



## **Counter Terrorism Bill**

### **Briefing for House of Lords Second Reading**

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## Contents

Summary	3
Introduction	4
Clause 1 – Power to remove documents for examination	5
Clauses 22-33 – Pre-charge detention	8
<i>42 days violates the right to liberty</i>	9
<i>42 days is unsupported by evidence</i>	12
<i>42 days is unnecessary in practical terms</i>	13
<i>42 days is far longer than any other western democracy</i>	16
<i>42 days lacks credible safeguards</i>	21
Clause 34 – Post-charge questioning	26
Clause 41– Consent to prosecution of offence committed outside the UK	29
Clause 42 – Sentences for offences with a terrorist connection	31
Clause 51 – Notification scheme	32
Clause 66 – Notification orders	33
Clause 67 – Foreign travel restriction orders	35
Clause 71 – Rules of court about disclosure	36
Clause 73 – Intercept evidence	37
Part 6 – Inquests and inquiries	38
Clause 82 – Amendment of definition of ‘terrorism’ etc	39
Clause 83 – Offences relating to information about members of armed forces	40
Clauses 85-88 – Control orders	41

## Summary

- The government's proposal to extend the maximum period of pre-charge detention in terrorism cases to 42 days is unnecessary and utterly flawed.
- The maximum period of pre-charge detention in the UK is already longer than that of any European country and longer than that of any common law jurisdiction (p 16).
- Indeed, the UK maximum is already greater than that in Zimbabwe under Robert Mugabe (p 18).
- We note that the proposal to extend pre-charge detention is not supported by the current Director of Public Prosecutions, Sir Ken MacDonald QC nor by the former Attorney General, Lord Goldsmith QC, among others (p 13).
- Nor are any of the 'safeguards' on the extension to 42 days proposed by the government credible. The Bill contains no additional judicial safeguards and the proposals for parliamentary scrutiny are particularly abject in their ability to restrain excessive detention by the executive (p 21).
- Rather than continue to enact unnecessary counter-terrorism measures, the Counter-Terrorism Bill is an important opportunity for Parliament to adopt a proportionate and effective response to the threat of terrorism. As it stands, however, the Bill contains a number of flaws in addition to the proposals on extending pre-charge detention. These include:
  - the failure to lift the ban on intercept evidence in terrorism prosecutions (p 37);
  - a lack of safeguards for post-charge questioning of suspects (p 26);
  - an overbroad scheme for notification of terrorist offenders (p 32);
  - provision for specially-appointed coroners to sit without a jury in secret hearings (p 38); and
  - the failure to tighten sufficiently the statutory definition of terrorism (pp 29 and 39).

## Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. The Counter-Terrorism Bill is a large one and we do not address all its clauses in this briefing. Some of the proposed measures are relatively uncontroversial (e.g. improved security at gas sites). Some are more problematic but we have not been able to deal with them due to constraints of space (e.g. power to take and retain fingerprint samples from persons subject to control orders).
3. The bulk of this briefing is concerned with the government's proposals to further extend the maximum period of pre-charge detention in terrorism cases (clauses 22 to 33). Although we consider the proposed extension to be utterly unnecessary and strongly urge all members of the House to vote against it, we also think it important to highlight several other flaws in the Bill. These include a lack of sufficient safeguards in relation to post-charge questioning (clauses 34 to 39), provision for closed inquests without juries (Part 6), and a continuing failure to narrow sufficiently the statutory definition of terrorism (clauses 41 and 82). Despite the inclusion of some minor amendments (clauses 85 to 88), we note that the Bill also fails to remedy the glaring faults of the control order scheme under the Prevention of Terrorism Act 2005.
4. Since the Bill was published in January, the Privy Council Review on intercept evidence has published its report recommending the lifting of the current ban. Although we recognise that this is a complex area, we are disappointed that the Bill does not contain provisions for allowing the use of intercept evidence in criminal and civil proceedings (especially as considerable work has already gone into the Public Immunity Plus model). In particular, we think it would be short-sighted and maladroit for Parliament to make provision for the use of intercept evidence in inquests and inquiries (clauses 80 and 81) until such time as the broader issues concerning the admissibility of intercept evidence in general have been properly addressed.

## PART 1 – POWERS TO GATHER AND SHARE INFORMATION

### Clause 1 – Power to remove documents for examination

5. It is a long-established principle of search and seizure that police may only seize documents covered by the terms of the search warrant or relevant statutory power. For police to take documents outside of the terms of a warrant or statutory power is not only unlawful but also very likely a serious violation of the owner's right to privacy, especially if the documents are legally privileged.<sup>1</sup> The wholesale seizure of private papers by agents of the Secretary of State Lord Halifax without lawful authority was condemned in the 1765 judgment of *Entick v Carrington* as follows:<sup>2</sup>

we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; *for papers are often the dearest property a man can have.*

6. Despite these well-established principles, clauses 1 to 9 of the Bill introduce a series of sweeping provisions to enable police to seize documents as part of a search even though they do not know whether the documents are lawfully part of the subject of the search or not. Specifically, clause 1(2) provides that:<sup>3</sup>

A constable who carries out a search ... may, *for the purposes of ascertaining whether a document is one that may be seized, remove the document* to another place for examination and retain it there until the examination is completed.

7. Clause 3(1) provides a very minimal safeguard in that a constable may not remove a document if 'the constable has reasonable cause to believe' that it is either an 'item subject to legal privilege' or that 'it has an item subject to legal privilege comprised within it' (e.g. where the privileged material forms part of a larger document). However, in the latter case, the document can still be removed if:<sup>4</sup>

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<sup>1</sup> Article 8(1) of the European Convention on Human Rights provides that 'everyone has the right to respect for his private and family life, his home and *his correspondence*' [emphasis added]. In *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL 26 the House of Lords unanimously held that the blanket search policy of the Prison Service including legally privileged documents was a breach of the appellant's right under Article 8(1) as well as his common law rights of access to a court, access to legal advice, and 'to communicate confidentially with a legal adviser under the seal of legal professional privilege' (see e.g. Lord Bingham at para 21).

<sup>2</sup> [1765] EWHC KB J98, 95 ER 807 (6 Geo. III 1765). Emphasis added.

<sup>3</sup> Emphasis added.

<sup>4</sup> Clause 3(2).

it is not reasonably practicable for the item subject to legal privilege to be separated from the rest of the document without prejudicing the use of the rest of the document that would be lawful if it were subsequently seized.

8. In cases where legally privileged material *is* knowingly removed, clause 3(5) directs that ‘it must not be examined *except* to the extent necessary for facilitating the examination of the rest of the document’.<sup>5</sup>
9. The explanatory notes suggest that the power to remove documents ‘might be used, for example, to remove documents in a foreign language for translation’ (i.e. to determine whether they are liable to be seized or not).<sup>6</sup>
10. In JUSTICE’s view, however, such a sweeping power to remove documents is:
  - utterly disproportionate, even in the context of the difficult investigative demands of terrorism cases;
  - far in excess of the careful safeguards that apply to searches in non-terrorism cases; and
  - almost certain to prove incompatible with the Human Rights Act 1998 in respect of the power to knowingly remove and retain legally privileged documents.
11. First, the government’s example of determining whether a document in a foreign language is liable to be seized, for instance, is hardly a novel one. On the contrary, we note that the principles governing the search and seizure of documents are extremely well-established, having evolved over centuries. In particular, the provisions in Code B of the Police and Criminal Evidence Act 1984 governing search of premises and seizure of documents reflect many decades of experience with such issues. Paragraph 7.1, for instance, provides that an officer conducting a search under warrant may seize anything:
  - a) covered by a warrant;
  - b) the officer has reasonable grounds for believing is evidence of an offence or has been obtained in consequence of the commission of an offence but only if seizure is necessary to prevent the items being concealed, lost, disposed of, altered, damaged, destroyed or tampered with; and

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<sup>5</sup> Emphasis added.

<sup>6</sup> Explanatory notes, para 18.

- c) covered by the powers in the Criminal Justice and Police Act 2001, Part 2 allowing an officer to seize property from persons or premises and retain it for sifting or examination elsewhere.<sup>7</sup>

12. The 'seize and sift' powers of Part 2 of the Criminal Justice and Police Act 2001, themselves controversial, nonetheless contain a number of safeguards lacking from clauses 1-9. In particular, section 50(1) requires that the police must have 'reasonable grounds' for believing the item is liable to be seized. In addition, unlike the test in clause 3(2), section 50(3) of the 2001 Act sets out a number of criteria for determining whether it is 'reasonably practicable' to separate out something liable to be seized from another item, including:

how long it would take to carry out the determination or separation on those premises;<sup>8</sup>

the number of persons that would be required to carry out that determination or separation on those premises within a reasonable period;<sup>9</sup>

the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation;<sup>10</sup>

13. Secondly and in any event, we regard the power to removal legally privileged documents as an especially disproportionate interference with the right to respect for privacy under Article 8(1) of the European Convention on Human Rights and the common law right of access to legal advice (including the right to communicate in confidence under the protection of legal professional privilege). Given that there is no power to take legally privileged material by way of an ordinary search warrant other than under the exceptional terms of Part 2 of the 2001 Act,<sup>11</sup> and given the greater safeguards of Part 2, we think there can be no justification for allowing such a broad, unfettered power in the present case.

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<sup>7</sup> Part 2 of the Criminal Justice and Police Act 2001 allows a police officer to seize an item 'he has reasonable grounds for believing may be or may contain something for which he is authorised to search on those premises' (section 50(1)(a) where 'in all the circumstances, it is not reasonably practicable for it to be determined' whether it is liable to be seized (section 50(1)(c)(i) and (ii)).

<sup>8</sup> Section 50(3)(a).

<sup>9</sup> Section 50(3)(b).

<sup>10</sup> Section 50(3)(d).

<sup>11</sup> Para 7.2, Code B of PACE: 'No item may be seized which an officer has reasonable grounds for believing to be subject to legal privilege, as defined in PACE, section 10, other than under the Criminal Justice and Police Act 2001, Part 2'.

