



House of Lords
House of Commons
Joint Committee on
Human Rights

Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter- Terrorism Bill

Thirtieth Report of Session 2007-08



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Report, together with formal minutes

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), James Clarke (Committee Assistant), Emily Gregory (Committee Secretary) and John Porter (Chief Office Clerk).

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Summary

This is the thirteenth Report on aspects of the Government's counter-terrorism strategy we have published since the 2005 election, and the third to deal specifically with the Counter-Terrorism Bill. The main purpose of the Report is to draw together into one place the recommendations and proposed amendments to the Bill which we consider to be most significant and to summarise the reasons for our recommendations. We also draw attention to criticisms of the UK's counter-terrorism law and policy in recent reports by the Parliamentary Assembly of the Council of Europe, the UN Human Rights Committee and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

We reaffirm our earlier conclusions that:

- we have not seen any evidence which demonstrates that the level of threat from terrorism is growing; we call on Government to provide Parliament with the relevant evidence;
- we fail to see how the Government can plausibly claim that there is a pressing need to extend further the maximum period of pre-charge detention when the existing power to detain beyond 14 days is so rarely used and had not been used for well over a year;
- the Secretary of State's power to extend the maximum period of pre-charge detention to 42 days is too broad;
- the proposed safeguards relating to the use of the power are insufficiently strong to meet the human rights concerns which have been raised; and
- there is no need to make any provision for extending the maximum period of pre-charge detention beyond 28 days and, even if there were, the safeguards in the Bill are inadequate.

Consequently, we call on the Government to delete the provisions in the Bill which would extend the maximum period of pre-charge detention for terrorism offences to 42 days.

We pointed out in a previous Report that the Government can already derogate from ECHR rights in times of emergency and we explain in more detail how a detailed framework for any future derogation would provide a human rights complaint alternative to the Government's approach in the event that there were a genuine public emergency threatening the life of the nation.

In an earlier Report we noted that controversial provisions in the Bill relating to coroners' inquests had been put forward without any analysis of their implications for human rights. We publish correspondence on this issue and find it extremely regrettable that the Government has continued to fail to provide an accessible explanation for its view that the relevant clauses are compatible with Article 2 of the ECHR. We recommend that the provisions should be dropped from the Bill and made subject to proper consultation, in advance of the introduction of the proposed Coroners Bill.

We also recommend that the provisions relating to the admissibility of intercept evidence in court should be removed from the Bill until the recommendations of the recent Chilcot review are implemented.

1 Introduction

Background

1. We have already reported a number of times on the main human rights issues raised by this Bill, in the following reports:

- (1) Prosecution and Pre-Charge Detention¹
- (2) 28 days, intercept and post-charge questioning²
- (3) 42 Days³
- (4) Annual Renewal of Control Orders⁴
- (5) Counter-Terrorism Bill before Second Reading in the Commons⁵
- (6) Counter-Terrorism Bill as it came out of Public Bill Committee in the Commons⁶
- (7) 42 Days and Public Emergencies⁷
- (8) Annual Renewal of 28 Days.⁸

2. Those reports are part of an ongoing series of reports during this Parliament in which we have subjected the Government's counter-terrorism policy to detailed scrutiny for human rights compatibility. This is the thirteenth report in that series. One of the purposes of this ongoing detailed scrutiny has been to build up a corpus of expertise in our Committee, and an understanding of the issues, which will enable us to make a constructive contribution to the debate, including by making our own recommendations of human rights compatible measures which can be taken to counter terrorism. To this end, we have made a number of detailed recommendations, many of which could be implemented by amendment of the current Bill.

3. The main purpose of this Report is to draw together into one place the recommendations and proposed amendments to the Counter-Terrorism Bill that we consider to be the most significant and to summarise our reasons for making those

¹ Twenty-fourth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention*, HL Paper 240/HC 1576 (hereafter "Report on Prosecution and Pre-charge Detention").

² Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157/HC 394 (hereafter "Report on 28 days, intercept and post-charge questioning").

³ Second Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights: 42 days*, HL Paper 23/HC 156 (hereafter "Report on 42 days").

⁴ Tenth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, HL Paper 57, HC 356 (hereafter "Report on Control Orders renewal").

⁵ Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL Paper 50/HC 199 (hereafter "First Report on Counter-Terrorism Bill").

⁶ Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*, HL Paper 108/HC 5549 (hereafter "Second Report on Counter-Terrorism Bill").

⁷ Twenty-first Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, HL Paper 116, HC 635 (hereafter "Report on 42 Days and Public Emergencies").

⁸ Twenty-fifth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008*, HL Paper 132, HC 825 (hereafter "Report on 28 Days Renewal").

recommendations. We do not repeat the more detailed analysis in our previous reports and readers of this report interested in a particular recommendation may therefore need to refer to some of our earlier reports for elaboration of the reasoning behind the recommendations. Where possible we have sought to cross-refer to those earlier reports to make this task easier.

4. This Report also takes into account, where relevant, the concerns recently expressed by various international bodies about the human rights compatibility of certain aspects of the Bill and some other aspects of the UK's counter-terrorism laws.

Recent developments: concerns of international monitoring bodies

5. Since we last reported on the Bill in June, a number of international monitoring bodies have expressed human rights concerns about specific aspects of the UK's counter-terrorism laws, and about the 42 days proposal in the current Bill in particular:

- The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, in a report on the 42 days proposal published on 30 September 2008, expressed serious doubts as to the compatibility of the 42 days proposal with the requirements of the ECHR and the Strasbourg Court's case-law;⁹
- The UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, issued its Concluding Observations on the UK on 30 July 2008, in which it expressed concern about the 42 days proposal in the Bill, as well as concerns about the control orders regime and about terrorism suspects' right of access to a lawyer;¹⁰
- The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), which monitors compliance with the European Convention of that name, published on 1 October 2008 its report to the UK Government following its visit to the UK in December 2007, in which it expressed concerns about both the current and proposed length of pre-charge detention for terrorism suspects, about safeguards against ill-treatment including the right of access to a lawyer and to be brought physically before a judge rather than by video-link when pre-charge detention is extended.¹¹

6. Where relevant, we refer to these reports in more detail below.

⁹ *Proposed 42-day pre-charge detention in the United Kingdom*, Report of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 29 September 2008 (hereafter, "the PACE Report on 42 Days").

¹⁰ *Concluding Observation of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/6, 30 July 2008 (hereafter, "the UN Human Rights Committee's Concluding Observations").

¹¹ *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 6 December 2007*, CPT/Inf (2008) 27, 1 October 2008 (hereafter, "the CPT Report"). The Government's response is in CPT/Inf (2008) 28.

2 Pre-charge Detention

Background

7. The Bill provides for the extension of the maximum amount of time that terrorism suspects can be detained before charge to 42 days.¹² It introduces a new “reserve power” which allows prosecutors to apply to a judge for an extension of a terrorism suspect’s detention beyond the current limit of 28 days and the judge to grant such extensions in periods of up to 7 days up to a maximum of 42 days.¹³

8. The reserve power to apply for and extend pre-charge detention of terrorism suspects beyond 28 days and up to 42 days is made available by the Secretary of State declaring, by order, that the power is exercisable.¹⁴ Such an order can only be made by the Secretary of State at a time when the maximum period of detention is already 28 days¹⁵ and when the Secretary of State has received a report from the DPP (or equivalent in Scotland and Northern Ireland) and the police of the “operational need” for a further extension to 42 days.¹⁶

9. The Secretary of State considers that these provisions are compatible with the right to liberty in Article 5 ECHR.¹⁷ The Explanatory Notes to the Bill proceed, correctly, from the premise that “there is no specific European Court of Human Rights jurisprudence on the length of time that a person can be detained before he is charged but there is the overarching principle that detention under Article 5 must not be arbitrary.”¹⁸ The Government argues that pre-charge detention for up to 42 days is not arbitrary because of the various safeguards contained in the Bill and in the law which already applies to the extension of pre-charge detention.¹⁹

10. We have set out our views on the human rights compatibility of the Government’s proposal to extend the maximum period of pre-charge detention to 42 days at length in previous reports.²⁰ We have not, however, previously reported in detail on many of the safeguards which were first introduced by the Government at Report Stage in the Commons.²¹ We exchanged correspondence with the Home Secretary about those amendments,²² and that correspondence was placed in the Library on the day of the debate, but we have not so far reported on those safeguards in the light of the Home Secretary’s response to our questions and the debate in the Commons. Here we summarise our views

¹² Clauses 22 to 31 and Schedule 2 to the Bill.

¹³ Schedule 2, Part 1, adding a new Part 4 to Schedule 8 of the Terrorism Act 2000 which governs the pre-charge detention of individuals arrested under s. 41 of that Act (persons reasonably suspected of being a terrorist).

¹⁴ Clause 23(1).

¹⁵ In other words, when an order is already in force extending the maximum period of detention from 14 to 28 days under s. 25 of the Terrorism Act 2006: Clause 23(2)(a).

¹⁶ Clause 23(2)(b).

¹⁷ EN paras 304-309.

¹⁸ EN para. 306.

¹⁹ EN para. 308.

²⁰ See in particular Report on 42 Days, paras 24-101; First Report on Counter-Terrorism Bill, paras 10-21; Second Report on Counter-Terrorism Bill, paras 22-26.

²¹ Our last report on the Bill, *42 Days and Public Emergencies*, published on 2 June 2008, commented on the Government’s likely amendments to the Bill to introduce additional safeguards, but was drafted and agreed before the text of the actual amendments had been published.

²² Letter to the Home Secretary, 9 June 2008 (Appendix 4); Letter from the Home Secretary, 11 June 2008 (Appendix 5), Twenty-fourth Report of Session 2007-08

about whether such an extension has been shown to be necessary and the adequacy of the safeguards in the Bill, and we bring together in one place our main recommendations about pre-charge detention.

The PACE Report on 42 Days

11. On 30 September 2008 the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe reported that it has “serious doubt as to the compatibility of certain elements of draft counter-terrorism legislation in the United Kingdom with the requirements of the European Convention on Human Rights and the Strasbourg Court’s case-law.” The PACE Committee examined the proposal in detail and concluded that the detention of terrorism suspects for up to 42 days without charge, with limited judicial review, can lead to arbitrariness, in breach of the right to liberty and security in Article 5 ECHR and the right to a fair trial in Article 6 ECHR. It also found the proposed legislation “unduly complicated and not readily understandable” and found the proposal to involve the legislature in the extension of pre-charge detention in specific cases to be unacceptable because it fails to maintain a clear separation of powers between the judicial and legislative functions.

12. **The publication of a report by a Committee of the Parliamentary Assembly expressing human rights concerns about draft legislation still pending before the Parliament of a member state of the Council of Europe is extremely unusual.** The Committee’s “strong reservations” about publishing such a report on a draft law which has not yet been enacted by a national parliament are expressed in the Report,²³ but nevertheless the human rights issues raised by the 42 days proposal in the Counter-Terrorism Bill were considered to be of sufficient general importance to all member states of the Council of Europe to merit general attention. The significance of this intervention, from a body which is well aware of the limits of its role, therefore should not be underestimated.

