to the Executive as:

> *actions and decisions to prevent the commission of acts of terrorism … often must be taken under very considerable pressure of time and require fine judgments of operational matters which … involve the intelligence and law enforcement agencies. The combination of the flow of information, the time required and the complexity of decisions is suited to decision making by the Executive, subject to the important safeguards of the courts.*[24]

16. The argument that the imposition of such coercive orders is best undertaken by Ministers rather than the courts misunderstands the importance of the separation of powers and the role the courts already undertake. The courts are often called on to make extremely sensitive and complex decisions often urgently. As Lord Lloyd of Berwick has pointed out in his submission to the Home Office on this Bill, it is actually the courts themselves that invented freezing orders in the first place.[25] In the seminal

---

[23] See written statement by the Financial Secretary to the Treasury (Mr Mark Hoban), *Hansard*, 26 July 2010, Column 56WS-57WS.
[24] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at columns 160-161 per The Commercial Secretary to the Treasury (Lord Sassoon).
[25] The 'Mareva' injunction was a common law development which freezes assets in civil proceedings where there is reason to believe the defendant might dispose of assets to frustrate a later court judgment. This was named after *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

Belmarsh case, the late distinguished jurist Lord Bingham described which branch of Government should be responsible for making a determination:

> *It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament, it is the function of the courts and not of political bodies to resolve legal questions*.[26]

The decision whether or not to make a designation is one that rests on the particular facts in each individual case. It does not require a political decision to be made, or any determination of public policy. It is a decision that is particularly suited to the judicial process. A court is able to make provision for evidence to be heard in closed court if it cannot be made public on national security grounds, the courts can also respond rapidly (with out-of-court sessions regularly taking place when required) and as for the "*complexity of decisions*" there is certainly no reason why highly learned judicial officers are not best placed to consider complex evidence and adjudicate accordingly.

17. Indeed, the Government has recognised the importance of the role of the courts in providing for an appeal mechanism. Yet no satisfactory reason has been given as to why the courts cannot be involved at the initial process. An appeal is no substitute for the court making the initial determination. An appeal can only take place after a designation has already been made, and while awaiting the outcome of an appeal the person's assets will be frozen with all the consequent implications this has on their employment, their rights to property as well as a private and family life. Indeed, a person whose assets have been frozen is likely to find it difficult to obtain legal advice in order to challenge the Treasury's decision – having to rely on (and perhaps apply for) a licence from the Treasury to make the appeal. In Committee Lord Wallace of Tankerness for the Government stated that "*the general presumption is that where a licence is requested to pay for legal costs, it will be granted*".[27] This statement demonstrates that the funding and licensing arrangements will certainly be a barrier for a person seeking to appeal a decision given an application will need to

[26] See *A v Secretary of State for the Home Department* [2005] 2 AC 68 per Lord Bingham at [29]

[27] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 174 per The Advocate-General for Scotland (Lord Wallace of Tankerness).

first be made simply for the money necessary to bring the appeal itself. And of course this is only a presumption in favour – under the Bill as currently drafted it is open to the Treasury to refuse to make such funds available. Further, setting out an appeal mechanism puts the onus on the affected person to make an application to the court for review of the decision – whereas the onus should be on the Government to make the application to the courts before such coercive measures should be imposed. For those with limited education, and perhaps limited English, proactively accessing the courts can be a difficult and complicated procedure. If principles of civil liberties are truly to be at the heart of this legislation, Liberty and JUSTICE consider it essential that the Bill provide for a judicial, and not a ministerial, process for the imposition of the terrorist asset freezing regime.

Threshold for designation – reasonable suspicion or belief?

18. The Bill as currently drafted allows the Treasury to designate anyone for 30 days on the basis of reasonable 'suspicion', and effectively indefinitely, on the basis of reasonable 'belief' that the person "*is or has been involved in terrorism*". The requirement of 'belief' was made as a late amendment just prior to the Committee stage on this Bill and was meant to address the civil liberties concerns over the threshold for designation. In a letter from the Commercial Secretary to the Treasury, Lord Sassoon, to the Chair of the Constitutional Reform Committee, the Government's position was described as follows:

> *The reason for retaining suspicion for a maximum 30-day period is to allow freezes to be imposed in cases where there is an immediate threat but the position is not clear, for example <u>where people have been arrested and there is an operational need to freeze assets</u> but the police have not yet had sufficient time to complete their investigations and establish sufficient evidence to charge them for terrorist offences. The 2006 Operation Overt transatlantic plane bomb plot is a good example of where being able to freeze assets <u>alongside arrests</u> proved operationally valuable.*[28]

During the Committee stage debates it was suggested that the threshold for designation could not be set too high because the regime needed to operate in a

[28] See letter dated 4 October 2010 to Baroness Jay of Paddington from Lord Sassoon (emphasis added), available at: http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LetterfromLordSasson041009.pdf

preventative way, and that there can be cases "*where the nature of each person's role in a plot is not immediately clear*" and it would be too severe a restriction to exclude those "*who might be involved in the broader commissioning, facilitation and support of terrorist activity*".[29]

19. We agree that it is important to ensure tools are available where a person has been arrested and there is an operational need to freeze someone's assets. The key word here is 'arrest'. If someone has been arrested (or an arrest warrant has been issued) the person has entered the criminal justice system. The threshold for arrest is not high – it is reasonable suspicion. We believe (and as set out in the amendments proposed below) that if an arrest warrant has been issued or a person has been arrested designation by a court can take place for a limited period pending charge. However, to separate it out completely from the criminal justice process, as is set out in this Bill, is to continue the trend of operating outside the normal criminal norms, in the same way as the control order regime does. There is no reason why this regime cannot be tied to arrest – particularly given the examples given by the Government relate to arrest. We are also concerned that in the examples given during the Committee stage debates there is a lack of understanding over the breadth of terrorist offences already available for which a person can be arrested. It is already an offence to encourage terrorism or prepare acts of terrorism,[30] or do anything ancillary to terrorism– and as such, any person suspected of involvement "*in the broader commissioning, facilitation and support of terrorist activity*" can already be arrested, triggering an application for designation.

