

**CHARGE** OR  
**RELEASE**

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's Briefing on the Motion to  
approve the Statutory Instrument to  
renew 28 days pre-charge detention in  
the House of Commons**

**July 2010**

## 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>

More information about Liberty's Charge or Release Campaign is available at

[www.chargeorrelease.com](http://www.chargeorrelease.com)

Parliamentarians may contact:

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

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

Anita Coles

Policy Officer

Direct Line: 020 7378 3659

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

Sophie Farthing

Policy Officer

Direct Line 020 7378 3654

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

## Introduction

1. On 14<sup>th</sup> July 2010 the Government will lay a Motion in the House of Commons to approve a Statutory Instrument relating to counter-terrorism, which will allow for the renewal of the temporary 28 day pre-charge detention limit for terror suspects.
2. On 24<sup>th</sup> June 2010 the Home Secretary, the Rt Hon Theresa May MP, announced that the new coalition Government would seek to extend the temporary 28 day pre-charge detention limit for terror suspects for a further six months. The announcement was made in a Written Ministerial Statement and accompanied by a draft order which, subject to Parliament's approval, will allow renewal to take place. The Home Secretary's statement also included a commitment that the Government will review counter-terrorism legislation more generally and that the pre-charge detention limit will form part of that review. This wider counter-terrorism review is due to report to Parliament in the autumn of 2010. Importantly in commenting on the current pre-charge detention period the Home Secretary said:

*However whilst we would not wish to pre-judge the outcome of the review, both parties in the coalition are clear that the 28 day maximum period should be a temporary measure and one that we will be looking to reduce over time.*

This intention certainly chimes with the Liberal Democrats' 2010 Manifesto commitment that if elected they would "*reduce the maximum period of pre-charge detention to 14 days*".

3. While Liberty welcomes the announcement of a comprehensive counter-terrorism review<sup>1</sup> we do not believe that the case for retaining the temporary 28 day pre-charge detention limit in the interim has been made. The pre-charge detention limit for terrorist suspects has quadrupled since 2003. Previously capped at 7 days, the period was extended to 14 days in 2003<sup>2</sup> and then extended yet again – this time to 28 days – in 2006.<sup>3</sup> Under section 25 of the *Terrorism Act 2006* the 28 day period must be renewed annually by Parliament in order to remain in place. The current 28

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<sup>1</sup> Indeed Liberty has long called for a review of counter-terrorism law and powers. In addition to the pre-charge detention limit the review should urgently consider the repeal of the unsafe and unfair control order regime which allows for indefinite house arrest and internal exile without charge or trial.

<sup>2</sup> In the *Criminal Justice Act 2003*.

<sup>3</sup> Section 23 of the *Terrorism Act 2006* extended the maximum period of detention between arrest and charge from 14 to 28 days.

day limit will expire on 25<sup>th</sup> July this year if its renewal is not approved by both Houses of Parliament. It is clear from this renewal requirement (and indeed parliamentary debate and Government assurances at the time) that the 28 day pre-charge detention period was never intended to be permanent.

4. Nonetheless, the enactment of 28 days pre-charge detention was not without huge controversy. The decision took place against the backdrop of an historic parliamentary vote in November 2005 when the former Prime Minister, the Rt Hon Tony Blair MP – suffering his first ever defeat in the House of Commons – was prevented from enacting his preferred proposal to extend pre-charge detention to 90 days. It was in this fraught and divisive context that parliamentarians agreed to extend the limit to 28 days and it was hoped at the time, by politicians from across the political spectrum, that the repeated ratcheting up of the detention limit would be halted.

5. This, sadly, was not the case. In 2007 the Government again asked Parliament to extend the pre-charge detention limit. Originally rumoured to favour a new limit of 56 days the Government ultimately sought an extension to 42 days. Again the policy proved divisive and controversial. Thirty-six Labour backbench MPs rebelled against the proposal and the Government managed only to secure a majority in the House of Commons with the support of the Democratic Unionist Party. The proposal was defeated in the House of Lords in the autumn of 2008 by a resounding majority of 191.

