FROM 'WAR' TO LAW

Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

About Liberty

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

Liberty Policy

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

Liberty's policy papers are available at
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Contact

Isabella Sankey
Director of Policy
Direct Line 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Anita Coles
Policy Officer
Direct Line: 020 7378 3659
Email: anitac@liberty-human-rights.org.uk

Sophie Farthing
Policy Officer
Direct Line 020 7378 3654
Email: Sophief@liberty-human-rights.org.uk

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FOREWORD

On the 13th July 2010 the new Home Secretary, Rt Hon Theresa May MP announced a review of seven key areas of counter terror policy. In doing this she expressly invited the contribution of Liberty (the National Council for Civil Liberties). We thank her for this invitation and accept with equal respect and good will. We see it as indication both of our organisation's seventy-six year experience protecting fundamental rights and liberties in Britain and of the Government's stated aspiration of combating terrorism within the rule of law and in the best traditions of an open society that values both its security and freedom.

Liberty has never been naïve to or unconcerned with threats from terrorism. However, we have consistently made the following observations that appear to have been vindicated in courts of law, history and public opinion.

Firstly, it is the vital task of Government, security and law enforcement agencies to protect life and the democratic way of life. Secondly, the framework of fundamental rights and freedoms (agreed by democrats the world over, after World War II), constitutes the underlying philosophy that distinguishes us from tyrants and terrorists. It is robust and flexible enough to withstand violent and ideological threats and binds a diverse society together, providing inspiration and resilience in difficult times. Finally, the 'War on Terror' rhetoric and policy of recent years has been misguided and often counter-productive to addressing violent extremism. On the one hand a 'war' without end means 'rules of the game' in constant flux so that rights, freedoms and the rule of law are fatally compromised in a permanent state of emergency. Conversely this perennial 'war' footing allows terrorists who would take innocent lives for political or ideological ends, to claim a moral high ground and paint themselves as soldiers rather than criminals. This is the disastrous outcome that terrorism seeks to provoke but which any sensible democratic Government seeking to unite society, should strive to avoid. It the most obvious reason why terrorism should be dealt with as a matter of law not war.

This review is not a comprehensive re-appraisal of domestic security policy. However the areas it covers all raise vital issues. Article 2 of the Convention on Human rights creates a legal (as well as moral) obligation on the State to protect human life. Article 3 contains the absolute prohibition on torture and inhuman and degrading treatment

(including sending people to such a fate). Articles 5 and 6 (with an especially proud and long tradition in Britain) contain the rights to liberty of the person and a fair trial. Article 8 is the right to respect for personal privacy and family life. Whilst precious in any democracy, it is necessarily a 'qualified' or 'balanced' right, but any interferences must be necessary, proportionate and in accordance with law. Articles 10 and 11 are the rights to free speech and association and can be similarly carefully and proportionately qualified in the interests of security. Article 14 is the crucial provision for equal treatment in the application of other rights and freedoms. Article 1 of Protocol 1 protects the peaceful enjoyment of property.

Control Orders under the *Prevention of Terrorism Act 2005* are perhaps the most shameful legislative legacy of Britain's domestic 'War on Terror'. They allow the indefinite imposition of serious punishments such as house arrest and internal exile by the Home Secretary of the day on the basis of reasonable suspicion without the need for charges, evidence or proof. They were introduced as an instant political fix after the earlier policy of internment for foreign national terror suspects was impugned in the House of Lords and continue to attract international amazement and judicial criticism. Further, they provide no real security against the suspect determined on mayhem or disappearance and an absurd proportion of those subject to these orders have absconded over the years. Liberty has campaigned and litigated against control orders on justice and security grounds since their invention and turbulent passage through Parliament five years ago. The first priority of this Review must be to dispense with this unsafe unfair embarrassment once and for all.

Following a Supreme Court judgment impugning sweeping executive powers to freeze the assets of terror suspects, the Government is committing to adding vital safeguards for the individual. We do not doubt the importance of stemming the flow of terrorist finance but insist that this can and must be achieved in a manner that respects due process and proportionality.

Section 44 of the *Terrorism Act 2000* is a dangerously broad 'stop and search' power that requires no reasonable suspicion of criminality on the part of the person who is subject to it. Furthermore it may be triggered in secret in respect of massive geographical areas by the police, subject only to the Home Secretary's approval. Unsurprisingly the power has been subject to considerable error and abuse against peace protesters, journalists, school children and has not been credited with the apprehension or prevention of a single terrorist. The police have themselves realised

the dangerous counter-productivity of such a measure and Liberty's test case of *Gillan and Quinton v UK* resulted in the Court of Human Right's finding that the power breaches Article 8 of the Convention and poses real dangers to other vital rights and freedoms as well.

The *Regulation of Investigatory Powers Act 2000* (RIPA) governs a range of surveillance powers including access to communications data and the many other intrusive powers delegated to local authority officials in Britain. Surveillance has a vital role to play in the fight against terrorism in particular and serious crime more generally. However public confidence in such necessary intrusion is severely undermined when this trust is placed in the wrong or inadequately supervised hands, resulting in petty but nonetheless chilling abuses of power. Liberty's test case of *Jenny Paton v Poole Borough Council* in the Investigatory Powers Tribunal demonstrates local government abuse of surveillance power (purportedly to police school catchment areas) and a firm rebuttal of the notion that 'the innocent have nothing to fear'.

Immigration control and the deportation of undesirable foreign nationals with no right to stay remains the prerogative of all nation states. However international and domestic law is clear that this cannot trump the absolute rule against torture. It is not enough that democratic nations do not torture by their own hands. They cannot send, deport, extradite or render people to places of torture either. Recent revelations (now to be formally investigated) about 'extraordinary rendition' during the 'War on Terror' graphically demonstrate the dangers of flouting such a vital democratic principle. Thus if deportation is to remain a tool of security policy, actual and potential allied nations must be encouraged, incentivised and persuaded to maintain or achieve sound records of repudiating and eradicating torture techniques in their jurisdiction. It must also be remembered that in this shrinking interconnected world of airline travel and porous international borders, deportation will never be as safe a disposal for a truly dangerous terrorist as fair criminal process (with or without extradition) followed by imprisonment.

Though not absolute, freedoms of speech and association are hallmarks of democratic society and our law has already impeded them to a great extent in pursuit of security and other goals. We have no argument with the proscription of violent and terrorist organisations but strongly caution against the banning of 'extreme' organisations that cannot be directly linked with inciting or perpetrating acts of

violence. There are many ways of challenging extreme and hateful organisations and ideologies but the over-use of proscription, censorship and guilt by association risks being both operationally ineffective and counter-productive in driving certain discourse underground and making it more rather than less attractive to some members of society.

Finally, pre-charge detention limits for terror suspects have provided some of the most highly charged political battle grounds of recent years. Liberty remains grateful to everyone in and outside Parliament who supported our vital campaigns against proposals to extend the time someone can be held without a formal accusation to 90 days (2005) and 42 days (2008). Nonetheless, 28 days detention remains way out of line with periods in comparable democracies. We suggest that such a lengthy period is wrong in principle and unnecessary and counterproductive in practice.

In what follows, we examine each of these issues with care and detail, suggesting modifications or alternatives to ineffective and unjust law and policy. The nine years following the Twin Towers atrocity have been a particularly challenging time for all those committed to fundamental rights, freedoms, democracy and the rule of law. These include the majority of our political, media, security, legal and judicial communities and we pay tribute to their vital work. Nonetheless, some grave mistakes have been made and the world's oldest unbroken democracy will be judged by its ability to reflect and correct itself. This is perhaps a once in a generation opportunity to move from 'war to law'. We must ensure that the moment is not wasted.

Shami Chakrabarti
Director, Liberty
August 2010

EXECUTIVE SUMMARY

Control Orders

- The control order regime is both unsafe and unfair.
- It abrogates the right to a fair trial and the presumption of innocence, enabling unending restrictions on liberty on the basis of secret intelligence and suspicion rather than charges, evidence and proof.
- What was originally intended as a temporary regime has been shown not to work, with many of those subject to control orders absconding, and many other orders being struck down by the courts.
- Aside from the human cost of control orders, millions of pounds have been spent on administering control orders and defending litigation.
- It is time that the control order regime is scrapped entirely. Instead, intercept evidence should be made admissible in criminal proceedings, criminal prosecutions should take place and there could be greater focus on the appropriate use of surveillance powers

Terrorist Asset Freezing Regime

- The terrorist asset freezing regime can have devastating effects on individuals and their families and has severe implications for rights and freedoms.
- Imposition of such a regime on those who have never been arrested, charged or convicted in relation to a terrorism offence undermines the presumption of innocence, as with the unfair control order regime.
- Terrorist asset freezing of the funds of proscribed organisations should be dealt with distinctly from the freezing of individuals assets
- There is currently disparate legislation dealing with terrorist asset freezing. The Bill currently before Parliament should be amended to give Parliament a clear and comprehensive account of all relevant powers, and the process by which a person is designated should be completely overhauled to protect the innocent and provide for procedural fairness.

Section 44 and photography

- Current stop and search powers under section 44 of the *Terrorism Act 2000* require urgent amendment following Liberty's successful challenge in the European Court of Human Rights.
- Exceptional stop and search powers without reasonable suspicion may be justified in certain very limited circumstances. Section 44 requires modification to ensure that if it remains at all, it can only be used for extremely short periods, in limited areas, not on a rolling basis and only in response to a specific event, place or intelligence and where it is considered reasonably necessary to prevent acts of terrorism.
- Counter-terrorism measures, including section 44 and sections 58 and 58A of the *Terrorism Act 2000*, have been used, or threatened to be used, disproportionately against photographers. These provisions are too broad and require amendment to ensure they only apply to those who intend to use the photographs etc for the purposes of terrorism.

Use of RIPA by local authorities and power to access communications data

- RIPA grants extremely broad powers to numerous public bodies to access highly intrusive surveillance powers.
- Most local authorities do not use RIPA powers but amongst those that do there is widespread misunderstanding of the Act. We question whether local authorities should have access to any RIPA powers at all – with such highly intrusive surveillance powers better suited to law enforcement agencies than local councils.
- It is inappropriate and confusing that powers to access communications data are spread across the statute book. RIPA alone should strictly govern access to communications data.

Deportations with Assurances

- The absolute prohibition on torture forbids deportations to places of torture. Diplomatic assurances obtained from countries with poor human rights records do not absolve the Government, and ultimately the courts, from the

obligation to examine whether such assurances practically provide sufficient guarantees that a person will be protected from torture and ill-treatment.

- Obtaining diplomatic assurances is difficult as a matter of foreign policy. It effectively amounts to asking another State to make an exception to its usual practice of ill-treatment and risks tacitly condoning torture.
- Post-return monitoring not only takes place after the event but also puts the UK in a difficult position of monitoring the safety of one or more named individuals in circumstances where officials are aware that other detainees (not the subject of the assurances), may be subjected to torture or ill-treatment.
- Rather than concentrating on seeking further hollow assurances, the UK should focus on helping to improve conditions in those countries to which we seek to deport people.

Measures to deal with organisations that promote hatred or violence

- The Government currently has broad powers to proscribe an organisation which is 'concerned' in terrorism. Once an organisation is proscribed it is illegal to (among other things), be a member of that organisation or to provide it with any financial or non-financial support. There are also numerous criminal provisions making it an offence for an individual to stir up hatred on the grounds of race, religion or sexual orientation.
- We believe that any extension of these powers to proscribe non-violent organisations which promote hatred would be a step too far. Banning an organisation of the basis of what they say, however distasteful, would be an unacceptable breach of the right to freedom of expression and the right to freedom of assembly and association.
- The current power to ban organisations is already far too wide, compounded by the inclusion of 'glorification' as a ground for proscription. Any extension to 'hatred' would capture an innumerable number of organisations, including, potentially, political or religious bodies. It would be a grave step indeed to ban an organisation on the basis that its message was offensive rather than violent.

Pre-charge detention of terrorist suspects

- 28 days detention of a person without charge is shamefully long, an egregious breach of the UK's human rights obligations and puts us way out of step with other comparable democracies;
- The period of pre-charge detention has crept up from seven days in 2000 to the current 28 day period. We believe the issue needs to be considered afresh and the period reduced to a proportionate level.

CHAPTER 1: CONTROL ORDERS

Terms of Reference: Control Orders (including alternatives)

Introduction

1. The control order regime under the *Prevention of Terrorism Act 2005* is a blot on the human rights record of the UK. The regime has been consistently questioned by both Coalition partners, who have challenged the evidence base put forward for its enactment and use, and have argued that the control order policy is wrong in principle and breaches civil liberties. Liberty believes that not only is the control order policy an egregious breach of the human rights of the individual subjected to it and their families, it is also a dangerously unsafe policy which has shown to be ineffective and frequently unworkable in practice. This has been played out in a series of judgments in the House of Lords and now the Supreme Court, in which the most senior judicial officers in the land have steadily chipped away at the policy on the basis that the control order breaches the subject's human rights. Recent evidence has also shown that control orders are the most costly of all of the counter-terrorism measures, and those costs are enormous.

2. Control orders are unfair and unsafe. This Review ought to scrap the scheme immediately; the control order regime cannot be amended to make the orders human rights compliant. An end to control orders will not, as the previous Government frequently argued, have any impact on the security of us all, particularly as the evidence demonstrates that control orders do little to protect us in the first place. Indeed, there are viable alternatives to the control order regime which are already in existence and which the former Government for some time, and for whatever motivation, ignored. Liberty believes that this Coalition Government, united in its opposition to this draconian legislation, must look at the alternatives and end the control order regime once and for all, relegating it to a dark chapter in the former Government's historical approach to anti-terrorism legislation.

Background

3. Control orders were created by the *Prevention of Terrorism Act 2005* (PTA), in response to the House of Lord's ruling against the detention powers in Part IV of

the *Anti-terrorism Crime and Security Act 2001* (ATCSA). The power to issue a control order must be renewed annually by statutory instrument. The power was most recently renewed in March 2010.[1]

4. Briefly, control orders allow for a wide range of restrictions to be imposed on individuals (British citizens and foreign nationals alike) whom the Home Secretary suspects of involvement in terrorism. Possible restrictions include curfews of up to 16 hours per day; reporting requirements; bans on visitors, communication with others and use of the internet etc. Taken together restrictions can prevent an individual from working or having any normal contact with the outside world amounting effectively to solitary confinement and house arrest. While the policy must be renewed annually by Parliament, an individual control order can be renewed indefinitely and several people have been subjected to a control order for years on end. In recent times, the regime has developed a sinister limb of 'internal exile' whereby 'controlees' are required not only to remain at home but to relocate – often hundreds of miles from their community, friends and family - to serve out their punishment.[2] All this is required of individuals who may never have been arrested, let alone charged or convicted of any offence. So greatly compounding the effects of the control order is the fact that controlees rarely know the substance of any suspicions against them.

5. For the last three years the Liberal Democrats have voted against renewal of control orders and the Conservatives have abstained from voting. The 2010 Liberal Democrat Manifesto included a commitment to scrap control orders.[3] Both Government parties originally voted against introducing the powers in the first place when the hastily compiled Bill was pushed through Parliament in under a month. In the lengthy Second Reading debate in the Commons in 2005 the current Lord Chancellor, the Rt Hon Kenneth Clarke QC MP, called on the former Home Secretary to

> *accept that he has made no case at all to explain why he comes here seeking greater powers than any Home Secretary in modern times has had over*

[1] Under the *Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2010*.
[2] As was the case for the controlee who was the subject of the recent Supreme Court decision in *Secretary of State for the Home Department v AP* [2010] UKSC 24, outlined in detail below.
[3] The Liberal Democrat Manifesto states that the Party would *"Scrap control orders, which can use secret evidence to place people under house arrest";* at page 94 of the *Manifesto*, accessed at http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf.

> *British citizens and greater powers than were ever sought by his predecessor, his Government or any other Government in modern times.*[4]

Similarly the current Attorney-General, the Rt Hon Dominic Grieve MP, stated

> *I accept that one may have to swallow the extremely unpalatable, but every hon. Member should be concerned about the principle of control orders. It is a departure from our established principles and threatens our liberties greatly.*[5]

The current Deputy Leader of the Liberal Democrats Simon Hughes MP outlined his party's frustrations:

> *For the past four years, while we have been arguing collectively with the Government, we have consistently said that there is an alternative to detention without trial and have consistently proposed constructive alternatives. The Government have put themselves in this position by refusing to listen during those four years.*[6]

6. There was also vehement opposition in the House of Lords. Liberal Democrat Peer Lord Thomas of Gresford, after outlining the basic human rights principles of fair trial and the right to liberty which the control order infringes, declared

> *This Bill can probably not be put into any acceptable form by amendment. We will do our best to co-operate with the Government, but the kindest thing may be to get all those stakeholders together and invite them to drive their stakes through the heart of the Bill. With proper time, and beyond the constraints of a pending election, all parties could come to a consensus on the best way forward to protect our security in these dangerous times, and to maintain the way of life that we enjoy, which is underpinned by liberty.*[7]

7. As Liberty has frequently said - at the time the Bill was going through Parliament and at every renewal stage thereafter - control orders failed adequately to address the underlying human rights objections to detention without trial under Part 4

[4] House of Commons *Hansard*, 22 February 2005, column 162.
[5] House of Commons *Hansard*, 23 February, column 368.
[6] House of Commons *Hansard*, 23 February 2005, column 367.
[7] House of Lords *Hansard*, 1 March 2005, column 124.

of ATCSA which they were introduced to resolve. The objection is to the complete abrogation of the right to fair trial and the presumption of innocence, in particular:

- unending restrictions on liberty based on suspicion rather than proof;
- reliance on secret intelligence (which by definition may be all the less reliable for having been gained by torture around the world); and
- the inability of the subject to test the case against him in any meaningful way.

We discuss these concerns in more detail below.

Presumption of Innocence/Fair trial

8. Control orders undermine the presumption of innocence, the 'golden thread' that runs back through centuries of criminal process to the Magna Carta, and allow punishment without trial. They also undermine the separation of powers as the decision to impose a control order is made directly by the executive.

9. The Home Secretary may make a control order if he or she has "*reasonable grounds for* suspecting *that the individual has been involved in terrorism-related activity*" and considers it is necessary to protect the public from the risk of terrorism. This is an extremely low threshold. There does not have to be any factual basis for this assessment of risk. Even if the suspicion is based on wholly inaccurate and misleading information, all that is required is that the suspicion of the Secretary of State be reasonable according to what is placed in front of him or her.

10. The 'controlee' in this process is appointed a 'special advocate' as their representative. The special advocate, in closed proceedings, puts their 'client's' case, but is not allowed to disclose any exempt material to the 'controlee'. This not only means that proper and effective legal representation is impossible, but also that intelligence on which the decision is based cannot be challenged. For years decisions to impose a control order have been based on secret intelligence which the individual concerned has been unable to see and has been powerless to dispute. The secret intelligence may also have been obtained by torture elsewhere in the world. The former Government claimed that judicial oversight answers those who argue that the control order system is fundamentally incompatible with fair trial rights. Even with a hobbled form of judicial procedure, control order proceedings remain the antithesis of a fair trial, involving the imposition of severe sanctions on individuals

who are not able to properly communicate with their 'special advocate' once crucial information has been disclosed, and who will therefore not be able to argue their innocence. Further, the judicial role in the process cannot even be deemed to constitute a minimal safeguard on arbitrariness – the Home Secretary is able to side-step any judicial decision by re-issuing an order once it has been declared unlawful.

11. This aspect of the control order hearings has been brought into disrepute, not only by the House of Lords as outlined below, but also by a number of resignations of former special advocates. On 1st November 2004, Ian MacDonald QC resigned as a 'special advocate' "*for reasons of conscience*" describing the pre-control order policy of indefinite detention for foreign nationals as *"an odious blot on our legal landscape*."[8] He has since commented on the substitution of indefinite detention with control orders:

> *House arrest is slightly better than imprisonment; but it is more of the same kind of medicine. And what an example it sets. Every tin pot dictator, who wishes to lock up his opponents, for an indeterminate period, without trial, from Burma to Zimbabwe and every country with internal unrest, can point to Britain and say, "well, we're only doing what the Brits have done"… I resigned because I felt that whatever difference I might make as a special advocate on the inside was outweighed by the operation of a law, fundamentally flawed and contrary to our deepest notions of justice. My role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial. For me this was untenable.*[9]

12. The fair trial impediments do not stop the secrecy aspect of the order process. Breach of a control order without reasonable excuse is a criminal offence punishable on indictment by imprisonment for up to 5 years or an unlimited fine, giving rise to further fair trial complications. One individual subject to a control order has been charged with breaching the terms of the order.[10] The 'controlee' is alleged

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[8] http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268

[9] See: http://74.125.47.132/search?q=cache:49tF55gCawAJ:www.gcnchambers.co.uk/index.php/gcn/content/download/1161/7517/file/Counsel_200503_mcdonald.pdf+ian+macdonald+siac+resign&hl=en&ct=clnk&cd=7&gl=uk

[10] *Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, Lord Carlile of Berriew QC (1 February 2010), at para 157. Accessed at http://www.official-documents.gov.uk/document/other/9781849871518/9781849871518.pdf

to have breached his curfew, tampered with his electronic tagging equipment and entering a prohibited area. Another 'controlee' has in the past been convicted for a control order breach and sentenced to five months imprisonment. Further, an individual who was not subject to a control order has been convicted and sentenced to 3 ½ years' imprisonment for assisting an individual to breach their control order.

13. The control order regime has also lost the support of senior Parliamentary bodies. On 2nd February 2010 the Home Affairs Select Committee published a report on the Home Office's response to the terrorism threat which indicated that due to the flaws in the system the Committee could not support the regime. Among other observations and recommendations the Committee said:

> *In 2006 we supported the introduction of control orders. We believed at the time that they could be used to disrupt terrorist conspiracies and that there would be circumstances in which it would not be possible to charge individuals but where close monitoring of a suspect would be necessary. However, control orders no longer provide an effective response to the continuing threat and it appears from recent legal cases that the legality of the control order regime is in serious doubt. It is our considered view that it is fundamentally wrong to deprive individuals of their liberty without revealing why. The security services should take recent court rulings as an opportunity to rely on other forms of monitoring and surveillance.*[11]

Punitive Restrictions

14. Control orders enable the Home Secretary to impose an unlimited range of restrictions on any person he or she suspects of involvement in terrorism. [12] Among

[11] See The Home Affairs Committee Report - *The Home Office's Response to Terrorist Attacks* available at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117/117i.pdf

[12] Available restrictions include:

(a) a prohibition or restriction on his possession or use of specified articles or substances;
(b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;
(c) a restriction in respect of his work or other occupation, or in respect of his business;
(d) a restriction on his association or communications with specified persons or with other persons generally;
(e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;
(f) a prohibition on his being at specified places or within a specified area at specified times or on specified days;

the restrictions that can be imposed are curfews of up to 16 hours enforced by an electronic tag; restrictions on the use of mobile phones and the internet; vetting of all visitors and meetings; and restrictions on the suspect's movements. The average curfew length for those currently subjected to a control order is 12 hours per day.[13] Put simply, for those who do not abscond, control orders effectively amount to indefinite house arrest without charge or trial.[14]

15. Control orders have devastatingly undermined the rights and freedoms not only of the men subject to them but also their families.[15] They may well also prove counterproductive in practice. Repeated attempts by the former Government to extend the pre-charge detention limit in recent years have led to comparisons between extended pre-charge detention and internment. Such comparisons can also be aptly applied to control orders which allow for individuals to be effectively detained without charge or trial for years on end - far longer than 14, 28, 42, 56 or even 90

(g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;
(h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;
(i) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;
(j) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;
(k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;
(l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;
(m) a requirement on him to allow himself to be photographed;
(n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;
(o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;
(p) a requirement on him to report to a specified person at specified times and places.

[13] *Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, ibid, at para 21.

[14] While each control order lasts for a maximum duration of 12 months they can (and have been) continually renewed.

[15] See the report, entitled 'Besieged in Britain', written by journalist and author Victoria Brittain, and co-authored with Moazzam Begg of *Enemy Combatant: a British Muslim's journey to Guantánamo and back* published on 12th February 2009. The report describes how control orders have led to severe mental health problems; suicide attempts; and led men to return 'voluntarily' to regimes where they face imprisonment and torture. See also*:* http://www.guardian.co.uk/commentisfree/2009/jan/22/control-orders-justice

days. Three of those currently subject to a control order have been subjected to it for more than 2 years. One man is in his fifth year under a control order.[16] The propensity for internment and extended pre-charge detention to act as a recruiting sergeant for terrorism is well known. Control orders may well have the same impact, as individuals and communities witness injustice and discrimination first hand.

Why control orders must be scrapped immediately

Temporary in nature and now discredited

16. During the swift passage of the PTA, parliamentarians were assured that control orders would be a temporary measure. Control orders have now been in force for five years. The former Government continued to push for their renewal, and sent clear signals that they intended the control order regime to become a permanent 'parallel' fixture of our legal landscape. Indeed Acts of Parliament continue to strengthen and reinforce the control order regime. For example, section 78 of the *Counter-Terrorism Act 2008* inserted additional provisions into the PTA allowing police powers of entry and search for those under control orders, the taking of DNA from controlees as well as a host of other strengthening and enforcement powers. Meanwhile, the control order has seeped into other areas. The *Policing and Crime Act 2009* introduced "*injunctions to prevent gang-related violence*" which are in effect a mix of control orders/ASBOs for anyone suspected of engaging in, encouraging or assisting gang-related violence. Liberty believes that the current Government, which has recognised whilst in opposition how dangerous the control order regime is for our rights and freedoms, must put an end to a measure which was never meant to be permanent in the first place.

No longer viable

17. Since their inception, control orders have been heavily litigated. The cost to the public purse is considered in more detail below. However another result of the litigation is that the policy has been gradually undermined by successive court judgments which have found individual orders to be in breach of rights enshrined in

[16] *Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, ibid, at para 43.

the *Human Rights Act 1998* – namely Article 5 (right to liberty) and Article 6 (right to a fair hearing).

18. The present review is intended to ensure that counter-terror measures meet the UK's domestic and international human rights obligations. A string of court judgments have found that individual control orders do not and a number of orders have been revoked as a result. These judgments have demonstrated that the scope and breadth of the punishing restrictions that can be imposed under the policy make individual orders constantly vulnerable to revocation. For those seriously suspected of involvement in terrorism, revocation of a control order with immediate effect with no replacement measures (such as targeted surveillance or arrest and charge) is hardly satisfactory.

19. As well as challenging the ongoing viability and safety of the policy, court judgments have also chipped away at the use that can be made of the control order regime. Control orders have only ever been used for a small number of individuals and after five years of litigation are likely to be able to be used less and less. The present review should take this opportunity to scrap altogether a regime that is continually being undermined in the courts and is increasingly less viable.

Most notable judgments

20. In a series of judgments the House of Lords, and now the Supreme Court, has wrestled with the effect of control orders on controlees in determining whether there has been a deprivation of liberty in breach of Article 5, or a breach of the Article 6 right to a fair trial. In doing so they have steadily chipped away at the ease with which a control order can be imposed on an individual with little regard given to its impact, both subjective and objective, on the controlee's life.

21. In *Secretary of State for the Home Department v AF & Ors* [2009] UKHL 28, the House of Lords held that individuals subject to a control order must be informed of the case against him. The failure of the then Government to disclose the case against the appellants amounted to a breach of their Article 6 rights. Following the

decision of the European Court of Human Rights in *A v United Kingdom,*[17] the House of Lords stated that

> *non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.*

It was further held that:

> *where the open material consisted purely of general assertions and the case against the controlled person was based solely or to a decisive degree on closed materials, the requirements of a fair trial would not be satisfied, however cogent the case based on the closed materials might be.*

The House of Lords held that the right to a fair trial:

> *belongs to everyone, as the opening words of art 6(1) of the European Convention on Human Rights remind us – even those who are alleged to be the most capable of doing us harm by means of terrorism*.

Following this important decision, the former Government, unable to meet the disclosure requirements laid down, has revoked two control orders.

22. In *SSHD v JJ & Ors* [2007] UKHL 45 the Law Lords quashed a number of control orders, holding that an 18-hour curfew, together with the other severe restrictions imposed under the order, was in breach of a controlee's human rights. The court held that it is the *"concrete situation of the particular individual"* which must be taken into account, including *"a whole range of criteria including the type, duration, effects and manner of implementation of the measures in question"*,[18] in order to assess the true impact of the order. In this case the social exclusion of the

[17] *A v United Kingdom* (2009) 26 BHRC 1, which addressed the extent to which the admission of closed material was compatible with the fair trial requirements of art 5(4). The court held that the indefinite detention regime (as overseen by the 'special advocate' procedure) had breached art 5 of the ECHR as 'special advocates' could not perform their function in any useful way if the detainee was not provided with sufficient information regarding the evidence against him.

[18] Per Lord Bingham at [15], [16]; Lady Hale at [58]; Lord Carswell at [76]; and Lord Brown at [94]. These principles were originally set out by the European Court of Human Rights in *Engel v Netherlands* [1976] ECHR 5100/71 (8 June 1976).

controlee was complete, the lengthy curfew and exclusion of visitors amounting in effect to *"solitary confinement"*.[19]

23. Most recently in *SSHD v AP* [2010] UKSC 24, the Supreme Court confirmed the revocation of a control order in circumstances where the conditions had socially isolated AP, moving him 150 miles from his family in circumstances where it was difficult for them to visit him. The Court held that factors affecting an individual's Article 8 rights will always be a relevant consideration and could 'tip the balance' when determining if there has been a breach of the controlee's Article 5 rights. This means that control orders will continue to be considered by the courts on a case by case basis, and will take into account not only the objective factors of the order, but the real impact this has on a controlee.

