

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's Second Reading Briefing on the Counter-Terrorism Bill in the House of Lords:**

### **Part 2 - Non detention extension provisions**

**July 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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Parliamentarians may contact:

Gareth Crossman

Director of Policy

Direct Line: 020 7378 3654

Email: [GarethC@liberty-human-rights.org.uk](mailto:GarethC@liberty-human-rights.org.uk)

Jago Russell

Policy Officer

Direct Line 020 7378 3659

Email: [JagoR@liberty-human-rights.org.uk](mailto:JagoR@liberty-human-rights.org.uk)

## Overview

1. The Counter-Terrorism Bill is the fifth piece of primary legislation proposed since 2000 dedicated to terrorism. The Terrorism Act 2000 (TA 2000), The Anti Terrorism Crime and Security Act 2001 (ATCSA), The Prevention of Terrorism Act 2005 (PTA) and the Terrorism Act 2006 (TA 2006) ensure that the UK does not lack for counter-terrorism legislation. Liberty has long maintained that the most effective legislation is that which identifies and addresses a specific gap in the law. Unfortunately, we believe that much terrorism legislation has been excessive and has proved counterproductive. The use of stop and search without suspicion under s.44 TA 2000, the introduction of control orders in the PTA and the offence of encouragement of terrorism created in the TA 2006 are, in our view, examples of laws that have proved divisive and which undermine community cohesion. The counterproductive impact of terrorism laws has been acknowledged in the Equality Impact Assessment accompanying this Bill. It speaks unambiguously of the perception among Muslim groups that they were being unreasonably targeted by anti terrorism laws; saying for example:

“There is a perception that the majority of people arrested under s.41 of the Terrorism Act 2000 (TACT) are Muslim.”

“There are strong concerns expressed by representatives of the Muslim community that they are being targeted as a religious group rather than individuals from that group.”

“The police noted that there was concern in the Muslim community that they are being targeted as a group rather than individual suspects.”<sup>1</sup>

2. The focus of debate during the Bill’s passage through the House of Commons was, understandably, the proposal to extend the maximum pre-charge detention period in terrorism cases from 28 to 42 days. This has of course been the subject of intense debate. The rebellion of back bench Labour MPs (many of who had been subjected to intense pressure from their whips) meant the Government was forced to rely on the support of Democratic Unionist Party MPs to scrape through the vote. Naturally pre-charge detention will feature heavily in Lords debate and we are confident that Peers will reject this unnecessary, unjustified and dangerously

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<sup>1</sup><http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-Bill-2007/ct-Bill-eia?view=Binary> at page 4

counterproductive measure. We have produced separate briefings on pre-charge detention extension.

3. There is also much else in the Bill which contains 106 clauses and 8 Schedules. While we have a fundamental objection to the detention extension, there are many parts of the Bill that we either broadly agree are appropriate or where we have suggested amendment. These parts are the subject of this briefing.

### **Part 1 – Powers to gather and share information**

4. Clauses 1 to 9 create powers to remove documents for examination from persons or premises where there is suspicion of a variety of terrorism offences. The power can be exercised in a number of situations including: the execution of search warrants; searches following arrest; and searches prior to arrest<sup>2</sup>. Most of the searches covered by Clause 1 already allow for documents to be seized. For example, s.43 (4) TA 2000 allows a police officer to, 'seize and retain anything which he discovers in the course of a search of a person... which he reasonably suspects may constitute evidence that the person is a terrorist'. Meanwhile Paragraph 1(1) (c) of Schedule 5 TA 2000 allows for an officer undertaking a premises search under warrant 'to seize and retain any relevant material which is found on a search'. Clearly, this extension is intended to address perceived shortcomings in the current system. These presumably arise from difficulties in ascertaining whether certain types of material might constitute evidence. The Bill will allow material to be taken to another place (Clause 1(2)) and contains a requirement that information stored in electronic form must be produced in a transportable and legible format (Clause 1(3)). A written record must be made of the removal within 24 hours (Clause 4). Removed material cannot be retained for over 2 days without authorisation of a Chief Inspector (Clause 5). There are a number of obligations governing the removal of documents which: require proper records to be made of material taken: govern access to and return of material; and govern the protection of legal privilege. Obstruction of the exercise of the power is a criminal offence (Clause 2).

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<sup>2</sup> Section 1 (1) Permitted under Schedule 5 TA 2000, S.43 (2) TA 2000 and S. 42 (1) TA respectively. The power can also be exercised under s.52 ATCSA (search for evidence of weapons related offences) S. 28 TA 2006 (search for terrorism publications) and the proposed new S.7 A-C PTA (control order searches introduced in this Bill)

5. Liberty can envisage situations where the current provisions governing documents might prove inadequate. For example, a large bundle of paper documents or those on a computer drive might take a long period of time to work through. It may well be practicable for this to occur away from the scene of investigation. We do not therefore take issue with the principle of the new power. We would, however, make a number of observations.

