



**Liberty's response to the Home Affairs
Committee inquiry into counter-
terrorism proposals – Fresh call for
Evidence**

September 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. The Home Affairs Committee call for fresh evidence follows the publication of a government discussion paper in July 2007¹. This paper was a more detailed version of a consultation published in June². The detailed paper has also been accompanied by a further consultation which sets out the potential options on extension of pre charge detention currently being considered by the Government³. These papers have been produced prior to publication of a new Terrorism bill in November.

2. The detailed paper emphasises that the Government is seeking consensus and an effective consultation process. It recognises that previous consultations on new terrorism laws have been unsatisfactory⁴. We sincerely hope that this is true. Many of Liberty's criticisms about the UK's legislative response to terrorism have been justified by subsequent events. Detention of foreign nationals under Part 4 of the Anti Terrorism Crime and Security Act 2001 was deemed incompatible with human rights obligations by the House of Lords Appellate Committee in 2004. Control orders introduced in the Prevention of Terrorism Act 2005 have also been found to breach human rights standards in a series of judgements. The use of stop and search powers without suspicion under s.44 Terrorism Act 2000 (TA2000) has attracted widespread criticism including from the Government's reviewer of terrorism legislation Lord Carlile and the Metropolitan Police Authority. The offence of Encouragement of Terrorism created under s.1 Terrorism Act 2006 has also been widely condemned, remains largely unused and has proved extremely difficult to combine with the definition of terrorism contained in s.1 TA2000. Liberty will always be supportive of appropriate and proportionate measures taken to safeguard the public and protect national security. Our concern is that a tendency to act in haste and to use legislation for political point scoring has resulted in a raft of excessive and ultimately counterproductive laws.

¹ <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/ct-bill-consultation.pdf?view=Binary>

² Liberty's response to the earlier paper can be found at <http://www.liberty-human-rights.org.uk/pdfs/policy07/home-affairs-ctte-counter-terrorism.pdf>

³ <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary>

⁴ Paragraph 7

3. As we have covered much of the subject matter contained in the 'measures for inclusion' paper in our earlier response to the committee the focus of our response will be the 'options for pre charge detention' consultation. We shall also make brief comments relating to some of the points raised in the new discussion paper.

Pre charge Detention

4. The pre charge detention consultation admits that the case for further extension does not have any evidential basis stating '...since the 2006 legislation came into effect, there has been no case in which a suspect was released but a higher limit than 28 days would definitely have led to a charge'⁵. Instead the case for further extension relies on a belief that there might be cases in the future when more time will be needed. This is an important admission. It means that Parliament is being asked to further extend, possibly permanently, what is already the longest period of pre charge detention time permitted in a western democracy without any factual basis of necessity. It also means that whatever period is proposed by the Government must by definition be a speculative guess as to how much might be needed at an indeterminate point in the future. The fact that the most frequently cited extension figure of 56 days has been arrived at by doubling the existing period demonstrates the arbitrary nature of determination. We appreciate that there must be a cut off point. However this should be reached though the admittedly difficult process of appropriately balancing the need to allow the police sufficient investigation time against the impact of ever extending detention periods. Liberty maintains that no extension beyond 28 days can be justified.

5. During debate on extension to 28 days Liberty did not take issue with the problems identified by the police in justification of a greater detention period⁶. Liberty has always acknowledged and appreciated the extremely difficult work undertaken by the police and other agencies charged with national security. If the police and Government say extension is needed over logistical, resource complexity or other reasons then we are sure these are genuine concerns. However, we also believe the appropriate approach is to seek an alternative and more proportionate solution than

⁵ Page 8

⁶ See in particular the Letter from Assistant Commissioner Hayman to the then Home Secretary Charles Clarke on 6 October 2005

yet further extension. We would also argue that the Government and Parliament are under a duty to seek the most proportionate solution. Proportionality is not only at the heart of the UK authorities' obligations under the human rights framework. It is also the way to minimise the risk of community resentment and disenfranchisement.

6. When commenting on previous attempts to increase the pre charge detention limit we set out a series of suggestions that would deal with the concerns raised in a more human rights compliant manner⁷. Some of these have been adopted by the Government⁸ although they seem to be introduced in addition to extended pre charge detention rather than as an alternative. There remain two significant recommendations that have not taken place. They are however the subject of serious consideration by the Government. The first is the removal of the bar on intercepted material in criminal trials. This is currently the subject of a Privy Council review. The second is to review the grounds for questioning after charge in terrorism cases. This is one of the measures proposed in the consultation on the forthcoming bill. As we have covered these subjects in earlier evidence to the committee we do not intend to go into detail again here.