Unsafe

24. According to the quarterly reports of the Reviewer of Terrorism Legislation seven of the 45 people that have been made subject to a control order have absconded.[20] The Reviewer considered these absconds an *"embarrassment to the system"*, and urged that *"viability of enforcement must always be considered when a control order is under consideration".*[21] Liberty believes that to refer to this rate of absconding as an 'embarrassment' is to miss the point. Disappearances are not just embarrassing for the Government they also pose a potentially grave threat to our security.

25. In addition to the 16% disappearance rate, control orders are ineffective in other ways: according to the February 2010 report by the Reviewer of Terrorism Legislation, two of the individuals who were then subjected to control orders were believed to continue to associate with extremist groups; and three others, despite being subject to control orders for extended periods of time, were believed to present the same level of risk as when they were first placed under house arrest.[22]

[19] Ibid, per Lord Bingham at [24].
[20] *Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, ibid, at para 17.
[21] *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, ibid, at para 23.
[22] Ibid.

Unfair

26. As explained above, the control order regime places unprecedented restrictions on a person's life which have an irrevocable effect. Some 'controlees' have become suicidal as a result of punishment without charge on trial. Cerie Bullivant, a British man from East London placed under a control order regime in 2006 whose statement is annexed to his report, has explained the effect the order had on his life:

> *Friends turned against me and people were afraid…the control order grew more and more restrictive – it began with forced residence, no travelling and daily signing in at a police station and ended up with tagging, curfews, no studying and forced unemployment. It became impossible to live an ordinary life*.

When his control order was finally revoked by the High Court two years later, Cerie recounted how it was impossible for his life to return to normal:

> *Finally, after two years, my life could begin again. Looking back, I see how naïve I was. There was no way my life would return to normal. I've had to move – I still get abused in the street, shouted and spat at. …I've always tried to live a good life but now I'm the lowest of the low – and I've never been charged, tired or convicted of any terror offences.*[23]

27. In addition, the effect of control orders extends to the lives of the parents, wives and children of these men, none of whom are even under suspicion and who are punished simply by their connection to the 'controlee'. At least one desperate suspect has chosen to face the risk of torture in Algeria to ease his family's suffering. Dina Al Jnidi, the wife of Abu Rideh, a father of six placed who was placed under a control order in 2005, has recounted the irreversible impact that her husband's control order has had on her life and those of her children. The full account of her experience makes for harrowing reading;[24] when her husband eventually came home, Dina:

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[23] See Cerie Bullivant's statement in full at Annexure Two.
[24] See the full statement as set out in *The Independent* at http://www.independent.co.uk/news/uk/home-news/life-with-a-control-order-a-wifes-story-1729620.html

did not know what a control order was. …We were not allowed to have a digital camera in the home, nor other basic items such as USB sticks, memory cards or MP3 players. Our children were not allowed to use the internet or have a computer. We were not allowed visitors unless they had been cleared by the Home Office after a rigorous vetting procedure. Many would not even call for fear of being harassed by the police or worse.

My husband was a wreck, a shattered man. He could not sleep, he would sweat and shake, he would have nightmares and flashbacks. It was almost impossible to deal with him. He was ill and had complex psychological needs – I am not a trained nurse and he required specialist help. One week later he attempted suicide by taking an overdose of his depression and anti-psychotic medications. I found him on the floor unconscious, in a pool of vomit foam coming from his mouth. He was taken to the hospital and remained unconscious for three days.

My life is ruined. I cannot sleep. I cry so much. It is having an effect on my children. I blame Tony Blair, the House of Lords, the Queen, the politicians, Parliament. They all have a have a hand in this. I am British. So are my children. Why, then, is it acceptable for us to be treated in this manner? The police came many times to search my house, violating the sanctity that is a home. What do they expect to find among my clothes and my children's clothes?[25]

Cost of Control Orders

28. For its *Annual Renewal of Control Orders Legislation 2010 report*[26] the Joint Committee on Human Rights (JCHR) was able to ascertain that approximately £13m was spent on control orders between 2006 and 2009, which included:

a. £8.1m on legal costs, including the costs of the Government's counsel (in court, preparing for court and the provision of legal advice before the imposition of the order), charges by the Treasury Solicitor, the cost of the

[25] Ibid.
[26] Joint Committee of Human Rights *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010. Ninth Report of Session 2009-2010* (HL Paper 64; HC 395) (26 February 2010) (TSO: London). Accessed at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf.

Special Advocates and Special Advocates Support Office and meeting costs for the other side when ordered by the court;[27]

b. £2.7m on administrative costs; and
c. £2m spent by the Legal Services Commission on publicly funded representation.[28]

This does *not* include any figure for the cost of policing, of court hearings or the actual cost of legal representation of controlled persons given the Legal Services Commission is not invoiced until the matter is closed.[29]

29. The JCHR noted that control orders are the most litigated of the counter-terrorism measures since 2001 *"and quite probably the most litigated ever",* with *"no sign of the litigation* abating".[30] The cost of this litigation is *"unusually high"* given every control order triggers an automatic judicial review, which is appropriate given the interference with fundamental rights caused by an executive order, *"but it means that every order carries a high price tag".*[31] This is due to a number of other factors, such as the large number of special advocates retained (50 at the time of the report) the amount of closed evidence; the Special Advocate Support Office; the legal representatives of the controlled person (who are publicly funded through legal aid); and the number of preparatory hearings involved (given the extensive arguments over disclosure).[32]

30. The costs led the Committee to conclude that *"we and others have had a growing sense that the financial cost of control orders may have become disproportionate to any benefit which can plausibly be claimed for them".*[33] The JCHR asked the then Home Office Minister, Rt Hon David Hanson, and the former Prime Minister Rt Hon Gordon Brown:

> *whether it is really justifiable to spend so much money on expensive lawyers rather than spend it directly on front-line counter-terrorism measures such as*

[27] Ibid, at para 102. See also the more detailed evidence provided in the Letter to the Chair of the Joint Committee on Human Rights from the Rt Hon David Hanson MP on 27 November 2009, extracted p 141 to 142 of the Joint Committee on Human Rights report, *Work of the Committee in 2008-09, Second Report of Session 2009-10* (HL Paper 20, HC 185) (15 January 2010) (TSO: London). Accessed at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/20/20.pdf.
[28] Ibid, at par 102.
[29] Ibid, at para 103.
[30] Ibid, at para 99.
[31] Ibid, at para 100.
[32] Ibid, at para 100.
[33] Ibid, at para 101.

surveillance officers, and whether the latter would in fact be more effective in any event. The Government's answer, supported by Lord Carlile, is a double assertion: that control orders remain necessary to protect national security (the implication being that so long as this is the case they must be maintained whatever the cost) and that surveillance "would be considerably more expensive". *An attempt by our Chair to obtain a ball-park figure of the cost per day of 24 hour surveillance has elicited no more information: the Home Secretary's written answer is that the Government do not comment on the details of terrorism-related operational matters.*[34]

31. Indeed it has proven difficult to compare the costs of control orders with the costs of other measures – for example targeted surveillance. The Intelligence Services Commissioner includes in a confidential annex to his annual report the statistics and figures of warrants and authorisations issued to security and intelligence agencies, alongside, presumably, the associated costs. The reason given for this confidentiality is that disclosure would *"assist those unfriendly to the UK were they able to know the extent of the work of the Security Service, Secret Intelligence Service and Government Communications Headquarters in fulfilling their functions. The figures are, however, of interest".*[35]

32. Without any publicly available information about the costs of RIPA surveillance it is difficult to *make* any meaningful comment on the relative costs of control orders. What is however beyond doubt is the exorbitant cost of the operation of control orders and associated costs. These costs and the litigation that can increase them show no sign of abating.

33. Relevant to this is the current economic downturn and the public sector cuts now being implemented. In a written Ministerial statement on 27 May 2010, Police Minister the Rt Hon Nick Herbert MP announced that the Government will cut £367m from the Home Office, and £125m will come from the police services budget.[36] Funding for counter-terrorism policing, which is additional to core Government funding to the police, will also be reduced by £10m in 2010-2011, with £569m still being provided to forces through police counter-terrorism specific grants for 2010-11,

[34] Ibid, at para 105.
[35] See *Report of the Intelligence Services Commissioner for 2007, and 2008*, at para 35 in each report.
[36] Ministerial Statement, House of Commons Hansard, 27 May 2010, at column 13WS.

maintaining 2009-10 funding levels. The Minister also stated he would be taking advice from police on the most appropriate way to make further savings to ensure the police service retains the ability to engage in all the necessary counter-terrorist activity.[37] Assistant Commissioner John Yates, the Head of Counter-Terrorism at Scotland Yard, as reported by the *Guardian* in July 2010, recently told fellow police chiefs that there would have to be a £150m saving from the counter-terrorism budget, which would weaken the ability to resist a terrorism attack. The Counter-Terrorism Unit has already suffered a £5m cut this year. The *Guardian* reported that *"Some insiders fear cuts will hit surveillance of subjects, a process which requires vast manpower and resources".*[38]

Why can't control orders be put right or made more proportionate

34. No amount of amendments and tightening up of the control order regime would make control orders viable. The principle behind control orders, which is effectively punishment without trial on the basis of secret suspicion, mean that control orders can never be human rights compliant. It has long been an essential part of British justice that there can be no punishment without trial – before punitive measures can be imposed, a person must, after having had access to a full and fair trial, be held to be guilty of committing an offence. Preventative measures seeking to ensure a person does not commit an offence must never become punishment, yet control orders with their indefinite house arrest, internal exile, and enforced unemployment most surely constitute a punishment in themselves. Any amendments or tightening up of the restrictions that can be imposed by a control order cannot fix the inherent problem with the very concept of these orders. Any Government that maintains such measures on the statute book will continue to excuse the actions of repressive regimes around the world who maintain similarly oppressive systems of house arrest and administrative detention.

35. Aside from the principled objections to control orders, there are some clear practical reasons why simply tweaking the control order regime will not succeed in dealing with the problem. There has been endless amount of litigation over the control order regime. The severe deprivation of liberty, the interference with the right to a private and family life, the unfair hearings, the impact on freedom of speech and

[37] Ibid, at column 16WS.
[38] See "Budget cuts raise 'terror risk'" *The Guardian,* 2 July 2010, accessed at http://www.guardian.co.uk/uk/2010/jul/02/police-budget-cuts-raise-terror-risk.

so on means that court applications (and appeals) are inevitable. Even if amendments were made to the type of restrictions that can be imposed by a control order, this will not prevent those subject to a control order from making individual applications for costly reviews of the order. Given the courts have ruled that the facts of each individual case can lead to a breach of the right to a fair hearing and the right to liberty, there can be no conditions imposed that would not give rise to a court challenge (even if not, in every case, successful). The courts have also often been divided on what they consider to constitute a deprivation of liberty, and future court decisions may well tighten the approach to hold that any period of house arrest breaches the right to liberty. Maintaining the control order regime, even with changes, would mean a continuation of costly and politically embarrassing court challenges.

36. This is not to say that there are no alternatives to control orders. Clearly the best alternative is to prosecute anyone suspected of having committed, or who is planning, a criminal offence. The use of intercept evidence would be invaluable in a large number of cases. If there is insufficient evidence with which to prosecute but police and the intelligence services consider a person to be a suspect and a danger to the community, the person can be put under intensive surveillance and, when appropriate, the police can make suspects aware that they are under investigation, in an attempt to disrupt and prevent any future activity. If such surveillance and disruption can be shown to be necessary and proportionate, there should be no objection, in contrast to control orders, on human rights grounds. Further details on these alternatives are provided below.

Alternatives to the control order regime

37. Since control orders appeared on the statute book they have been continually justified as a necessary evil[39] – that while Ministers dislike them, scrapping them would put us all, unacceptably in harms way. These empty and tired defences were continually put forward, even despite the absconds, despite the number of new terror-related offences now at prosecutors' disposal, despite the number of successful terrorism prosecutions and despite first hand accounts of the tortuous lives lived by those subjected directly and indirectly to the orders.

[39] See, for example, that statement of Lord West of Spithead earlier this year, House of Lords *Hansard,* 3 February 2010, at column 196.

38. Liberty has consistently argued that there *are* alternatives to control orders which negative any justification for their continued existence. Liberty has consistently argued that

- the breadth of criminal law now available,
- combined with a repeal of the ban on the use of intercept material in criminal cases,
- as well as the current powers available under the *Regulation of Investigatory Powers Act 2000*, with the appropriate safeguards,

provides a viable alternative to the control order regime. We discuss these in further detail below.

Criminal prosecution and admissibility of intercept

39. While we understand that the admissibility of intercept evidence does not form part of this Review, we believe its urgent consideration is essential to so many questions of relevance to the Review. This is particularly given the former Government's often incoherent response to the argument put forward that control orders could be scrapped in favour of prosecution and the use of intercept evidence to aid such prosecution. We were told on the one hand that there is credible and significant information and intelligence that those subjected to control orders have criminal intent or have committed criminal acts. We were also told that they cannot be prosecuted and that making intercept admissible would not substantially aid prosecution. Clearly this argument doesn't add up, and, given the strength of the opposition to the regime as it was passing through Parliament, we suspect the former opposition parties now in Government are well aware of this.

40. Successful prosecutions essentially depend upon (i) the robustness and scope of the offences with which individuals can be charged along with (ii) the quality and admissibility of the evidence that can be adduced. With regard to the former – we know that the criminal law is robust and comprehensive. Five terrorism related Acts of Parliament were passed between 2000 and 2008 (not to mention recent ministerial appetite for an annual piece of criminal justice legislation). The statute book is now crammed with every foreseeable terror-related offence, from dangerously overbroad offences that may capture a wide variety of innocent

behaviour, to reasonably framed offences that plug specific gaps in the law.[40] There are of course numerous offences that come within the 'normal' criminal law which are relevant for the prosecution of terrorist offences and which have been used to huge success in recent years. Preparatory acts that involve planning, but stop short of any violence, are likely to be criminalised under offences of conspiracy, incitement or attempt. In addition, the 2000 Act created a raft of offences to catch activities of a preparatory nature, as well as allowing for organisations which espouse violence and terrorism to be banned and criminalising actions and behaviour related to proscribed organisations (discussed later in this Report). Perhaps most importantly, whatever criminal and terrorism-specific offences existed before the enactment of the control order regime in 2005, a good deal more exist today. [41] In particular the *Terrorism Act 2006* created a raft of new offences including: encouragement of terrorism,[42] dissemination of terrorist publications,[43] preparation of terrorist acts,[44] training for terrorism,[45] and attendance at a place used for terrorist training.[46]

41. In examining the former Government's argument that criminal prosecution could not be a substitute for control orders it is instructive to examine the suspicions held about those who have been (and perhaps are still) subjected to control orders. In his latest report the Reviewer of Terrorism Legislation summarised the suspicions held about the 12 individuals then subjected to control orders . We were told that there was "*credible and significant intelligence*" that three individuals "*continue to present an actual or potential and significant danger to national security and public safety*". We were told that of those remaining on control orders, two were alleged to continue to associate with extremist groups, one was alleged to be a dangerous terrorist that would engage in terrorism activity as soon as possible, two were said to be wishing to travel abroad for terrorist training, two had already received terrorist training abroad and two had trained in terrorist activity and have been involved in considerable terrorist planning and facilitation in the UK. Crucially then, each of the suspicions outlined above, if supported by credible evidence, would be prosecutable.

[40] See for example section 8 of the *Terrorism Act 2006* which criminalised attendance at a place used for terrorist training whether in the UK or overseas.
[41] See in particular the offences created under the TA 2006 and the *Counter-Terrorism Act 2008* (CTA).
[42] Section 1 of the TA 2006.
[43] Section 2 of the TA 2006.
[44] Section 5 of the TA 2006.
[45] Section 6 of the TA 2006.
[46] Section 8 of the TA 2006.

42. Further, our assessment of the robustness or otherwise of the criminal law need not exist in the abstract. The rate of successful prosecutions for terror related offences is extremely high and since 11th September 2001 nearly 250 people have been convicted as a result. Proper criminal trials and custodial sentences for those suspected of terrorist activity have been hugely effective at protecting the public.

43. If then there are sufficient means for prosecuting those subject to control orders, the only conceivable flaw in the argument for criminal prosecution is in the quality or admissibility of the evidence that could be presented against each 'controlee'. Without being privy to this information we have to assume – perhaps generously so – that the quality of information and potential evidence against those currently subject to control orders is first rate. All that remains therefore is the issue of admissibility.

44. At present intercept material likely to have been gathered as part of terrorism investigations cannot form part of the evidence base for a charge because it is not admissible in such proceedings. In legal terms this bar is an anomaly. Elsewhere in the world, intercept evidence has been used effectively to convict those involved in terrorism and other serious crimes. While our domestic law[47] forbids the use of domestic intercepts in criminal proceedings, foreign intercepts can be used in such proceedings if obtained in accordance with foreign laws, and domestic intercept material is increasingly used in civil proceedings.[48] Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping can be admissible even if they were not authorised. This means that the transcript of a telephone conversation that is picked up using a bugging device concealed near a telephone is admissible in court while the same transcript if produced as a result of intercepting the phone conversation (rather than bugging it) is not.

45. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.[49] The imperative behind the historic bar on the admissibility of intercept was the protection of Security Services' methods rather than

[47] See section 17 of the *Regulation of Investigatory Powers Act 2000* (RIPA)
[48] Intercept evidence is already relied on by the state in non-criminal proceedings and the absolute bar on the use of intercept in court is being eroded in a piecemeal and ultimately illogical way. Exclusions to the absolute bar on admissibility are found in section 18 of RIPA. Most recently the CTA allowed intercept evidence to be used in terrorist asset-freezing proceedings.
[49] Cf Liberty's 2007 evidence to the Joint Committee on Human Rights on this subject at http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf

any obvious concerns for the fair trial process. Indeed there are no fundamental human rights objections to the use of intercept material, properly authorised by judicial warrant,[50] in criminal proceedings. Indeed the consensus around the admissibility of intercept in criminal proceedings is growing. In 2007 the Home Affairs Select Committee concluded:

> *We consider it ridiculous that our prosecutors are denied the use of a type of evidence that has been proved helpful in many other jurisdictions … We can learn from other similar countries, such as the USA and Australia, how to protect our intelligence sources …It would not be compulsory to use intercept evidence if it were felt that the damage from doing so outweighed the benefit.*[51]

When the Committee re-examined and reported on the Home Office's response to the terrorism threat earlier this year it concluded:

> *We see no reason to revise our earlier conclusions and strongly recommend that the Government immediately introduce legislation allowing the admission of intercept evidence in court.*[52]

46. Most recently the admissibility of intercept has been accepted in principle by a *Privy Council Review of Intercept as Evidence*[53] whose findings were accepted by the then Prime Minister in February 2008. Since then, a pilot project on implementation has been established for which an interim report was published in December 2009. On 10th December 2009, the former Home Secretary, the Rt Hon Alan Johnson MP, in a written statement to the House of Commons, reiterated the then Government's commitment to making intercept admissible and stated:

> *Any implementation of intercept as evidence must, as set out in the original Privy Council review, ensure that trials continue to be fair and that the operational requirements to protect current capabilities are met. As noted in the advisory group's interim report to the Prime Minister, reported in my predecessor's written ministerial statement of 12 February and placed in the*

[50] The Home Secretary currently authorises interception warrants.
[51] Home Affairs Committee, First Report of Session 2007–08, *The Government's Counter-Terrorism Proposals*, HC 43-i, para 86
[52] Ibid at footnote 11.
[53] Privy Council Review of Intercept as Evidence (January 2008) available at: http://www.official-documents.gov.uk/document/cm73/7324/7324.asp

Libraries of both Houses, there is an intrinsic tension between these legal and operational requirements. The work programme set out to develop a model for intercept as evidence that successfully reconciled these requirements, based on the approach recommended by the Privy Council review. This model has been subject to extensive practical testing, with the close involvement of senior independent legal practitioners. This testing has demonstrated that the model, if fully funded, would be broadly consistent with the operational requirements. However, it would not be legally viable, in that it would not ensure continued fairness at court. This has been confirmed by a recent European Court of Human Rights case (Natunen v Finland). The result would be to damage rather than enhance our ability to bring terrorists and other serious criminals to justice.[54]

47. It is unfortunate but perhaps not unexpected that experiments premised on the secrecy preferences of the security services have not met the UK's fair trial obligations. Indeed we have long been concerned that institutional inertia will unnecessarily delay reform in this area. As noted by former Director of Public Prosecutions, then Sir Ken Macdonald, in oral evidence to the Home Affairs Committee on 10th November 2009:

There is serious concern within the [security] agencies in particular that the use of intercept as an evidential tool would result in significant bureaucratic burdens upon them … There is a feeling that this is a reform that would be burdensome and might impact on the relationship between the agencies and law enforcement in a way which is unattractive.[55]

In commenting on the 'cultural response' of the security services to the issue of admissibility of intercept, the Home Affairs Select Committee recently concluded:

These concerns may be plausible and deeply-felt, but we fear that this is a case of the tail wagging the dog. Other states have adopted the use of intercept evidence without compromising the work of their security agencies so it is clear that a way can be found without impacting on security services

[54] The Home Secretary's written statement is available at: http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091210/wmstext/91210m0002.htm
[55] Oral Evidence of the former Director of Public Prosecutions, Sir Ken Macdonald QC, to the Home Affairs Select Committee (10/11/09) available at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117-ii/9111001.htm

too adversely. We suspect that that the apparent unwillingness of security agencies to approach this matter in a constructive manner is attributable as much to institutional inertia and a deeply felt cultural reflex as to insurmountable technical barriers. The clear desire of Prime Ministers and the Government to allow the admission of intercept material should not be frustrated by such responses.[56]

48. Further, according to the current Director of Public Prosecutions, Keir Starmer QC, any legal barriers to admissibility can be overcome:

As a matter of principle I think that a legal regime could be devised in which evidence obtained by intercept could be admissible in evidence … you can devise a legal model that would permit evidence obtained by an intercept to be used.[57]

49. It is indeed frustrating that the apparent political will to make intercept admissible seems to have been thwarted by institutional reluctance, which we hope, in the Government's proposed separate review of intercept, will be reversed. We are convinced that a repeal of the ban would make a significant difference to the ability of our prosecutors to prosecute suspected terrorists. Claims to the contrary are very hard to reconcile with the extent of interception in the UK[58] and recent comments by both the current and former DPP. Indeed we have briefly examined the issue of intercept in this briefing because we believe firmly that a repeal of the ban on admissibility would allow those genuinely suspected of criminal deeds or intent, who cannot currently be prosecuted, to be so. The offences exist; and prosecutorial expertise exists, and so if the suspicion is credible and genuine the only missing piece of the jigsaw is the admissibility of evidence. If, however, admissibility would not assist in prosecution of those under control orders as has been suggested, this raises serious questions over the quality of the information and evidence against 'controlees'. This could mean that indefinite house arrest - in a manner that imposes untold misery on individuals and their families and strains the very fabric our legal system - is being imposed simply because there is not enough evidence to charge.

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[56] Ibid at Footnote 11.
[57] Oral Evidence of Director of Public Prosecutions, Keir Starmer QC to the Home Affairs Select Committee (10/11/09) available at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117-ii/9111001.htm
[58] See for example, "Annual Report of the Chief Surveillance Commissioner for 2008–09", July 2009, HC 704 http://www.official-documents.gov.uk/document/hc0809/hc07/0704/0704.pdf

There is a reason why the criminal justice system has, over the centuries, required a high burden of proof to be satisfied before a person can face punishment – to ensure the innocent are not swept up with the guilty. In doing away with the need for proof before punishment, this new and unusual regime inevitably sweeps the innocent up in its wake.

Surveillance powers under RIPA

50. Liberty recognises that the monitoring of terrorist suspects and placing them under surveillance can, where in accordance with the law and accompanied by appropriate safeguards, be a necessary and proportionate use of police powers to detect a terrorist threat. The problem with the control order regime is that as well as monitoring, it encompasses so many more punitive factors which impose punishment without due process of law (that is, by charge or trial), and raises serious human rights concerns. The fact that the courts have so steadily eroded the conditions attached to control orders challenged by 'controlees', and used under an increasing range of criteria to do so, including Article 8 considerations,[59] is testament to the fact that it is the effect of the order on the otherwise innocent individual which forms the core of the problems associated with the control order regime. Many of the same goals in relation to surveillance and monitoring could, however, in appropriate circumstances, be achieved under other powers.

51. As outlined above, Liberty believes that there are more than enough criminal offences to effectively deal with prosecuting the terrorist threat, and we understand that surveillance and monitoring is an important part of investigating criminal offences. Surveillance, when provided for in law, properly authorised and shown to be necessary and proportionate, is a human rights compliant way of monitoring those suspected of serious criminality and gathering evidence. While targeted surveillance inevitably engages and interferes with the right to a private and family life, an interference with that right can be justified when shown to be in accordance with law, necessary and proportionate.

52. Currently the *Regulation of Investigatory Powers Act 2000* (RIPA) governs the use of targeted surveillance by police, security services and other public bodies. We do have considerable concerns with the RIPA regime, many of which we have

[59] Protecting the right to private and family life: Article 8 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998.*

outlined in Chapter Three, dedicated to RIPA. However, we do recognise that if these concerns are addressed RIPA provides the best mechanism for monitoring and surveillance to counter the terrorist threat. Liberty believes that the use of surveillance powers already provides a solution for the part of the control order regime which purports to interrupt and disrupt any potential terrorist activity. The tools of covert, and indeed overt, surveillance could be effectively employed to assist police with identifying terrorist threat and charging suspects with one of the many broad terrorist criminal offences. We believe that this is one method in which the police and security and intelligence services could achieve one of the goals of the control order regime, but importantly, without the corresponding egregious breaches of human rights.

CHAPTER 1A: TERRORIST ASSET FREEZING ORDERS

The review will help to inform whether any additional safeguards should be introduced in relation to the powers to freeze terrorist assets.

53. We are pleased that, although it is not one of the six issues in the original Terms of Reference, this Review will consider the need for safeguards in the terrorist asset freezing regime. This is particularly relevant given the recent introduction of the Terrorist Asset-Freezing etc. Bill into the House of Commons, which gives the Treasury highly intrusive powers to freeze the assets of anyone it has reasonable grounds to suspect is or has been involved in terrorist activity. Under the terrorist asset freezing regime, the executive can designate anyone to be "*subjected to a regime which indefinitely freezes their assets under which they are not entitled to use, receive or gain access to any form of property, funds or economic resources unless licensed to do so by the executive"*.[60] The Bill seeks effectively to put in primary legislation and on a permanent footing the same regime that was struck down by the Supreme Court earlier this year. Following the Supreme Court decision, the *Terrorist Asset Freezing (Temporary Provisions) Act 2010* was rushed through Parliament in February in the space of five days. That Act validated the orders which the Supreme Court had just struck down. The Act was only intended to be temporary in its effect and accordingly will expire on 31 December 2010.

54. As currently drafted, the Terrorist Asset-Freezing etc Bill fails to contain sufficient safeguards to ensure the regime complies with fundamental rights. In fact, it has some of the same profoundly unfair measures contained in the illiberal control order regime which we considered in Chapter One. The Bill also fails to deal with all aspects of terrorist asset freezing orders. Numerous other pieces of legislation and regulations set out separate regimes that allow for assets of individuals and groups to be frozen indefinitely on the say-so of either the executive or the Council of the European Union. None of which grant adequate safeguards to ensure innocent people are not swept up with the guilty. We believe there needs to be a wholesale review of the terrorist asset freezing regime to comply with fundamental rights and traditional notions of British justice.

[60] See *Ahmed v HM Treasury* [2010] UKSC 2 (*Ahmed*) at [39] (Lord Walker and Lady Hale agreeing) in describing what is effectively the same regime of asset freezing.

Terrorist Asset Freezing Regime

55. It is useful to set out the current terrorist asset freezing regime and what is proposed by the Terrorist Asset-Freezing etc Bill. The power to freeze assets of a person suspected of involvement in terrorism include:

- Part 2 of the *Anti-Terrorism, Crime and Security Act 2001* (ACTSA) which provides that the Treasury may make a freezing order when action which constitutes a threat to the life or property of UK nationals or residents has been or is to be taken by a non-national (or government of another country);
- The *Al-Qaida and Taliban (Asset-Freezing) Regulations 2010* which prohibit anyone (such as banks, building societies etc) from providing access to money or assets belonging to anyone who has been designated in a list attached to an EU Council Regulation[61] (such listed persons are those deemed to be members of Al-Qaida or the Taliban as well as the groups themselves);
- Part 6 of the *Counter-Terrorism Act 2008* which provides that a person affected by a decision of the Treasury made under the 2010 Regulations, or Part 2 of ATCSA, can apply for judicial review of the decision (which can take place in closed court with the use of special advocates – see more on this below);

Under clauses 1 and 2 of the Terrorist Asset-Freezing etc. Bill the Treasury will have the power to designate anyone it has reasonable grounds for 'suspecting' is or has been involved in terrorist activity. Under clause 1 of the Terrorist Asset-Freezing etc. Bill, any person, group or entity included on an EU Council Regulation[62] list will automatically have their assets frozen. The EU list implements UN Security Council resolution 1373 (2001) which lists anyone "*committing, or attempting to commit, participation in or facilitating the commission of any act of terrorism*".

56. This confusing regime has been put in place following a number of United Nations Security Council (UNSC) resolutions which require member states, including the UK, to freeze terrorist assets. The first of these resolutions was passed before the tragic attacks of September 11, 2001. UNSC resolution 1267 (1999) provided for the freezing of funds and other financial resources derived from or generated from

[61] See Council Regulation (EC) No. 881/2002 of 27 May 2002 (as amended).
[62] See Council Regulation (EC) No 2580/2001 of 27 December 2001.

property owned or controlled by the Taliban. This was taken further with UNSC resolution 1333 (2000) which provided states should freeze funds and other financial assets of Usama bin Laden and members of Al-Qaida. On 28 September 2001 as part of the response to September 11, the UNSC decided that action needed to be taken to freeze the assets of anyone who committed or attempted to commit terrorist acts or facilitated their commission – passing UNSC resolution 1373 (2001). Through these processes two lists were created. One, regulated by what is known as the 1267 Committee, lists people whose assets should be frozen on the basis of involvement with the Taliban or Al-Qaida. The other, regulated by the 1373 Counter-Terrorism Committee, lists anyone UNSC members consider have committed or attempted to commit such acts. Someone included on this list will not necessarily be notified of which country recommended their inclusion on the list, nor the reasons why, and has no genuine opportunity to challenge their inclusion,[63] and certainly no access to any independent judicial process.

