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**Liberty's Supplementary Evidence to the Home
Affairs Select Committee:**

**Terrorism Pre-Charge Detention - The
Government's Proposals and the Civil
Contingencies Act 2004**

December 2007

About Liberty

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

Liberty Policy

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

Liberty's policy papers are available at

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

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Introduction

1. This submission responds to the proposals published by the Home Office on 6th December 2007. We hope it assists the Committee with its inquiry and informs the evidence session with the Home Secretary on 11th December. In particular we:

- Explain the three major flaws with the Government's current proposals, which mean that it provides significantly weaker safeguards than the existing law; and
- Respond to the Government's arguments that the Civil Contingencies Act 2004 (the "CCA") does not provide a mechanism for temporary extensions to the detention limit if this is urgently needed to deal with a specific emergency.

2. In Liberty's view any legislation, permitting a temporary extension of pre-charge detention limits in exceptional circumstances, must build on rather than weaken the vital safeguards contained in the CCA. As we explain in this briefing the current Home Office proposals would provide significantly less protection.

The Three Major Flaws with the Government Proposal

3. In their "Summary of Responses to the Counter-terrorism Bill Consultation" published on 6th December the Home Office explicitly accepts that pre-charge detention: "is a controversial issue and the majority of responses which we received did not support an outright extension to the current 28 day limit".¹ The document also explains:

"from the four possible options put forward in the consultation paper the majority of respondents expressed a preference for Option iii, which is the suggestion that the CCA (2004) might provide an alternative to extending pre-charge detention beyond the current limit of 28 days".²

4. The Home Office document "Pre-Charge Detention of Terrorist Suspects" published on 6th December 2007, states:

"we have considered if there is some way we can make use of the CCA's guiding principle which makes any increase in pre-charge

¹ Para 14

² Para 15

detention exceptional, temporary and dependent upon specific operational need ... we are therefore proposing to legislate in the counter terrorism bill to increase the pre charge detention limit beyond 28 days to 42 days only for a strictly limited period or time and in response to a specific operational need”.

In reality the Government’s current proposal would lack many of the fundamental safeguards of the CCA.

5. In outline, the three major weaknesses with the proposals are as follows:

- ***No need for a real emergency*** - Although the Home Secretary has spoken of the powers being “exceptional”, the proposal is for a power to hold people for 42 days (six weeks) that can be turned on and off by the Home Secretary without any evidence of a genuine emergency. Instead, it is proposed that the powers would be available in response to “a specific operational need”. Under the CCA, by contrast, the exceptional powers have to be urgently needed to deal with a real emergency.
- ***Ineffective parliamentary oversight*** - Under the proposals parliamentary approval is not needed for the triggering of the extended detention powers. If Parliament considers that the powers are not needed or if it doubts the existence of the emergency it would be powerless to do anything about it. Instead, it is proposed that there would just be a debate in Parliament and a report from the Government’s Reviewer of Terrorism. By contrast, under the CCA, emergency powers have to be approved by Parliament within seven days.
- ***No judicial oversight*** - It is proposed that there should be no legal limits on the Home Secretary’s power to trigger the longer detention powers and no judicial oversight of her decision to do so. We believe the courts should have the power to overturn emergency powers which are, for example, disproportionate or irrational. This type of judicial oversight and the power to quash emergency orders exists under the CCA.

A Real Emergency or a just an Operational Need?

6. Although the Home Secretary has spoken of the extended detention powers being “exceptional” the proposal is for a power to hold people for over 28 days that can be turned on and off by the Home Secretary without any evidence of a genuine emergency. The power to detain people for 42 days could be triggered by the Home Secretary whenever she receives a report by the police and DPP showing that there is a compelling operational need for

extension. A “compelling operational need” is described as including “a major operation, a complex individual case, the foiling of a major plot, or an operation involving many countries”. The “operational need” threshold would seem to allow for the potential extension of detention in many terrorist investigations.

7. Liberty does not believe there is any justification for holding suspects beyond 28 days, except where this is urgently needed to deal with a real emergency of the kind covered by the CCA, i.e.:

“Multiple terror plots are identified which, if carried out, would cause significant loss to life or damage to property. Before the attacks are carried out, or afterwards, large numbers of people suspected of involvement in the plots are arrested. Given the number of people involved, the police do not, however, have the capacity and resources to gather the evidence needed to charge the large number of individuals involved within the existing Statutory Time Limit, i.e. 28 days.”

If there is not a real emergency we believe that 28 days (already longer than other comparable democracies) would be sufficient to gather enough evidence to charge a suspect with an offence, especially when the availability of post-charge questioning is taken into account. As Liberty’s “Real Consensus” document demonstrates we are not alone in reaching this conclusion.³

Real Parliamentary Oversight

8. Liberty’s second major concern is the lack of effective parliamentary oversight of the Home Secretary’s decision to trigger the extended detention power. Under the CCA, an emergency order must be presented before and approved by Parliament as soon as possible and, in any event, within seven days.

