



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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# **Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies**

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**Twenty-first report of Session  
2007-08**





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*Report, together with formal minutes and  
written evidence*

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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), and Karen Barrett (Committee Secretary).

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## Summary

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The Committee has already reported several times on the main human rights issues raised by the Counter-Terrorism Bill. The main purpose of this Report is to comment on the adequacy of the additional safeguards which the Government has indicated it intends to bring forward to meet the human rights concerns about its proposal to extend the maximum period of pre-charge detention to 42 days. The report explains the Committee's conclusion that the additional safeguards are inadequate to protect individuals against the risk of arbitrary detention (paragraphs 1-2).

Ministers at first argued that this proposal was justified by the high level of the terrorist threat. Now they argue that the threat is growing. But the Committee has still not seen any evidence which demonstrates that the threat is growing. It recommends that the Government provide Parliament with the evidence on which it relies when it says that the threat from terrorism is growing (paragraphs 4-9).

There is so far no information in the public domain about the use made of the extended power to detain without charge for up to 28 days since it was last renewed in July 2007. The Committee recommends that the Home Secretary makes the information publicly available in time to inform the debate at the Bill's report stage in the House of Commons (paragraphs 10-12).

Despite the Committee's earlier recommendations, the Government has not included in the Counter-Terrorism Bill a provision to improve the existing arrangements for parliamentary review of the operation of extended pre-charge detention. The Committee puts forward amendments to the Bill to improve the arrangements for parliamentary review (paragraphs 13-19).

The Government has indicated that it intends to bring forward some additional safeguards, modelled on the Civil Contingencies Act, to ensure that the proposed power to extend pre-charge detention to 42 days is not abused. The Committee reiterates its view that the Civil Contingencies Act does not already provide the power to extend the maximum period of pre-charge detention, and that it would be undesirable in principle for such a power to be available under the Civil Contingencies Act because the safeguards in that Act are inadequate. The Committee would be opposed to any proposal to amend the Civil Contingencies Act to allow the Secretary of State to extend the period beyond 28 days by emergency regulations.

The Committee considers the adequacy of the additional safeguards which the Government says it intends to propose. In the Committee's view, some of the suggested definitions of what is meant by "exceptional need" do not appear to raise significantly the threshold for the use of the power. A requirement that the Secretary of State should simply make a declaration to Parliament that there is exceptional need would not be much of a safeguard without making it a precondition of the exercise of the power. Nor would a requirement for parliamentary authorisation of the Secretary of State's decision within 7 days be a very significant safeguard either. The exceptional need would relate to a specific investigation which means that the debate in Parliament would be heavily circumscribed by the risk of prejudice to future trials.

The additional safeguards are not likely to include any additional judicial safeguards for the individual at hearings to extend their detention. The lack of proper judicial safeguards at such hearings is one of the main reasons why extending the maximum period of pre-charge detention to 42 days, without any additional judicial safeguards, would be in breach of the right to liberty in Article 5 ECHR. The Committee is not therefore persuaded that the additional safeguards being considered for the Bill provide sufficiently strong safeguards to meet the human rights concerns it has expressed about this aspect of the Bill (paragraphs 20-40).

In any event, as the Committee has explained in earlier reports, no amount of additional parliamentary or judicial safeguards can render the proposal for a reserve power of 42 days' pre-charge detention compatible with the right of a terrorism suspect to be informed "promptly" of the charge against him under Article 5(2) ECHR. The Bill is therefore incompatible with Article 5(2) on its face and a derogation from the UK's obligations under Article 5 would be required to make such a power available (paragraphs 42-44).

The Government argues that the reserve power will be used only in truly exceptional circumstances of a grave threat from terrorism. Article 15 ECHR already provides for the possibility, in principle, of extending the period of pre-charge detention in a case of genuine public emergency threatening the life of the nation, to the extent strictly required by the emergency. If there is a genuine emergency within the terms of Article 15 ECHR the Government should make its case for such a derogation rather than seek new legislation now. In the Committee's view the Government has not made its case. There is a case for providing in advance a detailed framework for the exercise of the power to derogate from the right to liberty in a genuine emergency, to ensure that the necessary safeguards against disproportionate exercise of the derogating power are already firmly in place. Neither the Civil Contingencies Act nor the Bill with the additional safeguards constitute such a measure because the emergency threshold is too low and the safeguards are too weak. The Committee recommends that the opportunity be taken to provide a clear framework for any future derogation from the right to liberty in this context, incorporating the necessary safeguards against improper derogation (paragraphs 45-55).

The Committee urges the Minister to meet the special advocates to discuss the Committee's recommendations and to report to Parliament on the outcome of that meeting (paragraphs 56-58).

The Committee welcomes the Government's proposal to place the disclosure and use of information by the intelligence services on a statutory footing. However, it cannot accept the Government's argument that the existing safeguards are working well and there is therefore no need for express safeguards to accompany the statutory power to acquire, use and disclose information. In the Committee's view the recent examples of questionable information sharing by the intelligence services, which risk making the UK complicit in torture or other inhuman or degrading treatment, show that there is a need for substantive legal safeguards to guarantee against the arbitrary and disproportionate use of the power to disclose and use such information. The Committee proposes amendments to strengthen safeguards (paragraphs 59-73).

# 1 Introduction

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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 Detention<sup>1</sup>
- (2) 28 days, intercept and post-charge questioning<sup>2</sup>
- (3) 42 Days<sup>3</sup>
- (4) Annual Renewal of Control Orders<sup>4</sup>
- (5) Counter-Terrorism Bill before Second Reading<sup>5</sup>
- (6) Counter-Terrorism Bill as it came out of Public Bill Committee.<sup>6</sup>

The main purpose of this Report is to comment further on certain aspects of the Bill's most controversial proposal, to extend the maximum period of pre-charge detention to 42 days, in the light of recent developments and, in particular, in the light of the Government's indication that it will shortly be bringing forward a number of amendments to this Part of the Bill designed to meet concerns about its human rights compatibility. On 1 June 2008 the Secretary of State for Justice and Lord Chancellor Jack Straw MP indicated in a television interview a number of amendments which are likely to be brought forward by the Government.<sup>7</sup> On 2 June the Prime Minister, in an article in *The Times*, argued that the Government's 42 Days proposal contains a number of practical safeguards which together ensure that the Government's response to the changing demands of national security also upholds civil liberties.<sup>8</sup>

2. In the light of the likely Government amendments and the Prime Minister's robust defence of the adequacy of the proposed safeguards, we focus in this Report on the question of whether those safeguards are sufficient to meet the concerns about the human rights compatibility of its 42 Days proposal. **It remains our view, expressed consistently in previous reports, that the Government has failed to make its case for further extending the maximum period of pre-charge detention and that there is therefore no need to make any provision for the extension of the current maximum. We explain why**

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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 The Andrew Marr Show, BBC1, 1 June 2008.

8 "42-day detention; a fair solution", *The Times*, 2 June 2008.

**the safeguards in the Bill, even after the potential Government amendments, are inadequate to protect individuals against the risk of arbitrary detention. We also spell out explicitly all the necessary safeguards in the event that the public emergency, which is the premise of the Government's proposal, were ever to materialise.** We also take the opportunity to comment on the provisions in the Bill concerning the obtaining, use and disclosure of information by the intelligence services.

## 2 Pre-charge Detention

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### Background

3. 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.<sup>9</sup> We do not seek to repeat those views here, save where relevant to the issues addressed below. The purpose of this chapter is to update our previous reports on the subject in the light of recent developments and, in particular, in the light of the potential Government amendments to this part of the Bill designed to meet concerns about its human rights compatibility. We stress that at the time of agreeing our report the text of the Government's amendments was not available, and what follows is therefore based on the Government's indication of the amendments it intends to bring forward.

### The "growing" threat

4. In our Report on 42 days, in December 2007, we subjected to careful scrutiny the precise nature of the Government's argument about the level of the threat from terrorism.<sup>10</sup> We noted that the Government's statements stressed the high level of the threat, but fell short of claiming that the level of the threat had *increased* since the extension to 28 days was enacted in 2006. We pointed out that both the Minister, Tony McNulty MP, and the then head of the Metropolitan Police's Counter-Terrorism Command, DAC Peter Clarke, had appeared to accept that, while the threat was at a very high level, it was at about the same level as when Parliament extended the maximum period of pre-charge detention to 28 days.

5. We note that the Home Secretary, in more recent statements, has become much less guarded and now refers to the "growing" threat from terrorism when seeking to justify the Government's proposal to extend the maximum period of pre-charge detention to 42 days.<sup>11</sup> This claim raises again the many questions we have asked in the past about exactly what evidence exists to support this claim. 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.

6. In our Report on 42 Days we concluded that we had 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. **We still have not seen any evidence which demonstrates that the threat level is growing.**

7. We have indicated to the Government the sort of evidence that we would like to see concerning the level of the threat. We pointed out in our Report on 42 Days that it is not

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<sup>9</sup> 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.

<sup>10</sup> Report on 42 Days, paras 24-33.