13. The PACE Committee Report proceeds from the same premise as the Government’s analysis in the Explanatory Notes to the Bill: the ECHR does not require a formal charge to be taken within a specific time, but only sets out procedural requirements that must be fulfilled during any detention prior to conviction, as stipulated in Article 5 ECHR.²⁴ “In ECHR terms, the crucial question is not that of how long a terrorist (or any other) suspect can be detained without ‘charge’, but rather whether the conditions and circumstances and the safeguards under which a suspect may be held are in compliance with the minimum common procedural requirements of Articles 5(1)(c), 5(2), 5(3) and 5(4) of the ECHR.”²⁵

14. Many of the more detailed findings of the PACE Committee about the human rights compatibility of the 42 days proposal accord with the conclusions we have expressed in previous reports. The PACE Committee also endorses a number of recommendations we have made in the past about the changes necessary to render the legal framework governing pre-charge detention human rights compatible. In short, **the PACE Committee**

²³ PACE Report, para. 1.

²⁴ Para. 31.

²⁵ Para. 32.

concludes that the 42 days proposal may not be compatible with the ECHR because it is not accompanied by sufficient legal safeguards:

- by allowing a person to be arrested on reasonable suspicion of having done something which is not a criminal offence, the UK's counter-terrorism law may be in breach of Article 5(1)(c) of the Convention, which requires that a person may only be arrested on reasonable suspicion of having committed an offence;²⁶
- the existing law does not expressly provide that the detained person is informed at all of the reasons for his or her arrest, contrary to Article 5(2) ECHR, a deficiency which could be corrected by imposing more stringent requirements about the information which must be contained in the statutory notice given to a suspect before a hearing;²⁷
- the limited review that the judge currently undertakes of whether the underlying facts at least give rise to a reasonable suspicion that the detained person has committed an offence does not appear to meet the standards laid down in Articles 5(3) and (4) ECHR;²⁸
- the fact that both the current law and the 42 days proposal would enable a person to be continuously detained without, in certain cases, having immediate access to a lawyer, without having been legally represented and without having had access to relevant information in proceedings that concern his or her right to liberty gives rise to serious concerns as to compatibility with Articles 5(3) and (4) and 6(1) and (3) ECHR;²⁹
- the length of time during which the person may be detained and the suspect's lack of information on the reasons for his detention increase the risk that the threshold of inhuman or degrading treatment may be exceeded, contrary to Article 3 ECHR;³⁰
- these shortcomings in the legal safeguards cannot be compensated by a complicated system of parliamentary oversight which seems to be ineffective, easy to circumvent and which appears to infringe the separation of powers.³¹

15. The PACE Committee also concluded that, rather than developing a questionable parliamentary safeguard, the UK Government might want instead to improve the existing judicial safeguards whilst at the same time including the possibility of a derogation from the Convention in its counter-terrorism legislation.³² We return to this important point about derogation in the following chapter.

²⁶ Paras 34-36. A person may be arrested under s. 41 of the Terrorism Act 2000 if they are suspected of being involved in the commission, preparation or instigation of a terrorist offence, but "instigation" is not itself a criminal offence.

²⁷ Paras 37-40. The PACE Committee's recommendation is based on our own recommendation in our Report on 42 Days, above, at para. 89.

²⁸ Paras 41-47. The PACE Committee's concerns reflect those expressed by us in our reports.

²⁹ Paras 48-54

³⁰ Para. 55. See also the recent CTP Report for the same concern about the 42 days proposal. And see our own reports on, e.g. the Terrorism Bill 2006 (Third Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I, HC 561-I at para. 86)

³¹ Para. 56. Cf. our own concerns about the effectiveness of the parliamentary safeguards: see e.g. Report on 42 Days and Public Emergencies at.

³² Para. 57. The recommendation endorses our own recommendations in previous reports.

Is there a current need to extend pre-charge detention to 42 days?

The “growing” threat from terrorism

16. At Report Stage in the Commons, the Home Secretary said that one of the arguments for the 42 days proposal “is the growing scale of the threat that we face” and she referred to her belief that “the threat is now greater” than it was when Parliament debated the proposal to extend the maximum to 90 days.³³

17. This claim that the threat has increased and continues to grow raises again the many questions we have asked in the past about exactly what evidence exists to support this claim.³⁴ We do not underestimate the seriousness of the threat this country faces from terrorism, but when the Government seeks more extensive counter-terrorism powers on the basis of broad assertions about a “growing” threat, it is vital that it produce to Parliament the evidence on which those assertions are based.

18. In previous Reports we have concluded that we have not seen any evidence to suggest that the level of the threat from terrorism had increased since the previous year, and that the evidence that we had seen suggested that the threat level remained about the same as it had been the previous year. At Report stage in the Commons the Home Secretary said that it was the Director General of the Security Service’s description of the scale of the threat that has led the Government to consider what sort of response it needs to make, and she referred to his “concerns about 2,000 individuals, 200 networks and 30 plots.”³⁵ We considered this assertion in an earlier report, and we indicated that it is not satisfactory to infer an increase in the level of the threat from bare statistics about the number of people of concern to the security services, or the suspected number of networks, in the absence of more qualitative analysis.

19. We also point out that we have still not received any response to the letter we wrote, in December 2007, to the Director General of the Security Service, Jonathan Evans. We asked whether the level of threat from terrorism had increased since June 2007, if so, to what extent. We also asked him to provide us publicly with as much information about the basis of his assessment of the increase in the threat level as possible, consistent with the obvious public interest in not disclosing information which would harm national security.³⁶

20. We still have not seen any evidence which demonstrates that the threat level is growing. We remain firmly of the view that the questions we have consistently raised about the precise evidential basis for assertions by Ministers and others that the threat from terrorism is “growing” have never been satisfactorily answered. We once again recommend that the Government provides Parliament with the evidence on which it relies when it says that the threat from terrorism is growing; if this is not done, we draw the attention of both Houses to the absence of such evidence.

21. In any event we question whether generalisations about the scale of the threat are relevant at all to the appropriate length of pre-charge detention. A longer period of pre-

³³ HC Deb 11 June 2008 col. 326.

³⁴ Report on 42 Days, paras 24-33.

³⁵ HC Deb 11 June 2008 col. 326.

³⁶ Letter to Director-General of MI5, 5 December 2007, Appendix 8 to Report on 42 Days.

charge detention is neither a pre-arrest investigative tool nor a deterrent. What is relevant to the debate about 42 days is not the general level of the threat but the amount of time that is required by investigators following arrest, and that is a question on which there is so far no evidence demonstrating the need for any longer period than the 28 days which currently exists.

The use made of the 28 day period

22. We pointed out in our Report on 42 Days and Public Emergencies that the use which is being made of existing powers to detain pre-charge is of vital importance when assessing the necessity to extend those powers still further.³⁷ At that time the information about the use which has been made in practice of the power to detain for more than 14 days was not publicly available.

23. We now know, however, that no terrorism suspect has been held for more than 14 days since the extended power to detain pre-charge for up to 28 days was renewed the time before last, in July 2007.³⁸ We also know that the power to detain for more than 14 days has only ever been used in a handful of cases. **We fail to see how the Government can plausibly claim that there is a pressing necessity to extend further the maximum period to 42 days (which is the standard it has to meet) when the existing power to detain for more than 14 days pre-charge has only ever been used in a small number of cases and has not been used at all for well over a year.**

Conclusion on necessity

24. For the reasons expressed above and in previous reports, we remain firmly of the view that the Government has failed to demonstrate the necessity for extending the maximum period of pre-charge detention of terrorism suspects beyond the current limit of 28 days.

The adequacy of the safeguards

25. The Government argues that the Bill contains sufficient safeguards to meet any human rights concerns about the compatibility of the 42 day proposal with the right to liberty.

(1) The threshold: a “grave exceptional terrorist threat”

26. After making an order declaring the reserve power to be exercisable, the Secretary of State is required to lay before Parliament a statement stating that she is satisfied, amongst other things, that “a grave exceptional terrorist threat” has occurred or is occurring.³⁹ A “grave exceptional terrorist threat” is defined⁴⁰ to mean an event or situation involving terrorism which causes or threatens

(a) serious loss of human life,

(b) serious damage to human welfare in the UK, or

³⁷ Report on 42 Days and Public Emergencies, paras 10-12.

³⁸ Report on Annual Renewal of 28 Days 2008, at para. 24.

³⁹ Clause 27(2)(a).

⁴⁰ Clause 22(1).

(c) serious damage to the security of the UK.

27. “Damage to human welfare” is further defined to include human illness or injury; homelessness; damage to property; disruption of a supply of money, food, water, energy or fuel; disruption of a system of communication; disruption of facilities for transport; or disruption of services relating to health.⁴¹ The event or situation involving terrorism may be outside the UK, and includes “planning or preparation for terrorism” which, if carried out, would cause or threaten one of the harms set out.⁴²

28. The reserve power will only be available in relation to investigations “that relate to the commission by the detained person or persons of a serious terrorist offence.”⁴³ “Serious terrorist offence” is defined to mean an offence under the Terrorism Act 2000 or the Terrorism Act 2006, or any offence that has a terrorist connection, which carries a sentence of life imprisonment.⁴⁴

29. The Government argues that the provisions in the Bill defining the trigger in terms of a grave exceptional terrorist threat and in relation to investigations into the most serious terrorist related offences constitute important safeguards. They claim that the tight definition of the circumstances in which the power to extend detention to 42 days could be used will ensure that it is only used in very exceptional circumstances.

30. We are not persuaded that the Bill as drafted will ensure that the power to extend pre-charge detention to 42 days could only be used in very exceptional circumstances. In our view, the Secretary of State’s power to extend the maximum period of pre-charge detention to 42 days is too broad.

31. First, the definition of a “grave exceptional terrorist threat” in the Bill includes events or situations which fall well short of constituting a genuine emergency in any meaningful sense of that word. A terrorist threat is always grave, given the seriousness of the harm which it might cause, and there is nothing in the definition of “grave exceptional terrorist threat” to confine the reserve power to situations such as “two or three 9/11s on one day” or the other extreme scenarios which the Government has said it wishes to ensure are provided for.

32. Second, the definition of a “serious terrorist offence” is also extremely broad. The new offence of “acts preparatory to terrorism”, for example, carries a maximum sentence of life imprisonment, and virtually any terrorism investigation will include an investigation into the possibility that the suspect has committed that offence. This makes the definition of the trigger in the Bill very much wider than that in the Civil Contingencies Act.

33. When we put these concerns to the Home Secretary,⁴⁵ she denied that the reserve power could be made available “simply because the police were investigating a terrorism offence that carries a sentence of life imprisonment. For example, it could not be used in relation to an investigation into a plot to kidnap and maim a group of people because this would not constitute serious loss of human life or serious damage to human welfare or the

⁴¹ Clause 22(2). The list is exhaustive.

⁴² Clause 22(3).

⁴³ Clause 24(3)(a).

⁴⁴ Clause 24(4).

⁴⁵ Letter to the Home Secretary, 9 June 2008.

security of the UK."⁴⁶ We do not understand why the power would not be available in relation to such an investigation. The plot would clearly threaten “serious damage to human welfare” and to “security”, both of which are expressly included in the definition of a “grave exceptional terrorist threat”. Despite the Home Secretary’s denial, it is clear to us that the power could be made available in relation to *any* investigation of a terrorism/terrorism-related offence carrying a life sentence. The “grave exceptional terrorist threat” requirement is easily satisfied by the mere fact that the investigation is into the possibility that such an offence has been committed.