## **PART 2 – DETENTION AND QUESTIONING OF SUSPECTS**

### ***Clauses 22-33 – Pre-charge detention***

14. Under the existing law, a person arrested without a warrant on ‘suspicion of terrorism’<sup>12</sup> may be detained without charge for up to 28 days.<sup>13</sup>
15. This detention can be authorised by a judge without the defendant or his lawyers having the opportunity to appear in court<sup>14</sup> or know any of the information presented to justify his continued detention.<sup>15</sup>
16. The judge is only required to consider whether the police investigation is being conducted ‘diligently and expeditiously’ and if there are ‘reasonable grounds’ for believing that the detention is necessary to obtain evidence.<sup>16</sup>
17. Clauses 22-33 and Schedule 2 of the Bill introduces a reserve power for the Home Secretary to extend by order the maximum period of pre-charge detention under the Terrorism Act 2000 to 42 days.
18. We consider this proposal fundamentally flawed for the following reasons:
- 42 days violates the right to liberty;
  - 42 days is unsupported by evidence;
  - 42 days is unnecessary in practical terms;
  - 42 days is far longer than any other western democracy; and
  - 42 days lacks credible safeguards.

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<sup>12</sup> See section 41 and Schedule 8 of the Terrorism Act 2000.

<sup>13</sup> Schedule 8 of the 2000 Act, as amended by section 25(7) of the Terrorism Act 2006.

<sup>14</sup> Ibid, paragraph 33(3).

<sup>15</sup> Ibid, para 34.

<sup>16</sup> Ibid, para 32(1).



*42 days violates the right to liberty*

19. Among the most ancient rights recognised under UK law is the right to liberty.<sup>17</sup> For this reason, it has for several centuries been a basic common law principle that anyone arrested must be:

(a) informed promptly of the charges against him;<sup>18</sup> and

(b) brought before a judge 'as soon as he reasonably can'.<sup>19</sup>

20. These requirements serve two purposes. First, they act as a check against arbitrary detention by obliging the authorities to specify their accusations against a suspect and by subjecting those charges to independent judicial scrutiny.

21. Secondly, they allow the suspect the opportunity to begin to answer the allegations that are the cause of his detention. Otherwise, as Lord Simonds asked in 1947, 'how can the accused take steps to explain away a charge of which he has no inkling?'.<sup>20</sup>

22. These ancient requirements of the common law not only inspired the Fourth Amendment in the US Bill of Rights,<sup>21</sup> but also became the model for the right to liberty under the European

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<sup>17</sup> See e.g. Dalton, *Country Justice* (1655), p 406 'The liberty of a man is a thing specially favoured by the Common Law of this Land'.

<sup>18</sup> See e.g. *Christie v Leachinsky* [1947] AC 573 at 592 per Lord Simond: 'if a man is to be deprived of his freedom, he is entitled to know the reason why'.

<sup>19</sup> Sir Matthew Hale CJ, *History of the pleas of the Crown* (1778), Vol 2, p 95: following a suspect's arrest, 'the safest and best way in all cases is to bring [the prisoner] to a justice of peace and by him the prisoner may be bailed or committed as the case shall require'. In situations where a suspect could not be brought immediately before a justice, e.g. if a suspect was arrested 'in or near night', they could be held in 'the common gaol', in the stocks, or exceptionally in a house 'for a day and a night at least, and in some cases of necessity for a longer time, till he can with safety and conveniency convey him to a justice of peace' (ibid, p 96). See also, Blackstone's *Commentaries on the Laws of England*, Book 4, Chapter 21, p 294: 'When a delinquent is arrested ... he ought regularly to be carried before a justice of the peace. The justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged'. In *Wright v Court*, 4 B.&C. 596 (1825), the court held that it 'is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can'.

<sup>20</sup> *Christie v Leachinsky*, n 18 above, at 593.

<sup>21</sup> See the decision of the US Supreme Court in *Gerstein v Pugh* 420 U.S. (1975) at 114-116: 'At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. .... The justice of the peace would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody .... This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment ... and there are indications that the Framers of the Bill of Rights regarded it as a model for a 'reasonable' seizure'.

Convention on Human Rights 1950, and the International Covenant on Civil and Political Rights 1966. Thus Article 5(2) of the European Convention on Human Rights requires that anyone arrested:<sup>22</sup>

shall be ***informed promptly*** ... of any charge against him.

23. Article 5(3) similarly provides that anyone arrested or detained:<sup>23</sup>

shall be ***brought promptly*** before a judge.

24. In addition, Article 5(4) provides that anyone arrested or detained:<sup>24</sup>

shall be entitled to take proceedings by which the lawfulness of his detention shall be ***decided speedily*** by a court.

25. Near-identical language is used in Articles 9(2), (3) and (4) of the International Covenant on Civil and Political Rights, respectively requiring that anyone arrested:<sup>25</sup>

shall be ... ***promptly informed*** of any charges against him.

shall be ***brought promptly*** before a judge.

shall be entitled to take proceedings before a court, in order that court may ***decide without delay*** on the lawfulness of his detention

26. The meaning of the term '*promptly*' in Article 9(3) was considered by the UN Human Rights Committee in 1994. The Committee stated:<sup>26</sup>

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<sup>22</sup> In *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, the European Court of Human Rights referred to Article 5(2) as 'the elementary safeguard that any person arrested should know why he is being deprived of his liberty' (para 40).

<sup>23</sup> Emphasis added.

<sup>24</sup> Article 5(4) in particular implies the right of the suspect to be able to challenge his detention in a manner that meets the essential judicial guarantees of fairness: see e.g. the judgment of the European Court of Human Rights in *Weeks v United Kingdom* (1989) 10 EHRR 293, in which it held that 'proper participation of the individual adversely affected by the contested decision' is 'one of the principal guarantees of a judicial procedure for the purposes of the Convention' and that conditions which prevent this (i.e. preventing the accused from attending the hearing and knowing the evidence against them) 'cannot therefore be regarded as judicial in character'.

<sup>25</sup> Emphasis added.

<sup>26</sup> Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994). Emphasis added.

More precise time-limits are fixed by law in most States parties and, in the view of the Committee, **delays must not exceed a few days**.

27. The UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment include the requirement that:<sup>27</sup>

Anyone who is arrested ... **shall be promptly informed** of any charges against him.

28. By definition, pre-charge detention under the 2000 Act means that a suspect is unable to know the charges against him. Moreover, Schedule 8 of the Act allows the suspect and his lawyers to be excluded from 'any part of the hearing' to authorise continued detention,<sup>28</sup> and be denied access to information used by police and prosecutors to justify that detention.<sup>29</sup>

29. In our view, it is plain that being held without charge for more than 28 days is not 'prompt' within the meaning of Article 5(2).

30. It is also obvious that detention authorised by a judge in the absence of the defendant and his lawyer, and without knowledge of the information presented against him, cannot satisfy either the basic right of a suspect to be brought 'promptly' before a court under Article 5(3) or the right to have the lawfulness of his detention 'decided speedily' under Article 5(4).

31. The European Court of Human Rights has repeatedly made clear that the requirements of Article 5 apply even in cases of suspected terrorism. In the 1988 case of *Brogan v United Kingdom*,<sup>30</sup> the Court considered the case of 3 suspected IRA members who were detained under the Prevention of Terrorism Act (Temporary Provisions) Act 1984 for periods up to 4 days without being brought before a judge. The Court acknowledged that 'the investigation of terrorist offences undoubtedly presents the authorities with special problems'<sup>31</sup> but concluded that:<sup>32</sup>

none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the

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<sup>27</sup> Principle 10, Adopted by General Assembly resolution 43/173 of 9 December 1988. Emphasis added.

<sup>28</sup> Paragraph 33(3) of Schedule 8.

<sup>29</sup> Ibid, para 34.

<sup>30</sup> (1988) 11 EHRR 117

<sup>31</sup> Judgment, paragraph 61.

<sup>32</sup> Ibid, para 62.

community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Art 5(3).

32. Of course, if the government considers that the threat of terrorism is so serious as to constitute a 'public emergency threatening the life of the nation',<sup>33</sup> and believes that 42 days pre-charge detention were necessary to combat that threat, the government could always seek to derogate from the requirements of Article 5. For the reasons set out below, we very much doubt that the threat is currently so serious as to require such a step. Without such a derogation, however, it is plain that the proposed extension to 42 days will result in the violation of the rights of suspects under Articles 5(2), (3) and (4) of the European Convention on Human Rights.

33. As we explained above, the guarantees contained in Article 5 of the European Convention and Article 9 of the International Covenant are not merely promises which the government has made at the international level. They are founded upon on the ancient common law rights of those arrested to be informed promptly of the charges against them and to be brought speedily before a court following their arrest – core principles which have for several centuries guided our criminal law and procedure. They are, in short, an essential part of this country's tradition of liberty – what the Prime Minister has acknowledged as Britain's 'gift to the world'.<sup>34</sup> We believe 42 days precharge detention would sully that tradition and that gift.

#### *42 days is unsupported by evidence*

34. There is no evidence to show that the existing maximum of 28 days has proved inadequate, as the government itself has repeatedly conceded:<sup>35</sup>

In the year since the 2006 legislation came into effect, there has been no case in which a suspect was released but a higher limit than 28 days would definitely have led to a charge.

And:<sup>36</sup>

It is not suggested that there has yet been a case in which the current limit of 28 days for pre-charge detention has proved inadequate.

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<sup>33</sup> Article 15(1) of the Convention.

<sup>34</sup> Prime Minister Gordon Brown, Speech on Liberty, University of Westminster, 25 October 2007.  
<http://www.number10.gov.uk/output/page13630.asp>

<sup>35</sup> *Options For Pre-Charge Detention In Terrorism Cases* (Home Office: 25 July 2007), p 8.

<sup>36</sup> *Pre-charge Detention of Terrorist Suspects* (Home Office, December 2007), p 6.

35. The government has nonetheless claimed that:<sup>37</sup>

Although there has not yet been a circumstance where more than 28 days has been needed to charge a suspect, the full 28 days have been needed in two separate investigations.

36. However, in November 2007 the Director of Public Prosecutions, Sir Ken Macdonald QC, told Parliament that:<sup>38</sup>

**We are ... satisfied with 28 days.** We have not had any cases which would require a longer period than that and indeed in one case, which is very well-known involving an airline plot, I think two or three men were charged on the 27th or 28th day and three men were released without charge and have not since been charged, so our day-to-day experience as prosecutors has been that the 28-day period has been useful and effective.

37. In December 2007, the head of the Counter-Terrorism Division of the Crown Prosecution Service, Sue Hemmings similarly confirmed that:<sup>39</sup>

The Crown Prosecution Service has made its position clear, that we think the 28 days has been sufficient in each case that we have had. **We have not seen any evidence that we have needed beyond 28 days.**

*42 days is unnecessary in practical terms*

38. In the absence of any evidence showing the existing limit has proved inadequate, the government's primary justification for extending pre-charge detention is its fear that the 'trend for increasingly complex plots' means that:<sup>40</sup>

it may be necessary to go beyond the current 28-day limit of pre-charge detention if we are to bring to justice those who carry out serious terrorist attacks.