9. Parliamentary control under the Government’s proposal would be much weaker than under the CCA:

- Two days after the powers have been triggered by the Home Secretary she must notify Parliament that she has done this and make a statement

³ Provided to the Committee with this submission

that the longer detention limit is urgently needed. This notification does not, however, have any real effect.⁴

- At the time of the notification there might be a debate but, at this point, Parliament would have no power to vote on the decision to activate the extended detention powers. If Parliament considered that the powers were not needed or if it doubted the existence of a real emergency it could do nothing about it.
- Parliamentary approval would only be needed if, after the extended detention powers have been in place for 30 days, the Home Secretary wanted to renew them for another month. In most cases no parliamentary approval would, therefore, be needed.⁵

This reduction in parliamentary oversight does not fit with the Government's stated aim to "entrust more power to Parliament".⁶

Judicial Oversight and the Rule of Law

10. Under the current proposals there would be no legal limits on the power of the Home Secretary to trigger extended detention and no judicial oversight of her decision to do so.⁷ One can understand why Government ministers might wish to avoid the risk of legal challenges but, in Liberty's view, under the British constitution the Government should not be able to operate above the law. Liberty believes that, as under the CCA, Parliament should limit the Home Secretary's authority to trigger any exceptional powers and that the courts should be given effective powers to sanction any failure by the Home Secretary to operate within the law.

11. Under the CCA Parliament placed legal pre-conditions on the power of Government Ministers to make emergency regulations. The following three conditions have to be met for the regulations to be lawful: a) An "emergency", as defined, must have occurred, be occurring or be about to occur; b) the order must be necessary to prevent, control or mitigate an aspect or effect of the emergency; and c) the order must be urgently needed. If these conditions are not met, an emergency order under the CCA could be quashed or

⁴ The notification might be accompanied by a report by the Government's Reviewer of Terrorism legislation.

⁵ The powers to detain people for longer than the current 28 day limit would only need to be triggered when the 28 day limit is coming to an end. Therefore, the full 42 detention limit for individual cases would be likely to expire during the initial 30 day period.

⁶ The Prime Minister's Constitutional Reform Statement, 3 July 2007

⁷ There would, however, be judicial oversight of the use of the extended detention powers in individual cases.

overturned by the courts. The courts would also have the power to quash emergency orders under the CCA which are irrational, made in bad faith or which breach the rights and freedoms protected by the Human Rights Act 1998.

12. This kind of effective judicial oversight would not exist under the current proposals because (A) there would not be legal restrictions on the Home Secretary's power to trigger the extended detention limits and (B) the detention powers would be contained in primary legislation (the forthcoming Terrorism Bill) rather than regulations like those made under the CCA. When the CCA was being scrutinized by Parliament the Government initially sought to prevent the courts having the power to quash emergency orders made under it. Government worried that it could not live with the risk of an emergency order being struck down by the courts while it was in the middle of dealing with an emergency like the outbreak of civil war, floods, famine or an epidemic. When published in draft, the Bill therefore treated emergency orders as primary legislation rather than secondary legislation so that they could not be quashed.

13. What is interesting is that, in the CCA context, Government did eventually get comfortable with the ability of the courts to quash unlawful emergency orders. In response to significant parliamentary opposition it agreed:

“In light of the range of tools available to the courts to ensure that the response to an emergency is not impeded by successful legal challenges, and the likely approach that the courts would take to emergency powers, the Government has concluded that no further provision is needed to protect procedurally emergency regulations from challenge in the courts.”⁸

In particular Government took comfort from the fact that many human rights are qualified, in the case of a real emergency it would be open to Government to derogate under Article 15 of the ECHR, the deferential approach that the courts have taken in the context of emergencies and the courts' discretion about what remedy to afford if it does decide that an order is unlawful.

⁸ Government Response to the Joint Committee on the draft Civil Contingencies Bill, p.15

The Civil Contingencies Act – a Realistic and Effective Option

14. As discussed above, the majority of respondents to the Government consultation supported the CCA option, i.e. the suggestion that the CCA provides an alternative to extending pre-charge detention beyond the current limit of 28 days. Given this we would expect the Government to offer substantive arguments as to why it has rejected this option in favour of its current proposal. We consider below each of the arguments made by Government against the CCA. These do not withstand scrutiny.

Argument 1⁹

“The CCA goes much wider than terrorism and we believe it would be preferable to make any changes to the law using anti-terrorism legislation rather than trying to adapt other legislation for purposes for which it was not intended” (emphasis added).

Liberty’s Response: There can be no doubt that the CCA is intended for (among other things) anti terror purposes. Section 19 of the CCA expressly defines “emergency” for the purposes of the Act as including “terrorism”:

“(1) In this Part “emergency” means – ...
(c) war, or terrorism, which threatens serious damage to the security of the United Kingdom” (emphasis added)

Argument 2¹⁰

“It is not entirely certain that the CCA could be used to detain individuals as opposed to restrict their movement.”

