

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's response to the Home Affairs Committee inquiry into counter- terrorism proposals**

**July 2007**

## **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

[www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml](http://www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml)

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## **Introduction**

1. The Home Affairs Committee call for evidence follows the publication of a short government discussion paper in June 2007<sup>1</sup>. This will form the basis of a new counter terrorism bill later in the year. The HAC inquiry requests submissions not exceeding 2500 words. As a consequence our evidence will provide a brief analysis of the issues raised for consideration. We would be grateful for the opportunity to provide further detail when the Committee takes oral evidence at a later date.

## **Extension of pre charge detention**

2. The current limit of 28 days pre charge detention was introduced as a compromise during the passage of the Terrorism Act 2006 (TA) after the government sought to extend the previous limit of 14 days to 90 days. In November 2005 the Home Affairs Committee called for evidence over the planned extension. Liberty submitted evidence<sup>2</sup> to this inquiry and we would refer the Committee to this briefing for further detail as our position remains unchanged. We argued that in order to be compatible with human rights principles parliament should first consider the problems claimed to arise from the existing time limit. Even if satisfied that problems existed no extension could be justified if other, more proportionate, solutions were found. We argued that no case had been made then and maintain there has been no event since justifying further extension. We are not aware of any suggestion that terrorist investigations have been hampered by a requirement to release those arrested after 28 days.

3. Liberty believes that effective counter terrorist policy requires the state to seek the most proportionate action within the context of the human rights framework. To do otherwise runs the risk of alienating vital support and proving ultimately counter productive. In an interview shortly after his appointment as security minister Admiral Sir Alan West foresaw a 15 year struggle against terrorism and urged people to 'snitch' on friends or relatives they suspected of involvement in terrorist activity<sup>3</sup>. We agree that everyone should be willing contact the authorities with information about possible involvement in terrorism or indeed any other form of criminality.

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<sup>1</sup> <http://security.homeoffice.gov.uk/news-publications/publication-search/legislation-publications/CT-Bill-2007-discussion-doc2.pdf?view=Binary>

<sup>2</sup> <http://www.liberty-human-rights.org.uk/pdfs/policy06/hac-terrorism-detention-powers.PDF>

<sup>3</sup> <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/07/08/nterr108.xml>

However, if this is to happen, those with information will need to have confidence and trust in the system. Will they have this confidence knowing that those arrested could face 90 days detention (the equivalent of a six month custodial sentence) without the need to bring any charge? It is perhaps inevitable that some suspicions will prove to be unfounded and no charge will be brought. It is therefore crucial that the police are under obligations to act expeditiously. Liberty has constantly maintained that effective counterterrorism policy is dependant on goodwill and good intelligence. No case has been made for increased detention and any move to extend, especially given the timeframe envisaged by Admiral West, will be a step toward internment regardless of any promised 'further judicial and Parliamentary oversight'<sup>4</sup>.

### **Post charge questioning**

5. Liberty proposed increasing the scope for post charge questioning during progress of the TA through parliament. We were the first to make the suggestion and argued that it provided a more proportionate solution to problems identified by Assistant Commissioner Andy Hayman<sup>5</sup> and used as justification for pre charge detention extension. However, we see it only as an alternative to pre charge time limit extension. Extending the grounds would not require significant amendment to the codes of practice under the Police and Criminal Evidence Act 1984 (PACE). 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<sup>6</sup>. It is arguable that re-interviews in many terrorism cases would already be permitted under the existing grounds. However, to allow certainty, a further exception could be included in the interests of national security.

6. We would emphasise that any re-interview must be subject to the same PACE safeguards and protections afforded to any other person under arrest including time limitations and access to legal representation<sup>7</sup>. Indeed we would argue the greater risk of oppression warrants enhancing these safeguards in relation to

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<sup>4</sup> Ibid 1 at paragraph 6

<sup>5</sup> Letter to the then Home Secretary Charles Clarke on 6 October 2005

<sup>6</sup> It should be pointed out that there is nothing to stop a person being interviewed in relation to a separate offence once he has been charged.

<sup>7</sup> It should be noted that under Annex B to Code C of PACE access to representation can be limited in some situations

post charge questioning. For example in normal circumstances the police self-authorise initial detention for interview and only need authorisation from a magistrate if seeking to detain in excess of 24 hours. If the police are seeking to re-question in terrorism cases it seems appropriate that judicial authorisation should be required before any interview takes place. Similarly, re-interview after charge is an unusual situation for a suspect. They are likely to face questions similar to those asked in interviews previously, possibly weeks or even months earlier. These circumstances would justify less restricted access to legal representation than occurs in other terrorism related interviews.