20. While raising the threshold for indefinite designations from 'suspicion' to 'belief' is a marginal improvement it does not address the more fundamental concerns that the designation process be brought within the normal criminal justice system (requiring links to conviction, or as an interim measure, to arrest and charge). Further, the requirement that it be a belief that the person "*is, or has been, involved in terrorism*" demonstrates that this is not a test to determine if a person has actually committed a terrorism offence. The terminology 'involved in terrorism' comes from similar wording in the control order regime. To be put under a control order the Executive needs to consider it necessary to prevent or restrict "*involvement by the*

[29] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 142 per Lord Sassoon.
[30] See sections 1-2, 5, 6 and 8 of the *Terrorism Act 2006* and Schedule 2 to the *Counter-Terrorism Act 2008*.

individual in terrorism-related activity".[31] This has been interpreted by the courts as applying even when a person has not been arrested or charged with any terrorism offence and even to those who have been acquitted of such an offence.[32]

21. Further, this low threshold is not even required as a result of the UNSC resolutions. The Bill is said to "*give effect in the United Kingdom to resolution 1373 (2001) adopted by the Security Council of the United Nations on 28th September 2001*".[33] However, UNSC resolution 1373, requires member states of the UN to prevent the financing of terrorist acts, including freezing the funds of those who "*commit or attempt to commit*" acts of terrorism. As Lord Phillips in the Supreme Court pointed out:

> *what the [UN] Resolution requires is the freezing of the assets of criminals. The natural way of giving effect to this requirement would be by freezing the assets of those convicted of or charged with the offences in question. This would permit the freezing of assets pending trial on a criminal charge, but would make the long term freezing of assets dependent upon conviction of the relevant criminal offence to the criminal standard of proof.*
>
> *The Resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures.*[34]

EU List designation

22. Also of great concern is the fact that those designated by the EU (and to whom clause 1 applies) have no right under this legislation to appeal or review a decision to include them on the list. If a person is included on such a list they are

---

[31] See section 1(9) of the *Prevention of Terrorism Act 2005*.
[32] See Secretary of State for the Home Department v AY [2010] EWHC 1860 (Admin). "*The fallacy at the heart of the submission advanced on behalf of AY is that a verdict of not guilty on a specific charge equates to a finding that there are no reasonable grounds for suspecting that the subject is or has been involved in terrorism-related activity*" and Secretary of State for the Home Department v MB [2006] EWCA Civ 1140 per Lord Phillips: "*Involvement in terrorist-related activity, as defined by s 1(9) of the PTA, is likely to constitute a serious criminal offence, although it will not necessarily do so. This, of itself, suggests that when reviewing a decision by the Secretary of State to make a control order, the court must make up its own mind as to whether there are reasonable grounds for the necessary suspicion*."
[33] See Explanatory Memorandum to this Bill, paragraph 3.
[34] See *Ahmed* at [136]-[137] (emphasis added).

automatically subject to the UK terror asset-freezing regime under the current provisions of the Terrorist Asset-Freezing etc. Bill. Clauses 26 and 27 as currently drafted, which provide for appeals and judicial review of a decision of the Treasury, does not apply to people on the EU list (as the Treasury makes no 'decision' in respect of them – their inclusion is automatic). The *Counter-Terrorism Act 2008* (which sets out a judicial review procedure almost identical to that contained in clause 27 in respect of other terror asset-freezing decisions) is not being amended to enable judicial review for those on the EU list. We presume that the new Coalition Government is intent on respecting traditional common law rights to a fair trial. We caution that not providing access to any sort of meaningful review directly contravenes the right to a fair trial in Article 6 of the *Human Rights Act 1998*.[35] As such, we believe the Terrorist Asset-Freezing etc. Bill as currently drafted would be open to challenge on numerous human rights grounds, not least the right to a private and family life (Article 8), the right to a fair trial (Article 6) and the right to property (Article 1 of Protocol 1).

23. We appreciate that the UK has international obligations in respect of those persons who have been designated by the UNSC 1267 Committee (in respect of those who are said to be members of Al-Qaida or the Taliban) and by EU Council Regulations. However, we believe the UK should urgently review the cases of all persons currently on EU lists (who as a result of the 2010 Regulations and the Terrorist Asset-Freezing etc. Bill, automatically have their funds frozen in the UK). If such persons have not been convicted of terrorism offences the UK should take steps, as is permitted by the EU Council Regulations, to unfreeze the funds of such persons after consultation with other member states.[36] We are particularly concerned that many of those currently included in the Consolidated List of those subject to the terrorist asset-freezing regime have not had their cases reviewed since 2002.[37] We do not propose suggesting any amendments to remedy this issue in the Bill currently before the House, but we urge the Government to urgently review the current arrangements and ensure procedural fairness is at the heart of the EU list designation regime.