6. Principally we see this power being exercised against those who are being searched but who have not been arrested. This is because it would allow an opportunity to remove material from person or premises in order to ascertain whether the contents reveal grounds for arrest. We are uncertain then, why these extended powers are necessary post-arrest. Anyone arrested under s.43 (1) TA 2000 can have property seized. If there was a need to search premises after a person had been arrested we presume that there would be an application to a Justice for the Peace for a premises search under Paragraph 1 Schedule 5 TA 2000 in order to obtain evidence. The current period of detention permitted for terrorism offences is 28 days (which of course the current Bill seeks to increase to 42 days). This would allow plenty of time to sift potential evidence. We are therefore unsure why this power needs to be applied post-arrest and hope this question is addressed during debates.

7. We note that the creation of a criminal offence of obstructing a constable exercising this power, combined with the power to require documents to be produced in a legible form, could make these proposals similar in effect to Part III of the Regulation of Investigatory Powers Act 2000 (RIPA). Part III RIPA governs the investigation and disclosure of encrypted data and creates an offence of failing to comply with a notice requiring disclosure of encrypted data (s.53 RIPA). Both create a coercive regime governing disclosure of material. The main difference is that RIPA covers only electronic data whereas the new Bill covers all material. When arguments were put forward in 2005 justifying extension of the (then) terrorism detention limit of 14 days, one often cited reason was the difficulty in processing large quantities of evidence. At the time Liberty pointed out that Part III RIPA had not been brought into force. Notwithstanding our concerns about Part III, we argued that, if the encryption of evidence really makes it impossible to charge people within 14 days, the Government could bring into force Part III powers that have already been passed in parliament. Part III has since come into force. We would now point out that these extra powers of evidence gathering should alleviate any lingering concerns about evidence gathering difficulties justifying detention extension.

8. Clause 10 creates a power allowing a constable to take fingerprints and non-intimate samples from those subject to control orders. These can be taken from the time the provisions come into force regardless of when the control order was made (Clause 13). The definition of 'non-intimate samples' includes mouth swabs and other means of obtaining DNA. 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 ATCSA. Part 4 was determined incompatible with human rights principles by an 8 -1 majority of the House of Lords' Appellate Committee in December 2004. We object to the process, regardless of whether the consequences of an order are house arrest (under a control order) or detention in a high security prison (under Part 4 ATCSA). The use of Special Advocates in the control order system to determine allegations of involvement in terrorism is a pale imitation 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 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>3</sup>. Liberty maintains this criticism still holds true.

9. The need to legislate specifically to allow fingerprints and DNA to be taken from those on control orders underlines fundamental problems of process. One consequence of creating a quasi-judicial system outside criminal law is that the normal procedural and ancillary policing powers associated with the criminal process do not apply. Anyone arrested for recordable offences (which include offences as trivial as begging) can currently have their DNA taken and permanently retained even if they are not convicted or even charged. The result is a policy anomaly where 'allegations' of involvement with terrorism (criminality of the highest order) through the control order system mean 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>3</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>

Allowing police to take the DNA of 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 the rule of law. We would urge that nothing further be done in this direction and that the focus be put back on criminal due process.

10. Clauses 14-17 amend the Police and Criminal Evidence Act 1984 (PACE) to allow cross referencing of the Secret Intelligence Service (MI6) and Security Service (MI5) fingerprints and DNA database held by the police on the National DNA Database (NDNAD). Clause 18 creates a statutory basis for fingerprints and DNA samples that are being held outside of existing regulatory frameworks, such as those maintained by the Secret Intelligence Service and Security Services. We do not take issue in principle with either of these developments in principle. There is no reason why databases such as the NDNAD should not have an interface with counterpart databases held by the security services. Similarly we would prefer to see any sample held being subject to a formal statutory regulation such as that provided by Clause 18.

11. 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 the 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. We agree that a DNA database of those convicted 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 innocent people are on the database.

12. Similarly, while we do not take issue with the principle of cross referencing of the police and MI5 and MI6 databases a significant issue arises from the scope. Section 14 (5), Clause 16 (3) and Clause 18 (2) set out the purposes for which samples can be used. These include the broad and vague 'in the interests of national security'. This means that the Security Services will be able to access and use DNA samples retained on its own database but also on the NDNAD created by PACE for

purposes that go well beyond crime detection and prevention. Until now samples retained on the NDNAD have been only retained for crime detection purposes<sup>4</sup>. The implications for this are profound. When challenged over the DNA database policing bodies will generally cite the limited uses to which samples can be put. For example the National Policing Improvement Agency website page 'Dispelling myths about the DNA database' states 'Records on the NDNAD may in accordance with PACE legislation only be used for the prevention and detection of crime, investigation of an offence or to support the prosecution of an offender...The NDNAD is a criminal intelligence tool and is mandated to be used as such.'<sup>5</sup> The ability to access the NDNAD database for broad national security purposes is a worrying development. We will suggest possible amendment to restrict these purposes during Committee Stage.