6. Ever lengthier pre-charge detention limits became a hallmark of the previous Government's response to the terrorism threat. Often knee-jerk in nature, repeated attempts to extend pre-charge detention came to represent the worst of counter-terror law and policy-making. Pre-charge detention, along with a slew of other measures – most pressingly the unsafe and unfair control order policy – now need the Government and Parliament's urgent attention.

7. Below we demonstrate that the case for renewing 28 days later this month has not been made. Despite claims about increasing complexity, no individual has been held beyond 14 days for over two years (since August 2007). Information that has since come to light indicates that those individuals who have been held over 14 days could have charged or released before the 14<sup>th</sup> day. Tellingly, our current 28 day limit

is embarrassingly out of step with comparable democracies around the world.<sup>4</sup> Additionally, and as we examine in greater detail below, since 28 days was added to the statute book in 2006 there have been a number of changes in law and policy that fatally undermine any arguments for the period to maintained for any longer.

8. The new Government has so far sought to bind itself together in the language of civil liberties. The speedy introduction of the Identity Documents Bill to repeal the *Identity Cards Act 2006* was a symbolic and hugely welcome step. Liberty hoped that the imminent expiry of the temporary 28 day pre-charge detention limit would have been another early opportunity for the Government to demonstrate a genuine commitment to fundamental rights and freedoms. Especially given both coalition partners firm rejection of the 42 days proposal back in 2008 and the subsequent Liberal Democrat pre-election commitment to bring the period down to 14 days if elected. While we are disappointed that this timely opportunity has not been taken we nevertheless urge parliamentarians to give their fullest consideration to the approval for renewal now being sought by the Government. Should renewal go ahead, we urge the Government to make this the last renewal of our shamefully long detention period.

### **Inevitable Injustice of Lengthy Pre-Charge Detention**

9. 'Charge' is an incredibly important point, marking the beginning of true criminal proceedings. It is when the prosecution formally advises the suspect that s/he is to be prosecuted and gives him/her the particulars of the criminal allegations s/he faces. Before charge a person is not formally accused of any criminal offence. A suspect is charged when the prosecuting authorities have gathered enough evidence to stand a reasonable prospect of convicting the suspect.<sup>5</sup> Before charge the police do not have this hard evidence. In fact, the arrest and detention of a suspect before charge is justified on the basis of police suspicion as opposed to evidence.

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<sup>4</sup> Liberty's Comparative Research on Pre-charge Detention (updated in July 2010) is available at: <http://www.liberty-human-rights.org.uk/publications/6-reports/comparative-law-study-2010-pre-charge-detention.pdf>

<sup>5</sup> In 2008 the former DPP, Sir Ken MacDonald QC confirmed that the 'threshold test' for charging is often applied in terrorism cases. This applies where the evidence to apply the Full Code Test for charging (i.e. reasonable prospect of conviction) is not yet available. It requires at least reasonable suspicion on the available evidence together with the likelihood that further evidence will become available within a reasonable time to meet the Full Code Test (The Code for Crown Prosecutors, Chapter 6).

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

11. The police will inevitably arrest people who they then release without charge because they can't find enough evidence to sustain a prosecution. This is demonstrated by the statistics on the suspects held for 27/28 days since the current 28 day limit came into force in 2006. Half were eventually released without charge. In effect, it seems that the police suspicion turned out to be unfounded. It is inevitable that this will sometimes happen in a democracy and it is not a cause for criticism. The consequences of these mistaken judgements do, however, vary enormously depending on how long a person has been detained: if detention is for a matter or hours or days the consequences may not be too grave but if a person is detained for almost a month the consequences are likely to be unacceptably severe.