34. The Home Secretary also argues that it is not the case that every investigation into a possible terrorism/terrorism-related offence may result in the suspect being charged with an offence which carries a possible sentence of life imprisonment. She says that this is because an investigation into, e.g. membership of a proscribed organisation, fundraising for terrorist purposes, provision of false passports or encouragement of terrorism “would not involve offences carrying a sentence of life imprisonment.” We accept, of course, that there are terrorism offences that do not carry sentences of life imprisonment. But, given the seriousness of terrorism, and the breadth of offences such as acts preparatory to terrorism which carry life sentences, every investigation into a possible terrorism offence must be an investigation which *may* result in the suspect being charged with an offence carrying a possible life sentence.

35. We are therefore concerned that the Government’s definition of the “exceptional” nature of the threat fails to provide any guarantee that the power will only be used in truly exceptional circumstances. Not only does it fall well short of any meaningful sense of being an “emergency power”, it is so broad as to make the power in principle capable of being applied in relation to virtually any terrorism investigation.

36. The Government accepts that the new trigger condition of a “grave exceptional terrorist threat” would have been satisfied in relation to the investigation into the alleged Heathrow bomb plot in 2006.⁴⁷ Indeed, the Home Secretary states that in the Government’s view “it is absolutely right that it should be so covered.” We cannot see the justification for this. In that case, all those charged with terrorism offences were charged within the 28 day period. A new power cannot be necessary to cover a situation in respect of which current powers were adequate. Three suspects, though, were released without charge towards the very end of the 28 day period, and have not subsequently been charged. Had the 42 day period been available, it is possible that they might have been detained for even longer before being released without charge.

(2) Parliamentary scrutiny

37. The Bill provides for parliamentary scrutiny of the Secretary of State’s order declaring the reserve power to be exercisable, by requiring that the order be laid before Parliament “as soon as is reasonably practicable” and providing that it shall lapse at the end of seven days from laying unless approved by a resolution of each House.⁴⁸ Other provisions in the Bill are intended to make parliamentary scrutiny effective. For example after making an

⁴⁶ Letter from the Home Secretary, 11 June 2008.

⁴⁷ Letter from Home Secretary, 11 June 2008.

⁴⁸ Clause 28(1).

order declaring the reserve power to be exercisable, the Secretary of State is required to lay before Parliament a statement that she is satisfied that a grave exceptional terrorist threat has occurred or is occurring, that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible, that the need for that power is urgent and that the provision in the order is ECHR compatible.⁴⁹

38. The Government argues that the opportunity for parliamentary scrutiny within seven days of the order being made is an important safeguard against the power being used arbitrarily.

39. We have pointed out in previous reports on this Bill that any parliamentary debate will be so circumscribed by the need to avoid prejudicing future trials as to be a virtually meaningless safeguard against wrongful exercise of the power.⁵⁰ However, as a result of the Government amendments brought forward at Report stage in the Commons, it is now clear that the scope of any parliamentary debate will be even more circumscribed than we had previously appreciated.

40. This is because the test to be applied by the Secretary of State when deciding whether or not to make the order to make the reserve power available (and therefore the questions to be decided by Parliament when it considers whether or not to approve the order made by the Secretary of State), is in important respects identical to the test which will have to be applied by the court when deciding whether to authorise further detention of an individual suspect. There is therefore a risk that the parliamentary debate will not only prejudice possible future trials, but will prejudice some of the very issues which a court will have to decide very shortly after the parliamentary debate, when an application is made to a court to extend the detention of the suspects who are already being investigated.

41. The questions for the court which is asked to extend pre-charge detention in relation to a particular suspect are whether (a) there are reasonable grounds for believing that the further detention is necessary and (b) the investigation is being conducted diligently and expeditiously. Further detention is necessary for these purposes if it is necessary:

- (a) to obtain relevant evidence, whether by questioning him or otherwise;
- (b) to preserve relevant evidence, or
- (c) pending the result of an examination or analysis of any such evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining such evidence.⁵¹

42. To make the reserve power available, the Secretary of State must be satisfied that it is “needed for the purpose of investigating the threat and bringing to justice those responsible.”⁵² That decision will be made by the Secretary of State in the light of the report from the DPP and police that they are satisfied that there are reasonable grounds for

⁴⁹ Clause 27

⁵⁰ See e.g. Second Report on the Counter-Terrorism Bill

⁵¹ Para 32(1) and (1A) of Schedule 8 to the Terrorism Act 2000.

⁵² Clause 27(2)(b).

believing that the detention of one or more persons beyond 28 days will be necessary for one or more of the following purposes:⁵³

- (a) to obtain, whether by questioning or otherwise, evidence that relates to the commission by the detained person or persons of a serious terrorist offence,
- (b) to preserve such evidence, or
- (c) pending the result of an examination or analysis of any such evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining such evidence.

43. The DPP and police must also be satisfied that “the investigation in connection with which the detained person or persons is or are detained is being conducted diligently and expeditiously.”⁵⁴

44. These are exactly the same questions as the court will have to decide when it hears the application for an extension of time in relation to the individual, which will take place shortly after the parliamentary debate.

45. Before making an order making the reserve power available, the Secretary of State is also required to obtain independent legal advice as to whether she can be properly satisfied of various matters.⁵⁵ Those matters include that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible.⁵⁶ In order to be able to advise the Secretary of State about the need for the reserve power in this sense, the independent lawyer will have to ask the same questions as the DPP and police address in their report, which are also the same questions as the court itself will have to ask when deciding whether or not to grant a further extension of detention in relation to the particular suspect.

46. The Secretary of State then has to decide, in the light of this material, whether she is satisfied that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible. If she is satisfied of that and the other relevant matters, she may make the order declaring the reserve power to be exercisable, and must lay before Parliament both a copy of the independent legal advice, and a statement containing such of her reasons for her decision as she considers appropriate. Neither the legal advice nor the Secretary of State’s statement should contain any material which might prejudice the prosecution of any person.

47. So the scheme of the Bill is:

- (1) the DPP and police make a report to the Secretary of State in essentially the same terms as they will later make in an application to court to extend the individual suspect’s detention;
- (2) An independent lawyer advises the Secretary of State on essentially the same issues as the court will later have to determine;

⁵³ Clause 24(2)(a) and (3)

⁵⁴ Clause 24(5).

⁵⁵ Clause 25.

⁵⁶ Clause 25(1).

(3) The Secretary of State decides whether to make the order, which requires her to be satisfied of the same matters as the court will later have to be satisfied;

(4) Parliament decides whether to approve the Secretary of State's order.

48. We asked the Home Secretary whether it was acceptable for Parliament to debate whether there are reasonable grounds for believing that any individual should be detained or whether a particular investigation into an individual was being conducted diligently or expeditiously.⁵⁷ The Home Secretary replied that these are matters for the police, prosecutors and courts, and not for Parliament to debate. The Home Secretary nevertheless denied that Parliament is unable to debate in any meaningful sense whether the reserve power is needed.⁵⁸ She says that Parliament can have a full and meaningful debate on whether the reserve power should be made available, including "whether the Home Secretary's decision was properly founded and all the statutory requirements have been met."

49. We do not accept that Parliament can have a full and meaningful debate about whether the Home Secretary's decision was well-founded. One of the most important statutory requirements is that the Home Secretary must be satisfied that the reserve power is "needed for the purpose of investigating the threat and bringing to justice those responsible."⁵⁹ To answer that question, as the Home Secretary herself acknowledges, information about whether there are reasonable grounds to detain a particular individual and whether the investigation is being conducted diligently and expeditiously is included in the report from the DPP/police to the Home Secretary "as part of the information that is *necessary* to enable the Home Secretary to decide whether the reserve power should be made available."⁶⁰ But, on the Home Secretary's own admission, Parliament should not debate it.

50. Parliament will not be able to debate "whether the Home Secretary's decision was properly founded and all the statutory requirements have been met", as the Secretary of State claims. To do so it would have to debate matters which the Home Secretary herself accepts are matters for the police, prosecutors and the courts, not Parliament. In our view this shows how limited a safeguard parliamentary scrutiny of such a power can ever be.

51. We are gravely concerned by the extent to which the Bill seeks to give, first, to the Secretary of State and then to Parliament what is really, by its nature, an inherently judicial function, namely the power to determine whether the further detention of an individual suspect is necessary. In order to avoid pre-judging the very issues which the court will be asked to determine shortly after Parliament approves the order, the material before Parliament (including the independent legal advice) will therefore have to be limited and the parliamentary debate itself will also have to be correspondingly circumscribed, avoiding any consideration of whether the further detention of the particular suspect or suspects is necessary.

⁵⁷ Letter to Home Secretary, 9 June 2008.

⁵⁸ *Ibid.*, Q5.

⁵⁹ Clause 27(2)(b).

⁶⁰ Letter from the Home Secretary, 11 June 2008, Q4 (emphasis added).

(3) Parliamentary review

52. The Bill provides that the statutory reviewer of terrorism legislation will report to the Secretary of State within 6 months of the reserve power ceasing to be available.⁶¹ The report will cover matters such as whether it was reasonable in all the circumstances for the Home Secretary to make the order bringing the extended 42 day period into effect,⁶² and whether, in relation to each case in which a suspect was held for more than 28 days, the applicable procedures for extending detention beyond 28 days were properly followed and other legal requirements and Codes of Practice complied with.⁶³ The reviewer's report must be laid before Parliament by the Secretary of State as soon as reasonably practicable,⁶⁴ so there would be an opportunity for a parliamentary debate on the reviewer's report.

53. The Home Secretary argues that the report by the statutory reviewer, and the accompanying parliamentary debate, are an important addition to the parliamentary oversight of the reserve power as they will enable Parliament to consider in some detail how the power has operated in practice.⁶⁵ She says that one of the purposes of requiring the reviewer to provide a report to Parliament on whether the detention of individual suspects for more than 28 days was in accordance with the relevant legislation and codes of practice is to meet the concern that we have previously raised about not having enough information about the operation of pre-charge detention.

54. We welcome in principle any strengthening by the Government of arrangements for properly informed parliamentary review of the operation of extraordinary measures with serious human rights implications. However, we doubt whether in practice a parliamentary debate about the reviewer's report 6 months after the event will be a very valuable safeguard, because the parliamentary debate will be severely constrained by the risk of prejudice to a future trial.

55. The Home Secretary acknowledges the possible overlap of issues dealt with in the reviewer's report and at a subsequent trial (for example, whether the detainee was held in breach of any of the PACE Codes), but merely asserts that "it is perfectly possible for the proposed report to address whether the pre-charge detention procedures have been met without prejudicing any trial. If the detainee was held in breach of the PACE codes, the defence could raise this issue at trial in any event and seek to have evidence excluded."

56. In our view this is wholly unrealistic. For Parliament to debate whether there had been a breach of the PACE Codes in the case of an individual who is awaiting trial, who may intend to apply to have evidence excluded from the trial on that basis, would clearly risk prejudicing the fairness of the subsequent trial and would fall foul of Parliament's *sub judice* rule which is designed to prevent such prejudice. It would clearly not be a matter for Parliament to consider when it debated the reviewer's report.

57. We doubt whether a parliamentary debate on the reviewer's report would in practice be able to provide a meaningful safeguard against wrongful exercise of the reserve power, when any such debate will almost certainly take place before any trial of

⁶¹ Clause 31(1).

⁶² Clause 31(2).

⁶³ Clause 31(4).

⁶⁴ Clause 31(7).