Liberty’s Response: In his opinion on the CCA (previously provided to the Committee) David Pannick QC did not envisage any legal problems with the use of the CCA to authorise the pre-charge detention of terrorist suspects. If Government feels that this is not sufficiently clear, Liberty would have no principled objection to the CCA being clarified to establish that it would allow terrorism pre-charge detention. This could be achieved by a provision in the forthcoming anti-terror legislation.

⁹ Found in a document entitled *Pre-Charge Detention of Terrorist Suspects* released by the Home Office on 5th December 2007, page 7

¹⁰ Ibid

Argument 3¹¹

“The CCA could not be used in all the circumstances where the police might need more than 28 days. Although it may be possible to use it in a 9/11 type situation ...it might not be possible to use it where the police have disrupted or foiled a large and complex plot where the suspects have been arrested.”

Liberty’s Response: David Pannick QC advised on the ability to use the CCA in exactly this kind of scenario – i.e. where “Before [major] attacks are carried out ... large numbers of people suspected of involvement in the plots are arrested.” He concluded that the CCA could be used in this type of situation. In outline, the CCA allows emergency regulations to be made where an emergency “has occurred, was occurring or was about to occur” (Section 21(2)). “Emergency” is defined as including “an event or situation which threatens serious damage to human welfare” (Section 21(1)). It is not therefore necessary that any terrorist plot has come to fruition and neither is it necessary that the threat continues to exist at the time the emergency order is made.

Argument 4¹²

“The police may need to detain individuals beyond 28 days because of the particular nature of the case not because it is part of an outrage that would constitute an emergency as defined in the CCA – for example there may be a case ... which is particularly complex in terms of the amount or type of material involved or a vast number of international connections.”

Liberty’s Response: Liberty considers that detention beyond 28 days could only be justified in a genuine “emergency” as defined in the CCA. As debates at the time of the CCA established, the definition of emergency in Section 19 of the CCA is very broad. We do not consider that more than 28 days’ detention could ever be justified in “ordinary” anti-terror operations, even if this would be operationally convenient. It should be remembered that 28 days is already far longer than the limit in other comparable democracies.¹³ In “ordinary” anti-terror operations it should be possible to gather enough evidence within 28 days properly to charge a suspect with one of the many lower-level terrorism offences, like acts preparatory to terrorism. If any new

¹¹ Ibid, pages 7-8

¹² Ibid, page 8

¹³ Cf Liberty’s comparative law study previously provided to the Committee

evidence comes to light after this, suggesting that a more serious charge is appropriate, Liberty has argued that, with judicial oversight, additional questioning of the suspect should be permitted with the possibility of the more serious charge being substituted.

Argument 5¹⁴

“The CCA requires confirmation of the emergency regulations by affirmative debate in both Houses within 7 days. These debates would be limited in what could be said because of the ongoing operation and would take resources away from dealing with the immediate situation.”

Liberty’s Response: The procedure for emergency orders under the CCA was designed to deal not only with terrorism incidents but also major incidents like pandemics and even civil war. If parliamentary approval is appropriate in the context of a civil war why not in the context of a terror attack? Indeed, Government does not seem to have a concern about a debate in Parliament because under the current model a debate (though no vote) would happen within 2 days of the extended detention powers being triggered by the Home Secretary. This suggests that the real concern is not the “resources” that would be taken up by the debate in Parliament but the Home Secretary’s fear that Parliament would not agree with her decision. In a democracy Parliament should have this power. The CCA would only need to be activated (to permit detention beyond 28 days) when the current 28 day limit is drawing to an end. Therefore, parliamentary approval would only be required at around the 35th day after the initial arrest (i.e. 7 days after the emergency regulations were triggered). The debate will not, therefore, occur at the height of the crisis.

Argument 6

“One proposal we cite in the consultation document from Liberty - and we are grateful to them for engaging so constructively in the debate - is that if the risk materialises we should declare an emergency under the Civil Contingencies Act and allow for a period beyond the 28 day limit, for up a further 30 days. But this would require the declaration of a state of emergency.”¹⁵

¹⁴ *Ibid*

¹⁵ Prime Minister’s Statement on National Security – 25th July 2007

“It does require a declaration of an emergency and, again, in terms of public safety that is not necessarily where we would want to be.”¹⁶

Liberty Response: The CCA does not require any declaration of a general state of emergency. Neither does it confer general and uncontrolled law-making powers on the Executive. The CCA, while broad in its scope, is a far-cry from the declaration of martial law that has recently occurred in Pakistan. It gives senior ministers limited powers to make temporary and targeted laws when they are urgently needed to deal with a specific emergency. Temporary and targeted emergency powers were, for example, used in the US to tackle the recent forest fires in California.

Jago Russell and Isabella Sankey, Liberty

¹⁶ Sir Ian Blair commenting on the CCA option while giving evidence to the HASC – 9th October 2007. See also Lord Carlile of Berriew QC in his Report on Proposed Measures for Inclusion in a Counter Terrorism Bill (December 2007) at Para 49