<sup>11</sup> See e.g. "Terror threat to UK is 'growing'", *BBC News Online*, 13 April 2008; HC Deb 21 April 2008.

satisfactory to infer an increase in the level of the threat from bare statistics about the number of convictions or the number of people charged with terrorism offences, in the absence of more qualitative analysis of, for example, the seriousness of the charges brought and the number of convictions secured in the last year compared to previous years. No such qualitative analysis has been forthcoming from the Government. Nor is it satisfactory to draw inferences about the level of the threat from the number of active investigations, the number of suspects, nor the number of prosecutions. An increase in the number of investigations, suspects, people charged or convictions may be consistent with an increased level of threat, or could be due to other factors.

8. We also wrote, in December 2007, to the Director General of the Security Service, Jonathan Evans, asking specifically whether the level of threat from terrorism has increased since June 2007, if so, to what extent, and asking him to provide us publicly with as much information about the basis of his assessment of the increase in the threat level as it is possible to provide consistent with the obvious public interest in not disclosing information which would harm national security.<sup>12</sup> We have not received a response to that letter.

**9. In our view, 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 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 evidence demonstrating that the threat level is growing.**

### The use made of the 28 day period

10. In our previous reports we have frequently drawn attention to the need for careful analysis of the use which is being made of existing powers when considering whether or not they should be extended further.<sup>13</sup> During Public Bill Committee it became clear that, not only have the Crown Prosecution Service (CPS) been working comfortably within the 28 day limit, but for the last nine or ten months they have been working comfortably within the 14 day limit. Sue Hemming, the Head of the CPS’s Counter-Terrorism Division, told the Public Bill Committee that there has been no need to make an application to extend pre-charge detention beyond 14 days since the investigation into the attack on Glasgow airport in the summer of 2007.<sup>14</sup>

11. The annual renewal of the provisions in the Terrorism Act 2006 which extend the maximum period of pre-charge detention in terrorism cases from 14 to 28 days is imminent. That extended period will expire on 25 July 2008 unless a renewal order is passed by both Houses. So far, however, there is no information in the public domain concerning what use has been made of the extended power to detain without charge for up to 28 days, and how it is operating in practice since it was last renewed.

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<sup>12</sup> Letter to Director-General of MI5, 5 December 2007, Appendix 8 to Report on 42 Days.

<sup>13</sup> See e.g. Report on 28 days, paras 29-44.

<sup>14</sup> PBC, 22 April 2008, col. 57 (Qs 147-8).

12. We have written to the Home Secretary to request some information about the operation of the extended period since its last renewal with a view to ensuring that Parliament is fully informed when it comes to debate the draft renewal order.<sup>15</sup> That information will also be highly relevant to the debate about the need to further extend the maximum period of pre-charge detention beyond 28 days. We have not received the information we requested at the time of agreeing this report, and **we recommend that the Home Secretary make the information available in time to inform the debate on this issue at the Bill's Report stage. If this is not done, we draw the attention of both Houses to the absence of this information.**

## Parliamentary Review

13. In our Report on 28 Days, Intercept and Post-Charge Questioning, published in July 2007, we made a number of specific recommendations concerning the arrangements for parliamentary review of the operation in practice of the extended period of pre-charge detention up to a maximum of 28 days. The aim of our recommendations was to ensure that there is rigorous independent scrutiny of the operation in practice of the extended period, which is made available to Parliament sufficiently in advance of the renewal debate to ensure that Parliament is fully and reliably informed about how the power has actually been working before it is asked to approve renewal of the extraordinary power for another year.

14. We recommended that parliamentary oversight be improved by making available to Parliament, at least a month before the renewal debate, a report by an independent reviewer on the operation in practice of the extended period and on the continued necessity for it, and a detailed annual report by the Home Secretary on the use which has been made of the power by the police. In response, the Government said that Lord Carlile already reports annually on the operation of the Terrorism Act 2000, including on the extended period of pre-charge detention. It also said that it would be looking to ensure that there is sufficient parliamentary oversight of the pre-charge detention period as part of the consultation on the forthcoming counter-terrorism bill and that it would consider our recommendations as part of that consultation.

15. We also recommended that an appropriate independent body undertake an in-depth scrutiny of the operation in practice by the Metropolitan Police Service of the new power of pre-charge detention beyond 14 days. We suggested that the Metropolitan Police Authority, the independent statutory body charged with scrutinising the work of the Metropolitan Police Service, may be well placed to do this. The Government said in its response that it would consider whether there is a need for an independent body to review the operation of pre-charge detention as part of the consultation on the forthcoming counter-terrorism bill.

16. The Counter-Terrorism Bill, however, makes no provision for improving the existing arrangements for parliamentary review of the operation of extended pre-charge detention. Instead, as we pointed out in our recent report on the annual renewal of the control orders legislation,<sup>16</sup> the Bill's provisions for parliamentary review of the power to extend pre-

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<sup>15</sup> Letter to the Home Secretary, 23 May 2008, Appendix 2.

<sup>16</sup> Report on Control Orders Renewal, at para. 29.

charge detention are closely modelled on the very provisions relating to the renewal of the control orders legislation in the Prevention of Terrorism Act 2005, which have failed to ensure proper parliamentary scrutiny in three consecutive years.<sup>17</sup>

17. We also recommended in our Report on 28 days that, in order to help Parliament evaluate the strength of the case for extended pre-charge detention in terrorism cases, the police should in future keep data to demonstrate the number of times terrorism suspects have been released without charge and then subsequently rearrested as a result of information that had subsequently come to light as a result of searching computer hard drives or related material. In our view, such data is central to any evidence-based assessment of the adequacy of the current period. In the Government's response to our report it said that the Home Office was working with the police to review the collation and publication of statistics relating to terrorism legislation and that statistics and information available with reference to pre-charge detention would be reviewed as part of this process. However, we have not been told what, if any, additional statistics or information in relation to pre-charge detention the Government or the police decided to collect as a result of their joint review.

18. In our last report on this Bill we expressed again our disappointment at the Government's failure to respond to our constructive proposals for improved parliamentary review, particularly in light of the Prime Minister's commitment to the importance of parliamentary oversight in relation to the unusual powers required to counter terrorism.<sup>18</sup> In view of the Government's failure to respond to our proposals, and the lack of provision in the Bill, we have written to the Home Secretary to ask what improvements she has made in the arrangements for parliamentary review and for her reasons if, as appears to be the case, she has decided not to accept our recommendations for improving those arrangements.<sup>19</sup> **We look forward to a response to our queries in time to inform debate at Report stage.**

**19. In the meantime, we think it is important for the arrangements for parliamentary review to be improved by providing for the independence of the reviewer, some parliamentary input into the appointments process and for direct and timely reporting to Parliament. We also feel that there is now more work than one reviewer can reasonably do and that a panel of independent reviewers would be desirable.** We therefore suggest the following amendment to the Bill for debate:

To move the following clause:-

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

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

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17 See Report on Control Orders Renewal, paras 19-34; Twelfth Report of Session 2005-06, *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, paras 13-14; Eighth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL Paper 60, HC 365, paras 12-17.

18 Second Report on Counter-Terrorism Bill, at para. 20.

19 Letter to Home Secretary, 23 May 2008, Appendix 2.



(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.”’

## **The Civil Contingencies Act type safeguards**

### ***Possible additional safeguards***

20. At our recent conference on counter-terrorism policy and human rights on 14 May 2008, the minister, Tony McNulty MP, indicated that the Government was still seeking consensus in relation to pre-charge detention and welcomed further discussion about what further safeguards might be built into the Bill to ensure that the exceptional reserve power

to extend the period to 42 days is not abused. In particular, the Government was still willing to consider whether more of the type of safeguards contained in the Civil Contingencies Act 2004 could be imported into the Bill.

21. It now appears that the following additional safeguards are under consideration by the Government and likely to be the subject of Government amendments to the Bill.<sup>20</sup>

(1) A tightening of the definition in the Bill of what amounts to an “exceptional need” to use the power, to make it clear that it will only be used in exceptional circumstances, such as the discovery of multiple terrorist plots or the aftermath of an atrocity, or in a “grave terrorist emergency”;<sup>21</sup>

(2) A shortening of the time within which Parliament is required to authorise the extension by the Secretary of State, from 30 days to a much shorter period, possibly seven days; and

(3) Reducing the period for which the reserve power is available from 60 to 30 days.

22. In this part of our Report, we draw attention to those parts of our previous conclusions which will be most relevant to assessing any further safeguards, judicial or parliamentary, offered by the Government. We also consider whether *any* additional safeguards could render the 42 days proposal compatible with the right to liberty in Article 5 ECHR.

### ***The Civil Contingencies Act: does it and should it apply?***

23. In our Report on 42 Days, we considered whether the Civil Contingencies Act 2004 already provides the Secretary of State with the power to extend pre-charge detention beyond 28 days in circumstances such as those which concern the Government, and whether it would be desirable, in principle, for the Civil Contingencies Act to apply in such circumstances.

24. We concluded that the Civil Contingencies Act, properly interpreted, did not already provide the power to extend the period of pre-charge detention beyond 28 days. We reached this view for two reasons. First, the general power of the executive to make emergency regulations under the Civil Contingencies Act does not expressly authorise the making of regulations which deprive a person of their liberty. In our view, the common law principle of legality, which requires general powers capable of interfering with fundamental rights to be read strictly, requires a power to deprive a person of their liberty to be expressly authorised by Parliament in the regulation making power. Second, in our view the restriction in the Civil Contingencies Act itself on the scope of the power to make emergency regulations, that they “may not alter procedure in relation to criminal proceedings”, would apply to any regulation purporting to extend the period of pre-charge detention. The Government agrees with us that the Civil Contingencies Act does not already give the power which the Government seeks.