7. We are pleased to see that Liberty's proposals look likely to be adopted. We would however again emphasise that we made these suggestions as an alternative, rather than an addition to, further extension of pre charge detention. Notwithstanding this, we will comment on the proposals put forward in the consultation on the basis that the bar on intercept will be removed and the grounds for questioning after charge extended.

8. The first two options propose legislating to extend the current limit. Option (i) will do so with immediate effect upon Royal Assent. Option (ii) would require affirmative resolution of both houses before coming into effect. We are commenting on both together as we do not see a significant distinction between the two. The need for affirmative resolution is preferable to the first option in that it would delay implementation and require a further vote. However, once the resolution had taken

⁷ Liberty's evidence to the Home Affairs Committee 2005 enquiry goes into detail and is available at <http://www.liberty-human-rights.org.uk/pdfs/policy06/hac-terrorism-detention-powers.PDF>

⁸ Such as use of conditional bail from the police station (introduced in the Serious Crime Act 2006) and bringing into force the criminalisation of a failure to provide an encryption key under part 3 of the Regulation of Investigatory Powers Act 2000 (planned to come into force in October 2007)

place it would still result in an effectively permanent extension. It would also be extremely difficult for parliamentarians to vote against an order knowing that they were being asked to do so to prevent a public emergency. This contrasts with use of the Civil Contingencies Act 2004 (CCA) which we will consider later. Use of the CCA requires ongoing authorisation by parliament and is also subject to review by the courts.

9. Our objection to extension either by way of option (i) or option (ii) is that it will create a permanent state of emergency without any evidence that it is necessary. It will also prove to be counterproductive in that the divisive message sent out to communities will far outweigh any possible benefit that might arise from possible application to, at the most, a handful of cases. We appreciate that the consultation suggests a number of safeguards including authorisation by the Director of Public Prosecutions and judicial oversight as well as statements to parliament and annual renewal. While these would of course be desirable if detention is extended they might prove of limited value. An individual judge, or indeed the DPP, would be placed in an extremely difficult position in determining that an extension would not be justified in the context of what presumably would be an investigation generating a huge amount of interest. It would also be difficult to hear a balanced case. Details of the justification for extension would presumably not be available to the person detained or their representatives making rebuttal difficult. In broader terms, whatever safeguards are put in place, an unfortunate message would be sent out. Anyone who, in the words of Admiral Sir Alan West, should 'snitch' on friends and relatives will be far less likely to do so when aware that a person might be held for many weeks as a consequence⁹. A valuable supply of intelligence might be jeopardised.

10. Option (iii) envisages using the CCA if a state of emergency justifies holding people beyond the current 28 day limit. It is not strictly an 'option' as the CCA is already law so no further legislative action would be required. When considering use of the CCA, Liberty commissioned an opinion from David Pannick QC and Javan Herberg from Blackstone Chambers. This opinion confirmed that the CCA could be used in an emergency of the type described by the Government and would allow for further detention. The opinion is attached to this submission so we do not intend to

⁹ See <http://news.bbc.co.uk/1/hi/uk/6281388.stm>

describe the mechanics of operation in detail. Rather we will focus on the policy rationale we believe makes this the proper approach.

11. Liberty is convinced that removal of the bar on intercept and reviewing post charge questioning will have a huge impact upon the ability to charge. We accept that intercept might not be the ‘magic bullet’ allowing charges to always be brought. However, we maintain that the admissibility would ensure that charges could be brought in most situations. At present the police have 28 days to bridge the gap between the arrest standard and the charging standard. This is not a significant gap, particularly as the Director of Public Prosecutions has said that in terrorism cases the ‘threshold test’ was usually applied to charging decisions¹⁰. The threshold test is that there is a reasonable suspicion that the offence has been committed¹¹. However unlike the decision to arrest this must be based on admissible evidence. Currently intercept cannot be considered as it is not admissible. If the bar is lifted it could be considered.

12. Reviewing the ability to question post charge would also be extremely useful in situations where, for example, the evidence gathering process that takes place as a matter of course after a person has been charged indicates a greater degree of involvement and the possibility of a more serious charge being brought. This would allay any concern that the 28 days questioning currently permitted might not allow sufficient time to gather all relevant evidence.

