



LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Second Reading Briefing on the Counter-Terrorism Bill

Part I – Pre-Charge Detention

March 2008

About Liberty

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

Liberty Policy

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

Liberty's policy papers are available at

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Executive Summary

1. The Prime Minister and Home Secretary have rightly been congratulated for abandoning their predecessors' "tough talk" on terror, headline grabbing but ultimately inflammatory and counter-productive. In the wake of last summer's attempted terror attacks in London and Glasgow, both avoided talk of Britain being engaged in a "war on terror". Thankfully there was no dangerous reference to the "rules of the game" having changed and no to-do list of oppressive new laws was cobbled together in haste.¹ Sadly this calm and reasoned approach to the very real terrorist threat is not matched by the proposal in this Bill to allow the police to hold suspects without charge for up to 42 days.

2. While Liberty supports many of the measures in the Counter-Terrorism Bill (dealt with in a separate briefing) we are deeply disappointed that Parliament is being forced to revisit the divisive issue of pre-charge detention limits just two years after it agreed to double the limit from 14 to 28 days. Like politicians of all parties, we had hoped that the historic vote back in November 2005, Tony Blair's first ever defeat in the House of Commons, had marked an end to the repeated ratcheting-up of pre-charge detention limits (already quadrupled since 2003) and an end to political contests over who can appear toughest on terror.

3. You might expect urgent and compelling reasons for revisiting this issue given how recently it was considered by Parliament, how controversial it was at the time and how uncomfortably it sits with the Government's broader approach to the terror threat. In reality no such justifications exist. As the Home Affairs Select Committee concluded "[n]either the police nor the Government have made a convincing case for the need to extend the 28 day limit on pre-charge detention."² In fact the Home Secretary and Sir Ian Blair have themselves accepted that there has been no case to date where longer than 28 days' detention has been needed.

4. Since the Government first indicated its intention to revisit this issue, a clear consensus has emerged that any extension beyond 28 days would not be justified. Only 6 of the 71 respondents to the Government's consultation supported an

¹ Cf Prime Minister's Press Conference, 5 Aug 2005 (the "12 Point Plan Speech")

² First Report of 2007/08, "The Government's Counter-Terrorism Proposals", para 70

extension beyond 28 days.³ The Director of Public Prosecutions, responsible for charging decisions, has confirmed publicly that he is “satisfied with the position as it stands at the moment.”⁴ Other high-profile opponents of longer detention include Lord Woolf (Former Lord Chief Justice),⁵ Rachel North (Survivor of 7/7 Bombs),⁶ opposition parties, a growing number of backbench Labour MPs, almost all of the UK’s major newspapers, the Joint Committee on Human Rights and all four mayoral candidates.⁷

5. As the Home Secretary herself accepts “what we are proposing to do does raise fundamental issues about people’s liberty”.⁸ It would fly in the face of our basic democratic principles of justice, fairness and liberty to hold people for over a month without formally accusing them of any criminal offence on the basis of police suspicion rather than hard evidence. The proposal would certainly lead to innocent people being detained for 42 days and then released without charge.⁹ Released after six weeks in police custody (the equivalent of a short prison sentence) the suspect may well have lost their job, home and the trust of their community, friends and perhaps even family. They will be powerless to rebut the inevitable suspicion that they are involved in terrorism – no jury will have declared them “not guilty”. This is the reason the British legal system has for centuries required suspects to be either charge or released within a matter of days, rather than weeks or months. Indeed, in non-terror cases in the UK the limit remains 4 days and the current 28 limit in terrorism cases is already much longer than in other comparable democracies.¹⁰

6. The Government seems to suggest that this might be a price worth paying for greater security but in the long-term unjust measures like these do not in fact make us safer, even if they do have operational benefits in the short-term. As the Home Office’s own Equality Impact Assessment states, ‘Muslim groups said that pre charge detention may risk information being forthcoming from members of the community in

³ Home Affairs Select Committee, Uncorrected transcript of evidence, 11 Dec 2007, Q23

⁴ Home Affairs Select Committee, Uncorrected transcript of evidence, 21 Nov 2007, Q545

⁵ BBC Radio 4’s Today Programme, 23 November 2007

⁶ Home Affairs Select Committee, Uncorrected transcript of evidence, 13 Nov 2007

⁷ Second Report of 2007/08, “Counter-Terrorism Policy and Human Rights: 42 Days”

⁸ Home Affairs Select Committee, Uncorrected transcript of evidence, 22 Oct 2007

⁹ Half of those detained for the existing maximum of 28 days have been released without charge and none have been rearrested, placed on control orders or subjected to surveillance

¹⁰ As we discuss below, Liberty has conducted a study which demonstrates that the existing 28 day limit for pre-charge detention in the United Kingdom already far exceeds equivalent limits in other comparable democracies.

the future.¹¹ This proposal would further alienate those communities we most need to engage if we are to combat terrorism. In some extreme cases, as with internment in Northern Ireland, it might even operate as a recruiting sergeant to terrorism.