7. The Government discussion paper makes reference to the nature of the caution to be given and suggests drawing adverse inference from a failure to answer questions. Currently, no adverse inference can be drawn for not responding to questions after charge. Liberty's principled position has always been that no adverse inference should be drawn from any failure to answer questions. There are any number of legitimate reasons why a person might not be willing or able to answer questions during interview. Adverse inferences shift the burden of proof away from the presumption of innocence. As we have always opposed the introduction of adverse inference we would oppose any extension.

### **Notification requirements for released prisoners**

8. The discussion paper suggests a post release notification scheme for those convicted of terrorism offences. It is worth pointing out there is already a significant post custodial monitoring regime. Part 12 Chapter 5 of the Criminal Justice Act 2003 (CJA) provides that anyone convicted of a specified offence punishable by more than 10 years imprisonment will be given an indefinite period of imprisonment for public protection. Once released from prison they will be on licence for a minimum of a further 10 years. After this, they can apply to the Parole Board for termination of the licence. Anyone considered a risk is unlikely to have their licence terminated by the Parole Board. If still on licence they could of course be subject to conditions and indeed be subject to recall. Somewhat surprisingly Schedule 15 to the CJA, which lists 153 offences to which Part 12 Chapter 5 apply, does not have any specific reference to offences under the terrorism acts of 2000 and 2006. It does however

contain a range of offences which might be linked to terrorism<sup>8</sup>. Rather than introduce an entirely new control regime, extension of Schedule 15 to include terrorism offences might provide an alternate approach.

9. If this approach is not adopted and a new order regime comes into effect we believe that modifications from the sex offender regime would be appropriate. In particular, any decision to make an order should be by judicial determination. A judge is appropriately placed to determine whether there is a public protection need, what proportionality issues there might be, and any other relevant factors. The mandatory regime in the Sex Offenders Act 1997 determines orders according to the nature of the offence and the sentence. It allows for no judicial discretion as to what is most appropriate in the circumstances.

### **Enhanced sentences**

10. The discussion paper suggests introducing enhanced sentences for non terrorism specific offences. We do not have an issue with this in principle. It is worth pointing out that the UK does have an extremely broad range of ancillary terrorism offences so it is unlikely that there would be many occasions that the enhanced sentences would be relevant<sup>9</sup>. However the introduction of enhanced sentencing should require an evidential burden to be satisfied. In order to secure an enhanced sentence the jury should be satisfied to a criminal standard that the offence was committed with the relevant *mens rea* or mental element. In other words, as well as being satisfied that the non terrorism offence has been committed the jury should also be convinced that there was an *intention* on the defendant's part that the offence was committed for connected terrorism purposes. Without an appropriate evidential burden there is a danger that characteristics associated with certain types of terrorism, such as racial and religious demographics, might by themselves become enhancing factors.

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<sup>8</sup> Examples include section 30 of Offences Against the Person Act 1861 (placing explosives with intent to do bodily injury) and section 3 of the Explosive Substances Act 1998 (attempt to cause explosion, or making or keeping explosive with intent to endanger life or property).

<sup>9</sup> Examples of ancillary terrorism offences include membership or support of a proscribed organisation; a range of fundraising and other terrorist property offences; duties to disclose information and a range of offences for possessing articles for terrorism use (all Terrorism Act 2000). Offences under the Terrorism Act 2006 include encouragement of terrorism; dissemination of terrorist publications; preparation of terrorist acts; training for terrorism; attendance at a place used for terrorist training; possession of radioactive devices and trespassing on a nuclear site.

## **Changes to control orders for fingerprinting, DNA etc**

11. Ever since the introduction of the Prevention of Terrorism Bill in early 2005 Liberty has been absolutely opposed to the control order regime. We see no fundamental distinction between control orders and the detention of foreign nationals under Part 4 of the Anti Terrorism Crime and Security Act 2001 determined incompatible with human rights principles by an 8-1 majority of the House of Lords Appellate Committee in December 2004. Whether the consequences are house arrest or detention in high security prison, the use of Special Advocates in the control order system to determine allegations of involvement in terrorism is a travesty of due process. The ability of a person to know, and thus be able to rebut, allegations that have been made against them goes to the heart of common law concepts of fair trial and of the presumption of innocence. Liberty has argued at length that more can and should be done to utilise the breadth of criminal law available. We have made suggestions as to how problems in bringing prosecutions might be overcome. In December 2003 the Newton Committee of Privy Counsellors criticised the Government for failing to make sufficient attempt to bring criminal prosecutions<sup>10</sup>. Liberty maintains this criticism still holds true.

