

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Prevention of Terrorism Bill**

### **Liberty's briefing for Second Reading in the House of Commons**

**February 2005**

## **About Liberty**

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

## **Liberty Policy**

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

Liberty's policy papers are available at

[www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml](http://www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml)

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## Summary

- We accept that there is a considerable threat to the United Kingdom from terrorism. However the unending nature of the threat and the counterproductive effects on community relations and intelligence gathering of visible injustice, make any departure or “derogation” from ancient and modern human rights standards undesirable.
- “Control Orders” as described in the Bill, fail to adequately address the underlying human rights objections to detention without trial under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (“the 2001 Act”). The ultimate objection is to the complete abrogation of the right to a fair trial and the presumption of innocence in particular<sup>1</sup>:
  - Unending restrictions on liberty (up to and including detention) based on suspicion rather than proof.
  - Reliance upon secret intelligence (which by definition may be all the less reliable for having been gained by torture around the world)
  - The complete inability of the subject to test the case against him in any meaningful way.
- The House of Lords Appellate Committee found “judicial supervision” of the 2001 Act (the Special Immigration Appeals Commission and the use of Special Advocates) inadequate remedy for the fundamental defects of detention without trial. Similar attempts to provide “judicial supervision”, appeal or review of control orders will also operate as political palliative rather than real cure for a process built on secret intelligence and suspicions which never solidify into charges or proof. Even if the Government made concessions allowing initial authorisation to be made by a judge rather than a government minister these fundamental defects in process would not be remedied.

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<sup>1</sup> As reflected in Article 6.2 of the European Convention on Human Rights.

- We do not accept the Government's view that lower level control orders will not result in a deprivation of liberty, or indeed a criminal penalty, requiring derogation from human rights obligations. However, judicially supervised restrictions upon a suspect's liberty and activities (up to and including detention) will be permissible in human rights terms if they are made with a view to criminal charge and trial within reasonable prospect. Pre-charge restrictions in particular must be tightly and firmly time limited. This sits within our traditional concepts of remand and bail with conditions (already adapted and extended within the anti-terror context).

## **Introduction**

1. The Government is planning to pass this bill through parliament in approximately two weeks. It is completely unacceptable that legislation of such constitutional importance, allowing British citizens to have severe restrictions on liberty placed on them, is being allocated negligible parliamentary time. In December 2003 the Newton Committee of Privy Counsellors called for the Government to end detention under Part 4 of the Anti Terrorism Crime and Security Act 2001 (ATCSA) and seek alternatives. Since then, the Joint Committee on Human Rights and at least two UN Committees<sup>2</sup> have made the same demand. In December 2004 the House of Lords Appellate Committee ruled that Part 4 ATCSA detention was unlawful and quashed the UK's derogation. The Government has had a long time to consider alternatives to Part 4. It should not seek to rush new draconian emergency legislation through parliament at breakneck speed.

2. As publication of the Bill takes place the day before Second Reading it is extremely difficult to provide any detailed analysis of the Bill. This briefing seeks to address some of the broad human rights issues arising from control orders along with a brief synopsis of the main provisions of the Bill.

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<sup>2</sup> The Committee against Torture and the Committee for the Elimination of all forms of Racial Discrimination

## **Background**

3. Control orders were initially proposed by the Home Secretary in his statement to the House of Commons on 26 January. As control orders are broader in scope than detention under Part 4 ATCSA the Government argues that they will not be considered unlawful by the courts on proportionality grounds. We do not accept this as the most serious control orders will still result in potentially indefinite detention without due process. The Bill does not specify which type of control order will require a derogation from Article 5<sup>3</sup> of the European Convention on Human Rights (ECHR) under the procedure set out in Clause 2. The implication from statements made by the Home Secretary is that derogation will be reserved for the most serious restrictions (such as house arrest). It follows that he believes less restrictive control orders, such as curfews, will not require the derogation process to be followed. We do not accept this to be true of any control order that restricts liberty or otherwise provides a criminal penalty. If there is no prospect of criminal proceedings then any penalty will eventually breach human rights obligations.

4. In his statement to the House on 22 February the Home Secretary indicated no immediate derogation. A future derogation will only be sought if he feels it necessary. We are however concerned that derogation will be used as a convenient mechanism to suggest the legality of anti-terrorism proposals. A decision to derogate should only be based on whether there is an 'exceptional situation or crisis that affects the whole population and constitutes a threat to the organised life of the community of which the state is comprised'. Britain remains the only Council of Europe member to have derogated from the ECHR in response to the current terrorist threat. The House of Lords Appellate Committee quashed this previous derogation in December 2004.