7. Liberty believes there are better ways of responding to the increasing complexity and international nature of terrorist investigations than continually ratcheting-up pre-charge detention limits. All of these should be tried before considering the grave and potentially counter-productive step of going beyond 28 days. Liberty has for years argued that the bar on intercept evidence should be lifted. We were, therefore, delighted by the Prime Minister's indication that he will seek to implement the Chilcott Review's recommendation that intercept material be made admissible as evidence in terrorist prosecutions. Given the scale of surveillance in the UK (including phone tapping) we would be very surprised, or indeed concerned, if terror suspects' communications were not intercepted before the suspect is arrested. Allowing this body of material potentially to be used in court could make it possible to charge suspects earlier in a large number of cases. Liberty also believes that post-charge questioning could make a significant difference to terrorism investigations. The Bill currently contains limited proposals to allow post-charge questioning. We urge parliamentarians to consider how the proposed powers could be extended and appropriate safeguards developed to provide another important tool to enable police to charge suspects earlier.

8. The Home Secretary has described the current proposals as creating "exceptional" "reserve powers", suggesting that they are needed to deal with nightmare scenarios where the police could simply not cope with the existing 28 day limit - "[a]s an extreme example, imagine two or three 9/11s."¹² Liberty has always maintained that existing emergency powers legislation already gives senior ministers the power to extend pre-charge detention limits if urgently needed to deal with a real emergency like this.¹³ New legislation is not needed. In reality, these proposals are designed to be much wider than exceptional emergency powers. They could be turned on and off by the Home Secretary to deal with individual cases without any evidence of a genuine emergency. Significantly, despite the Government's repeated references to parliamentary oversight, in the vast majority of cases, Parliament would

¹¹ Page 4

¹² "Minister warns of 'peril' as he pushes for 42 day lock-up", *Daily Mirror*, 23 Jan 2008

¹³ Liberty has obtained an unequivocal legal opinion from David Pannick QC which confirms this.

get no vote whatsoever on the decision to trigger the 42 day limit. The result of the Government's attempts to camouflage these proposals as something other than what they really are – an extension from 28 to 42 days – is frankly “a dog's dinner”. The Home Secretary has, for example, offered the fig leaf of a statement informing Parliament that the 42 day limit has been triggered. But because the 42 day limit would be triggered to deal with individual cases any parliamentary debate about the statement would be constitutionally inappropriate, confusing the roles of Parliament and the courts and potentially prejudicing future trials.

Inevitable Injustice of Lengthy Pre-Charge Detention

9. “Charge” is an incredibly important point, marking the beginning of true criminal proceedings. It is when the prosecution formally advises the suspect that s/he is to be prosecuted and gives him/her the particulars of the criminal allegations s/he faces. Before charge a person is not formally accused of any criminal offence. A suspect is charged when the prosecuting authorities have gathered enough evidence to stand a reasonable prospect of convicting the suspect.¹⁴ Before charge the police do not have this hard evidence. In fact, the arrest and detention of a suspect before charge is justified on the basis of police suspicion as opposed to evidence.

10. Suspicion is such a low “evidential” hurdle that it is not really capable of being tested by the courts or challenged by the suspect or their lawyers. Any proper contest between defence and prosecution or any true scrutiny by a court is not really possible in the absence of hard evidence. This could not amount to any more than second-guessing a police officer's hunch. In fact, the law recognizes that the most that judicial oversight can reasonably achieve before charge is to ensure (1) that there is indeed a police investigation ongoing and (2) that the police are carrying out this investigation diligently and expeditiously.¹⁵ Government claims that the risk of injustice will be removed by judicial involvement in authorising pre-charge detention should, therefore, be viewed with scepticism.

¹⁴ The DPP has confirmed that the “threshold test” for charging is often applied in terrorism cases. This applies where it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the Full Code Test (i.e. reasonable prospect of conviction) is not yet available. It requires at least reasonable suspicion on the available evidence together with the likelihood that further evidence will become available within a reasonable time to meet the Full Code Test (The Code for Crown Prosecutors, Chapter 6)

¹⁵ Terrorism Act 2000, Schedule 8, para 32

11. Pre-charge detention is easily confused with detention after charge, i.e. detention in remand while a suspect awaits trial. There is, however, a major difference between pre- and post-charge detention. While the total period of detention from arrest to trial should be as short as possible we accept that suspects are often held for quite lengthy periods of time after charge while awaiting trial, especially in serious cases like those involving terrorism. Unlike before charge this has traditionally been accepted after charge because: the detention is based on hard evidence rather than police suspicion; the suspect knows the reason for their detention; they have been formally accused of committing an offence and can decide whether to plead guilty or to contest the charges; and, if they do plead not-guilty, their lawyers can start to develop the defence.