<sup>20</sup> See e.g. “Brown signals retreat on 42 day detention”, *The Guardian*, 16 May 2008; “Gordon Brown to offer 42 days concessions to Labour MPs”, *The Telegraph*, 25 May 2008; Secretary of State for Justice on the Andrew Marr Show, BBC1, 1 June 2008.

<sup>21</sup> The phrase used by the Secretary of State for Justice on 1 June 2008.

25. We also concluded that it would be undesirable in principle for such a power to be available under the Civil Contingencies Act, for two main reasons. First, we are concerned by the lack of safeguards provided by the Civil Contingencies Act: it leaves it to the emergency regulations themselves to provide the necessary safeguards, such as appropriate judicial scrutiny of extended detention, which both the Government and Parliament may be less inclined to provide when regulations are being made in the context of an emergency. Moreover, the Government has refused to publish any drafts of the emergency regulations which might be made under Part II of the Civil Contingencies Act, so it is impossible to tell what safeguards, if any, would be included in the regulations extending pre-charge detention beyond 28 days. Second, we share the concerns of the Director of Public Prosecutions (DPP) about the risk of prejudice to future trials when Parliament debates the emergency regulations extending the period of pre-charge detention in respect of a particular case, as the Civil Contingencies Act framework would require.

**26. It follows that we would also be opposed to any proposal to amend the Civil Contingencies Act to provide the Secretary of State with the power to extend the period of pre-charge detention beyond 28 days by way of emergency regulations. 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.**

### *Adequacy of proposed additional safeguards*

27. The question which now arises is whether the additional safeguards which the Government appears to be proposing would meet all of the human rights concerns which have been expressed about the 42 days proposal. In our view, those safeguards would not meet our concerns about the 42 days proposal, for the following reasons.

#### *(1) The “emergency” threshold*

28. The Civil Contingencies Act provides that three conditions must be satisfied before the power to make emergency regulations is triggered:<sup>22</sup>

- (1) an emergency must have occurred, be occurring or about to occur;
- (2) it must be necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency; and
- (3) the need for the provision must be urgent.

29. An emergency, for the purposes of the Civil Contingencies Act, is defined to include “terrorism which threatens serious damage to the security of the UK”.

30. In the Counter-Terrorism Bill, as presently drafted, the only precondition to the exercise of the power of the Secretary of State to make the reserve power available is that there must have been a report from the DPP and the police on the operational need for the reserve power.<sup>23</sup> The Secretary of State is required to make a statement to Parliament

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<sup>22</sup> Civil Contingencies Act 2004, s. 21.

<sup>23</sup> Under proposed new para. 39 of Schedule 8 to the Terrorism Act 2000.

shortly after having made the reserve power available, in which she must state certain prescribed things, including that she has received information indicating that an ongoing terrorism investigation gives rise to “an exceptional operational need” and that she is satisfied that the reserve power is needed, that the need to make it available is urgent, and that its availability is compatible with the Convention rights. However, these are not preconditions to the making of the order which brings the reserve power into effect. One of the possible additional safeguards which may be proposed by the Government is that the Bill define in more detail the circumstances which would amount to “exceptional need”, for example the discovery of multiple terrorist plots or the aftermath of an atrocity, or, in the words of the Secretary of State for Justice, “a grave terrorist emergency”. It is difficult to comment on this potential amendment without more detail about what is intended, but we observe that some of the suggested formulations do not appear to raise very significantly the threshold of what is meant by “exceptional”. For example, according to the Director-General of MI5, in his lecture to the Society of Editors in November 2007, there are already “multiple plots”: some 30 in total being monitored by the intelligence services. **On the other hand, a substantial threat to the nation, which appears to be what was contemplated by Tony McNulty MP in a radio interview on BBC Radio 4 on 2 June 2008, or a “grave terrorist emergency” would set the bar rather higher. We would also point out, however, that, as presently drafted, the Bill merely requires that the Secretary of State make a statement to Parliament that she is satisfied of certain matters. It does not make those matters preconditions to the exercise of the power.**

31. In our view, a requirement that the Secretary of State merely make a declaration to Parliament that she is satisfied that there are exceptional circumstances giving rise to an “exceptional operational need” to use the power would not amount to much of a safeguard, even if the circumstances capable of amounting to such an exceptional need were spelt out in more detail in the Bill.

32. In our view, **requiring the Secretary of State to declare there is an exceptional need for a reserve power, or even that there is an emergency which makes such a power necessary, is not, in reality, much of a safeguard, at least without some meaningful opportunity for that assertion to be tested by independent scrutineers, whether in Parliament or the courts.**

## *(2) Parliamentary scrutiny*

33. The Civil Contingencies Act provides for parliamentary authorisation of emergency regulations within seven days.<sup>24</sup>

34. The Counter-Terrorism Bill currently provides for parliamentary approval of the Secretary of State’s decision to make the reserve power available within 30 days of the power becoming available: if the decision to invoke the reserve power has not been approved by resolution of each House within that time the power ceases to be available at the end of the 30 days,<sup>25</sup> and it ceases to be available immediately if it is disapproved of by either House. As we pointed out in our first Report on this Bill,<sup>26</sup> the 30 day provision

<sup>24</sup> Civil Contingencies Act 2004, s. 27(1)(b).

<sup>25</sup> Under proposed para. 45(2) of Schedule 8 to the Terrorism Act 2000, as would be inserted by Schedule 2 to the Bill.

<sup>26</sup> First Report on Counter-Terrorism Bill, para. 13.

means that by the time Parliament expresses a view on whether the reserve power should be made available, it is likely that the full 42 day period will have expired. The Government now appears to be suggesting that this period be reduced from 30 days to seven.

35. We considered in our second report on this Bill the possibility of an amendment which would guarantee Parliament an opportunity to debate the justification for invoking the reserve power before the expiry of the 42 day period.<sup>27</sup> However, we concluded that such an amendment would not meet the objection 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.

**36. Even if the Bill were amended to provide for parliamentary authorisation of the Secretary of State's decision within a very short period such as seven days, this would not be a very significant safeguard so long as the exceptional need relates to a specific, ongoing investigation, because the debate would be heavily circumscribed by the risk of prejudicing future trials.** Indeed, this was the very criticism made by the DPP of the proposed use of the Civil Contingencies Act option in his evidence to the Home Affairs Committee. Authorisation by Parliament within a short period such as seven days would not therefore, in our view, amount to a very significant additional safeguard.

### *(3) Duration*

37. The Government appears to be suggesting that the period for which the power is available be reduced from 60 days to 30 days. We acknowledge that this would match the equivalent provision in the Civil Contingencies Act.

### *(4) Judicial safeguards*

38. We welcome the Prime Minister's express acknowledgement in his *Times* article that it is essential to "maximise the protection of individuals against arbitrary treatment". **We note, however, that neither the Bill as drafted, nor any of the potential Government amendments to it, provide any additional judicial safeguards for the individual.**

39. We have explained in detail in previous reports why, in our view, the lack of proper judicial safeguards at extension hearings under the present law amounts to a breach of the right to a judicial hearing in Article 5(4) and to sufficient guarantees against arbitrariness in Articles 5(1) and 5(3) ECHR. **The lack of proper judicial safeguards is one of the principal reasons why, in our view, extending the maximum period of pre-charge detention to 42 days, without providing any additional judicial safeguards, would be in breach of the right to liberty in Article 5 and therefore require a derogation from that Article.**

### *Conclusion on adequacy of additional safeguards*

**40. We are not, therefore, persuaded that the additional safeguards being considered for the Bill, modelled on those in the Civil Contingencies Act 2004, provide sufficiently**

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<sup>27</sup> Second Report on Counter-Terrorism Bill, para. 17.

**strong safeguards to meet the human rights concerns that we have expressed about this particular aspect of the Bill.**

41. In any event, the nature of one of those concerns is such that no amount of additional parliamentary or judicial safeguards can render the proposal to detain for up to 42 days without charge compatible with the right to liberty in Article 5 ECHR, as we now seek to explain.

**Can any additional safeguards prevent incompatibility with the “promptness” requirement in Article 5(2) ECHR?**

42. In our earlier reports we have explained in detail why, in our view, the legal framework which will be created by the Bill is both not compatible with the right to liberty in Article 5 ECHR and will inevitably lead to breaches of the rights in Article 5 in individual cases. In our view the Bill is incompatible on its face with the right of a terrorism suspect in Article 5(2) to be informed “promptly” of any charge against him. For a suspect to be informed of the charge against him only after more than 28 days in detention cannot be considered “prompt”. We pointed out that we were fortified in this view by the evidence we had heard that terrorism suspects are often provided with very little information about the reasons for their arrest, other than that they are a suspected terrorist, and by the very limited opportunity to challenge the reasons for detention at hearings to extend pre-charge detention. The rationale for the “promptness” requirement in Article 5(2) is to enable the suspect to have an effective opportunity to challenge the lawfulness of their detention before a court. We remain firmly of the view that the Bill is therefore incompatible with Article 5(2) on its face.

