
THE GOVERNMENT REPLY TO THE TENTH
REPORT FROM THE HOUSE OF LORDS
SELECT COMMITTEE ON THE CONSTITUTION
SESSION 2007-08 HL PAPER 167

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

**Presented to Parliament**
**by the Secretary of State for the Home Department**
**by Command of Her Majesty**
**October 2008**

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**COUNTER-TERRORISM BILL: THE ROLE OF MINISTERS, PARLIAMENT AND THE JUDICIARY**

**Recommendation 1**

**It will be for the House as a whole to consider the rival legal analyses of the Joint Committee on Human Rights and the Government in deciding whether the Government have made a compelling case for the necessity of reserve powers to detain and question suspects for 42 days. If the House approves the time limit set out in the Bill, it will do so in the knowledge that the question of compliance with Convention rights is likely to be heard and ultimately determined by the courts. (Para. 15)**

We believe the proposal for the extension of the maximum period of pre-charge detention in the Counter-Terrorism Bill to 42 days is compatible with Article 5 of ECHR. Continued detention of a suspect beyond 48 hours will continue to be authorised by a judge – this is compatible with Article 5(3) which requires a person to be 'brought promptly before a judge'. It is also compatible with Article 5(4) because a detainee can challenge the lawfulness of their detention at the judicial hearings for extending detention.

Article 5(1)(c) of the ECHR allows for the deprivation of liberty in the case of the 'lawful arrest or detention of a person effected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence'.

There has not been a case where detention up to the current maximum limit has been found to be incompatible or unlawful.

**Recommendation 2**

**We agree with the policy of the Terrorism Act 2000 that after an initial short period of detention authorised by police officers unconnected with the inquiry, any further authorisation should be a matter for the judiciary. That policy not only accords with the requirements of the ECHR but also reflects the basic constitutional principle that individual liberty is to be protected by the courts. (Para 22)**

**Recommendation 3**

**We are satisfied that the Bill preserves a constitutionally proper division of responsibilities between the Home Secretary and the judiciary. The Bill maintains the principle that in any given case it will be a judge, not a minister, who determines whether an individual suspect continues to be detained by the police. In this respect, the reserve power orders in this Bill are very different from the executive authorisation of detention included in earlier Terrorism Acts. (Para 25)**

We welcome the Committee's recognition that the Counter-Terrorism Bill maintains the principle that it is a judge, not a minister, who determines whether an individual suspect should be detained by the police after the first 48 hours of detention.

**Recommendation 4**

**We are unconvinced that "Privy Counsellor briefings" to three committee chairmen will enhance the effectiveness of Parliamentary scrutiny. The chairmen will be unable to share with their committees their assessment of the confidential information they have been shown—and may even refuse to view the information in the first place for this reason—or to consult their committees' legal and specialist advisers for guidance and analysis. It is also difficult to understand how having access to secret material will enable the chairmen to participate any more fully in Parliamentary debates than other members. Moreover, we are concerned that there is a risk that the consensual ethos of select committees will be undermined if some members have privileged access to information not made available to others. In our view, this proposal is untenable and should be removed from the Bill. (Para 29)**

Providing additional information to the Chairs of key parliamentary committees will ensure that those individuals are aware of the circumstances leading to the Home Secretary's decision and are therefore able to participate fully in the subsequent debates on the issue.

Parliament itself will not have access to the report of the police and the Director of Public Prosecutions (DPP) (which is likely to contain sensitive information and material which if made public might be prejudicial to criminal proceedings) or the un-redacted version of the legal advice (which will by definition contain information of a similar nature). Giving these documents to the Chairs of these Committees will therefore provide a level of reassurance to Parliamentarians and the public that the Home Secretary is acting properly and in accordance with the law. The Chairmen also have particular and relevant expertise which will allow them, having had access to the report of the police and the DPP and the full independent legal advice, to make informed and valuable contributions to the Parliamentary debates, while of course protecting any sensitive information.