12. The police will inevitably arrest people who they then release without charge because they can't find enough evidence to sustain a prosecution. This is demonstrated by the statistics on the suspects held for 27/28 days in the short period since the current limit came into force. Half were released without charge. None has been subsequently re-arrested, placed on a control order or subjected to intensive surveillance. In effect, it seems that the police suspicion turned out to be unfounded. It is inevitable that this will sometimes happen in a democracy and it is not a cause for criticism. The consequences of these mistaken judgements do, however, vary enormously depending on how long a person has been detained: if detention is for a matter of hours or days the consequences may not be too grave but if a person is detained for over a month the consequences are likely to be unacceptably severe.

13. A suspect released without charge after six weeks may well have lost their job, home and the trust of their community, friends and perhaps even family. Their arrest and detention would no doubt have been accompanied by media speculation and gossip but once released the suspect would be unable to clear away the air of suspicion that they are involved in terrorism. Their only option may be to sell-up, move home, look for a new job and new schools for their children. In October 2007 Liberty spoke to one lady who had been through something approximating this kind of ordeal. She was released without charge after 12 days' detention under the Terrorism Act. She said of her experience:

“The 12 days when I was held without charge felt like 12 months – I was claustrophobic, fearful, and I thought I would never get out. For months

after being released without charge I was afraid to leave my home alone.
This experience has changed my life forever.”¹⁶

14. Due to the injustices that will inevitably arise from lengthy pre-charge detention, UK law has historically required suspects to be charged within a matter of hours or days, rather than weeks or months. The pre-charge detention limit in non-terrorism cases, for example, is still 4 days and in terrorism cases the limit was just 7 days until 2003. The proposed 42 day limit is way out of line with this historic position. Even the existing 28 day limit is much longer than in other comparable democracies (discussed below). Indeed, lengthy detention without charge is more commonly associated with oppressive, non-democratic regimes. When informed of the current proposals Helen Suzman, anti-apartheid activist and South African politician, said:

“I am reminded of the course of events in apartheid South Africa which started with house arrest without charge, continued with 90 day detention without charge, then 180 days’ detention without charge, and finally, under the so-called Terrorism Act, indefinite detention without charge.”

Examining the Case for 42 days’ Detention

15. Successive acts of Parliament have increased the pre-charge detention period in terrorism cases – from 7 to 14 days in 2003,¹⁷ from 14 to 28 days in 2005¹⁸ and now it is proposed to increase the limit to 42 days. The basis for this ratcheting-up of the limit has been the nature of al-Qaida inspired terrorism and the increasing complexity of police investigations. In particular, the Government has pointed to the increase in the level of the threat; the fact that the new terrorist threat can cause “mass casualties without warning” (meaning that the police must intervene early to prevent attacks before they happen);¹⁹ and the complexity of cases “in terms of material seized, use of false identities, multiple languages and dialects and international links”.²⁰ Despite the fact that there have been two major terrorist investigations since the 28 day limit came into force, Sir Ian Blair and the Home Secretary have accepted that the existing limit has given the police sufficient time. Proponents of 42 days argue instead that cases requiring longer than 28 days might

¹⁶ Her full story is available at www.chargeorrelease.com

¹⁷ Criminal Justice Act 2003

¹⁸ Terrorism Act 2006

¹⁹ Home Office, “Pre-Charge Detention of Terrorist Suspects”, December 2007, p.4

²⁰ Ibid. p.5

arise in the future and that Parliament should agree to extend the limit in case this happens.

16. In spite of these arguments, made repeatedly over several months, a clear consensus has emerged that there is no justification for going beyond the existing 28 day limit. The Home Affairs Select Committee put it simply: “[n]either the police nor the Government have made a convincing case”.²¹ Only 6 of the 71 respondents to the Government’s own consultation, for example, supported any extension beyond 28 days. The Director of Public Prosecutions, responsible for charging decisions, has stated unequivocally “we have not asked for an increase ... [w]e are satisfied with the position as it stands at the moment.”²² Other high-profile opponents of any extension include Lord Woolf (the former Lord Chief Justice), Rachel North (Survivor of 7/7 Bombs in London), Sue Hemming (Head of Counter-Terrorism, Crown Prosecution Service), the Parliamentary Joint Committee on Human Rights, opposition parties, a growing number of Labour back-bench MPs and almost all the UK’s newspapers. Selected quotations illustrating the strength and breadth of opposition are available at www.chargeorrelease.com.