⁶⁵ Letter from Home Secretary, 11 June 2008.

the suspects who were the subject of the extension. Parliamentary debate will therefore be severely circumscribed by the need not to prejudice any future trials.

(4) Judicial safeguards

58. As we have consistently said in previous reports, decisions concerning the liberty of particular individuals require judicial not parliamentary safeguards. However, the Bill still does nothing to improve the judicial safeguards surrounding the extension of pre-charge detention. We have found those safeguards to be inadequate because of the power both to exclude the suspect and their lawyer and to withhold from them information which is seen by the judge. We asked the Home Secretary why the Government had decided not to include any additional judicial safeguards for the individual at the hearings for extension of further detention when this was something on which it had explicitly consulted.

59. The Home Secretary's answer on judicial safeguards is that hearings of applications to extend detention are already fully adversarial and therefore compatible with Article 5 ECHR, because the suspect is entitled to be legally represented and "to be present at the open part of the hearing" and the information provided to the suspect both in writing in advance and during the proceedings through representations and evidence is "extensive".⁶⁶ She says it is enough to comply with the requirements of Article 5 that the suspect be brought before a judge within 48 hours and that thereafter there is continuing judicial approval of the need to detain the suspect. The extension of pre-charge detention beyond 28 days is therefore said to raise no new legal issues in this respect because the current judicial safeguards will all apply and if those safeguards were incompatible with Article 5 we could expect them to have been challenged by now in Strasbourg or in our own courts under the HRA.

60. The Home Secretary's description of extension hearings as "fully adversarial" is incorrect in ECHR terms. The powers to exclude the suspect from the hearing and to withhold information from them which goes before the judge, without any provision for representation by a special advocate, is a clear breach of the right to an adversarial hearing which is required by Article 5 ECHR even at a hearing to decide whether to extend pre-charge detention. This is clear from the decision of the European Court of Human Rights in *Garcia Alva v Germany*, cited in our Report on 42 days at para. 76, which prescribed a certain minimum content for a procedure to count as a "judicial procedure" for the purposes of Article 5:

"39. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention".

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of

⁶⁶ Letter of 5 June 2008 responding to Second Report on Counter-Terrorism Bill.

arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required

...

The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer."

61. The evidence we received on this issue does not support the Government's assertion that the information received by suspects is "extensive". On the contrary, we heard that they are told very little about the reasons for being detained and therefore have very little that they can challenge at extension hearings.

62. Even if the safeguards for detention up to 28 days were adequate, it is not correct to say that extending pre-charge detention beyond 28 days raises no new legal issues. The longer the period of pre-charge detention, the more stringent the procedural protections should be to ensure against arbitrary detention.

(5) Judicial review

63. The Government has indicated that it considers that the Home Secretary's decision to make an order declaring the reserve power to be exercisable would be amenable to judicial review by the courts.⁶⁷ The possibility of judicial review of the Secretary of State's order making the reserve power exercisable is in principle an important safeguard against its wrongful use. **The Government's clarification that the lawfulness of the Secretary of State's order will be controlled by the courts is therefore welcome.** However, the Bill in its present form leaves considerable uncertainty about two important questions:

- (a) whether a court could quash the order for incompatibility with the right to liberty under the Human Rights Act; and
- (b) the precise grounds on which judicial review of the order could be sought.

(a) Can courts quash the order for breach of the right to liberty in Article 5 ECHR?

64. The first uncertainty concerns whether the order can be quashed by the courts on judicial review on the ground that it is incompatible with the right to liberty in Article 5

⁶⁷ Letter from Home Secretary, 11 June 2008, Q9.

ECHR. This is an important question because breach of Article 5 is likely to be one of the main grounds on which any challenge to the lawfulness of the order could be made.

65. Under the Human Rights Act, subordinate legislation which is incompatible with a Convention right can be quashed by the courts. Primary legislation, however, cannot be quashed by the courts if it is found to be incompatible with a Convention right, it can only be declared incompatible.⁶⁸ A declaration of incompatibility leaves the provision in question in force until Parliament decides whether to repeal or revoke it.

66. The Secretary of State's order declaring the reserve power exercisable looks to all intents and purposes like subordinate legislation. However, the Human Rights Act defines "subordinate legislation" for the purposes of that Act to mean "any ... order ... made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force)".⁶⁹ It is not clear from the Bill whether, for the purposes of the Human Rights Act, the Secretary of State's order declaring that the reserve power is exercisable is an order bringing the reserve power in the primary legislation into force. If it is such an order, it constitutes primary legislation for the purposes of the HRA and cannot be quashed if it is found by the courts to be incompatible with the right to liberty in Article 5.

67. In the Civil Contingencies Act, there is an express provision to make clear that emergency regulations made under that Act "shall be treated for the purposes of the Human Rights Act 1998 as subordinate legislation and not primary legislation (whether or not they amend primary legislation)."⁷⁰ That provision was inserted by the Government in response to concerns expressed by the JCHR and others about whether emergency regulations could be quashed by the courts under the Human Rights Act. There is no equivalent provision in relation to the order making the reserve power available in the Counter-Terrorism Bill.

68. In view of this uncertainty, we asked the Home Secretary whether it is the Government's intention that the Secretary of State's order declaring that the reserve power is exercisable is primary or subordinate legislation for the purposes of the Human Rights Act.⁷¹ The Home Secretary's response did not answer this important question, but merely stated that the Government considers that the order would be amenable to judicial review.

69. Whether the Secretary of State's order declaring the reserve power to be exercisable is primary or subordinate legislation for the purposes of the Human Rights Act is an important question, because if it is to be treated as primary legislation it can only be declared incompatible, and not invalidated, if found by a court to be in breach of Convention rights. In the absence of a clear answer from the Government about the intention behind the Bill in this respect, **we recommend that, if these provisions are not deleted, the Bill be amended to include an equivalent provision to that in the Civil Contingencies Act, making clear that the Secretary of State's order shall be treated for the purposes of the Human Rights Act as subordinate legislation and not primary legislation.**

⁶⁸ Under s. 4 HRA 1998.

⁶⁹ S. 21(1)(f) HRA 1998.

⁷⁰ Civil Contingencies Act 2004, s. 30(2).

⁷¹ Letter to Home Secretary, 9 June 2008, Q9.

Page 17, line 21, insert

‘(4) An order under this section shall be treated for the purposes of the Human Rights Act 1998 as subordinate legislation and not primary legislation.’

(b) On what grounds can the order be challenged in court?

70. The second uncertainty about the scope for judicial control concerns the grounds on which the Secretary of State’s order could be judicially reviewed.

71. Under the Bill, there are two preconditions to the making of an order by the Secretary of State declaring that the reserve power is exercisable:

- (1) an order extending the maximum period of pre-charge detention to 28 days⁷² must already be in force; and
- (2) the Secretary of State must have received the necessary report from the DPP and the police stating the operational need for a further extension.

72. It is clear that these are preconditions to the exercise of the power: the Bill provides expressly “No such order may be made unless-”.⁷³ The order could clearly be challenged by way of judicial review on the basis that one of these conditions was not satisfied and the order is therefore unlawful for that reason.

73. The Bill also provides that the Secretary of State must lay a statement before Parliament, after making the order, stating that she is satisfied of four things:

- (a) that a grave exceptional terrorist threat has occurred or is occurring;
- (b) that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible;
- (c) that the need for that power is urgent; and
- (d) that the provision in the order is compatible with Convention rights.

74. However, the Bill does not provide that these are preconditions to the exercise of the power. They are merely matters in respect of which the Secretary of State must state to Parliament that she is satisfied.

75. Under the Civil Contingencies Act, by comparison, there is power to make emergency regulations if the Minister is satisfied that three prescribed conditions are satisfied:⁷⁴

- (a) that an emergency has occurred, is occurring or is about to occur;
- (b) that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency; and
- (c) the need for the provision is urgent.

⁷² Under s. 25 of the Terrorism Act 2006.

⁷³ Clause 23(2).

⁷⁴ The power to make emergency regulations is in s. 20 Civil Contingencies Act 2004. The conditions for making emergency regulations are specified in s. 21.

76. The Civil Contingencies Act also provides for the maker of the emergency regulations to make a statement at the beginning of the regulations declaring that they are satisfied that the specified conditions are met.

77. It is not clear, therefore, whether, under the Counter-Terrorism Bill, the Secretary of State's order declaring that the reserve power is exercisable is subject to judicial review on the basis that these conditions are not satisfied, or only on the narrower basis that the Secretary of State's decision that she is satisfied of those things is so unreasonable that no reasonable Secretary of State could have reached that view (a very high threshold which it is quite difficult to meet in judicial review proceedings).

78. When we sought clarification from the Home Secretary about the grounds on which judicial review of the order would be available, the Home Secretary indicated that the Government considers that there would be narrower scope for judicial review under this Bill than under the Civil Contingencies Act.⁷⁵

“... the level of scrutiny available to the court under our proposals is appropriate to the action taken by the Home Secretary. Under our proposals, the order made by the Secretary of State brings into force amendments to the 2000 Act already extensively debated in Parliament and exhaustively set out in ... the Bill. This is in contrast to the regulations made under the CCA, which can include any number of as yet unspecified measures.”

79. We conclude that the Government intends the degree of judicial control of the Secretary of State's decision making the reserve power available to be weaker than the judicial control of emergency regulations made under the Civil Contingencies Act, and that the Government can be expected to argue in court that the courts should not readily interfere with the Secretary of State's judgment that the power should be made available. If these provisions are not deleted, we recommend that the matters in respect of which the Secretary of State must state to Parliament that she is satisfied should be made preconditions to the lawful exercise of the power.

(6) Independent legal advice

80. The Bill includes a requirement that the Secretary of State obtain independent legal advice, from a non-government lawyer, as to whether she can properly be satisfied of the various matters of which she must be satisfied before making the 42 day power available.⁷⁶ That advice must be laid before Parliament⁷⁷ as soon as practicable after the order is made, except to the extent that it contains material which would be damaging to the public interest or might prejudice the prosecution of any person.⁷⁸

81. The Home Secretary says that the independent legal advice will cover "most importantly, analysis and conclusions about the lawfulness of making the reserve power available."⁷⁹ However, for the reasons explained above, the central question about the

⁷⁵ Letter from Home Secretary, 11 June 2008, Qs 12-14.

⁷⁶ Clause 25.

⁷⁷ Clause 25(6).

⁷⁸ Clause 25(7).

⁷⁹ Letter from Home Secretary, 11 June 2008, Q15.

lawfulness of the Secretary of State's decision concerns matters which, the Home Secretary herself accepts, ought not to be debated by Parliament. This will be the heart of the independent legal advice but it will be material which should not be laid before Parliament because it directly prejudices the very issues which will have to be determined at the application for judicial authorisation of extended detention which would follow if Parliament approved the Secretary of State's order. Those parts of the legal advice dealing with these matters would therefore also have to be redacted, so the advice will be of very limited assistance to Parliament.

82. The requirement that the Secretary of State obtain independent legal advice before making the reserve power available, and lay that advice before Parliament, does not provide a very meaningful safeguard when the most important parts of the legal advice will have to be withheld from Parliament.