---

[35] Article 6 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[36] See Article 6 of Council Regulation (EC) No 2580/2001 of 27 December 2001.
[37] See HM Treasury, *Consolidated List of Financial Sanctions Targets in the UK*, last updated 30 July 2010, available at: http://www.hm-treasury.gov.uk/d/terrorism.htm

Proposed amendments

Amendment 1 – Designation by the court

Clause 1, page 1, line 8 leave out 'a person designated by the Treasury' and insert 'an individual or organisation designated by the court'.

Effect

24. This will amend clause 1 to redefine a designated person as one who is designated by a court rather than the Treasury.

Amendment 2 – Substituted new clauses 2-10

Pages 1 -5, leave out Clauses 2 to 10 and insert—

"*Pre-arrest designation*

2 Court's power to make pre-arrest designations

(1) A court may make a designation of an individual for the purposes of this Part if—

(a) the Treasury has made an application for designation of the individual;

(b) an arrest warrant has been issued against the individual in respect of a terrorism offence but the individual has not yet been arrested; and

(c) the court considers that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the individual.

(2) For this purpose a "terrorism offence" means any one or more of the following—

(a) an offence for the time being listed in section 41(1) of the Counter-Terrorism Act 2008;

(b) an offence for the time being listed in Schedule 2 of the Counter-Terrorism Act 2008 that has a terrorist connection.

(3) For the purposes of this Part an offence has a terrorist connection if the offence—

(a) is, or takes place in the course of, an act of terrorism, or

(b) is committed for the purposes of terrorism.

3 Notice of pre-arrest designation

(1) The hearing of an application under section 2 may take place in the absence of the individual in question and without the individual having been notified of the application.

(2) Where a designation is made under section 2 the Treasury must give written notice of the designation to the designated individual unless the court considers the disclosure of the designation should be restricted for reasons connected with the prevention or detection of serious crime or the apprehension of the individual.

4 Duration of pre-arrest designation

(1) A designation made under section 2 or renewed under subsection (2) expires—

(a) 7 days beginning with the date on which it was made or renewed, or

(b) on the making of a designation under section 6 in relation to the same individual,

whichever is the earlier.

(2) The court may renew a designation made under section 2 at any time before it expires if—

(a) the requirements in section 2(1) continue to be met, and

(b) the court is satisfied that reasonable steps have been taken to execute the arrest warrant.

Designations

5 Court's power to designate organisations

(1) The court may designate an organisation for the purposes of this Part if—

(a) the Treasury has made an application for designation of the organisation;

(b) the court reasonably believes the organisation is concerned in terrorism; and

(c) the court considers that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the organisation.

(2) For the purposes of subsection (1) an organisation is concerned in terrorism if it—

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) is otherwise concerned in terrorism.

6 Court's power to make designations against individuals

(1) A court may make a designation of an individual for the purposes of this Part if the Treasury has made an application for designation of the individual and the following two conditions are met.

(2) The first condition is that ─

(a) the individual has been arrested for a terrorism offence but proceedings for the offence have not yet been started against the individual;

(b) the individual has been charged with a terrorism offence but proceedings have not been concluded against the individual; or

(c) the individual has been convicted of a terrorism offence;

(3) The second condition is that the court considers that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the individual.

(4) For this purpose a "terrorism offence" means any one or more of the following─

(a) an offence for the time being listed in section 41(1) of the Counter-Terrorism Act 2008;

(b) an offence for the time being listed in Schedule 2 of the Counter-Terrorism Act 2008 that has a terrorist connection; or

(c) conduct committed outside the United Kingdom which would, if carried out in any part of the United Kingdom, have constituted an offence as described in paragraphs (a) and (b).

(5) For the purposes of this Part an offence has a terrorist connection if the offence—

(a) is, or takes place in the course of, an act of terrorism, or

(b) is committed for the purposes of terrorism.

7 Notice of application for designation

(1) If an application under section 5 or 6 is made without the respondent being given notice the court must either–

(a) dismiss the application, or

(b) adjourn the proceedings.

(2) If the court adjourns the proceedings

(a) it may make an interim designation if it thinks it necessary to do so; and

(b) the interim designation continues in effect until the full hearing of the application.

(3) In this section "full hearing" means a hearing of which notice has been given to the respondent in accordance with rules of court.

(4) An interim designation is to be treated as a designation for the purposes of this Part.

8 Duration of designation

(1) A designation made under section 5 (organisations) expires at the end of the period of one year beginning with the date on which it was made, unless renewed.

(2) A designation made under section 6 (individuals) expires—

(a) in the case of designation of an individual arrested for a terrorism offence where proceedings had not yet started—

(i) at such time as the court determines;

(ii) two weeks after the proceedings for the terrorism offence for which the individual was arrested have started; or

(ii) 2 months from the date the individual was arrested;

whichever is sooner;

(b) in the case of an individual who has been charged with a terrorism offence but proceedings have not been concluded, at the conclusion or discontinuation of the proceedings or at such earlier time as the court determines;

(c) in the case of an individual convicted of a terrorism offence, at such time as the court determines.

(3) The court may renew a designation made under section 5 or 6 at any time before it expires, if the requirements in section 5 and 6 continue to be met.