17. Liberty does not deny that the UK faces a very real and severe threat from al-Qaida-inspired terrorism. Neither do we seek to dismiss claims about the increasing complexity of terrorist investigations or, indeed, claims that longer pre-charge detention might prove operationally convenient for police in future cases, at least in the short-term. We have always acknowledged and appreciated the extremely difficult work undertaken by the police and other agencies charged with national security. We do not, however, believe that the possibility of short-term operational advantages would, in itself, justify pre-charge detention for longer than 28 days. If, indeed, this were the only test, why should Parliament restrict police powers at all? We urge parliamentarians to look beyond any possible short-term benefits of these proposals and to consider:

- The potential counter-productivity of detaining suspects without charge for over a month; and
- The possibility of other ways of addressing the arguments for longer pre-charge detention which are less damaging to civil liberties and pose less risk of counter-productivity.

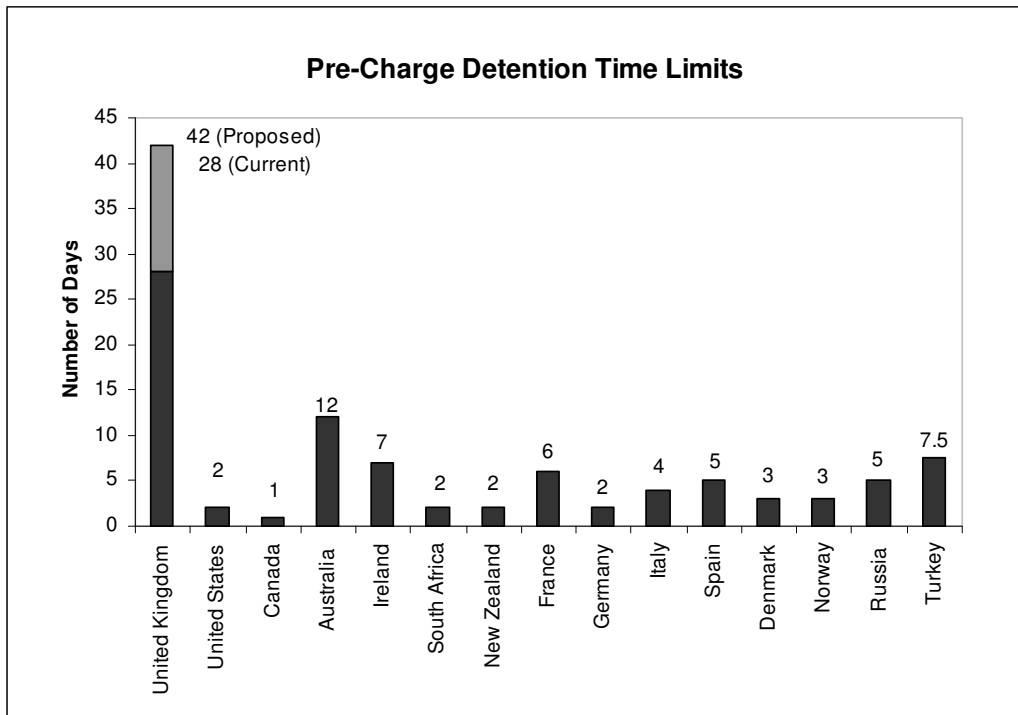
²¹ First Report of 2007/08, “The Government’s Counter-Terrorism Proposals”, para 7

²² Evidence to the Commons Home Affairs Committee, 21 Nov 2007

Before turning to these two key issues, we briefly consider the Government's case for 42 days' detention from an international perspective.

International Perspective on the Government's Case

18. There can be no doubt about the international nature of the threat from al-Qaida-inspired terrorism. Like the United Kingdom, Spain, the US and Turkey have all suffered from terrorist attacks in recent years. Police in these countries face the same investigative challenges cited in support of longer pre-charge detention in the UK - the greater complexity of terror plots, their international dimension and the need to intervene and arrest suspects earlier. Given these similarities, a consideration of how other comparable democracies have responded to these challenges is a useful guide to the necessity and proportionality of the UK Government's current proposal. Liberty asked qualified lawyers and academics in 14 comparable democracies to advise us on how long a terror suspect can be detained before charge (or the closest equivalent to charge) under the criminal law in their jurisdictions. We found that none of the countries surveyed permits pre-charge detention for anything like the existing 28 day limit in the UK. The US Constitution, for example, limits pre-charge detention to two days, the closest equivalent to pre-charge detention in France is limited to six days and the limit in Ireland is seven days.



Can the UK's police truly need the power to detain suspects for over a month without charge when their counterparts in other jurisdictions are successfully prosecuting terror suspects with far shorter time limits?