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<sup>37</sup> Ibid, p 4.

<sup>38</sup> Evidence to House of Commons Home Affairs Committee, 21 November 2007, Q 539. Emphasis added.

<sup>39</sup> Evidence to Joint Committee on Human Rights, 5 December 2007, Q 119. Emphasis added.

<sup>40</sup> *Pre-charge Detention of Terrorist Suspects*, n 36 above, p4.

39. This argument is seriously flawed in two key respects. First, there is little evidence to show that the complexity of suspected terror plots has increased significantly since the 9/11 attacks in 2001 or the 7/7 bombings in 2005.

40. Secondly and more importantly, even if it were true that the complexity of plots is in fact increasing, it is clear that longer periods of precharge detention have little bearing on the ability of prosecutors to charge suspects with terrorism offences.

41. In respect of the difficulty of investigations, the government cites four indicators to suggest that 'operations are growing in complexity and scale' in terms of:

- (i) the amount of material seized;
- (ii) the use of false identities;
- (iii) multiple languages; and
- (iv) international links

42. However, there is no evidence to show that the incidence of false identities, the number of languages involved or the number of international links in Al-Qaeda-related terrorism have significantly increased since the 9/11 attacks in 2001 (when the maximum period of pre-charge detention in the UK was 7 days), the Madrid bombing in 2004 (when the maximum was 14 days) or 7/7 bombings in 2005 (following which the maximum was increased to 28 days).

43. The investigation of the Madrid bombings, for instance, resulted in 29 suspects being charged with terrorism offences including individuals of Algerian, Egyptian, Lebanese, Moroccan, Spanish, Syrian, and Tunisian nationality, resulting in 21 convictions.<sup>41</sup> The trial involved 'over five months of testimony, more than 300 witnesses and 70 experts'.<sup>42</sup> Suspects were alleged to have used 'multiple false identities',<sup>43</sup> and the investigation involved arrests in Belgium, the Canary Islands, Italy and Serbia. The investigations of the plots behind the 9/11 attacks and 7/7 bombings were similarly wide-ranging, involving inquiries in a number of different jurisdictions, and in different languages.

44. Contrary to the government's claim, then, the incidence of terrorism plots involving the possible use of false identities, suspects speaking different languages and involving multiple jurisdictions appears to have been fairly stable since 9/11. Indeed, the sole indicator to show

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<sup>41</sup> Guardian, 'Madrid Bombings: the defendants', 31 October 2007.

<sup>42</sup> Associated Press, '2004 Madrid Bombings', 31 October 2007.

<sup>43</sup> See e.g. Washington Post, 'Lebanese Man held in Madrid Bombing', 31 July 2004.

an actual increase since 9/11 has been the amount of material seized by British police in their investigations.<sup>44</sup>

To demonstrate the increasing complexity of cases, in the Dhiron Barot case in 2004, there were 274 computers seized compared with 400 computers in the alleged airline plot in 2006. In addition, there were approximately 2,000 computer discs, CDs and DVDs in the Dhiron Barot case compared with approximately 8,000 computer discs, CDs and DVDs in the alleged airline plot. Finally, there were 8,224 exhibits seized in the Dhiron Barot case compared with in excess of 25,000 in the alleged airline plot.

45. These figures, however, do not necessarily reflect any increase in the actual complexity of the alleged plots themselves.<sup>45</sup> Statistics concerning the amount of material seized in any particular case, or the number of exhibits used at trial, may only reflect the complexity of the police's own suspicions rather than hard fact.

46. For example, the Forest Gate raid in 2006 involved over 250 police officers, the imposition of a ban on aircraft flying below 2500 feet over the site of the investigation,<sup>46</sup> and the closure of nearby roads for several days.<sup>47</sup> It reportedly followed a two month surveillance operation involving police and MI5,<sup>48</sup> and the raid itself cost over £2.2 million including £864,300 in overtime payments for the police officers involved.<sup>49</sup> The so-called 'complexity' of an investigation, in other words, may have nothing to do with whether a plot actually exists.

47. In any event, even if it were true that the complexity of terrorism investigations is increasing, we think that use of the Threshold Test combined with the lifting of the ban on intercept evidence and provision for post-charge questioning would make it possible to bring charges against suspects within the existing 28 day limit in even the most complex of cases.

48. During the debate over 90 days pre-charge detention in 2005, we pointed out<sup>50</sup> that the Threshold Test – which allows the CPS to charge suspects in cases where further evidence is

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<sup>44</sup> Home Office paper, n 36 above, p5.

<sup>45</sup> As the Home Office's own paper notes, 'No individual case since the alleged airline plot in August 2006 has yet exceeded that plot in complexity – though there have been a number of arrests and charges for terrorist offences in alleged plots since then' (*Pre-charge Detention of Terrorist Suspects*, n 36 above, p 6).

<sup>46</sup> BBC News, 'Raid police hunt chemical device', 3 June 2006.

<sup>47</sup> Times, 'Police struck rapidly after chillingly precise tip-off', 3 June 2006.

<sup>48</sup> Guardian, 'Men in gas masks, a broken window, then a single shot', 3 June 2006.

<sup>49</sup> Daily Telegraph, 'Chemical bomb' raid that found nothing cost £2.2m', 3 October 2006.

<sup>50</sup> See e.g. Home Affairs Committee, *Terrorism Detention Powers* (HC 910: July 2006), paras 110-112.

expected but not yet available<sup>51</sup> – enables charges to be brought promptly against suspects in even very complex investigations. This argument was publicly dismissed by the police, however, who claimed that ‘the Threshold Test was not applicable in terrorism cases’.<sup>52</sup> We are therefore pleased to see that the CPS has now publicly confirmed that the Threshold Test can and does play a major part in bringing charges against suspects in terrorism cases within the existing time-limit. As the Director, Sir Ken MacDonald QC, told Parliament in December:<sup>53</sup>

given the nature of the threshold test, the evidence is only required to demonstrate a reasonable suspicion that the defendant committed the offence. I can only say to you that our experience so far has been that we have managed and managed reasonably comfortably.

49. The head of the CPS’s Counter-Terrorism Division similarly informed the Joint Committee on Human Rights that the Threshold Test had been used in ‘just under 50%’ of the last 18 or 20 terrorism cases,<sup>54</sup> and in ‘slightly more’ than 50% of cases in which a suspect was held for longer than 14 days.<sup>55</sup>

50. Although we think that existing provisions enable charges to be brought within the existing time limits, we have long supported the introduction of additional measures to enable charges to be brought swiftly against suspects in terrorism cases. These are: (i) lifting the ban on intercept evidence and (ii) introducing provision for questioning suspects post-charge in exceptional circumstances. We dealt with each of these proposals in more detail below.<sup>56</sup>

*42 days is far longer than any other western democracy*

51. Although the UK faces a serious threat from Al Qaeda-related terrorism, it is far from unique in this respect. The 9/11 attacks in 2001 and the Madrid bombings in 2004 showed that other

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<sup>51</sup> The Threshold Test is contained in the Code for Crown Prosecutors and applies in cases where ‘it is proposed to keep the suspect in custody after charge [e.g. because of the threat of terrorist attack] but the evidence required to apply the Full Code Test is not yet available’ (para 3.3). The Test itself requires prosecutors ‘to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it is in the public interest to charge that suspect’ (para 6.1).

<sup>52</sup> Home Affairs Committee, *Terrorism Detention Powers*, n 52 above, para 111. See e.g. the statements of DAC Peter Clarke, then-head of the Met Anti-Terrorism Branch, that ‘I do not think the Threshold Test is at all applicable in these sorts of cases’ and ‘I do not think the Threshold Test is something which really plays into this debate at all’, 28 February 2006, Q 227.

<sup>53</sup> Evidence to Home Affairs Committee, n 38 above, Q 551.

<sup>54</sup> Evidence to Joint Committee on Human Rights, n 39 above, Q 151.

<sup>55</sup> *Ibid.*, Qs 154-155.

<sup>56</sup> For intercept evidence see p 37; for post-charge questioning see p 26.



democracies also face the same risk. And yet at 28 days, the UK already has a maximum period of pre-charge detention far in excess of any other western country, as the following list of countries indicates:

- Canada 1 day;<sup>57</sup>
- United States 2 days;<sup>58</sup>
- South Africa 2 days;<sup>59</sup>
- New Zealand 2 days;<sup>60</sup>
- Germany 2 days;<sup>61</sup>
- Spain 5 days;<sup>62</sup>
- France 6 days.<sup>63</sup>

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<sup>57</sup> Criminal Code (R.S., 1985, c. C-46), s 503(1)(b): 'where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible'.

<sup>58</sup> In *County of Riverside v. McLaughlin* 500 U.S. 44 (1991), the US Supreme Court held that the Fourth Amendment required, 'as a general rule', that a suspect must be brought before a judge within 48 hours for a determination of probable cause. For further details, see JUSTICE, *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11* (November 2007).

<sup>59</sup> Section 35(1)(d), Constitution of the Republic of South Africa 1996: 'Everyone who is arrested for allegedly committing an offence has the right ... to be brought before a court as soon as reasonably possible, but not later than (i) 48 hours after the arrest; or (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day'. See also section 35(1)(e), entitling those arrested 'at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released'.

<sup>60</sup> Section 23(2), New Zealand Bill of Rights Act 1990: 'Everyone who is arrested for an offence has the right to be charged promptly or to be released'. See also section 23(3): 'Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal'. Although legislation does not specify a time limit, the courts have consistently interpreted the requirement 'promptly' in a narrow manner: see e.g. *R v Rogers* (1993) 1 HRNZ 282, in which the Court of Appeal held that pre-charge detention as short as 5 hours was not sufficiently prompt in the particular circumstances of the case.