13. Clauses 19-21 and Schedule 1 make provision for any person to speak to the security services in connection with any of its functions without breach of a contractual duty or breach of common law duties of confidence. We imagine these provisions have arisen in response to concerns in specific cases about the willingness of individuals to pass on information. We do not have any particular comment to make about these provisions with regard to, for example, breach of contractual obligations. We agree that the passing on of potentially valuable intelligence should not be jeopardised as a consequence of concern over potential civil action. We are more concerned by breaches of obligations of confidence. Any trust that exists between advisor and client is based on confidence. The new provisions might be relevant to the application of s.19 TA 2000 which created an offence of failing to disclose a suspicion about terrorism arising from a person's employment. This might not impact upon the relationship between terrorism suspect and lawyer as s.19 has a specific exemption that it does not apply to information received from a professional legal advisor (s.19 (5)). However, there are other relationships of confidence that could be affected including medical professionals and religious advisors.

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<sup>4</sup> Although they can also be used to help with the identification of the dead.

<sup>5</sup> <http://www.npia.police.uk/en/9818.htm>

## Part 2 – Detention and questioning of terrorist suspects

14. Clauses 22 to 33 and Schedule 2 cover the critical issue of the period of permissible pre-charge detention in terrorism cases. This is covered by our other briefing paper.

15. Clause 34 contains provision about post-charge questioning. The issue of post-charge questioning was originally raised by Liberty during debate in 2005 over proposed extension of the pre-charge detention limit from 14 to 90 days. A letter from Andy Hayman, the former Assistant Commissioner of the Metropolitan Police, to the Home Secretary explained why he believed the extension to 90 days was necessary. The letter stressed the difficulties faced by the police in gathering sufficient evidence to bring an appropriate charge in the time allowed. Liberty pointed out that much of the evidence gathering in criminal prosecutions already takes place after charge. As a consequence there was no reason why properly authorised re-questioning could not take place if continuing investigation suggested that someone charged with a ‘lesser’ terrorism offence<sup>6</sup> might be questioned again in connection with a more serious offence. Allowing this would negate one of the central planks put forward in justification of pre-charge detention extension.

16. Clause 34 provides that a constable can question a person about a terrorism offence after they have been charged or officially informed that they may be charged with it (Clause 34 (2)). An adverse inference can be drawn from a failure to answer questions (Clause 34 (8)). This creates a general ability to question after charge in terrorism cases. At present, PACE Codes of Practice set out very limited grounds for permitting questioning of those who have already been charged<sup>7</sup>. When the Bill was originally published in the House of Commons Liberty expressed concerns that there were no independent safeguards in place to ensure questioning could only take place if there was a reason to do so. A person could simply be re-questioned if the police wished to do so. This would have allowed repeated questioning of a person already charged with a terrorism offence for no other reason than to improve the prospect of adverse inference being drawn at trial from a failure to answer questions.

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<sup>6</sup> Such as Encouragement of Terrorism (s.1 TA 2006), Preparation of Terrorist Acts (s.5 TA 2006) or Possession for Terrorist Purposes (s.57 TA2006)

<sup>7</sup> 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

17 Amendments were introduced in the House of Commons that go some way to meeting these concerns. Clause 34 (4) and (5) provide that a person can only be questioned for 24 hours after which authorisation is required from a Justice for the Peace. A JP can then only authorise questioning if satisfied that further questions need to be asked in the interests of justice and if satisfied that the investigation is being carried out diligently and expeditiously. Further, authorisations can occur for periods of up to five days at a time with no limit on consequential authorisations.

18 While an improvement, these amendments still fall short of adequate protection. As situations where further authorisation is being sought should be rare (given the relatively small number of terrorism cases), at most a handful a year, we cannot see any logistical reason why decisions cannot be reserved for a more senior judicial determination. Further questioning does have the potential to be oppressive and it is appropriate that decisions should be made by a professional legally-trained High Court judge. We are also concerned to see that no authorisation is needed for the first 24 hours of questioning. We imagine the rationale behind this is that no judicial authorisation is required for the first 24 hours of questioning following an arrest governed by PACE. However, there is a significant distinction between questioning following initial arrest and questioning once a person has already been charged. There is, for example, no issue as to whether it is 'necessary' to question a person immediately after arrest as this will be the first opportunity to do so. Similarly there will be no question as to whether the investigation of a person just arrested is being carried out diligently and expeditiously. These, however, are very pertinent issues for questioning post-charge we see no reason why judicial authorisation should not be immediately sought. We understand that concerns have been raised that prior authorisation would delay questioning and the need for preparation time would make immediate authorisation logistically difficult. We cannot see these as being significant issues. It is very likely that the person to be questioned would already be remanded in custody for the offence they are charged with so there would be no issues over 'running clocks'. Similarly, as the current plans envisage the need for authorisation after 24 hours it does not seem that the preparation time needed will be excessive.

19 One outstanding issue remains the fact that the scope of further questioning relates only to the offence the person has already been charged with (Clause 34 (2)). By definition, the person to be questioned will have had sufficient evidence already

gathered against them to allow charge. The implication from this is that the motivation for post-charge questioning will not be evidential. For example, the current proposal would allow re-questioning to take place with no incentive other than a desire to ensure that adverse inferences can be drawn from any refusal to answer questions. Similarly it could have the effect of allowing the police to seek disclosure of information about possible evidence on which the defence intends to rely in advance of the usual disclosure processes. The implications of post-charge questioning on the fairness of the investigation are, in fact, more of a concern where the questioning relates to the same offence.