19. Proponents of 42 days have sought to dismiss these findings, arguing that it is impossible to compare different legal systems.²³ Of course no two legal systems are exactly the same and comparisons are not always simple but this does not mean we should shut our eyes to overseas experience. The UK's counter-terror laws do not exist in a vacuum. Difficulties in drawing comparisons can, indeed, be over-played. Some countries like Ireland, the United States and Canada, for example, have very similar criminal justice systems to our own, making comparisons relatively straightforward. In civil law countries like France and Germany, which do not have the exact concept of "pre-charge detention", we explained the significance of charge in the UK and asked lawyers qualified in those jurisdictions to identify the closest equivalent. Liberty's 60-page study, setting out the findings in detail, is available at: <http://www.chargeorrelease.com>.

20. Any extension to pre-charge detention would put the UK further out of line with comparable democracies. Not only does this further undermine arguments that we really need to hold people for over a month without charge, it could also have broader implications. States and individuals seeking to radicalise Muslim youths may use the disparity to undermine the UK's claim to civility and moral authority. As human rights activists around the world warn, other governments may even see this as a green light to pass their own unjust and over-broad measures against those they consider a threat. Asma Jahangir, Chairperson of the Human Rights Commission of Pakistan (placed under house arrest by General Musharraf), for example, has said of these proposals:

"Britain has a proud history of promoting democratic norms and upholding human rights. It takes the lead in advancing the cause of human rights. A measure that sees a reverse trend will send a negative signal to the international community. The worry is that while Britain may make amends, they would have left a poor precedent for dictators to follow on the pretext of fighting terrorism. This downward trend will be detrimental to the rights of individuals and surely Britain would not want to be a part of it."

²³ By contrast, Professor Nicola Lacey (Chair of Criminal Law and Legal Theory at the LSE) has described "the report into comparative detention periods across democracies [as] an excellent piece of research"

Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU) has similarly commented that the attempts of many Americans to achieve the closure of Guantanamo Bay and the end of CIA torture flights “would not be helped by our friends across the Atlantic developing their own brand of injustice – detention without charge for over a month.”

Counter-productivity

21. The Government has rightly started to focus on the need to tackle Al-Qaida-inspired terrorism by engaging in a battle for hearts and minds. 42 days’ pre-charge detention and the injustice that would inevitably result would not help us to win that battle. On the contrary, pre-charge detention for over a month could damage community relations, make it more difficult for police and intelligence agencies to maintain all-important relationships with Muslim communities and, in some extreme cases, could even operate as a recruiting sergeant to terrorism.

22. The Home Office’s own Equality Impact Assessment explains, “[t]here is a perception that the majority of people arrested under s.41 of the Terrorism Act 2000 are Muslim.”²⁴ This perception is entirely justified. Sir Ian Blair and Peter Clarke have explained, “by and large, most of those who come into custody when asked say that they profess the Muslim faith”.²⁵ It is not, therefore, surprising that there is, to quote the Equality Impact Assessment, a “concern in the Muslim community that they are being targeted as a group rather than individual suspects.”²⁶ History has shown that oppressive laws, which have a disproportionate impact on one racial or religious group, can cause serious long-term damage to community cohesion.²⁷

23. Pre-charge detention for weeks on end would further alienate those communities we most need to engage if we are to combat terrorism. If you, your friends, colleagues or family members had been detained without charge for weeks on end you would be bound to feel a certain amount of animosity to the police and authorities. At the very least you would be less likely to choose to assist the police with their future inquiries. As the Home Office’s own Equality Impact Assessment states, ‘Muslim groups said that pre-charge detention may risk information being

²⁴ page 4

²⁵ Evidence to the Home Affairs Select Committee, 9 Oct 2007, Q21

²⁶ Equality Impact Assessment, page 4

²⁷ Examples include the controversial sus laws as well as internment in Northern Ireland

forthcoming from members of the community in the future.’²⁸ The Mayor of London has warned:

“I am fully aware of the nature and extent of the terrorist threat facing London and other UK cities but I feel this particular proposal could worsen that threat by undermining the community support that is essential for effective, intelligence-led anti-terrorist policing.”²⁹

There is also a real concern that people will be dissuaded from reporting any suspicions they might have about colleagues or neighbours for fear that, even if their suspicions turn out to be unfounded, the person concerned could be held in police custody for over a month.

