

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

Pre-Charge Detention: 28 Days Annual Renewal

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

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

Arrangements for parliamentary review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The operation in practice of the extended period

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

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

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

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

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

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

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

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

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

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-first Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies	HL Paper 116/HC 635
Session 2006-07		
First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394

Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056
Session 2005–06		
First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC

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Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716



HOUSE OF LORDS

Select Committee on the Constitution

10th Report of Session 2007–08

**Counter-Terrorism
Bill: The Role of
Ministers,
Parliament and the
Judiciary**

Report

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Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary

CHAPTER 1: INTRODUCTION

Scope of the report

1. The Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. **We draw to the attention of the House provisions contained in the Counter-Terrorism Bill, in particular Part 2 (detention and questioning of terrorist suspects) and Part 6 (inquests and inquiries).** This report considers the respective roles of ministers, Parliament and the judiciary in the arrangements proposed by these Parts of the Bill.
2. In order to assist our analysis and deliberations, we wrote to Lord West of Spithead, the minister in charge of the Bill, on 25 June 2008. We are grateful for his prompt response, which we publish as Appendix 1 to this report.

The Government’s approach to the Bill

3. Our report expresses concern about aspects of the proposed arrangements in Part 2 and Part 6 of the Bill. Accommodating the needs of national security and respect for the fundamental constitutional principles on which a free society is based is a difficult task faced by governments around the world. It is clear to us that the Government have listened carefully to their critics. Indeed, the proposals contained in the Bill have emerged from compromises and concessions by the Government. **We make no criticism of the process by which the Bill’s proposals have been developed. Our concerns are directed at the outcomes that have been reached.**

The totality of terrorism legislation

4. In our December 2005 report on the Terrorism Bill, we stated that “While anti-terrorist legislation is not new, each incremental instalment, generated by concerns about public safety, must be considered not only on its merits but also in relation to the totality of such legislation”.¹ The powers contained in the Counter-Terrorism Bill need to be considered against the background of other recent anti-terrorism legislation. Table 1 below seeks to summarise key features in legislation enacted from the Terrorism Act 2000 onwards.
5. In a constitutional democracy such as the United Kingdom, a proper balance must be struck between the constitutional principles of security on the one hand and respect for the rule of law and individual liberty on the other. **The role of Parliament is to assess whether there is a necessity for new measures, to ensure that the measures are framed proportionately so**

¹ 4th Report (2005–06): *Terrorism Bill* (HL Paper 82), paragraph 4.

as to go no further than necessary, and to require that legislation provides for adequate judicial control of the exercise of new powers. Our purpose in conducting constitutional scrutiny of the Bill is to assist the House by identifying and clarifying the constitutional principles and practices that are either expressly or inadvertently affected by the proposals contained in the Bill.