57. Under the changes proposed by the Terrorist Asset-Freezing etc. Bill, UK legislation will no longer automatically freeze the assets of anyone included on these UN lists. Instead, as noted above, the Treasury can designate a person it suspects of committing terrorist acts and anyone on a list maintained by the EU will have their funds automatically frozen. However, the EU lists seek to implement the UNSC resolutions, so in practice the same people and entities should be included in both lists. Again, the EU listing procedure offers no real possibility for review for a person included on such a list.

58. The Terrorist Asset-Freezing etc. Bill was introduced in response to a Supreme Court ruling earlier this year, that secondary legislation that sought to implement the UNSC resolutions was invalid.[64] The Court held that the orders were beyond power as they had not been properly authorised by Parliament and did not provide effective safeguards – particularly the order that froze the assets of anyone on a UN list without giving any opportunity of review. The Supreme Court made clear

[63] In 2006 the UNSC passed Resolution 1730 (2006) which established a Focal Point within the UN Secretariat which listed persons could apply to seek to be de-listed. Such a request will be forwarded to the country that designated the person originally and that country will be asked to reconsider the listing. However, if the country still considers the person should remain on the list it is likely they will remain on it indefinitely. See also UNSC Resolution 1909 (2009), which provides that the Focal Point no longer receives de-listing requests from anyone listed by the 1267 Committee concerning Al-Qaida and the Taliban. Such requests are received by the Office of the Ombudsperson.

[64] See *Ahmed v HM Treasury* [2010] UKSC 2.

that the "*draconian*" regime had significant repercussions on the life of the people subjected to it and their family members.

Impact of a terrorist asset freezing order

59. Before turning to our specific concerns in relation to the current terrorist asset freezing regime and the proposed amendments to it by way of the Terrorist Asset-Freezing etc. Bill, it is important to consider the very real human effect such orders have on those individuals subject to them. Any person (be they an individual or group) designated as one to whom this regime applies has no access to any of their assets unless this is authorised by the executive. It is an offence for anyone, be it a bank or friends or family, to provide that person (directly or indirectly – which includes providing assistance to the person's immediate family) with any financial assistance or funds of any kind. Such a regime can be applied indefinitely to persons who may never have been convicted, charged, or even arrested in respect of any offence.

As Lord Brown said in the recent Supreme Court case of *Ahmed*:

> *The draconian nature of the regime imposed under these asset-freezing orders can hardly be over-stated. Construe and apply them how one will – and to my mind they should have been construed and applied altogether more benevolently than they appear to have been – they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing.*[65]

60. Lord Hope agreed with Sedley LJ in the Court of Appeal, that people designated in this way "*are effectively prisoners of the state*".[66] As money is required in order to take any form of transport, effectively such people's freedom of movement is in the hands of Treasury officials who can decide whether money for such travel should be dispensed. And of course, finding or maintaining any employment is effectively discouraged given any monies earned will be immediately frozen. The day to day reality for someone subject to such a regime was vividly set out in *Ahmed*. In this case, one of the people subjected to such a regime had never been told the reason for his inclusion on the list and was required to subsist on his wife's social security payments. For many years the family was required to list and inform the

[65] *Ahmed* at [192].
[66] See *Ahmed* at [4].

Treasury of every last penny spent during the month,[67] including on food, school uniforms, toiletries and medical expenses. It is clear that such requirements imposed on individuals have a severe impact, not just on personal property, but on a person's family and private life. In fact, in *Ahmed*, two of the designated men were said to have had significant mental health difficulties and marriage break-ups as a result of the burden imposed on them and their wives by this regime.[68] As Lord Hope pointed out:

> *The overall result is very burdensome on all the members of the designated person's family. The impact on normal family life is remorseless and it can be devastating...*
>
> *…the restrictions strike at the very heart of the individual's basic right to live his own life as he chooses… It is no exaggeration to say … that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.*[69]

61. It is no doubt that this is a harsh and coercive regime that has severe implications for a designated person and their family. In this respect, as in many others, the regime is comparable to control orders. Those subjected to it may well be innocent of any offence, and may not necessarily know why they have been subjected to the regime. As Lord Rodger in *Ahmed* noted "*the harsh reality is that mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right*."[70]

Fundamental flaws in the terrorist asset freezing regime

62. We believe that the current, and proposed, terrorist asset freezing regime is fundamentally flawed and needs a complete overhaul. We believe that the regime has different implications depending on whether it is applied to individuals (and their

[67] See *Ahmed* at [37].
[68] See Ahmed at [31}.
[69] See *Ahmed* per Lord Hope (DP) (with whom Lord Walker and Lady Hale agreed) at [38] and [60].
[70] *Ahmed* at [182].

families) or to groups and legal entities. As such we have set out our position in relation to the two separately below, and believe that the legislative regime should do the same.

Groups and entities

63. Groups and organisations that have been shown to be concerned in terrorism can already be banned by the Government – making it an offence for anyone to be a member of such an organisation, to organise or attend meetings on behalf of the organisation, or provide funding to the organisation. In Chapter Five of this response we have set out our position in relation to the proscription of organisations concerned in terrorism. While we are opposed to extending powers of proscription to groups on the basis of unpopular views, we do not take issue with banning groups that undertake, promote or incite violence. Aside from some procedural concerns and the breadth of the current proscription powers, we believe banning such groups can be an important part of any counter-terrorism measures. If such an organisation is banned we can see no reason why any assets held by such an organisation should not be frozen, and no financial assistance should be made available to that body. This of course, should only be done on the basis that, as it currently stands, the organisation has been shown to be 'concerned in' acts of terrorism (or preparation etc). Subject to the concerns set out below in relation to the procedure by which such a body is designated, we take no issue with subjecting a proscribed body to the terrorist asset freezing regime (which already occurs). We would, of course, have very real concerns if such measures were extended in respect of groups that are believed to promote hatred but which do not engage in terrorist activities. See Chapter Five for a detailed consideration of this issue. We believe the Terrorist Asset Freezing etc. Bill should be amended to ensure that bodies and entities that are proscribed under the *Terrorism Act 2000* can have their assets frozen under the terrorist asset freezing regime.

Individuals designated as subject to the regime

64. We believe that applying the terrorist asset freezing regime to individuals is quite a different thing than applying it to legal entities and bodies. As already noted, terrorist asset freezing measures can have a devastating effect on an individual's life and liberty, not to mention the effect on family members. In respect of individuals, just as with control orders, terrorist asset freezing measures undermine the presumption

of innocence, the 'golden thread' that runs through centuries of the criminal process to the Magna Carta, and can effectively allow punishment without trial. Just as with the control order regime, the terrorist asset freezing regime places unending restrictions on individual liberty based on suspicion rather than proof. It relies on secret intelligence and a person subject to the regime cannot test the case against him in any meaningful way.

65. Just as with control orders, as the Terrorist Asset Freezing etc. Bill currently stands, a person can be subjected to the regime simply if the Treasury has "*reasonable grounds for* suspecting *that the person is or has been involved in terrorist activity*" and it considers it is necessary to protect the public from the risk of terrorism. This is an extremely low threshold. There does not have to be any factual basis for this assessment of risk. Even if the suspicion is based on wholly inaccurate and misleading information, all that is required is that the suspicion of the Treasury be reasonable according to what is presented to it. Additionally, a person can be subjected to the regime if they are on an EU list – and they can be on such a list on the basis that a country (including any that may have its own political reasons to include a person on the list) has nominated that person as one that it considers has 'committed or attempted to commit' a terrorist act.

66. Indeed, this low threshold is not even required as a result of the UNSC resolutions. The Terrorist Asset Freezing etc. Bill is said to "*give effect in the United Kingdom to resolution 1373 (2001) adopted by the Security Council of the United Nations on 28th September 2001*".[71] However, resolution 1373, as referred to above, requires member states of the UN to prevent the financing of terrorist acts, including freezing the funds of those who "*commit or attempt to commit*" acts of terrorism. As Lord Phillips in the Supreme Court pointed out, the UN resolution "*nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures*".[72] Yet, clause 2 of the Bill gives the Treasury the power to designate a person as someone whose assets can be frozen if there are merely "*reasonable grounds for suspecting*" they have been involved in terrorist activity – not that they have actually committed an act of terrorism. This is a lower

[71] See Explanatory Memorandum to this Bill, paragraph 3.
[72] See *Ahmed* at [137] (emphasis added).

test than that required by the UN resolution and will inevitably capture more people, including those who are innocent of any wrong-doing.[73]

67. The designation of such a person is done either at the initiative of the Treasury or as a direct result of inclusion on the EU list. The person made subject to it has no ability to make any representations at the time such a designation is made. Under the Bill a person affected by a decision of the Treasury can take judicial review proceedings before the High Court for review of the decision. However, this is taken after the decision has already been made, and while awaiting the court's decision the person is left without access to their own funds. It also provides only for judicial review of the decision to make the order – and not full merits review. And, most importantly, the Bill provides that provisions allowing for special rules of court and special advocates apply to financial restriction proceedings.[74] The applicable rules provide for closed hearings, secret evidence and the use of special advocates – similar to that used in control order cases. Just as in control order proceedings, special advocates are appointed by the Attorney General to represent a person in closed proceedings and are not allowed to disclose any exempt material to the affected person. This not only means that proper and effective legal representation is impossible, but also that intelligence on which the decision is based cannot be effectively challenged. Our position set out in Chapter One in relation to procedural fairness surrounding control orders is just as applicable to the terrorist asset freezing regime in relation to individuals.

68. Of even greater concern is the fact that those designated by the EU have no right at all to appeal or review a decision to include them on the list. If a person is included on such a list they are automatically subject to the UK terror asset freezing regime under the current provisions of the Terrorist Asset Freezing etc. Bill. Clause 22, which provides for judicial review of a decision of the Treasury, does not apply to people on the EU list (as the Treasury makes no 'decision' in respect of them – their inclusion is automatic). The *Counter-Terrorism Act 2008* (which sets out a judicial review procedure almost identical to that contained in clause 22 in respect of other terror asset freezing decisions) is not being amended to enable judicial review for those on the EU list. This leaves these individuals without any possibility

[73] See Ahmed at [137] per Lord Phillips: "*Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected*".
[74] See clause 23(4) which provides that sections 66-68 of the *Counter-Terrorism Act 2008* apply. Part 79 of the *Civil Procedure Rules* have been made under these sections.

of effective review, something which the Supreme Court was highly critical of in its judgment in *Ahmed* earlier this year. The Court's finding of a breach of the right to a fair trial would apply just as strongly to the current clauses in the Bill. And while primary legislation cannot be struck down as the secondary legislation was, Parliament should not be legislating on this basis. We presume that the new Coalition Government is intent on respecting traditional common law rights to a fair trial. We also caution that not providing access to any sort of meaningful review directly contravenes the right to a fair trial in Article 6 of the *Human Rights Act 1998*.[75] And while the HRA may not have been able to apply to the implementation of UN Security Council resolutions,[76] the same cannot be said of primary legislation enacted without reliance on the UNSC resolutions or indeed on the basis of an EU Council decision.[77] As such, we believe the Terrorist Asset Freezing etc. Bill as currently drafted would be open to challenge on numerous human rights grounds, not least the right to a private and family life (Article 8), the right to a fair trial (Article 6) and the right to property (Article 1 of Protocol 1).

69. We believe that the entire system of terrorist asset freezing in respect of individuals needs to reviewed. If such a regime is to be applied to a person a Court must make the decision to designate a person based on proof and evidence. If a person has been convicted of a terrorism related offence such an order can be readily imposed following conviction. Further, we would take no issue with a system that provided for a Court to impose a temporary freezing order pending trial. UNSC resolution 1373 (2001) requires a state to impose asset freezing measures on those who "*commit, or attempt to commit, terrorist acts or who participate in or facilitate the commission of such acts*". The extremely broad counter-terrorism offences already on the statute book criminalise acts of terrorism as well as attempts, facilitating, encouraging, preparing, planning, conspiring and inciting terrorism. Anyone convicted of such offences will clearly be considered to be one who has 'committed or attempted to commit' acts of terrorism. We believe, therefore, that the terrorist

[75] Article 6 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[76] Because of Article 103 of the UN Charter which provides that decisions of the UN Security Council take precedence over international treaties and conventions, including the European Convention on Human Rights. See *R (Al-Jedda) v Secretary of State for the Defence* [2008] AC 332.
[77] See *Kadi v Council of the European Union*, European Court of Justice, Joined Cases C-402/05P and C-415/05P), [2009] AC 1225. In this case the ECJ held that an international agreement such as the UN Charter cannot affect the autonomy of the European Community legal system, including the principle that all Community acts must respect fundamental rights.

asset freezing regime should only be applied to those pending charge or trial or who have been convicted of one of these many terrorism offences.

70. We appreciate that the UK has international obligations in respect of those persons who have been designated by the UNSC 1267 Committee (in respect of those who are said to be members of Al-Qaida or the Taliban) and by EU Council Regulations. However, we believe the UK should urgently review the cases of all persons currently on EU lists (who as a result of the 2010 Regulations and the Terrorist Asset Freezing etc. Bill, automatically have their funds frozen in the UK). If such persons have not been convicted of terrorism offences the UK should take steps, as is permitted by the EU Council Regulations, to unfreeze the funds of such persons after consultation with other member states.[78] We are particularly concerned that many of those currently included in the Consolidated List of those subject to the terrorist asset freezing regime have not had their cases reviewed since 2002.[79] It is also of interest to note that although the freezing of the assets of those who have committed or attempted to commit terrorist acts is an important element of broader counter-terrorism measures, the amount of funds currently frozen are certainly not huge. As recently as 30 June 2010, Parliament was informed that a total of 202 accounts of "*suspected terrorist funds*" were frozen in the UK, containing a total of "*just under £360,000*".[80] This averages out at £1,782 per account. And of the £360,000 only about $58,000 was frozen in the UK. It is apparent from these figures that the freezing of suspected terrorists' assets is not currently a key part of the UK's counter-terrorism response as it is unlikely that many terrorism plots rely on access to such small amounts of funding. This is not to downplay the importance of these measures, but it does suggest that amendments to this regime to import much needed elements of fairness and proportionality will not cause any significant practical problems.

Overlap with other terrorist asset freezing regimes

71. As set out above, the Terrorist Asset-Freezing etc. Bill does not purport to set out a comprehensive scheme in relation to terrorist asset freezing orders. If this Bill is passed as currently drafted there will be three primary pieces of legislation dealing

[78] See Article 6 of Council Regulation (EC) No 2580/2001 of 27 December 2001.
[79] See HM Treasury, *Consolidated List of Financial Sanctions Targets in the UK*, last updated 30 July 2010, available at: http://www.hm-treasury.gov.uk/d/terrorism.htm
[80] See written statement by the Financial Secretary to the Treasury (Mr Mark Hoban), *Hansard*, 26 July 2010, Column 56WS-57WS.

with asset freezing and a number of pieces of secondary legislation. As the law currently stands, a number of people have been designated under both regimes which, as the House of Lords Select Committee on the Constitution has said suggests "*that the two regimes are in practice closely inter-twined and it raises the question of whether it would be more satisfactory to have both the regimes governed by a single Act of Parliament*".[81] The Committee went on to express its concerns "*that the partial coverage of the Bill, and the maintenance of other terrorist asset-freezing measures under separate statutory regimes, makes the law unnecessarily complex*".[82] The complexity created by these separate regimes will only be exacerbated if this Bill is enacted as currently drafted. We agree with the Committee's conclusion that:

> *it would be preferable for Parliament to be presented with a clear and comprehensive account of the full range of asset-freezing powers contained in the UK's counter-terrorism law, so that it can understand which powers are necessary and useful, and which not. To present to Parliament a Bill which covers only one aspect of these powers, without a full explanation of how those powers relate to other regimes (including those contained in Part 2 of ATCSA and in Schedule 7 to the CTA) risks presenting an account of the law that is partial.*[83]

72. It is clear that the remorseless and devastating effect of the terrorist asset freezing regime has severe implications for personal rights and freedoms. Inclusion on such a list is an extremely serious step and should be taken with the utmost caution on the basis of proof and evidence. We accept that countering terrorist plots may require the suspension of funding. In particular, denying support to organisations that fund and carry out terrorism is essential to disrupt such grave activities. That is why we take no issue with the many counter-terrorism provisions that criminalise the funding of national and international terrorist groups or persons. We do, however, have serious concerns with the proposals in the Terrorist Asset-Freezing etc. Bill, as well as the current provisions of the *Al-Qaida and Taliban (Asset-Freezing) Regulations 2010*. It would be a surprising and regressive move if the executive could continue to impose measures that the Supreme Court has described as 'draconian' and "*scarcely less restrictive of the day to day life of those*

[81] House of Lords Select Committee on the Constitution, Terrorist Asset-Freezing etc. Bill, 2nd Report of Session 2010-11, 22 July 2010, HL Paper 25, paragraph 10.
[82] Ibid.
[83] House of Lords Select Committee on the Constitution, Terrorist Asset-Freezing etc. Bill, 2nd Report of Session 2010-11, 22 July 2010, HL Paper 25, paragraph 16.

designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing".[84] We hope that, in addition to repealing the unsafe and unfair control order regime which is a relic of the last Government's tenure, the new Coalition Government will completely overhaul the terrorist asset freezing regime to ensure it is targeted at actual terrorist funding, and not sweep up the innocent with the guilty by unfair executive order.

[84] See Lord Brown in *Ahmed* at [192].

CHAPTER 2: SECTION 44 AND PHOTOGRAPHY

Terms of Reference: Section 44 stop and search powers and the use of terrorism legislation in relation to photography

73. We are extremely pleased that this Review is considering stop and search powers under section 44 of the *Terrorism Act 2000* which have been disproportionately used against peaceful protesters and ethnic minority groups. We're also pleased the Review will consider the use of terrorism legislation in relation to photography where the use, or threatened use, of terrorism powers has had a chilling effect on artistic expression and journalism. Section 44 needs urgent amendments to ensure it can no longer be used in an arbitrary and discriminatory way and we urge the Government to take the earliest possible opportunity to do just that.

Background to stop and search powers

74. Since the introduction of the *Police and Criminal Evidence Act 1984,*[85] stop and search powers have required police officers to form a reasonable suspicion of some form of criminality before exercising that power. While there will be situations where these powers are used inappropriately, the requirement of 'reasonable suspicion' acts as a safeguard against abuse as it offers a direct standard against which the exercise of police powers can be tested. Of far greater concern are the exceptional powers given allowing for stop and search without the need for any suspicion.[86] We have long been concerned with the scope and drafting of section 44 (and associated section 46) of the *Terrorism Act 2000* which allows for stop and search without suspicion. The power to stop and search without suspicion in order to prevent acts of terrorism was first introduced throughout Britain in 1994 and enhanced in 1996[87] (and far earlier in Northern Ireland). These powers were very

[85] See section 1 of the *Police and Criminal Evidence Act 1984* which replaced the infamous 'sus' laws and introduced a requirement of reasonable suspicion.
[86] See also section 60 of the *Criminal Justice and Public Order Act 1994* which allows an area to be designated for 24 hours as a place where a person can be stopped and search without suspicion to prevent violent crimes. Many of the same problems with section 44 apply to section 60 and we believe that section 60 powers also need to be reviewed.
[87] Section 81 of the *Criminal Justice and Public Order Act 1994* introduced new section 13A into the *Prevention of Terrorism (Temporary Provisions) Act 1989*. Section 1 of the

similar to the current section 44 powers, and were introduced in response to the threat of IRA terrorism, particularly following a large number of vehicle bombs which had been planted in and around London between 1992 and 1994. In response to these bombings the police introduced mobile road checks in metropolitan areas, including the stop and search of pedestrians. It was unclear whether the existing police powers were able to support such checks resulting in the introduction of these further powers in 1994 and 1996.

75. Lord Lloyd of Berwick carried out an investigation in 1996 of the existing temporary terrorism legislation.[88] He considered powers to stop and search without suspicion and analysed how they had been used in practice in the two years they had then been in existence. Lord Lloyd noted: "*A decision to give the police a power to stop and search at random is not to be taken lightly. The right of people to go about their lawful business without interference by the police is a fundamental right of long standing*".[89] However, he went on to say that while no terrorists had been caught under these powers, he considered that terrorists might be deterred by road checks. In concluding that these powers should form part of permanent counter-terrorism legislation, Lord Lloyd was heavily influenced by the fact that the power "*has been used with great discretion*" and a number of requests had been turned down. He concluded:

> *The police are very sensitive to the damage which would be done if there were ever any grounds for suspecting that the power was being used as anything other than a counter-terrorism measure*.[90]

76. However, section 44 of the *Terrorism Act 2000* (together with section 46) has been used for almost nine years as a general stop and search without suspicion power – not specifically linked to counter-terrorism measures, but used disproportionately on ethnic minority groups, peaceful protesters and photographers. The powers in the Act are so broad that an entire area can be designated as one in which any constable in uniform can stop and search, without suspicion, a pedestrian or vehicle for "*articles of a kind which could be used in connection with terrorism*" so

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Prevention of Terrorism (Additional Powers) Act 1996 introduced new section 13B into the 1989 Act.

[88] See The Rt Hon Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Volume One, October 1996, Cm 3420, Chapter 10.

[89] Ibid at 10.19.

[90] Ibid at 10.22.

long as a senior police officer simply believes that it is "*expedient for the prevention of acts of terrorism*". Designations may be made in secret and no judicial or parliamentary involvement is required. Designations last 28 days but can be renewed and in many areas have been made on a rolling basis for years at a time. Whole police areas may be designated and during the height of the Iraq War, these included several counties of England and Wales. In fact, the whole of Greater London (an area of 620 square miles and 7.2 million people) was designated on a rolling basis for over eight years (from the date the *Terrorism Act 2000* came into force on 19 February 2001).[91]

77. In 2003 anti-Iraq war protesters at RAF Fairford (the US Airbase in Gloustershire from which B-52 bombers flew to Iraq) were constantly stopped and searched under section 44:

> *On a typical day at Fairford, a protester could expect to be stopped and searched about half a dozen times by different groups of police officers. One resident at the Gate 10 peace camp told her solicitors how she had been stopped and searched no less than 11 times in one day. One group of police would watch her being searched by another group, and then when she had walked the few yards along the road to reach them, they would search her again…*
>
> *It was very obvious that only individuals whom the police assumed to be anti-war protesters were stopped and searched. Protesters being searched would often see other passers-by – usually more conventionally dressed or older than most protesters - walk past them without being challenged by the police*.[92]

European Court of Human Rights – *Gillan and Quinton v UK*

78. In September 2003 Liberty took on two clients who had been stopped and searched by the police at an East London arms fair. Kevin Gillan, a peace protester, was stopped while cycling towards the planned peaceful demonstration, his rucksack searched and papers he was carrying confiscated which contained directions to and details of the planned demonstrations. Pennie Quinton, an accredited journalist, was

[91] See paragraph 34 of *Gillan.*
[92] Taken from *Casualty of War: 8 weeks of counter-terrorism in rural England*, July 2003, a report by Liberty, Gloucestershire Weapons Inspectors and Berkshire Citizens Inspection Agency, available at: http://www.liberty-human-rights.org.uk/publications/pdfs/casualty-of-war-final.pdf

stopped on foot, searched and her camera was taken from her and switched off. Liberty took this case ultimately to the European Court of Human Rights[93] which held earlier this year that section 44, as currently drafted, breaches the right to privacy.[94] The Court considered that the use of coercive powers to require a person to submit to a "*detailed search of his person, his clothing and his personal belongings"* amounted to a clear interference with the right to respect for private life. The Court went on to note that the fact that the search was carried out in public did not mean that the right to privacy in Article 8 did not apply. It stated that "*the public nature of the search may, in certain cases, compound the seriousness of the interference with the right because of an element of humiliation and embarrassment*".[95]

79. Of course, the right to privacy under Article 8 of the Convention on Human Rights is not an absolute right. It can be limited if the limitation is "*in accordance with the law*", pursues a legitimate purpose and is necessary and proportionate. The requirement that a measure be 'in accordance with law' is not simply that the measure find some basis in law (either by statute or the common law) but it must also be compatible with the rule of law, adequate and accessible and protect against arbitrary interferences with rights by public authorities. The Court held that the *Terrorism Act 2000* contained insufficient safeguards "*to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference*."[96]

80. The Court also highlighted the potential for discrimination and misuse of section 44, stating that:

> *there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration … There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protesters in breach of Article 10 [free speech] and/or 11 [right to protest] of the Convention.*[97]

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[93] See *Gillan and Quinton v the United Kingdom (Application no. 4158/05),* European Court of Human Rights ('*Gillan*')
[94] See Article 8 of the *European Convention on Human Rights*.
[95] See paragraph 63 of *Gillan*.
[96] See paragraph 79 of *Gillan*.
[97] See paragraph 85 of *Gillan*.

The Court concluded that the powers "*are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*". As a result the Court declared there was a breach of Article 8 (right to privacy) on the basis that the interference with that right was not even done 'in accordance with law'.[98]

Liberty's position on section 44

81. Liberty has always maintained that exceptional stop and search powers (i.e. stop and search without suspicion) may be justified in certain very limited circumstances – for example where, due to a particular event or the nature of a particular area, it is reasonably suspected that an act of terrorism may be planned; or where specific information linked to a place or event has been received which indicates the same. However section 44, as currently drafted, does not sufficiently restrict the use of the exceptional stop and search to such circumstances. Instead it gives a wide power to authorise stop and search without suspicion merely on the basis that an authorisation would be 'expedient'; with little in the way of geographical limits and no effective upper time limit.

82. While we accept that the power may be justified in certain limited circumstances, a power that lacks any need for reasonable suspicion of criminality inevitably invites the risk that it is used in a discriminatory way against 'suspect' communities. This risk is yet another reason why the power desperately needs to be tightened. Indeed we know only too well that section 44 powers have been used disproportionately against the minority ethnic population[99] and that this has in turn damaged community relations. Many young Muslim men in particular feel that they are stopped and searched simply because they fit a general stereotype held by the police – indeed if you are Black or Asian you are between 5 and 7 times more likely to be stopped under section 44 than your white counterparts.[100] Section 44 has also been misused against peaceful protestors including the octogenarian holocaust survivor Walter Wolfgang who was unlawfully ejected from the Labour Party

[98] See paragraph 87 of *Gillan*.
[99] For example, statistics have revealed that of those stopped and searched under s44, 17.7% of the people stopped in England and Wales were identified by the police as Asian, as against 4.7% of the population. 63.1% of those stopped and searched were identified as White, as against 91.3% of the population. See The Ministry of Justice Statistics on Race and the Criminal Justice System 2007/8, available at: http://www.justice.gov.uk/publications/docs/stats-race-criminal-justice-system-07-08-revised.pdf
[100] Ibid.

conference in 2005 after heckling the then Foreign Secretary Jack Straw. This disproportionate use of stop and search powers, without suspicion, risks alienating large sections of the community. As well as the potential counterproductive effect of stop and search under section 44, it has also not proven to be an effective tool in countering the terrorist threat. Statistics demonstrate that as little as 0.6% of stop and searches under section 44 in 2008/9 resulted in an arrest.[101]

83. Recent statistics revealed a disturbing increase in the use of section 44. In 2007/2008 there was an enormous 215% rise in the number of stop and searches under section 44 from the previous year. Disturbingly, the rise included a 322% increase in stop and searches of Black people and 277% of Asian people.[102] This was followed by a further 36% increase in 2008/2009.[103] These alarming statistics are only partially mediated by the more recent drop in the number of section 44 stops and searches, with a 40% decrease in 2009.[104] Liberty understands that this drop in section 44 stops is a direct result of a move by the Metropolitan Police Commissioner, Sir Paul Stephenson, to reduce the operational use of the power. This move came in recognition of the unintended impact that the over use of section 44 powers by the police may have had. While this move was welcome and an important step in re-building community trust and confidence it is unfortunate that it initially fell to the police to restrict the operational use of an over-broad power granted by Parliament.

84. We very much welcomed the Home Secretary's announcement on 8 July 2010 that interim guidance had been produced for the police providing that pedestrians could only be stopped using reasonable suspicion powers and people in vehicles stopped and searched under section 44 "only if they have reasonable

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[101] Home Office Statistical Bulletin, 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop & searches', 2008/2009. Available at: http://www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf

[102] See *Statistics of Race and the Criminal Justice System 2007/08,* A Ministry of Justice Publication under Section 95 of the Criminal Justice Act 1991, April 2009, available at: http://www.justice.gov.uk/stats-race-criminal-justice-system-07-08-revised.pdf

[103] Home Office Statistical Bulletin, 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop & searches', 2008/2009. Available at: http://www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf

[104] See *Report on the operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* by Lord Carlile of Berriew QC, July 2010, page 80, available at: http://www.homeoffice.gov.uk/publications/counter-terrorism/independent-reviews/ind-rev-terrorism-annual-rep-09?view=Binary

suspicion of terrorist activity".[105] These are important first steps and particularly welcome pending this wider review of these powers. However, it is important to point out that a roll back on the operational use of the power is insufficient to satisfy the recent European Court of Human Rights judgment which requires amendments to be made to the law itself. Liberty believes that the Terrorism Act 2000 must be urgently amended to strictly limit the power to use section 44. At a minimum, we believe the Act should be amended to:

- Require that a section 44 authorisation is only given if either:
    - the events to be held in a specific area;
    - the nature of a place; or
    - specific information received,

  mean that the person giving the authorisation reasonably believes it is necessary to prevent acts of terrorism.
- Require that authorisations for an area or place are no larger than is reasonably necessary to enable an effective response to a terrorism threat and no more than one square kilometre in total.
- Require that authorisations can be made only by a chief officer of police.
- Require that authorisations do not last longer than is reasonably necessary and must not exceed 24 hours.
- Require that authorisations are not renewed for the same area within 7 days unless renewed in writing by the Secretary of State.
- Require that if the Secretary of State renews an authorisation on six or more occasions he or she must lay a copy of the renewed authorisation before both Houses of Parliament as soon as reasonably practicable.
- Require that notice of an authorisation must be published as soon as reasonably practicable and not later than 7 days after the authorisation is given.