(4) A renewed designation is to be treated in the same way as a designation and expires in accordance with subsection (1) or (2).

(5) Where a designation expires the Treasury must give written notice of that fact to the designated individual or organisation.

9 Variation or revocation of designation

The court may vary or revoke a designation made under this Part if—

(a) the Treasury or a designated person make an application to vary or revoke the designation; and

(b) the court considers it is appropriate to vary or revoke the designation.

10 Rules of court on notification

Rules of court relating to designations made under this Part must secure that the Treasury must publicise the designation where the court considers it necessary and appropriate to do so.".

Effect

25. This will remove clauses 2 -10 and substitute new clauses, the effect of which is set out below.

New clauses 2-4

26. These proposed clauses would allow a Court (defined later as the High Court and its equivalent in Scotland) to designate a person as one whose assets can be frozen if an arrest warrant for a terrorism offence has been issued in respect of that person. In order for an arrest warrant to be issued the police are required to reasonably suspect that a terrorism offence is about to take place, has taken place or is taking place. Proposed clause 3 would allow the Treasury to apply to the court on an ex parte basis (without notifying the person against whom the arrest warrant has been issued). The designation could last seven days or until a later determination is made (under new clause 6, for example following the actual arrest or charge). In order to deal with circumstances where the person against whom the arrest warrant has been issued has not been apprehended, proposed clause 4 would enable the court to renew the designation for another seven days if the same conditions are met and the court is satisfied that reasonable steps have been taken to execute the arrest warrant (and apprehend the person). The requirement for the police to renew the designation every seven days would ensure the designation of someone who has not been arrested (but for whom there is an arrest warrant) does not continue indefinitely as the court would need to be satisfied each week that reasonable steps are being taken to apprehend the person and it is necessary to continue to make the designation. The definition of what constitutes a terrorism offence is tied to the offences set out in the *Counter-Terrorism Act 2008* (which applies to terrorism specific offences such as weapons training etc, as well as to murder, explosions etc that have a terrorist connection). The definition of 'terrorism' is defined in later Amendment 12 as being the same as that in the *Terrorism Act 2000*.

New clause 5

27. This proposed clause will allow the Court to designate an organisation as one which can have its assets frozen. The Treasury can bring the application and the

court can make a designation if it reasonably believes the organisation is concerned in terrorism and the designation is necessary to protect the public from terrorism. The term 'concerned in terrorism' is the same as that used when determining whether to ban a suspected terrorist organisation under the *Terrorism Act 2000*.[38] The only difference is the removal of a reference to promoting or encouraging terrorism (which includes glorification of terrorism).

New clause 6

28. This clause would allow a court to designate an individual on application by the Treasury. In contrast to the present Bill this would mean that a person could only be designated (and have their assets frozen) if they had been through the criminal justice process or criminal proceedings were in train. So the court could designate a person who has been convicted of a terrorism offence as well as those arrested or charged with a criminal offence (the designation could last during the criminal investigation – which could be converted into a more lasting designation if the person was later convicted of a terrorism offence). In addition the court would need to consider if the designation was necessary for purposes connected with protecting members of the public from terrorism. The definition of a terrorism offence is tied to the offences set out in the *Counter-Terrorism Act 2008* (which applies to terrorism specific offences such as weapons training etc, as well as to murder, explosions etc that have a terrorist connection). In addition, if the offence was committed outside the UK it would also be caught if the conduct would have constituted an offence under UK laws – thereby ensuring that those convicted of, or subject to proceedings elsewhere for, like offences can have their assets frozen in the UK where necessary.

New clause 7

29. This clause requires a person to be given notice of the fact that a designation is sought so that the person can make representations before a designation is made. However, we understand there may be circumstances in which it is not appropriate to notify a person before an application is made. Therefore, proposed new clause 7 allows an application to be made without notice, whereby an interim designation can be made if the court considered it necessary to do so, pending a full hearing by which time the person will have been notified of the hearing.

[38] See section 3 of the *Terrorism Act 2000*.

New clause 8

30. Proposed new clause 8 sets out the period by which a designation remains in effect. This will differ according to the type of designation. Proposed clause 8(1) provides that a designation of an organisation can last for up to one year (and can be renewed). Proposed clause 8(2) provides that designation of an individual will depend on whether criminal proceedings are in train or have been concluded. For those convicted of a terrorism offence the court imposing the designation can determine in each individual circumstance how long the designation should remain in force. In relation to those arrested for a criminal offence but not yet charged the designation can remain in force until the person is charged (and gives a two week leeway to allow the Treasury to make an application for a new designation post-charge), or if charges are not brought, the designation will expire within 2 months. Alternatively, the court may decide a lesser amount of time is appropriate. And for those charged with a terrorism offence the designation can remain in force during the course of the proceedings or such earlier time as the court determines. An application to the court to renew a designation can be made by the Treasury at any time before it expires.

New clause 9

31. This proposed clause would allow a court to vary or revoke a designation (including a pre-arrest designation) if the Treasury or designated person applies for variation or revocation and the court considers it appropriate to do so.

New clause 10

32. This proposed clause would allow rules of court to be made setting out when the Treasury should publicise the fact of a designation – ensuring that it is up to the court in each individual designation to decide on how widely (if at all) a designation should be publicised.

