



**Liberty's evidence to the Constitution  
Committee Inquiry – 'Emergency  
Legislation'**

**March 2009**

## **About Liberty**

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

## **Liberty Policy**

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

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## Introduction

1. Liberty welcomes the opportunity to give evidence to the Constitution Committee in respect of Emergency Legislation. This is an important and timely inquiry as there have been a number of Bills rushed through Parliament in recent years with insufficient time for proper scrutiny. In particular, the threat of terrorism has been used as a justification for expediting Bills through parliament and there has been little review as to whether the measures passed were appropriate and necessary. While we do not in any way seek to downplay the potential threat of terrorism, and can understand there may be rare circumstances in which emergency legislation may be necessary, it is important to ensure that there are limits on what can be done in emergency legislation.

2. Human rights law recognises that there may be situations in which it is possible to derogate from some rights, but that there are certain non-derogable rights, such as the prohibition against torture. Article 15 of the *European Convention on Human Rights*, which is to be considered as part of the *Human Rights Act 1998* (HRA),<sup>1</sup> provides that in times of war or “*other public emergency threatening the life of the nation*” derogations from the obligations under the Convention can be made “*to the extent strictly required*”.<sup>2</sup> The courts have been quick to defer to the government in determining whether there is a public emergency.<sup>3</sup> The problem of course is how to define an ‘emergency’, when does it start and end? The notion of ‘emergency’ is inherently linked to the concept of ‘normalcy’, as for something to be considered an emergency it must be outside the ordinary course or events: it must only last a relatively short time and yield no substantial permanent effects.<sup>4</sup> The problem occurs when emergency powers are used when there is arguably no real emergency or

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<sup>1</sup> Note the acceptance in *A v Secretary of State for the Home Department* [2005] 1 AC 68 by the House of Lords that article 15 applied in the UK domestic context, but cf Lord Scott’s comments.

<sup>2</sup> This applies to most of the rights in the Convention, but there can be no derogation from the right to life (except in respect of lawful acts of war), the prohibition against torture, the prohibition against slavery and the requirement that there should be no punishment without law.

<sup>3</sup> See *A v Secretary of State*: (Lord Bingham at [29] “*a pre-eminently political judgment*”; Lord Hope at [112] “*great weight must be given to the views of the executive*”; Lord Scott at [154] “*the judiciary must in general defer to the executive’s assessment*”; Baroness Hale at [226] “*Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government*”).

<sup>4</sup> See Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 2006, page 172.

when powers invoked in an emergency are continued once the emergency has passed.

### **History of Emergency Legislation in England & Wales**

3. Rushed legislation is not a new phenomenon. Leading up to the outbreak of both world wars legislation was rushed through giving sweepingly broad powers to the executive (see the 1914 *Defence of the Realm Act* and the 1939 *Emergency Powers (Defence) Act*). The first *Prevention of Terrorism (Temporary Provisions) Act 1974* was enacted in a 24 hour period within seven days of the Birmingham pub bombings (although the 'Birmingham six' were arrested before its enactment). A number of other measures in relation to the situation in Northern Ireland were rushed through following terrible events. As Brice Dickson said in a 1992 article about this type of legislation:

*"On occasions such as these the government of the day, and Parliament too, have wanted to give an impression to the public that the law has at its disposal effective means for dealing with terrorists, even if no-one can honestly point to an obvious connection between the atrocities in question and the legal reforms."*<sup>5</sup>

4. Following press reports of a spate of dog attacks, the *Dangerous Dogs Act 1991* was rushed through parliament in six weeks. The result was legislation that contained an ill-thought out definition of the breeds of dangerous dogs and a large number of court cases and subsequent amendments were required to clear up some of the problems. More recently, the *Anti-Terrorism Crime and Security Act 2001* (ATCSA) was rushed through Parliament in less than one month after the attacks in America on September 11, 2001. The Bill was first published on 13 November 2001 and the Act received royal assent on 14 December 2001, with the first foreign nationals detained under Part 4 of the Act on 19 December 2001. While the tragic events of September 11 were understandably of the gravest concern, there was no apparent need for an immediate legislative response. The *Terrorism Act 2000* had come into force only months earlier; designed to tidy up the powers in relation to terrorism and intended to be the last word on anti-terrorism powers and procedures for the foreseeable future. Despite this, the ATCSA was rushed through Parliament and there was no proper opportunity for reasoned parliamentary debate.