85. We believe that these are the bare minimum amendments that must be made in order to ensure section 44 is only used in exceptional circumstances where strictly necessary. Anything less than this would leave wide open the prospect of future legal challenges.

[105] See *Commons Hansard*, 8 July 2010, Column 540, statement by The Secretary of State for the Home Department (Mrs Theresa May).

Photography

86. There have been numerous reports of section 44 powers being used to stop and search photographers, with officers then viewing images contained on photographers' cameras. This has often taken place in the context of peaceful demonstrations where journalists, as in the case of Pennie Quinton, have been stopped and searched while reporting on the demonstration. There are also numerous examples of tourists and amateur photographers stopped and searched under section 44 for photographing iconic landmarks such as Big Ben or the London Eye. The concerns we set out above in relation to section 44 apply equally to these situations and we consider the proposals above to amend section 44 would alleviate many of the concerns over stop and search.

87. There are also other counter-terrorism measures that have an adverse effect on photographers – in particular, sections 58 and 58A of the *Terrorism Act 2000*. Section 58 has been in force since February 2001. It makes it an offence to collect, make or possess a record (which expressly includes a photograph) "*of a kind likely to be useful to a person committing or preparing an act of terrorism*". This applies to all information of a kind likely to be useful for terrorism, whether or not it concerns a police officer or member of HM Forces or the intelligence services. The *Counter-Terrorism Act 2008* inserted a new section 58A into the 2000 Act, making it an offence to elicit, attempt to elicit, publish or communicate information about an individual who is or has been a member of HM forces, the intelligence services or a constable and which is "*of a kind likely to be useful to a person committing or preparing an act of terrorism*". This new section was based on the original section 103 of the *Terrorism Act 2000* which originally applied only in Northern Ireland.[106] One major difference with section 58A compared to section 58 is that it could cover situations where a person attempts to, or does obtain information, or passes it on, but makes no record of it.

88. One of the major problems with both these offences is that neither of them requires the individual to have any actual intention that the information or record be used for terrorist activity: all that is required is that the material is of a kind 'likely to be useful'. This is an extremely broad definition: any photograph of a police officer might conceivably be considered useful to someone preparing for terrorism – it might

[106] Section 103 of the *Terrorism Act 2000* ceased to have effect on 31 July 2007 by virtue of the *Terrorism (Northern Ireland) Act 2006*.

enable someone planning terrorism from overseas to recognise an officer's uniform, for example. While both offences provide for some limited protection in terms of evidentiary requirements if a prosecution is brought,[107] the danger lies more in the implementation of the law by police officers on the ground, and the potential chilling effect of the legislation, than it does in any real fear of many prosecutions. It seems entirely possible that these offences might be interpreted by officers as outlawing any photography of police officers or iconic buildings, without any real consideration of whether such photography is likely to be useful to terrorism, or whether the photographer has a reasonable excuse. Even if arrests (or threats of arrest) are unlikely to result in prosecutions, they are still time consuming, distressing and frustrating and, if you are arrested, may well result in a lengthy battle to have DNA, fingerprints and other records removed from police databases.

89. It seems clear that the problem lies in the broadness of the provisions which apply without any need for intention on the part of the person making, collecting or possessing information that it will or may be used for the purposes of terrorism. On its broadest construction almost anything could be of a kind that is 'likely to be useful' for preparing / committing acts of terrorism. A person seeking to commit a terrorist act might find a photograph of a landmark useful in their preparations. Section 58A which makes it an offence to 'elicit' information could conceivably cover something as broad as asking about a soldier's leave dates – and such information could certainly be useful to terrorists. We know that these broadly framed offences have led to police officers interpreting the law in expansive ways – preventing journalists from taking photographs of officers, stopping tourists from filming the Houses of Parliament etc. We believe that the criminalisation of any activity that is not in itself normally within the sphere of criminal activity should require intent for an offence to be committed. Sections 58 and 58A of the *Terrorism Act 2000* should be amended to limit the offences to situations where a person has intended that the information will be useful for terrorist purposes (which would still make it an offence even if no actual terrorist activity is planned or takes place). Given the way in which police officers have interpreted the current laws police should also be provided with strong Guidance setting out that these powers should only be used to arrest someone who the officer reasonably suspects is taking a photo, making a sketch etc. to assist in preparing or

[107] Section 118 of the *Terrorism Act 2000* reverses the burden of proof, so that if a person presents some evidence that they had a reasonable excuse in acting as they did (e.g. there was a legitimate reason they took the photograph) the prosecution must prove beyond reasonable doubt, that that reasonable excuse does not exist.

committing acts of terrorism. Officers should not, however, be simply warning people against taking photographs more generally where there is no reasonable suspicion that the person intends the photos to be used in this way.

CHAPTER 3: USE OF RIPA BY LOCAL AUTHORITIES AND POWERS TO ACCESS COMMUNICATIONS DATA

The use of the *Regulation of Investigatory Powers Act 2000* (RIPA) by local authorities and access to communications data more generally

90. We are pleased that this Review is considering the use of the *Regulation of Investigatory Powers Act 2000* (RIPA) by local authorities. The Terms of Reference for this Review simply state that it will consider *"the use of the* Regulation of Investigatory Powers Act 2000 (RIPA) *by local authorities".* No greater detail is given, but it is of interest to note that the Coalition Government's Programme for Government stated:

> *We will ban the use of powers in the Regulation of Investigatory Powers Act 2000 (RIPA) by councils, unless they are signed off by a magistrate and required for stopping serious crime.*[108]

91. The powers granted by RIPA are complex and grant extremely broad access to highly intrusive surveillance powers to a wide array of public authorities without any judicial oversight. We do not believe it appropriate that local authorities have access as a general rule to such powers. From the moment RIPA was introduced Liberty expressed concern over the breadth of power it contains. We take no issue with the use of intrusive surveillance powers per se. While intrusive surveillance will always engage Article 8 of the *Human Rights Act 1998* (HRA)[109] (the right to a private and family life), such intrusion can be justified if it falls within the legitimate purposes set out under Article 8 (e.g. if done to prevent crime and threats to national security) and if it can be shown to be necessary and proportionate. Unfortunately, broadly speaking, RIPA does not provide sufficient safeguards to meet this test. We understand that given the need for urgency in this Review, only local authorities' access to RIPA powers is being considered by the Review. As such, our response will only consider this aspect of RIPA. However, we urge the Government to carry out a wider-ranging review of RIPA as soon as possible. Such a review should include in its remit: who should authorise the use of RIPA powers, which bodies have

[108] See *The Coalition: Our Programme for Government*, May 2010, Chapter 4.
[109] Article 8 (right to privacy) of the *European Convention on Human Rights* as incorporated by the HRA.

access to such powers and for what purposes such access is available. It should also consider what further safeguards are required to ensure that RIPA complies with human rights standards, including reviewing the procedure of the Investigatory Powers Tribunal.

Brief background to surveillance powers pre-RIPA

92. Until the introduction of the *Interception of Communications Act 1985* there was no statutory regulation of interception of communications (other than some specific offences regarding postal employees and interference with postal communications).[110] Before 1985 the practice was for the Secretary of State to issue an executive warrant for interception, although there were no legal consequences if such a warrant was not obtained. The 1985 Act was introduced following a European Court of Human Rights ruling in 1984 that held that the UK was in breach of its obligations under the European Convention on Human Rights (ECHR) as interferences with the right to privacy were not covered by legislation and as such were not "*in accordance with law*".[111] Additionally, until 1989 the security and intelligence services were not governed by statute and the only official published detail of their work was the Maxwell-Fyfe Directive (a Directive named after the Home Secretary who issued it), which set out an administrative Charter governing the Security Service's work. The *Security Service Act 1989* replaced the 1952 Directive putting the security services on a statutory footing for the first time. The *Intelligence Services Act 1994* similarly placed the secret intelligence services on a statutory footing, but it wasn't until the *Security Service Act 1996* that an attempt was made to define what criminal conduct could lead to the grant of an interception warrant or a warrant to enter property by the security and intelligence services.

93. In relation to intrusive surveillance (the use of electronic surveillance devices on private property, but not the bugging of telephones or interception of post), there were Home Office guidelines to govern its use, but no statutory provision, until the advent of the *Police Act 1997*. This Act introduced a Code of Practice on Intrusive Surveillance that came into force in February 1999.

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[110] Section 20 of the *Telegraph Act 1868* made it a criminal offence if any Post Office official "*shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic message or any message entrusted to the [Post Office] for the purpose of transmission*".

[111] See *Malone v UK*, 1984, ECtHR, Application no. 8691/79. See in particular paragraph 79 "*it cannot be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive*".

Available RIPA powers

94. After the introduction of the HRA, RIPA was introduced in an attempt to build human rights safeguards – the tests of necessity and proportionality – into the authorisation of surveillance. Yet, although it was a step forward, as the Act attempted to remain faithful to those that had passed before it[112] the result is a byzantine piece of legislation that is as confusing as it is insidious.

95. The Act is extremely complicated. The Court of Appeal has labelled it "*a particularly puzzling statute*"[113] and Lord Bingham in the House of Lords described it as "perplexing", noting that "*the trial judge and the Court of Appeal found it difficult to construe the provisions of the Act with confidence, and the House has experienced the same difficulty*".[114] When one of the most eminent jurists in the land finds it difficult to comprehend an Act of Parliament it certainly raises very real doubts over its accessibility. This is particularly troubling given the large number of bodies that now have access to powers contained within it, including of course, hundreds of local authorities. This difficulty is compounded by the fact that it has spawned an unprecedented number of statutory instruments (over 30) which must be consulted in order to fully understand the remit of RIPA's powers.

96. There are five types of surveillance or intrusive powers governed by RIPA. Two of which – interception of communications and intrusive surveillance – are only available to law enforcement agencies and the security and intelligence services. The three other types of powers are currently available to a wide array of bodies, including over 430 local authorities:

1. Directed surveillance: this is covert surveillance in a public place, such as covertly monitoring the movements and actions of specific targets, e.g following them around, covertly listening in or filming in public spaces (this does not apply to CCTV as this is visible filming, unless the CCTV is covert or used to follow a specific individual). This can be self-authorised by the public authority that wishes to have access. In 2009-2010, law enforcement

[112] See for example Mr Straw's comments in introducing the Bill: "*We start from the regime established by the Interception of Communications Act 1985, and we have been faithful to many of its key tenets*". *Hansard* HC Debs. Vol 345, col 769, 6 March 2000.
[113] *R v W* [2003] EWCA Crim 1632; [2003] 1 WLR 2902, 12 June 2003 at para 98.
[114] *Attorney General's Reference (No. 5 of 2002)* [2004] UKHL 40 at para 9.

agencies obtained 15,285 directed surveillance authorisations, and other public authorities obtained 8,477 authorisations.[115]

2. Covert Human Intelligence Sources (CHIS): A CHIS is a person who, under direction from a public authority, establishes or maintains a personal or other relationship in order to (covertly) use the relationship to obtain information or disclose information gained from the relationship. This includes undercover agents and informants. In 2008-2009 there were 5,320 CHIS recruited by law enforcement agencies and all other public authorities recruited 229 CHIS.[116]

3. Communications data: this contains the record of a communication, such as a telephone call, email or website visited – it does not contain the content of the communication. There are three types of data covered by this:
    (a) Traffic data: this tells you where the mobile phone, internet connection etc was located at the time the communication took place – e.g. where a mobile phone was when it received or made a call, or the website visited;
    (b) Service use: this tells you how a communication occurred (i.e. was it via email, a text or a phone call etc), the date and time it occurred and how long it lasted;
    (c) Subscriber information: this tells you any information held by the person who has signed up to the communications service, for example the name and address and any direct debit details of the user.

The power to acquire service use data and subscriber information is available to numerous public bodies, including law enforcement agencies, over 430 local authorities and around 110 other public authorities. Acquisition of traffic data is limited to bodies that show they require it to fulfil their statutory functions and local authorities have no access to it. During the year ended 2008 public authorities as a whole made 525,130 requests for communications data, with 1,756 of these requests made by local authorities.[117]

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[115] See *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2009-2010*, by the Rt Hon Sir Christopher Rose, printed 27 July 2010, at para 4.7, available at: http://www.official-documents.gov.uk/document/hc1011/hc01/0168/0168.pdf.

[116] Ibid at para 4.8.

[117] See *Report of the Interception of Communications Commissioner for 2009*, by the Rt Hon Sir Paul Kennedy, printed 27 July 2010, at paras 3.8 and 3.41, available at: http://www.official-documents.gov.uk/document/hc1011/hc03/0341/0341.pdf

97. The three types of surveillance powers available to local authorities (and hundreds of other public authorities) are currently all self-authorised and require no prior external authorisation at all. Authorisation is simply by a designated person within the organisation seeking access to surveillance. Most worryingly, the Codes on directed surveillance and the use of a CHIS provide that authorising officers should *generally* not be responsible for authorising their own activities but states that it is recognised that this is not always possible, *"especially in the cases of small organisations, or where it is necessary to act urgently or for security reasons*".[118]

98. The circumstances in which RIPA powers can be granted are broad and ill-defined. For all of the types of surveillance local authorities have access to, authorisations can be given if:

- it is considered necessary in the interests of national security;
- it is for the purpose of preventing or detecting crime or of preventing disorder;
- it is in the interests of the economic well-being of the UK;
- it is considered necessary in the interests of public safety;
- it is considered necessary to protect public health; or
- it is considered necessary to assess or collect any tax, duty or other type of government charge.[119]

Communications data can also be accessed in an emergency to prevent death or to prevent or mitigate injury or any damage to a person's mental or physical health. For the types of surveillance local authorities have access to, the Secretary of State can make orders extending the purpose for which authorisations can be made. To date orders have been made in relation to communications data: to allow communications data to be accessed to investigate alleged miscarriages of justice and to assist in identifying deceased persons or persons unable to identify themselves because of a physical or mental condition.[120]

[118] See *Code of Practice on Covert Surveillance and Property Interference* at para 5.7 and the *Code of Practice on Covert Human Intelligence Sources* at para 5.7.
[119] See sections 28 (directed), 29 (CHIS) and 22 (communications data) of RIPA.
[120] See *Regulation of Investigatory Powers (Communications Data) Order 2010*, SI 480/2010.

Use of RIPA powers by local authorities

99. In 2008-2009 only 131 local authorities made use of their powers to obtain communications data – meaning over 300 local authorities made no use of these powers.[121] In 2008 over half of all local authorities who made use of directed surveillance powers granted five or less authorisations, with 16% not using the power at all.[122] And in the same year, 86% of local authorities did not make use of CHIS powers at all and of those few that did, 97% recruited five or fewer people to act as CHIS.[123] In his 2008 Report the Interceptions Communications Commissioner has stated that a large number of local authorities have "*struggled to achieve the best possible level of compliance with the Act and Code of Practice*", mainly because they make infrequent use of their powers and staff are not properly trained.[124] In his 2009 report the Commissioner stated in relation to local authority staff:

> *The specialist staff who process applications for communications data are not trained to the same standard as their counterparts in other public authorities, and the infrequent use which most Councils make of their powers sometimes makes it difficult for relevant members of staff to keep abreast of developments in the communications data community*.[125]

100. The Chief Surveillance Commissioner has similarly said that local authorities tend to resort to covert activity as a last resort but that when they do they "*have a tendency to expose lack of understanding of the legislation*" and there is a "*serious misunderstanding of the concept of proportionality*".[126] He also said that the inexperience of some authorising officers is matched in many cases by poor oversight "*and a tendency for Chief Executives not to understand the risks that face their authorities*".[127]

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[121] See the *Report of the Interception of Communications Commissioner for 2008*, ibid, at para 3.41.
[122] See *Annual Report of the Chief Surveillance Commissioner 2009*, ibid, at para 4.7.
[123] Ibid, para 4.9.
[124] See *Report of the Interception of Communications Commissioner for 2008*, by the Rt Hon Sir Paul Kennedy, printed 22 July 2008, para 3.28, available at: http://www.official-documents.gov.uk/document/hc0708/hc09/0947/0947.pdf
[125] See *Report of the Interception of Communications Commissioner for 2009*, Ibid, para 3.40.
[126] See the *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2007-2008*, by the Rt Hon Sir Christopher Rose, printed 22 July 2008, at para 9.2.
[127] Ibid.

101. A clear example of disproportionate use of RIPA powers by local authorities is the directed surveillance carried out by Poole Borough Council on Jenny Paton and her family. After Ms Paton applied for her child to go to a particular school in the local authority area, between 10 February and 3 March 2008 the council put Jenny Paton, her partner and three children under surveillance in order to discover whether the family lived within the school catchment area. A local council official sat outside the front of the family's house, making notes on who went in and out, and on one occasion tailed the family in their car (or 'target vehicle' as the local council described it in their reports). Liberty represented the family before the Investigatory Powers Tribunal, which recently ruled that the council had acted unlawfully. The Tribunal held not only that the surveillance not been carried out for the ostensible purpose of preventing or detecting crime (as it is not a crime to seek to enrol a child in school), but the surveillance (particularly as it was carried out against three small children) was neither necessary nor proportionate.[128]

102. There have also been numerous other recent examples of the use of RIPA powers by local authorities to investigate the 'fly tipping' of clothes outside charity shops, checking up on dog owners whose animals were suspected of dog fouling or to see if the dog was wearing a collar and tag and council tax fraud. Both the Interception of Communications Commissioner and the Chief Surveillance Commissioner refer to critical media reports of the use of RIPA by local authorities. The Interception of Communications Commissioner stated in his 2009 report, in response to such media reports, "*that no evidence has emerged from the inspections, which indicates communications data is being used to investigate offences of a trivial nature, such as dog fouling or littering*".[129] Given that this Commissioner is responsible for investigating the use of communications data – which involves records of phone calls, emails etc – it is little surprise that communications data would not be used to investigate dog fouling or littering, neither of which offences are likely to be solved by trawling through the record of a person's phone calls or emails. The Chief Surveillance Commissioner has also criticised the media's portrayal of local councils' use of RIPA noting that "*The use of covert powers to prevent dog fouling of a pavement is likely to be disproportionate. But dog fouling in a playground is a different matter bearing in mind the parasite in dog excrement*

[128] See *Paton v Poole Borough Council*, Investigatory Powers Tribunal, 29 July 2010, IPT/09/01/C; IPT/09/02/C; IPT/09/03/C; IPT/09/04/C IPT/09/05/C.
[129] *Report of the Interception of Communications Commissioner for 2009*, ibid, para 3.43.

which can cause blindness in children."[130] Implicit in this statement is the dubious suggestion that the use of *covert* surveillance powers by local council officials to monitor dog owners in playgrounds is likely to be proportionate and necessary.

103. We appreciate that local authorities have responsibility for a wide range of regulatory offences, including dealing with trading standards, benefit fraud and environmental protection. It is in relation to the investigation of many of these offences that local authorities use RIPA powers, not simply monitoring school catchment areas and dog owners. However, RIPA, as it currently stands, does not restrict access to the surveillance powers in any meaningful way. The heads under which surveillance can be authorised are unnecessarily broad and vague. No definition is given as to what is, for example, 'in the interests of national security' or the 'economic well-being of the UK'. And the 'prevention of crime' and especially of 'disorder' is extremely broad so as to capture almost any minor transgression. The notion of 'disorder' is so broad and subjective it could, for example, conceivably cover pre-emptive action against those exercising their right to protest. As there is no need for external approval before these powers are exercised, whatever the local authority subjectively decides is for the prevention of crime or disorder, in the interests of public safety or the economic well-being of the UK, is what will be used to authorise the surveillance.

104. In fact, the Interception of Communications Commissioner, while noting that instances of the wrongful access of communications data by local authorities is relatively rare, gave an example of one local authority that obtained sensitive communications data before identifying the relevant target:

> *At that stage in the process there was no information or intelligence to indicate whether the telephone numbers or their subscribers were associated with criminal or illicit activity and potentially they could have been innocent members of the public who were in contact with the suspect for perfectly legitimate reasons.*[131]

105. Further, the use of covert human intelligence sources by local authorities raises its own particular concerns. This technique can involve using an individual to exploit their relationship with another person to obtain information about

[130] *Annual Report of the Chief Surveillance Commissioner 2009*, ibid, at para 5.20.
[131] *Report of the Interception of Communications Commissioner for 2009*, ibid, para 3.42.

that person which is then disclosed to the public authority. This intrusive technique raises some serious issues about entrapment and is particularly alarming given that RIPA provides that restrictions on intrusive surveillance do not apply to the conduct of a CHIS who is recording information.[132] So for example, a local authority could recruit a 16 year old to spy on his or her parents, get them to covertly record conversations and film events occurring in the home, and there would be no need for any authorisation other than by an official within that authority.[133] This type of surveillance, which has proved controversial even in its use by law enforcement agencies, is even more troubling when used by a local council. We believe that RIPA should be amended to require that if a CHIS is going to act, in effect, as a form of intrusive surveillance, authorisation for intrusive surveillance must be first obtained. Otherwise, the low level of authorisation for the use of a CHIS could be used to bypass the more restrictive requirements of authorisation required for intrusive surveillance.

Liberty's recommendations

106. As referred to earlier, the majority of local authorities don't see the need to use RIPA powers at all. Given this, and the widespread misunderstanding of the Act by those that do use it, serious questions remain as to why local authorities need access to these powers at all. While we don't doubt that it is necessary that investigations take place to prevent or detect possible breaches of many of these regulatory offences, we do not consider that local authorities should generally have the power to covertly follow and film suspects; to employ undercover operatives; or to access data showing information held on a person by a communications service provider. This is not to say that it is never appropriate that these methods of surveillance be used in order to investigate such offences, rather, it is not a power that should be given to the staff of local authorities. Surveillance powers are inherently intrusive and should only be used by persons who are properly trained in law enforcement. These are complex and highly intrusive powers that council officials do not routinely use. As such, as the Interception of Communications Commissioner has noted, it is difficult for such staff to keep abreast of relevant developments. We believe that the case for local authorities to continue to have

[132] See section 48(3) of RIPA.
[133] Note, the *Regulation of Investigatory Powers (Juveniles) Order 2000*, SI 2000/2793, provides that children under 16 should not be used as a source if it would be to use a relationship with his or her parent. This implicitly means that children aged 16-18 can be used to monitor their parents.

access to these intrusive powers has yet to be made out. We believe local authorities are not best placed to use these powers and if such powers are necessary to investigate regulatory offences the matter should be referred to the local police force. If this approach is not adopted, at the very least we believe local authorities' powers must be heavily restricted to apply only to specifically listed serious offences for which local authorities have sole responsibility.

107. Further, it is entirely unacceptable for a local authority to be allowed to self-authorise its own use of surveillance powers. Many of these covert surveillance techniques are highly intrusive and should be independently authorised. Considerations of necessity and proportionality can only be properly made by someone without any conflict, or perceived conflict, of interest. A public official within a public authority that may not exercise such powers on a regular basis is also not best placed to determine when conduct will or will not unnecessarily or disproportionately interfere with a person's right to a private and family life. There is a range of severity of intrusion within the use of such surveillance powers. If local authorities are to retain RIPA powers at all (which we question) we welcome the Coalition Programme for Government statement that such powers should require authorisation by a magistrate. This would provide greater transparency and accountability, and independent consideration of issues of proportionality, without becoming a particularly convoluted process.

108. We of course would be concerned if, in taking away the ability for local authorities to access RIPA powers, these councils continued to use surveillance but without RIPA authorisation. We believe, as we set out below, that RIPA should govern all uses by public authorities of any type of surveillance power, including access to communications data. There is nothing in RIPA that prevents any public authority (or others) from carrying out intrusive surveillance, directed surveillance, using a CHIS or accessing communications data (although this may be an offence under the *Data Protection Act 1998*, section 55). Therefore, the main consequence for a public authority in carrying out these types of surveillance without authorisation is the possibility of civil action being taken against them under the Human Rights Act. However, the majority of actions taken under the HRA in respect of the use of RIPA powers[134] must be taken before the Investigatory Powers Tribunal (IPT). While

[134] See section 65 of RIPA which essentially requires a person who has an HRA complaint in respect of interception of communications or access to communications data to go to the IPT,

Liberty does not usually support the creation of new criminal offences given the excessive amount of criminal law that already exists, we believe that there is a clear need to make it an offence to carry out unlawful intrusive surveillance, directed surveillance and the unauthorised use of a CHIS. Unlawful access to communications data should be an offence under RIPA, with appropriate penalties. This would then make it an offence for public authorities that act outside the law in carrying out surveillance, and would provide legal protection for the public from private investigators and those that unlawfully use surveillance mechanisms in circumstances where there is an expectation of privacy. This is essential if the state is to comply with its positive obligations under Article 8 to respect people's legitimate right to a private and family life. And it is essential to ensure that in taking away powers to use RIPA non-regulated surveillance measures are not adopted as a default.

Communications data more generally

109. Part 1 of RIPA sets out the circumstances in which communications data can be obtained and for what purposes. However, despite this specific legislation governing this highly sensitive area, there are numerous pieces of other legislation that also enable access to communications data. We believe that there should be one piece of legislation that tightly restricts and governs access to communications data. It is unacceptable and confusing to have these highly intrusive powers scattered across the statute book, and we are pleased this Review is considering this broader issue.

Background to communications data

110. Access to communications data, while sometimes thought of as one of the least intrusive of surveillance measures, can have serious implications for personal privacy. It is possible through the use of communications data to build up a detailed picture of an individual's activities, lifestyle and associations, from which detailed inferences can be drawn. The European Court of Human Rights has found violations of the right to privacy where State officials have made excessive use of

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and to also go before the IPT in respect of the other three types of surveillance if the action is against the intelligence services, the armed forces, the police, SOCA or HMRC.

powers to obtain access to documents in the nature of transaction records.[135] It would be wrong, therefore, to approach the regulation of access to communications data on the basis that such access raises less weighty privacy issues than access to content.

111. RIPA consolidated and reformed much of the law on targeted surveillance powers including the use of communications data. RIPA was originally concerned with authorising requests for considering future communications data. However, not long after the enactment of RIPA, arguments were forwarded from law enforcement agencies that access was required to historical communications data. In 2001, in the wake of the tragic events of 9/11, the *Anti-Terrorism Crime and Security Act 2001* was rushed through Parliament. Part 11 of the Act granted powers for the creation of voluntary agreements between the Government and Communication Service Providers (CSPs) (such as telephone companies and ISPs) for the retention of historical communications data. Voluntary agreements between the former Government and CSPs were put in place in 2003. These agreements required the retention of communications data (ordinarily collected by the CSPs) for a fixed period.

112. Dissatisfied with the mechanism of voluntary agreements, the previous Government used the UK Presidency of the EU to push through further innovations in the collection and retention of communications data. EU Directive 2006/24/EC now requires CSPs to retain data, that they already collect, for between 6-24 months. The Directive did not require CSPs to collect information that they would not otherwise collect. In April 2009, this Directive was fully transposed into UK law.[136] The then Government opted for a 12 month retention period. It is therefore now the case that CSPs are required by law to retain the communications data that they collect for business purposes for a period of 12 months. The previous Government proposed plans to retain this data on a centralised database – plans that were thankfully dropped after concerted opposition. Such data continues to be retained by CSPs – access to which is dealt with under RIPA, but also under various other statutes.

[135] *Funke* v. *France* (1993) Ser A no. 256-A. In the well-known *Malone* case ((1984) Ser. A no. 82) the Court found a violation of Article 8 (right to privacy) in relation to telephone metering data as well as interception of content: see paragraphs 85-87.
[136] *Data Retention (EC Directive) Regulations 2009*, SI 2009/859.

Access to communications data outside of RIPA

113. Even if RIPA is tightened up to restrict access to surveillance by local authorities, many other statutes provide local authorities and other public bodies with means to access communications data. One such example is the wide provisions of the *Social Security Administration Act 1992*. This Act enables an authorised officer (which is a government or local council employee etc.) to require numerous people and bodies to provide information to them for the purposes of investigating social security fraud.[137] A written notice requiring production of sensitive information, including electronic records,[138] can be made to certain employers, local authorities, banks, credit reference agencies, insurers and many, many others. Of most interest in the context of communications data is the ability to require telecommunications services (as defined in RIPA) to provide such information. Local council officials administering housing and council tax benefits are specifically given these powers to investigate whether benefits are payable or are being accessed fraudulently.[139] Use of these powers enables such officials to effectively by-pass the requirements of RIPA and gain direct access to highly sensitive information such as communications data.[140] A number of other bodies also use powers of access contained in numerous other pieces of legislation. For example, the Charity Commission (and local authorities) can use powers to require the production of information under the *Charities Act 1993*. The Environment Agency and local authority environmental health officers can use powers to obtain information under the *Environmental Protection Act 1990*. There are many other Acts of this nature, too many for us to catalogue.

114. Liberty believes that RIPA, although it requires significant amendment, is the best place within which to locate the powers of all public authorities to access communications data (and other surveillance type powers). It is confusing, not only for public authorities, but also for members of the public to try to understand what powers the State has to access sensitive personal information held about us all. Having such powers spread across the statute book also means appropriate supervision and safeguards are diluted and it increases the likelihood that personal

[137] See section 109B of the *Social Security Administration Act 1992.*
[138] See section 109BA.
[139] See section 110A.
[140] Note, some of the provisions that enable this access were introduced after the enactment of RIPA. See, e.g., amendments made by section 1 of the *Social Security Fraud Act 2001*.

data is being accessed inappropriately, when it is neither necessary nor proportionate to do so. This leaves the Government wide open to challenges for breaches of Article 8 (right to privacy) of the *Human Rights Act 1998*.[141] We are pleased that this Review is considering this important issue and we urge the Government to audit all legislation and ensure that RIPA alone governs access to communications data.