**Recommendation 5**

**In our letter, we asked Lord West to provide greater details—amplifying or adding to the matters referred to by the Home Secretary in the House of Commons on 11 June 2008—of what matters would in the Government's view be (a) appropriate and (b) inappropriate for debate in Parliament on a resolution to affirm a reserve power order. No such further details have been provided. We are unconvinced that the Government have properly thought through this aspect of their proposed scheme. (Para 36)**

**Recommendation 6**

**We are concerned that Parliament would be asked, under the scheme of the bill, to make decisions that in the circumstances it is constitutionally ill-equipped to determine. (Para 37)**

**Recommendation 7**

**There has been little discussion as to whether the votes in each House to affirm a reserve power order will be subject to the guidance of party whips in the usual way or whether members will be permitted to have a free vote. If (as would seem likely) it is the former, we are concerned that a judge determining an application**

**for extended detention will be called upon to exercise powers a matter of days or perhaps hours after a highly politically charged debate in Parliament in which there has been a clear division on party lines and over which there continues to be party political controversy. There is a risk that this will be perceived to undermine the independence of the judiciary. (Para 38)**

**Recommendation 8**

**In developing this scheme, the Government have sought to devise ways in which Parliament may be involved in decision-taking about police detention of terrorist suspects. Insofar as the motivation is to ensure democratic accountability, this is understandable; in our view, however, it is muddled. The Bill risks conflating the roles of Parliament and the judiciary, which would be quite inappropriate. It is ill-advised to create a decision-making process that requires Parliament and the judiciary to ask and answer similar questions within a short space of time—or at all. Far from being a system of checks and balances, this is a recipe for confusion that places on Parliament tasks that it cannot effectively fulfil and arguably risks undermining the rights of fair trial for the individuals concerned. (Para 39)**

There is no confusion between the role of Parliament and the role of the judiciary. The role of Parliament is clearly to discuss and, if so minded, approve the order making available for a temporary period the power to detain terrorist suspects for up 42 days pre-charge. The Home Secretary will lay a statement before Parliament within 2 days of making the order or as soon as practicable, setting out that she is satisfied that there is or has been a grave exceptional terrorist threat, that the reserve power is urgently needed for the purpose of investigating that threat and bringing those responsible to justice and that the provision is compatible with Convention rights. The Home Secretary will at the same time lay before Parliament independent legal advice on these matters (redacted as necessary to protect sensitive information and anything prejudicial to a prosecution). There will then be a full debate within 7 days. The debates would not be dissimilar to previous debates after serious terrorist incidents in the past, covering matters such as the general security threat; the progress of the investigation; the police numbers involved; the number of suspects detained; the outline of the plot; and the number of countries involved. Parliament will also be able to debate in the light of these matters whether the Home Secretary's decision to make an order was properly founded; if she had indeed received the police and DPP report in the first place; and other broad discussions. The Bill expressly prohibits any mention of individual cases in the Home Secretary's statement. It is for both Houses to determine whether, given the grave exceptional circumstances, it is justifiable for the order commencing the 42 day provisions to remain in force for the limited duration of 30 days. The arrangements for the debates in Parliament will be agreed by the usual channels.

The courts in contrast assess on a case by case basis whether the police and CPS need more time to collect and examine evidence in order that a charge may be brought against an individual. It is also for the court to be satisfied that the investigation is proceeding diligently and expeditiously in these individual cases.

Nowhere in the provisions of the Bill are these two distinct constitutional functions confused or conflated at all. Decisions about the detention of individual suspects will be a matter for the courts, not Parliament. The decision about whether legislative powers should be made available is, quite rightly, the role of the Secretary of State,

but given the exceptional nature of the powers in the CT Bill, Parliament will also have a role in approving this decision.

**Recommendation 9**

**While there may be formidable practical difficulties in obtaining instructions from a detained suspect to question the legality of a reserve power order, there are a number of interest groups who would have standing to bring a public interest challenge. In determining whether the order is valid, the Administrative Court would make its own assessment as to whether there is "a grave exceptional terrorist threat" and whether the need for the reserve power is urgent. The court would not be precluded from reaching different views from that of the Home Secretary or Parliament. The elaborate decision-making scheme, involving delegated legislation, set out in the Bill provides far greater opportunities for legal challenge than would a straightforward statement in primary legislation of the maximum permitted detention period. It is a weakness of the Bill, not a strength, that it is likely to lead to high-profile litigation during a time when the response to terrorism will be a matter of high controversy. (Para 46)**