<sup>61</sup> Articles 112-130 of the German Code of Criminal Procedure (*Strafprozessordnung*) set out the various time-limits that a suspect may be detained following arrest prior to being brought before a court. According to the Foreign and Commonwealth Office survey in 2005: 'Anyone arrested in Germany must be brought before a judge by the "termination of the day following the arrest". Usually this is within 24 hours, but can be up to nearly 48 hours' (*Counter-Terrorism Legislation and Practice: A Survey of Selected Countries*, October 2005, para 40). Like the Foreign Office, we take the issue of a judicial arrest warrant (*Haftbefehl*) to be the closest equivalent of a charge in common law terms, in the sense that it involves an independent judicial determination of the evidence identifying allegations against a suspect (c.f. Sec. 112(2) of the Code of Criminal Procedure). See also Liberty's detailed analysis of the German judicial arrest warrant in their comparative study, *Terrorism Pre-Charge Detention Comparative Law Study* (November 2007), pp 40-43.

<sup>62</sup> Article 17(2) of the Spanish Constitution provides that 'Preventive arrest (*La detención preventiva*) may not last more than the time strictly necessary for the investigations which tend to clarify events, and in every case, within a maximum period of 72 hours'. Article 520 bis of the Spanish Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*) permits the further detention of suspects in terrorism cases up to a maximum of 5 days. Although provision is made for detention incommunicado up to 13 days, suspects continue to receive legal assistance and 'all other rights, including *habeas corpus*, continue to apply' (FCO study, n 61 above, para 94).

52. Indeed, at 28 days, the UK's maximum period of pre-charge detention is already greater than that in Zimbabwe under Robert Mugabe.<sup>64</sup> Indeed, the Director of Public Prosecutions, Sir Ken MacDonald QC, has described the 28 day maximum as 'by far the greatest period in the common law world'.<sup>65</sup>

53. Rather than explain why the UK should be unique in this regard, the government has instead sought to dismiss such comparisons as 'misleading', complaining that:<sup>66</sup>

***It is not straightforward to try and compare the UK's pre-charge detention scheme with figures from countries*** which have very different systems and approaches to ours.

54. At the same time, the government continues to claim that pre-charge detention in the UK compares favourably with pre-charge detention in other European countries. The latest Home Office paper even manages to present its contradictory arguments on the same page.<sup>67</sup>

***No other European country has the identical charging process*** and threshold tests that we have or the same adversarial system ....

.... We can all think of recent examples where suspects are considered under investigation ***for considerable periods of time before they are charged***, which may not be until very near the beginning of a trial. For example, the suspects in the Meredith Kercher killing can be ***held in Italy for a year and yet they have not been charged*** – their system simply works in a different way to ours.

We believe, on balance, that the systems and safeguards we have in the UK ***compare favourably*** to those in other countries.

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<sup>63</sup> Under the Code of Criminal Procedure (*Code de procédure pénale* or CPP), the maximum period of pre-charge detention (*garde à vue*) is 1 day (Articles 63-4) but may be extended to 2 days where authorized by a district prosecutor (Art 77) or *juge d'instruction* (Art 154). In terrorism cases (offences under Article 421 of the *Code pénal*) an additional 4 days detention may be authorized by a *juge des libertés et de la détention* (Article 706-88 of the CPP). Although we agree that the nature of a *charge* under French law is not precisely the same as a charge in English law, we consider that the specification of an offence against a suspect is the most obvious point of comparison.

<sup>64</sup> The current maximum period of pre-charge detention in Zimbabwe under the Criminal Procedure and Evidence (Amendment) Act 2004 is 21 days. In February 2004, President Mugabe used regulations under the Presidential Powers (Temporary Measures) Act 1990 to extend pre-charge detention to 28 days but this was later reduced by the later 2004 Act.

<sup>65</sup> Evidence to Home Affairs Committee, n 38 above, Q 551.

<sup>66</sup> Home Office, *Pre-charge Detention of Terrorist Suspects*, n 36 above, p 10. Emphasis added.

<sup>67</sup> *Ibid.* Emphasis added.

55. On the one hand, the government maintains that periods of pre-charge detention are not comparable. On the other hand, the government claims that the periods *are* comparable and the UK maximum compares favourably to that in other countries.

56. In particular, the government continues to confuse detention pre-charge with detention pre-trial in other EU countries. Just as UK law allows a court to refuse bail to a suspect who has been charged, other EU countries allow for extended pre-trial detention of suspects after they have been brought before a court to hear the evidence against them.

57. In Italy, for instance, the maximum period of pre-charge detention is 4 days.<sup>68</sup> Three suspects in the Meredith Kercher case, Amanda Knox, Patrick Lumumba and Raffaele Sollecito were arrested on 6 November 2007<sup>69</sup> and appeared in court on 9 November for a *convalida* hearing.<sup>70</sup> Following the hearing, the *giudice per le indagini preliminari* (preliminary judge) released her report detailing the allegations against the three suspects, including the following account:<sup>71</sup>

A short while later, Meredith returned, or she could have already been there. She went into her bedroom with Patrick, after which something went wrong, in the sense that Sollecito in all probability joined them and the two began to make advances, which the girl refused. She was then threatened with a knife, the knife which Sollecito generally carried with him and which was used to strike Meredith in the neck. The three, realising what had happened, quickly left the house, creating a mess with the intention of simulating a break-in, spreading blood everywhere, and in an attempt to clean up drops of blood in the bath, on the ground and in the sink.

58. Notwithstanding the differences between criminal procedure in Italy and that in the UK, we find it striking that a suspect arrested in Italy is not only brought promptly before a court but is given such a detailed account of the case against him or her within three days of arrest. By

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<sup>68</sup> Article 13(2) of the Italian Constitution provides that 'No one may be detained, inspected, or searched nor otherwise restricted in personal liberty except by order of the judiciary'. Article 13(3) provides that 'As an exception, under the conditions of necessity and urgency strictly defined by law, the police may take provisional measures that must be reported within 48 hours to the judiciary and, if they are not ratified within another 48 hours, are considered revoked and remain without effect'. Article 390 requires that, within 48 hours of arrest, a suspect must be either released or a request made to a preliminary judge (*giudice per le indagini preliminari*) for 'validation' (*convalida*) of the arrest. The *convalida* is, in our view, clearly the closest equivalent to a charge in English criminal procedure, involving the formal accusation against the suspect and an independent judicial determination of the grounds of detention. See also the analysis of the *convalida* hearing in Liberty's comparative study, n 61 above, p 45.

<sup>69</sup> BBC News, 'Meredith suspects to stay in jail', 30 November 2007.

<sup>70</sup> Times, 'Judge: Meredith killed for resisting violent sex', 9 November 2007.

<sup>71</sup> Translated extracts from report by Judge Claudia Matteini, of the Civil and Penal Tribunal of Perugia, on the Meredith Kercher case, Times, 'Meredith Kercher: Judge's report', 9 November 2007.

contrast, a UK suspect detained under the Terrorism Act 2000 may be excluded from any hearing authorising his detention,<sup>72</sup> and can be held without knowing any of the allegations against him for almost a full calendar month. Nothing remotely comparable to the detailed report of the preliminary judge in the Kercher case would be available to a terrorism suspect in the UK.

59. An equally specious claim is made by the government against periods of pre-charge detention in other common law countries such as Australia, Canada, New Zealand, South Africa or the United States. Since these countries do not have 'very different systems' from that in the UK (having all inherited the English common law rules governing criminal procedure), the government instead has complained that they 'are not bound by the requirements of the European Convention on Human Rights'.<sup>73</sup>

60. However, we find it impossible to understand how the requirements of the European Convention could be any kind of obstacle to a straightforward comparison between the period of pre-charge detention in, for example, Canada (1 day) with that in the UK (28 days). Nor has the government explained how this could possibly make a difference.

61. As it happens, all common law countries are bound by the requirements of the right to liberty under Article 9 of the International Covenant on Civil and Political Rights which – as we noted above – is identical in its terms to Article 5 of the European Convention on Human Rights.<sup>74</sup>

62. In addition, nearly all other common law countries are bound by domestic equivalents of Article 5 whose protection is equal to – indeed, in many cases greater than – that provided under the Convention. For example, the 2 day maximum in the US is part of the constitutional guarantee of the Fourth Amendment to the Bill of Rights. Canada, New Zealand and South Africa all have domestic human rights instruments (themselves modelled on the European Convention) protecting the right to liberty.<sup>75</sup>

63. As we noted in our November 2007 report, *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11*, tight limits on pre-charge detention are no obstacle to the effective prosecution of suspected terrorists. We surveyed ten of the most high-profile terrorism cases since 9/11 in which the FBI, together with state and local police, arrested over

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<sup>72</sup> See Schedule 8 of Terrorism Act 2000, n 28 above.

<sup>73</sup> See e.g., the Home Office claim that 'simple comparisons of number of days can be misleading because such countries outside the EU are not bound by the requirements of the ECHR' (ibid).

<sup>74</sup> See n 25 above.

<sup>75</sup> The right to liberty is protected under sections 7, 10 and 11 of the Canadian Charter of Rights and Freedoms 1982, sections 22 and 23 of the New Zealand Bill of Rights Act 1990 and by sections 12 and 35 of the South African Bill of Rights 1996.

50 suspects in alleged plots aimed at causing widespread loss of life, including the destruction of such key US landmarks as the Sears Tower and the Brooklyn Bridge. Nonetheless, in all ten alleged terror plots between 2002 and 2007, each suspect was charged with a criminal offence within 48 hours of their arrest.

64. On 10 June, the Home Secretary Jacqui Smith MP wrote to Martin Linton, a backbench Labour MP, on the issue of international comparisons. In particular, the Home Secretary wrongly claimed:<sup>76</sup>

[I]nternational comparisons [on periods of pre-charge detention] by organisations such as Liberty are misleading .... The Home Affairs Committee **and even organisations such as Justice accept that such comparisons are wrong.**

65. JUSTICE has written to Home Secretary asking for these comments to be corrected, on the basis that they are wholly without foundation.<sup>77</sup> However, we have yet to receive any acknowledgement, still less a correction. In our view, the government's failure to correct its error on this basic point is indicative of a more general lack of accuracy in its analysis of international comparisons.

#### *42 days lacks credible safeguards*

66. The government described the Bill as originally introduced as containing an 'operationally triggered, exceptional and time limited' reserve power with both 'judicial and parliamentary' safeguards.<sup>78</sup> In June, the government introduced a number of 'additional safeguards', which it argued provided further protection against excessive detention.
67. However, the actual mechanics of the 'reserve power' are nowhere nearly as limited as the government claims, nor do we think any of the proposed judicial or parliamentary checks can accurately be described as 'safeguards'. More fundamentally, no amount of 'additional scrutiny' of pre-charge detention can hope to overcome the inherent lack of evidence which is, after all, the defining characteristic of such detention in the first place.
68. First, we note that the threshold of a 'grave exceptional terrorist threat' (the declaration required of the Home Secretary to Parliament under clause 22 in order to make the 'reserve power' available) can be triggered by any of a wide variety of events that may be neither grave nor exceptional.