[141] Article 8 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

CHAPTER 4: 'DEPORTATIONS WITH ASSURANCES'

Terms of Reference: Extending the use of 'Deportations with Assurances' in a manner that is consistent with our legal and human rights obligations

115. The use of diplomatic assurances was heavily relied on by the previous Government as an attempted means to deport persons to countries that are known to use torture, on the undertaking from that country that it will not torture or mistreat anyone returned to it from the UK. The courts have consistently ruled that diplomatic assurances do not remove the UK's obligation to examine whether such assurances actually demonstrate that the person would be protected against the risk of torture and ill-treatment. This is a question of fact in all the circumstances which assurances add little to. We are pleased that the Terms of Reference for this review speak of deportations with assurances "*consistent with our legal and human rights obligations*", however, there are a number of inherent problems in seeking to rely on agreements with countries that have a history of human rights abuses.

Absolute prohibition on torture

116. Article 3 of the *Human Rights Act 1998*[142] provides, in absolute terms, that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*". This prevents UK officials from themselves torturing a person or subjecting them to inhuman or degrading treatment or from imposing policies that put a person in a situation where they face inhuman or degrading treatment. It also prevents the UK from returning, deporting, extraditing or indeed 'rendering' a person to a place where there are substantial grounds to believe there is a real risk the person would face torture.[143] This principle was first established in 1989 in the context of extradition. The European Court of Human Rights held that extradition when a person could face the death penalty, including lengthy periods spent on death row, would expose a person to a real risk of treatment breaching the rule under Article 3, and as such the UK would itself be in breach were the person to be extradited. The Court held:

[142] Article 3 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[143] See *Chahal v United Kingdom*, 1996, European Court of Human Rights, (1996) 23 EHRR 413 (*Chahal v UK*).

This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. … It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.[144]

117. The principle is also expressly stated in the Convention Against Torture which the UK voluntarily agreed to be bound by in 1988. Article 3 of that Convention states:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[145]

118. In 1996 the Court of Human Rights in the *Chahal* case[146] considered the UK's argument that the courts should be able to undertake a balancing exercise in deciding whether or not someone could be returned to a country where they face a risk of torture, if the person in question poses a potential threat to national security.

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[144] See *Soering v United Kingdom*, 1989, European Court of Human Rights, (1989) 11 EHRR 439 at [88].
[145] See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature on 4 February 1985. Signed by the United Kingdom on 15 March 1985 and ratified on 8 December 1988.
[146] *Chahal v UK.*

The Court unequivocally held that the prohibition on torture is absolute – both in prohibiting the State itself from carrying out torture and in sending a person to a place of torture. It stated that "*the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration*" as the Convention "*prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct*".[147] This approach was unanimously reaffirmed by the Court in 2008 when it rejected the UK's argument that a distinction could be drawn in Article 3 cases between treatment directly inflicted by a State and treatment that might be inflicted by a third country. It held:

> *Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule … It must therefore reaffirm the principle stated in the* Chahal *judgment … that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account.*[148]

119. It is clear that under both international and domestic human rights law the UK cannot remove, deport or extradite anyone to a place where they face a real risk of torture. It certainly cannot be involved in any process of 'extraordinary rendition' which operates outside the law with the assumption that a person will be tortured in the place they are rendered to. In determining whether a person will face a real risk of torture the UK Government has, for a number of years, sought to rely on diplomatic assurances, or memorandums of understanding, that the country to which they are sending a person will not subject the person to torture or ill-treatment. These assurances though cannot, in and of themselves, determine whether deportation or extradition is appropriate in individual cases.

[147] See *Chahal v UK*, at [79]-[80].
[148] *Saadi v Italy*, 2008, European Court of Human Rights, (2008) 49 EHRR 730 (the UK intervened in this case).

Diplomatic assurances and Memorandums of Understanding

120. Since at least the 1990s the UK Government has been attempting to use diplomatic assurances obtained from other States as a means of deporting people to States that are known to practice torture. In 1992 the then Home Secretary attempted to deport a man named Mr Chahal on the basis that the UK had received an assurance from the Indian Government that he would have "*no reason to expect to suffer mistreatment of any kind at* the *hands of the Indian authorities*".[149] However, the Court of Human Rights held that while it didn't doubt the good faith of the Indian Government in providing the assurances, as the Indian Government was unable to properly control its security forces these assurances "*were of little value*".[150]

121. Again in 1999 the UK Government sought to deport four alleged Islamic militants to Egypt, where torture and mistreatment were known routinely to occur. Over several months the men were detained in the UK while the Government sought to obtain assurances that Egypt would not subject the men to torture if they were returned. The attempts taken to obtain the assurances were revealed in court proceedings.[151] It showed that the then Prime Minister, Rt Hon Tony Blair, was insistent that the men be returned, writing on a Home Office letter which set out the assurances that the Government was seeking: "*This is a bit much. Why do we need all these things?*" and proclaiming at the top of the letter "*Get them back*".[152] Later, despite advice from the Foreign and Commonwealth Office (FCO), the security services and the Home Office that appropriate assurances could not be obtained and attempts to obtain them were damaging diplomatic relationships, the Prime Minister's Office wrote the following:

> *the Prime Minister is not content simply to accept that we have no option but to release the four individuals. He believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts. If the courts rule that the assurances we have are inadequate, then at least it would be the*

[149] See *Chahal v UK* at [37].
[150] See *Chahal v UK* at [93] and [105].
[151] See *Youssef v The Home Office* [2004] EWHC 1884 (QB), (30 July 2004).
[152] See *Youssef* at [15].

courts, not the government, who would be responsible for releasing the four from detention.[153]

The Home Secretary later made the decision to release the four men as it was impossible to obtain adequate assurances from the Egyptian Government, because even if the Egyptian Government would agree not to torture the men such an assurance "*would not go to the far more significant question of free-lance behaviour on the part of members of the security forces*."[154]

122. Following the Belmarsh ruling on 16 December 2004[155] (that indefinite detention of foreign nationals without charge was incompatible with the *Human Rights Act 1998*) and the 7 July 2005 bombings, the Government stepped up its efforts to seek diplomatic assurances with countries that had questionable human rights records. In 2005 Memorandums of Understanding were signed with Jordan, Libya and Lebanon. Assurances were also sought from a number of Middle Eastern countries with poor human rights records, including Algeria. Algeria would not agree to any diplomatic assurances that contained a post-return monitoring scheme and instead in 2006 Prime Minster Tony Blair and the Algerian President, Mr Abdelaziz Bouteflika, agreed to an exchange of letters which provided that "*in cases relating to questions of internal security*" the British Government "*may, depending on the circumstances, wish to request special assurances from the competent authorities of the Algerian Government*".[156] The Foreign and Commonwealth Office has been attempting, since that date, to obtain further diplomatic assurances from other countries. In 2008 it obtained an assurance from Ethiopia.[157]

123. These assurances have been obtained from countries where there is independent evidence and reports of severe human rights abuses and the torture

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[153] See letter from the Prime Minister's Private Secretary on 14 June 1999 to the Home Office, reproduced in *Yousef* at [38].
[154] See letter from Home Secretary to the Prime Minister, 8 July 1999, as reproduced in *Youssef* at [51].
[155] See *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.
[156] See Letter from Prime Minister Tony Blair to President Abdelaziz Bouteflika, July 11, 2006, available at: http://www.fco.gov.uk/resources/en/pdf/pm-letter-to-algerianpres and letter from President Abdelaziz Bouteflika to Prime Minister Tony Blair, July 11, 2006, available at: http://www.fco.gov.uk/resources/en/pdf/algerian-pm-letter
[157] See *Foreign and Commonwealth Office Annual Report on Human Rights 2009*, printed March 2010, page 45: "*We have negotiated memoranda of understanding with Jordan, Libya, Lebanon and Ethiopia and an exchange of letters has taken place with the Algerian government. We will continue to negotiate new memoranda of understanding in 2010*." Report available at: http://centralcontent.fco.gov.uk/resources/en/pdf/human-rights-reports/human-rights-report-2009

and ill-treatment of detainees. The UK's own Foreign and Commonwealth Office has raised serious concerns about human rights in many of the countries from which the UK has diplomatic assurances.

124. For example, the current FCO Country profile for Ethiopia, which the UK entered into an Memorandum of Understanding (MOU) with on 12 December 2008, states:

> *During 2007 until the present time an on-going insurgency in the Somali regions [of Ethiopia] has met with a strong government response with numerous unconfirmed accounts of atrocities and detention. Only a single Ethiopian human rights NGO remains active and comprehensive information on the human rights situation is not available. International monitoring bodies note that detention without trial is common; prison conditions are very poor and allegations of torture under detention are common.*[158]

125. The 2009 FCO Annual Report on Human Rights states: "*In the countries with which we have memoranda of understanding, local NGOs have been appointed as monitoring* bodies *to follow up on the safety of those deported on their return".*[159] Given the FCO itself has said that in Ethiopia there is one lone NGO able to operate in that country and comprehensive information on human rights is not available, the claim that monitoring bodies are able to effectively follow up on the safety of those deported rings rather hollow.

126. Similar concerns arise in respect of Libya, which the UK entered into a MOU with on 18 October 2005. The current FCO Country Profile for Libya states that there are "*credible reports of torture and widespread mistreatment in Libya's prisons, police stations and detention centres*".[160] In addition, Lebanon, which the UK entered into a MOU with on 23 December 2005, has been criticised by numerous NGOs for its record on torture. Human Rights Watch, for example, in its 2010 report noted that

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[158] See Foreign and Commonwealth Office website, Country Profile: Ethiopia, (emphasis added) accessed on 28 July 2010: http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/ethiopia?profile=all

[159] See *Foreign and Commonwealth Office Annual Report on Human Rights 2009*, printed March 2010, page 45.

[160] See Foreign and Commonwealth Office website, Country Profile: Libya, accessed on 28 July 2010: http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/middle-east-north-africa/libya?profile=all

while Lebanese law prohibits torture *"accountability for torture and ill-treatment in detention remains elusive".*[161]

127. Additionally, in Jordan, which the UK entered into an MOU with on 10 August 2005, numerous domestic and international NGOs have reported torture, arbitrary arrest, and prolonged detention. In 2006, less than a year after the UK signed the MOU with Jordan, the UN Special Rapporteur on Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, visited Jordan and reported that many "*consistent and credible allegations of torture and ill-treatment*" had been brought to his attention and that in prison "*detainees were routinely beaten and subjected to corporal punishment amounting to torture*".[162] In follow up reports the Special Rapporteur reported in 2008 his concerns about "*the reported continued use of torture*"[163] and again in 2010 that there had been no developments on his recommendations.[164]

Reliance on diplomatic assurances

128. While substantial efforts have been made, particularly in the past five years, to obtain diplomatic assurances that a person returned to a country will not be subjected to torture or ill-treatment, the courts have often refused to accept the legitimacy of these assurances. The courts have consistently held that the existence of diplomatic assurances does not absolve the Government, and ultimately the courts, from the obligation to examine whether such assurances provide, in their practical application, sufficient guarantee that the person would be protected against the risk of torture and ill-treatment.[165] The House of Lords recently considered this issue. Lord Phillips cautioned against reliance on assurances from countries with records of disregarding fundamental human rights:

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[161] Human Rights Watch, World Report 2010, page 531, available at: http://www.hrw.org/en/world-report-2010/news-release

[162] Report of The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, on his Mission to Jordan (25 to 29 June 2006), A/HRC/4/33/Add.3, 5 January 2007, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/101/07/PDF/G0710107.pdf?OpenElement

[163] Follow-up to the recommendations made by the Special Rapporteur, A/HRC/7/3/Add, 2 18 February 2008, at page 240, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/106/95/PDF/G0810695.pdf?OpenElement

[164] Follow-up to the recommendations made by the Special Rapporteur, A/HRC/13/39/Add.6, 26 February 2010, at page 40, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

[165] See *Chahal v UK* at [105] and *Saadi v Italy* at [148].

there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by state agents is endemic. This comes close to the 'Catch 22' proposition that if you need to ask for assurances you cannot rely on them. If a state is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?[166]

The House of Lords held that whether or not an assurance could be relied on was a question of fact and to determine this question the decision-maker (in this instance the Special Immigration Appeals Commission (SIAC)) needed to consider the conditions in the relevant country, the attitude of the authorities to observing human rights, how much control the authorities had over their police and security services etc. and how the performance of the assurances could be verified.

129. It is clear then that diplomatic assurances in and of themselves will never be a sufficient safeguard against the likelihood of abuse. The Executive, SIAC and the courts will still need to make an assessment on a case by case basis as to whether a person is likely to face a real risk of torture or ill-treatment. Given the negative human rights message that seeking such assurances sends and the very many practical and diplomatic concerns in seeking such assurances, the proposal to extend the use of deportations with assurances is problematic.

Human rights concerns with reliance on diplomatic assurances

130. The prohibition on the use of torture is a legal norm that binds all States. Under international law it has achieved the status of a norm that binds all countries, regardless of whether a country has voluntarily agreed to be bound.[167] In addition, the vast majority of States are signatories to the *International Convention on Civil and Political Rights* (ICCPR) or the *Convention Against Torture* (CAT) and others,[168] which prohibit in absolute terms torture and ill-treatment. As such, it is

[166] *RB (Algeria) and ors v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 4 All ER 1045 at [115].
[167] It has reached the international customary law standard of a *jus cogens* norm.
[168] See Article 4 of the ICCPR, Articles 2 and 15 of the *Convention Against Torture*; Article 27 of the *American Convention on Human Rights*; Article 4 of the *Arab Charter of Human Rights*;

clear that States are already bound by law and international agreement not to practice torture or subject someone to inhuman or degrading treatment or punishment. As a matter of law it is, therefore, unnecessary to require diplomatic assurances that the State will not breach international law. And, as a matter of law, diplomatic assurances are not legally binding, making it difficult to see why a State that chooses to violate binding international law and treaty agreements would consider itself honour bound to comply with non-binding diplomatic assurances.

131. Yet, it is a disturbing reality that all too many States do breach their legal obligations and allow their officials to subject persons to horrendous conditions of torture and ill-treatment. It is from these States – those which have shocking records of abuse of fundamental human rights – that diplomatic assurances are sought. They are generally not sought from countries that have a better record of upholding rights and freedoms. The only exception to this is the UK's agreement with the USA that anyone extradited to America will not face the death penalty. This is an example of an assurance which has proved to be successful – but it is hugely important that this comes from a country that is an old and established ally, with a general history (if inevitably with exceptions) of respect, on its own soil, for the rule of law.

132. However, Libya, Lebanon, Jordan and Ethiopia, with which the UK currently has assurances, have no such general history of respect for human rights and the rule of law. Instead the UK, in seeking such assurances, is requesting the State to make an exception to its general practice of abusing fundamental human rights for the handful of people the UK wishes to deport to it – and so tacitly accepts that torture and ill-treatment routinely takes place in that State. Rather than condemning this practice outright the UK is instead asking for only those people who it has responsibility for to be saved from the possibility of torture and ill-treatment.[169] The Coalition Programme for Government declared that this new Government would

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Article 5 of the *Inter-American Convention to Prevent and Punish Torture*; and of course Article 3 of the *European Convention on Human Rights*.

[169] Note the UN Special Rapporteur on Torture's statement "*Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture for a few individuals, which leads to double standards vis-à-vis other detainees in those countries* - UN Commission on Human Rights, *Civil and Political Rights, Including The Questions of Torture And Detention Torture and other cruel, inhuman or degrading treatment Report of the Special Rapporteur on the question of torture, Manfred Nowak* , 23 December 2005, E/CN.4/2006/6, at page 11, available at: http://www.unhcr.org/refworld/docid/441181ed6.html [accessed 29 July 2010].

"*never condone the use of torture*". Seeking to enter into negotiations and assurances with countries that are known to practice torture does not help further this goal. A paper promise not to engage in what is already unlawful cannot override what occurs in practice. Even if assurances are made in good faith at the time they are agreed, this does not mean they will be adhered to later on. Assurances given at one point in time rest on an assessment of a country's present self-interest – which can change over time (what happens, for example, if a person is deported on the basis of an assurance but months later that State, for whatever reason, cuts off diplomatic ties with the UK?). In any event, in many cases the Government giving the assurances may have limited control over what takes place in prisons and other places of detention. And post-return monitoring has a number of problems – not least that it takes place after the event by which time any torture or ill-treatment may have occurred, often with irreversible psychological and physical effects. Torture and ill-treatment takes place in the dark and outside the law. We've seen the difficulty in establishing the facts of what happened following the extraordinary rendition of persons to places of torture. Even though deportations, unlike extraordinary rendition, take place through a proper process of law, monitoring respect for human rights in foreign countries after a person is returned remains difficult.

133. Moreover, both States involved in giving assurances and deporting and accepting a deported person have a common interest in denying that a returned person was subjected to torture contrary to the assurance. Obviously, the State involved in the torture is likely to deny it as it is an illegal act. And the State that deported the person is unlikely to want to reveal that it was wrong to conclude that it was safe to deport the person. This is exactly the situation Sweden found itself in, after it deported suspected terrorist Ahmed Agiza to Egypt, after Egypt had given Sweden guarantees that he would not face torture or ill-treatment. Yet, immediately on his return Agiza was held incommunicado for five weeks and when he did see Swedish officials he told them he had been tortured and ill-treated in detention. Swedish officials blacked out this claim in an official Swedish monitoring report.[170] Later the UN Committee Against Torture held that Sweden had breached its obligations under the Convention Against Torture.[171]

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[170] See Human Rights Watch, *Not the Way Forward, The UK's Dangerous Reliance on Diplomatic Assurances*, (2008), pages 9-10, available at: http://www.hrw.org/en/reports/2008/10/22/not-way-forward-0

[171] *Agiza v Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, May 20, 2005.

134. It is clear that in monitoring after the fact there is difficulty in obtaining full knowledge of what is happening on the ground, and even if credible allegations are made it is in the interests of both States to keep those allegations secret. The UK also puts itself in a potentially difficult legal situation whereby its officials or agents take on responsibility for monitoring the safety of one or more named individuals. However, in doing so UK officials may become aware of torture and ill-treatment of other detainees. If the official fails to act and continues to simply monitor the one detainee at issue, questions around complicity arise (as it has in relation to the UK's knowledge of or involvement in America's unlawful extraordinary rendition programme). Whether this attracts any civil or criminal liability for UK officials remains to be seen but it is certainly something that needs to be considered before any monitoring arrangements are put in place.

135. But there is an even more important and principled objection to relying on post-deportation monitoring. And that is that it puts a person at a risk of torture and then merely seeks to monitor whether the torture has taken place. Once torture or ill-treatment is discovered it is too late – the person will already have been subjected to severe and irreversible physical and mental pain and suffering at the hands of a State. If torture is discovered after the event there is no recourse for the individual in question. Needless to say that the consequences of torture can be fatal and in situations where they are not, no amount of monetary compensation or sincere apologies can ever put the person back in the position they were in before being tortured. Sending a person to a place of torture on the promise that British officials may be able to find out, after the event, whether a person has been tortured puts all parties in a difficult position and would undermine the commitment never to condone the use of torture.

Practical concerns with extending deportations with assurances

136. Aside from the many legal and ethical concerns with the use of diplomatic assurances and the practical problems with monitoring compliance, the Government also faces practical problems with seeking to extend the use of deportations with assurances. In particular, finding countries that are willing to enter into such assurances is difficult. As referred to above, the UK does not seek to enter into such assurances with countries that don't have a history of torturing and ill-treating its people. Instead, Government envoys have been sent to many Middle Eastern and African countries to try to negotiate agreements. Many countries

approached for assurances would be offended that the UK Government was approaching it on the basis that it is a country with a shocking human rights record with reports of routine torture and ill-treatment. Even if the State in question does practice torture it is rare that it would formally acknowledge this. The fact that the UK has been very actively trying to seek numerous assurances but has only managed to enter into four MOU's and one exchange of letters demonstrates how difficult it is to obtain these assurances. The use of deportations with assurances is not new – the previous Government was an enthusiastic supporter. Extending their use would likely prove extremely difficult in practice.

137. The other practical concern with deportations with assurances is that if the UK does credibly consider a person to be a risk to our national security, deporting the person to another country will not necessarily remove that risk. Particularly if the country to which the person is deported does not have adequate mechanisms to properly monitor and reduce any risk. The assumption that deporting a person who is a security risk will make Britain safer must surely rest on the assumption that the country to which the person is deported will apprehend the person on their return. If there is credible and reliable evidence that a person has committed terrorism offences anywhere in the world, UK legislation enables that person to be tried in UK courts (regardless of where the offence was committed).[172] Putting a suspect through the criminal justice process and, if found guilty, imprisoning them is far preferable to deporting them to a country where they might not only face torture, ill-treatment and an unfair trial, they could be free to threaten British security from afar.

138. Rather then focus efforts on seeking further diplomatic assurances that are unlikely to be forthcoming and which only add to the matrix of facts that a decision-maker and court have to consider, the UK should focus its efforts on helping to improve conditions in those countries to which we seek to deport people. Clearly the UK alone cannot achieve a change in respect for human rights in other sovereign countries, but by leading by example and focusing our aid, development, trade and diplomacy on seeking respect for human rights we will be in a far better position to deport a person than by relying on diplomatic assurances that mean very little. An assurance from a country that has had a poor human rights record but which is undergoing transitional change, together with independent country reports that torture and ill-treatment is no longer a concern, may help in making a deportation

[172] See, for example, sections 62 – 63E of the *Terrorism Act 2000* and section 17 of the *Terrorism Act 2006*.

decision. However, these countries are few and far between and in reality assurances are sought from countries that continue to abuse human rights. Seeking an assurance as an exception to the general approach to torture and ill-treatment adds very little, if anything, to the factual decision as to whether it is safe to deport a person. The focus instead should be on ensuring that other States end the abhorrent practice of torture once and for all. In focusing on this approach the Coalition Government would truly show its commitment to "*never condone the use of torture*".[173]

[173] Coalition Programme for Government, May 2010, Chapter 15.

CHAPTER 5: MEASURES DEALING WITH ORGANISATIONS THAT PROMOTE HATRED OR VIOLENCE

Terms of Reference: 'Measures to deal with organisations that promote hatred or violence'

139. The Terms of Reference for this Review include consideration of "*measures to deal with organisations that promote hatred or violence*". No detail is given as to what type of measures are envisaged or whether this is concerned with rowing back on the current counter-terrorism powers in relation to organisations, or increasing those powers. The Coalition's Programme for Government proposed proscribing organisations that have *"espoused or incited violence or hatred"*.[174] While we take no particular issue with proscribing organisations that espouse or incite violence, allowing organisations to be banned on the basis that they promote 'hatred' has serious implications for freedom of speech and association. There is already an enormous amount of terrorism and public order legislation that allows for the banning of organisations that promote terrorist violence. There is clearly no need to expand these powers - rather the legislation already in place should be amended to tighten up these coercive powers to ensure they apply only to organisations that promote and incite violence. We are also unclear as to whether such 'measures' might include freezing the assets of organisations under the terrorist asset freezing regime. Our position in relation to this regime has been set out in Chapter 1A.

Current powers of proscription

140. The power to proscribe or ban an organisation was initially created in 1973 in the context of terrorism in Northern Ireland.[175] Under this early legislation the Secretary of State was empowered to proscribe an organisation *"concerned in, or in promoting or* encouraging*, terrorism occurring in the United Kingdom and connected with the affairs of Northern Ireland".*[176] These early powers of proscription were

[174] *The Coalition: Our Programme for Government*, 2010, at page 24.
[175] Including under the *Northern Ireland (Emergency Provisions) Acts* of 1973, 1978, 1991 and 1996 and the *Prevention of Terrorism (Temporary Provisions) Acts* of 1974, 1976, 1984 and 1989 (also restricted to the Northern Ireland context).
[176] Section 1(2) *Northern Ireland (Emergency Provisions) Act 1991* (repealed by the *Northern Ireland (Emergency Provisions) Act 1991*.

subsumed by the *Terrorism Act 2000* (the 2000 Act) and the *Terrorism Act 2006* (the 2006 Act). This legislation has gone much further, by applying powers of proscription to international organisations (that may have no link to the UK) and greatly expanding the grounds for when an organisation can be proscribed.

141. The Secretary of State is able to proscribe any organisation which is believed to be *"concerned in terrorism"*.[177] An organisation will be considered to be 'concerned in terrorism' if it commits or participates in acts of terrorism; prepares for terrorism; promotes or encourages terrorism; or *"is otherwise concerned in terrorism"*.[178] An organisation 'promotes and encourages terrorism' where the organisation:

- 'unlawfully glorifies' the commission or preparation of terrorist acts; and
- carries out its operations in such a matter that 'ensures' the organisation is *"associated with statements containing any such glorification"*.[179]

The inclusion of 'glorification' was introduced by the 2006 Act. It is defined to include *"any form of praise or celebration, and cognate expressions are to be construed accordingly"*. A 'statement' includes *"communication without words consisting of sounds or images or both".*[180]

142. Beyond these wide statutory grounds, there is little further indication of when an organisation may be proscribed at the discretion of the Secretary of State. The Court of Appeal has narrowly construed the circumstances in which an organisation is otherwise 'concerned with terrorism':

> *an organisation that has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity or otherwise to promote or encourage terrorist activities cannot be said to be 'concerned in terrorism' simply because its leaders have the contingent intention to resort to terrorism in the future. The nexus between such an organisation and the commission of*

[177] Including any alias names – for example, al-Muhajiroun is proscribed, as is Islam4UK, which is ostensibly the same organisation. Sections 3(2) and 3(6) of the *Terrorism Act 2000*. Terrorism is defined in section 1 of the 2000 Act to include the use or threat of action designed to influence a government or intimidate the public for the purpose of advancing a political, religious, racial or ideological cause. The action can take place either in the UK or outside it and must involve serious violence or damage, endanger a person's life, or disrupt an electronic system.
[178] Section 5 of the *Terrorism Act 2000*.
[179] Section 5A of the *Terrorism Act 2000*.
[180] Section 5C of the *Terrorism Act 2000*.

terrorist activities is too remote to fall within the description 'concerned in terrorism'.

An organisation that has temporarily ceased from terrorist activities for tactical reasons is to be contrasted with an organisation that has decided to attempt to achieve its aims by other than violent means. The latter cannot be said to be 'concerned with terrorism', even if the possibility exists that it might decide to revert to terrorism in the future.[181]

143. If an organisation is proscribed any person who remains a member or supporter of that organisation is liable to be convicted of a number of criminal offences. This includes belonging to a proscribed organisation,[182] providing support (including monetary as well as arranging meetings or addressing meetings) to a proscribed organisation,[183] or even to wear clothing or wear, carry or display an article in such a way or in such circumstances *"to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation".*[184]

144. An organisation, or any person 'affected by the organisation's proscription', can apply to the Secretary of State for the organisation to be 'deproscribed'.[185] The Secretary of State's decision can be judicially reviewed on application to the Proscribed Organisations Appeal Commission (POAC).[186] The organisation remains proscribed until the final decision is made.[187] If an organisation is deproscribed, any person convicted of an offence relating to the organisation can appeal against that conviction.[188]

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[181] *Secretary of State for the Home Department v Alton & Ors* [2008] EWCA Civ 443, per Lord Phillips at para's 37 and 38.
[182] Section 11 of the *Terrorism Act 2000*.
[183] Section 12 of the *Terrorism Act 2000*. Note also section 15 of the *Terrorism Act* which makes it an offence to fundraise or provide money to an organisation for the purposes of terrorism.
[184] Section 13(1) of the *Terrorism Act*.
[185] Section 4 of the *Terrorism Act 2000.*
[186] Section 5 of the *Terrorism Act 2000*. Where an appeal is allowed and an order made by the Commission, the Secretary of State shall 'as soon as is reasonably practicable' lay a draft order in Parliament before removing the organisation from the proscription list. A further appeal from an adverse decision of POAC lies to the Court of Appeal, and thereafter the Supreme Court, if permission is granted (section 6 of the *Terrorism Act 2000).*
[187] Section 6(3) of the *Terrorism Act 2000.*
[188] Section 7 of the *Terrorism Act 2000.* The appellant can also apply for compensation for miscarriage of justice under section 133(5) of the *Criminal Justice Act 1988*: s 7(8) of the *Terrorism Act 2000*.

145. There are currently 60 organisations which have been proscribed.[189] These include 46 international organisations (mostly those regarded as Islamic fundamentalist organisations) and 14 from Northern Ireland (which had already been proscribed under previous legislation). Two of the organisations have been proscribed under powers introduced under the glorification provisions following the introduction of this in the *Terrorism Act 2006*. To date only a handful of people have been charged under the proscription offences.[190]

Hate speech offences

146. There are also a number of offences which criminalise behaviour which promotes hatred of particular groups. The *Public Order Act 1986* makes it an offence to act in a manner intended to or likely to stir up racial hatred.[191] This Act was amended by the *Racial and Religious Hatred Act 2006* to make it an offence to use threatening words or behaviour intended to stir up religious hatred.[192] A further amendment was made by the *Criminal Justice and Immigration Act 2008*, adding an offence of using threatening words or behaviour intended to stir up hatred on the grounds of sexual orientation.[193] There is no definition of 'hatred' in the Act.[194]

Expansion of proscription powers?