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

*The 12 days when I was held without charge felt like 12 months – I was claustrophobic, fearful, and I thought I would never get out. For months after being released without charge I was afraid to leave my home alone. This experience has changed my life forever.*<sup>6</sup>

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

### **Examining the case for renewing 28 days detention**

14. Successive Acts of Parliament have increased the pre-charge detention period in terrorism cases – from 7 to 14 days in 2003,<sup>7</sup> from 14 to 28 days in 2006<sup>8</sup>. Other attempts to increase the detention period have, fortunately, been unsuccessful. 28 days was ultimately settled on in 2006 after attempts to extend to 90 days were rejected. Similarly, a subsequent attempt to extend the limit to 42 days in 2008 was soundly defeated. The basis for this ratcheting-up of the limit has been the nature of al-Qaida inspired terrorism and the increasing complexity of police investigations. In particular, the previous Government pointed to the increase in the level of the threat; the fact that the new terrorist threat can cause “*mass casualties without warning*” (meaning that the police must intervene early to prevent attacks before they happen);<sup>9</sup> and the complexity of cases “*in terms of material seized, use of false identities, multiple languages and dialects and international links*”.<sup>10</sup>

15. Liberty does not deny that the UK faces a very real and severe threat from al-Qaida-inspired terrorism. Neither do we seek to dismiss claims about the increasing complexity of terrorist investigations or, indeed, claims that lengthy pre-charge

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<sup>6</sup> Her full story is available at [www.chargeorrelease.com](http://www.chargeorrelease.com)

<sup>7</sup> *Criminal Justice Act 2003*.

<sup>8</sup> *Terrorism Act 2006*.

<sup>9</sup> Home Office, “Pre-Charge Detention of Terrorist Suspects”, December 2007, p.4.

<sup>10</sup> *Ibid.* p.5.

detention might prove operationally convenient for police in future cases, at least in the short-term. We have always acknowledged and appreciated the extremely difficult work undertaken by the police and other agencies charged with national security. We do not, however, believe that the possibility of short-term operational advantages, in itself, justifies the annual renewal of 28 days. If, indeed, this were the only test, why should Parliament restrict police powers at all? We urge parliamentarians to look beyond any possible short-term benefits of continuous renewal and to consider:

- the potential counter-productivity of detaining suspects without charge for almost a month;
- the other developments in law and policy since the original case for 28 days was made in 2006;
- the possibility of other ways of addressing the arguments for longer pre-charge detention which are less damaging to civil liberties and pose less risk of counter-productivity.

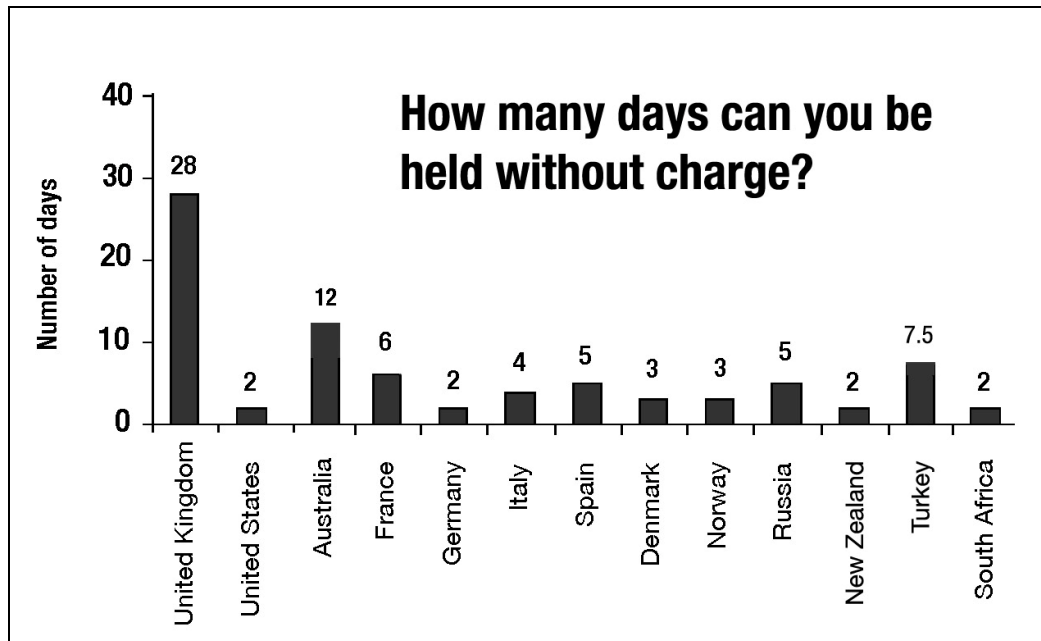
Before turning to these three key issues, we briefly consider the UK's current 28 day limit from an international perspective.