## **Surveillance**

5. The Bill does not specify the use of surveillance other than, for example, ensuring that control order conditions can require co-operation with monitoring communications. However, it is worth drawing attention to how surveillance could be

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<sup>3</sup> The Right to Liberty and Security.

used in a manner that has the potential to comply with human rights requirements. The use of covert surveillance or the interception of communications by police or security services do not place any restriction on an individual's ability to carry on a normal life. While their use will engage privacy rights<sup>4</sup>, this can be justified if the intrusion is not excessive to the situation. So long as the surveillance continues to be justified, it is not time limited.

### **Restrictions on liberty and the 'badge of criminality'**

6. Control order proposals in the Bill fail to address the human rights breaches identified by the House of Lords Appellate Committee arising from detention without trial under Part 4 ATCSA. They fail to address the fundamental concerns that arise from a process that is dependant on the use of secret intelligence (possibly involving evidence obtained through the use of torture) and which does not allow the subject the chance to test the evidence against them. As any criminal law practitioner knows, you cannot hope to effectively represent your client if you cannot discuss the evidence against them so that they are able to refute allegations. Control orders are flawed as they undermine the central pillars of the British legal system: protection against unlawful detention; the right to a fair trial; and the presumption of innocence.

### **Protection against unlawful detention**

7. Several of the measures proposed will place restrictions on liberty. They include curfews, tagging, and house arrest. It is tempting to place these into an order of seriousness and say that even if house arrest were not justified then tagging would be. Similarly, even though it would require derogation, house arrest might be viewed as less of an infringement than custody in a high security prison (as occurred under Part 4 ATCSA).

8. However protections against unlawful detention<sup>5</sup> do not specify one place of restriction being preferable to another and do not allow for any indefinite restriction on liberty. Restrictions on liberty are permissible but only with a view to some form

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<sup>4</sup> Under Article 8 of the Human Rights Act

<sup>5</sup> Such as under Article 5 of the Human Rights Act

of criminal disposal otherwise restriction *must* eventually become unlawful. There are a number of restrictions on liberty permitted relating to spreading of disease, deportation, mental health and so on but these are not relevant to the use of control orders. To be lawful they can only be used to detain or restrict someone with a view to bringing them to trial, to stop them committing an offence or from absconding after committing an offence<sup>6</sup>. Once detained they must be brought to trial within a reasonable time or released<sup>7</sup>

9. Restrictions such as tagging and curfew are established practices in criminal law. They are imposed as bail conditions by police or courts to ensure that, for example, a defendant attends court or does not commit further offences while awaiting disposal of his case. To be legitimately and effectively used as part of an anti terror package there must be a view to criminal disposal. Otherwise, eventually, the restriction must be lifted.

10. In December 2004 The House of Lords Appellate Committee found that the use of SIAC and Special Advocates was insufficient remedy for detention without trial under Part 4 ATCSA. Similarly, applying judicial authorisation to the use of control orders cannot provide sufficient remedy for the restrictions they will impose. The only judicial involvement capable of justifying prolonged restriction on liberty is when criminal trial is anticipated.

### **The right to a fair trial and the presumption of innocence**

11. Many control orders, whether a restriction on movement, association and communication or tagging, curfew or house arrest will be punitive. European caselaw makes it clear that it does not matter how something is described, if it punishes and has serious consequences then it is part of the criminal process. Therefore, those subjected to control orders will suffer the badge of criminality without the benefit of a trial. They will be denied the presumption of innocence, the 'golden thread' that runs back through centuries of criminal process to the Magna Carta. As with restrictions on

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<sup>6</sup> Article 5 (1) (c) Human Rights Act

<sup>7</sup> Article 5 (3) Human Rights Act

liberty, to satisfy requirements of fair trial and presumed innocence, control orders must anticipate criminal proceedings.

## **Comments on the Bill**

12. Clause 1 contains the specific elements of control orders. These are broad and range from restriction on place of residence (Clause 1 (3) (e)) to allowing their property to be searched (Clause 1 (3) (k)). This is a non exhaustive list<sup>8</sup> so presumably the Secretary of State can impose other control orders if he wishes. If he believes that it is necessary for him to derogate from the ECHR in order to impose a control order he may do so under clause 2. The Bill does not specify which control orders will require derogation. The Home Secretary has indicated that only the most serious orders will derogate. However, this is left to his total discretion. If, for example, he feels that 23 hours home curfew daily would not need derogation there is no opportunity for parliament to debate this.