12. The problems identified by the Home Affairs Committee over DNA, powers of entry and so on highlight other problems arising from the use of control orders. One consequence of creating a quasi judicial system outside criminal law is that the normal procedural and ancillary policing powers associated with criminal process do not apply. Anyone arrested for recordable offences (which include offences as trivial as begging) can have their DNA taken and permanently retained even if they are not convicted or even charged. Similarly, the police have broad powers of entry onto property with or without warrant in order to apprehend those suspected of crime or to obtain evidence. The result is a policy anomaly where 'allegations' of involvement with terrorism, one the most serious forms of criminality, through the control order system means the police are unable to use powers that are available as a matter of course when investigating suspicion of much lower level criminality.

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<sup>10</sup> The Newton Committee report of Privy Counsellors <http://security.homeoffice.gov.uk/news-publications/publication-search/independent-reviews/newton-committee-report-2003.pdf?view=Binary>

13. The government might attempt to remedy this anomaly by coupling police entry powers to control orders and allowing DNA samples to be taken from those subject to control orders<sup>11</sup>. This would be a dangerous step to take. Policing powers of entry onto private property for non-crime related purposes are currently restricted to situations necessary to avoid immediate harm or damage. They are limited to when 'necessary to protect life and limb or preventing serious damage to property' or 'to prevent a breach of the peace'<sup>12</sup>. To allow general power of police entry into property for non crime purposes would be a significant shift away from the historical limitation on police powers setting a dangerous precedent. Similarly, the taking of DNA by the police against those who have not even been arrested for any offence would push the boundaries of state intervention into new territory. Liberty believes that the blurring of criminal process through the existence of control orders has already damaged principles of the rule of law. We would urge that nothing further be done in this direction and that the focus once more be on criminal due process.

### **Changes to data sharing powers and the DNA database**

14. The discussion paper makes two specific suggestions. Firstly, it recommends that the intelligence and security agencies are given data sharing powers similar to those provided for the Serious Organised Crime Agency. Secondly, that the police counter terrorist database is placed on a statutory footing similar to the National DNA Database. We have no issue in principle with either of these proposals. Appropriate, proportionate and targeted information sharing between state agencies is a vital tool in effective counter-terrorism policy. Similarly we agree it is appropriate for DNA databases to be placed on a statutory footing to define parameters to their use and purpose.

15. Our concerns lie not with the principle but with the practice. There has been a massive increase in the scope of data retention and dissemination in recent years. Coupled with this are moves towards use of data mining and data matching techniques used to imply potential illegality without the use of human intelligence sources. We believe these moves are undermining data protection principles and are increasingly disproportionate. Similarly, we agree that a database of those convicted

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<sup>11</sup> There would be no need to legislate to allow fingerprints to be taken as this has already been catered for in relation to every person present in the United Kingdom for over three months under the Identity Card Act 2006.

<sup>12</sup> Section 17 (1) (e) PACE and Section 17 (6) PACE respectively.

of certain crimes, including terrorism related offences, can be a useful crime detection tool. However, permanent DNA retention is now permitted on arrest even if no charge follows. This, coupled with the difficulty in having samples removed, means that many thousand innocent persons are on the database.

## **Review of the use of intercept material**

16. Liberty has opposed the bar on using intercepted material in criminal trials since its introduction in the Regulation of Investigatory Powers Act 2000. In February 2007 we submitted evidence on the issue to the Joint Committee on Human Rights and would refer the Home Affairs Committee to this for more detailed analysis<sup>13</sup>. We are pleased to see that an increasing number of senior figures now agree with Liberty by supporting removal of the bar<sup>14</sup>. The UK is one of the only countries maintaining a bar and we do not accept there is a principled reason for this. We do accept that some within the police and security services have reservations about the logistical implications of removal. They are concerned that terrorism trials might be delayed and complicated as a consequence of prosecution and defence sifting large volumes of material. However, other countries have addressed these issues and it should be possible to mitigate concerns. For example, judicial sifting during the disclosure stage of proceedings might allow independent determination of what material might be relevant to prosecution or defence.

17. It is important to remember that removal of the bar will not automatically mean that intercept material will be heard in court. Existing mechanisms such as Public Interest Immunity and evidential limitations contained in PACE can ensure that only relevant material is admissible. Removal of the bar will affect a relatively small number of cases. Continued retention of the bar props up arguments in favour of the quasi-judicial control order regime and for further extension of pre charge detention limits. We would urge the Home Affairs Committee to recommend removal of the bar.

**Gareth Crossman, Liberty**

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<sup>13</sup> <http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf>

<sup>14</sup> Supporters of removal include Commissioner of the Metropolitan Police Sir Ian Blair; Dame Stella Rimington, former director of MI5; The former Attorney General Lord Goldsmith; and the Director of Public Prosecutions Sir Ken MacDonal.