<p>Terrorism Act 2006</p>	<p>Anti-Terrorism Crime and Security Act 2001</p>	<p>Prevention of Terrorism Act 2005</p>	<p>Terrorism Act 2006</p>	<p>Counter-Terrorism Bill</p>
<p>Part 1: Definition of terrorism</p> <p>Part 2: Proscribed organisations</p> <p>Part 3: Offences relating to terrorist property and seizure of terrorist cash</p> <p>Part 4: Terrorist investigations, including cordons</p> <p>Part 5: Counter-terrorist powers, including arrest without warrant and detention (s 41 and schedule 8), search of premises and persons, stop and search, port and border controls</p> <p>Part 6: Weapons training</p>	<p>Part 1: Forfeiture of terrorist cash and property</p> <p>Part 2: Freezing orders</p> <p>Part 3: Disclosure of information</p> <p>Part 4: Indefinite detention without charge of foreign nationals suspected of terrorist involvement (repealed)</p> <p>Part 5: Religiously aggravated offences and race hatred offence penalties</p> <p>Part 6: Weapons of mass destruction</p> <p>Part 7: Security of pathogens and toxins</p> <p>Part 8: Security of nuclear industry</p> <p>Part 9: Aviation security</p> <p>Part 10: Police powers (fingerprinting, searches, photographing suspects)</p> <p>Part 11: Retention of communications data</p> <p>Part 12: Bribery and corruption</p>	<p>Provision to make 'control orders', a replacement regime for Part 4 of the Anti-Terrorism, Crime and Security Act 2001</p>	<p>Part 1: New offences of encouragement of terrorism, preparation of terrorist acts and terrorist training, etc</p> <p>Part 2: Proscription of terrorist organisations; extension of time limit for detention of suspects from 14 to 28 days (ss 23-25); all premises search warrants</p>	<p>Part 1: Powers to gather and share information (including removing documents, taking fingerprints and samples from a person subject to a control order without consent)</p> <p>Part 2: Detention and questioning of terrorist suspects before and after charge. Reserve powers for pre-charge detention and questioning for up to 42 days</p> <p>Part 3: Prosecution and punishment of terrorist offences</p> <p>Part 4: Notification requirements</p> <p>Part 5: Asset freezing proceedings</p> <p>Part 6: Inquests and inquiries</p> <p>Part 7: Definition of terrorism amended; amendment of control order regime; amendment of arrangements for forfeiture of terrorist cash; costs of policing at gas facilities; appointment of special advocates in Northern Ireland</p>

CHAPTER 2: PRE-CHARGE DETENTION AND QUESTIONING

6. Under Part 2 of the Bill, it is proposed to permit an extension of the time a terrorist suspect may be detained and questioned by police before a decision is made to charge or release him or her. The chain of decision-making envisaged by the Bill is set out in Appendix 2. In Appendix 3 we set out further information about how prosecutors determine when there is sufficient evidence to permit a charge to be brought.
7. In the United Kingdom, the only lawful purpose of pre-charge detention and interrogation is investigatory—to build a case for particular charges. Detention before charge may not be used for general intelligence-gathering (for which the police and other agencies have a range of surveillance powers). Nor are pre-charge detention powers intended directly to protect the public from those under suspicion of involvement in terrorism (for which purpose there are other powers such as making control orders under the Prevention of Terrorism Act 2005 or, in relation to non-nationals, excluding a person from the United Kingdom).
8. There are two basic constitutional questions that need to be addressed in designing a system for pre-charge detention. What should be the maximum permitted time of pre-charge detention? And who should be empowered to authorise such detention?

What should be the maximum period of detention?

9. In the current debate there is no disagreement about the need to have in place a legal requirement for police and prosecutors to decide to charge or release a suspect within a specified time. The point in issue is what, in the circumstances of an investigation of serious terrorist offences, may properly be regarded as a necessary and proportionate time for police to gather sufficient evidence, given the fundamental requirement that suspects be charged and brought before a court promptly. In 2000, the Terrorism Act set that time at 7 days. It was increased to 14 days in 2003. In 2006 it was further extended to 28 days. The Bill seeks to create powers for the limit to be increased to 42 days on a temporary basis.
10. In a free society, the purpose of placing time limits on the detention and questioning of suspects in an investigation is to guard against arbitrary detention. A requirement that the police and prosecutors must, within a defined period of time, either decide to charge a suspect and then bring him or her before an independent and impartial judge for the trial process to begin, or to release the person, ensures compliance with the rule of law by placing the accused under the control of a court. Time limits also serve to prevent prolonged interrogation that may in and of itself amount to coercion, with the attendant risk of false confessions.
11. Although a time limit on police detention is widely accepted as a basic aspect of liberty of the person, international human rights instruments do not lay down any specific time limit. This is no doubt because, in the legal systems of the world, the respective roles of the police, prosecutors and the judiciary in the criminal justice process vary widely. The European Convention on Human Rights requires that those arrested shall be informed “promptly” of the reasons for their arrest and of any charge against them, and then be brought “promptly” before a judge (Article 5(2) and 5(3)).