147. There is currently no specific power to proscribe an organisation or group on the basis that it promotes *hatred*, as opposed to one that incites or promotes terrorism. In the Conservative Party's 2010 Election Manifesto, the Conservatives pledged:

[189] Schedule 2 of the *Terrorism Act 2000.* There may be some overlap given this list may also include aliases for organisations previously proscribed.
[190] *Report on the Operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006 by Lord Carlile of Berriew QC,* (July 2010) (TSO: London); at page 18.
[191] See sections 17-19 of the Public Order Act 1986. 'Racial hatred' is defined by section 17 to mean *"hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins".*
[192] Under Part IIIA of the *Public Order Act 1986.*
[193] Now under Part IIIA of the *Public Order Act 1986.*
[194] Note also that sections 4A and 5 of the *Public Order Act 1986* make it an offence for a person to use threatening, abusive or insulting words or behaviour that causes, or is likely to cause, another person harassment, alarm or distress.

A Conservative government will ban any organisations which advocate hate or the violent overthrow of our society, such as Hizb-ut-Tahrir, and close down organisations which attempt to fund terrorism from the UK.[195]

148. The Liberal Democrats, on the other hand, took a different approach. The party's Election Manifesto did not propose banning organisations, rather it stated that the best way to combat the threat *"is to prosecute terrorists, not give away hard-won British freedoms"*.[196] While in opposition, the Liberal Democrats criticised the previous Government for overusing proscription powers and questioned whether proscription is a useful tool to combat terrorist threats. Earlier this year the then Liberal Democrat Shadow Home Secretary Chris Huhne MP criticised the banning of the organisation Islam4UK, stating

"Proscribing Islam4UK is playing into the hands of publicity-seeking Anjem Choudary and his odious followers.
There is a real risk they will paint themselves as martyrs while simply changing their name and carrying on, or going underground". [197]

149. However, in the Coalition Programme for Government the new Government proposed proscribing groups that espouse or incite hatred:

We will deny public funds to any group that has recently espoused or incited violence or hatred. We will proscribe such organisations, subject to the advice of the police and security and intelligence agencies.[198]

150. As the current powers enable only organisations that are "*concerned in terrorism*" to be banned, any moves to ban organisations that simply espouse or incite 'hatred' – without any links to threatened or actual violence - would require an amendment to the current law. Liberty believes that any extension of the grounds of proscription to organisations promoting 'hatred' is unnecessary and would take proscription powers a step too far. It is difficult even to conceive how 'hatred' could

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[195] *The Conservative Manifesto 2010,* at page 105. Accessed at http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_hires.pdf
[196] *Liberal Democrat Manifesto 2010,* at page 94. Accessed at http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf.
[197] See the Press Release, 12 January 2010, accessed at http://www.libdems.org.uk/press_releases_detail.aspx?title=Banning_Islam4UK_plays_into_its_hands_says_Huhne_&pPK=ae3c88b3-3638-41fe-b80d-715518adaddf.
[198] Ibid, at para 24.

be satisfactorily defined so that it doesn't capture all manner of organisations. The grounds for proscription are already extremely broad, and any further extension would lead to a potentially never-ending list of unpopular religious or political organisations which could be banned on the basis of Ministerial discretion. It would, for example, mean that there would be enormous pressure on the Government to ban organisations such as the British National Party, which arguably promotes hatred on the basis of nationality and race. If 'hatred' was to be linked to that set out in current hate speech offences – of race, religion and sexual orientation – this would capture a huge number of organisations. Would, for example, there be calls for fundamentalist Christian groups to be banned on the basis they might be espousing hatred on the grounds of sexual orientation? The expansion of such banning powers would not only strike at the heart of our democracy, freedom of expression and freedom of association, it would also put the Government in the difficult position of having to explain why it proposed banning one organisation that promoted hatred over another. This leads down the very slippery slope of banning organisations based on what voices the Secretary of State considers should not be heard.

Impact of proscription on human rights

151. While there is no doubt that governments are legitimately able to ban organisations that seek to incite or encourage violence, problems arise if proposals are made to ban non-violent organisations on the basis that the Government disagrees with the opinions and beliefs of the organisation's members. Proscription is a means of state censorship, and banning non-violent political organisations is likely to breach the rights to freedom of expression and association under the *Human Rights Act 1998* (HRA).[199] Indeed the Joint Committee of Human Rights, considering the proposed extension of proscription to cover organisations glorifying acts of terrorism in 2006, concluded that the extension was unlikely to be compatible with the HRA.[200] Any further extension to allow organisations to be banned for expressing views of hatred would be even more likely to be in breach of fundamental rights.

[199] See Articles 10 and 11 of the *European Convention of Human Rights,* as incorporated by the *Human Rights Act 1998*.
[200] *Tenth Report of Session 2005-2006*. Accessed at http://www.publications.parliament.ukpa/jt200506/jtselect/jtrights/114/114.pdf

152. There will always be situations where the views being publicly expressed by an extreme group[201] may be extremely distasteful and upsetting for the wider population, but as long as they do not cross the line into violence or incitement to violence, the ability to express such views is a hallmark of our democracy. Stopping these views from being aired will not stop their development. Banning an organisation and criminalising its members will only create martyrs and drive debate underground.

Use of proscription as a political measure

153. Banning a violent organisation on the basis that its members actually threaten the UK's national security, or indeed to disrupt the activities of violent groups, is one thing. It is quite another if an organisation is banned, or proposed to be banned, because of its unpopularity. The former Government faced just this problem when it wanted to use the powers of proscription to ban organisations that could not be shown to pose a terrorist threat. A revealing exchange of internal Government emails and a minute of a 2005 meeting between the then Home and Foreign Secretaries[202] clearly show that the previous Government was intent on ignoring the advice of the security services in relation to the banning of a number of fundamentalist organisations, including Hizb ut-Tahrir (HuT). From these leaked documents it is clear that the heads of both the security and intelligence services doubted the need for further proscription. And while both the then Foreign and Home Secretaries concluded that there was not likely to be a case for proscription of HuT as much of the organisational literature *"explicitly rejects the use of violence",*[203] Ministers still considered that regardless of whether there was a basis in law for proscription it would be politically useful, not least as a means of identifying members of the organisations if they brought a challenge to the ban.[204] The view of the intelligence services was that although they did not oppose proscription as such, they did *"oppose reliance on their assessment to justify what they see as a change of*

[201] See, for example, French M "English Defence League and Muslim groups threaten summer of discontent" *The Guardian* (22 June 2010), accessed at http://www.guardian.co.uk/world/2010/jun/22/english-defence-league-muslim-clashes.
[202] As published by the *New Statesman*, Bright, M "Losing the Plot" (30 January 2006), accessed on 30 July 2010 at http://www.newstatesman.com/200601300005.
[203] See the email written by Irfan Siddiq, dated 30 August 2005, accessed at http://www.newstatesman.com/pdf/antiterror/antiterror.pdf.
[204] Ibid.

policy, not fact".[205] Neither Director-General thought that further proscription would withstand a legal challenge given there was no new evidence to warrant the organisations being proscribed.[206]

154. Additionally, the People's Mojahadeen Organisation of Iran (PMOI)[207] was banned under the 2000 Act, despite being, since 2001, a peaceful democratic movement. An application for deproscription was made by 35 members of the two Houses of Parliament who wished to support the peaceful aims of the organisation but could not do so without committing criminal offences under the 2000 Act. The then Secretary of State refused the application, though acknowledged that the PMOI did not pose a specific threat to the UK, to British nationals overseas, and nor did it even have a presence here. It was felt, however, that due to *"the nature and scale of the PMOI's activities and the need to support other members of the international community in the global fight against terrorism"* it ought to be proscribed.[208] The ban on it was later overturned as it could not be shown that the organisation took part in any activities that *"directly or indirectly, lend support to terrorism"* or carried on any *"activities connected with terrorism"*.[209]

Extensive current counter-terrorism measures

155. Given the breadth of the current powers of proscription, criminalisation of hate speech and other counter-terrorism offences, any moves to expand powers of proscription would be totally unnecessary. There are already a number of offences which capture and criminalise threatening behaviour by focusing on individual criminal acts. As noted in 2004 by the then Director of Public Prosecutions, Ken Macdonald QC, giving evidence to the JCHR, *"There is an enormous amount of legislation that can be used in the fight against terrorism".*[210] Of course, since 2004,

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[205] See the email written by David Richmond dated 30 August 2005, and the email from Robert Tinline dated 28 August 2005, both accessed at http://www.newstatesman.com/pdf/antiterror/antiterror.pdf.
[206] Ibid.
[207] The PMOI is an Iranian political organisation, founded in 1965, which aims to replace theocracy with a democratically elected secular government in Iran. For an outline of the organisation's activities and purpose see the Court of Appeal decision: *Secretary of State for the Home Department v Alton & Ors* [2008] EWCA Civ 443, and the decision of POAC on 30 March 2007, application PC/02/2006, accessed at http://www.siac.tribunals.gov.uk/poac/outcomes.htm,
[208] Per Lord Phillips in the *Alton* decision, ibid, at para 12.
[209] Per Lord Phillips in the *Alton* decision, ibid, at para 39.
[210] Transcript of evidence to the JCHR for the *Eighteenth Report of Session*, 19 May 2004, accessed at http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/15806.htm.

even more criminal offences have appeared on the statute book. Police can already charge individuals with incitement of terrorism abroad,[211] encouraging acts of terrorism abroad[212] and disseminating terrorist publications,[213] as well as a number of other offences related to terrorists, terrorism and terrorist organisations.[214] There are also several provisions already in place which are designed to ensure that public protests are conducted peacefully and do not lead to violence.[215] In this context it is difficult to see the need for any powers which would extend proscription to cover even more organisations and potentially criminalise an even greater number of otherwise innocent people.

156. In addition, the breadth of the proscription legislation is already extremely wide and has the potential to ban peaceful organisations which employ non-violent strategies in the pursuit of political aims. As Simon Hughes MP, Deputy Leader of the Liberal Democrats has noted, under the current laws organisations like the African National Congress of 20 to 30 years back and groups opposing General Pinochet in the 1980s may well now *"by any definition…be classed as terrorist for undertaking activity that may have been illegal in their own countries, but would always have been legal in democratic countries"*.[216] Seen from this perspective, it is clear that any restrictions of the freedoms of expression and association must be tightly proscribed. Liberty believes that current proscription legislation is too broad and ought to be amended to ensure that only organisations promoting and orchestrating violence are banned.

Lack of procedural safeguards

157. Further, the current procedure for proscribing an organisation is a political process with minimal oversight and safeguards. A decision to proscribe is made by the Secretary of State, who is required to lay a draft Statutory Instrument before Parliament which must be passed by both Houses. As it is only a Statutory Instrument, and not an Act of Parliament, a maximum of 90 minutes is ordinarily

[211] Under section 59 of the *Terrorism Act 2000.*
[212] Under section 1 of the *Terrorism Act 2006.*
[213] Under section 2 of the *Terrorism Act 2006.*
[214] Including the provision of instruction or training in the use of weapons (section 54 of the *Terrorism Act 2000*); directing the activities of a terrorist organisation (s 56); and possessing an article connected with the commission, preparation or instigation of an act of terrorism (s 57). See also, generally, Part 1 of the *Terrorism Act 2006* for additional offences.
[215] Under Part II of the *Public Order Act 1986*.
[216] House of Commons *Hansard,* 13 March 2001, column 962.

allocated for parliamentary debate. The Secretary of State is not required to put before the House any or all of the evidence which formed the basis for the decision to ban a particular organisation, and there is no judicial oversight for a measure which can instantly criminalise any member of a banned organisation. Indeed, judicial oversight is only possible after the Secretary has refused a request from an organisation to be deproscribed, and only then on the basis of judicial review and not a review on the merits. Under the current process it is difficult to see how the banning of political organisations could be prevented.

158. When the draft *Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001* was laid Parliament had to consider, in the 90-minute window, 21 organisations listed for proscription. The lack of opportunity for detailed scrutiny of a potentially criminalising provision did not go unnoticed. Simon Hughes MP, putting forward the position of the Liberal Democrats, accepted the need for a proscription power but recognised that the measure was made solely on the basis of subjective judgment by the Secretary of State, and the House was required not only to debate the issue in a short period of time but also *"to hold one vote and make one decision that will proscribe every one"* of the 21 different organisations.[217]

159. Liberty believes the current list of banned organisations should be constantly reviewed to ensure that the evidence base for the initial proscription remains current. This is an important safeguard and one that should be vigilantly, and most importantly transparently, pursued. While there is a working group responsible for reviewing the proscription list every 12 months, it has been noted that *"deproscription has not enjoyed a high priority in Ministerial thinking or activity"*.[218]

160. In addition the ability to challenge a proscription order involves many of the same problems we have seen in much of recent counter-terrorism legislation: closed hearings, special advocates and a lack of transparency. If a person wishes to challenge the Secretary of State's refusal to deproscribe an organisation he or she must go to the Proscribed Organisations Appeal Commission. This Commission is governed by Rules that provide for the use of closed material to be admitted as part of the case against the organisation, which is revealed to a 'special advocate' acting

[217] House of Commons *Hansard*, 13 March 2001, column 962.
[218] Lord Carlile's Report, ibid, at para 64.

on the applicant's behalf.[219] As discussed earlier in relation to control orders and asset-freezing orders, the use of secret evidence and special advocates has eroded great principles of British justice – an erosion that we hope will be reversed by the new Coalition Government in response to this Review.

Liberty's recommendations on proscription

161. First and foremost, Liberty believes that any extension of the grounds of proscription to organisations promoting hatred would be likely to have a disproportionate impact on the rights of freedom of association and freedom of speech. Regardless of how much any such power might be used, its potential chilling effect, which is far more difficult to measure, should not be underestimated. We will not be better protected if we persist in criminalising individuals on the basis of association rather than intention and actions.

162. The powers to proscribe organisations connected with terrorism are currently too wide and require amendment. Current provisions capture an innumerable number of organisations and could be said to be used as a political tool rather than in response to a direct threat to our safety. If non-violent organisations are banned this will only create martyrs of those who express unpleasant views (or their supporters), which in turn will only strengthen the attraction of the organisation to many of its followers. Criminalising distasteful expressions of belief does not make us safer from terrorism. We believe that on this basis the addition in 2006 of 'glorification' of terrorism as a ground for proscription ought to be repealed. This would have the effect of minimising the interference with the right to free speech and assembly, and would focus the limited resources of our security services on those organisations that incite and encourage violence or which are a direct threat to our security. Originally the 2006 legislation introducing this power contained a separate provision criminalising the glorification of terrorism by individuals. After concerted opposition this provision was removed – yet criminalisation of those who support a *group* that glorifies terrorism remains. We believe this anomaly should now be remedied and glorification should be removed in its entirety.

163. Finally, we have raised a number of concerns about the need for fairness guarantees surrounding the process by which an organisation is proscribed

[219] See rule 9 of *The Proscribed Organisations Appeal Commission (Procedure) Rules 2007*, made under Schedule 3 of the *Terrorism Act 2000*.

– as this can result in a criminal conviction, with a maximum 10-year imprisonment term, for an otherwise innocent individual. The deproscription process must be made transparent, with full disclosure of the reasons why an organisation has been banned and the process and conclusions of the 'working group' reviewing the list of proscriptions ought to be made publicly available. As is the case with control orders, we have serious concerns over the use of 'secret evidence' and the special advocate system. There is also a need for greater judicial oversight when an organisation is proscribed in order to protect an organisation from being unjustly proscribed.

164. Groups and organisations that promote hatred of others are objectionable and offensive. They should be publicly challenged and their hateful views rejected. However, freedom of expression is crucial to democracy. While the right to free speech is not absolute, any limitations on it must be shown to be necessary and proportionate. Criminalising even the most unpalatable, illiberal and offensive speech should be approached with grave caution in a democracy. It is a slippery slope indeed to ban organisations not on the basis that they promote or incite violence, but that we disagree with their views. If such powers were introduced there would be innumerable calls for all manner of organisations, including political parties like the BNP, to be banned. Government can of course encourage civil society to deal with organisations that promote hatred, but denying an offensive organisation the space to flourish is more effective than criminalising membership of that organisation. We urge the new Coalition Government to commit itself to the principles of freedom of expression and association and resist the temptation to take counter-productive and unnecessary steps to introduce further criminal offences and counter-terror powers in this already heavily legislated area.

CHAPTER 6: PRE-CHARGE DETENTION OF TERRORIST SUSPECTS

Terms of Reference: The detention of terrorist suspects before charge, including how we can reduce the period of detention below 28 days

165. The Government has committed to review the length of time a terrorist suspect can be detained without charge, including looking at *"how we can reduce the period of detention below 28 days".*[220] The day after the Review was announced, the House of Commons passed a Statutory Instrument under the *Terrorism Act 2000* allowing for the 28-day extension on pre-charge detention (which would otherwise be 14 days), to remain in place for a further six months pending this Review. In six months time, the limit will fall to 14 days if no renewal Statutory Instrument is laid, or amendments are made as proposed by the Home Secretary to provide for a *"reduced period of pre-charge detention, but with the possibility of contingency arrangements for extreme circumstances, when it may be necessary to take detention beyond 14 days"*.[221]

166. Liberty welcomes the Government's intention to reduce the pre-charge detention period from its current high of 28 days. Such a lengthy period of detention without charge is shamefully long. It is an egregious breach of the UK's human rights obligations and puts us way out of step with other comparable democracies. Liberty believes that the issue of pre-charge detention needs to be looked at afresh, in light of all of the evidence, some of which indicates that *less* than 14 days is needed to gather enough information to charge a terror suspect. Liberty appreciates that investigation of terrorism offences is complex. But our human rights and civil liberties should not, and need not, be sacrificed to deal with those suspected of terrorism. Both the Conservatives and Liberal Democrats while in opposition vigorously defended the right to liberty as the former Government continually ratcheted up pre-charge detention periods. Both coalition partners firmly rejected the 42 days proposal back in 2008, and the Liberal Democrats subsequently put forward a pre-election commitment to bring the period down to 14 days if elected. The new Government has so far sought to bind itself together with the language of civil liberties. Ever lengthier pre-charge detention limits were a hallmark of the previous Government's response

[220] Terms of Reference.
[221] House of Commons *Hansard*, 14 July 2010, at column 1007, 1008.

to the terrorism threat. Often knee-jerk in nature, repeated attempts to extend pre-charge detention came to represent the worst of counter-terror law and policy-making. This approach, and the legislation it generated, can now be remedied. Liberty believes that the time has come permanently to reduce pre-charge detention periods in legislation, in line with what is necessary, proportionate and the minimum interference possible with our civil liberties. It is time for shamefully long pre-charge detention periods to be removed from the statute book permanently.

Background

167. The length of time a terror suspect can be held without charge in the UK has been steadily increasing since the introduction of extended temporary emergency periods at the height of conflict in Northern Ireland. Until 1974, a suspect could only be detained without charge for 48 hours. Under the *Prevention of Terrorism Act (Temporary Provisions) Act 1974*, rushed through Parliament in two days shortly after the Birmingham bombing, this period was extended to seven days. These provisions were only meant to be temporary to deal with an emergency situation: the trouble with temporary emergency powers, of course, is that they all too often become permanent.[222] Accordingly when the *Terrorism Act 2000* was introduced it too provided for a terror suspect to be detained without charge for extended periods, with the floor set at seven days. This seven day maximum was permanently extended, by statutory amendment, to 14 days in 2003[223] and then extended yet again – this time to 28 days – in 2006.[224] The 28 day extension (which was the compromise reached following attempts to extend to 90 days) was always intended to be temporary, and so must be renewed annually by both Houses of Parliament.[225] The 28 day limit has been renewed each year since 2006, with the most recent extension approved in July 2010.

168. The proposal to extend the 7 day period to 14 days of pre-charge detention was introduced as a late amendment to the *Criminal Justice Bill* in 2002.[226]

[222] For a history of the legislation enacted in relation to the Northern Ireland terrorist threat see "Introduction" and the "Arrest and detention" power in Scorer, C, Spencer, S and Hewitt, P (National Council for Civil Liberties) (1974) *The New Prevention of Terrorism Act: The case for Repeal* (NCCL: London).
[223] Under section 306 *Criminal Justice Act 2003.*
[224] Section 23 of the *Terrorism Act 2006* extended the maximum period of detention between arrest and charge from 14 to 28 days.
[225] See section 25 of the *Terrorism Act 2006.*
[226] Subsequently the *Criminal Justice Act 2003*.

It was reluctantly passed by the House of Commons, with strong opposition from both the Liberal Democrats and the Conservatives. At the time, the now Attorney-General Rt Hon Dominic Grieve MP was dismayed with the inadequate evidence put forward to justify such greatly expanded state powers:

> *I am sure that the Minister will readily accept our difficulty: the proposal has been made at a late stage of the Bill's proceedings and it is draconian. …If the provision goes into the statute book, I very much hope that it is kept under constant review, with a view to its removal from the statute book as soon as possible, because I do not like the idea that individuals could be detained for up to 14 days without charge. That is a serious matter.*[227]

Current Deputy Leader of the Liberal Democrats Simon Hughes MP agreed with the position put forward by the Conservatives[228] and stated:

> *Irrespective of the justification for a significant removal of people's civil liberties and a significant increase of the state's power, we must be careful not to do that without having the opportunity to recover the position in more normal times.*[229]

169. Given this early sentiment, it was not surprising that the further extension to 28 days pre-charge detention in 2006 was not without huge controversy. The decision took place against the backdrop of an historic parliamentary vote in November 2005 when the former Prime Minister, the Rt Hon Tony Blair MP – suffering his first ever defeat in the House of Commons – was prevented from enacting his preferred proposal to extend pre-charge detention to 90 days. It was in this fraught and divisive context that parliamentarians agreed to extend the limit to 28 days and it was again hoped at the time, by politicians from across the political spectrum, that the repeated ratcheting up of the detention limit would be halted.

170. This, sadly, was not the case. In 2007 the Government again asked Parliament to extend the pre-charge detention limit. Originally rumoured to favour a new limit of 56 days the Government ultimately sought an extension to 42 days. Again the policy proved divisive and controversial. Thirty-six Labour backbench MPs rebelled against the proposal and the Government managed only to secure a

[227] House of Commons *Hansard*, 20 May 2003, at column 949.
[228] House of Commons *Hansard*, 20 May 2003, at column 951.
[229] House of Commons *Hansard*, 20 May 2003, at column 952.

majority in the House of Commons with the support of the Democratic Unionist Party. The proposal was defeated in the House of Lords in the autumn of 2008 by a resounding majority of 191.

171. On 14th July this year, for the fourth consecutive year, the House of Commons approved a Statutory Instrument[230] allowing for the renewal of the temporary 28 day pre-charge detention limit for a further six months. The shortened extension period of six rather than 12 months was on account of this counter-terror review taking place. In announcing the extension the Home Secretary said:

> *whilst we would not wish to pre-judge the outcome of the review, both parties in the coalition are clear that the 28 day maximum period should be a temporary measure and one that we will be looking to reduce over time.*[231]

This intention certainly chimes with the Liberal Democrats' 2010 Manifesto commitment that if elected they would "*reduce the maximum period of pre-charge detention to 14 days*".[232]

172. Liberty believes that the extended period of pre-charge detention which has been in place for so many years is a stain on the UK's human rights record. Continuing the extension at 28 days is not only wrong in principle, it has also been shown to be unnecessary. To date, Parliamentarians have had limited opportunity to ruminate on what would be an acceptable and appropriate pre-charge limit to allow for effective policing, taking into account the evidence available and properly balancing the need for protection with respect for the Government's human rights obligations. Extended pre-charge detention was never meant to be a permanent fixture, which is why it must be renewed every year. Much of the debate has taken place against the backdrop of continual attempts to re-extend the pre-charge limit. Liberty welcomes the counter-terror review as it provides the first opportunity, finally, to not only reduce the lengthy pre-charge detention periods permanently but to properly examine and question the evidence and assertions which the former Government put forward as justification.

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[230] *Terrorism Act 2006 (Disapplication of Section 25) Order 2010*; initially laid by the Home Secretary in draft on 24th June 2010. The Order was approved by the House of Lords on 19th July 2010.
[231] Written Ministerial Statement of Secretary of State for the Home Department, Rt Hon Theresa May MP, *Hansard*, 24 June 2010, Column 20WS.
[232] *Liberal Democrat Manifesto 2010*, accessed at: http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf.

173. Below, we demonstrate that the case for extending the pre-charge detention period has never been made out. Despite claims about increasing complexity, no individual has been held beyond 14 days for over two years (since August 2007). Information that has since come to light indicates that those individuals who have been held over 14 days could have been charged or released before the 14th day. Tellingly, our current 28 day limit is embarrassingly out of step with comparable democracies around the world. Additionally, and as we examine in greater detail below, since 28 days was added to the statute book in 2006, there have been a number of changes in law and policy that fatally undermine any arguments for the period to be maintained for any longer.

Inevitable Injustice of Lengthy Pre-Charge Detention

174. The moment of 'charge' is an incredibly important point, marking the beginning of true criminal proceedings. It is when the prosecution formally advises the suspect that he or she is to be prosecuted and gives the particulars of the criminal allegations faced. Before charge a person is not formally accused of any criminal offence. A suspect is charged when the prosecuting authorities have gathered enough evidence to stand a reasonable prospect of convicting the suspect.[233] Before charge the police do not have this hard evidence. In fact, the arrest and detention of a suspect before charge is justified on the basis of police suspicion as opposed to evidence.

175. Suspicion is such a low legal hurdle that it is not really capable of being tested by the courts or challenged by the suspect or their lawyers. Any proper contest between defence and prosecution or any true scrutiny by a court is not really possible in the absence of hard evidence. Pre-charge detention is easily confused with detention after charge, i.e. detention in remand while a suspect awaits trial. There is, however, a major difference between pre- and post-charge detention. While the total period of detention from arrest to trial should be as short as possible we accept that suspects are often held for quite lengthy periods of time after charge

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

while awaiting trial, especially in serious cases like those involving terrorism. Unlike before charge this has traditionally been accepted after charge because the detention is based on hard evidence rather than police suspicion; the suspect knows the reason for their detention; they have been formally accused of committing an offence and can decide whether to plead guilty or to contest the charges; and, if they do plead not-guilty, their lawyers can start to develop the defence.

176. The police will inevitably arrest people who they then release without charge because they can't find enough evidence to sustain a prosecution. This is demonstrated by the statistics on suspects held for 27/28 days since the current 28 day limit came into force in 2006. Half were eventually released without charge. In effect, it seems that the police suspicion turned out to be unfounded. It is inevitable that this will sometimes happen in a democracy and it is not a cause for criticism. The consequences of these mistaken judgements do, however, vary enormously depending on how long a person has been detained: if detention is for a matter of hours or days the consequences may not be too grave but if a person is detained for 14 days or almost a month the consequences are likely to be unacceptably severe. The previous two extensions were passed on the basis of hypothetical examples and little evidence (most of it being withheld for stated reasons of 'national security'). We now have the evidence, and the evidence shows that the extended powers simply are not necessary. This was accepted by the Home Secretary when she recently asked for the short 28 day renewal:

> *No suspect has been held for more than 14 days since July 2007. When one considers that in the 12 months ending in December 2009 28 terrorism-related trials were completed, with 93% convictions, including six life sentences, it is clear to me that the power to detain for up to 28 days is not needed routinely for the police to investigate, interrogate and charge terrorist suspects.*[234]

177. A suspect released without charge after several weeks may well have lost their job, home and the trust of their community, friends and perhaps even family. Their arrest and detention will no doubt have been accompanied by media speculation and gossip but once released the suspect will be unable to clear away the air of suspicion that they are involved in terrorism. Their only option may be to sell-up, move home, look for a new job and new schools for their children. In October

[234] House of Commons *Hansard*, 23 May 2010, at column 1007.

2007 Liberty spoke to one lady who had been through something approximating this kind of ordeal. She was released without charge after 12 days detention under the *Terrorism Act*. She said of her experience:

> *The 12 days when I was held without charge felt like 12 months – I was claustrophobic, fearful, and I thought I would never get out. For months after being released without charge I was afraid to leave my home alone. This experience has changed my life forever*.[235]

178. Due to the injustices that will inevitably arise from lengthy pre-charge detention, UK law has historically required suspects to be charged within a matter of hours or days, rather than weeks or months. The pre-charge detention limit in non-terrorism cases, for example, is still 4 days and in terrorism cases the limit was just 7 days until 2003. The current 28 day limit and its predecessor of 14 days are way out of line with this historic position and much longer than in other comparable democracies (discussed below). Indeed, lengthy detention without charge is more commonly associated with oppressive, non-democratic regimes.