### **International Perspective on 28 days**

16. There can be no doubt about the international nature of the threat from al-Qaida-inspired terrorism. Like the United Kingdom, Spain, the US and Turkey have all suffered from terrorist attacks in recent years. Police in these countries face the same investigative challenges cited in support of lengthy pre-charge detention in the UK – the greater complexity of terror plots, their international dimension and the need to intervene and arrest suspects earlier. Given these similarities, a consideration of how other comparable democracies have responded to these challenges is a useful guide to the necessity and proportionality of the UK Government's current proposal.

17. Back in 2007 Liberty asked qualified lawyers and academics in comparable democracies to advise us on how long a terror suspect can be detained before charge (or the closest equivalent to charge) under the criminal law in their jurisdictions. We found that none of the countries surveyed permits pre-charge detention for anything like the existing 28 day limit in the UK. In June 2010 we asked

the same lawyers and academics to update their previous legal advice. This confirmed, once again, that the UK is dangerously out of step with comparable democracies the world over. The US Constitution, for example, limits pre-charge detention to two days, the closest equivalent to pre-charge detention in France is limited to six days.



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

18. In 2007/2008 the then proponents to extend pre-charge detention to 42 days sought to dismiss these comparative findings, arguing that it is impossible to compare different legal systems.<sup>11</sup> Of course no two legal systems are exactly the same and comparisons are not always simple but this does not mean we should shut our eyes to overseas experience. The UK's counter-terror laws do not exist in a vacuum. Difficulties in drawing comparisons can, indeed, be over-played. Some countries like Australia and the United States have very similar criminal justice systems to our own, making comparisons straightforward. In civil law countries like France and Germany, which we explained the significance of charge in the UK and asked lawyers qualified in those jurisdictions to identify their equivalent.

<sup>11</sup> By contrast, Professor Nicola Lacey (Chair of Criminal Law and Legal Theory at the LSE) described Liberty's "report into comparative detention periods across democracies [as] an excellent piece of research".

### The Australian Experience

19. There have been recent and relevant developments in Australia regarding pre-charge detention. As we advised in our earlier comparative report the maximum period of pre-charge detention for the purposes of investigating a terrorism offence in Australia is 24 hours. While the normal pre-charge detention limit is restricted to 4 hours, in terrorism cases this can be extended on application to a judicial officer to the 24 hour maximum.<sup>12</sup> 'Dead time' during which no questioning is permitted is not, however, included within this 24 hour period. Accordingly, 'dead time' can allow a person to be detained longer than 24 hours but the total amount of time spent questioning the person cannot exceed 24 hours.<sup>13</sup> There has until now been no statutory cap on the maximum amount of 'dead time' that can be authorised. The first and only case in which an extended period of 'dead time' was authorised by a magistrate led to a person – Dr Mohamed Haneef – being detained for a total of 12 days without charge.<sup>14</sup> This period was far greater than the maximum anticipated by the Australian Government during the passage of the relevant legislation. At the time, in response to calls for an absolute limit of 48 hours, the Attorney-General's Department staff assured a Senate inquiry that such a limit was not necessary and that it would be surprising if the powers were used to detain anybody for 48 hours.<sup>15</sup> In Parliament, the Minister for Justice and Customs indicated that the provision would also be limited by case law interpreting a 'reasonable time' to be a 'limited time'.<sup>16</sup>

20. Following Dr Haneef's detention an independent review was conducted by the Hon. John Clarke QC. Part of the remit of the Inquiry was to review the circumstances of Dr Haneef's arrest and detention and the operational and administrative procedures which surrounded it.<sup>17</sup> The Inquiry also made a number of

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<sup>12</sup> s23CA, *Crimes Act 1914*. Two hours for a minor or Aboriginal person or Torres Strait Islander.

<sup>13</sup> s 23CA *Crimes Act 1914*.

<sup>14</sup> Dr Haneef was arrested on 2 July 2007 in connection with the failed bomb attacks in the UK. He was charged 12 days later with supporting a terrorist organisation but the Director of Public Prosecutions withdrew the charges on 27 July 2007 because there was insufficient evidence to establish the elements of the offence.