(7) Notification of Committee Chairs

83. The Bill provides that on making the order the Secretary of State must notify the chairs of this Committee, the Home Affairs Committee and the Intelligence and Security Committee and, as soon as reasonably practicable, provide them with copies of the report from the DPP and police and of the independent legal advice on Privy Council terms (or corresponding terms if not a Privy Counsellor).⁸⁰ The Home Secretary says that providing information to the Chairs of the relevant parliamentary committees "will help inform any reports that these committees publish in support of the debates in Parliament."⁸¹

84. Disclosure on Privy Council terms, however, would limit considerably the use which can be made of the information. The chairs of the relevant committees will not be able to take advice on the information they receive, including any legal advice in relation to the independent legal advice received by the Secretary of State. Nor will it be possible for the chair to share the information with the rest of their Committee. **It is not clear to us how information to which only the Chair of the Committee is privy can inform the Committee's report when that information cannot be shared with other Committee members, nor with the Committee's advisers. In practical terms, therefore, we do not consider that the requirement that the Secretary of State notify certain Committee Chairs will operate as much of a safeguard.**

Conclusion on adequacy of safeguards

85. We remain unpersuaded that the safeguards contained in the Bill are sufficiently strong to meet the human rights concerns about a power to detain terrorism suspects for up to 42 days before charge. We are fortified in this conclusion by the analysis of the PACE Committee in its recent Report on the 42 Days proposal.

Conclusion

86. It remains our view, expressed consistently in previous reports, that the Government has failed to prove that there is a current need to extend further the

⁸⁰ Clause 26(1)-(3).

⁸¹ Letter from Home Secretary, 11 June 2008, Q16.

maximum period of pre-charge detention and that there is therefore no need to make any provision for the extension of the current maximum of 28 days. Even if we were persuaded that the evidence demonstrated a need to extend the current maximum, the safeguards in the Bill are inadequate to protect individuals against the risk of arbitrary detention. We therefore recommend the deletion of the relevant provisions from the Bill.

87. We suggest the following amendment to give effect to this recommendation:

Page 16, line 27, leave out clauses 22 to 31

Page 74, line 15, leave out schedule 2

88. We welcome the provision in clause 32 of the Bill, amending the Civil Contingencies Act 2004 to make it clear that regulations made under Part 2 of that Act cannot be used to extend the maximum limit for pre-charge detention in terrorism cases. As we have made clear in previous reports, in our view the existing safeguards against the wrongful use of such a power in the Civil Contingencies Act itself are neither sufficiently strong nor appropriate for an exercise of power which deprives individuals of their liberty.⁸²

⁸² See e.g. Report on 42 Days and Public Emergencies at paras 23-26

3 A framework for derogation from the right to liberty in a genuine emergency

The emergency scenario

89. As we have made clear in chapter 2 above, we remain firmly of the view that the Government has not made out its case for changing the law to extend the maximum period of pre-charge detention to 42 days. Our primary recommendation is that the relevant provisions are deleted from the Bill. However, we note that human rights law permits the Government to derogate from Convention rights in times of emergency. We recommend in this chapter an amendment to the Bill to introduce a framework for derogation from the right to liberty in relation to pre-charge detention. Our recommendation would ensure that certain requirements are met before any derogation is possible, as well as strengthening both parliamentary and judicial scrutiny of the justification for any such derogation.

90. We also note with interest that our earlier recommendation that the Bill be amended to include a clear framework regulating a possible future derogation from the right to liberty in Article 5 ECHR has found favour with the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. It concluded that “it seems wise to follow the suggestion of the JCHR to include the possibility of a derogation in the Bill”,⁸³ instead of creating a complicated system with questionable parliamentary safeguards. We therefore return to the issue to explain in more detail why the creation of a specific framework for derogating from the right to liberty in this context would be a human rights enhancing measure.

91. In the course of the debate about the 42 days proposal, the Government has often stressed that what it seeks is in the nature of a reserve or contingency power, a “backstop” to deal with the truly exceptional situation in which the current exceptional limit of 28 days would not be enough. The Government has put its case for its 42 days proposal in terms of a need to ensure that the police are ready to deal with an emergency scenario in which multiple incidents occur or multiple plots are discovered at once, tying up the police’s finite resources and making it impossible to gather sufficient evidence to charge within 28 days. As Home Office minister Tony McNulty MP graphically put it in a newspaper article, “imagine two or three 9/11s”.⁸⁴

The human rights law framework for derogating

92. In such an extreme scenario, human rights law already permits exceptions from some of the usually applicable norms, in the form of “derogations”. Article 15 of the ECHR provides:

“Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under

⁸³ PACE Report at paras 57-58.

⁸⁴ “Minister warns of ‘peril’ as he pushes for 42 day lock-up”, *Daily Mirror*, 23 Jan 2008.

this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

93. The right to liberty in Article 5 ECHR is one of the Convention Rights from which derogation is permitted in time of emergency.⁸⁵

94. The ECHR therefore already provides for the possibility, in principle, of extending the period of pre-charge detention in a genuine emergency, in the form of the power to derogate from the right to liberty in Article 5, but only to the extent strictly required by the particular emergency.

The domestic law framework for derogating

95. The power to derogate from certain Convention rights in time of emergency is acknowledged in the Human Rights Act 1998 (“the HRA”). The Convention rights which are given effect by the HRA, including the right to liberty in Article 5 ECHR, have effect “subject to any designated derogation.”⁸⁶ The Secretary of State has the power under the HRA to make a “designated derogation order”, designating a derogation for the purposes of the Act.⁸⁷ The effect of the Secretary of State’s designation order is that the derogation takes effect as a limitation on the scope of the right in the domestic legal system under the HRA. The opportunity for both parliamentary and judicial scrutiny of such derogations from Convention rights is both limited and uncertain.

96. As far as parliamentary scrutiny is concerned, the HRA itself provides for some but it is of limited scope. There is no obligation on the Government to consult Parliament before it decides to derogate from a Convention right. A derogation order, making the derogation effective in domestic law, is made by Order-in-Council and can be made without being laid first in draft, but once made it must be laid before Parliament and it will cease to have effect after 40 days unless approved by a resolution of each House.⁸⁸ Parliament’s ability to scrutinise a derogation is therefore fairly limited.⁸⁹

97. **As for judicial scrutiny, the HRA itself does not make any express provision for judicial control of derogations.** Article 15 ECHR, which is the source of the power to derogate from Convention rights and contains the preconditions which must be satisfied for a derogation to be lawful, is not one of the Articles of the ECHR expressly incorporated by the HRA.

98. The precise legal basis for any challenge in court to the lawfulness of a derogation is therefore uncertain under the HRA. The power to detain foreign nationals in the Anti-Terrorism, Crime and Security Act 2001 and the accompanying derogation order⁹⁰ were judicially reviewed in *A v Secretary of State for the Home Department*.⁹¹ However, the 2001

⁸⁵ Under Article 15(2) ECHR no derogations are permitted from Articles 2, 3, 4(1) or 7.

⁸⁶ Human Rights Act 1998, s. 1(2).

⁸⁷ Human Rights Act 1998, s. 14(1)(b).

⁸⁸ HRA s. 16(3) and (5).

⁸⁹ Our predecessor Committee was so concerned about Parliament’s ability to scrutinise the derogation process effectively that in March 2002 it announced an inquiry into UK derogations from Convention rights, and called for evidence on how to make scrutiny of derogations more effective. The inquiry was not, however, completed.

⁹⁰ The Human Rights Act (Designated Derogation) Order 2001.

⁹¹ [2004] UKHL 46.

Act itself contained a provision expressly providing for a “derogation matter” to be questioned in legal proceedings before the Special Immigration Appeals Commission and on appeal from the Commission⁹² and for at least some members of the House of Lords in that case this was the basis of the courts’ jurisdiction to entertain a challenge to the lawfulness of the derogation.

The human rights case for a specific framework for derogating from the right to liberty

99. We have no difficulty in accepting that a co-ordinated, large-scale attack on a nation’s political, military and financial institutions, could constitute a public emergency threatening the life of the nation. If the possibility of such an emergency scenario is truly the justification for the 42 days proposal, **there is in our view a positive human rights argument for legislation which would provide in advance a detailed framework for the exercise of the power to derogate from the right to liberty in such a genuine emergency. Such legislation would be positively beneficial in human rights terms by enshrining clearly into law the requirements which must be met in order for such a derogation to be valid, and ensuring that the necessary safeguards against disproportionate exercise of the derogating power are already in place in advance of the power being used.**

100. **It could also ensure that there is an opportunity for both Houses to satisfy themselves that the conditions for derogating are met and that the extent of the derogation is no greater than is required by the exigencies of the situation, as well as a proper opportunity for judicial scrutiny.**

The precedent: derogating control orders

101. There is already a precedent in our law for counter-terrorism legislation providing powers in advance which will require derogation in order to be exercisable. The Prevention of Terrorism Act 2005, the control orders legislation, authorises the making of “derogating control orders”.⁹³ Derogating control orders are control orders imposing obligations on the controlled person which are incompatible with their right to liberty under Article 5 ECHR but covered by a designated derogation.⁹⁴ An example would be a control order requiring the controlled person to stay at home for 18 hours a day seven days a week. If the Secretary of State wished to impose such a control order, she would first have to derogate from the right to liberty in Article 5 ECHR and designate that derogation by a designation order made under the HRA.⁹⁵ No derogating control orders have been sought to date, but their availability under the Prevention of Terrorism Act 2005 demonstrates how legislation can provide in advance powers which require derogation in order to be exercisable.

102. The Prevention of Terrorism Act, however, makes no specific provision regulating the exercise of the power to derogate in the control orders context. Were the power to make a derogating control order exercised, there would therefore be uncertainty about the

⁹² Anti-Terrorism, Crime and Security Act 2001, s. 30(2) and (5).

⁹³ Prevention of Terrorism Act 2005, s. 1(2).

⁹⁴ PTA 2005, s. 1(10).

⁹⁵ HRA s. 14(1)(b).

precise safeguards which apply, including uncertainty about whether a legal challenge to the derogation were possible in our courts and if so on what grounds.

A framework for future derogation

103. **We remain of the view that the case for 42 days pre-charge detention has not been made out, that the availability of alternatives makes it unnecessary, and that it would inevitably breach the right to liberty in Article 5 ECHR. In our view, however, providing a detailed framework for any future derogation is a human rights compliant alternative to the Government’s approach: it both recognises that human rights law can accommodate a wholly exceptional power to extend the pre-charge detention limit in a case of genuine public emergency, and at the same time ensures that the scope of any such future derogation will be strictly confined to that which is permitted by the ECHR.**

104. Providing a specific framework for derogation would, we believe, provide more stringent safeguards than are currently proposed by the Government or are contained in the Civil Contingencies Act.⁹⁶ It would ensure that there was an opportunity for both Parliament and the courts to scrutinise the derogation from Article 5, which in our view is inevitably involved in extending the period of pre-charge detention beyond 28 days.

105. In the framework we propose, the “reserve power” to apply for and extend pre-charge detention beyond 28 days in the Bill as currently drafted would become a “derogating power” which can only be made exercisable if the conditions for derogation are met. There would have to be a public emergency threatening the life of the nation in the sense of Article 15 ECHR, and making the power to detain before charge for more than 28 days exercisable would have to be strictly required by the emergency as well as consistent with the UK’s other international obligations.