Examining the case for extended pre-charge detention

179. Successive Acts of Parliament have increased the pre-charge detention period in terrorism cases – from 7 to 14 days in 2003,[236] and from 14 to 28 days in 2006.[237] Other attempts to increase the detention period have, fortunately, been unsuccessful. The 28 day extension was ultimately settled on in 2006 after attempts to extend to 90 days were rejected. Similarly, a subsequent attempt to extend the limit to 42 days in 2008 was soundly defeated. The rationale for this ratcheting-up of the limit has been the nature of al-Qaida inspired terrorism and the increasing complexity of police investigations. In particular, the previous Government pointed to the increase in the level of the threat; the fact that the new terrorist threat can cause "*mass casualties without warning*" (meaning that the police must intervene early to prevent attacks before they happen);[238] and the complexity of cases "*in terms of material seized, use of false identities, multiple languages and dialects and*

[235] Her full story is available at www.chargeorrelease.com
[236] *Criminal Justice Act 2003*.
[237] *Terrorism Act 2006*.
[238] Home Office, "Pre-Charge Detention of Terrorist Suspects", December 2007, p.4.

international links".[239] When making the proposals for extension the former Government revealed little detail of the evidence, mostly for reasons of security. Accordingly, the first extension to 14 days in 2003 was done largely on the basis of hypothetical scenarios, which the current Attorney General found difficult to swallow given the resulting interference with the right to liberty:[240]

> *We must be careful that we do not end up with a situation in which, because the police think that the provision might be a useful tool in a hypothetical setting, we simply say, "Yes, of course you must have it". It is offensive to civil liberties that people should be detained for 14 days.*[241]

180. There is little evidence on which to base a 28 day or, for that matter, 14 day extension. When the *Criminal Justice Act 2003* was passing through the House of Commons to extend pre-charge detention to 14 days the Liberal Democrats proposed an amendment which, as a compromise, would see pre-charge detention limited at 10 days, recognising that doubling the seven day period within three years of its implementation was *"a step too far".*[242] In his inquiry into terrorist legislation in 1996,[243] Lord Lloyd recommended that terrorist suspects be detained for a maximum of 48 hours, before judicial authorisation is sought to extend the period for up to two further days, making *four days* maximum in total.[244] Lord Lloyd made this proposal in the context of a review in which he was tasked with making recommendations for permanent terrorism legislation after the temporary Northern Ireland legislation, and to ensure compliance with the UK's human rights obligations.[245]

181. There is also evidence to show that extended pre-charge detention is counter-productive and can lead to investigations being dragged out unnecessarily. In 2009, Operation Overt, following the failed plot at Heathrow in 2006, led to 24 people being arrested on suspicion of terrorist offences, five of whom were held for

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[239] Ibid. p.5.
[240] The right to liberty is protected under article 5 of the *European Convention of Human Rights* incorporated by the *Human Rights Act 1998*.
[241] House of Commons *Hansard*, 20 May 2003, column 949.
[242] House of Commons *Hansard,* 20 May 2003, at column 953.
[243] Lord Lloyd of Berwick's *Inquiry into legislation against terrorism* (October 1996) (Cm 3420) (TSO: London).
[244] Ibid, at para 9.10. Lord Lloyd concluded that this limit ought to be in the permanent anti-terrorism legislation, but accepted that in the context of emergency legislation in place at the time the seven day limit could remain.
[245] Ibid, at para 1. Given he provided his report at the height of the conflict with Northern Ireland, Lord Lloyd did recommend that the then current seven day pre-charge detention period remain in place as a *temporary* measure: at para 9.22.

27 to 28 days. Three of those held for this extended period were eventually released without charge or further suspicion. The operation was frequently held up by the former Government as the reason why a 28 day pre-charge detention was necessary, and it was frequently asserted by senior Government Ministers as hard evidence that the police were "*up against the buffers*"[246] under the existing 28 day limit. However lawyers for those charged revealed that the evidence relied on to charge the two suspects was obtained between four and 12 days of the detention commencing. Further, during the last 15 days of detention the suspects were interviewed for periods of only 10 and 16 minutes per day respectively. So even though it was possible to lay the charges very early on, the full amount of time legally available was used, perhaps simply because it was there.[247]

182. Liberty does not deny that the UK faces a very real and severe threat from Al-Qaida-inspired terrorism. Neither do we seek to dismiss claims about the increasing complexity of terrorist investigations or, indeed, claims that lengthy pre-charge detention might prove operationally convenient for police in future cases, at least in the short-term. We have always acknowledged and appreciated the extremely difficult work undertaken by the police and other agencies charged with national security. We do not, however, believe that the possibility of short-term operational advantages, in itself, justifies the continued extension of pre-charge detention. If, indeed, this were the only test, why should Parliament restrict police powers at all? We urge this Review to look beyond any possible short-term benefits of continuous renewal and to consider:

- the potential counter-productivity of detaining suspects without charge for almost a month;
- the other developments in law and policy since the original case for 14 days was made in 2003, and the case for 28 days made in 2006;
- the possibility of other ways of addressing the arguments for longer pre-charge detention which are less damaging to civil liberties and pose less risk of counter-productivity.

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[246] Ken Jones, then head of ACPO: 'We are up against the buffers on the 28-day limit', *Observer*, 15 July 2007.

[247] See, further, "'Up against the buffers': Fact and fiction about the existing 28 day pre-charge detention limit", *Liberty Press Release* (10 June 2008), accessed at http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/fact-and-fiction-about-the-existing-28-day-pre-charge-detention-limit.shtml. The case was also recently outlined by David Davis MP in House of Commons *Hansard,* 14 July 2010, at column 1015.

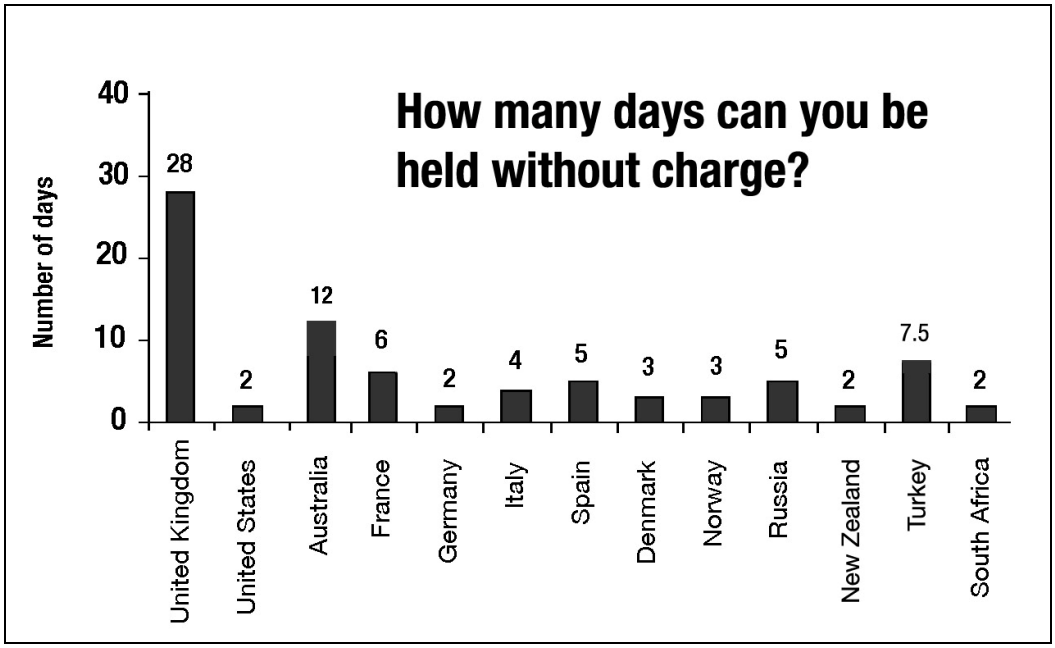
Before turning to these three key issues, we briefly consider the UK's current 28 day limit from an international perspective.

International Perspective on extended pre-charge detention

183. There can be no doubt about the international nature of the threat from al-Qaida-inspired terrorism. Like the United Kingdom, Spain, the US and Turkey have all suffered from terrorist attacks in recent years. Police in these countries face the same investigative challenges cited in support of lengthy pre-charge detention in the UK – the greater complexity of terror plots, their international dimension and the need to intervene and arrest suspects earlier. Given these similarities, a consideration of how other comparable democracies have responded to these challenges is a useful guide to the necessity and proportionality of the current 28 day limit.

184. Back in 2007 Liberty asked qualified lawyers and academics in comparable democracies to advise us on how long a terror suspect can be detained before charge (or the closest equivalent to charge) under the criminal law in their jurisdictions. We found that none of the countries surveyed permits pre-charge detention for anything like the existing 28 day limit in the UK.[248] In June 2010 we asked the same lawyers and academics to update their previous legal advice. This confirmed, once again, that the UK is dangerously out of step with comparable democracies the world over. The US Constitution, for example, limits pre-charge detention to two days, the closest equivalent to pre-charge detention in France is limited to six days.

[248] See Liberty's *Terrorism Pre-Charge Detention Comparative Law Study*, annexed to this report. The report is also available at http://www.liberty-human-rights.org.uk/publications/6-reports/comparative-law-study-2010-pre-charge-detention.pdf.



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

185. In 2007/2008 the then proponents of extending pre-charge detention to 42 days sought to dismiss these comparative findings, arguing that it is impossible to compare different legal systems.[249] Of course no two legal systems are exactly the same and comparisons are not always simple but this does not mean we should shut our eyes to overseas experience. The UK's counter-terror laws do not exist in a vacuum. Difficulties in drawing comparisons can, indeed, be over-played. Some countries like Australia and the United States have very similar criminal justice systems to our own, making comparisons straightforward. In civil law countries like France and Germany, we explained the significance of charge in the UK and asked lawyers qualified in those jurisdictions to identify their equivalent.

The Australian Experience

186. There have been recent and relevant developments in Australia regarding pre-charge detention. As we advised in our earlier comparative report the maximum period of pre-charge detention for the purposes of investigating a terrorism

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

offence in Australia is 24 hours. While the normal pre-charge detention limit is restricted to 4 hours, in terrorism cases this can be extended on application to a judicial officer to the 24 hour maximum.[250] 'Dead time' during which no questioning is permitted is not, however, included within this 24 hour period. Accordingly, 'dead time' can allow a person to be detained longer than 24 hours but the total amount of time spent questioning the person cannot exceed 24 hours.[251] There has until now been no statutory cap on the maximum amount of 'dead time' that can be authorised. The first and only case in which an extended period of 'dead time' was authorised by a magistrate led to a person – Dr Mohamed Haneef – being detained for a total of 12 days without charge.[252] This period was far greater than the maximum anticipated by the Australian Government during the passage of the relevant legislation. At the time, in response to calls for an absolute limit of 48 hours, the Attorney-General's Department staff assured a Senate inquiry that such a limit was not necessary and that it would be surprising if the powers were used to detain anybody for 48 hours.[253] In Parliament, the Minister for Justice and Customs indicated that the provision would also be limited by case law interpreting a 'reasonable time' to be a 'limited time'. [254]

187. Following Dr Haneef's detention an independent review was conducted by the Hon. John Clarke QC. Part of the remit of the Inquiry was to review the circumstances of Dr Haneef's arrest and detention and the operational and administrative procedures which surrounded it.[255] The Inquiry also made a number of findings about the effect of having uncapped pre-charge detention, including that the provisions "*removed, or diminished, the sense of urgency that should have been brought to the task of determining whether to charge or release*".[256]

188. The Inquiry concluded that "*If pressed – and having regard to Dr Haneef's detention in circumstances where the overseas involvement created time*

[250] s23CA, *Crimes Act 1914*. Two hours for a minor or Aboriginal person or Torres Strait Islander.
[251] s 23CA *Crimes Act 1914*.
[252] Dr Haneef was arrested on 2 July 2007 in connection with the failed bomb attacks in the UK. He was charged 12 days later with supporting a terrorist organisation but the Director of Public Prosecutions withdrew the charges on 27 July 2007 because there was insufficient evidence to establish the elements of the offence.
[253] Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) para 3.25
[254] *Pollard v R* (1992) 176 CLR 177 cited in Commonwealth, *Parliamentary Debates*, Senate, 18 June 2004, 24228-29 (Chris Ellison, Minister for Justice and Customs)
[255] The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008), accessible at http://www.haneefcaseinquiry.gov.au.
[256] At page ix of the Report. A similar argument also applies to a lengthy pre-charge detention period.

problems generally *for the investigation – I would tend to say the cap should be no more than seven days".*[257] This conclusion has now been acted on by the Federal Government which introduced the *National Security Legislation Amendment Bill* earlier this year.

189. The Bill's provisions in relation to pre-charge detention draw directly from the Clarke Report's conclusions. The Bill deals with non-terrorism and terrorism offences in two separate subdivisions in Division 2 of Part 1C and will bring into force a seven-day cap on the number of days a person can be held without charge. This means a person will not be able to be detained for longer than a total of eight days on account of 'dead time'. The Bill was referred to the Senate and Legal Constitutional Affairs Legislation Committee, which reported back on 18 June 2010. In relation to pre-charge detention, submissions to the Committee were, for the most part, not only critical of the seven-day cap but also the apparently arbitrary way that figure had been reached. The Australian Human Rights Commission, for example, argued that a maximum eight day detention plus any further disregarded time for specified events is unjustified and disproportionate.[258] The Committee concluded that the Government should go further in restricting pre-charge detention, and recommended that there be a three day limit on pre-charge detention inclusive of 'dead time'.[259]

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

191. The Australian Government's plans to limit pre-charge detention for terror suspects to a maximum 8 days stand in sharp contrast to events in the UK. While it is of course the case that each country needs to determine its own statutory limits on pre-charge detention the experience in Australia, whose legal system is very

[257] At page 249 of the Report.
[258] As summarised by the Committee at 3.90 of its Report. See further para's 3.91 to 3.98.
[259] The Committee recommended that the investigatory dead time provision set out in clause 23DB be retained, but amending clause 23DB(11) to reflect a three-day time limit.

similar to our own, is worth consideration. The Executive Summary of Liberty's comparative law study, setting out legal advice from eleven other jurisdictions, is annexed to this report.[260]

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

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

Counter-productivity

193. Tackling Al-Qaida-inspired terrorism necessarily includes engaging in a battle for hearts and minds. The continuous renewal of the extended pre-charge detention limit and the injustice that inevitably results does not help us to win that battle. On the contrary, pre-charge detention for almost a month can and has damaged community relations, potentially making it more difficult for police and intelligence agencies to maintain all-important relationships with Muslim communities. In some extreme cases, it could even operate as a recruiting sergeant to terrorism.

194. There is no question that extended pre-charge detention impacts disproportionately on the minority ethnic and Muslim communities. As Sir Ian Blair

[260] The Report is also available online at http://www.liberty-human-rights.org.uk/publications/6-reports/comparative-law-study-2010-pre-charge-detention.pdf.

and Peter Clarke have previously explained, with regard to those arrested under the *Terrorism Act 2000* "*by and large, most of those who come into custody when asked say that they profess the Muslim faith*".[261] History has shown that oppressive laws, which have a disproportionate impact on one racial or religious group, can cause serious long-term damage to community cohesion.[262]

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

196. There is also a real concern that people will be dissuaded from reporting any suspicions they might have about colleagues or neighbours for fear that, even if their suspicions turn out to be unfounded, the person concerned could be held in police custody for many weeks. While we would not suggest that extended pre-charge detention can magically transform law-abiding individuals into terrorists, we are concerned that the visible injustice of such a policy can provide a propaganda tool to those seeking to radicalise others. The impact of detention without charge in Northern Ireland confirms these risks. Internment in Northern Ireland has been described as the "*best recruiting sergeant the IRA ever had*".[263]

What has changed since pre-charge detention was extended to 14 days in 2003 and 28 days in 2006?

197. Liberty has consistently maintained that there are better ways of responding to the increasing complexity and international nature of terrorist investigations than continually renewing the temporary and unjustified period suspects can currently be held before charge. Some of the alternatives, highlighted by Liberty in the past, have been adopted. Other changes to law and practice have also been made since the 28 day limit was passed in 2006. Taken together, police powers for investigating, questioning and charging suspected terrorists have been

[261] Evidence to the Home Affairs Select Committee, 9 Oct 2007, Q21.
[262] Examples include the controversial sus laws as well as internment in Northern Ireland.
[263] cf Lord King of Bridgewater, HL Deb, 10 March 2005, cols 1040-1041.

greatly extended. These developments make the continued extension of pre-charge detention limited.

198. One example is the bringing into force, in October 2007, of Part 3 of the *Regulation of* Investigatory *Powers Act 2000*. This criminalizes any failure to disclose an encryption key and provides an answer to police arguments that longer pre-charge detention is needed because of the time taken to decrypt large amounts of electronic data.[264]

199. Another development since 2006 is the creation of additional 'lower order' terrorism offences including: dissemination of terrorist publications; preparation of terrorist acts, training for terrorism; attendance at a place used for terrorist training etc[265] which provide greater scope for charging suspected terrorist behaviour. While Liberty has concerns over the breadth of many 'lower order' terror offences it certainly cannot be said that law enforcement lacks offences with which to refer an early charge against those suspected of terrorist activity.

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

201. Another factor, hugely relevant to the period necessary for pre-charge detention, is the evidential threshold that needs to be met before a charge can be laid. Again, over recent years there have been significant developments here. Prosecutors can now lay charges in situations where the level of evidence required to apply the Full Code Test for charging (i.e. reasonable prospect of conviction) is not

[264] The *Police and Justice Act 2006* also allowed suspects to be released on bail subject to potentially strict conditions.
[265] *Terrorism Act 2006* and *Counter-Terrorism Act 2008.*

yet available. This alternative threshold is known as the 'Threshold Test' and it requires at least reasonable suspicion on the available evidence together with the likelihood that further evidence will become available within a reasonable time to meet the Full Code Test.[266] A lower threshold for charging has an obvious and direct impact on the necessary period required for pre-charge detention. Prosecutors' ability to charge suspects sooner seriously undermines claims that an extended period of pre-charge detention needs to be continuously renewed.

Other Alternatives to Lengthy Pre-charge Detention

Intercept evidence

202. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.[267] While we understand that the admissibility of intercept evidence does not form part of this urgent Review, we believe its urgent consideration is essential to so many questions of relevance to the Review. We believe that admitting intercept evidence would make it possible to charge suspects earlier in a significant number of terrorism cases. Claims that lifting the bar would not make a significant difference in terrorism investigations are very hard to reconcile with the extent of surveillance in the UK (including phone tapping). It would indeed be a surprise, or a cause for concern, if the communications of those suspected of involvement in terrorism were not being intercepted before they are arrested. In many cases we would, therefore, expect intercept material to be available at the time of arrest.

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

[266] The Code for Crown Prosecutors, Chapter 6.
[267] Cf Liberty's evidence to the JCHR on this subject at www.liberty-human-rights.org.uk.

proceedings. We urge the Government to recognise the link between admissibility of intercept and pre-charge detention and take immediate action to allow for admissibility.

The Nightmare Scenario and Existing Emergency Laws

204. Proponents of lengthy pre-charge detention limits have in the past argued that the powers might be needed to deal with a future nightmare scenario involving multiple grave terror plots which come to notice and/or fruition so suddenly and simultaneously that the police are simply unable to gather the evidence required to charge such a large number of suspects within a shorter time limit. During the previous Government's attempt to extend the pre-charge detention limit to 42 days the then Minister of State for Security, Counter-Terrorism, Crime and Policing (Rt Hon Tony McNulty MP), for example, wrote in the *Daily Mirror*: "*As an extreme example, imagine two or three 9/11s. Imagine two 7/7s.*"[268] Liberty has seriously considered the hypothetical 'nightmare scenario'. Even if such a scenario did arise we do not, however, consider that a lengthy pre-charge detention limit, renewed on a rolling basis, is necessary to deal with it. Existing emergency powers legislation (the *Civil Contingencies Act 2004*) already gives senior ministers the power to pass emergency laws extending pre-charge detention limits if this is urgently needed to deal with a real emergency such as three 9/11s. In 2007 Liberty obtained an opinion from David Pannick QC confirming this.

205. The Government's decision to renew the 28 day detention period – even if for 6 months – was an early disappointment. But we are heartened by the commitment to reduce this period to at least 14 days, and believe the period could be reduced even further. As we explain above, the case for retaining any exceptional period has not been made out. Practical experience since the period was extended in 2006 indicates that it has never been necessary to hold an individual for longer than 14 days, and in many cases the individual could have been held for much less. In the interim there has also been a number of hugely significant changes to law and practice which more than deal with previous concerns and arguments about the complexity etc. of investigating terrorism. Indeed changing the law to allow intercept to be made admissible in criminal proceedings would certainly address any residual claims for extended periods. Our updated comparative research eerily demonstrates

[268] "Minister warns of 'peril' as he pushes for 42 day lock-up", 23rd January 2008.

just how far down the wrong path we have gone. We urge the Government to heed this stark comparison and to re-assess what length of pre-charge detention is actually necessary in light of all the evidence and other recent changes in law and policy. It is time to end the shamefully long periods of detention which have been a malign feature of the fight against terrorism for the past decade and restore the UK's human rights record in this area.

ANNEXURE ONE

Timeline **Significant developments on the road from 'war' to law**	
20 July 2000	Royal Assent of the *Terrorism Act 2000* makes permanent a number of exceptional anti-terror provisions that had been previously been subject to annual renewal.
7 June 2001	General Election – Tony Blair returned to power.
11 September 2001	Twin-towers atrocity in New York.
October 2001	War in Afghanistan commences.
12 November 2001	Introduction of the Anti-Terrorism, Crime and Security Bill.
14 December 2001	Just a month after its introduction (and three months after 9/11) the *Anti-Terrorism, Crime and Security Act 2001* is passed. This includes Part 4, which provides for internment without charge or trial for foreign nationals suspected of 'links' with international terrorism - the 'Belmarsh' policy). Liberty begins campaign against the Belmarsh policy.
22 February 2002	The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment schedule an emergency visit to the UK to investigate the treatment of those interned under the *Anti–Terrorism, Crime and Security Act 2001*. Liberty lawyers are amongst those helping the Committee with its enquiries.
28 February 2002	Moinul Abedin, arrested in 2000 with almost 100kg of the chemical components of the explosive HMTD, is convicted of committing an act with intent to cause an explosion using HMTD and sentenced to 20 years in prison.
12 July 2002	The Special Immigration Appeals Commission (SIAC) agrees to hear in public the case against interning terrorist suspects without charge or trial – the first opportunity for the detainees to mount a legal challenge to the legality of their detention. Liberty is given special permission to intervene at the hearing.
30 July 2002	SIAC rules that the Government has breached Article 14 of the HRA (equal treatment) in its implementation of indefinite detention powers in the *Anti–Terrorism, Crime and Security Act 2001*. SIAC found that the derogation from Article 5 (right to liberty) of the *European Convention on Human Rights* was justified, but as the new powers only concerned foreign nationals there was a clear breach of the

	discrimination protections.
7 January 2003	The Metropolitan Police announce they have arrested seven men on suspicion of manufacturing Ricin for use in a terrorist attack on the London Underground. The Prime Minister appears on television that night referring to the 'find' as a stark illustration of the threat of weapons of mass destruction. US Secretary of State, Colin Powell, refers to those arrested as the 'UK Poison Cell' of a global terrorist network in making the case for military intervention in Iraq to the UN Security Council.
23 January 2003	The Investigatory Powers Tribunal upholds a Liberty challenge to its procedures. Hearings no longer have to be held in secret and the Tribunal will be able to hold some parts of some cases in public: IPT/01/62 and IPT/01/77.
March 2003	Invasion of Iraq begins.
11 March 2003	The Home Secretary issues control orders against ten terrorist suspects just released from detention connecting them to the Ricin plot, even though it was alleged to have occurred while they were in custody. Letters of apology are sent two weeks later explaining it was a 'clerical error'.
1 April 2003	Brahim Benmerzouga and Baghdad Meziane, arrested in 2001, are found guilty of entering into a funding arrangement for the purposes of terrorism. The men fraudulently amassed more than £200,000 for Al Qaida and were imprisoned for 11 years.
September 2003	A Metropolitan Police operation against a peace protest at an arms fair in the Docklands reveals that the entire Greater London Area is designated for stop and search without suspicion on a rolling basis since February 2001 under section 44 of the *Terrorism Act 2000*. Legal proceedings in relation to the stopping and searching of journalist and photographer Pennie Quinton and protester Kevin Gillan begin.
20 November 2003	*Criminal Justice Act 2003* enacted, which increased seven days pre-charge detention in terrorism cases to 14 days.
7 January 2004	Civil Contingencies Bill introduced delegating extensive powers to the executive in the event of an emergency, including a terrorist emergency.
18 November 2004	Royal assent of the *Civil Contingencies Act 2004*.
16 December 2004	*A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (Belmarsh indefinite detention case). The House of Lords declares the Belmarsh internment policy to be incompatible with Articles 5 and 14 (liberty and equal treatment) of the Human Rights Act. Liberty intervened in this case from the first instance

	onwards.
2005	On the basis of submissions made by Liberty the UN agrees to remove British resident, the former Afghan General Rahmatullah Safi, from the list of those subject to terrorism related sanctions .
22 February 2005	Introduction of the Prevention of Terrorism Bill, which replaced indefinite detention without charge with house arrest and other 'control order' conditions without charge or trial.
11 March 2005	Less than one month after its introduction the *Prevention of Terrorism Act 2005* is enacted after significant controversy and a constitutional tussle between both Houses of Parliament.
13 April 2005	After a six month trial, eight people arrested in the Ricin plot are found not guilty, or have had the charges against them dropped.
5 May 2005	General Election – Tony Blair returned to power.
7 July 2005	7/7 bombings occur. The atrocities prompt the then Prime Minister to announce "*the rules of the game are changing*", followed by a 12-point plan including deportation (with assurances) to countries with poor records on torture, new speech offences and an intention to ban fundamentalist Islamist political parties.
21 July 2005	Attempted London bombings.
22 July 2005	Police shoot dead Jean Charles de Menezes.
29 July 2005	Police arrest four suspects in connection with the 21st July attempted bombing.
September 2005	Octogenarian holocaust survivor and peace protester Walter Wolfgang bundled out of Labour Party Conference and barred from re-entry for heckling the Foreign Secretary. Sussex Police purport to rely on section 44 of the *Terrorism Act 2000*. Liberty represents Mr Wolfgang who subsequently elicits an apology from the Police.
12 October 2005	The Terrorism Bill is introduced, proposing extension of pre-charge detention to 90 days, and introducing a number of new criminal offences.
29 November 2005	In response to growing concerns about the alleged practice of 'extraordinary rendition', Liberty writes to ten Chief Constables, whose jurisdictions include specific airports and airbases in England, asking the Chief Constables to honour their obligations under international and domestic law to conduct criminal investigations into these allegations. Liberty also asks the Government to seek assurances from the US

	Government that British territory had not and would not be used for the purposes of extraordinary rendition and, regardless of such assurances, to investigate whether British sovereignty had been abused.
November 2005	The Government's attempt to extend pre-charge detention limits to 90 days results in defeat and a parliamentary compromise limit of 28 days in terror cases.
8 December 2005	*A v Secretary of State for the Home Department (No2)* [2005] UKHL 7: the House of Lords upholds the prohibition on the use of evidence obtained through torture in UK legal proceedings.
19 December 2005	Liberty holds a meeting with the then Greater Manchester Police Chief Constable Michael Todd. At the meeting Chief Constable Todd confirms that he would look into 'extraordinary rendition' flights on behalf of the Association of Chief Police Officers (ACPO). Chief Constable Todd inform Liberty that the police had begun initial inquiries and would follow Liberty's recommendations for further questioning.
24 January 2006	A Council of Europe report is released that says it is highly likely that European governments are aware of the secret transport of up to 100 prisoners through Europe to third countries where they may face torture.
30 March 2006	Royal Assent of the *Terrorism Act 2006*.
28 June 2006	*Secretary of State for the Home Department v JJ* [2006] EWHC 1623 (Admin): The High Court declares control orders to be incompatible with Article 5 (the right to liberty) of the *European Convention on Human Rights* and quashes the control orders of six foreign nationals.
1 August 2006	A Parliamentary Joint Committee on Human Rights report stresses that prosecuting terror suspects is key to preventing future terror attacks and urges the Government to remove the ban on intercept evidence.
10 August 2006	Police thwart a suspected plot to bring down planes travelling from the UK to the US and Canada. It is believed that the plot involved liquid explosives that were to be detonated using an electrical device such as a mobile phone. 24 people are arrested.
10 October 2006	Chancellor of the Exchequer Gordon Brown calls for new laws to imprison terror suspects without charge beyond 28 days.
12 October 2006	A judgment released by SIAC reveals that secret Government intelligence in a terror case was flawed. While acting on behalf of two suspects before SIAC, Special Advocate Andrew Nicol QC found that intelligence used as

	key evidence in one case was contradicted by the other. In new judgment, SIAC found that "*there has been fault on the part of the Secretary of State*" and that failures by Home Office lawyers put the very administration of justice at risk.
27 April 2007	SIAC rules that two Libyans cannot be deported because of risk of torture if they are returned. The decision is the first successful challenge of the UK Government's 'memorandum of understanding' policy with the Libyan government which relies on diplomatic assurances that returned Libyans will not be ill-treated or tortured: *DD & AS* (2007) SC/42/2005 & SC/50/2005
11 June 2007	Liberty receives a final letter from ACPO refusing to open a formal inquiry into UK involvement in extraordinary rendition and claims that there is no evidence of any UK involvement.
29/30 June 2007	Terrorist attempts in London and Glasgow. No emergency legislative response but the Government is already talking about extension of pre-charge detention limits, perhaps to 56 days. Liberty launches 'Charge or Release' campaign against extension.
9 July 2007	Muktar Ibrahim,Yassin Omar, Ramzi Mohammed and Hussain Osman, charged with the 21 July attempted bombings on the London Underground, are found guilty of conspiracy to murder. The four attempted bombers were each sentenced to a minimum of 40 years imprisonment.
31 October 2007	*Secretary of State for the Home Department v JJ* [2007] UKHL 45. The House of Lords declares that house arrest for 18 hours a day breached the right to liberty under Article 5 of the *Human Rights Act 1998*
30 November 2007	Liberty formally launches its 'Charge or Release' campaign to stop Government plans to extend the period terror suspects are held without charge.
13 December 2007	The Home Affairs Select Committee announces its opposition to any extension to pre-charge detention, noting that neither the Government nor police have made the case to go beyond the 28 day limit.
24 January 2008	Introduction of the Counter-Terrorism Bill which proposes extending pre-charge detention limits to 42 days.
6 February 2008	A Privy Council report finds that a new framework can be introduced to allow the use of intercept evidence in criminal trials and calls for the 42 day pre-charge detention proposal to be scrapped.
10 February - 3 March 2008	Poole Borough Council uses RIPA covert surveillance against Jenny Paton and her children to check if the family live in the correct school catchment area.