20. The Government has suggested that there is no need for the Bill to address questioning for different offences as this is already permitted. Naturally, we accept that it is common practice for a person charged with an offence to face further questioning about a separate allegation. This is straightforward when a person charged with say, burglary, is to be questioned about an assault. However, matters are not so clear when questioning involves a potentially different charge arising from the same set of facts. For example, a person might be charged with the offence of 'Wounding' (Section 20 Offences Against the Person Act 1861 (OAPA)). If however, evidence arises that indicates a person might have intended the injury a more appropriate charge might be the much more serious offence of 'Wounding with intent' (Section 18 OAPA). Liberty has consulted a variety of legal practitioners to confirm whether it might be possible to re-interview in this situation. The consensus has been that in such a situation it would not be permissible to question the person again. The issue would be the mental element (*mens rea*) but the facts would be essentially identical. Similarly in a terrorist context, evidence might come to light suggesting that someone charged with the offence of Preparation of Terrorist Acts (s.5 TA 2006) might instead be investigated for a more serious terrorist offence such as conspiracy to murder. Although the offence is different, the subject matter could well involve the same facts. Whether re-questioning would currently be permitted in such a situation is a grey area. Liberty would suggest that, as above, re-questioning in such a case would not be permitted. The PACE codes that govern conduct by the police are silent on the issue<sup>8</sup>. As the PACE codes list the activities that are authorised, the implication must be that something not authorised by PACE is not permitted.

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<sup>8</sup> The grounds for re-questioning being limited to those listed in footnote 7 above

21. One reason this point is important is that allowing questioning for *other* terrorism offences would significantly undermine arguments for extended pre-charge detention to 42 days. As discussed above we do not see any human rights or civil liberty reason why this could not occur with appropriate judicial authorisation and safeguards. However, limiting questioning only to an offence for which a person has already been charged would be irrelevant to the 42 day debate.

22. During passage through the House of Commons measures were introduced to ensure that all interviews must be video recorded with sound (unless the Secretary of State determines it should not) and that a code of practice be published on the recording of interviews (Clauses 37 and 38). We agree that these are appropriate further measures but would not be a substitute for the authorisation safeguards described above.

### **Part 3 – Prosecution and Punishment of Terrorist Offences**

23. Clause 42 contains provisions aggravating certain offences if they have a terrorist connection. Schedule 3 lists the offences covered and includes common law offences (such as murder and manslaughter) and a range of statutory offences relating to explosives, hostage taking and so on. Conviction for any of these offences will now be accompanied by a requirement for the court to determine whether there is a terrorist connection. In making the determination the court can hear evidence and must take into account any defence or prosecution representations relevant for sentencing purposes. If an offence has a terrorist connection it must be treated as an aggravating factor for sentencing.

24. Liberty does not take issue with the principle of aggravating factors in sentencing. We do, however, have concerns about the manner in which determinations of a terrorist connection will be made. Clause 42 (2) states that 'If having regard to the material before it for the purposes of sentencing it appears to the court that the offence has or may have a terrorist connection, the court must determine whether that is the case'. This makes the determination a matter solely for the judge as opposed to one of evidential consideration by the jury. This is a departure from normal procedure where the judge makes determinations of law while the jury are responsible for findings of fact. We would suggest that findings of terrorist connections are reserved for the jury. The stigma of 'terrorism' is such that we believe it appropriate that it should only follow the conventional process of fact

determination by a jury. Furthermore, a finding by the court that an offence has a terrorist connection is likely to lead to the making of a notification order under Part 4 of the Bill. Notification requirements result in onerous obligations involving notification and restrictions on travel for those subject to them. Again we would suggest that such restrictions should only follow a finding of fact by a jury.

#### **Part 4 - Notification Requirements**

25. Part 4 of the Bill creates a range of notification requirements and travel restrictions. The Bill covers 3 main areas of notification and restriction:

- 1) Clauses 51 to 55 create a requirement that anyone convicted of certain specified terrorism offences register their details with the police and provide notification of any change in details or of any intention to travel abroad. If a person is convicted of an offence that has a terrorist connection (see paragraphs 24 and 24 above) they will also be subject to notification requirements.
- 2) Schedule 5 allows for anyone convicted of a foreign terrorism offence to also be subject to notification requirements.
- 3) Schedule 6 allows for anyone subject to notification requirements to be restricted or refused foreign travel.

26. The notification requirements under Part 4 cover anyone convicted of any offence listed in Clause 52. If a person has been convicted of any of the offences in Schedule 3 (see paragraph 23) and the court has determined that there is a terrorist connection, they will also be subject to notification requirements (Clause 53)<sup>9</sup>. Notification applies once a trigger sentence has been imposed (Clause 56). A trigger sentence is effectively one exceeding 12 months imprisonment (Clause 56 (1) (a) (ii)). The notification requirements are retrospective in that they will apply to anyone who is in custody or on licence for an offence at the time the provisions come into force.<sup>10</sup> The notification requirements are set out in Clause 58 and broadly cover personal details including address, national insurance number, details of the offence, and details of any notification requirements. The Bill reserves a power for this information to be added to by way of affirmative resolution (Clause 58 (3)). Re-notification must occur annually or whenever any details change (Clauses 59 and 60). If a person intends to travel abroad they must give details of their intended travel

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<sup>9</sup> Although they can appeal against this to the determining court (Clause 53 (2)).