106. In the event that the Government wanted to invoke the derogating power, the Secretary of State would first notify the Secretary General of the Council of Europe of the Government’s intention to adopt measures derogating from Article 5, then make a designation order under the HRA designating the proposed derogation from Article 5 for the purposes of the HRA, before making an order under the Counter-Terrorism Act making the derogating power available. That order would then be subject to parliamentary scrutiny within seven days as to whether the strict conditions for derogating are satisfied, and subsequently to judicial scrutiny for compliance with the same conditions. There is no need for an express provision authorising legal challenges to the derogation, because it is clear on the face of the statute that the derogating power can only be made exercisable if the stipulated preconditions are satisfied. If the preconditions are not satisfied, the Secretary of State’s order making the derogating power exercisable is unlawful.

107. **We therefore recommend that the Bill be amended to provide a clear framework for any future derogation from the right to liberty in the particular context of pre-charge detention. The Government already has the power, under human rights law, to derogate from the right to liberty in certain circumstances. Our amendment regulates the exercise of that power in the pre-charge detention context by spelling out clearly the conditions that must be satisfied before it can be lawfully exercised.**

⁹⁶ The Table in Annex 2 compares the strength of the safeguards under the Bill, the Civil Contingencies Act and our proposal.

108. Our proposed framework for derogation strengthens the safeguards in our domestic law against wrongful resort to derogation: it will not make it easier for the Government to derogate from the right to liberty. The framework explicitly writes into our law the requirements that must be satisfied before any derogation from the right to liberty by extending the period of pre-charge detention to 42 days can be lawful and by ensuring that there is a proper opportunity for parliamentary debate before and proper judicial scrutiny afterwards.

Amendments to the Bill

109. The following amendments seek to provide a clear framework for any future derogation from the right to liberty in relation to an extension of pre-charge detention beyond 28 days.⁹⁷

Page 16, line 27, leave out clause 22 and insert–

‘22 Public emergency threatening the life of the nation

In this Part –

“emergency” means a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention.

“derogating power” means the power conferred by Part 4 of Schedule 8 to the Terrorism Act 2000 (c. 11), inserted by Schedule 2 to this Act, to apply for and extend detention under s. 41 of that Act beyond 28 days which –

- (a) may be incompatible with the detainee’s right to liberty under Article 5 of the Human Rights Convention; but
- (b) is set out in a designation order designating for the purposes of the Human Rights Act a derogation by the United Kingdom from Article 5 of the Convention.

“designated derogation” has the same meaning as in the Human Rights Act 1998 (c. 42) (see section 14(1) of that Act)

“designation order”, in relation to a designated derogation, means the order under section 14(1) of the Human Rights Act 1998 by which the derogation is designated

“the Human Rights Convention” means the Convention within the meaning of the Human Rights Act 1998 (c. 42) (see section 21(1) of that Act).’

Page 17, line 13, leave out sub-section (b) and insert –

‘(b) the following conditions are satisfied:

- (i) there is an emergency;
- (ii) the Secretary of State has made a designation order in respect of the proposed derogation;

⁹⁷ Paragraph 50

- (iii) making the derogating power exercisable is strictly required by the emergency; and
- (iv) the exercisability of the derogating power is consistent with the other international obligations of the United Kingdom.'

Page 17, line 21, leave out clauses 24, 25 and 26.

Page 19, line 35, leave out sub-section (2) and insert-

- '(2) The statement must state the Secretary of State's reasons for being satisfied -
 - (a) that there is an emergency;
 - (b) that making the derogating power exercisable is strictly required by the emergency; and
 - (c) that the exercisability of the derogating power is consistent with the other international obligations of the United Kingdom.'

4 Coroners Inquests

Background

110. Part 6 of the Bill contains far-reaching provisions concerning coroners' inquests. It provides for "the Secretary of State" to certify in relation to an inquest that, in the Secretary of State's opinion, the inquest will involve the consideration of material that should not be made public in the interests of national security, in the interests of the relationship between the UK and another country, or otherwise in the public interest.⁹⁸ The effect of such a certificate being issued is that the inquest shall be held without a jury,⁹⁹ and the Secretary of State also has the power to appoint a "specially appointed coroner" to hold the inquest, from an "approved list" established and maintained by the Secretary of State.¹⁰⁰

The Explanatory Notes

111. These provisions were inserted into the Bill at a very late stage, and were not the subject of any prior consultation. In our first Report on this Bill, we expressed our disappointment that the Explanatory Notes to the Bill contained no analysis of the human rights implications of these provisions.¹⁰¹ We pointed out in that Report that the provisions have the most serious implications for the ability of the UK to comply with the positive obligation implicit in the right to life in Article 2 ECHR, to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents. We explained these human rights concerns more fully in our Report as the Bill came out of Committee in the Commons.¹⁰² The human rights concerns featured prominently in the debate about the provisions at Report stage in the Commons.¹⁰³

112. Notwithstanding the human rights concerns which have been widely expressed about these provisions, the Explanatory Notes to the Bill as introduced in the Lords still contain no explanation of the basis for the Government's view that this part of the Bill is compatible with the ECHR. When this was pointed out to the Government by Lord Lester at the Bill's Second Reading in the Lords,¹⁰⁴ the Minister, Admiral The Lord West of Spithead, promised to write to Lord Lester setting out the Government's reasons.

113. The letter from Lord West dated 21 July 2008 states that the reason why the Explanatory Notes to the Bill are silent on the ECHR compatibility of Part 6 of the Bill is that "there is no requirement under any Article of the ECHR for an inquest to be held with a jury." **We do not find this a satisfactory explanation for the lack of explanation in the Explanatory Notes. We made clear the nature of the human rights concerns about**

⁹⁸ Clause 77 of the Bill, inserting new s. 8A into the Coroners Act 1988.

⁹⁹ New s. 8A(3) of the Coroners Act 1988. Equivalent provision is made for Northern Ireland by clause 78 of the Bill, inserting new s. 18A into the Coroners Act (Northern Ireland) 1959.

¹⁰⁰ Clause 79, inserting new s. 18A into the Coroners Act 1988.

¹⁰¹ Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL Paper 50, HC 199, para. 5.

¹⁰² Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*, HL Paper 108, HC 554, paras 115-120.

¹⁰³ HC Deb 10 June 2008, cols. 238-269.

¹⁰⁴ HL Deb 8 July 2008 col. 653.

these provisions in January 2008, shortly after the Bill was published. They do not rest on any claim that the ECHR requires inquests to be held with a jury. Rather they concern the effect of the provisions on the ability of the UK to comply with the positive obligation in Article 2 ECHR to provide an adequate, effective and independent investigation, including sufficient public scrutiny and involvement of the next of kin, where an individual has been killed as a result of the use of force, particularly where the force was used by state agents. We find extremely regrettable the Government's continuing failure to provide an accessible explanation, in the Explanatory Notes to the Bill, for its view that the provisions are compatible with Article 2 ECHR.

Compatibility with Article 2 ECHR

114. The explanation of the Government's position contained in Lord West's letter is that the measures are necessary in order to ensure that the UK is able to comply with its Article 2 obligations while protecting the integrity of the material in question. The Government argues that, under the current law, proceedings before a Coroner's Court will not suffice to discharge the Article 2 ECHR investigative obligation in circumstances where there is sensitive material which is central to the assessment of how the deceased came by his death but which cannot, for public interest reasons, be disclosed to the coroner or the jury or the next of kin. The Government envisages that, where necessary, independent counsel will be appointed to represent the interests of the next of kin during the closed parts of the proceedings and scrutinise the sensitive material on their behalf.

115. The Government also claims that the Bill now meets the concerns which have been expressed about the lack of independence of coroners specially appointed by the Secretary of State. The Bill requires the Secretary of State for Justice to seek the agreement of the Lord Chief Justice, first, to the inclusion of a coroner on the "approved list" of coroners, second, to each individual appointment of a specially appointed coroner to hold an inquest when a certificate has been issued, and, third, to the revocation of the appointment of such a coroner by the Secretary of State. The Lord Chief Justice's involvement, say the Government, will ensure that there is independent judicial involvement in the appointment and removal of specially appointed coroners.

116. We do not agree that the human rights concerns about these proposals have been met by the provision for the involvement of the Lord Chief Justice. The proposed system would still be one of coroners specially chosen by the Secretary of State. The mere involvement of the Lord Chief Justice in the process of appointment and revocation does not remove the fundamental objection that such a system lacks the appearance of independence. In any event, the human rights concerns about the proposals go far wider than concerns about the apparent lack of independence of the coroners.

117. The provisions apply to cases involving national security, and therefore may have some application in inquests concerning terrorism, but the scope of the provisions goes far beyond terrorism. For example, the Bill would permit the Secretary of State to certify that an inquest should be held without a jury where, in the opinion of the Secretary of State, the inquest will involve the consideration of material that should not be made public "in the interests of the relationship between the United Kingdom and another country."¹⁰⁵ When

¹⁰⁵ News s. 8A(1)(b) of the Coroners Act 1988, as inserted by clause 77(2).

we took evidence from some special advocates about the use made of the facility for closed proceedings in the Special Immigration Appeals Commission, they told us that the Government had begun to invoke the procedure in deportation cases in order to keep secret information which might otherwise cause diplomatic embarrassment.¹⁰⁶ The width of the present provisions clearly give rise to the same risk.

118. The provisions in the Bill concerning inquests will also apply to inquests which have already started, but not yet been concluded, on the date on which the new provisions are brought into force.¹⁰⁷ This means that the new provisions will apply to some of the unresolved cases from Northern Ireland which have been the subject of adverse judgments of the European Court of Human Rights.¹⁰⁸ This has significant implications for the UK's ability to comply with judgments against it which have still not been implemented to the satisfaction of the Committee of Ministers of the Council of Europe.

119. The Government has also failed to explain why the existing law of public interest immunity, which applies to coroners' inquests, does not already provide the Government with the means to ensure that documents and information which would be damaging to the public interest are not disclosed.

120. We therefore recommend that the provisions concerning inquests be removed from the Bill and subject to proper consultation with a view to bringing forward any necessary new measures as part of the Coroner Reform Bill which is scheduled for next session. We also recommend that the related provisions concerning intercept evidence also be removed until the implementation of the Chilcot review of intercept evidence.

121. We suggest the following amendments to give effect to these recommendations:

Page 53, line 35, leave out clauses 77 to 81

¹⁰⁶ See e.g. evidence of Andy Nicol QC and Nicholas Blake QC (ref).

¹⁰⁷ Clause 77(3).

¹⁰⁸ See Sixteenth Report of 2006-07, Monitoring the Government's Response to Court Judgements Finding Breaches of Human Rights, HL Paper 128/HC 728 paras 95-96, and forthcoming Report, Monitoring the Government's Response to Human Rights Judgements: Annual Report 2008

5 Recommendations and amendments relating to other matters

Background

122. We have previously recommended a number of other amendments to this Bill concerning a wide range of matters. These recommendations are the product of our prolonged examination of the Government’s counter-terrorism policy, and the present Bill provides an opportunity to make our counter-terrorism laws more human rights compatible in a number of ways. We therefore include in the Annex to this Report other recommended amendments to the Bill, and in this chapter we provide the necessary cross-references to our earlier reports where the reasons for the amendments are explained in greater detail.

Pre-Charge Detention: Strengthening the judicial safeguards

123. We recommend that the relevant part of the legal framework (Schedule 8 to the Terrorism Act 2000) be amended to ensure that the judicial safeguards which apply at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR that there be a truly “judicial” procedure.¹⁰⁹ We suggest some amendments to the Bill which are designed to ensure that the suspect has an effective opportunity, at an open hearing and with access to the relevant material, to challenge the reasonableness of the suspicion on which the prosecution relies as the basis for the original arrest and continued detention.