Briefing

33. In line with the principles set out earlier in this briefing, in these amendments we propose an entirely different system which gives the power to make these intrusive orders to the courts and away from the Executive. We have proposed a two-tier system depending on whether the person being designated is an organisation or an individual.[39]

34. Groups and organisations that have been shown to be concerned in terrorism can already be banned by the Government – making it an offence for anyone to be a member of such an organisation, to organise or attend meetings on behalf of the organisation, or provide funding to the organisation. Aside from some procedural concerns and the breadth of the current proscription powers,[40] we believe banning violent terrorist groups can be an important part of any counter-terrorism strategy. If such an organisation fits the criteria for proscription we can see no reason why any assets held by such an organisation should not be subject to being frozen by the courts. Proposed new clause 5 above would allow a court to do just that whenever it considers an organisation is 'concerned in terrorism' – the test currently available in relation to proscription.

35. We believe that applying the terrorist asset-freezing regime to individuals is quite a different thing to applying it to legal entities and bodies. As already noted, terrorist asset-freezing measures can have a devastating effect on an individual's life and liberty, not to mention the effect on family members. In respect of individuals, just as with control orders, terrorist asset-freezing measures undermine the presumption of innocence, the 'golden thread' that runs through centuries of the criminal process to the Magna Carta, and can effectively allow punishment without trial. Just as with the control order regime, the terrorist asset-freezing regime places unending restrictions on individual liberty based on suspicion rather than proof. It relies on secret intelligence and a person subject to the regime cannot test the case against him or her in any meaningful way.

---

[39] Given the EU and international dimensions of those subject to the EU list, we have not proposed amendments to this regime but call on the Government to lobby for change and the EU level and consider what amendments are possible to bring this in line with requirements of procedural fairness.

[40] See Chapter 5 of *From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010*, available at www.liberty-human-rights.org.uk

36. UNSC resolution 1373 (2001) requires a state to impose asset-freezing measures on those who "*commit, or attempt to commit, terrorist acts or who participate in or facilitate the commission of such acts*". The extremely broad counter-terrorism offences already on the statute book criminalise acts of terrorism as well as attempts, facilitating, encouraging, preparing, planning, conspiring and inciting terrorism. Anyone convicted of such offences will clearly be considered to be one who has 'committed or attempted to commit' acts of terrorism. Our proposed new clause 6 would allow a court to designate anyone convicted of a terrorism offence. We have suggested applying this to the broad range of terrorist offences as already defined in the *Counter-Terrorism Act 2008* which includes offences such as murder, use of explosions etc which have a terrorist connection as well as any of the other specific terrorist offences under the myriad of anti-terrorism legislation. We have also proposed applying it to conduct undertaken other than in the UK which would (if it took place in the UK) constitute a terrorism offence. This deals with the Government's argument (as set out in the Committee stage debates) that persons convicted of terrorism offences overseas may require designation in the UK.

37. As described above, our proposed amendments could also provide for limited designations where a person has been arrested or charged with a terrorist offence, to cover the situation where proceedings have begun against a person but have not yet been concluded. Limiting designation in this way is, according to the Treasury's own analysis, likely to have little impact on the type of designation that currently occurs. In a consultation carried out earlier this year before introducing this Bill, the Treasury stated that "*asset-freezing does not necessarily or even mainly involve closed source material and individuals who are never prosecuted before a Court. On the contrary, the vast majority of cases involve individuals who are charged and prosecuted with terrorist offences*".[41] It should thus have little impact in practice to ensure that designations only apply to those who have been, or are involved in, the criminal justice system. And of course this upholds the important and long-held principles of presumption of innocence and fair trial rights.

[41] See HM Treasury, *Public Consultation: draft terror asset freezing bill*, March 2010, Cm 7852 at paragraph 4.39, available at: http://www.hm-treasury.gov.uk/d/consult_terrorist_assetfreezing_bill.pdf

38. Clauses 3 and 7 of the Bill as it is currently drafted provides that the Treasury must publicise a designation except in the case of designated children or when the Treasury considers disclosure of the designation should be restricted in the interests of national security, to prevent or detect serious crime or in the interests of justice. Our proposed new clause 10 would require rules of court to be made setting out when the Treasury should publicise such information and leave it up to the Court to determine how much information is to be disclosed. We believe, given the inevitable impact on the right to privacy of the designated person in having the fact of that designation widely publicised, this is a matter best left to the Court to decide in an individual case than for the Executive. Clause 10 as currently drafted provides that if the Treasury has limited disclosure of the designation it is an offence for a person to disclose the fact of the designation. Again, if a court orders the designation the usual rules of court, including contempt of court, can govern issues of disclosure.

Amendment 3 – Clause 17: Licences

Clause 17, page 8, line 5, leave out "Treasury" and insert "court".

Clause 17, page 8, after line 5 insert–

"( ) On an application under section 2 or 6 the Treasury must submit a draft licence to the court in respect of the designated person.

( ) On making a designation under section 2 or 6 the court must grant a licence in respect of the designated person.

( ) In granting a licence under this section the court must be satisfied that the effect of the licence would be to enable an individual designated under section 2 or 6 to have access to such funds as is reasonably necessary for travel and subsistence, including of any dependants of the designated person, and for payment of fees for legal representation, legal advice or other legal services for the benefit of the designated person.

Clause 17, page 8, line 14, leave out "Treasury" and insert "court".