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<sup>76</sup> Emphasis added.

<sup>77</sup> Letter of Roger Smith, Director of JUSTICE, to the Rt Hon Jacqui Smith MP, 13 June 2008.

<sup>78</sup> Home Office, *Pre-Charge Detention of Terrorist Suspects*, n 36 above, p 11.

69. In substance, clause 22 defines 'grave exceptional terrorist threat' in exceedingly broad terms, and is closely modelled upon the similarly wide definition of 'emergency' in Part 2 of the Civil Contingencies Act 2004.<sup>79</sup> This definition was strongly criticised by both the Joint Committee on the Draft Civil Contingencies Bill and the House of Lords Constitution Committee as 'unduly broad'.<sup>80</sup> Despite subsequent amendment, the definition of 'emergency' enacted by Parliament in the Civil Contingencies Act 2004 remained deliberately broad and it is this definition that the government has used as its template for the definition of 'grave exceptional terrorist threat'.

70. It is also important to note that 'terrorism' in subclause (1) remains undefined. Accordingly, 'terrorism' would be interpreted under clause 86 of the Bill to follow the broad definition in the Terrorism Act 2000, which includes under section 1(4)(d) the use or threat of force against any government anywhere in the world.

71. Consequently, the statutory definition of 'grave exceptional terrorist threat' could be triggered by a variety of situations that most members of the public would not necessarily consider grave nor exceptional. For example:

- A group of protesters who released an internet virus ('disruption of a system of communication' under subclause 2(e)) to make a political statement could qualify as 'serious damage to human welfare' (under subclause (1)(b)). Section 1(2)(e) of the Terrorism Act 2000 also includes actions 'designed seriously to interfere with or seriously disrupt an electronic system'. So long as the protesters released the internet virus with the intention of 'influencing the government' (section 1(1)(b) of the 2000 Act) and it was made with 'the purpose of advancing a political, religious or ideological cause' (section 1(1)(c)), it would qualify as a 'situation involving terrorism' under clause (1);
- A group of Burmese rebels who plotted to overrun a local army base in order to obtain relief for cyclone victims and publicise their plight to the world at large would constitute a 'situation involving terrorism which causes or threatens ... serious loss of human life' (clause (1)(a)), on the basis that terrorism includes any act 'designed to influence the government' (section 1(1)(b) of the 2000 Act) and includes 'the government of ... a country other than the United Kingdom (section 1(4)(d) of the 2000 Act).

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<sup>79</sup> C.f. the structure of clause 22 and section 17 of the 2004 Act.

<sup>80</sup> Report of the Joint Committee on the Draft Civil Contingencies Bill (November 2003; HL 184; HC 1074) para 32; Memorandum from the House of Lords Constitution Committee to the Joint Committee on the Draft Civil Contingencies Bill, *ibid*, Appendix 1, para 6.

72. However far-fetched these examples may undoubtedly seem in practical terms, they are not outside the scope of 'grave exceptional terrorist threat' as a court would construe them following the normal principles of statutory construction. It is not necessary to seek extreme examples, however. Two years ago, the then-Prime Minister Tony Blair said of the police in the Forest Gate incident:<sup>81</sup>

I think if they have a reasonable piece of intelligence and they believe they have got to investigate — take action on — they should ... You can only imagine if they fail to take action and something terrible happened what the outcry would be then.

Examples such as Forest Gate show that following 9/11, Madrid, and 7/7, the allegation of a threat involving serious loss of life is a common feature of terrorist investigations. Defining a 'grave exceptional terrorist threat' as an event 'which causes or threatens serious loss of human life' is essentially meaningless, therefore - measured against any other alleged threat of terrorism, it would be neither grave nor exceptional.

73. Secondly, the 'operational trigger' in clauses 23 and 24 involves an equally low hurdle. They simply require the relevant law officer (the DPP in England and Wales and Northern Ireland; the Crown Agent in Scotland) and a chief constable to give their view that 'there are reasonable grounds for believing' that detention of a suspect beyond 28 days will be necessary for one of the grounds set out in subclause 24(3), and that the investigations are being carried out 'diligently and expeditiously'. But for the seniority of those involved, these requirements are substantively the same as those for detention *up to* 28 days under the existing law in Schedule 8 of the 2000 Act.

74. In other words, the sole 'safeguard' offered by clauses 23 and 24 is a statement by the senior prosecutor and a senior policeman expressing their belief that the standard grounds for extended pre-charge detention under the Terrorism Act 2000 are made out. Far from providing a threshold for the use of exceptional powers, the proposed requirements do not demand anything more from the police and CPS than they would have had to show a judge in order to detain a suspect for more than 48 hours.

75. By contrast, the operational trigger for making emergency regulations under the Civil Contingencies Act 2004, for example, requires a senior Minister to be satisfied, among other things, that '*it is necessary* to make provision for the purpose of preventing, controlling, or mitigating an aspect or effect of an emergency'.<sup>82</sup> Although the 'reserve power' does require the Secretary of State to state to Parliament that she is 'satisfied ... that the reserve power is

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<sup>81</sup> 'Forest Gate raid police forced to act', *Times*, 7 June 2006.

<sup>82</sup> Section 21(3) of the Civil Contingencies Act 2004. Emphasis added.

needed for the purposes of that investigation',<sup>83</sup> it has no bearing on the validity of the order and is, thus, not a trigger of any kind.<sup>84</sup>

76. Indeed, under clause 23(3), the 'reserve power' is available immediately upon the making of the order. Although clauses 27 and 28 make provision for subsequent parliamentary debate of the Secretary of State's order, the reserve power lasts until either it expires after 7 days or a motion to approve the Secretary of State's order is negated by either House of Parliament, whichever is sooner.<sup>85</sup> In other words, an individual may be detained up to a maximum of 35 days without Parliament ever having the opportunity to debate the measure.

77. Thirdly, the requirement upon the Home Secretary to obtain 'independent legal advice' as to whether she 'can properly be satisfied' of the grounds set out in clause 27(2) seems a toothless gesture for several reasons: (i) it has always been open to government to publish the legal advice it receives from the Law Officers, the Home Office Legal Advisor's Branch, and external Treasury Counsel and – since it has never been suggested that lawyers who advise the Crown are tainted in their independence – the requirement that the lawyer be external to government would make little difference; (ii) since the government has yet to publish the legal advice it has received on the compatibility of the extension of pre-charge detention to 42 days, it is difficult to see how the provision of independent legal advice would be an improvement upon this state of affairs; (iii) subclause 25(7) allows the Home Secretary to redact the legal advice received so Parliament may not see the full advice; and (iv) the specific legal grounds required of the Secretary of State under clause 27(2) are so impoverished that even the most independent-minded legal advice would amount to little more than a rubber stamp. It would certainly not constitute an effective safeguard against excessive executive detention.

78. Fourthly, clause 31 provides for the government-appointed reviewer of terrorism legislation (currently Lord Carlile of Berriew QC) to carry out a review of the operation of the reserve power, including the case of every person detained beyond 28 days. The Home Secretary Jacqui Smith MP has described the prospect of review as a significant check on the exercise of the reserve power:<sup>86</sup>

Trust me, as a minister and as a home secretary, one of the things that makes you think very carefully about the decision that we are making is not only the immediate

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<sup>83</sup> Paragraph 41(3)(a).

<sup>84</sup> Detention remains valid even if Parliament subsequently concludes that the Home Secretary's statement was wrong or false: see paragraph 45(5): 'the cessation of the availability of the reserve power under this paragraph does not affect the validity of anything previously done by virtue of that power'.

<sup>85</sup> Clause 28(1)(b).

<sup>86</sup> '42 day detention: Smith reveals details of new safeguards', *Guardian*, 3 June 2008.



explanation that you are going to need to give to parliament but the fact that, six months to a year down the line, an independent reviewer will go back over this decision.

79. However, there is little evidence to show that independent reviews have had much effect on the conduct of Home Secretaries, especially in the field of terrorism legislation. For instance, the December 2003 recommendations of the Newton Committee on the Anti-Terrorism Crime and Security Act 2001 – in particular, its recommendation that indefinite detention under Part 4 of the Act be ‘replaced as a matter of urgency’ – were rejected by the then-Home Secretary David Blunkett MP, and Part 4 was not replaced until after the judgment of the House of Lords in the Belmarsh case a year later. Similarly, we note that the current Home Secretary has failed to implement all the recommendations made by Lord Carlile concerning the statutory definition of terrorism.<sup>87</sup>

80. In any event, even parliamentary debate immediately following the Secretary of State’s order would be a hopelessly inadequate check against unjustified extension of the maximum period to 42 days. In order to prevent prejudice to any criminal proceedings, clauses 25(7) and 27(4) rightly preclude reference to any details of the suspect or suspects detained and ‘any material that might prejudice the prosecution of any person’. Consequently, any parliamentary debate would be entirely restricted to generalities and unable to address the proportionality of the extension as it applies to any particular case. The Home Secretary has herself conceded that it is not Parliament’s role to decide on individual cases,<sup>88</sup> but it is extremely difficult to see what evidence Parliament could usefully debate in the absence of ‘any material that might prejudice the prosecution of any person’. We agree completely with the assessment of the Joint Committee on Human Rights that the proposed parliamentary safeguards are ‘virtually worthless’.<sup>89</sup> More importantly, there is no way they can be made more worthwhile without prejudicing potential prosecutions in individual cases.

81. Similarly, we do not believe there are any additional judicial ‘safeguards’ that can be offered that would sensibly protect against the very real prospect of an innocent person being held for

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<sup>87</sup> See e.g. clause 41 below.

<sup>88</sup> See Evidence of the Home Secretary to the Home Affairs Committee, 19 February 2008, Q 174: ‘I do not believe, and nor do others, that it is the role of Parliament to make decisions about individual detention, and that is why I think we have, effectively, in our proposals, separated out the role of the judiciary, which is to make the decisions about individual periods of detention, to make the decision as to whether or not the case has been proved, that the investigation is proceeding quickly, whether the case is proved, that it is reasonable to detain somebody in the proposals that we are putting forward for an additional period of seven days. That is not the role of Parliament. It is the role of Parliament to approve the bringing into force of the legislation that has been previously discussed. It is the role of the judiciary to consider the individual case’.