<sup>10</sup> They are not retrospective in relation to conviction for an offence with a terrorist connection under Clause 43 as these provisions will only come into force when the Bill comes into law

to the police (Clause 63). A person who fails to comply with any of the notification requirements commits an offence (Clause 65). Notification requirements last for life for anyone imprisoned for 5 years or longer. They last for 10 years in other cases (Clause 64).

27. The notification provisions are broadly similar to those applying to sex offenders (under the Sex Offenders Act 1997). As with sex offender notification, Liberty agrees that the imposition of notification requirements on those convicted of terrorism offences can be a legitimate and proportionate interference with rights. We would draw a contrast with restrictions imposed upon those subject to control orders whose liberty can be severely curtailed regardless of the fact they have not been convicted of any offence. As the notification scheme does not of itself allow restriction, application to those already convicted is unlikely to be in breach of the prohibition on retrospective punishment (Article 7 of the Human Rights Act 1998)<sup>11</sup>.

28. While we do not take issue with the principle of notification, we do have concerns about the detail. Notification will automatically apply to anyone who receives a custodial sentence of 12 months. The offences covered include those not requiring any involvement or participation in terrorism actively, such as 'encouragement of terrorism' (s.1 TA 2006) and 'failure to disclose information about acts of terrorism' (s.38B TA 2000). We presume the purpose behind notification is to ensure that the authorities are aware of the location of those who might constitute a risk to public safety. As a consequence we believe that, rather than being automatic, notification should follow a judicial assessment that the person convicted is a public risk. Having heard the case, the trial judge is best placed to make the appropriate risk assessment in an individual case. If the person is convicted of a Schedule 3 offence and the court determines there is a 'terrorist connection' under Clause 42 they can appeal against required notification on the same terms as an appeal against conviction (Clause 53). We can understand the rationale behind the ability to appeal as the offence will not be a 'terrorist offence'. However, seeing as the court will have already made a determination that the offence has a 'terrorist connection' we do not see any reason why a person convicted of encouragement of terrorism should not

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<sup>11</sup> The European Court of Human Rights has determined that Article 7 was not breached by offender registration under the Sex Offenders Act (1997) when applied to those convicted before the regime was implemented (*Ibbotson v United Kingdom* [1999] Crim LR 153).

have the same ability to appeal against notification as would be permitted to a person convicted of a terrorist murder.

29. We would also question the absolute nature of the two tier system of 10 years' notification (for those sentenced to less than five years' imprisonment) and lifetime notification (for all others). It would be appropriate to retain a residual discretion to dispense with notification requirements in exceptional circumstances. There will be situations arising where a court (and indeed the authorities) might accept that a person convicted of a serious historic terrorist offence might renounce violence. A notable feature of the Northern Ireland peace process has been the participation of those previously associated with involvement in sectarian violence. It would serve no purpose and entail a questionable use of policing resources not to allow scope within the Bill to dispense with notification requirements for those who present no risk at all to public safety.

30. We do not have any particular comment about Schedule 5. This allows for those convicted of terrorism offences overseas to be subject to the notification regime. If notification is to be introduced there is no reason why it should not equally apply to those who have committed offences overseas. We note that anyone subjected to notification under Schedule 5 will be entitled to appeal to the Crown Court. We imagine that this appeal has been introduced to cater for the fact that, although the Bill refers to 'corresponding' offences committed overseas, it is not always possible to compare like with like. The appeal mechanism would allow inappropriately made orders to be dismissed. For the reasons outlined earlier we believe an appeal should apply to all.

31. Schedule 6 allows for overseas travel restrictions to be placed on those subject to notification. For restrictions to be imposed, a person subject to notification must have acted in a way that 'makes it necessary' to impose a travel restriction order (Paragraph 2(3)). Application is made by a chief officer of police to the magistrates' court (Paragraph 3). Orders can last for up to six months but can be renewed indefinitely. Restrictions can range from a bar on travelling to named countries, to an absolute bar on all travel outside the UK (Paragraph 6). Appeals against the making, or scope, of travel restriction orders can be heard in the Crown Court (Paragraph 12).

32. Liberty does not take issue with the creation of travel restriction orders. There might be situations where it is appropriate to restrict the overseas travel of those who have been convicted of terrorist offences and whose behaviour justifies preventative action to avoid involvement in further terrorist activity. When the Bill was originally published the ability to make the order was on a far lower evidential basis. All that was required is there was 'reasonable cause to believe' it was necessary to make an order. In Committee stage Liberty tabled an amendment which would introduce the more rigorous requirement of necessity and we are glad to see this now contained in the Bill.