43. We acknowledge that there is no decision of the European Court of Human Rights establishing precisely how promptly a suspect must be informed of the charge against him, but we find further support for our view that the Bill is incompatible with Article 5(2) in the recent decision of the European Court of Human Rights in *Saadi v UK*.<sup>28</sup> In that case the Grand Chamber unanimously found a violation of Article 5(2) of the Convention because a delay of 76 hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given “promptly”.<sup>29</sup> Although the case concerned the right to be informed of the reasons for arrest, rather than of the charge, the judgment graphically demonstrates the importance attached by the Grand Chamber of the Court to the promptness of being informed of the genuine reasons for detention.

44. It follows from the above that, in our view, **no amount of additional parliamentary or judicial safeguards can render the proposal for a reserve power of 42 days’ pre-charge detention compatible with the right to liberty in Article 5 ECHR. In our view, such provision inevitably involves derogation from the right to liberty in Article 5. Inserting safeguards such as those apparently suggested by the Government does not change our view that a derogation from the UK’s obligations under Article 5 would be required to make available a reserve power of 42 days pre-charge detention.**

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<sup>28</sup> *Application no. 13229/03*, 29 January 2008.

<sup>29</sup> Paras 81-85.

## 3 Derogation from the right to liberty in Article 5 ECHR

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### Derogation: background

45. **As we have made clear 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 clear recommendation therefore remains the deletion of the relevant provisions from the Bill, as we recommended in our last report.**

46. In the course of the debate about the Government's 42 days proposal, it has increasingly 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 often put its case for its 42 days proposal in terms of a need to ensure that the police are ready to deal with a 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".<sup>30</sup>

47. We have no difficulty in accepting that a co-ordinated, large-scale attack on a nation's political, military and financial institutions, which of course is what happened on 9/11, constitutes a public emergency threatening the life of the nation. In such an extreme scenario, human rights law already provides the framework in which exceptions from the usually applicable norms are permitted, in the form of derogations. The ECHR provides for such a derogation where there is a "public emergency threatening the life of the nation" and the measures taken are "strictly required by the exigencies of the situation" and consistent with the UK's other international obligations.<sup>31</sup> The right to liberty in Article 5 ECHR is not one of the Convention Rights from which no derogation is permitted.<sup>32</sup> Such a derogation requires a public statement by the Secretary of State that there is an emergency threatening the life of the nation, and of the justification for the measures taken in response to that emergency.<sup>33</sup>

48. Under the Human Rights Act ("HRA"), the right to liberty in Article 5 ECHR has effect "subject to any designated derogation."<sup>34</sup> 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.<sup>35</sup> The HRA also provides that a designation order may be made in anticipation of the making of a proposed derogation by the UK.<sup>36</sup> Both the derogating measure and the

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30 "Minister warns of 'peril' as he pushes for 42 day lock-up", *Daily Mirror*, 23 Jan 2008.

31 Article 15(1) ECHR.

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

33 Article 15(3) ECHR which requires the UK to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor.

34 Human Rights Act 1998, s. 1(2).

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

36 *Ibid.*, s. 14(6).

Secretary of State's accompanying derogation order would be subject to judicial review for compatibility with the requirements of Article 15 ECHR, just as the power to detain foreign nationals in the Anti-Terrorism, Crime and Security Act 2001 and the accompanying derogation order were judicially reviewed in *A v Secretary of State for the Home Department*.<sup>37</sup>

49. Both the ECHR and the HRA therefore already provide 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 to the extent strictly required by the particular emergency. **We remain firmly of the view that if there is a genuine emergency within the terms of Article 15 of the ECHR the Government should make its case for such a derogation and not seek new legislation.**

### **Incorporating safeguards against improper derogation**

50. **As we stated in paragraph 45, above, the Government has not made its case for any increase in the period of pre-charge detention. There is a case for legislation which would provide in advance a detailed framework for the exercise of the power to derogate from particular rights in a particular context in a public emergency. Indeed, such legislation could be beneficial 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. In our view, this would be positively beneficial from a human rights perspective by ensuring that the necessary safeguards are firmly in place.**

51. The Civil Contingencies Act, however, is not such a measure. The threshold for invoking the emergency powers in that Act is lower than a public emergency threatening the life of the nation, and the Act does not impose a requirement that the emergency measures must be "strictly required by the exigencies of the situation." If the Government's aim, as it appears to profess, is to set out in advance a detailed framework for dealing with a public emergency of the extreme kind it describes, it is seeking to achieve what in principle human rights law permits it to do provided certain conditions are satisfied. If the Government is seeking to provide a legal framework for derogating from Article 5 in the particular context of pre-charge detention, its proposals would need to be different in a number of significant respects. For example, the threshold for the availability of the exceptional power would have to be raised. The Government proposes that the trigger for the power is "exceptional operational need" in relation to a particular terrorism investigation. If the police and DPP report that they are likely to need more time for their investigation in relation to particular persons, that is sufficient to trigger the power. However, once it is appreciated that the 42 days proposal requires a derogation, it becomes clear that the trigger for the availability of the reserve power ought to be nothing less than that there is a public emergency threatening the life of the nation, and that making such extraordinary powers of pre-charge detention available is strictly required by the emergency.

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37 [2004] UKHL 56.



52. This approach could also provide for Parliament to approve of the Secretary of State's order within a relatively short period, giving both Houses an opportunity to scrutinise the adequacy of the Secretary of State's case for derogation, applying the requirements of Article 15 ECHR (as opposed to considering the operational need for an extension of time in relation to a particular investigation). If the Secretary of State's view, as expressed in the order bringing the reserve power into effect, were approved by both Houses within seven days, the order could then itself be subjected to independent scrutiny by the courts for compatibility with Article 15 of the Convention, which would include an independent assessment both of whether there really is a public emergency threatening the life of the nation, and of whether the extension of pre-charge detention is strictly required by the nature of the emergency.

**53. This alternative, it seems to us, would provide much more stringent safeguards than are currently proposed by the Government.<sup>38</sup> 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.**

54. It would also, we hope, make it more likely that the Government will improve the judicial safeguards at pre-charge detention hearings. The Government will have a greater prospect of persuading a court that the availability of the reserve power to detain pre-charge for up to 42 days is "strictly required" if the judicial safeguards at extended detention hearings are strengthened, so as to ensure that such hearings provide an early and genuine opportunity to mount an effective and meaningful challenge to the reasons why a suspect is being held.

**55. We therefore recommend that the opportunity be taken in the Bill to provide a clear framework for any future derogation from the right to liberty in this particular context. This is not an alternative to, but complements, the other elements in the package of measures we have recommended in our previous reports. We remain of the view that the case for 42 days detention has not been made, that the availability of alternatives makes it unnecessary, and that it would inevitably breach 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.** We suggest the following amendments to the Bill to give effect to this recommendation.

Page 64, Schedule 2, line 25, insert–

‘(2) ‘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.’

Page 64, Schedule 2, line 26, leave out paragraph 39.

<sup>38</sup> The Table in Annex 1 compares the strength of the safeguards under the Bill (after the possible Government amendments), the Civil Contingencies Act and our proposal.

Page 65, Schedule 2, line 29, at end insert–

‘if the following conditions are satisfied:

- (a) there is an emergency;
- (b) making the derogating power available is strictly required by the emergency; and
- (c) the availability of the derogating power is consistent with the UK’s other international obligations.’

Page 66, Schedule 2, line 6, leave out sub-sub paragraph (b).

Page 66, Schedule 2, line 8, leave out “that the Secretary of State is” and insert “the Secretary of State’s reasons for being”.

Page 66, Schedule 2, line 9, leave out lines 9 to 15 and insert–

- ‘(a) that there is an emergency;
- (b) that making the derogating power available is strictly required by the emergency; and
- (c) that the availability of the derogating power is consistent with the UK’s other international obligations.’

Page 69, Schedule 2, line 6, leave out ‘30’ and insert ‘seven’.

Page 69, Schedule 2, line 9, leave out ‘30’ and insert ‘seven’.

## 4 Control Orders

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### Special advocates

56. In our last report on this Bill we recommended six amendments to the control orders legislation which are designed to ensure that in the future control order hearings are much more likely to be fair in all cases.<sup>39</sup> These recommendations are very largely based on the evidence that we have received from special advocates expressing their concerns about the fairness of the hearings under the current legislative framework.

57. At our recent conference on counter-terrorism policy and human rights, a special advocate spoke strongly in favour of our recommendation that the law should be amended so that special advocates could, with judicial authorisation, communicate with the controlled persons whose interests they represent after they had seen ‘closed material’ and without the Secretary of State knowing about the communication. She said that this would improve the fairness of proceedings involving special advocates and enhance the accountability of special advocates. She thought that judges were capable of dealing with possible breaches of national security and would rigorously scrutinise requests by special advocates to communicate with the controlled person.

58. The Minister, Tony McNulty MP, offered to meet the special advocates to discuss the recommendations in our report concerning them. We wrote to the Minister on 16 May to follow up his offer and to express the hope that his meeting with the special advocates could be held in time to inform debate on our proposed amendments about special advocates at the Bill’s Report stage.<sup>40</sup> **We urge the Minister to meet the special advocates to discuss our recommendations and to report to Parliament on the outcome of that meeting.**

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39 Second Report on Counter-Terrorism Bill, at paras 90-111.