<sup>89</sup> Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Counter-Terrorism Bill* (HL 50/HC 199: 30 January 2008), para 10.

42 days without charge. Since pre-charge detention is premised on a lack of sufficient evidence being available to satisfy even the Threshold Test ('reasonable suspicion'), the very idea of 'additional scrutiny' seems to us in any event to be a chimera. The ability of a judge to scrutinise a police investigation under Schedule 8 of the Terrorism Act 2000 is already at its maximum possible under our common law system of justice, and we doubt that British police would welcome the continental-style judicial control of investigations that any further increase would necessarily require.

### **Clause 34 – Post-charge questioning**

82. Clauses 34 to 39 allow police to question a person who has already been charged with a terrorism offence.

83. We note that there is already provision to question suspects after charge in certain limited circumstances. Specifically, Code C of the Police and Criminal Evidence Act 1984 permits questioning:<sup>90</sup>

- to prevent or minimise harm or loss to some other person, or the public;
- to clear up an ambiguity in a previous answer or statement;
- in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted.

84. Although we believe there is a principled case for a limited expansion of the grounds for post-charge questioning beyond those listed above, we also think it is important to bear in mind the reasons for the general prohibition on questioning suspects after charge in the first place.

85. First, the key reason for prohibiting post-charge questioning by police has been to prevent unfairness to, and indeed oppression of, suspects. Although *pre*-charge detention has historically been extremely limited, *post*-charge detention on remand awaiting trial can last much longer – e.g. a suspect sent from the magistrates' court to trial by way of indictment in the Crown Court may spend up to six months detained on remand.<sup>91</sup> Unrestricted police questioning of a detained suspect for weeks or months on end is likely to be oppressive in any event, no matter how mild the treatment of the detainee is in other respects.

86. Moreover, the fact that a suspect has already been charged with an offence when subject to police questioning has often been a decisive factor in judgments of the European Court of

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<sup>90</sup> Code C, section 16.5.

<sup>91</sup> Prosecution of Offences (Custody Time-limits) Regulations 1987 (SI 1987/299).

Human Rights determining whether such questioning breaches a suspect's right against self-incrimination.<sup>92</sup> In *Shannon v United Kingdom*, for instance, in which compulsory post-charge questioning was held to breach the suspect's right to silence, the Court noted that:<sup>93</sup>

The applicant ... was not merely at risk of prosecution in respect of the crimes which were being examined by the investigators: he had already been charged with a crime arising out of the same raid. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged.

87. The second main reason for restricting post-charge questioning is to ensure the proper supervision of the courts of the post-charge process. One of the fundamental features of the UK's adversarial system of justice is that the court acts as an arbiter between the prosecution and defence, and it is the court that is responsible for ensuring the suspect's rights are respected. As Professor Clive Walker explained to the Joint Committee on Human Rights:<sup>94</sup>

[A]fter charge, the suspect becomes subject to the control of the court and further actions in pursuance of the case should be authorised by the court. It is the court which takes charge of the suspect and not the police, and the police should not intervene without permission.

88. For these reasons, it is vitally important that any provision for expanding post-charge questioning be attended by a legal framework containing strict safeguards to prevent oppression of, and unfairness, to suspects. In particular, the Joint Committee on Human Rights has recommended that any provision for broader post-charge questioning should include the following safeguards:<sup>95</sup>

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<sup>92</sup> See e.g. *Saunders v United Kingdom* (1997) 23 EHRR 313 at para 68; *Weh v Austria* (2005) 40 EHRR 37 at paras 39-46; *Heaney and McGuinness v. Ireland* (2001) 33 EHRR 12 at para 40.

<sup>93</sup> (2006) 42 EHRR 31 at para 38.

<sup>94</sup> Memorandum from Professor Clive Walker, Centre for Criminal Justice Studies, School of Law, published in Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill* (HL 50/HC 199: 7 February 2008), para 7.

<sup>95</sup> JCHR report, *ibid*, para 37.

- a requirement that post-charge questioning be judicially authorised;
- the purpose of post-charge questioning be confined to questioning about new evidence which has come to light since the accused person was charged;
- the total period of post-charge questioning last for no more than 5 days in aggregate;
- post-charge questioning always take place in the presence of the defendant's lawyer;
- the judge which authorised post-charge questioning review the transcript of the questioning after it has taken place, to ensure that it remained within the permitted scope of questioning and was completed within the time allowed; and
- there should be no post-charge questioning after the beginning of the trial.

89. We agree with the safeguards recommended above by the Joint Committee. Indeed, we view them as the bare minimum required in any event, given the exceptionality of post-charge questioning. We would go further and support Professor Walker's proposal for any post-charge questioning to be directly supervised by the court itself, along the lines of that provided under section 6 of the Explosive Substances Act 1883.<sup>96</sup> We also agree that it is important to establish safeguards in primary legislation rather than leave such safeguards to be provided by way of the PACE Codes.

90. Following its introduction to the House of Commons, clause 34 was amended to require a degree of judicial authorisation: clause 34(4) allows post-charge questioning to be authorised in the first instance by a senior police officer up to a period of 24 hours; any subsequent questioning must be authorised by a magistrate on the grounds that 'further questioning of the person is necessary in the interests of justice'<sup>97</sup> and that the 'investigation for the purposes of which the further questioning is proposed is being conducted diligently and expeditiously'.<sup>98</sup> Bizarrely, this is not something of which the senior police officer needs to be satisfied before authorising post-charge questioning up to 24 hours.

91. In our view, the model of authorisation provided by clause 34(4) falls short of the minimum level of judicial scrutiny that the exceptionality post-charge questioning requires. If post-charge questioning is going to be put on a statutory footing, then we see no basis for allowing the police to question a suspect without judicial authorisation for up to 24 hours. On the contrary, it seems to us that – once a suspect has been charged and is under the jurisdiction of the court – any questioning of a suspect must be authorised by the court from the outset. And given the

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<sup>96</sup> Memorandum from Professor Clive Walker, n 94 above, paras 13-17.

<sup>97</sup> Clause 34(5)(a).

<sup>98</sup> Clause 34(5)(b).

limited utility the police themselves appear to attach to post-charge questioning,<sup>99</sup> it is hard to see how the requirement to obtain judicial authorisation for further questioning would be an impediment to an ongoing police investigation.

92. Apart from the attenuated form of judicial authorisation, we note that none of the other safeguards identified by the Joint Committee (see para 88 above) appear in the face of the Bill. In our view, no provision should be made for post-charge questioning without such safeguards.

93. Clause 34(8) allows for the drawing of adverse inferences against an accused's failure to answer questions post-charge. We do not support the drawing of adverse inferences from the failure to answer questions, either pre-charge or post-charge. Notwithstanding the view of the Strasbourg Court in *Murray v United Kingdom*,<sup>100</sup> we consider them an unwarranted and disproportionate interference with a suspect's right to silence, long-established under the common law. Nonetheless, if provision is to be made for the of drawing adverse inferences, we agree with the Joint Committee that there should be:<sup>101</sup>

a special warning to the jury to do with post-charge questioning, to remind them that, post-charge, the reliability of silences or statements might be questionable because of the particularly fraught stage of being a suspect.

### **PART 3 – PROSECUTION AND PUNISHMENT OF OFFENCES**

#### ***Clause 41 – Consent to prosecution of offence committed outside the UK***

94. Clause 41 requires the consent of the Attorney General where any prosecution is sought relating to terrorist offences alleged to have been committed outside the UK.

95. This follows one of the recommendations of Lord Carlile of Berriew QC in his March 2007 report on the definition of terrorism,<sup>102</sup> namely:<sup>103</sup>

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<sup>99</sup> See e.g. the evidence of then-Assistant Metropolitan Police Commissioner Peter Clarke to the House of Commons Home Affairs Committee, 21 March 2006, Q322: 'I think it must be the case that the percentage that would result in criminal charges as a result of post-charge questioning would be quite low. We are not against it but I think it would be quite low'.

<sup>100</sup> (1996) 22 EHRR 29.

<sup>101</sup> JCHR report, n 94 above, para 35.

<sup>102</sup> Lord Carlile of Berriew QC, *The Definition of Terrorism* (Cm 7052: March 2007),

<sup>103</sup> *Ibid*, para 81.

that a new statutory obligation be inserted within the definition section to strengthen confidence that the discretion for or against the use of the *Terrorism Act 2000* is exercised correctly in relation to actions outside the United Kingdom and persons and property outside the United Kingdom.

96. The basis for Lord Carlile's recommendation was his recognition that 'there is no doubt that non-terrorist activities ... could fall within the definition [of terrorism in section 1 of the Terrorism Act 2000] as currently drawn'.<sup>104</sup> Given the breadth of the definition, and its potential to apply to those legitimately resisting oppressive regimes, Lord Carlile suggested that the consent of the Attorney General to all prosecutions relating to actions outside the UK would provide 'a flexible response to concerns about inappropriate prosecution of those struggling against oppressive regimes'.<sup>105</sup>

97. Although we support this measure as a step towards a more proportionate definition of terrorism, it is by itself inadequate to achieve this end. Clause 41 only requires the Attorney's consent. It does not contain any of the criteria recommended by Lord Carlile, e.g. 'having regard to':<sup>106</sup>

- (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

98. Indeed, given the purpose of the clause to prevent 'inappropriate prosecution of those struggling against oppressive regimes', we believe the criteria should be even more explicit, e.g. whether the action involved the use or threat of force against civilians; and whether the action was taken for the purpose of establishing or restoring democratic government.

99. Notwithstanding the amendments to the statutory definition of terrorism in clauses 41 and 82, we also note that several other recommendations of Lord Carlile's report have not been included in the Bill, including his recommendation that the definition of 'terrorism':<sup>107</sup>

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.

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<sup>104</sup> Ibid, para 60.

<sup>105</sup> Ibid, para 64.

<sup>106</sup> Ibid, p 48.

<sup>107</sup> Ibid, p 47, emphasis in original.

100. Nor do we think that Lord Carlile's recommendations go far enough. In JUSTICE's view, the Bill is an important opportunity for Parliament to establish a statutory definition of 'terrorism' that is both proportionate and effective. We hope to suggest appropriate amendments to this end prior to Committee and Report stages.

**Clause 42 – Sentences for offences with a terrorist connection: England and Wales**

101. Clause 42 provides that evidence of a 'terrorist connection' should be considered an aggravating factor in sentencing for a non-terrorist offence. In particular, the government cites the recommendation of Lord Carlile that:<sup>108</sup>

the provision of special sentencing powers for apparently ordinary offences connected with terrorism would be a useful addition to the criminal law.