Clause 17, page 8, line 19, leave out "Treasury consider" and insert "court considers".

Effect

39. This will amend clause 17 to ensure that a licence enabling living expenses to be made available to a designated person and his or her children, as well as necessary legal fees, must be made by the court when a designation is made under proposed new clauses 2 or 6 (note this will not apply to organisations subject to designation).

Briefing

40. Under the current terrorist asset-freezing regime the Treasury may (but is not required to) grant licences to allow for limited funding to be provided to designated persons and their family members on a case-by-case basis. The Treasury has said that the key objective of the licensing regime "*is to strike an appropriate balance between minimising the risk of diversion of funds to terrorism and meeting the human rights and humanitarian needs of affected individuals and their families*".[42] During the Committee stage debates on the Bill Lord Sassoon for the Government said that the licensing regime was a "*very significant safeguard*" as it allows proper expenditures to be made. On this basis Lord Sassoon said "*Therefore, I do not recognise the word 'draconian' in that sense as we ensure, under individual or general licences, that money can be released for the appropriate uses, whether that is to pay legal bills or family expenses and so on*".[43] Yet, there is no requirement in the Bill as currently drafted that would require the Treasury to issue any such licence. It is completely at the Treasury's discretion. If this is to truly be considered to be any sort of safeguard there must be a requirement for a licence to be issued that ensures basic subsistence and access to funding for legal fees. This is also a sensitive decision that requires an analysis of the circumstances of the designated person and their family and what likely terrorist finance risks are involved. Clause 17 of the Bill as currently drafted maintains this discretionary role for the Treasury. In making an application for the designation of an individual the Treasury should be required to submit a draft licence to the court. It should be then up to the court to decide what the terms of the licence should be having regard to what is reasonably necessary for

[42] Ibid at paragraph 5.10.
[43] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 136 per Lord Sassoon.

subsistence and travel and any legal fees. This will mitigate against the harshness of this regime and ensure that the needs of individuals and their families form part of the court's decision in making the designation.

Amendment 4 – Clause 20: Provision of information to Treasury

Clause 20, page 9, leave out lines 29-32. Clause 20, page 9, line 33, leave out "or (2)".

Effect

41. This will remove clause 20(2) and any consequential reference to it.

Briefing

42. Clause 20(2) as currently drafted allows the Treasury to require a designated person to provide any information the Treasury asks for about their expenditure, including expenditure by or on behalf of the person or for the benefit of the designated person. In practice this can be an onerous requirement on an individual and their family. The Supreme Court in *Ahmed* noted in that case that this imposed an extraordinary burden on the designated person and their family with the wife of one of the designated persons being "*required to report to the Treasury on every item of household expenditure, however small, including expenditure by her children*".[44]

43. Given that a designated person should have no funds available to them apart from what is allowed under licence by the Treasury, and subclause (1) also requires the person to provide information about any funds or economic resources they hold or own, there seems little reason to require the person to stipulate exactly how they spend their money. It is not difficult to see how such a power can become particularly intrusive and degrading if a person and their family are required to demonstrate every item of expenditure – including on food, toiletries, school books etc. We see no need to include this provision and believe it should be removed entirely.

[44] *Ahmed* at paragraph 39.

Amendment 5 – Clause 22: Self-Incrimination

Clause 22, page 11, after line 13 insert–

"(3) A person must comply with a request under this Chapter even if doing so might constitute evidence that the person has committed an offence.

(4) But in criminal proceedings in which a person is charged with an offence—

(a) no evidence relating to any answer given, or anything else done, in response to the request may be adduced by or on behalf of the prosecution, and

(b) no question relating to those matters may be asked by or on behalf of the prosecution,

unless evidence relating to those matters is adduced, or a question relating to those matters is asked, in the proceedings by or on behalf of the person.

(5) Sub-paragraph (4) does not apply to—

(a) an offence under section 112 of the Social Security Administration Act 1992;

(b) an offence under section 5 of the Perjury Act 1911 (false statements made otherwise than on oath in England and Wales); or

(c) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (corresponding provision for Scotland).".

Effect

44. This will amend clause 22 to insert new subsections (3) – (5).

Briefing

45. Under proposed clauses 20 and 21 the Treasury can request any person (including a designated person and anyone else resident in the UK) to provide any information, or documents, as the Treasury may require in relation to establishing and monitoring the terror asset-freezing regime. Clause 22 makes it an offence for anyone to fail to comply with such a request. We believe provision must be made in relation to the requirement to provide information where to do so may result in self-

incrimination. Article 6 of the *Human Rights Act 1998*[45] provides the right to a fair trial which includes the privilege against self-incrimination. The proposed amendments above (modelled on provisions in existing legislation – specifically Schedule 3 to the *Welfare Reform Act 2009*) continue to require a person to submit such information but any such evidence which is self-incriminatory should not be admissible in any criminal proceedings against that person. The Government in the Committee stage debates on this amendment, as tabled by Baroness Hamwee, stated that "*the right against self-incrimination would form a reasonable excuse … to refuse to comply*" with a request for such information.[46] We do not, however, believe it appropriate to rely on a general defence in such a fundamental area. Legislation should not be drafted in such a way so that a person is open to prosecution for failure to comply with a statutory obligation, with the onus on them to raise a defence if prosecutions are brought forward. This proposed amendment should, we believe, form part of the provisions of the Bill to ensure persons relying on their right not to self-incriminate are not unfairly left open to prosecution.