13. It might appear that the use of control orders will be restricted to those who are actively involved in terrorism. However, involvement in ‘terrorism related activities’ is broadly defined in Clause 1(8). It includes conduct which gives ‘encouragement to the commission, preparation or instigation of such acts’. This is likely to include anyone who expresses vocal support for terrorist groups. We might find such sentiments distasteful. It does not however justify the restriction of liberty.

14. Authorisation of a non derogation control order is made by the Secretary of State. An order requiring derogation needs to be authorised by a High Court within 7 days of the Home Secretary making an order. There has already been much debate about the level of judicial involvement in making orders. While it can be argued that judicial authorisation is preferable to executive, this will not ensure compliance with human rights standards. Even if all control orders were authorised by the High Court the fact is that no criminal disposal, or fair trial, is contemplated. We maintain that only the prospect of a trial can legitimise long term restrictions on liberty.

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<sup>8</sup> Clause 1 (3) ‘The obligations...*include*...’

15. The Home Secretary has emphasised the time limited nature of control orders. Non-derogating orders are limited to 12 months, derogating orders for 6 months. Both can be renewed, although a derogating order requires Parliamentary approval. Non derogating orders in particular are potentially indefinite as the renewal does not need authorising<sup>9</sup>. We are pleased to see that renewal of a derogating order needs parliamentary approval<sup>10</sup>. However this still does allow for the possibility of potentially indefinite detention. Many parliamentarians are not privy to the intelligence material indicating the level of risk to the nation. This makes it extremely difficult to disagree with any assertion that renewal is vital for public safety.

16. Under Clause 6 it is an offence punishable by up to 5 year imprisonment to breach the terms of a control order. Given the range of control orders they will be extremely easy to breach. For example, if the person under an order meets someone who he is barred from contacting (Under Clause 1 (3) (e)) he will be in breach. As it is likely that these people will be from the same community, possibly from a small geographic location, it is difficult to see how any contact could be avoided. This means there is prospect of a criminal conviction and lengthy custodial sentence arising from a chance meeting.

17. Anyone made subject to an order can appeal against it under Clause 8. However, any appeal will consist of open and closed evidence and the use of Special Advocates. It will essentially replicate the use of SIAC to appeal against detention under Part 4 ATCSA. As we have indicated above, there is nothing about the new process that makes it more acceptable than the process ruled unlawful by the House of Lords Appellate Committee. Scathing comments about the process have been made by special advocates who have resigned, such as Ian MacDonald QC, who referred to Part 4 ATCSA as an 'odious blot on our legal landscape'. These criticisms are likely to increase should this legislation be passed. In February 2004 six special advocates<sup>11</sup> wrote an open letter to the Home Secretary expressing concerns at plans then circulating to use them in criminal trials saying,

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<sup>9</sup> The recourse of the person subject to the order being an appeal under Clause 7

<sup>10</sup> Although under Clause 4 (6) the Secretary of states reserves an opt out from this obligation.

<sup>11</sup> Nicholas Blake QC, Andrew Nicol QC, Manjit Singh Gill QC, Ian Macdonald QC, Rick Scannell and Tom de la Mare, letter to *The Times*, 7 February 2004

*'We are convinced that both basic principles of fair trial in the criminal context and our experience of the system to date make such a course untenable. It would contradict three of the cardinal principles of criminal justice: a public trial by an impartial judge and jury of one's peers, proof of guilt beyond reasonable doubt, and a right to know, comment on and respond to the case made against the accused. The special advocate system is utterly incapable of replacing these essential fundamentals of a fair trial.'*

This disquiet arose from concern that they would be used in criminal trials. However the criminal process contains greater protection for the defendant than civil law. We imagine these views would be expressed in even stronger terms in relation to the appeal process in the Prevention of Terrorism Bill.

### **Restrictions on liberty allowed under the current law**

18. It is worth contrasting the breadth of restriction on liberty with the current permissible restriction allowed in anticipation of criminal trial. A combination of statutory time limits and human rights requirements set out the current time frame for limiting liberty. The general rule limits detention without charge to 24 hours (or 36 if authorised by a superintendent). Beyond 36 hours further extension must be made by a magistrate, and will not exceed a total of 96 hours. Anyone suspected of a terrorist offence can be detained for up to 48 hours. The Secretary of State can extend this up to seven days. Detention must be kept under regular review.