## Part 5 – Asset Freezing

33. Clauses 69 to 76 concern applications to set aside asset freezing decisions. We have no specific comment to make about Part 5. The various asset freezing powers for the Treasury are listed in Clause 69 (3). Part 5 makes some general provisions regarding rules of court, disclosure and the appointment of Special Advocates which will apply during applications in the High Court to set aside Treasury orders. It is worth noting that Clause 60 removes the bar on intercept evidence in asset freezing proceedings. Liberty has always argued that there is no justification for the bar on the use of intercepted material as contained in Section 18 of the Regulation of Investigatory Powers Act 2000 (RIPA). We were pleased to see that the *Privy Council Review of Intercept as Evidence* agreed with the principle that the bar on intercept should be removed<sup>12</sup> and we hope the Government will follow its recommendations. The removal of the bar in relation to asset freezing proceedings is evidence of governmental acceptance that removing the bar on intercept can serve a useful purpose.

34. It is worth noting that in April 2008 (following publication of the Bill) there was a significant decision in the High Court that determined a series of asset freezing orders unlawful in that the Treasury procedures bypassed Parliament<sup>13</sup>. As a consequence, it has been anticipated that amendments to the Bill might be introduced to set out these procedures. There has been no attempt to do this so far but this might occur during progress through the Lords. If this does happen the rules will bear careful scrutiny. Solicitors acting for some of those subject to asset freezing orders described the severity and scope of restriction in the following terms:

‘We have the madness of civil servants checking Tesco receipts, a child having to ask for a receipt every time it does a chore by running to the shops for a pint of milk and a neighbour possibly committing a criminal offence by lending a lawnmower.’<sup>14</sup>

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<sup>12</sup> <http://www.official-documents.gov.uk/document/cm73/7324/7324.pdf>

<sup>13</sup> <http://news.bbc.co.uk/1/hi/uk/7364549.stm>

<sup>14</sup> *Ibid* 13

## **Part 6 – Inquests and Inquiries**

35. Part 6 introduces a range of provisions which would limit transparency and increase executive control over the inquest process. Clause 77 inserts a new Clause 8A into the Coroners Act 1988 (CA) to allow the Secretary of State to issue a certificate that an inquest will be held without a jury. Clause 79 also amends the CA by inserting a new Clause 18A into the CA which allows specially appointed coroners to be appointed by the Secretary of State in order to replace the person who would otherwise have held the inquest. Clauses 80 and 81 are similar to the provisions in Part 5 relating to asset freezing orders in that they amend Section 18 of RIPA to allow intercept material to be admissible in inquiries in exceptional circumstances.

36. With regard to the admissibility of intercept evidence we would reiterate the comments made earlier. The removal of the bar is a tacit acceptance of the use of intercept material. It is also worth adding that one of the consequences of the bar has been to create the need specifically to legislate to allow intercept to be used. It would be far more sensible to simply remove the bar and allow established rules of evidence, both in criminal and other proceedings, to determine the appropriateness of admissibility in individual cases.

37. Our principal concern with Part 6 relates to the significant scope given to the Secretary of State to intercede in inquest proceedings. The removal of juries in particular will effectively allow ‘secret’ inquests to take place following deaths that result from state actions. The grounds for the removal of a jury are extremely broad and cover situations where the inquest will involve material that should not be made public: 1) in the interests of national security 2) in the interests of a relationship with another country or 3) if it is otherwise in the public interest (new Clause 8A(1) CA). Determinations as to whether an inquest will be held without a jury are made solely by the Secretary of State. The only potential challenge to a decision to hold an inquest without a jury would be by way of Judicial Review (JR) in the High Court. However, the purpose of a JR would be to challenge the legality of the decision not to allow a jury. Given that the grounds for the Secretary of State to make a determination covering a broad non-specific ‘public interest’, the decision might prove difficult to challenge in practice. The Bill does not specifically state that other interested parties, such as family or legal representatives, are excluded. However, the basis for deciding that a jury should be excluded is that ‘the inquest will involve consideration of material that should not be made public’. By implication anyone who

is not security cleared is likely to be excluded from proceedings in the same way that they would be from, for example, closed sessions in control order proceedings.

38. We have serious concerns about the impact that jury removal would have upon public confidence in the inquest system. We also question the compatibility of the proposals with the UK's legal obligations under Article 2 of the European Convention on Human Rights (The Right to Life). The European Court of Human Rights in the case of *Jordan v UK*<sup>15</sup> concluded that Article 2 compliance required five essential elements when deaths occur due to state action or while someone is in the care of a state body. These requirements are 1) independence 2) effectiveness 3) promptness and reasonable expedition 4) public scrutiny 5) accessibility to the family of the deceased. This position has since been confirmed as a minimum standard by the House of Lords Appellate Committee in domestic cases<sup>16</sup>. Exclusion of the jury and the family would seem to conflict with requirements of family involvement and public scrutiny. During passage through the Commons there were frequent assertions from the Government that the removal of juries would improve the prospect of Article 2 compliance. The basis of these claims remain uncertain and we hope debate in the Lords will clarify why the Government believes this.