Amendment 6 – Clause 25: Power of Treasury to disclose information

Clause 25, page 12, leave out lines 12-13.

Effect

46. This will remove clause 25(1) of the Bill.

Briefing

47. Clause 25(1) of the Bill as currently drafted provides that nothing done under Chapter 3 powers "*is to be treated as a breach of any restriction imposed by statute or otherwise*". This is a breathtakingly broad power to remove any requirement for Treasury officials or others to act in accordance with any laws, both statutory and common law, when acting under the terrorist asset-freezing powers in relation to requesting and disclosing information. The only exception for this is contained in subclause (2) which states that this does not authorise a disclosure that contravenes

[45] Article 6 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[46] *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 174 per Lord Wallace.

the *Data Protection Act 1998* or Part 1 of the *Regulation of Investigatory Powers Act 2000*. However, on the face of it this still exempts Treasury officials from the *Human Rights Act 1998*, common law principles of negligence and defamation and any other statutory requirement. .During the Committee stage debate on the Bill Lord Sassoon for the Government explained the purpose of the provision as follows:

> *In fact, this provision applies to anyone giving information to the Treasury as well as to any information supplied by the Treasury. Therefore, the purpose of the provision is primarily to protect persons when they disclose information to the Treasury. For example, it protects a bank that has provided information about a customer to the Treasury in accordance with the requirement under the Bill from being subject to an action taken by the customer on the basis of a breach of confidence.*[47]

However, the provision is certainly not drafted in any way that reflects these comments. Nor does it seem necessary to indemnify persons acting when disclosing information to the Treasury. In the example given by Lord Sassoon a bank providing information on a customer pursuant to a statutory obligation would clearly not be acting in breach of confidence, as it would have to be an 'unauthorised use' of the information to be considered so.[48] There will also be no breach of confidence if disclosure is in the public interest.[49] If, despite this, this is indeed the concern of the Government the provision should actually reflect that. But instead the provision is drafted so broadly as to say that nothing done, by anyone, under clauses 19-25, will be treated as a breach of any restriction imposed by statute. Lord Sassoon also said in the Committee stage debates that the general wording of this provision "*is not, as a matter of constitutional principle, capable of overriding any provision in the Human Rights Act*".[50] This is a matter of statutory interpretation and it is not certain that the courts would take the same view – particularly given the terminology is "*a breach of any restriction imposed by statute or otherwise*" – which is clear and certain. In any event, in a matter as important as disapplying the law, which may include the *Human Rights Act 1998*, it is incumbent on Parliament to be as clear as possible in its intention and not rely on vague principles of statutory interpretation.

---

[47] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at columns 198-199 per The Commercial Secretary to the Treasury (Lord Sassoon).
[48] See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 per Megarry J.
[49] *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 per Lord Goff.
[50] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 199 per The Commercial Secretary to the Treasury (Lord Sassoon).

Amendment 7 – Clauses 26-28: Appeals and Review of decisions

Page 12, line 33, leave out clause 26.

Page 13, line 6, leave out clause 27.

Clause 28, page 13, leave out lines 22-24 and insert—

"(i) on an application under sections 2, 5 or 6 of the Terrorist Asset-Freezing etc. Act 2010 (court's designation of organisations or individuals), or".

Clause 28, page 13, line 26, leave out "appeal or".

Clause 28, page 13, leave out lines 30-32 and insert—

"(i) on an application under sections 2, 5 or 6 of the Terrorist Asset-Freezing etc. Act 2010 (court's designation of organisations or individuals), or".

Clause 28, page 13, line 34, leave out "appeal or".

Effect

48. This will remove clauses 26 and 27 from the Bill (appeals and review of decisions by the court) and amend clause 28 to make reference to applications made to the court under proposed new clauses 2, 5 or 6 (rather than appeals made under clause 26 and applications made under clause 27).

Briefing

49. These amendments are consequential on the earlier proposed amendments being made which requires a court to make a designation rather than Treasury officials. Clause 26 was introduced immediately prior to Committee stage and allows for an appeal of the Treasury's decision to designate. This appeal could only occur after the decision to designate has already been made, and while awaiting the court's decision the person would be left without access to their own funds. As explained above, we do not believe it appropriate for the Executive to make the designation in the first place and our proposed Amendment 2 would give the power to the courts to

do this – making any appeal mechanism redundant (as the normal court rules on appeals would then apply). Clause 27 provides for review of a Treasury decision by way of judicial review. If Amendment 2 proposed above is successful the designation itself should be by the court and any decision by the Treasury will be subject to the normal rules regarding judicial review of executive action. It would therefore be unnecessary to continue to retain clause 27. The amendments to clause 28 are also consequential on the amendments proposed in Amendment 2 being made.

Amendment 8 – Clause 28: Special rules of court, special advocates etc.

Clause 28, page 13, leave out lines 38-44 and page 14, leave out lines 1-2.