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<sup>5</sup> Brice Dickson, 'Northern Ireland Emergency Legislation – the Wrong Medicine? [1992] *Public Law* 592 at 597.

5. The ATCSA not only included measures designed to deal with terrorism but also included provisions relating to disclosure of information for the purposes of general criminal investigations and allowed the freezing of certain assets if action to the detriment of the UK's economy had been or was likely to be taken by a government or person outside the UK.<sup>6</sup> Although these were not terrorism related powers, their inclusion in 'emergency' legislation, means it is not difficult to see why it has incorrectly been assumed that the freezing of assets using this power (i.e. of Icelandic banks) was done using 'terror laws'. In our Bill briefing we stated:

*We are particularly concerned to see a number of measures smuggled into this Bill which either have nothing to do with terrorism or the events of 11<sup>th</sup> September or are very much more wide-ranging in their remit. These measures should be removed from the Bill and added to [the] next Home Office measure so that they can be properly considered and debated outside of the current crisis.<sup>7</sup>*

6. The next time legislation was rushed through Parliament without the opportunity for a full and proper debate followed from a House of Lords decision<sup>8</sup> on 16 December 2004 which (unsurprisingly) declared that parts of the ATCSA were incompatible with the HRA. The Prevention of Terrorism Bill was introduced on 22 February 2005 and the *Prevention of Terrorism Act 2005* (PTA) received Royal Assent on 11 March 2005. Among other things, this Act introduced control orders; indefinite house arrest without trial. As we said at the time the Bill was introduced:

*The Government plans to pass this bill through Parliament in approximately two weeks. It is completely unacceptable that legislation of such constitutional importance, allowing British citizens to have severe restrictions placed on their liberty, is being allocated negligible parliamentary time.<sup>9</sup>*

We also observed at the time that it should have come as no surprise that the House of Lords declared that indefinite detention without charge breached the right to liberty. In December 2003 the Newton Committee of Privy Counsellors had called for

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<sup>6</sup> See now section 4 of the *Anti-Terrorism Crime and Security Act 2001*.

<sup>7</sup> See Liberty's Briefing on Anti-Terrorism Crime and Security Bill 2001, November 2001, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy01/nov.pdf>

<sup>8</sup> In *A v Secretary of State for the Home Department* [2005] 1 AC 68.

<sup>9</sup> See Liberty's briefing for Second Reading in the House of Lords, Prevention of Terrorism Bill, February 2005, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy06/ptb-2nd-reading-commons.PDF>

the Government to end detention under the ACTSA, as had the JCHR and at least two UN Committees. The Government had had plenty of time to consider alternatives to the detention regime in the ACTSA.

7. Liberty advocated opposition to the control order regime in its entirety, but as an alternative, argued that the Bill should contain a sunset clause similar to that contained in ACTSA. The result was a regime that requires an order by the Secretary of State continuing the relevant sections relating to control orders to be approved by Parliament. While this is more welcome than a permanent provision, it certainly does not ensure that 'temporary' measures remain temporary. Control orders have now been in force for four years. Most worryingly, the Government has made no indication that they intend to scrap the regime any time soon. In 2009, the Government asked parliamentarians to renew the control order regime for the fourth year running. There is, of course, the danger that the longer the control order regime stays in place the easier it is to renew year on year without proper consideration.<sup>10</sup> Even worse, the Government has sent clear signals that they intend the control order regime to become a permanent 'parallel' fixture of our legal landscape.

8. This is evidenced in part by subsequent Acts of Parliament which continue to strengthen and reinforce the control order regime. Section 78 of the Counter-Terrorism Act 2008 inserted additional provisions into the PTA allowing police powers of entry and search for those under control orders as well as a host of other strengthening and enforcement powers. Meanwhile, the control order model is currently being extended into other areas. Government amendments introduced into the Policing and Crime Bill only last month provide for "*injunctions to prevent gang-related violence*". In effect these are a mix of control orders/ ASBOs for anyone suspected of engaging in or encouraging or assisting gang-related violence.