39. A more general concern is the impact on public confidence in the inquest process. Almost by definition the inquests to which these provisions would apply are likely to involve controversial or violent deaths. If these provisions were already in place it is likely that they could have been applied to the inquest into the shooting of Jean Charles de Menezes at Stockwell tube station in July 2005. This inquest, due to recommence later in 2008, clearly raises issues about national security. It is also likely to involve the consideration of material, for which disclosure may not be in the 'public interest'. Any decision to hold the de Menezes inquiry in secret would be extremely politically contentious. There would inevitably be allegations of a whitewash and a cover up. Indeed, the political pressure might be such that the decision to hold the inquiry without a jury might be considered too contentious. While this is supposition, we make this point to demonstrate the dangers of allowing this type of determination to be made by the Secretary of State. Any decision will be inherently political. Other inquests might raise similar issues to the de Menezes inquiry but not have the same profile or risk the same political fallout. Political

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<sup>15</sup> (2003) 37 EHRR 52

<sup>16</sup> *Ex Parte Amin* [2003] UKHL 51, [2004] HRLR 3

considerations risk inconsistent decision making when based on such arbitrary grounds as 'public interest'.

40. Similar concerns arise from the provisions contained in Clause 79 which amends the CA to allow for the appointment of coroners by the Secretary of State in specific cases. In contrast to the process allowing the Secretary of State to certify inquests to take place without a jury<sup>17</sup> there are no grounds to be satisfied relating to the appointment of special coroners. The Secretary of State simply issues a certificate. This can even happen during an ongoing inquest (new clause 18A (3) (b) CA) allowing the current coroner to be replaced with the politically appointed alternative. There is no justification needed or explanation given.

41. During passage of the Bill through the Commons the Government responded to criticisms over direct executive interference over coroner appointment by introducing amendments that require the Secretary of State to establish and maintain a list of eligible coroners (new clause 18A (2) CA). Entry of a coroner onto this list would require the agreement of the Lord Chief Justice (new clause 18A (3) CA) as would the appointment of a coroner to a specific inquest (new clause 18A (4) CA). These measures do introduce a measure of independent involvement into the special appointment process. However, this remains essentially an executive appointment which will have a significant impact on public confidence in the system and which is in direct conflict with the traditional separation of powers between the executive and the judiciary. The purpose of an inquest is to provide an independent determination of law and evidence. Allowing direct executive interference would prejudice this independence. It would certainly be difficult to convince the family of a person who had died in custody that a decision of the Secretary of State to replace the coroner in the middle of proceedings was not direct political interference. Similarly, any coroner hearing a politically sensitive inquest would be affected by the knowledge that they could be replaced at any moment, and without the need for justification, by the Secretary of State.

42. It is difficult to see what recourse that family would have if they wished to challenge a decision to change a coroner. The Secretary of State will be given absolute discretion (albeit with the Chief Justice's veto). This suggests there would be little basis to challenge the legality of their decision. With no justification needed

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<sup>17</sup> That is, the interests of national security, in the interests of the relationship with another country or otherwise in the public interest (New Clause 8A(1) CA)

for the appointment of special coroners, allegations of political interference are perhaps inevitable. Similar criticisms of these proposals have been made by the Joint Committee on Human Rights<sup>18</sup> and the House of Commons Justice Committee in their report on the Counter-Terrorism Bill<sup>19</sup>. At the very least we would expect this Bill to articulate some grounds for the exercise of the Secretary of State's discretion.

43. Commenting on these and other criticisms that arose during debate in the House of Commons the Government said they were without foundation. Speaking in the Report Stage debate the Home Office Minister Tony McNulty stated 'It is arrant nonsense to suggest that this is about the state taking over people's article 2 rights and in some sinister fashion ensuring that anything remotely attached to the state relating to the death of an individual will now be hush-hush, covered up and secret. We have said very clearly in the substance of the Bill that the only secret bit of any proceedings, even with a specially appointed coroner, will be for sensitive information, intercept evidence and whatever else. The rest of the inquest, albeit just with the special coroner, is public.'<sup>20</sup> However, whatever the Government's intention, the Bill would allow exactly this sort of secretive process. We do not dispute the Government's claim that the changes are intended to improve the inquest process. Our concern is that they will do the opposite. It has been suggested that a Counter-Terrorism Bill is not the appropriate vehicle for changes to the inquest system and that it would be better to use the anticipated Coroners Bill. Given concerns over the proposals we would agree with this and argue for Part 6 to be removed from the Bill and for discussions to continue between interested parties.

## **Part 7 - Miscellaneous**

44. Clause 83 brings into effect one of the recommendations of Lord Carlile's report into the definition of terrorism. It adds the 'advancement of a racial cause' to the current definition found in s.1 TA 2000 which includes political, religious or ideological causes. We agree that this is an appropriate amendment to the definition

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<sup>18</sup> See the Joint Committee on Human Rights Ninth Report of Session 2007 – 08: Counter-Terrorism Policy & Human Rights (Eighth Report): Counter-Terrorism Bill available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf>

<sup>19</sup> See the House of Commons Justice Committee Third Report of Session 2007-08 on the Counter Terrorism Bill available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/405/405.pdf>

<sup>20</sup> <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080610/debtext/80610-0021.htm>

and have no particular comment to make. However, we would add that the current wide definition remains problematic especially when coupled with new speech offences contained in the TA 2006<sup>21</sup>. Concerns about distinctions between ‘terrorists’ and ‘freedom fighters’, about calls for the overthrow of repressive regimes and about the chilling effect on free speech have previously been expressed on all sides of the House. These problems remain unresolved. The amendment to the current definition proposed by this Bill, will allow the opportunity to revisit the definition.