102. It is important, however, to bear in mind Lord Carlile's comments in 2004 when the Newton Committee of Privy Counsellors made a similar recommendation:<sup>109</sup>

The Privy Counsellors recommended that terrorism should be an aggravating factor when sentencing for conventional criminal offences such as credit card fraud, as happens in the USA. There is a kind of domestic analogy in the aggravation of other crimes by racial motivation. However, in relation to race there has to be a verdict of the Court on the main aspect of the crime (in those cases the substantive offence rather than the racially aggravated behaviour, for the most part), unless there is a guilty plea. *Bearing in mind that the terrorist element factually and logically would have to be the major element of the crime as a whole*, I am doubtful that the Committee's proposal would have the support of government or, more problematically in the context, an easy passage through both Houses of Parliament.

103. Although we support aggravated offences in principle, we firmly believe that the terrorist connection must be an ingredient of the offence to be proved by the prosecution to the criminal standard of proof. Since, as Lord Carlile noted in 2004, 'the terrorist element factually and logically would have to be the major element of the crime as a whole', we believe it would be an improper evasion of the criminal justice process to allow the terrorist element to be determined without the proper safeguards of the criminal trial itself. It is also important to note:

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<sup>108</sup> Ibid, para 44. See also p 47: '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'.

<sup>109</sup> Lord Carlile of Berriew QC, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003*, para 115. Emphasis added.

- the breadth of the statutory definition in section 1 of the Terrorism Act 2000 which makes the scope of offences with arguable 'terrorist' connections particularly broad; and
- that a person found guilty of an offence aggravated by terrorism will also be subject to the stringent notification requirements under Part 4 of the Bill.

Terrorism is among the most serious crimes a person can commit. The claim that a person is not only guilty of a criminal offence, but guilty of involvement in terrorism as well, is too serious an allegation to be dealt with in any other manner short of the criminal standard of proof.

## **PART 4 – NOTIFICATION REQUIREMENTS**

### ***Clause 51 – Notification scheme***

104. Clause 51 sets out a scheme for imposing notification requirements on persons convicted of a range of terrorism offences specified in clauses 52 to 55 and who receives a sentence within the scope of clause 56 sufficient to trigger notification requirements.

105. Leaving aside the continuing problem created by overbroad terrorist offences – e.g. the offence of 'encouraging' terrorism under s1 of the Terrorism Act 2006 – the creation of a terrorist offenders register seems to us a sensible practical measure to ensure that those convicted of terrorist offences are subject to proper monitoring following the end of their sentences. In our view, the public interest in preventing reoffending of this kind would be sufficient to justify the proportionate interference with the privacy of a convicted terrorist caused by the notification.

106. However, although we support the general principle of imposing notification requirements on persons convicted of terrorism offences, we think it important that there should be assessment of the *need* for notification requirements on a case-by-case basis, in order to ensure that any interference with a convict's rights are proportionate to any continuing risk they are deemed to pose in each individual case. The notification scheme in Part 4, by contrast, involves no individual assessment of the need or the proportionality of notification requirements but is instead triggered solely by reference to sentence (clause 56). Nor is there any provision for review of a continuing need for notification requirements, especially where they may apply on an indefinite basis (clause 64(1)).



107. Indeed, we wonder at the need to create an entirely separate notification scheme for convicted terrorists when the Criminal Justice Act 2003 already requires police, the Probation Service and the Home Office Minister in charge of prisons to make arrangements:<sup>110</sup>

for the purpose of assessing and managing the risks posed in that area by—

(a) relevant sexual and violent offenders, and

(b) *other persons who, by reason of offences committed by them (wherever committed), are considered by the responsible authority to be persons who may cause serious harm to the public.*

108. In our view, it would be better to adapt existing arrangements for those convicted of sexual and violent offences into a general scheme for individual assessment of risk and imposing notification requirements, rather than create an unnecessarily specialised scheme for convicted terrorists (and one which, despite its specialisation, makes no provision for individualised assessment of those convicted). Since terrorism is obviously serious violent crime, it would be appropriate to establish clear linkages with existing arrangements for dangerous violent offenders. This would be consistent with Lord Lloyd's bedrock principles of terrorism legislation, i.e. that 'legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure'.<sup>111</sup>

### **Clause 66 – Notification orders**

109. Clause 66 and Schedule 5 make provision for the notification requirements of Part 4 to be applied to those convicted of terrorism offences in other countries.

110. Specifically, the terms of paragraph 2(3) of Schedule 5 provide that a notification order can be made against any person who has been convicted of an offence in another country if:

(a) it would have constituted [a terrorist offence] ... if it had been done in any part of the United Kingdom, or

(b) it was, or took place in the course of, an act of terrorism or was done for the purposes of terrorism.

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<sup>110</sup> Section 325(2) of the Criminal Justice Act 2003. Emphasis added.

<sup>111</sup> *Inquiry into Legislation Against Terrorism* (Cm 3420, October 1996), para 3.1. See also para 94 of the Privy Counsellors Review Committee chaired by Lord Newton, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004).

111. However, given the very broad definition of ‘terrorism’ in section 1 of the Terrorism Act 2000, notification orders will not only to foreign terrorists but also individuals convicted of offences in the course of legitimate resistance to oppressive regimes abroad. The best known example, Nelson Mandela, was convicted in 1964 of involvement in planning armed action and sabotage in relation to his activities with the ANC and sentenced to life imprisonment. More recently, numerous pro-democracy activists in Burma have been convicted under Burmese security legislation and sentenced to lengthy terms of imprisonment.<sup>112</sup>

112. We also note the absence of any consideration as to *how* the individual was convicted abroad, e.g. whether their conviction was the result of a fair trial or simply a show trial, whether they were tortured into producing a confession, etc. For example, Alexander Mitchell and Leslie Walker – two British nationals who were convicted in Saudi Arabia following their videotaped confessions to planning the terrorist bombings in Riyadh in 2001 and 2002 – would be liable to the notification scheme under clause 66 notwithstanding the subsequent clemency arrangement (which under English law does not erase the conviction, only its penalty) and the widespread recognition that their confessions were produced under torture.

113. As with notification requirements under Part 4 generally, we question the absence of any assessment procedure to determine the *need* for notification requirements in each individual case (c.f. section 72(6) of the Nationality Immigration and Asylum Act 2002 which allows a foreign national convicted of serious criminal offences to rebut the statutory presumption of ‘dangerousness’). In the absence of any such assessment, we note the likelihood that notification orders will be found a disproportionate interference with Convention rights in individual cases.

114. We also note that there is already extensive provision under existing immigration legislation to attach notification requirements on persons subject to immigration control in any event. For instance, paragraph 21(2) of Schedule 2 of the Immigration Act 1971 provides that anyone liable to immigration detention may be released:

subject to such restrictions as to residence and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer.

115. Section 36 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2002 even allows for the use of electronic tags for those liable to immigration detention. Most recently, Part 10 of the Criminal Justice and Immigration Act 2008 provides for the possibility

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<sup>112</sup> See e.g. US State Department, ‘Burmese Regime Increases Pressure on Democracy Activists’, 29 January 2008; The United Nations Special Rapporteur on the situation of human rights in Myanmar expresses dismay over the continued

of 'special immigration status' against persons convicted of criminal offences abroad who cannot be removed from the UK on human rights grounds, triggering the power of an immigration officer to impose a number of restrictions on residence, employment and the obligation to report regularly to authorities.<sup>113</sup> Indeed, if clause 66 is enacted in its current form, many foreign nationals will be liable to be subjected to *two* sets of notification requirements: one under Part 10 of the Criminal Justice and Immigration Act and one under Schedule 5 of this Bill.

### **Clause 674 – Foreign travel restriction orders**

116. Clause 67 and Schedule 6 of the Bill provide for the making of foreign travel restriction orders ('FTRO') against any person subject to notification requirements under Schedule 4. An FTRO can restrict a person from travelling:

- to a specific country;<sup>114</sup>
- to anywhere outside the UK except a specified country;<sup>115</sup>
- anywhere outside the UK altogether.<sup>116</sup>

117. Travel restriction orders are already available against convicted sex offenders<sup>117</sup> and those convicted of football-related violence or disorder.<sup>118</sup> In the circumstances, we consider that provision for restrictions on the foreign travel of UK nationals convicted of terrorism offences may be a proportionate restriction on the right to freedom of movement<sup>119</sup> (albeit inevitably subject to provisions guaranteeing freedom of movement of EU nationals within the EU).<sup>120</sup>

118. However, we strongly doubt that the blanket requirement on an individual in paragraph 6(3) of Schedule 6 to '*surrender all that person's passports*' could be compatible

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arrests, detentions and charges against political and human rights activists, 5 February 2008.

<sup>113</sup> Section 133(2).

<sup>114</sup> Clause 67(a).

<sup>115</sup> Clause 67(b).

<sup>116</sup> Clause 67(c).

<sup>117</sup> Sections 114-122 of the Sexual Offences Act 2003.

<sup>118</sup> Section 14A of the Football Spectators Act 1989 (as amended by Schedule 1 of the Football (Disorder) Act 2000).

<sup>119</sup> See Article 12(2) of the International Covenant on Civil and Political Rights and Article 2(2) of Protocol 4 of the European Convention on Human Rights: 'Everyone shall be free to leave any country, including his own'.

<sup>120</sup> See e.g. Article 45(1) of the EU Charter of Fundamental Rights: 'Every citizen of the Union has the right to move and reside freely within the territory of the Member States'.

with fundamental rights or the UK's other international obligations.<sup>121</sup> It is, of course, open to the UK government to require the surrender of any UK passport held by an individual. However, in the case of dual UK nationals and foreign nationals, it is essential to note that any foreign passport is the property of the issuing state and it is not for the UK government to impose restrictions on the travel of dual nationals or foreign nationals travelling on foreign passports (other than to restrict the entry into the UK of those foreign nationals subject to immigration control). As the UN Human Rights Committee has noted:<sup>122</sup>

In no case may a person be arbitrarily deprived of the right to enter his or her own country ... The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

## **PART 5 – ASSET FREEZING PROCEDURE**

### ***Clause 58 – Rules of court about disclosure***

119. Part 5 of the Bill provides rules governing proceedings for the freezing of assets pursuant to certain international agreements, as well as appeals against a decision to freeze assets. In particular, clauses 70, 71 and 72 makes provision for the use of closed evidence and special advocates along the lines of those in proceedings before the Special Immigration Appeals Commission and before the High Court in control order cases.