<sup>15</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) para 3.25

<sup>16</sup> *Pollard v R* (1992) 176 CLR 177 cited in Commonwealth, *Parliamentary Debates*, Senate, 18 June 2004, 24228-29 (Chris Ellison, Minister for Justice and Customs)

<sup>17</sup> The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008), accessible at <http://www.haneefcaseinquiry.gov.au>.

findings about the effect of having uncapped pre-charge detention, including that the provisions “*removed, or diminished, the sense of urgency that should have been brought to the task of determining whether to charge or release*”.<sup>18</sup>

21. The Inquiry concluded that “*If pressed – and having regard to Dr Haneef’s detention in circumstances where the overseas involvement created time problems generally for the investigation – I would tend to say the cap should be no more than seven days*”.<sup>19</sup> This conclusion has now been acted on by the Federal Government which introduced the *National Security Legislation Amendment Bill* earlier this year.

22. The Bill’s provisions in relation to pre-charge detention draw directly from the Clarke Report’s conclusions. The Bill deals with non-terrorism and terrorism offences in two separate subdivisions in Division 2 of Part 1C and will bring into force a seven-day cap on the number of days a person can be held without charge. This means a person will not be able to be detained for longer than a total of eight days on account of ‘dead time’. The Bill was referred to the Senate and Legal Constitutional Affairs Legislation Committee, which reported back on 18 June 2010. In relation to pre-charge detention, submissions to the Committee were, for the most part, not only critical of the seven-day cap but also the apparently arbitrary way that figure had been reached. The Australian Human Rights Commission, for example, argued that a maximum eight day detention plus any further disregarded time for specified events is unjustified and disproportionate.<sup>20</sup> The Committee concluded that the Government should go further in restricting pre-charge detention, and recommended that there be a three day limit on pre-charge detention inclusive of ‘dead time’.<sup>21</sup>

23. The National Security Legislation Amendment Bill had its third reading in the lower house of Federal Parliament, the House of Representatives, on 25 May 2010 and has now passed to the upper house. In the Senate, the Bill was introduced and read a first time on 15 June 2010, with a second reading moved on the same day. The Senate Legal and Constitutional Affairs Legislation Committee reported back to Parliament on 17 June. The Bill has received cross-party support. It has also

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<sup>18</sup> At page ix of the Report. A similar argument also applies to a lengthy pre-charge detention period.

<sup>19</sup> At page 249 of the Report.

<sup>20</sup> As summarised by the Committee at 3.90 of its Report. See further para’s 3.91 to 3.98.

<sup>21</sup> The Committee recommended that the investigatory dead time provision set out in clause 23DB be retained, but amending clause 23DB(11) to reflect a three-day time limit.

received broad support from the Police Federation of Australia and the Australian Crime Commission.

24. The Australian Government's plans to limit pre-charge detention for terror suspects to a maximum 8 days stand in sharp contrast to events in the UK. While it is of course the case that each country needs to determine its own statutory limits on pre-charge detention the experience in Australia, whose legal system is very similar to our own, may help parliamentarians in assessing whether our current 28 day should be renewed. Liberty's comparative law study, setting out legal advice from eleven other jurisdictions, is available at: <http://www.liberty-human-rights.org.uk/publications/6-reports/comparative-law-study-2010-pre-charge-detention.pdf>.

25. Human rights activists around the world have previously warned, that other governments may take our extended pre-charge detention period as a green light to pass their own unjust and over-broad measures against those they consider a threat. While this has evidently not been the case in Australia the threat nonetheless remains. Asma Jahangir, Chairperson of the Human Rights Commission of Pakistan (placed under house arrest by General Musharraf), said of previous proposals to extend detention to 42 days:

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

### **Counter-productivity**

26. Tackling Al-Qaida-inspired terrorism necessarily includes engaging in a battle for hearts and minds. The continuous renewal of the extended pre-charge detention limit and the injustice that inevitably results does not help us to win that battle. On the contrary, pre-charge detention for almost a month can and has damaged community relations, potentially making it more difficult for police and intelligence agencies to

maintain all-important relationships with Muslim communities. In some extreme cases, it could even operate as a recruiting sergeant to terrorism.