Pre-Charge Detention: Strengthening the parliamentary safeguards

124. We recommend a new clause, to provide for a panel of reviewers of terrorism legislation, parliamentary consideration of the appointment of members of the panel, and sufficient time to elapse between the publication of the report on the operation of the extended period of pre-charge detention and the annual renewal debate.¹¹⁰

Lowering the Charging Threshold

125. We recommend a new clause which would place the threshold test for charging on a statutory footing and would insert some necessary basic safeguards into the legal framework.¹¹¹

Bail in Terrorism Cases

126. We recommend a new clause to make court-ordered pre-charge bail with conditions available in relation to terrorism offences. In our view, the availability of bail with conditions would enable the police to continue their investigation of those suspected of terrorism offences who do not pose a risk to public safety or a flight risk, while at the

¹⁰⁹ Report on 42 Days, at paras 89, 96 and 98; Second Report on Counter-Terrorism Bill, paras 21 and 33.

¹¹⁰ Report on 28 days, intercept and post-charge questioning, at para. 63; Second Report on Counter-Terrorism Bill, paras 13-20.

¹¹¹ Second Report on the Counter-Terrorism Bill at paras 37-49.

same time maintaining some control over them through bail conditions. We acknowledge that this will be a significant reform which will require careful and detailed drafting, but we suggest an amendment to the Bill to give Parliament an opportunity to debate our recommendation in principle.¹¹²

Post-Charge Questioning

127. We recommend a new clause which would supplement the provisions in the Bill dealing with post-charge questioning with a number of additional safeguards.¹¹³

Control Orders

128. We recommend a number of amendments to the control orders regime which in our view are necessary in order to render it human rights compatible.¹¹⁴ We note with interest that the UN Human Rights Committee in its recent Concluding Observations on the UK's compliance with the ICCPR was concerned about the control order regime.¹¹⁵ It recommended that the Government should ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, and also that those subjected to control orders are promptly charged with a criminal offence. Both of these concerns are addressed in the amendments we recommend.

Priority of prosecution

129. We recommend that the Prevention of Terrorism Act 2005 should be amended to provide that, except in urgent cases, the Secretary of State may only make a control order where the DPP has certified that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence. We also recommend that the Secretary of State should be subject to an express statutory duty to review the possibility for prosecution on a regular basis, and an amendment to increase the transparency of decisions that prosecution is not possible.

Deprivation of liberty

130. We recommend an amendment to clarify the approach to be taken by courts when deciding whether the effect of a control order is to deprive a person of their liberty in the Article 5 ECHR sense; and an amendment to impose a 12 hour maximum limit on daily curfews imposed by control orders to make it less likely that control orders will be in breach of Article 5 ECHR.

Due process

131. We recommend amendments:

- to include express references to the right to a fair hearing for those subject to control orders in the Prevention of Terrorism Act 2005

¹¹² Second Report on the Counter-Terrorism Bill, at paras 50-56.

¹¹³ Second Report on the Counter-Terrorism Bill at paras 57-65.

¹¹⁴ Second Report on the Counter-Terrorism Bill at paras 67-114.

¹¹⁵ UN Human Rights Committee Concluding Observations at para. 17.

- to create a statutory obligation for the Secretary of State to give reasons for make control orders
- to require the Secretary of State to provide a summary of any material on which he intends to rely
- to allow a High Court judge to sanction communication between special advocates and controlled persons, on application by the special advocate
- to make clear that the standards of procedural protection are to be commensurate with the seriousness of the consequences for the controlee, including the standard of proof
- to allow special advocates to call expert witnesses

Maximum duration of control orders

132. We recommend an amendment to set a statutory maximum duration of 2 years for a non-derogating control order.

Disclosure of information involving the intelligence services

133. We recommend an amendment and new clause to ensure that information disclosure relating to the intelligence services does not breach the Human Rights Act, UN Convention Against Torture or other of the UK's international obligations.¹¹⁶

¹¹⁶ Report on 42 Days and Public Emergencies at paras 59-73.

Annex 1: Proposed Committee amendments

In this Annex, we suggest amendments to give effect to some of our recommendations in this Report.¹¹⁷

Pre-Charge Detention: 42 days

Page 16, line 27, leave out clauses 22 to 31

Page 74, line 15, leave out schedule 2

Page 17, line 21, insert -

‘(4) An order under this section shall be treated for the purposes of the Human Rights Act 1998 as subordinate legislation and not primary legislation.’

Page 17, line 15, insert –

‘(c) the Secretary of State is satisfied that the conditions in section 27(2) are met.’

Derogation from the right to liberty

Page 16, line 27, leave out clause 22 and insert–

‘22 Public emergency threatening the life of the nation

In this Part -

“emergency” means a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention.

“derogating power” means the power conferred by Part 4 of Schedule 8 to the Terrorism Act 2000 (c. 11), inserted by Schedule 2 to this Act, to apply for and extend detention under s. 41 of that Act beyond 28 days which –

(a) may be incompatible with the detainee’s right to liberty under Article 5 of the Human Rights Convention; but

(b) is set out in a designation order designating for the purposes of the Human Rights Act a derogation by the United Kingdom from Article 5 of the Convention.

“designated derogation” has the same meaning as in the Human Rights Act 1998 (c. 42) (see section 14(1) of that Act)

¹¹⁷ Page, clause and line references are to HL Bill 65.

“designation order”, in relation to a designated derogation, means the order under section 14(1) of the Human Rights Act 1998 by which the derogation is designated

“the Human Rights Convention” means the Convention within the meaning of the Human Rights Act 1998 (c. 42) (see section 21(1) of that Act).’

Page 17, line 13, leave out sub-section (b) and insert –

- ‘(b) the following conditions are satisfied:
 - (i) there is an emergency;
 - (ii) the Secretary of State has made a designation order in respect of the proposed derogation;
 - (iii) making the derogating power exercisable is strictly required by the emergency; and
 - (iv) the exercisability of the derogating power is consistent with the other international obligations of the United Kingdom.’

Page 17, line 21, leave out clauses 24, 25 and 26.

Page 19, line 35, leave out sub-section (2) and insert-

- ‘(2) The statement must state the Secretary of State’s reasons for being satisfied -
 - (a) that there is an emergency;
 - (b) that making the derogating power exercisable is strictly required by the emergency; and
 - (c) that the exercisability of the derogating power is consistent with the other international obligations of the United Kingdom.’

Pre-Charge Detention: Strengthening the judicial safeguards

New clause

Extension of detention under section 41 Terrorism Act 2000

(1) The Terrorism Act 2000, Schedule 8, Part III (Extension of Detention under Section 41) is amended as follows:

(2) After sub-paragraph (6) of paragraph 29 (Warrants of further detention) there is inserted –

- ‘(7) Nothing in this Part is to be read as requiring the judicial authority to act in a manner inconsistent with the right of the specified person to a fully judicial procedure in Article 5(4) of the European Convention on Human Rights.’

(3) After sub-paragraph (d) of paragraph 31(Notice) there is inserted -

- ‘(e) a statement of the suspicion which forms the basis for the person’s original arrest and continued detention, and
- (f) the gist of the material on which the suspicion is based.’

(4) Before sub-sub-paragraph (a) of sub-paragraph 32(1) (Grounds for extension) there is inserted –

‘(aa) there are reasonable grounds for believing that the person has been involved in the commission, preparation or instigation of a terrorist offence,’

(5) Sub-paragraph (1) of paragraph 33 (Representation) is deleted and there is inserted in its place –

‘(1) The person to whom an application relates shall be entitled –

(a) to appear in person before the judicial authority and make oral representations about the application,

(b) to be legally represented by counsel at the hearing,

(c) to legal aid for such representation,

(d) to be represented by a special advocate at any closed part of the hearing of the application, and

(e) through his representative, to cross examine the investigating officer.

(6) After sub-paragraph (3)(b) of paragraph 33 there is inserted –

‘if the judicial authority is satisfied that there are reasonable grounds for believing that the exclusion of the person and/or his representative is necessary in order to avoid any of the harms set out in sub-paragraphs (a)-(g) of paragraph 34(2) below.’

Pre-Charge Detention: Strengthening the parliamentary safeguards

New clause

‘Expiry or renewal of extended maximum detention period: further parliamentary safeguards

(1) The Terrorism Act 2006 is amended as follows.

(2) After subsection (6) of section 25, there is inserted–

“(6A) The Secretary of State and the panel appointed under section 36 must lay annual reports before Parliament on the operation of the extended period of pre-charge detention.

(6B) No motion to approve a draft order under subsection (6) may be made by a Minister of the Crown until one month has elapsed since the publication of the reports laid under section (6A).”

(3) In section 36–

(a) in subsection (1) for “person” there is inserted “panel of persons”;

- (b) in subsection (2)–
 - (i) for “That person” there is inserted “The panel”;
 - (ii) for “he” there is inserted “it”; and
 - (iii) for “his” there is inserted “its”;
- (c) in subsection (3)–
 - (i) for “That person” there is inserted “The panel”; and
 - (ii) for “his” there is inserted “its”;
- (d) in subsection (4), for “That person” there is inserted “The panel”;
- (e) in subsection (6)–
 - (i) for “a person” there is inserted “the persons”; and
 - (ii) for “his” there is inserted “their”.

(4) In section 36, after subsection (1) there is inserted–

- “(1A) A person may not be appointed under subsection (1) unless–
- (a) the Secretary of State lays a report on the appointment process before both Houses of Parliament, and
 - (b) a Minister of the Crown makes a motion in both Houses to approve the report laid under this subsection.”’

Lowering the Charging Threshold

New clause

‘Lower threshold for charging in terrorism cases

(1) When deciding whether there is sufficient evidence to charge a person with an offence having a terrorist connection, a Crown Prosecutor may apply the “Threshold Test” for charging if the conditions in subsection (3) below are satisfied.

(2) The “Threshold Test” for charging is met where there is at least a reasonable suspicion that the suspect has committed an offence having a terrorist connection.

(3) The conditions which must be satisfied for the Threshold Test to apply are:

- (a) it would not be appropriate to release the suspect on bail after charge
- (b) the evidence required to demonstrate a realistic prospect of conviction is not yet available, and
- (c) it is reasonable to believe that such evidence will become available within a reasonable time.

(4) The factors to be considered in deciding whether the Threshold Test of reasonable suspicion is met include

- (a) the evidence available at the time;
- (b) the likelihood and nature of further evidence being obtained;

- (c) the reasonableness for believing that evidence will become available;
 - (d) the time it will take to gather that evidence and the steps being taken to do so;
 - (e) the impact the expected evidence will have on the case;
 - (f) the charges that the evidence will support.
- (5) Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the person charged shall be immediately informed of the fact that they have been charged on the standard of reasonable suspicion.
- (6) When the person charged on the Threshold Test is brought before the Court it shall be the duty of the Crown Prosecutor to inform the Court of that fact.
- (7) The Court shall set a timetable for the receipt of the additional evidence and for the application of the normal test for charging as set out in the Code for Crown Prosecutors.
- (8) The Chief Inspector of the Crown Prosecution Service shall report annually on the operation of the Threshold Test in terrorism cases.’