40 Letter to Tony McNulty, 16 May 2008, Appendix 1.

## 5 Disclosure and use of information by the intelligence services

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59. The Bill places on a statutory footing the disclosure of information to and by the intelligence services<sup>41</sup> (the Security Service, the Secret Intelligence Service and GCHQ<sup>42</sup>). It provides for:

- (1) the *disclosure* of information *to* the intelligence services by any person;<sup>43</sup>
- (2) the *use* of information *by* those services;<sup>44</sup> and
- (3) the *disclosure* of information *by* the intelligence services for certain prescribed purposes.<sup>45</sup>

60. Specifically, the Bill provides that:

- a person may disclose information to any of the intelligence services for the purposes of the exercise by that service of any of its functions;<sup>46</sup>
- information obtained by any of the intelligence services in connection with any of its functions may be used by that service in connection with the exercise of any of its other functions;<sup>47</sup>
- information obtained by any of the intelligence services for the purposes of any of its functions may be disclosed by it for the purpose of the proper discharge of its functions and for the purpose of any criminal proceedings;<sup>48</sup>
- information obtained by the Security Service and the Secret Intelligence Service may also be disclosed by them for the purpose of the prevention and detection of crime;<sup>49</sup> and
- information obtained by the Secret Intelligence Service may also be disclosed by it in the interests of national security.<sup>50</sup>

61. The Bill provides that a disclosure under these provisions does not breach any obligation of confidence owed by the person making the disclosure, “or any other

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41 Clauses 19-21.

42 Clause 21(1).

43 Clause 19(1).

44 Clause 19(2).

45 Clause 19(3)-(5).

46 Clause 19(1).

47 Clause 19(2).

48 Clause 19(3)-(5).

49 Clause 19(3) and (4).

50 Clause 19(4).

restriction on the disclosure of information (however imposed),<sup>51</sup> save for disclosures which contravene the Data Protection Act 1998, or are prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000.<sup>52</sup>

**62. We welcome the Government’s proposal to place the disclosure and use of information by the intelligence services on a statutory footing, as a potentially human rights enhancing measure.** As the Explanatory Notes to the Bill rightly acknowledge,<sup>53</sup> the disclosure of information to and by the intelligence services will often involve an interference with the right to respect for private and family life, home and correspondence in Article 8(1) ECHR, and to be compatible with that right such interferences must be “in accordance with the law”. This means that there must be a legal basis for the disclosure and use of information, which means not merely a formal statutory authority but also a sufficiently detailed legal framework prescribing the scope of the power and providing adequate safeguards against the power being exercised arbitrarily or disproportionately.

63. The Explanatory Notes to the Bill explain the Government’s reasons for its view that these provisions are compatible with the right to respect for private life in Article 8.<sup>54</sup> It is argued that the provisions are “in accordance with the law as they appear in the Bill” and that they pursue the legitimate aims under Article 8(2) of the protection of national security and the prevention of crime. Any interference with the right to respect for private life is said to be justified under Article 8(2) for two reasons. First, any disclosure of confidential information is subject to the statutory constraint that it must be “necessary” for the protection of national security or for the prevention of crime. Second, before acquiring and disclosing information, the intelligence services take care to ensure that the acquisition or disclosure is both necessary for the specified statutory purposes and proportionate, and that they will continue to take care to apply these twin tests of necessity and proportionality in future when acquiring or disclosing information and when using it internally for their statutory functions.

64. We consider the adequacy of this explanation below. However, we have an additional and very significant human rights concern about these provisions, which is not acknowledged in the Explanatory Notes to the Bill, concerning the risk of complicity by our intelligence services in the use of torture, inhuman or degrading treatment or other human rights violations in other countries. In our work on Torture and Counter-Terrorism Policy and Human Rights, we have often commented on this risk and on the need for safeguards to make sure, first, that information acquired and used by our intelligence services has not been obtained by torture or other human rights violations, and, second, that information disclosed by our intelligence services is not then used in acts, such as interrogation by torture, which amount to serious human rights violations.<sup>55</sup> In our Report on Torture, for example, we said, in relation to the use of information obtained by torture:<sup>56</sup>

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51 Clause 19(6)(b).

52 Clause 20(2).

53 EN para. 267.

54 EN paras 264-268.

55 See e.g. UNCAT Report, paras 43-60.

56 Para. 55.

“We accept that UNCAT and other provisions of human rights law do not prohibit the use of information from foreign intelligence sources, which may have been obtained under torture, to avert imminent loss of life by searches, arrests or other similar measures. We cannot accept the absolutist position on this subject advanced by some NGOs when human life, possibly many hundreds of lives, may be at stake. Indeed, where information as to an imminent attack becomes available to the UK authorities, their positive obligation to protect against loss of life under Article 2 ECHR may require them to take preventative action, even when they suspect that the information may have been obtained by use of torture. However great care must be taken to ensure that use of such information is only made in cases of imminent threat to life. Care must also be taken to ensure that the use of information in this way, and in particular any repeated or regular use of such information, especially from the same source or sources, does not render the UK authorities complicit in torture by lending tacit support or agreement to the use of torture or inhuman treatment as a means of obtaining information which might be useful to the UK in preventing terrorist attacks. Ways need to be found to reduce and, we would hope, eliminate dependence on such information.”

65. In relation to co-operation with foreign interrogators abroad, we said:<sup>57</sup>

“For the future, the UK security and intelligence services must take all feasible steps to ensure that information exchanged with foreign intelligence services has not been obtained from, and will not be used in, acts which would be regarded as human rights violations. If this is not done, such co-operation is likely to imply active or tacit approval of the use of torture or inhuman or degrading treatment, such as might render the UK complicit in such acts.”

66. We therefore wrote to the Government, when we saw the draft clauses before publication of the Bill, asking whether the Bill would include express safeguards designed to ensure that information has not been obtained as a result of, and will not be used in, acts amounting to torture or other human rights violations.<sup>58</sup> In response, the Government shared our concern but did not accept the need for express safeguards, expressing itself satisfied with the current arrangements.<sup>59</sup>

“The Government shares the concern that everything practical should be done to ensure that information from foreign sources is not gained from human rights violations and that information shared with foreign governments is not used in such violations. However, the Government is satisfied that the existing oversight and safeguard arrangements for the intelligence and security agencies are working well and that no express safeguards are required. You will be aware that under Governance of Britain ways to develop the Parliamentary accountability and public transparency of the Intelligence and Security Committee are being considered.”

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<sup>57</sup> Para. 60.

<sup>58</sup> Letter to the Home Secretary, 12 November 2007, Ninth Report of Session 2007-08, Ev 12.

<sup>59</sup> Letter from the Home Secretary, 5 December 2007, *ibid*, Ev 14.

**67. We cannot accept the Government's argument that the existing safeguards are working well and there is therefore no need for express safeguards to accompany the statutory power to acquire, use and disclose information.**

68. In April the Guardian newspaper reported a number of allegations that the Security Service had provided information about a number of British terrorism suspects to the intelligence services of Pakistan who tortured them.<sup>60</sup> As far as we are aware these remain contested allegations, but we have referred in previous reports to cases where it is a matter of public record that the intelligence services have made use of information it knows may have been obtained by torture, and made information available to others where there is a risk of it leading to torture or inhuman or degrading treatment.<sup>61</sup>

69. In her witness statement to the House of Lords in the recent case concerning the admissibility of evidence obtained by torture, for example, the then Director General of the Security Service, Dame Eliza Manningham-Buller, made clear that information disclosed to the Security Service by sources such as the Algerian intelligence agencies, where there is a risk that it may have been obtained by torture, would nevertheless be made use of "where the reporting is threat-related ... in order to protect life." The same witness statement also makes clear that the UK authorities provided questions to the Algerian authorities to be put to those who were being interrogated in Algeria. It is also a matter of public record that the UK intelligence services provided intelligence information about two British residents to the Gambian authorities which then directly or indirectly found its way into the hands of the US authorities who, it is alleged, subjected them to torture.<sup>62</sup>

70. As we pointed out in our Torture Report, the judgment of the House of Lords in the torture evidence case leaves open the possibility that information which may have been obtained by torture or ill-treatment by foreign agents may be used in intelligence or law enforcement operations, in particular to take preventative measures to protect against imminent attack. We also pointed out that where the intelligence services supply information to certain foreign intelligence services, it is likely to be impossible without safeguards to be confident that the provision of such information does not give rise to a real risk of torture or inhuman or degrading treatment. We therefore remain of the view expressed in that report, that express safeguards are needed to be confident that information is not routinely acquired, used or disclosed by the intelligence services in a way which renders the UK complicit in torture, inhuman or degrading treatment or other serious human rights violations.

**71. In our view, clauses 19-21 of the Bill provide a formal legal basis for the disclosure and use of information by the intelligence services, but they fail to provide sufficient substantive legal safeguards to guarantee against the arbitrary and disproportionate use of the power to disclose and use such information.** There is no express saving for disclosures which would breach the Human Rights Act 1998, nor other relevant international obligations such as the UN Convention Against Torture (UNCAT).

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60 *M15 accused of colluding in torture of terrorist suspects*, The Guardian, 29 April 2008.