27. There is no question that extended pre-charge detention impacts disproportionately on the minority ethnic and Muslim communities. As Sir Ian Blair and Peter Clarke have previously explained, with regard to those arrested under the *Terrorism Act 2000* “by and large, most of those who come into custody when asked say that they profess the Muslim faith”.<sup>22</sup> History has shown that oppressive laws, which have a disproportionate impact on one racial or religious group, can cause serious long-term damage to community cohesion.<sup>23</sup>

28. Detention for almost a month without charge or trial has the potential to further alienate those communities we most need to engage if we are to combat terrorism. If you, your friends, colleagues or family members had been detained without charge for weeks on end you would be bound to feel a certain amount of animosity to the police and authorities. At the very least you would be less likely to choose to assist the police with their future inquiries.

29. There is also a real concern that people will be dissuaded from reporting any suspicions they might have about colleagues or neighbours for fear that, even if their suspicions turn out to be unfounded, the person concerned could be held in police custody for over a month. While we would not suggest that extended pre-charge detention can magically transform law-abiding Muslims into terrorists, we are concerned that the visible injustice of such a policy can provide a propaganda tool to those seeking to radicalise young Muslims. The impact of detention without charge in Northern Ireland confirms these risks. Internment in Northern Ireland has been described as the “*best recruiting sergeant the IRA ever had*”.<sup>24</sup>

### **What has changed since 2006?**

30. Liberty has consistently maintained that there are better ways of responding to the increasing complexity and international nature of terrorist investigations than continually renewing the temporary and unjustified period suspects can currently be held before charge. Some of the alternatives, highlighted by Liberty in the past, have

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<sup>22</sup> Evidence to the Home Affairs Select Committee, 9 Oct 2007, Q21.

<sup>23</sup> Examples include the controversial sus laws as well as internment in Northern Ireland.

<sup>24</sup> cf Lord King of Bridgewater, HL Deb, 10 March 2005, cols 1040-1041.

been adopted. Other changes to law and practice have also been made since the 28 day limit was passed in 2006. Taken together, police powers for investigating, questioning and charging suspected terrorism have been greatly extended. These developments make the further renewal of 28 days even more unjustified.

31. One example is the bringing into force, in October 2007, of Part 3 of the *Regulation of Investigatory Powers Act 2000*. This criminalizes any failure to disclose an encryption key and provides an answer to police arguments that longer pre-charge detention is needed because of the time taken to decrypt large amounts of electronic data.<sup>25</sup>

32. Another development since 2006 is the creation of additional 'lower order' terrorism offences including: dissemination of terrorist publications; preparation of terrorist acts, training for terrorism; attendance at a place used for terrorist training etc<sup>26</sup> which provide greater scope for charging suspected terrorist behaviour. While Liberty has concerns over the breadth of many 'lower order' terror offences it certainly cannot be said that law enforcement lack offences with which to prefer an early charge against those suspected of terrorist activity.

33. Also since 2006, provisions to allow for the post-charge questioning of suspects charged with terrorism-related offences have been enacted. Contained in section 22 of the *Counter-Terrorism Act 2008* post-charge questioning allows a judge of the Crown Court to authorise the questioning of a person about a suspected terrorism offence (or an offence with a terrorist connection) (a) after the person has been charged with the offence or officially told that they may be prosecuted for it or (b) after the person has been sent for trial for the offence. Post-charge questioning was intended to allow police to charge suspects as soon as possible whether or not it appeared that further evidence about that offence or a different offence might come to light. Liberty understands that section 22 of the 2008 has yet to be brought into force.

34. Another factor, hugely relevant to the period necessary for pre-charge detention, is the evidential threshold that needs to be met before a charge can be laid. Again, over recent years there has been significant developments here.

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<sup>25</sup> The *Police and Justice Act 2006* also allowed suspects to be released on bail subject to potentially strict conditions.

<sup>26</sup> *Terrorism Act 2006* and *Counter-Terrorism Act 2008*.