13. We are convinced that adoption of these two measures would cover most conceivable situations. However, the consultation justifies further extension by identifying a ‘nightmare scenario’ likely to overwhelm the ability and resources of police and security services, ‘where there are multiple plots, or links with multiple countries, or exceptional levels of complexity’¹². It is exactly this sort of situation which Liberty maintains would justify the passing of regulations under the CCA. Emergency powers legislation is justified in principle *precisely* because situations might arise where powers under the domestic law prove insufficient. There might be very good political reasons why creating a general pre charge time extension would

¹⁰ 24th Report of the JCHR

<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/24002.htm> at paragraph 126

¹¹ As opposed to the usual charging standard of ‘reasonable prospect of conviction’

¹² Page 9

be preferable to reliance on the CCA. Use of emergency powers might be interpreted as a failure on the part of Government, an inability to cover all eventualities. Anticipatory extension however would appear more proactive, the action of a government in control of a situation.

14. We do appreciate the political reality faced by the Government and the dangers of appearing 'weak' on terrorism. However this does not justify further unnecessary extension. The unfortunate reality is that much of the terrorism legislation passed in recent years has been of little practical use and has caused resentment. Being seen to take positive action does not necessarily mean good or effective lawmaking.

15. The principle benefits of reliance on the CCA is that its use is specifically targeted towards the emergency faced and it has inbuilt accountability mechanisms. Even if an extension over 28 days has a sunset clause as suggested in the consultation, the experience with the Prevention of Terrorism Act 1974 (PTA74) demonstrated that renewal can become formulaic¹³. Given the generally accepted wisdom that the current security threat may well outlast the one giving rise to the PTA74, it is likely that renewal might become effectively automatic. Far better to approach periods of extended detention without charge as context specific and subject to ongoing scrutiny. Under the CCA regulations have to be agreed by Parliament within seven days of passing and can only last 30 days (although they can be renewed at any time). They are also subject to judicial oversight. As the regulations are secondary legislation they can be struck down if incompatible with human rights protections. 'Human rights' have come under regular attack in recent years, and some critics might suggest that susceptibility to judicial determination as to compliance with the Human Rights Act 1998 might be a reason to oppose reliance on the CCA. However, we would emphasise that proportionality goes to the heart of the human rights framework. In a time of national emergency even severe restrictions on liberty can be justified if appropriate to the situation.

¹³ See for example the comments of Jack Straw as Home Secretary in 1999 at the time of the 25th Annual re POTA 1974
<http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990316/debtext/90316-39.htm>

16. Central to our belief that the CCA is the appropriate approach to the ‘nightmare scenario’ is that regulations are tailored to the situation and that the emergency cannot be extended indefinitely. Once laws are passed it is easy to allow them to remain on the statute book, possibly in perpetuity, even if they might no longer be justified.

17. The final suggestion put forward in the consultation is a move towards judge managed investigations similar to the model adopted in some civil code countries such as France and Spain. We would not support such a move and agree with the concern expressed in the paper that this would require ‘a major shift in the way in which cases are investigated and in the adversarial system of prosecution’.¹⁴ In any event the investigating magistrate approach comes with its own problems. The detention powers of the juge d’instruction process in France have been frequently re-legislated, in what is described as a ‘recurrent feature of the political agenda’¹⁵. There have also been criticisms that the remand provisions were being abused and that custody has been used to put pressure on suspects to provide a confession. France also has one of the highest numbers of remand prisoners in Europe.

18. We appreciate the Government’s concerns over public security should the ‘nightmare scenario’ arise. However, there is grave danger that legislating for such a scenario through extension beyond 28 days could become an excuse for inadequate preparation and an even graver danger of a significant undermining of the ordinary Rule of Law and the principle that criminal suspects should be charged “promptly” (within a few days of arrest). The CCA provides the proper framework for dealing with emergencies. There is no need for further action.

Other measures

19. The paper ‘Possible measures for inclusion in a future terrorism Bill’ contains several proposals not contained in the original Home Office paper. These include the prospect of notification requirement for those convicted of terrorism offences; the introduction of orders restricting foreign travel for convicted terrorists; and the

¹⁴ Page 11

¹⁵ Elliot C, French Criminal Law (Devon, Willan Publishing, 2001) p 35

prospect of travel document seizure. Notification requirements and travel restrictions are already imposed on those convicted of certain sex offences. We do not have an issue of principle with these in relation to sex offences and accept they could also be appropriately used against those convicted of terrorism offences. We might raise concerns over the detail of what offences are covered by travel orders; what details are required for notification; who is notified and so on. We will wait for further development of these suggestions. Of greater concern might be the removal of documents. The consultation does not specify the basis of removal and there is no mention of criminal investigation or of what threshold would be needed. We would be concerned about the exercise of this broadly expressed power and would like to see greater detail about what is being proposed.

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