9. Another example of rushed legislation, but this time outside the context of terrorism, was the Criminal Evidence (Witness Anonymity) Bill which was introduced on 3 July 2008 and received Royal Assent on 21 July 2008. All of the Commons stages of the Bill were concluded in a single day (8 July) and two days later all of the Lords stages of the Bill were concluded on a single day (10 July). This was again in

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<sup>10</sup> For more information on the evolving permanence of the control order regime see Liberty's Briefing on the draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2009, March 2009 available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-briefing-on-control-order-renewal-2009.pdf>

response to a House of Lords judgment, which was delivered on 18 June 2008.<sup>11</sup> In the only briefing we managed to produce in the short time between introduction of the Bill and its enactment, we stated:

*The opportunity for careful consideration and detailed debate are incredibly important, especially where, as in the current Bill, civil liberties and the protection of the public are at stake. Sadly, Parliament's ability to perform this vital task will be severely curtailed in the current context, with the Bill rushed through in just a few days. Given the very tight parliamentary timescale, this is likely to be Liberty's sole briefing on the Bill and we do not have the opportunity to propose detailed amendments to it. We do, however, suggest one amendment: a sunset clause to ensure that Parliament is able to look at the issue in more detail in the near future.*<sup>12</sup>

A sunset clause was included in the final version of the Act, and these provisions have now been introduced in the Coroners and Justice Bill currently before Parliament, so are now subject to a proper period for debate. The much criticised House of Lords' decision which prompted the Bill (*R v. Davis*) met with an impassioned and in some cases misleading response from some police and sections of the media. On this occasion Liberty was relieved that the response of Government and opposition parties to the decision did not follow suit. It was, in contrast measured and informed. Accordingly, the provisions introduced in response to the judgment were relatively uncontroversial – indeed it is likely that if the same case went before the court with these measures in force the court would be likely to come to the same conclusion. As such, it is difficult to see the need, other than a political imperative, for such legislation to be rushed through Parliament.

### **Impact of “Emergency” Legislating**

10. When legislation is introduced into Parliament and passed within a few weeks or even days it is impossible for Parliament fully to analyse and debate the proposals put before it. It is also extremely difficult for NGOs and civil society to have the time to examine the proposals and brief parliamentarians on the likely impact of such

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<sup>11</sup> *R v Davis* [2008] UKHL 36.

<sup>12</sup> See Liberty's Briefing on the Criminal Evidence (Witness Anonymity) Bill, July 2008, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy08/liberty-briefing-witness-anonymity.pdf>

legislation. Legislation drafted in haste will inevitably contain errors be they minor or more substantial. Even more worryingly, the policy behind such legislation will at best be ill-thought out and at worst may be motivated by political objectives to be 'seen' to be responding to an event or judgment. Legislation of this kind should never be devised as a blunt tool for expressing political revulsion at terrifying acts. Statutes must be drafted with greater care than speeches. It is not sufficient that the passing of a new law would send tough signals to Britain's enemies, nor that it somehow makes some of us feel safer. Each proposed interference with democratic rights and freedoms must be carefully weighed against its purported benefits. Experience shows that such laws are likely to be with us for a very long time.

11. The Terrorism Act 2006 (TA) was the direct legislative response to the attacks on London in July 2005. The State is, of course, under an obligation to take appropriate steps to safeguard people within the United Kingdom. Following a direct terrorist attack it is inevitable that there be consideration of laws and powers available to agents of the state. However, as so often in the past, there was a hasty assumption that new legislation must be at least a considerable part of the answer. The original draft Bill contained a strict liability offence of glorification of terrorism and proposed an incredible 90 days detention without charge. These proposals were, of course, modified during the parliamentary stages of the Bill but both of the compromises eventually reached remain unsatisfactory and arguably counterproductive. It is also important to remember that legislating directly in response to terrorist outrages can be interpreted as a victory for those who seek to undermine our democratic values and our way of life.

12. Liberty also has concerns about court decisions being used as an excuse to bypass the ordinary legislative process on the basis that the decisions leave a gap in the law. In the case of indefinite detention under Part 4 of the ACTSA the court's decision did not and could not affect the validity of the legislation.<sup>13</sup> Moreover, the court's decision was not unexpected – the government had been advised by a number of eminent bodies that indefinite detention without charge would be in breach of the right to liberty under the HRA and any derogation from that right would not be valid as it was not strictly required. The introduction of rushed through legislation in

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<sup>13</sup> The court was only able to strike down the secondary legislation derogating from article 5 of the European Convention of Human Rights, and to issue a declaration of incompatibility in relation to Part 4 of the ACTSA– which does not affect the validity of the ACTSA (see section 4(6) of the HRA “A declaration [of incompatibility] does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given”).

response to the House of Lords decision in *R v Davis* similarly was not necessary. While some legislation may legitimately have been considered necessary (indeed, it was surprising that the statute book had stayed silent on the issue for so long, leaving it to the courts to decide) there was no 'emergency' that required the fast-tracking of this legislation. Knee-jerk legislation that undermines fundamental principles is often the least best type of proactive response. Unfortunately it is often the most politically attractive.