19. Once charged a suspect must be bailed by the police (who can attach conditions) to court. The police can ask the court to remand in custody, in which case they can hold the suspect until the next local magistrate's court sitting. They will be granted bail unless the court believes they might fail to attend court, commit further offences while on bail or interfere with witnesses. Conditions can be attached to bail to ensure that none of these things happen. If bail conditions are breached the prosecution can seek to remand the suspect in custody.

20. Once criminal proceedings are underway there are no specified time limits. As mentioned above, Article 5 (3) ECHR requires this to be within 'reasonable time'. There is no absolute limit to permissible period of pre trial detention. It depends on the facts of the case. Detentions have lasted for years without breaching Article 5. However, this does not mean that control orders limiting liberty can last for years without breaching Article 5. It is crucial to distinguish between detention after charge while awaiting trial and detention prior to charge. The latter can last for years, the former merely for days. Lesser restrictions such as tagging or curfew might allow days to stretch into weeks or even months but, without the anticipation of criminal disposal, breach of Article 5 is inevitable.

### **Current criminal law**

21. The government has stated on many occasions that it is not possible to bring criminal charges against those it intends to use control orders. We may dispute the assertion that, for example, removing the self imposed bar on intercept evidence will not allow charges to be brought. However we are not privy to the information the government bases this assessment on. However we are aware of the breadth of criminal law already available. Any assertion that charges cannot be brought needs to be justified. The Terrorism Act 2000 (TA) creates a raft of offences and creates a list of 'proscribed' or banned organisations. There are currently 25 organisations currently subject to proscription. The list includes al-Qaeda, Hamas and many other groups associated with international terrorism. Being a member of, or belonging to, a proscribed organisation is an offence under section 11(1) TA, and carries a maximum penalty of ten years imprisonment. Under section 12 it is enough to support or "further the activities of" an organisation by literally any method. The TA stresses the fact that support is not restricted to money or property terms. Organising or addressing a meeting, with full knowledge of its aims to support or further the activities of a proscribed organisation, is an offence under section 12. All the offences under section 12 can be punished by 10 years imprisonment. It is even an offence to wear an item of clothing, or wearing or displaying any article which can give rise to reasonable suspicion indicating membership or support of a proscribed group (section 13)

22. The TA also creates a category of offences which are available even when the option of proscribing an organisation cannot be exercised, and, therefore, the proscription-related offences do not apply. It makes an offence of directing the activities of a terrorist organisation “at any level” (section 56). This offence carries a penalty of life imprisonment. It is also an offence, punishable by ten years imprisonment, to possess something “in circumstances which give rise to reasonable suspicion that (the) possession is for a purpose connected with terrorism” (section 57). There is a penalty of ten years imprisonment for the offence of collecting “information of a kind likely to be useful to a person committing or preparing an act of terrorism” (section 58) or to keep any form of documentation or record (including photographic or electronic) which contains such information. The TA 2000 also creates an offence of “inciting terrorist activity overseas” (Section 59). Further offences include fundraising for terrorist activity and using money for terrorist activity.

23. There are offences that come within the ‘normal’ criminal law which could also be relevant to the prosecution of terrorist offences. An act involving terrorist violence will invariably involve an offence under the criminal law such as murder or criminal damage as well as being an offence under Part 1 of the TA 2000. Those preparatory acts that involve planning but stop short of any violence are likely to be criminalised under offences of conspiracy, incitement or attempt. When two or more people agree to carry a criminal scheme into effect, the plot itself becomes a criminal act. Less serious offences of incitement and attempted incitement cover situations where there is insufficient common enterprise to establish conspiracy. Under the Criminal Attempts Act 1981 is an offence to attempt to commit an offence. While the act must be ‘more than preparatory’, the offence would be appropriate to attempted terrorist attacks where presumably it is necessary to gather together materials prior to commission. It has also been suggested that a new offence of ‘Acts Preparatory to Terrorism’ be created. Given the breadth of the TA coupled with other criminal law we are not sure where the gap in the current law is. However we hope the creation of a new offence would ensure control orders engaging Article 5 are only imposed preparatory to criminal trial.

## **Conclusion**

24. A lack of time has prevented a detailed analysis of each clause of the Prevention of Terrorism Bill. We will look at this in greater detail before the next stage. There are however certain principles which mean the bill must be opposed in its entirety. Allowing a politician to place severe restrictions on the liberty of British citizens without proper process is unjustifiable. The appeal process is fundamentally flawed and offers no improvement on the discredited use of SIAC. In 2003 and Newton Committee of Privy Counsellors criticised the government for failing to look at ways in which the criminal law could be properly used to place suspected terrorists on trial. This Government still does not appear willing to do so.

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