Prosecutors can now lay charges in situations where the level of evidence required to apply the Full Code Test for charging (i.e. reasonable prospect of conviction) is not yet available. This alternative threshold is known as the 'Threshold Test' and it requires at least reasonable suspicion on the available evidence together with the likelihood that further evidence will become available within a reasonable time to meet the Full Code Test.<sup>27</sup> A lower threshold for charging has an obvious and direct impact on the necessary period required for pre-charge detention. Prosecutors' ability to charge suspects sooner seriously undermines claims that an extended period of pre-charge detention needs to be continuously renewed.

### **Other Alternatives to Lengthy Pre-charge Detention**

#### *Intercept evidence*

35. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.<sup>28</sup> We believe that this would make it possible to charge suspects earlier in a significant number of terrorism cases. Claims that lifting the bar would not make a significant difference in terrorism investigations are very hard to reconcile with the extent of surveillance in the UK (including phone tapping). It would indeed be a surprise, or a cause for concern, if the communications of those suspected of involvement in terrorism were not being intercepted before they are arrested. In many cases we would, therefore, expect intercept material to be available at the time of arrest.

36. At present, the kind of intercept material that is likely to have been gathered before arrest cannot form part of the evidence base for a charge because it is not admissible in criminal proceedings. The police therefore have to spend unnecessary time filling the gap in evidence that the current bar creates. Once intercept material is made admissible it would, therefore, save police time. Indeed, elsewhere in the world, intercept evidence has been used effectively to convict those involved in terrorism and other serious crimes. In fact, even within the UK, intercept evidence is currently relied on by the State in non-criminal proceedings. We are delighted that both parties in the new coalition Government have previously expressed clear support for the admissibility of intercept evidence in criminal proceedings. We

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<sup>27</sup> The Code for Crown Prosecutors, Chapter 6.

<sup>28</sup> Cf Liberty's evidence to the JCHR on this subject at [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk)

understand that consideration of intercept admissibility will form part of the wider review of counter-terrorism measures currently being undertaken by the new Government. While we do not believe that the current pre-charge detention limit should be renewed in July 2010 we urge the Government, as part of its wider review, to recognise the link between admissibility and pre-charge detention and take action on the former in order to reduce the latter.

### *The Nightmare Scenario and Existing Emergency Laws*

37. Proponents of lengthy pre-charge detention limits have in the past argued that the powers might be needed to deal with a future nightmare scenario involving multiple grave terror plots which come to notice and/or fruition so suddenly and simultaneously that the police are simply unable to gather the evidence required to charge such a large number of suspects within a shorter time limit. During the previous Government's attempt to extend the pre-charge detention limit to 42 days the then Minister of State for Security, Counter-Terrorism, Crime and Policing (Rt Hon Tony McNulty MP), for example, wrote in the *Daily Mirror*: "As an extreme example, imagine two or three 9/11s. Imagine two 7/7s."<sup>29</sup> Liberty has seriously considered those based on the hypothetical 'nightmare scenario'. Even if such a scenario did arise we do not, however, consider that a lengthy pre-charge detention limit, renewed on a rolling basis, is necessary to deal with it. Existing emergency powers legislation (the *Civil Contingencies Act 2004*) already gives senior ministers the power to pass emergency laws extending pre-charge detention limits if this is urgently needed to deal with a real emergency such as three 9/11s. In 2007 Liberty obtained an opinion from David Pannick QC confirming this.

### **Conclusion**

38. The Government's decision to seek renewal of 28 days – even if for 6 months – is an early disappointment. As we explain above, the case for retaining this exceptional period has not been made. Practical experience since the period was extended in 2006 indicates that it has never been necessary to hold an individual for longer than 14 days. This is despite the fact that a number of individuals have been held for the full four weeks. In the interim there has also been a number of hugely significant changes to law and practice which more than deal with previous concerns

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<sup>29</sup> "Minister warns of 'peril' as he pushes for 42 day lock-up", 23<sup>rd</sup> January 2008.

and arguments about the complexity etc. of investigating terrorism. Indeed changing the law to allow intercept to be made admissible in criminal proceedings would certainly address any residual claims that 28 days is necessary. Our updated comparative research eerily demonstrates just how far down the wrong path we have gone. We urge parliamentarians to heed this stark comparison and reject the Government's request for renewal.

**Isabella Sankey**