24. While we would not suggest that 42 days’ pre-charge detention would magically transform law-abiding Muslims into terrorists, we are concerned that the visible injustice of such a policy would provide a propaganda tool to those seeking to radicalise young Muslims. During House of Lord’s debates in 2005, Lord Paul Condon (one of Sir Ian Blair’s predecessor as Met Police Commissioner) warned:

“If we now go back and make it look like we are going to challenge yet again the point of 28 days that we have reached, I fear that it will play into the hands of the propagandists, who will encourage young men and women ... to be misguided, brainwashed and induced into acts of martyrdom.”³⁰

These concerns are supported by recent focus-group research that Liberty has conducted with Muslim men in London, Birmingham, Bradford and Leeds. 34 of the 40 participants felt that “extending the detention limit beyond 28 days will provide religious extremists with a propaganda coup.” The impact of detention without charge in Northern Ireland confirms these risks. Internment in Northern Ireland has been described as the “best recruiting sergeant the IRA ever had”.³¹

Better Alternatives

25. There are better ways of responding to the increasing complexity and international nature of terrorist investigations than continually ratcheting-up the length of time suspects can be held before charge. Before considering the grave and

²⁸ Page 4

²⁹ Letter to Shami Chakrabarti, Director of Liberty, 30 Nov 2007

³⁰ HL Deb, 13 December 2005, col 1175

³¹ cf Lord King of Bridgewater, HL Deb, 10 March 2005, cols 1040-1041

potentially counter-productive step of extending the detention limit beyond 28 days we believe that all of these alternatives should be tried. Some of the alternatives, highlighted by Liberty in the past, have already been adopted. For example, in October 2007, Government brought into force Part 3 of the Regulation of Investigatory Powers Act 2000. This criminalizes any failure to disclose an encryption key and provides an answer to police arguments that longer pre-charge detention is needed because of the time taken to decrypt large amounts of electronic data.³² It is disappointing that, despite these new tools for the police, a further extension to the pre-charge detention limit is being proposed. Indeed, as we discuss below, at the same time as pushing ahead with 42 days, the Government is starting to look more seriously at some of the most significant alternatives to lengthy pre-charge detention suggested by Liberty. In light of the Chilcott review's findings, the Prime Minister has recently agreed to look at lifting the bar on intercept evidence. In addition, the current Bill contains a provision on post-charge questioning – albeit one which is much more restrictive and at the same time potentially more unjust than Liberty's proposal. These kinds of alternatives should be implemented and tried out before longer pre-charge detention periods are considered any further.

Intercept evidence

26. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.³³ We believe that this would make it possible to charge suspects earlier in a significant number of terrorism cases. We are, therefore, delighted that the in-depth Chilcott review into this issue has reached the same conclusion and recommended that the bar be lifted. We also welcome the Prime Minister's initial indications that he intends to implement these conclusions. It would be premature to extend the pre-charge detention limit beyond 28 days before this bar has been lifted and the effect of this development fully appreciated.

27. Claims that lifting the bar would not make a significant difference in terrorism investigations are very hard to reconcile with the extent of surveillance in the UK (including phone tapping).³⁴ In 2004, for example, roughly 1,800 intercept warrants were authorised by the Home Secretary. Given this it would be a surprise, or indeed

³² Police and Justice Act 2006 also allowed suspects to be released on bail subject to potentially strict conditions

³³ Cf Liberty's evidence to the JCHR on this subject at www.liberty-human-rights.org.uk

³⁴ Report of the Independent Surveillance Commissioner for 2004.

a cause for concern, if the communications of those suspected of involvement in terrorism were not being intercepted before they are arrested. In many cases we would, therefore, expect intercept material to be available at the time of arrest.

28. At present, the kind of intercept material that is likely to have been gathered before arrest cannot form part of the evidence base for a charge because it is not admissible in criminal proceedings. The police therefore have to spend unnecessary time filling the gap in evidence that the current bar creates. Once intercept material is made admissible it would, therefore, save police time. Indeed, elsewhere in the world, intercept evidence has been used effectively to convict those involved in terrorism and other serious crimes. In fact, even within the UK, intercept evidence is currently relied on by the state in non-criminal proceedings and Clause 60 of the current Bill proposes to allow intercept evidence to be used in terrorist asset-freezing proceedings.

Post-charge questioning

29. Liberty has argued that the police should be able to re-question suspects after charge where new evidence subsequently comes to light suggesting that a more serious charge might be appropriate.³⁵ We believe that this could have a major impact on terrorism investigations. In order to appreciate why, it is necessary to consider the way the police currently investigate suspected crimes. At present where, for example, the police suspect that a person might have been involved in a complex conspiracy to murder they will arrest the person and detain them while trying to gather the evidence to support their suspicion, including by police questioning. In the process of doing this they may well obtain enough evidence to support a charge for a lower level offence - in a terror investigation this could well be a relatively serious pre-cursor offence like "possessing articles for terrorist purposes",³⁶ "preparation of terrorist acts"³⁷ or offences connected to the "membership or support of proscribed

³⁵ At present the ability for the police to question suspects after charge in relation to offences arising from the same set of facts is limited. Paragraph 16.5 of Code C of PACE allows for re-interview in relation to an offence i) to prevent or minimise harm or loss to some other person, or the public ii) to clear up an ambiguity in a previous answer or statement or iii) in the interests of justice...to comment on, information...which has come to light since they were charged. It should be pointed out that there is nothing to stop a person being interviewed in relation to an offence arising from a different set of facts once he has been charged.