13. It is particularly concerning when additional provisions are included in 'emergency' legislation which do not relate to the event or judgment that the Government is purporting to address. This has occurred on a number of occasions as outlined above. It appears that there may be times when emergency legislation has been seen as a potential vehicle to include other proposed measures that have not yet been allocated a spot in the legislative programme. This is totally unacceptable, and a clear perversion of the parliamentary process. Similar concerns arise when substantive amendments are introduced into Bills at a very late stage thereby bypassing much of the time for debate and effectively ensuring that interest groups are unable to properly comment or lobby parliamentarians.<sup>14</sup>

14. There are, of course, valid questions as to when it might be necessary for 'emergency' legislation to be introduced. The parliamentary process and timelines for debate and consideration form an essential part of the democratic system. It is an essential feature of the UK's constitutional structure that Bills be properly debated and scrutinised. We do not deny that there are circumstances in which emergency legislation may need to be passed when national security is actually threatened or there is a real pressing legal (as opposed to political) need to respond to a court decision that may affect a large number of cases. These situations should be extremely rare. If the emergency legislation impacts on human rights a higher threshold should be passed before parliamentary processes can be curtailed. At the very least, emergency legislation passed in haste should always include a sunset clause of no more than 12 months to ensure that the legislation is properly considered and debated at a later stage.

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<sup>14</sup> See for example the provisions on terrorist financing introduced at a very late stage in the Counter-Terrorism Bill.

## Civil Contingencies Act 2004

15. The *Civil Contingencies Act 2004* enables the executive to make regulations when there is an emergency and the person making the regulations is subjectively satisfied that they are appropriate to prevent, control or mitigate an aspect or effect of the emergency. The Act gives sweepingly broad powers to the government to pass secondary legislation which can amend primary legislation and, among other things, allow for the confiscation or destruction of property without compensation, forcibly move people to or from a place or prohibit travel at certain times and prohibit peaceful protest. Clearly if such powers are to be used then the trigger for their use should be limited to ensure they are invoked only when absolutely necessary. Liberty believes that the definition of an ‘emergency’ in section 19 of the CCA is, currently too widely drawn.<sup>15</sup>

16. ‘Emergency’ in section 19 of the CCA is defined as meaning “*an event or situation which threatens serious damage*” to human welfare or the environment or war or terrorism which threatens serious damage to UK security. However, this means that the event or situation itself need not be of any seriousness. This means that a relatively innocuous event may be considered to have implications of damage sufficient to trigger the emergency powers. The decision as to whether the definition of emergency has been satisfied is effectively made by a Minister.<sup>16</sup> As the damage needs only be threatened, rather than actual, this may be a highly subjective decision based on assumptions as to cause and effect. Although parliamentary scrutiny is required, this is not likely to occur for several days, by which time the regulations may already have had considerable impact. The nature of the regulations – such as movement to or from a place, or the destruction of property – means that their effect is required to be immediate (i.e. before parliamentary consideration can take place).

17. Part 2 of the CCA should not be used unless the government can demonstrate the seriousness of an event or situation and its effect on the UK. There are a number of constitutional safeguards contained in the CCA however, which could make its use in very tightly defined circumstances appropriate. It is important that section 23(5) provides that emergency regulations cannot amend Part 2 of the

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<sup>15</sup> See Liberty’s Second Reading Briefing on the Civil Contingencies Bill in the House of Lords, June 2004, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy04/civil-contingencies-bill-2nd-lords.pdf>

<sup>16</sup> Although the Queen is the primary decision maker she will effectively be acting on the instructions of one or more Ministers.