45. Clause 83 creates a new criminal offence of eliciting, publishing or communicating information about members of the armed forces, the intelligence services or the police. It creates a new s.58A of the Terrorism Act 2000. It will be an offence punishable by up to 10 years’ imprisonment to elicit information about a member of the armed forces, intelligence services or police which is of a kind ‘likely to be useful’ to a person committing or preparing an act of terrorism. The offence also covers publication or communication of the information. It is a defence for a person to prove they had a reasonable excuse for their action. We imagine the rationale behind the offence is that members of the armed forces are particular targets for terrorism and require greater legal protection. The recent conviction of Parviz Khan for planning the kidnap and beheading of a British Muslim soldier would seem to support this presumption. However, we are not convinced the new offence is necessary. As the explanatory notes to the Bill point out, s.58 TA 2000 currently criminalises the collection, making or possession of a record of information likely to be useful to a person committing or preparing an act of terrorism. The new Clause does go further in that it covers ‘eliciting’ information. This means that a person will commit an offence if they try to obtain information but make no record of it. Arguably such a situation would also be covered by the offence of attempt under s.1 Criminal Attempts Act 1981, which criminalises an act ‘more than merely preparatory’ to the commission of another offence.

46. We do not take particular issue with the creation of a statutory offence that effectively conflates existing criminal law on attempt with another offence. We do, however, feel the new offence is overbroad. In particular, there is no requirement that the information is intended to be used for anyone committing or preparing an act of terrorism. The test is merely whether the information is ‘of a kind likely to be useful’ to

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<sup>21</sup> See Liberty’s briefing on the Carlile Review of the Definition of Terrorism for greater detail <http://www.liberty-human-rights.org.uk/pdfs/policy06/response-to-carlile-review-of-terrorism-definition.pdf>

terrorist activity. The existing s.58 offence is similarly (and in Liberty's view excessively) broad in that it also does not require any intention that the information be used for terrorist activity. However, the fact that the existing s.58 requires some sort of record to be made or possessed is at least more indicative that some sort of impropriety might be planned. 'Eliciting' under the new s.58A could be interpreted as asking about a soldier's leave dates. Such information could certainly be useful to terrorists. There is a defence available under s.58A (2) if a person charged can prove a reasonable excuse. Under Clause 83 (4), s.118 TA 2000 applies to the use of this defence meaning that if the defendant adduces evidence sufficient to raise an issue then the duty is on the prosecution to prove beyond doubt that the issue does not exist. This strengthens the defence by placing the burden on the prosecution. However, we still believe it appropriate that the criminalisation of any activity that is not in itself normally within the sphere of criminal activity should require intent for an offence to be committed. Restriction to a defence of 'reasonable excuse' will not provide protection to those who act thoughtlessly or carelessly. A person duped into 'eliciting' information by others with terrorist intent would be unlikely to have a 'reasonable excuse'. They could therefore be convicted even if they had no idea that they were being used.

47. Clauses 85 to 88 make a variety of provisions about control orders. Clauses 86 to 88 are essentially technical amendments relating to the definition of 'involvement in terrorism-related activity' (Clause 86), the time allowed for representations by controlled persons (Clause 87), and anonymity provisions for those subject to orders (Clause 88). They arise from uncertainty over interpretation of the PTA. We have no particular comment to make about these other than to point out that, as the PTA was rushed through Parliament in two weeks, it was perhaps inevitable that mistakes would be made. Parliament needs sufficient time to scrutinise Bills so that similar errors can be spotted.

48. Clause 85 creates powers for the police to enter and search the property of those subject to control orders. These are to be used to ascertain whether a person subject to an order has absconded and to allow monitoring to ensure compliance with the terms of an order. As we have stated earlier, Liberty believes the control order regime has proved both excessive and ineffective. This Bill's inclusion of provisions allowing police entry to ascertain whether a person has absconded is a consequence of people subject to control orders disappearing. The need to create a police power of entry once again demonstrates the fact that a regime created outside of the normal

criminal law requires constant legislating to create parallel powers to those used as a matter of course by the police and other agencies.

49. The remainder of the Bill contains a range of technical, explanatory and consequential provisions. These cover, for example, changes to terrorist cash forfeiture periods (so that only working days are taken into consideration) and requirements for gas transporters to pay the costs of policing at gas facilities. We have no specific comment to make about these, or about other parts of the Bill where we have been silent. There are parts of the Bill which are proportionate, justified or which plug gaps in the existing framework. The removal of the pre-charge detention provision would still leave a substantial piece of anti-terrorism legislation.

**Gareth Crossman**  
**Liberty**