³⁶ Section 57 of the Terrorism Act 2000. This makes it an offence to possess an article in circumstances which give rise to a reasonable suspicion that the possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

³⁷ Section 5 of the Terrorism Act 2006. This makes it an offence to do anything in preparation

organisations”.³⁸ Nevertheless, instead of charging the suspect with the lower level offence, police will continue looking for evidence to support the more serious complex conspiracy charge. They will only charge with the lower-level offence when the law says that their time has run out and when they therefore need either to charge or to release the suspect – at present after 28 days.

30. The 42 day proposal is designed to allow the police to go on investigating for longer, to allow evidence to be received from overseas or for massive computer databases to be searched in case this produces evidence to support the more serious conspiracy to murder charge. Instead of continually agreeing to longer pre-charge detention periods Liberty believes it would be better promptly to charge the suspect with the lower-level offence and then to continue looking for evidence to support the more serious offence after charge. Where the initial charge is a serious pre-cursor terrorism offence of the type referred to above one would frequently expect the suspect to be held in remand while awaiting trial. If new evidence does come to light we believe that, with prior judicial approval, it should be possible for the police to re-question the suspect about that evidence and, if appropriate, to re-charge them with the more serious offence. If there were proper judicial oversight Liberty does not believe that this proposal could lead to the use of “trumped-up” holding charges as some have argued.

31. Clause 23 of the Bill (considered in more detail in Part 2 of Liberty’s Second Reading Briefing on the Bill) does propose to allow greater post-charge questioning but does not go as far as Liberty has suggested. Neither does it contain the vital safeguards against oppressive post-charge questioning and abuse that we would consider necessary. If Clause 23 were expanded to allow re-interview about other more serious offences arising from the same set of facts as the initial charge we believe this would provide a significant alternative to even longer periods of pre-charge detention. If accompanied by the safeguards we propose this alternative would be more proportionate and less likely to prove counter-productive.

to give effect to your intention to commit an act of terrorism or to assist another to commit such an act.

³⁸ Sections 11 and 12 of the Terrorism Act 2000

The Nightmare Scenario and Existing Emergency Laws

32. Proponents of 42 days often argue that the powers might be needed to deal with a future nightmare scenario involving multiple grave terror plots which come to notice and/or fruition so suddenly and simultaneously that the police are simply unable to gather the evidence required to charge such a large number of suspects within the 28 day time limit. The Minister of State for Security, Counter-Terrorism, Crime and Policing (Rt Hon Tony McNulty MP), for example, wrote in the *Daily Mirror*: “As an extreme example, imagine two or three 9/11s. Imagine two 7/7s.”³⁹ As with all of the Government’s arguments for 42 days’ detention, Liberty has seriously considered those based on the hypothetical “nightmare scenario”. Even if such a scenario did arise we do not, however, consider that new laws are needed to deal with it. Existing emergency powers legislation (the Civil Contingencies Act 2004 or CCA) already gives senior ministers the power to pass emergency laws extending pre-charge detention limits if this is urgently needed to deal with a real emergency such as three 9/11s. Liberty has obtained an opinion from David Pannick QC confirming this.

33. It is not Liberty’s intention to detract parliamentary attention from the current 42 day proposals by dwelling here on how the CCA and Liberty’s reference to it have been misrepresented by those advocating 42 days’ pre-charge detention.⁴⁰ We would, however, like briefly to clarify two key points. First, the fact that Liberty sought to draw the Government’s attention to the powers that are contained in existing emergency legislation does not mean we accept that it is necessary to go beyond the current 28 day limit. We have merely responded to the “nightmare scenario” justification for 42 days by highlighting that in such a situation the Government already has the powers to extend pre-charge detention limits if this is urgently needed. Secondly, using the CCA would not require the declaration of a “general state of emergency” and would not amount to a kind of martial law of the kind seen recently in Pakistan.⁴¹ Using the powers in the CCA temporarily to extend pre-charge detention limits would, of course, be a serious step but this is entirely appropriate given the grave consequences of lengthy pre-charge detention discussed above.