CCA itself or the HRA. Emergency regulations have to be laid before Parliament as soon as is reasonably practicable, will lapse if Parliament does not approve them within 7 days, and once approved will lapse after 30 days (although new regulations can still be made). Importantly, there is a power for Parliament to amend the regulations. While on the face of it emergency regulations could amend *any* Act of Parliament (other than the HRA and CCA), it is arguable that amendments to acts of constitutional significance could not be made via regulations if there is no clear power to do so.<sup>17</sup>

### **Counter-Terrorism Act 2008**

18. Last year, as part of our campaign<sup>18</sup> against proposals to extend pre-charge detention to 42 days Liberty raised concerns at the way in which the Government used 'emergency rhetoric' in an attempt to lend credibility to their plans. Ministers repeatedly claimed that the proposed powers would only be invoked in an emergency scenario.<sup>19</sup> Similarly, the original Counter-Terrorism Bill 2008 and the Government amendments that followed sought to dress the 42 day pre-charge detention proposal in language similar to that contained in the CCA. The Home Secretary claimed that the Bill would only create exceptional "reserve powers" that could only be used where longer detention is urgently needed to deal with a "grave and exceptional terrorist threat".<sup>20</sup> In response to increased scepticism, the Government introduced amendments that included prominently placed and chilling language about "grave and exceptional terrorist threats". However, looking beyond emotive use of language and clever drafting, it was clear that, in reality, the power would still have been triggered for operational convenience in individual cases. David Pannick QC (now Lord Pannick) confirmed at the time that the decision to trigger 42 days would have been lawful even if there were no "grave and exceptional terrorist threat". The only real legal limit on the Home Secretary's power to trigger 42 days was that a report be received from the DPP and a chief police officer saying that there were an "operational need for further detention"

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<sup>17</sup> See *Thoburn v Sunderland City Council* [2002] 4 All ER 156 per Laws LJ (recognising 'constitutional statutes') and the Government's response to the Report of the JCHR on the Draft Civil Contingencies Bill.

<sup>18</sup> For more information on Liberty's Charge or Release campaign see: <http://www.liberty-human-rights.org.uk/issues/2-terrorism/extension-of-pre-charge-detention/index.shtml>

<sup>19</sup> For example, the then Minister of State for Security, Counter-Terrorism, Crime and Policing (Rt Hon Tony McNulty MP) wrote in the *Daily Mirror*: "As an extreme example, imagine two or three 9/11s. Imagine two 7/7s." "Minister warns of 'peril' as he pushes for 42 day lock-up", 23 January 2008.

<sup>20</sup> In her interview on the Today Programme on 3<sup>rd</sup> June, for example, the Home Secretary said "*this is a power that would be used at a time when frankly, as we will describe it in the bill, there will be a grave and exceptional terrorist threat*"

to help with the terrorist investigation.<sup>21</sup> Lord Pannick described this report as a low hurdle that would be “easy to satisfy “. Despite Government claims to the contrary, the proposed powers remained concerned with individual prosecutions rather than preventing or controlling an emergency. The powers would certainly not have been restricted to the kind of real emergency covered by the CCA. It was on this basis that Liberty has argued<sup>22</sup> that in the extremely rare instance of a ‘nightmare terrorism scenario’ the CCA would allow for emergency regulations which would extend the period of pre-charge detention in terrorism cases.<sup>23</sup> This does not mean that these powers should in fact be used, but if such an extension in such circumstances were to take place derogation from the ECHR would be required on an extremely time limited basis with the powers continually required to be renewed by Parliament, rather than made as a permanent change to the law.

## **Conclusion**

19. In our view the powers permitted under the CCA (and discussed in greater detail above) are too broad and demand considerable amendment. Use of the CCA in a true emergency for a temporary change to the law (that must be consistent with the HRA) is however preferable to permanent and knee-jerk erosions to fundamental rights in primary legislation. In recent years we have, unfortunately, seen too much of the latter. This is when notions of emergency and normalcy merge. Our recent legislative history powerfully demonstrates how powers introduced to deal with an ‘emergency’ are continued long after the emergency has passed. It is after all, far easier to introduce such legislation than it is to repeal.

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<sup>21</sup> New Clause 5 (Report Stage in the House of Commons)

<sup>22</sup> See Liberty’s Second Reading on the Counter-Terrorism Bill in the House of Commons, Part 1 – Pre-Charge Detention, available at: <http://www.liberty-human-rights.org.uk/publications/pdfs/counter-terror-bill-detention-provisions-2nd-reading-commons-final.pdf>

<sup>23</sup> For example, where it could be shown that there was 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 current 28 day time limit.