61 See e.g. UNCAT Report at paras 52-60.

62 *Al-Rawi v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC Admin 972.

**72. We therefore recommend that clause 20(2) of the Bill be amended to provide that nothing in clause 19 authorises a disclosure that breaches (1) the Human Rights Act (2) UNCAT and (3) any other relevant international obligation concerning the disclosure and use of information.** The amendment below is designed to give effect to this recommendation.

Page 15, Clause 20, Line 29, 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.’

**73. We also recommend the insertion of further safeguards to require the intelligence services to take active steps to ascertain whether information it is acquiring was obtained by torture.** We suggest the following new clause for debate:

*‘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 1: Pre-Charge Detention: Six Key Safeguards Compared

Safeguard	Counter-Terrorism Bill (after potential Government amendments)	Civil Contingencies Act	JCHR Proposal
1. “Emergency” threshold	Exceptional operational need in relation to a specific investigation due to exceptional circumstances, e.g. multiple plots or a grave terrorist emergency <sup>63</sup>	Terrorism which threatens serious damage to the security of the UK <sup>64</sup>	Public emergency threatening the life of the nation <sup>65</sup>
2. Parliamentary scrutiny	(1) Approval by both Houses within 7 days <sup>66</sup> (2) Parliamentary debate circumscribed by need to	(1) Approval by both Houses within 7 days <sup>68</sup> (2) Parliamentary debate circumscribed by need to	(1) Approval by both Houses within 7 days (2) Full parliamentary debate on (a) whether public emergency exists (b) whether extension to 42 days “strictly

<sup>63</sup> Possible Government amendment (Bill currently provides for “exceptional operational need” threshold without further definition).

<sup>64</sup> CCA 2004 s. 19(1)(c).

<sup>65</sup> Article 15(1) ECHR, as elaborated in the case-law of the European Court of Human Rights.

<sup>66</sup> Possible Government amendment to new para 45(2) of Schedule 8 to the Terrorism Act 2000 (Bill currently provides for approval by each House within 30 days).

	avoid prejudice to future trials <sup>67</sup>	avoid prejudice to future trials <sup>69</sup>	required” by the emergency (c) whether extension consistent with other international obligations
3. Judicial review of extension	Judicial review of Secretary of State’s view that: <sup>70</sup> (1) extension is needed for purposes of investigation giving rise to exceptional operational need; (2) need for extension is urgent; (3) power is compatible with Article 5 ECHR	Judicial review of Secretary of State’s view: <sup>71</sup> (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; (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; (3) whether extension to 42 days consistent with UK’s other international obligations.

67 As acknowledged by proposed new para. 44(5) of Schedule 8 to Terrorism Act 2000 (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).

68 CCA 2004 s. 27(1)(b).

69 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 both Houses of Parliament after a debate.

70 Proposed new para. 41(3) of Schedule 8 to Terrorism Act 2000.

71 CCA 2004, s. 23(1).

<p>4. Judicial safeguards for individual (at applications for extension)</p>	<p>Review by a judge but no additional judicial safeguards, so current law applies:<sup>72</sup>                  (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;                  (3) no provision for special advocates</p>	<p>None specified in Act; left to emergency regulations (drafts not published)</p>	<p>Fully judicial hearing with full procedural rights for suspect and right to be represented by special advocate at any closed hearing<sup>73</sup></p>
<p>5. Duration</p>	<p>30 days<sup>74</sup></p>	<p>30 days (or earlier if specified in emergency regulations)<sup>75</sup></p>	<p>30 days</p>
<p>6. Parliamentary review</p>	<p>Statutory reviewer to report to Secretary of State on</p>	<p>None in Act itself; Government commitment to</p>	<p>(1) Panel of independent reviewers                  (2) reporting directly to Parliament on operation of extended pre-charge detention</p>

<sup>72</sup> Paras 33 and 34 of Schedule 8 to the Terrorism Act 2000.

<sup>73</sup> Under JCHR's proposed amendment to Schedule 8 to the Terrorism Act 2000: see Second Report on Counter-Terrorism Bill, at para. 13.

<sup>74</sup> Possible Government amendment (Bill currently provides for reserve power to cease after 60 days: proposed new para. 45(1) of Schedule 8 to the Terrorism Act 2000).

<sup>75</sup> CCA 2004, s. 26(1).

	<p>(1) operation of legislation                  (2) each individual case</p>	<p>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<sup>76</sup></p>	<p>(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</p>
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76 HC Deb 18 November 2004 col.s 1509-1510 (Ruth Kelly MP).

## Annex 2: Proposed Committee amendments

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In this Annex, we suggest amendments to give effect to some of our recommendations in this Report.<sup>77</sup>

### **Pre-Charge Detention: Strengthening the parliamentary safeguards**

The Committee has recommended the following 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.<sup>78</sup>

*‘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)–

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<sup>77</sup> Page, clause and line references are to Bill 100.

<sup>78</sup> Paragraph 19.

- (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.”.

## **Derogation from the right to liberty**

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.<sup>79</sup>

Page 64, Schedule 2, line 25, insert–

- ‘(2) ‘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.’

Page 64, Schedule 2, line 26, leave out paragraph 39.

Page 65, Schedule 2, line 29, at end insert–

‘if the following conditions are satisfied:

- (a) there is an emergency;
- (b) making the derogating power available is strictly required by the emergency; and
- (c) the availability of the derogating power is consistent with the UK’s other international obligations.’

Page 66, Schedule 2, line 6, leave out sub-sub paragraph (b).

Page 66, Schedule 2, line 8, leave out “that the Secretary of State is” and insert “the Secretary of State’s reasons for being”.

Page 66, Schedule 2, line 9, leave out lines 9 to 15 and insert–

- ‘(a) that there is an emergency;
- (b) that making the derogating power available is strictly required by the emergency; and
- (c) that the availability of the derogating power is consistent with the UK’s other international obligations.’

Page 69, Schedule 2, line 6, leave out ‘30’ and insert ‘seven’.

Page 69, Schedule 2, line 9, leave out ‘30’ and insert ‘seven’.

## **Disclosure of information involving the intelligence services**

The following amendment and new clause seek 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.

Page 15, Clause 20, Line 29, 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.’

*‘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.’



## Conclusions and recommendations

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1. It remains our view, expressed consistently in previous reports, that the Government has failed to make its case for further extending the maximum period of pre-charge detention and that there is therefore no need to make any provision for the extension of the current maximum. We explain why the safeguards in the Bill, even after the potential Government amendments, are inadequate to protect individuals against the risk of arbitrary detention. We also spell out explicitly all the necessary safeguards in the event that the public emergency, which is the premise of the Government's proposal, were ever to materialise. (Paragraph 2)
2. We still have not seen any evidence which demonstrates that the threat level is growing. (Paragraph 6) In our view, 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 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 evidence demonstrating that the threat level is growing. (Paragraph 9)
3. We recommend that the Home Secretary make the information [about the operation of the extended period of pre-charge detention since its last renewal] available in time to inform the debate on this issue at the Bill's Report stage. If this is not done, we draw the attention of both Houses to the absence of this information. (Paragraph 12)
4. We look forward to a response to our queries [about improved parliamentary review of pre-charge detention] in time to inform debate at Report stage. (Paragraph 18) In the meantime, we think it is important for the arrangements for parliamentary review to be improved by providing for the independence of the reviewer, some parliamentary input into the appointments process and for direct and timely reporting to Parliament. We also feel that there is now more work than one reviewer can reasonably do and that a panel of independent reviewers would be desirable. (Paragraph 19)
5. It follows that we would also be opposed to any proposal to amend the Civil Contingencies Act to provide the Secretary of State with the power to extend the period of pre-charge detention beyond 28 days by way of emergency regulations. 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. (Paragraph 26)
6. On the other hand, a substantial threat to the nation, which appears to be what was contemplated by Tony McNulty MP in a radio interview on BBC Radio 4 on 2 June 2008, or a "grave terrorist emergency" would set the bar rather higher. We would also point out, however, that, as presently drafted, the Bill merely requires that the Secretary of State make a statement to Parliament that she is satisfied of certain

matters. It does not make those matters preconditions to the exercise of the power. (Paragraph 30)