120. In October 2007, a majority of the Appellate Committee of the House of Lords held that the disclosure rules in control order proceedings under the Prevention of Terrorism Act 2005 were incompatible with the right to a fair hearing under Article 6 of the European Convention on Human Rights.<sup>123</sup> Their Lordships held that the incompatibility was to be cured using section 3 of the Human Rights Act to read the prohibition on disclosing closed evidence to the appellant subject to the proviso that 'except where to do so would be incompatible with the right of the controlled person to a fair hearing'.<sup>124</sup> In other words, closed evidence must be disclosed to appellants where it is necessary for the appellant to receive a fair trial. We therefore welcome the explicit requirement in clause 71(6) that:

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<sup>121</sup> Emphasis added.

<sup>122</sup> UN Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 21.

<sup>123</sup> *Secretary of State for the Home Department v MB* [2007] UKHL 26.

<sup>124</sup> *Ibid*, per Baroness Hale at para 72.

Nothing in this section, or in rules of court made under it, is to be read as requiring the court to act in a manner inconsistent with Article 6 of the Human Rights Convention.

We further agree with the recommendation of the Joint Committee on Human Rights that the Bill should make explicit this requirement in relation to closed proceedings under other terrorism legislation, including the Prevention of Terrorism Act 2005.<sup>125</sup> We also agree with the Joint Committee that additional statutory provisions should be inserted into the Bill to make such closed proceedings fair, including:

- an obligation on the Secretary of State to provide a summary of any material which fairness requires the appellant have an opportunity to comment on;<sup>126</sup>
- special advocates be given the power to apply ex parte to a High Court judge for permission to ask the appellant questions, without being required to give notice to the Secretary of State;<sup>127</sup>
- the appellant is entitled to such measure of procedural protection (including, for example, the appropriate standard of proof) as is commensurate with the gravity of the potential consequences of the order for the appellant;<sup>128</sup> and
- where permission is given by the relevant court not to disclose material, special advocates may call witnesses to rebut the closed material.<sup>129</sup>

### ***Clause 73 – Intercept evidence***

121. Clause 73 makes provision for the admissibility of intercept evidence in asset-freezing proceedings under Part 5. In light of the Chilcot Report on the intercept evidence,<sup>130</sup> however, we think it is wholly inappropriate to make provision for the use of intercept for courts and tribunals on a case-by-case basis without taking steps to allow the use of intercept evidence in criminal and civil proceedings generally.

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<sup>125</sup> JCHR report, n 94 above, para 58.

<sup>126</sup> *Ibid*, para 66.

<sup>127</sup> *Ibid*, para 69.

<sup>128</sup> *Ibid*, para 71.

<sup>129</sup> *Ibid*, para 73.

<sup>130</sup> Report of the Privy Council Review of Intercept as Evidence (Cm 7324: 30 January 2008).

122. As we have noted elsewhere,<sup>131</sup> there is a overwhelming case for the ban on intercept to be lifted forthwith in order to end reliance on such exceptional measures as control orders and extended pre-charge detention in terrorism cases. We are pleased to see that the Chilcot Committee has now accepted the merits of our argument.<sup>132</sup>

## PART 6 – INQUESTS AND INQUIRIES

123. Clauses 77 to 81 allow for the Secretary of State to certify an inquest where, in his opinion:<sup>133</sup>

the inquest will involve the consideration of material that should not be made public –

- (a) in the interests of national security,
- (b) in the interests of the relationship between the United Kingdom and another country, or
- (c) *otherwise in the public interest.*

124. Where the Secretary of State has certified an inquest, clause 79(1) allows the appointment of a specially appointed coroner to hold the inquest without a jury. Clauses 80 and 81 allow for the use of intercept evidence in closed proceedings by specially-appointed coroners and inquiries held under the terms of the Inquiries Act 2005.

125. The consequence of these provisions is that in any case where the state is alleged to be responsible for a person's death – for example the killing of Jean Charles de Menezes by Metropolitan Police or the death of Baha Mousa at the hands of British soldiers in Basra – the Secretary of State will be free to appoint a coroner to sit entirely in closed session without a jury so long as he or she is satisfied that it is in the public interest to do so because of the sensitive nature of the material that is likely to be considered. This would also be applicable to inquests into deaths of individuals outside of state custody but raising issues of the state's broader conduct, e.g. an inquest into the death of a soldier killed in Iraq or the inquest into the death of David Kelly. We do not think that the consent of the Lord Chief Justice to the appointment of the coroner under clause 79(1) – a purported safeguard introduced by way of amendment to the House of Commons – makes the proposed use of closed coronial proceedings any fairer or more transparent.

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<sup>131</sup> *Intercept Evidence: Lifting the ban* (JUSTICE: October 2006).

<sup>132</sup> See n 130 above, para 216: 'We conclude that it would be possible to provide for the use of intercept as evidence in criminal trials in England and Wales by developing a robust legal model, based in statute and compatible with ECHR, starting from the PII Plus model described in Chapter VIII'.

<sup>133</sup> Clause 77(2). Emphasis added.

126. Among the UK's obligations under Article 2 of the European Convention on Human Rights guaranteeing the right to life is the obligation to:<sup>134</sup>

secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

127. In particular, the European Court of Human Rights has held that '*there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory*'.<sup>135</sup> The Court was especially careful to stress that 'in all cases' the victim's next-of-kin '*must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests*'.<sup>136</sup> We find it impossible to see how the fundamental requirements of Article 2 could be satisfied in the case of a specially appointed coroner sitting without a jury and hearing closed evidence *in camera*. We therefore agree with the recommendation of the House of Commons Justice Committee that 'they be withdrawn pending more detailed scrutiny and the Introduction of the Coroners Bill'.<sup>137</sup>

128. In addition, the lack of provision in the Bill for the use of intercept evidence in criminal proceedings generally throws up the bizarre prospect of a coroner reaching a verdict of unlawful killing on the basis of intercept material, but the Crown Prosecution Service being unable to prosecute because the key evidence is – for the time being at least – still inadmissible. The fact that such a grotesque outcome would be possible under the proposed Part 6 scheme is an additional reason for the provisions to be withdrawn from the Bill.

## **PART 7 – MISCELLANEOUS**

### ***Clause 82 – Amendment of definition of 'terrorism' etc***

129. Clause 82 broadens the definition of 'terrorism' in section 1 of the Terrorism Act 2000 to include terrorist actions motivated by 'racial' causes. This follows another recommendation of Lord Carlile that:<sup>138</sup>

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.

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<sup>134</sup> *Jordan v United Kingdom* (2001) 37 EHRR 52 at para 105.

<sup>135</sup> *Ibid*, para 109.

<sup>136</sup> *Ibid*.

<sup>137</sup> House of Commons Justice Committee, *The Counter-Terrorism Bill* (HC 405: 20 March 2008), para 7.

<sup>138</sup> See n 102 above, para 81.

130. Like Lord Carlile himself, we doubt that this adds anything particularly to the existing definition as any racially-motivated action is, in our view, bound to fall under the ‘ideological’ category already contained in section 1(1)(c) of the 2000 Act. We nonetheless agree that it is consistent with some of the international definitions, including that under the 2003 Council of Europe Convention on the Prevention of Terrorism. As we noted in respect of clause 41 above, several other recommendations of Lord Carlile’s report have not been included in the Bill, including his recommendation that the definition of ‘terrorism’:<sup>139</sup>

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.

### **Clause 83 – Offences relating to information about members of armed forces**

131. Clause 83 makes it an offence to ‘elicit or attempt to elicit’,<sup>140</sup> without reasonable excuse,<sup>141</sup> information about current or former members of the armed forces ‘which is of a kind likely to be useful to a person committing or preparing an act of terrorism’ or who ‘publishes or communicates information of that kind’.

132. We consider this measure utterly redundant and unnecessarily specific. As the Bill’s own explanatory notes explain, ‘Section 58 of the Terrorism Act 2000 already prohibits the collecting of information which is likely to be of use to a person taking part in acts of terrorism’.<sup>142</sup> It is exceedingly difficult to see how such conduct is not already punishable under section 58 or, indeed, the offence of acts preparatory to terrorism under section 5 of the Terrorism Act 2006. We also question why it should be thought necessary to make special provision for members of the armed forces only, particularly as there are other categories of public servants who could be equally subject to information-gathering by terrorists, e.g. police officers, airport staff and immigration officials, civil servants, etc.

133. We are particularly concerned that one ingredient of the offence involves the ‘publication or communication’ of information about members of the armed forces. It is possible to see this as having an unnecessary chilling effect on journalists and others investigating wrongdoing by members of the armed forces, e.g. the torture and killing of Baha

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<sup>139</sup> Ibid, p 47, emphasis in original.

<sup>140</sup> Clause 69(1).

<sup>141</sup> Clause 69(2).

<sup>142</sup> Explanatory notes, para 201.



Mousa which the Minister for Defence has now admitted happened at the hands of British soldiers.<sup>143</sup>

**Clause 85-88 – Control orders**

134. Clauses 85 to 88 make a series of amendments to the control order scheme under the Prevention of Terrorism Act 2005, including:

- a power enabling police to enter and search premises to monitor compliance with a control order (clause 85);
- a very slight tightening the definition of ‘terrorism-related activity’ under the 2005 Act to prevent people who unknowingly provide support or assistance to suspected terrorists from themselves being subject to control orders (clause 86);
- making clear that the time available for the detainee to make representations runs from the date of service of the control order (clause 87); and
- allowing for an anonymity order to be made from the point at which the Secretary of State *applies* for a control order (clause 88).

135. Although we welcome the amendments in clauses 85 to 88, we agree with the Joint Committee that they are relatively minor ‘tidying-up’ amendments,<sup>144</sup> and that they fail to address the most egregious features of the 2005 Act, i.e. the low standard of proof, the failure to disclose key evidence to detainees, and the restrictions on communication between special advocates and detainees. We hope to identify suitable amendments to the control order regime prior to Committee and Report stages of the Bill.

ERIC METCALFE  
Director of Human Rights Policy  
JUSTICE  
4 July 2008

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<sup>143</sup> See e.g. ‘MOD admits responsibility for the death of Iraqi prisoner Baha Mousa’, Daily Telegraph, 28 March 2008.

<sup>144</sup> JCHR report, n 94 above, para 40.