21 February 2008	Statement by Foreign Minister David Miliband in the House of Commons admitting that the UK territory of Diego Garcia had been used for flights illegally transporting detainees to locations where they faced torture and inhuman and degrading treatment. The Foreign Secretary writes to Liberty's Director apologising for incorrect statements made to Liberty by previous Foreign Secretaries.
22 February 2008	The High Court quashes a control order in *Bullivant* [2008] EWHC 337 (Admin) as it was no longer justified – the Court held that evidence of sympathy with insurgents is insufficient on its own.
26 February 2008	Mohammed al-Figari, Mohammed Hamid, Kader Ahmed, Mohammed Kyriacou, Kibley da Costa, Atilla Ahmet, Yassin Mutegombwa and Mustafa Abdullah are convicted of providing or attending terrorist training in the UK.
28 February 2008	*Saadi v Italy (App No 37201/06)* (28 February 2008), [2008] ECHR 37201/06: Notwithstanding an intervention by the former UK Government attempting to dilute the rule against deporting people to places of torture contrary to Article 3 of the Convention (torture and inhuman and degrading treatment), the Court of Human Rights upholds the principle established in *Chahal v UK (App No 22414/93)* (15 November 1996) – that the prohibition on torture is absolute and in no circumstances can it ever be diluted.
29 February 2008	High Court states that the Secretary of State cannot rely on secret evidence - controlee must at least be told the 'gist' of the allegations: AN [2008] EWHC 372(Admin)
10 March 2008	High Court again states that a control order will not comply with the right to a fair trial under Article 6 of the *Human Rights Act 1998* if controlee cannot effectively challenge secret evidence: AF [2008] EWHC 453 (Admin).
3 April 2008	The trial of eight men involved in the 'liquid bomb plot' begins at Woolwich Crown Court.
12 August 2008	High Court quashes a residence obligation in a control order requiring a controlee to relocate: *AP* [2008] EWHC 2001 (Admin).
15 August 2008	High Court modifies restrictions which were having a disproportionate effect on controlee's mental state and on his family: *Abu Rideh* [2008] EWHC 2019 (Admin).
21 August 2008	The High Court finds that the UK Security Services facilitated interviews by or on behalf of the United States when Mr Binyam Mohamed was being detained by the United States incommunicado and without access to a lawyer, and continued to do so in the knowledge of what had been reported to them in relation to the conditions of his

	detention and treatment: *R (on application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048
October 2008	Government announces it had referred the case of Binyam Mohamed to the Attorney-General to investigate whether it should be referred to the police for a criminal investigation.
October 2008	Government's proposal to extend pre-charge detention limits to 42 days is roundly defeated in the House of Lords after passing by narrowest of margins in the Commons (9 votes) and controversy about the level of pressure applied to Labour MPs to secure an affirmative vote . Amidst the Banking crisis, the Government drops the proposal.
8 November 2008	After more than 50 hours of deliberations, the jury in the 'liquid bomb plot' trial finds Ahmed Abdullah Ali, Assad Sarwar and Tanvir Hussein guilty of conspiracy to murder charges.
26 November 2008	*Counter-Terrorism Act 2008* receives Royal Assent.
12 February 2009	High Court quashes one control order which is deemed to be no longer necessary, and amends the conditions of another order in respect of where the controlee must live, and quashes an obligation requiring the controlee to submit to a search of his person: *AU* [2009] EWHC 512 (Admin).
19 February 2009	European Court of Human Rights agrees with the House of Lords in the Belmarsh case – that indefinite detention of foreign nationals without charge or trial breached the right to liberty, and the procedure for review, when it involves secret evidence (with the open material consisting only of general assertions), breached the right to a fair trial: *A v UK* (2009) 26 BHRC 1.
26 February 2009	Defence Secretary admitted UK forces had handed over detainees within the UK's jurisdiction to US officials who were then unlawfully rendered to Afghanistan where torture routinely takes place.
March 2009	The Attorney General announces that Binyam Mohamed's claims of kidnap and torture will be the subject of a police criminal investigation.
20 March 2009	High Court quashes a control order as the basis for which the order was made was materially wrong: *AW* [2009] EWHC 512 (Admin).
30 April 2009	High Court orders a control order be revoked on the grounds that it was no longer necessary by the time of the hearing: *AV* [2009] EWHC 902 (Admin).
10 June 2009	House of Lords unanimously ruled that sufficient disclosure must be given to controlees to enable them to give effective

	instructions to their special advocates. Control orders remitted to High Court for consideration in the light of the judgment*: AF & Others* [2009] UKHL 28.
7 September 2009	A second jury in the 'liquid bomb plot' trial at Woolwich Crown Court finds Ahmed Abdulla Ali, Assad Sarwar and Tanvir Hussain guilty of conspiracy to murder involving liquid bombs.
5 November 2009	A Liberty challenge to a Local Authority's use of surveillance powers begins in the Investigatory Powers Tribunal. The hearing concerns Poole Council's use of covert surveillance to check that Jenny Paton lived in her declared school catchment area. This case is the first that time that the IPT held hearings in public since the Liberty challenge to the tribunal's procedures in 2003.
11 November 2009	High Court rules that 'light' control orders are also subject to the fair trial requirements of Article 6 and therefore sufficient disclosure must be given to the controlees: *BC & BB* [2009] EWHC 2927 (Admin).
21 December 2009	High Court orders control order revoked on grounds that it was no longer necessary: *AS* [2009] EWHC 3390 (Admin).
12 January 2010	Liberty wins *Gillan and Quinton v UK (App No 4158/05)* in the European Court of Human Rights in Strasbourg. The Court finds section 44 of the *Terrorism Act* to be so broad and to have inadequate safeguards as to breach Article 8 of the Convention on Human Rights (right to privacy). The then Government refuses to amend the law and promises instead to request that the case be referred to the Grand Chamber of the Court of Human Rights.
27 January 2010	Supreme Court strikes down terrorist-asset freezing orders as they were made without power and lacked proper safeguards: *Ahmed v HM Treasury* [2010] UKSC 2.
5 February 2010	Terrorist Asset-Freezing (Temporary Provision) Bill introduced.
10 February 2010	*Terrorist Asset-Freezing (Temporary Provision) Act 2010* receives Royal Assent just 5 days after its introduction.
10 February 2010	Court of Appeal orders publication of seven disputed paragraphs of a High Court judgment relating to Binyam Mohamed. The High Court had ruled Binyam Mohamend was entitled to access material held by UK authorities relevant to his defence, but the UK Government had claimed public interest immunity over the documents and seven paragraphs of the High Court's judgment which summarised the UK authorities' knowledge of Binyam Mohamed's torture while in US custody. While Mr Mohamed subsequently obtained the documents from the US authorities, the UK Government continued to resist publication of the seven

	paragraphs. In the meantime a US court ruled that Mr Mohamed had been subjected to torture and ill-treatment: [2010] EWCA Civ 65.
4 May 2010	After Mr Mohamed and a number of other ex-Guantanamo Bay detainees bring a civil claim against the UK Government for its involvement in their ill-treatment and unlawful detention by the US authorities, the Court of Appeal rules that an ordinary civil claim must be held in open court as a litigant's right to know the case against him or her and to know the reasons why he or she has won or lost is fundamental to the right to a fair trial. The Court rejects the UK Government's application that the Court adopt a 'closed material procedure'.
6 May 2010	General Election
11 May 2010	Coalition Government formed
23 June 2010	Supreme Court upholds High Court decision quashing a residence order requiring a controlee to relocate: *AP* [2010] UKSC 24 & 26
24 June 2010	New Home Secretary announces that the new Coalition Government will seek to extend the temporary 28 day pre-charge detention limit for terror suspects for a further six months, pending a wider review.
28 June 2010	The Grand Chamber of the Court of Human Rights rejects the former Government's request to refer the *Gillan and Quinton v UK* decision. The Court's judgment that section 44 violates Article 8 therefore becomes final.
6 July 2010	Prime Minister David Cameron announces an inquiry will be established to investigate claims of involvement by UK officials in torture.
8 July 2010	New Coalition Government announces the suspension of section 44 of the *Terrorism Act 2000*.
8 July 2010	Ibrahim Savant, Arafat Waheed Khan, Waheed Zaman are found guilty of conspiracy to murder for their involvement in the 'liquid bomb plot'. They are sentenced to life in prison.
13 July 2010	New Coalition Government announces details of a review of seven areas of counter-terror policy (to report in the autumn). The review process is to be chaired by Lord Macdonald (former DPP) and Liberty accepts a public invitation by the Home Secretary to contribute
22 July 2010	28 day pre-charge detention limit renewed for further six months.
28 July 2010	Court of Appeal rules that suspects whose control orders have been quashed by the courts are entitled to bring

	compensation claims: *AN & Others* [2010] EWCA Civ 869.
2 August 2010	Investigatory Powers Tribunal rule unlawful Poole Council's surveillance of Liberty client Jenny Paton. The IPT also finds that the surveillance breached the family's right to privacy under Article 8 of the Human Rights Act.

ANNEXURE TWO

THE STORY OF CERIE BULLIVANT[269]

1. It all started when I decided to travel to Syria. I was going to study Arabic and I wanted to work with orphans over there. I was stopped by the police at Heathrow airport and questioned for 9 hours. I was held under section 5 of the terrorism act which means that the officers didn't need to give a reason and it's a criminal offence not to answer their questions. They also took five sets of my fingerprints. They asked me all kinds of questions, everything you could imagine; from what school I attended to who my friends are and information about my grandparents. This went on for a long time but finally the police said I was free to go and showed me to what they told me was a back door exit. Instead it lead me into another room where there was another officer, this time from MI5. She told me that they had intelligence from Syria that had I travelled there the Syrians were planning to detain and probably torture me. She asked me the same questions the police had asked me and also asked whether I knew that Syria was 'forwarding post'. She suggested that I be sensible about where I chose to travel too. I have never broken the law, never had any involvement with the police and I understand that these are frightening times and that those who are in charge have to be cautious. After the interview I was told I was free to go but they kept my passport for a month.

2. In the 3 years since this began, this was the only time I was ever questioned by the authorities about terrorism.

3. I was still determined to go and do something worthwhile so once my passport was returned I took the MI5 agent's advice and arranged to go somewhere that wouldn't raise suspicion. I had a friend in Bangladesh, who would arrange for me to help out in an orphanage and also to pursue my Arabic lessons. Two weeks before I was due to travel, MI5 called my friend's mother and asked whether she knew that I was a terrorist and that she shouldn't let me travel. Well, my friend's mother freaked out and that was that – no trip to Bangladesh. One week later I was under a control order.

4. Once I was under a control order my life changed beyond recognition. Friends turned against me and people were afraid. I was losing any network of

[269] As retold on February 2010 to Liberty.

support - The Muslim community is so afraid – they don't want to draw anymore attention so they keep their head down. The control order grew more and more restrictive – it began with forced residence, no travelling and daily signing in at a police station and ended up with tagging, curfews, no studying and forced unemployment.

5. It became impossible to live an ordinary life. As more and more restrictions and conditions were added, normal activities like working and studying became impossible. Not only did inflexibility of the hour that was set for the daily signing in make it difficult – between noon and 1pm – but any places of work or study had to be vetted by the Home Office. What employer is going to take the risk of hiring someone on a control order! Your life is no longer your own – you can't plan anything. Another condition was that the police could enter my home at anytime and this happened every couple of weeks or so. They would confiscate all kinds of things – once they even confiscated some passport photographs taken when I was 14. They thought I might use them to gain a fake passport.

6. The control order was based on secret evidence that neither I nor my lawyer ever saw. The only explanation I had was the reason on the control order – that I was 'a threat to troops abroad'. If the situation wasn't so awful it would be funny – my friends joke that I'm too much of a sissy

7. My mum suffers from mental health problems and I was her primary carer – it's just me and mum in London, she's my only family down here. One of the conditions of the control order was the police searching my registered address – my mum is ill and it would have been so distressing for her to have the police turning over our home so I moved to a flat nearby. I managed to keep the control order hidden from mum for about a year – until the day the police decided to illegally search her home. When she questioned them about what I had done and what their evidence was they told her that they weren't privy to the intelligence against me but they could assure her that it was irrefutable.

8. It's true I breached the control order a number of times – mostly for signing in late. Everyday I would have to travel to a particular police station to sign in. It wasn't my local police station – it had to be a 24hour station, even though I had a set one hour period to sign in. Often the police station would be busy and I would have to wait in a queue – one of my 'breaches' for being late happened as I was standing in

the police station waiting to sign in! On one occasion my mum called me late at night, because of her illness she was having hallucinations and she begged me to come and stay the night. What can you do? It was my mum. I stayed with her that night and the next day the police came to search my flat…of course, I wasn't there, so once again I was arrested for breaching the order. Another time I became really ill with blood poisoning – my cat had scratched me and infection set in. I got really ill, was feverish, sore and couldn't get out of bed. I phoned the police to tell them I couldn't sign in. They asked when I'd be better and I told them I didn't know – after a couple of days they came to my home and arrested me for breaching. I was still ill.

9. After a year on the control order I tried to study mental health nursing – because of my experience of mum's illness I thought I'd be good at it. However, the CRB check wasn't coming back and the College were suspicious - also the daily sign in time made it impossible for me to attend class on time – and they wouldn't let me change the time I had to sign in. In the end, it was impossible – I had to give it up.

10. More and more restrictions were added to my control order; I couldn't work, I couldn't study, I couldn't plan anything, friends had turned against me, the pressure had caused my new wife to leave me. I felt isolated. I became really depressed; I was having nightmares, and would wake up in the night terrified, thinking the police were at my door. Some people I knew came to me and said they'd help me get away from all of this – I know now that absconding wasn't the answer, but at the time I was down and desperate.

11. I absconded for 5 ½ weeks. Without warning the Home Office dropped the anonymity ban and suddenly my face was everywhere, headlines screamed that I was one of the most dangerous people in the country. My name was mentioned in parliament with the Home Secretary at the time talking of derogating from the ECHR – all because of me! I couldn't believe it – I'm just an ordinary guy from east London. I realised that running away wasn't solving anything; I saw that the press were camping outside my mum's house - it was affecting my friends and family and was causing such trouble. It was time to face up to my situation. I called my lawyer and said I was ready to turn myself in.

12. It was the Saturday that my lawyer called the police and said that I had returned and was ready to face the consequences. I sat with them as they called the

police. My lawyer put down the phone, looking baffled 'the police said you can turn yourself in on Monday'. Monday! I'd been hearing how I was the most dangerous man in Britain and the police weren't coming to arrest me and sling me in a cell – instead they were giving me the weekend and asking me to turn up unescorted at the beginning of the next working week!

13. I was then remanded to custody, mostly in Belmarsh but in Wandsworth too. I was waiting for two trials; the criminal case, which would consider the breaches of the control order and the High Court which would consider the control order itself. It is a crime to breach a control order and in December the criminal case would be the first I would face. I had seven counts of breaching – I wanted the court to know the circumstances and tell them how ridiculous the control order was, that there was no evidence, that I'd never been told what I had done wrong. But the criminal trial couldn't discuss this – only the High Court can consider the rights and wrongs of a control order and this wouldn't happen until after the criminal case. This meant that the jury just had to accept that I was a terrorist and that the threat I presented had already been proven beyond doubt. It was impossible – I had breached my control order on all the occasions that they said I did, therefore I was guilty – but I didn't feel guilty. I wanted them to know I'd felt I had no choice and how ridiculous and upside down the whole thing was. I pled not guilty.

14. Impossibly, amazingly, the court found me not guilty. My own little miracle. It didn't stop there a few months later the High Court quashed the control order. The official judgment wasn't handed down until February but we knew in advance that it was going to be quashed. My lawyers asked the Home Office to relax some of the conditions while we waited for the official judgment – perhaps I could sign in once a week, rather than everyday? Even though they knew the control order was coming to an end, they wouldn't budge. To me, it seemed like pure vindictiveness. The day the judgment was handed down, I was ecstatic – it was over! I couldn't wait for the police to come and remove my tag, so I cut it off and hand delivered it to them myself. Finally, after two years, my life could begin again.

15. Looking back, I see how naïve I was. There was no way my life would return to normal. I've had to move – I still get abused in the street, shouted and spat at. The police still stop me – in fact some police stopped me as they believed me still 'wanted'. I can't open a bank account. I've lost friends. I have always mixed with all kinds of people regardless of their creed or colour - but now, no one wants to mix

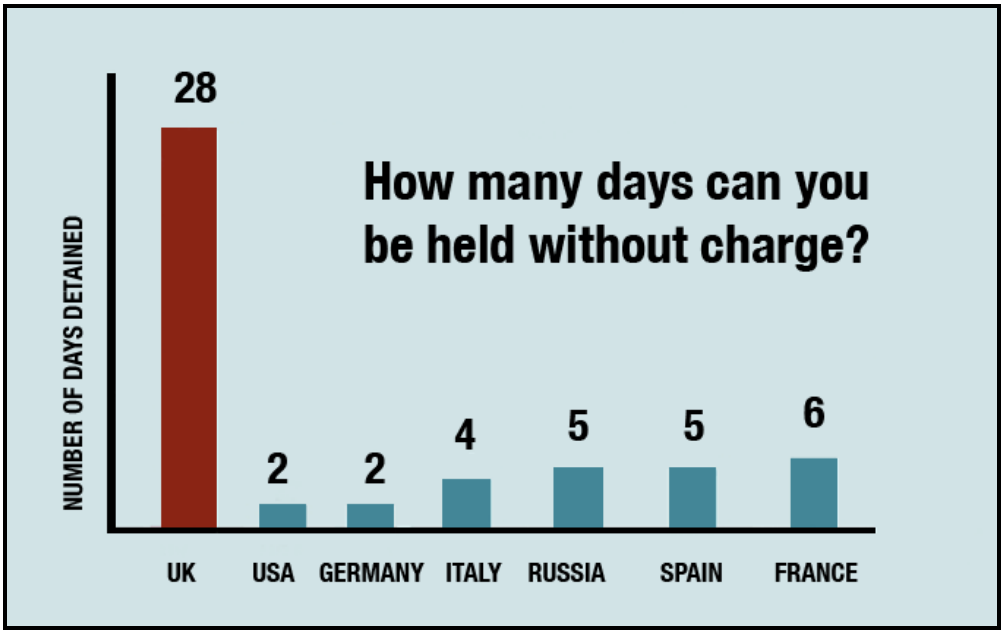
with me. The judge in the high court said there were no reasonable grounds to suspect I was involved in terrorism. I've always tried to live a good life but now I'm the lowest of the low – and I've never been charged, tried or convicted of any terror offences. The only times I've been arrested in my life were for breaches of the control order.

16. The name of Liberty's campaign - 'Unsafe, Unfair'- makes so much sense because the irony is that had I actually been someone dangerous, with criminal intent, the control order wouldn't have stopped me. Instead all it achieved was to beat me down for two years and change my life forever.

ANNEXURE THREE

TERRORISM PRE-CHARGE DETENTION
COMPARATIVE LAW STUDY

- This study demonstrates that the existing 28 day limit for pre-charge detention in the United Kingdom far exceeds equivalent limits in other comparable democracies. These findings, based on advice and assistance from lawyers and academics around the world,[270] provides further evidence that the current temporary 28 day limit needs urgently to be reduced. How can the UK possibly need to hold people for over two weeks when so many other countries manage with pre-charge detention periods of less than one week?



- There can be no doubt about the international nature of the threat from Al-Qaida-inspired terrorism. Like the United Kingdom, Spain, the US and Turkey have all suffered from terrorist attacks in the recent past. Police in these countries must also face the same investigative challenges cited in support of extended pre-

[270] Liberty has obtained legal advice from qualified lawyers and academics in all of the jurisdictions covered in this report. The analysis contained and the conclusions reached are based on this advice. We would like to thank the following for providing us with their advice and assistance on a *pro bono* basis: Freshfields Bruckhaus Deringer, for providing advice on the law in the United States, France, Russia, Italy, Germany and Spain; Anton Katz, for advising on the law in South Africa; Petra Butler, for advising on the law in New Zealand; Peter Vedel Kessing, for advising on the law in Denmark; Aage Borchgrevink and Gunnar Ekelove-Slydal, for advising on the law in Norway; and Emrah Şeyhanlıoğlu, for providing advice on the law in Turkey.

charge detention - the greater complexity of terror plots, their international dimension and the need to intervene and arrest suspects earlier. Despite this, the legal limit imposed on the pre-charge detention of terror suspects in these countries is much shorter than in the UK. The US constitution limits pre-charge detention to 48 hours, and the closest equivalent to pre-charge detention in Spain is limited to five days.

- No two legal systems are exactly the same and comparisons are not always simple, but this does not mean we should shut our eyes to overseas experience. The UK's counter-terror laws do not exist in a vacuum. Difficulties in drawing comparisons can, indeed, be over-played. Some countries have very similar criminal justice systems to our own, making comparisons relatively straightforward. None of these countries permits pre-charge detention for anything like 28 days, or even 14 days. In countries that do not have the exact concept of 'pre-charge detention', like France and Germany, we asked lawyers qualified in those jurisdictions to identify the equivalent. We found that the equivalent to a charge must happen within a matter of days; not months or years as Sir Ian Blair, former Commissioner of the Metropolitan Police, and others have suggested in past debates on this issue.

INTRODUCTION

In this report we consider how the UK law on pre-charge detention and the current limit of 28 days compares with the law in other comparable democracies. Have other countries, facing the same threat from Al-Qaida-inspired terrorism, also resorted to lengthy pre-charge detention in order to tackle this threat? Before discussing our findings, we consider two preliminary questions. First, why should we care about the law in other countries? Secondly, is it really possible to draw worthwhile comparisons when legal systems differ so much?

Relevance of Comparisons

Few would doubt that detaining people for just under a month without charge is a grave matter. It has serious implications for the individuals that are directly affected, for the ability of the UK to fight terrorism by winning hearts and minds, and, more broadly, for the tradition of liberty and justice in Britain. It is not, therefore, surprising that parliamentarians of all parties have always demanded that clear and compelling

evidence is produced as to the necessity of extending and maintaining lengthy pre-charge detention periods before voting on the issue. The findings in this study are central to the question of whether maintaining the current temporary extension to pre-charge detention in the UK can really continue to be justified.

Other countries face similar threats to the UK from Islamist terrorism. They also face the same difficulties the UK Government has historically cited in support of continuing the extended 28 days pre-charge detention: the need to intervene early given the scale of the threat, the absence of warnings before an attack and the use of suicide bombers; and increasing complexity in terms of material seized, the use of false identities and international networks. Given these similarities, a consideration of how other comparable democracies have responded to these challenges is a useful guide to the necessity and proportionality of the UK Government's proposed response. Can the UK's police truly need the power to detain suspects for 28 days without charge when the police in other jurisdictions are managing with far shorter time limits?

The question of how UK law contrasts with the law in other comparable democracies could also have broader implications. If UK law is significantly more repressive than the law in other countries, some will use the disparity to question Britain's moral authority. One can imagine dictators like Mugabe using such a disparity to undermine British attempts to persuade the international community to condemn Zimbabwe's human rights record. One could also imagine those seeking to radicalise young Muslims pointing to this policy to argue that the UK is a country without values and whose law is unjust. Established democracies like the UK should be setting a positive example, demonstrating to newly emerging democracies and non-democratic states that the best way to counter even the gravest threats should be tackled without sacrificing our basic rights and freedoms.

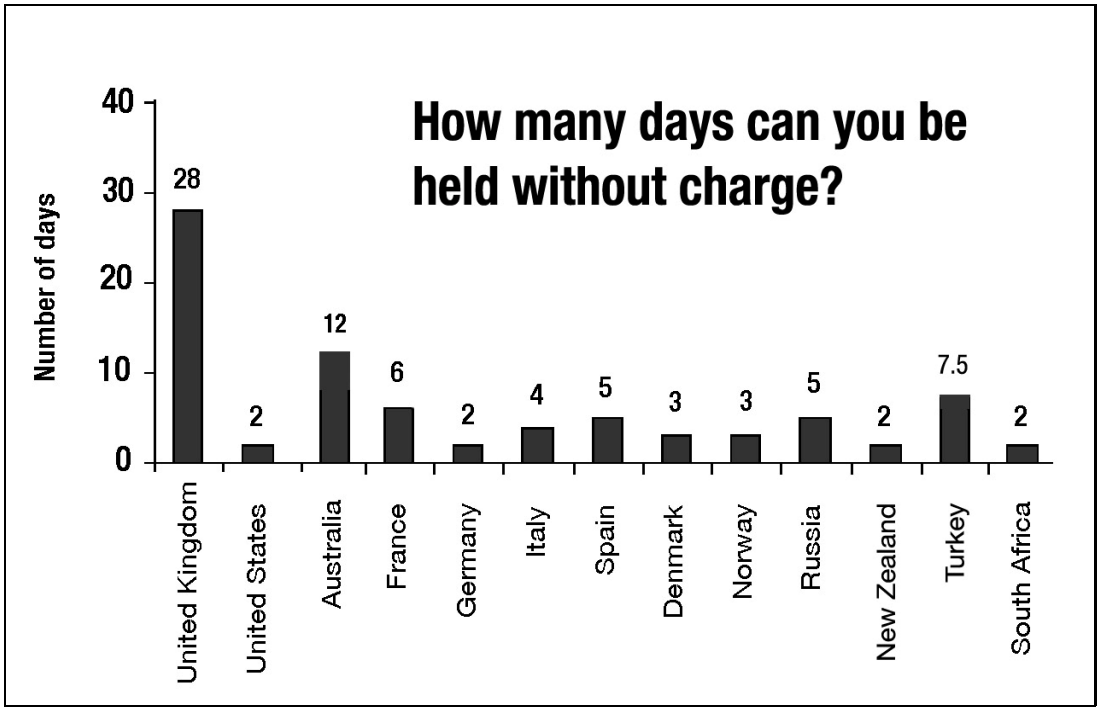
Are Worthwhile Comparisons Possible?

Liberty has obtained legal advice from qualified lawyers and academics in all of the jurisdictions covered in this report. In 2007 we asked for short notes of advice on how long a person suspected of committing a terrorist offence can be detained before they are either charged or released without charge. In July 2010 we obtained new legal advice to confirm whether or not respective pre-charge detention periods had changed. The analysis contained and the conclusions reached in the study are based on this advice.

It is, of course, true that no two legal systems are exactly the same and drawing comparisons between the laws in different countries inevitably poses some difficulties. These difficulties can, however, be overplayed. It should for example be remembered that the British common law system has been exported around the world and forms the basis of the legal systems in a number of other countries including the United States, New Zealand and Australia. Some of these countries have exact equivalents to pre-charge detention making comparisons relatively straight-forward.

While comparisons are, however, more difficult with some of the UK's geographically closest neighbours it is possible to make some meaningful comparisons by identifying the closest equivalent to pre-charge detention in these jurisdictions. At what point does the suspect learn the precise nature of the allegations against them, when are prosecutions formally initiated, and at what point does the test for detention change from police suspicion to evidence and proof considered by a judge? Liberty did not itself seek to identify the equivalent to pre-charge detention in other countries. Instead, we asked lawyers qualified in those jurisdictions to judge this for themselves. To enable them to do this we explained the significance of 'charge' in the UK system and described how this fits within the UK's criminal justice process

OVERVIEW OF FINDINGS



The graph above provides a visual overview of the maximum number of days a person can be detained without charge in the twelve countries surveyed. A detailed description of our findings is contained in a report we produced in July 2010 available on our website.[271] The following are brief summaries of those findings:

United Kingdom

In the UK the maximum period of pre-charge detention in terrorism cases is 28 days. This is a temporary extension, renewed annually by statutory instrument, on the fixed statutory limit of 14 days.

United States

Under U.S. Federal law, the maximum period of pre-charge detention is 48 hours. This limit derives from the Fourth Amendment to the US Constitution.

Australia

In Australia the maximum period of pre-charge detention for the purposes of investigating a terrorism offence is 24 hours. 'Dead time' (including time taken to

[271] Liberty, *Terrorism Pre-Charge Detention: Comparative Law Study*, July 2010, available at: http://www.liberty-human-rights.org.uk/publications/6-reports/comparative-law-study-2010-pre-charge-detention.pdf

transport a suspect) is not included within this 24 hour period but during 'dead time' no questioning is permitted. The first and only case in which an extended period of 'dead time' was authorised by a magistrate, it led to a person being detained for a total of 12 days without charge. It has previously been understood that in practice this is likely to be the longest that would be permitted. In our earlier report on comparative pre-charge detention periods 12 days was treated as the legal maximum. However following a critical independent inquiry into this incident of 12-day detention, a Bill is currently passing through the Upper House of the Australian Parliament which would limit the amount of 'dead time' at seven days. If passed, this would mean that pre-charge detention could only last a maximum of eight days.

Preventative detention is also permitted in Australia for up to 14 days. These preventative detention powers have not, however, been used and differ from pre-charge detention as questioning is not allowed. Finally, although not part of the criminal justice process, the Australian Security Intelligence Organisation has the power to detain people for up to 7 days without charge for the purposes of questioning.

South Africa

In South Africa the maximum period of pre-charge detention in terrorism cases is 48 hours.

New Zealand

In New Zealand persons arrested must be charged 'promptly'. There is no fixed definition of 'prompt' but case law on this question indicates that pre-charge detention of more than 48 hours would not be considered 'prompt'.

France

In France, the maximum period of pre-charge detention in terrorism cases is six days.

Germany

The closest equivalent to pre-charge detention in Germany is provisional police custody, the period prior to a formal 'warrant of arrest' being issued by a court. A person held in provisional police custody must be set free at the end of the day following the day on which s/he was arrested. The longest possible period of provisional police detention would, therefore, be 48 hours.

Italy

In Italy the maximum period of pre-charge detention is four days.

Spain

The closest equivalent to pre-charge detention in Spain is preventative arrest. In relation to suspected terrorist offences, the maximum period for which a person can be detained under these powers, before being released or handed over to the judicial authorities, is five days.

Denmark

In Denmark the maximum period of pre-charge detention in terrorism cases is three days.

Norway

In Norway the maximum period of pre-charge detention in terrorism cases is three days.

Russia

In Russia the maximum period of pre-charge detention is five days.

Turkey

The maximum period of pre-charge detention in terrorism cases in Turkey is seven days and 12 hours. The 12 hour period is the maximum that is permitted for the transfer of the suspect.

Liberty
21 Tabard Street
London SE1 4LA

Tel: 020 7403 3888
Fax: 020 7407 5354

www.liberty-human-rights.org.uk
www.yourrights.org.uk

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