7. Requiring the Secretary of State to declare there is an exceptional need for a reserve power, or even that there is an emergency which makes such a power necessary, is not, in reality, much of a safeguard, at least without some meaningful opportunity for that assertion to be tested by independent scrutineers, whether in Parliament or the courts. (Paragraph 32)
8. Even if the Bill were amended to provide for parliamentary authorisation of the Secretary of State's decision within a very short period such as seven days, this would not be a very significant safeguard so long as the exceptional need relates to a specific, ongoing investigation, because the debate would be heavily circumscribed by the risk of prejudicing future trials. (Paragraph 36)
9. We note, however, that neither the Bill as drafted, nor any of the potential Government amendments to it, provide any additional judicial safeguards for the individual. (Paragraph 38)
10. The lack of proper judicial safeguards is one of the principal reasons why, in our view, extending the maximum period of pre-charge detention to 42 days, without providing any additional judicial safeguards, would be in breach of the right to liberty in Article 5 and therefore require a derogation from that Article. (Paragraph 39)
11. We are not, therefore, persuaded that the additional safeguards being considered for the Bill, modelled on those in the Civil Contingencies Act 2004, provide sufficiently strong safeguards to meet the human rights concerns that we have expressed about this particular aspect of the Bill. (Paragraph 40)
12. No amount of additional parliamentary or judicial safeguards can render the proposal for a reserve power of 42 days' pre-charge detention compatible with the right to liberty in Article 5 ECHR. In our view, such provision inevitably involves derogation from the right to liberty in Article 5. Inserting safeguards such as those apparently suggested by the Government does not change our view that a derogation from the UK's obligations under Article 5 would be required to make available a reserve power of 42 days pre-charge detention. (Paragraph 44)
13. As we have made clear 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 clear recommendation therefore remains the deletion of the relevant provisions from the Bill, as we recommended in our last report. (Paragraph 45)
14. We remain firmly of the view that if there is a genuine emergency within the terms of Article 15 of the ECHR the Government should make its case for such a derogation [from Article 5 ECHR] and not seek new legislation. (Paragraph 49)
15. As we stated in paragraph 45, above, the Government has not made its case for any increase in the period of pre-charge detention. There is a case for legislation which

would provide in advance a detailed framework for the exercise of the power to derogate from particular rights in a particular context in a public emergency. Indeed, such legislation could be beneficial 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. In our view, this would be positively beneficial from a human rights perspective by ensuring that the necessary safeguards are firmly in place. (Paragraph 50) This alternative, it seems to us, would provide much more stringent safeguards than are currently proposed by the Government. 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. (Paragraph 53)

16. We therefore recommend that the opportunity be taken in the Bill to provide a clear framework for any future derogation from the right to liberty in this particular context. This is not an alternative to, but complements, the other elements in the package of measures we have recommended in our previous reports. We remain of the view that the case for 42 days detention has not been made, that the availability of alternatives makes it unnecessary, and that it would inevitably breach 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. (Paragraph 55)
17. We urge the Minister to meet the special advocates to discuss our recommendations and to report to Parliament on the outcome of that meeting. (Paragraph 58)
18. We welcome the Government's proposal to place the disclosure and use of information by the intelligence services on a statutory footing, as a potentially human rights enhancing measure. (Paragraph 62)
19. We cannot accept the Government's argument that the existing safeguards are working well and there is therefore no need for express safeguards to accompany the statutory power to acquire, use and disclose information. (Paragraph 67)
20. In our view, clauses 19-21 of the Bill provide a formal legal basis for the disclosure and use of information by the intelligence services, but they fail to provide sufficient substantive legal safeguards to guarantee against the arbitrary and disproportionate use of the power to disclose and use such information. (Paragraph 71)
21. We therefore recommend that clause 20(2) of the Bill be amended to provide that nothing in clause 19 authorises a disclosure that breaches (1) the Human Rights Act (2) UNCAT and (3) any other relevant international obligation concerning the disclosure and use of information. (Paragraph 72)

22. We also recommend the insertion of further safeguards to require the intelligence services to take active steps to ascertain whether information it is acquiring was obtained by torture. (Paragraph 73)

# Formal Minutes

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Monday 2 June 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	John Austin MP
Lord Dubs	Mr Douglas Carswell MP
The Earl of Onslow	Dr Evan Harris MP
Baroness Stern	Mr Virendra Sharma MP
	Mr Richard Shepherd MP

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Draft Report (*Counter-Terrorism Policy and Human Rights (Eleventh 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.

Paragraph 1 read and agreed to.

Paragraph 2 read as follows:

The main purpose of this report is to comment further on certain aspects of the Bill's most controversial proposal, to extend the maximum period of pre-charge detention to 42 days. We also comment on the provisions in the Bill concerning the obtaining, use and disclosure of information by the intelligence services.

Amendment proposed, in line 3, after "days" to insert:

“, in the light of recent developments and in particular in the light of the Government's indication that it will shortly be bringing forward a number of amendments to this Part of the Bill designed to meet concerns about its human rights compatibility. On 1 June 2008 the Secretary of State for Justice and Lord Chancellor Jack Straw MP indicated in a television interview a number of amendments which are likely to be brought forward by the Government. On 2 June the Prime Minister, in an article in *The Times*, argued that the Government's 42 Days proposal contains a number of practical safeguards which together ensure that the Government's response to the changing demands of national security also uphold civil liberties.

In the light of the likely Government amendments and the Prime Minister's robust defence of the adequacy of the proposed safeguards, we focus in this Report on the question of whether those safeguards are sufficient to meet the concerns about the human rights compatibility of its 42 Days proposal. **It remains our view, expressed**

**consistently in previous reports, that the Government has failed to make its case for further extending the maximum period of pre-charge detention and that there is therefore no need to make any provision for the extension of the current maximum. If, however, Parliament were to be persuaded of the need to legislate on a precautionary basis for a possible future emergency, we explain why the safeguards in the Bill, even after the Government’s likely amendments, are inadequate to protect individuals against the risk of arbitrary detention. We propose an alternative framework, spelling out explicitly all the necessary safeguards in the event that the public emergency, which is the premise of the Government’s proposal, were ever to materialise.”—(*The Chairman.*)**

Amendments made.

Another Amendment proposed, in line 21, to leave out “Government’s likely” and insert “rumoured Government”—(*Mr Richard Shepherd.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2

Not Content, 7

The Earl of Onslow  
Mr Richard Shepherd MP

John Austin MP  
Lord Bowness  
Mr Andrew Dismore MP  
Lord Dubs  
Dr Evan Harris MP  
Mr Virendra Sharma MP  
Baroness Stern

Another Amendment made.

Paragraph, as amended, agreed to.

Paragraphs 3 to 5 read, amended and agreed to.

Paragraph 6 read and agreed to.

Paragraph 7 read, amended and agreed to.

Paragraph 8 read and agreed to.

Paragraphs 9 to 12 read, amended and agreed to.

Paragraphs 13 to 15 read and agreed to.

Paragraph 16 read, amended and agreed to.

Paragraphs 17 to 20 read and agreed to.

Paragraphs 21 and 22 read, amended and agreed to.

Paragraphs 23 to 26 read and agreed to.

Paragraph 27 read, amended and agreed to.

Paragraph 28 read and agreed to.

A paragraph—(*The Chairman*)—brought up, read the first and second time, and inserted (now paragraph 29).

Paragraphs 29 and 30 read, amended and agreed to (now paragraphs 30 and 31).

Paragraph 31 read as follows:

Moreover, Governments may be quick to assert the existence of an emergency or exceptional need in circumstances which, with the benefit of hindsight, did not warrant such assertions. Indeed, it should not be forgotten that the Home Office continues to maintain that the UK is facing a “public emergency threatening the life of the nation” in the sense meant by Article 15 ECHR. This emergency has existed, according to the Home Office, for the whole of what is now almost seven years, since September 2001. At present, it is not thought to necessitate derogating measures, but the Government has been careful to preserve the endorsement by a majority of the House of Lords in *A* of its assertion that a public emergency threatening the life of the nation exists. This may seem rather an extravagant claim to many, including the current DPP, but the Government clearly believes that it avoids the need to demonstrate again, by reference to up to date evidence, that a public emergency exists.

Paragraph disagreed to.

Paragraphs 32 and 33 read and agreed to.

Paragraph 34 read, amended and agreed to.

Paragraph 35 read and agreed to.

Paragraph 36 read, amended and agreed to.

Paragraphs—(*The Chairman*)—brought up, read the first and second time, and inserted (now paragraphs 37 to 39).

Paragraphs 37 to 41 read and agreed to (now paragraphs 40 to 44).

Paragraph 42 read, amended and agreed to (now paragraph 45).

Paragraphs 43 to 45 read and agreed to (now paragraphs 46 to 48).

Paragraph 46 read, amended and divided.

Paragraph 46 agreed to (now paragraph 49).

Question put, That paragraph 46A, as amended, stand part of the Bill.

The Committee divided.

Content, 8

Not Content, 1

John Austin MP  
Lord Bowness  
Mr Andrew Dismore MP  
Lord Dubs  
Dr Evan Harris MP  
The Earl of Onslow  
Mr Virendra Sharma MP  
Baroness Stern

Mr Richard Shepherd MP

Paragraph, as amended, agreed to (now paragraph 50).

Paragraph 47 read.

Amendment proposed, in line 4, to leave out from “situation.”” to the end—(*Lord Bowness.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 3

Not Content, 6

Lord Bowness  
The Earl of Onslow  
Mr Richard Shepherd MP

John Austin MP  
Mr Andrew Dismore MP  
Lord Dubs  
Dr Evan Harris MP  
Mr Virendra Sharma MP  
Baroness Stern

Other Amendments made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 7

Not Content, 2

John Austin MP  
Mr Andrew Dismore MP  
Lord Dubs  
Dr Evan Harris MP  
The Earl of Onslow  
Mr Virendra Sharma MP  
Baroness Stern

Lord Bowness  
Mr Richard Shepherd MP



Paragraph 47, as amended, agreed to (now paragraph 51).

Paragraph 48 read and amended.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 7

Not Content, 2

John Austin MP

Lord Bowness

Mr Andrew Dismore MP

Mr Richard Shepherd MP

Lord Dubs

Dr Evan Harris MP

The Earl of Onslow

Mr Virendra Sharma MP

Baroness Stern

Paragraph 48, as amended, agreed to (now paragraph 52).