Making Bail Available in Terrorism Cases

New clause

‘Bail for terrorism offences

- (1) The Terrorism Act 2000, Schedule 8, is amended as follows.
- (2) After paragraph 37 there is inserted:

“Part IV: Bail

38. The judicial authority with power to extend detention under section 41 has power to release the suspect on bail, with conditions.”’

Post-Charge Questioning

New clause

‘Post-charge questioning: safeguards

- “(1) Reference in this section to “post-charge questioning” relate only to post-charge questioning for terrorism offences.
- (2) Post-charge questioning must be judicially authorised in advance.
- (3) Post-charge questioning shall be confined to questioning about new evidence which has come to light since the accused person was charged and which could not reasonably have come to light before.
- (4) The total period of post-charge questioning shall last for no more than 5 days in aggregate.

(5) Post-charge questioning may only take place in the presence of the defendant's lawyer.

(6) Post-charge questioning shall always be video-recorded.

(7) The judge who authorised post-charge questioning shall review the transcript of the questioning after it has taken place, to ensure that it remained within the scope of questioning under subsection (2) and was completed within the time allowed under subsection (3).

(8) Post-charge questioning for a terrorism offence shall never be permissible after the beginning of the defendant's trial for that offence.”’

Control Orders

Priority of prosecution

New clause

‘Control orders: pre-conditions

After sub-paragraph (b) in section 2(1) of the Prevention of Terrorism Act 2005 there is inserted –

“; and (c) unless section 3(1)(b) below applies, the DPP has certified that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence.”’

New clause

‘Control orders: ongoing review of possibility of prosecution

After subsection (6) of section 8 of the Prevention of Terrorism Act 2005 there is inserted –

“(6A) The Secretary of State shall, throughout the period during which the control order has effect

(a) ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence is kept under review at least every 3 months;

(b) consult the police prior to such review;

(c) share with the police such information as is available to him which is relevant to the prospects of a successful prosecution.”’

New clause

‘Control orders: reasons for decisions on prospects of prosecution

After subsection (2) of section 8 of the Prevention of Terrorism Act 2005 there is inserted -

“(2A) If the chief officer advises the Secretary of State that there is no realistic prospect of prosecution, he shall give reasons for his view.

(2B) The chief officer’s reasons shall be disclosed to the controlled person to the extent that such disclosure would not be contrary to the public interest.”’

Deprivation of liberty

New clause

‘Control orders: cumulative effect of restrictions relevant to determination about deprivation

After subsection (10) of section 3 of the Prevention of Terrorism Act 2005 there is inserted -

“(10A) In determining whether the effect of a non-derogating control order is to deprive a person of their liberty, the factors to which the court shall have regard must include,

(a) the nature, duration, effects and manner of implementation of the restrictions, and

(b) the cumulative effect of the obligations.

(10B) The combination of obligations may amount to a deprivation of liberty even if no individual obligation amounts to such a deprivation.”’

New clause

‘Control orders: maximum limit on daily curfews

After subsection (5) of section 1 of the Prevention of Terrorism Act 2005 there is inserted -

“(5A) The duration of any prohibition or restriction on the controlled person’s movements shall not exceed 12 hours in any 24 hour period.”’

Due process

New clause

Control orders: right to a fair hearing

(1) At the end of subsection (13) of section 3 of the Prevention of Terrorism Act 2005 there is inserted -

‘except where to do so would be incompatible with the right of the controlled person to a fair hearing’.

(2) At the end of paragraph 4(2)(a) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted -

‘except where to do so would be incompatible with the right of the controlled person to a fair hearing’.

(3) At the end of paragraph 4(3)(d) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

‘except where to do so would be incompatible with the right of the controlled person to a fair hearing’.

(4) After paragraph 4(5) in the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

‘(6) Nothing in this paragraph, or in rules of court made under it, is to be read as requiring the court to act in a manner inconsistent with the right to a fair hearing in Article 6 of the European Convention on Human Rights.’

New clause

‘Control orders: obligation to give reasons

After subsection (4) of section 2 of the Prevention of Terrorism Act 2005 there is inserted –

“(4A) A non-derogating control order must contain as full as possible an explanation of why the Secretary of State considers that the grounds in s. 2(1) above are made out.”’

New clause

‘Control orders: obligation to provide gist of closed material

“(1) At the end of paragraph 4(3)(e) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

“and must require the Secretary of State to provide a summary of any material on which he intends to rely and on which fairness requires the controlled person have an opportunity to comment.”’

New clause

‘Control order: communications between special advocate and controlled person

After subparagraph 7(5) in the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

“(5A) Rules of court must secure that persons appointed under this paragraph may apply to a High Court judge, without notice to the Secretary of State, for permission to communicate with the controlled person after the service of closed material.”’

New clause

‘Control orders: proportionality of procedural protection

After subsection 3(11) of the Prevention of Terrorism Act 2005 there is inserted –

“(11A) In a hearing to determine whether the Secretary of State’s decision is flawed, the controlled person is entitled to such measure of procedural protection as is commensurate with the gravity of the potential consequences of the order for the controlled person.”’

New clause

‘Control orders: Power of special advocates to call expert witnesses

After paragraph 4(3)(e) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

“(ea) that, where permission is given by the relevant court not to disclose material, persons appointed under paragraph 7 may call witnesses to rebut the closed material.”’

Maximum duration of control orders

This amendment is designed to set a statutory maximum duration of 2 years for a non-derogatory control order.¹¹⁸

New clause

‘Control orders: maximum duration

After section 3 of the Prevention of Terrorism Act 2005 there is inserted –

“3A Duration of non-derogating control orders

A non-derogating control order ceases to have effect at the end of the period of two years from the date on which it was made, unless there are exceptional circumstances justifying its renewal.”’

Coroners’ inquests

Page 53, line 35, leave out clauses 77 to 81

Disclosure of information involving the intelligence services

Page 15, Clause 20, Line 42, at end insert–

‘or (c) breaches–

(i) the Human Rights Act 1998,

(ii) the UN Convention Against Torture, or

(iii) any other relevant international obligation concerning the disclosure and use of information.’

¹¹⁸ Paragraph 114 of this Report.

New clause

‘Disclosure and the intelligence services: safeguards

Information disclosed by virtue of sections 19(3)(c), 19(4)(d) or 19(5)(b) which has been obtained from authorities or persons outside of England and Wales, must be accompanied by a statement–

- (a) for section 19(3)(c), from the Director of the Security Service,
- (b) for section 19(4)(d), from the Chief of the Intelligence Service,
- (c) for section 19(5)(b), from the Director of GCHQ,

setting out the steps taken to ascertain the circumstances in which such information was obtained and that it had not been obtained by torture.’

Annex 2: Pre-Charge Detention: Six Key Safeguards Compared

Safeguard	Counter-Terrorism Bill	Civil Contingencies Act	JCHR Proposal
1. "Emergency" threshold	Grave exceptional terrorist threat ¹¹⁹	Terrorism which threatens serious damage to the security of the UK ¹²⁰	Public emergency threatening the life of the nation ¹²¹
2. Parliamentary scrutiny	(1) Approval by both Houses within 7 days ¹²² (2) Parliamentary debate circumscribed by need to avoid prejudice to future trials ¹²³	(1) Approval by both Houses within 7 days ¹²⁴ (2) Parliamentary debate circumscribed by need to avoid prejudice to future trials ¹²⁵	(1) Approval by both Houses within 7 days (2) Full parliamentary debate on: (a) whether public emergent exists; (b) whether extension to 42 days "strictly required" by the emergency; and (c) whether extension consistent with other international obligations
3. Judicial review of extension	Judicial review of Secretary of State's view that: ¹²⁶ (1) a grave exceptional terrorist threat has occurred or is occurring; (2) the reserve power is needed for the purpose of investigation the threat and bringing to justice those responsible; (3) that the need for the power is urgent; and (4) power is compatible with Article 5 ECHR.	Judicial review of Secretary of State's view: ¹²⁷ (1) that extension to 42 days is appropriate for purpose of preventing, controlling or mitigating an aspect or effect of the emergency; (2) that effect of extension is in due proportion to that aspect or effect of emergency; and (3) compatibility with Article 5 ECHR	Judicial review of whether derogation objectively justified: (1) whether public emergency threatening life of the nation exists; (2) whether extension to 42 days "strictly required" by the emergency; and (3) whether extension to 42 days consistent with UK's other international obligations.

¹¹⁹ Clause 22

¹²⁰ CCA 2004 s. 19(1)(c)

¹²¹ Article 15(1) ECHR, as elaborated in the case-law of the European Court of Human Rights

¹²² Clause 28(1)

¹²³ As acknowledged by clause 27(4) (Secretary of State's statement to Parliament must not include any details of person detained or any material that might prejudice the prosecution of any person).

¹²⁴ CCA 2004 s. 27(1)(b)

¹²⁵ As acknowledged by the DPP in evidence to the Home Affairs Committee: House of Commons Home Affairs Committee, First Report of Session 2007-08, The Government's Counter-Terrorism Proposals, Vol II, HC 43-II, EV 88, Q580, pointing out the risk to a fair trial where the order made to extend the period in respect of a particular case has to be approved by both Houses of Parliament after a debate.

¹²⁶ Clause 27(2)

¹²⁷ CCA 2004, s. 23(1)

4. Judicial safeguards for individual (at applications for extension)	Review by a judge but no additional judicial safeguards, so current law applies: ¹²⁸ (1) suspect and legal representative can be excluded from part of hearing; (2) information can be provided to judge but withheld from suspect and legal representative; and (3) no provision for special advocates	None specified in Act; left to emergency regulations (drafts not published)	Fully judicial hearing with full procedural rights for suspect and right to be represented by special advocate at any closed hearing. ¹²⁹
5. Duration	30 days ¹³⁰	30 days (or earlier if specified in emergency regulations) ¹³¹	30 days
6. Parliamentary review	Statutory reviewer to report to Secretary of State on (1) operation of legislation; and (2) each individual case.	None in Act itself; Government commitment to Parliament to appoint senior Privy Councillor to carry out review of operation of the Act within one year of any use of emergency powers; report to be published and therefore available to Parliament. ¹³²	(1) Panel of independent reviewers (2) reporting directly to Parliament on operation of extended pre-charge detention (3) at least one month before parliamentary debate on renewal (4) Annual report by Secretary of State also one month before debate (5) Secretary of State to report to Parliament on appointment process of independent reviewers and report to be approved by both Houses.

¹²⁸ Paras 33 and 34 of Schedule 8 to the Terrorism Act 2000

¹²⁹ Under JCHR's proposed amendment to Schedule 8 to the Terrorism Act 2000: see Second Report on Counter-Terrorism Bill, at para 13.

¹³⁰ Clause 30(1)

¹³¹ CCA 2004, s. 26(1)

¹³² HC Deb 18 November 2004 col.s 1509-1510 (Ruth Kelly MP)

Formal Minutes

Tuesday 7 October 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	John Austin MP
Lord Dubs	Dr Evan Harris MP
Lord Lester of Herne Hill	Virendra Sharma
Lord Morris of Handsworth	Richard Shepherd
Earl of Onslow	
Baroness Stern	

Draft Report (*Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 133 read and agreed to.

Annexes read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Thirtieth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

[Adjourned till Tuesday 14 October at 1.30pm.]

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper XXX/HC XXX

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human	HL Paper 77/HC 410

Rights Act		
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056
Session 2005-06		
First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004-05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and	HL Paper 114/HC 888

Human Rights: Terrorism Bill and related matters

Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716