³⁹ “Minister warns of ‘peril’ as he pushes for 42 day lock-up”, 23rd January 2008

⁴⁰ of Liberty’s submission to HASC in December 2007: www.liberty-human-rights.org.uk

⁴¹ Prime Minister’s Statement on National Security – 25 July 2007

The Current Proposals

34. If enacted in its current form, Liberty believes the practical effect of this Bill would be for terror suspects to be detained for up to 42 days whenever it is considered that this would assist an investigation. In simple terms the effect would not be very different if the Bill simply replaced the existing 28 day limit with a 42 day limit. For this reason we would urge parliamentarians to look beyond the Government's complex flow-charts and not to become side-tracked with the confusing "trigger procedures" or the safeguards which the Government claims to have included in the Bill.⁴² We believe that the following key questions (considered above) should be considered before getting into this level of detail: Has the Government made a case for any extension beyond 28 days? Are there better alternatives that could be tried first? Could 42 days' detention prove counter-productive in the long term?

35. Nevertheless, we make a few observations at this stage about how the Government has presented the current proposals. The Home Secretary has claimed that the Bill would only create exceptional "reserve powers". The reality, however, is rather different. The Bill would actually allow the Home Secretary to trigger the power to detain people for up to 42 days at any time, to deal with individual cases.⁴³ The only requirement is that she has first received a report from the DPP and a chief police officer stating that longer detention would assist their investigations and that those investigations are being pursued diligently.⁴⁴ The powers would certainly not be restricted to the kind of real emergency covered by the CCA. Furthermore, once the higher limit is triggered to deal with an individual case, while it remains in place this higher limit would apply to all suspects detained under the Terrorism Act 2000 and to anyone subsequently arrested under that legislation.

36. Home Office ministers have also made much of the parliamentary and judicial safeguards which they claim to be contained in the Bill. Liberty is not, however, convinced. There are, for example, three stages at which Parliament would be involved once the Home Secretary has triggered the 42 day limit. On closer inspection it is clear that none is satisfactory and that some would actually be constitutionally inappropriate:

⁴² For a detailed analysis of the proposals see: www.chargeorrelease.com

⁴³ Schedule 1, para 1, proposed para 40(1)

⁴⁴ Schedule 1, para 1, proposed para 39

- Parliamentary approval is not needed to trigger the 42 day limit. If asked by the DPP and a chief police officer, this decision would be solely a matter for the Home Secretary.⁴⁵ All Parliament would receive is a statement that the Home Secretary has done so after the event.⁴⁶ In short, if Parliament considered that the powers had been triggered in an inappropriate situation it would be powerless to do anything about it. As the power is likely to be triggered to deal with individual cases, it would even be difficult for Parliament to have a meaningful debate about the Home Secretary's statement without the risk of prejudicing future prosecutions.⁴⁷
- Parliament would only have a vote if the Home Secretary wanted the 42 day limit to stay in place for longer than 30 days.⁴⁸ This would be very unlikely to ever happen in practice because, by this time, suspects would already have been held for 42 days.⁴⁹ Alternatively the Home Secretary could choose to allow the power to lapse after 30 days and then re-trigger the 42 day limit, thereby avoiding any vote in Parliament.
- Individual cases where people are detained for longer than 28 days would be notified to Parliament.⁵⁰ This proposal confuses the constitutional roles of Parliament and the courts. Parliament's role is to determine the law of the land but it is the courts that should control how that law is exercised in individual cases.

It may well be Government's intention to concede a greater role for Parliament as this Bill proceeds through Parliament. This would not, however, remedy the grave, potentially counter-productive and unjustified proposal to allow detention without charge for over a month.

37. Government has also argued that any potential for injustice would be removed due to the existence of judicial safeguards. Again, these arguments are overplayed. It is true that the courts would have a limited role in authorising the use of the detention powers in individual cases. However, as we explain above, this would only be of

⁴⁵ Schedule 1, para , proposed para 40

⁴⁶ Schedule 1, para , proposed para 41

⁴⁷ This is the case notwithstanding the fact that the Bill now prohibits the Home Secretary from including this kind of personal information in her statement (proposed para 41(5))

⁴⁸ Schedule 1, para , proposed para 45

⁴⁹ Although the powers can be triggered at any time, in reality the 42 day limit would only be triggered once the normal 28 day limit has nearly run out

⁵⁰ Schedule 1, para , proposed para 44

limited assistance because before charge there is no hard evidence and no formal allegation for a court to scrutinise. Judicial oversight of how powers are used in individual cases is only part of the story. Liberty believes that, as under the CCA, Parliament should limit the Home Secretary's authority to trigger any exceptional detention powers and that the courts should be given effective powers to sanction any failure by the Home Secretary to operate within these legal limits. Under the current proposals there would be no legal limits on the power of the Home Secretary to trigger the 42 day limit and no judicial oversight of her decision to do so. One can understand why Government ministers might wish to avoid any risk of legal challenges but, in Liberty's view, under the British constitution the Government should not be able to operate above the law.

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