Paragraph 49 read and amended.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 8

Not Content, 1

John Austin MP

Mr Richard Shepherd MP

Lord Bowness

Mr Andrew Dismore MP

Lord Dubs

Dr Evan Harris MP

The Earl of Onslow

Mr Virendra Sharma MP

Baroness Stern

Paragraph 49, as amended, agreed to (now paragraph 53).

Paragraph 50 read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 8

Not Content, 1

John Austin MP	Mr Richard Shepherd MP
Lord Bowness	
Mr Andrew Dismore MP	
Lord Dubs	
Dr Evan Harris MP	
The Earl of Onslow	
Mr Virendra Sharma MP	
Baroness Stern	

Paragraph 50 agreed to (now paragraph 54).

Paragraph 51 read.

Amendment proposed, in line 12, to leave out from “ECHR.” to the end—(*Mr Richard Shepherd.*)

Question put, That the Amendment be made.

Content, 3	Not Content, 6
Lord Bowness	John Austin MP
The Earl of Onslow	Mr Andrew Dismore MP
Mr Richard Shepherd MP	Lord Dubs
	Dr Evan Harris MP
	Mr Virendra Sharma MP
	Baroness Stern

Other Amendments made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 8	Not Content, 1
John Austin MP	Mr Richard Shepherd MP
Lord Bowness	
Mr Andrew Dismore MP	
Lord Dubs	
Dr Evan Harris MP	
The Earl of Onslow	
Mr Virendra Sharma MP	
Baroness Stern	

Paragraph 51, as amended, agreed to (now paragraph 55).

Paragraph 52 read and agreed to (now paragraph 56).

Paragraphs 53 and 54 read, amended and agreed to (now paragraphs 57 and 58).

Paragraphs 55 to 63 read and agreed to (now paragraphs 59 to 67).

Paragraphs 64 to 68 read, amended and agreed to (now paragraphs 68 to 72).

Paragraph 69 read and agreed to (now paragraph 73).

Annexes read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

*Resolved*, That the title of the Report be changed to the following: *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies.—(The Chairman.)*

*Resolved*, That the Report be the Twenty-first 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.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

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[Adjourned till Tuesday 10 June at 1.30pm.]

# Appendices

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## **Appendix 1: Letter to Rt Hon Tony McNulty MP Minister of State, Home Office, dated 16 May 2008**

### **Counter-Terrorism Bill: Special Advocates**

Thank you for attending our mini-conference on Counter Terrorism Policy earlier this week. The Committee was particularly grateful that you stayed for the subsequent discussion.

I am writing to follow up your offer at the conference to meet with representatives of the special advocates to discuss some of the recommendations in our most recent report on the Bill.

In our report (paras 90-111) we recommend six amendments to the control orders legislation which are designed to ensure that in future control order hearings are much more likely to be fair in all cases. These recommendations are very largely based on the evidence that we have received from special advocates expressing their concerns about the fairness of the hearings under the current legislative framework.

I have tabled amendments to the Counter-Terrorism Bill to give effect to these recommendations. I am sure you would agree that Parliament would find it extremely useful when debating these amendments if it had available a report of your discussions with the special advocates about these proposed changes.

I therefore hope it will be possible for you to hold the meeting you offered in time to inform the debate at Report stage of the Bill. If you are able to hold the meeting I would be very grateful to be kept informed of what was discussed and any conclusions reached.

I am copying this letter to the special advocates who have given evidence to us in the past and the Special Advocate Support Office.

## **Appendix 2: Letter to Rt Hon Jacqui Smith MP, Home Secretary, dated 23 May 2008**

### **Pre-Charge Detention: 28 Days Annual Renewal**

I am writing to you concerning the annual renewal of the provisions in the Terrorism Act 2006 which extend the maximum period of pre-charge detention in terrorism cases from 14 to 28 days. That extended period will expire on 25 July 2008 unless a renewal order is passed by both Houses. The laying of the draft order to renew the extended period is therefore imminent.

I am writing, first, to enquire as to what improvements you have made to the arrangements for parliamentary review of the extended period in light of our previous recommendations and, second, to request some information about the operation of the extended period since its last renewal with a view to ensuring that Parliament is fully informed when it comes to debate the draft renewal order.

### **Arrangements for parliamentary review**

In our Report on 28 Days, Intercept and Post-Charge Questioning, published in July 2007, we made a number of specific recommendations concerning the arrangements for parliamentary review of the operation in practice of the extended period of pre-charge detention up to a maximum of 28 days. The aim of our recommendations was to ensure that there is rigorous independent scrutiny of the operation in practice of the extended period, which is made available to Parliament sufficiently in advance of the renewal debate to ensure that Parliament is fully and reliably informed about how the power has actually been working before it is asked to approve renewal of the extraordinary power for another year.

We recommended that parliamentary oversight be improved by making available to Parliament, at least a month before the renewal debate, a report by an independent reviewer on the operation in practice of the extended period and on the continued necessity for it, and a detailed annual report by the Home Secretary on the use which has been made of the power by the police. In response, you said that Lord Carlile already reports annually on the operation of the Terrorism Act 2000, including on the extended period of pre-charge detention. You also said that you would be looking to ensure that there is sufficient parliamentary oversight of the pre-charge detention period as part of the consultation on the forthcoming counter-terrorism bill and would consider our recommendations as part of that consultation.

We also recommended that an appropriate independent body undertake an in-depth scrutiny of the operation in practice by the Metropolitan Police Service of the new power of pre-charge detention beyond 14 days. We suggested that the Metropolitan Police Authority, the independent statutory body charged with scrutinising the work of the Metropolitan Police Service, may be well placed to do this. You said in your

response that you would consider whether there is a need for an independent body to review the operation of pre-charge detention as part of the consultation on the forthcoming counter-terrorism bill.

The Counter-Terrorism Bill, however, makes no provision for improving the existing arrangements for parliamentary review of the operation of extended pre-charge detention.

**Has the Government now considered our recommendations for improving parliamentary review of extended pre-charge detention and decided to reject them? If so, we would be grateful to receive your reasons.**

Lord Carlile's annual report on the Terrorism Act 2000 covers the calendar year. His forthcoming report on the operation of the Terrorism Act 2000 during 2007, will therefore only cover the first 5 months of the period since the last annual renewal. Furthermore, as we pointed out last year, Lord Carlile's last report on the Terrorism Act 2000 did not even state in how many cases the power to authorise extended detention had been exercised, let alone contain any detailed scrutiny of each case in which the power had been exercised.

**Will Lord Carlile's annual report on the operation of the Terrorism Act 2006 during 2007 be available before the renewal debate? If so, when?**

**Have you asked Lord Carlile to ensure that his next report on the Terrorism Act 2000 contains a detailed analysis of the operation in practice of extended pre-charge detention?**

**Will any other independent reviewer be providing Parliament with any analysis of the use which has been made of the extended period?**

**Will you be providing your own detailed report to Parliament, in advance of the renewal debate, on the use which has been made of the power to detain without charge beyond 14 days in the year since its last renewal?**

We also recommended in our Report on 28 days that, in order to help Parliament evaluate the strength of the case for extended pre-charge detention in terrorism cases, the police should in future keep data to demonstrate the number of times terrorism suspects have been released without charge and then subsequently rearrested as a result of information that had subsequently come to light as a result of searching computer hard drives or related material. In our view, such data is central to any evidence-based assessment of the adequacy of the current period. In your response to our report you said that the Home Office was working with the police to review the collation and publication of statistics relating to terrorism legislation and that statistics and information available with reference to pre-charge detention would be reviewed as part of this process.

**What additional statistics or information in relation to pre-charge detention did you or the police decide to collect as a result of your joint review?**

**How many times in the past year has a terrorism suspect been released without charge and then subsequently rearrested, or sought for arrest, because of information which has only subsequently come to light as a result of searching computer or related material after their release?**

**The operation in practice of the extended period**

We would be grateful if you could provide us with the following information about the operation in practice of the extended period of pre-charge detention and the continuing need for it.

**In respect of how many terrorism suspects has the power of extended detention beyond 14 days been used since its renewal in July 2007? Please provide the dates on each occasion when detention was extended.**

**Please provide a thorough analysis of the way in which each of those suspects were dealt with, including**

- **precisely how long after their arrest they were charged or released without charge**
- **the reasons relied on at each application to a court for an extension of authorisation for detention**
- **the exact charges brought against those charged**
- **whether the Threshold Test or the Full Code Test was used when charging them.**

**What independent medical evidence have you sought of the psychological impact of extended pre-charge detention on those detained for more than 14 days?**

In view of the imminence of the laying of the draft renewal order, I would be grateful for your response to these questions by **Friday 30 May 2008**.

I am copying this letter to Deputy Assistant Commissioner John McDowall, Head of the Metropolitan Police's Counter-Terrorism Command, Sue Hemming, Head of the Counter-Terrorism Division at the CPS, and Lord Carlile of Berriew QC, the statutory reviewer of the terrorism legislation, who may be able to assist with the relevant information.

# Reports from the Joint Committee on Human Rights in this Parliament

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## 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

#### 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 Rights Act	HL Paper 77/HC 410
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
<b>Session 2005–06</b>		
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 Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
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

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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