Effect

50. This will remove subclause 28(4) from the Bill.

Briefing

51. Subclause 28(4) applies the provisions of the *Counter-Terrorism Act 2008* to terrorist asset freezing cases to allow for special rules of court to be made which can allow for closed hearings, secret evidence and special advocates. These special rules of court are similar to those used in control order cases. They can allow proceedings to be determined without a hearing, there can be different modes of proof and evidence, decisions regarding the proceedings don't need to be given to a party and indeed proceedings can take place in the absence of a party.[51] Just as in control order proceedings, special advocates can be appointed by the Attorney General to represent a person in closed proceedings and are not allowed to disclose any exempt material to the affected person. There are also limitations on the special advocate's access to expert evidence and a lack of accountability of special advocates in performance of their duties. All of this not only means that proper and effective legal representation is impossible, but also that intelligence on which the decision is based cannot be effectively challenged. Indeed, during the Committee stage debates the Government stated that under this regime "*some cases will inevitably involve the use of sensitive, or closed, material such as intelligence material that it would not be in the public interest to disclose to the individual*

[51] See sections 66-68 of the *Counter-Terrorism Act 2008.*

concerned".[52] Lord Wallace for the Government stated that the Government was not of the view that litigation under the control order regime on the right to a fair hearing was applicable in the context of the terror asset-freezing regime. In particular, the Government refused to recognise the applicability of the case of AF[53] in which the Supreme Court held that a person must know at least the basic case against them. It is clear that under this regime as currently drafted a person may never know the case against them before their assets and property are indefinitely frozen by the Executive. If these special rules of court continue to apply, even the much vaunted right of appeal could be rendered meaningless if a person does not even know what the decision to designate is based on. Given these powers do not guarantee the right to a fair hearing we believe the application of these powers must be removed from this Bill.

Amendment 9 – Clause 29: Powers to make rules of court

Page 14, line 3, leave out Clause 29.

Effect

52. This will remove clause 29 from the Bill.

Briefing

53. Clause 29, which was introduced just prior to the Committee stage, allows special rules of court (allowing for secret evidence, closed hearings, special advocates etc) to be made initially by the Lord Chancellor (without consultation with anyone other than the Lord Chief Justice of England and Wales) instead of by the Civil Rules Committee. The reason given for this amendment was that "*Rules are needed immediately the Act is in force and, given the short time frame, it would be very difficult for the committees to make such provision*".[54] We do not, however, believe that any such special rules allowing for secret evidence and the like should be made at all and believe therefore that this provision should be removed entirely.

[52] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at columns 202-203 per The Advocate-General for Scotland (Lord Wallace of Tankerness).
[53] *Secretary of State for the Home Department v AF & Ors* [2009] UKHL 28.
[54] See *Commons Hansard* debates on the Terrorist Asset-Freezing etc Bill, 6 October 2010, at column 207 per The Advocate-General for Scotland (Lord Wallace of Tankerness).

Amendment 10 – Clause 30: Treasury report

Clause 30, page 15, line 22, leave out “on them”.

Effect

54. This will remove the words “on them” from clause 30(1)(a) so that the Treasury must prepare a report about the exercise of any powers conferred by the Bill (not just the powers conferred on the Treasury).

Briefing

55. This is a consequential amendment if the amendments proposed above are made to ensure that the exercise of any powers under this Part of the Bill (including by the court) are reported on by the Treasury – not just the exercise by the Treasury of its powers.

Amendment 11 – Clause 32: Penalties

Clause 32, page 16, line 40, leave out “10 or”.

Effect

56. This will remove reference to section 10 in the list of offences for which penalties apply.

Briefing

57. This is a consequential amendment if Amendment 2 proposed above is accepted as it proposes removing clause 10.

Amendment 12– clause 42: Interpretation

Clause 42, page 21, after line 42 insert–

"'organisation' includes any association or combination of persons;
'terrorism' has the same meaning as in the Terrorism Act 2000 (see section 1(1) to (4) of that Act);
'the court'—

(a) in relation to proceedings relating to a designation in the case of which the designated person is a person whose principal place of residence is in Scotland, means the Outer House of the Court of Session;

(b) in relation to proceedings relating to a designation in the case of which the designated person is a person whose principal place of residence is in Northern Ireland, means the High Court in Northern Ireland; and

(c) in any other case, means the High Court in England and Wales;".

Effect

58. This proposed amendment will introduce three new definitions into the general interpretation section of clause 42.

Briefing

59. These interpretations relate to new terms proposed in Amendment 2 – in particular in relation to proposed substituted clauses 2, 5 and 6. It uses the same definition of 'organisation', 'terrorism' and 'the court' as is found in the *Terrorism Act 2000* and the *Prevention of Terrorism Act 2005*.

Conclusion

60. It is clear that the remorseless and devastating effect of the terrorist asset-freezing regime has severe implications for personal rights and freedoms. Inclusion on such a list is an extremely serious step and should be taken with the utmost caution on the basis of proof and evidence. We accept that countering terrorist plots may require the suspension of funding. In particular, denying support to

organisations that fund and carry out terrorism is essential to disrupt such grave activities. That is why we take no issue with the many counter-terrorism provisions that criminalise the funding of national and international terrorist groups or persons. We do, however, have serious concerns with the proposals in the Terrorist Asset-Freezing etc. Bill (as well as the current provisions of the *Al-Qaida and Taliban (Asset-Freezing) Regulations 2010*). It would be a surprising and regressive move if the Executive could continue to impose measures that the Supreme Court has described as 'draconian' and "*scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing*".[55] Replacing discredited past and present regimes with a near identical system for asset-freezing will only invite expensive litigation and further reforming legislation. It would also be wholly out of step with the Government's professed commitment to civil liberties.

[55] See Lord Brown in *Ahmed* at [192].