After lengthy consultation, it was clear this power needed to be of a temporary nature and only made available to deal with grave exceptional circumstances. We also wanted to give Parliament a role in overseeing the activation of the powers. All this could only be achieved by the mechanism of an order-making power. The Civil Contingency Act (CCA) model was suggested to us by the Home Affairs Select Committee and others as the appropriate way forward, in part precisely because it allows for legal challenge to the Home Secretary's decision. Given that, unlike regulations that may be made under the CCA, the provision to be made in relation to pre-charge detention is known and has been debated by Parliament in advance in the course of the Counter Terrorism Bill, we did not consider it appropriate to place the powers in secondary legislation. However, we accept that there is scope for the decision to make the order to be subject to legal challenge but this was a decision made as a result of an extensive consultation and the need to ensure that there are appropriate safeguards accompanying any activation of the power.

**Recommendation 10**

**We do not regard habeas corpus as significant to the debate about judicial control over extensions of detention time. Modern judicial review provides an equally robust mechanism for dealing with legal challenge. (Para 47)**

Legislative provisions on detention must of course comply with Article 5 of the ECHR, paragraph (4) of which provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court. There is no express exclusion of habeas corpus under the Terrorism Act 2000 or the CT Bill. However, the lawfulness of the person's detention under the Terrorism Act 2000 is decided by a court under Schedule 8 to the Act after 48 hours' detention and then at least every 7 days after that. The grounds for extending detention are set out in paragraph 32 of Schedule 8. Those detained under terrorism legislation therefore have the right to have their detention regularly reviewed by a judge. This remains the case with extended detention under the proposals in the Bill. As mentioned above, judicial review will be available in relation to the Home Secretary's decision to make the reserve power available.

**Recommendation 11**

**We welcome the Government's indication that they are considering a sunset clause to enable matters to be discussed again when the Coroners and Death Certification Bill is introduced. In our view, such a sunset clause is essential. (Para 49)**

We are aware of circumstances in which a coroner's' inquest may need to consider material that cannot be disclosed publicly or shown to the jury, as the finders of fact, without harming the public interest (for example, for reasons of national security). This creates the potential for coroners' inquests to be incompatible with Article 2 of the ECHR where the inquest must be held with a jury and the sensitive material is central to the inquest but by reason of its sensitivity cannot be disclosed to the jury.

We are considering the possibility of a sunset clause on the basis that Part 6 will provide an interim solution to this problem whilst ensuring that Parliament will have a second chance to re-debate the relevant issues during the passage of the Coroners and Death Certification Bill.

**Recommendation 12**

**In our view, Ministers should be required to apply to the court for a non-jury inquest, rather than being empowered to determine without any judicial oversight that there will be such an inquest. (Para 53)**

Should the decision to certify an inquest to sit without a jury become a judicial function, the judge, before granting the certificate, would undoubtedly need to see and thoroughly examine all the information claimed by the Secretary of State to be sensitive in order to properly consider the application and reach an informed decision as to whether section 8A(1)(a) to (c) applied.

We understand concerns about the Executive's involvement in certifying inquests where the death may have been caused by the actions of agents of the state. The Secretary of State may be privy to information or material (which may go to national security or the relationship between the United Kingdom and another country for example). Assessing the sensitivity of this material requires not simply evaluation of information that is available, but also (for example) evaluating the significance to be attached to the overall intelligence picture informed by a further appreciation of national and international conditions (relating to security matters, and otherwise). The Secretary of State would be in the best position to assess the requirements of national security and international relations and to determine, in any particular case, whether the public interest requires a certificate to be issued requiring an inquest to be held without a jury.

A decision to certify an inquest will be capable of challenge by way of judicial review so there will still be an important element of judicial scrutiny of the Executive's function in determining the sensitivity or otherwise of the material.

**Recommendation 13**

**In our view, it is the Lord Chancellor, not a Secretary of State, who should be responsible for appointing and revoking the appointment of "specially appointed coroners". Coroners are independent judicial officers. Under the Constitutional Reform Act 2005, the Lord Chancellor has special responsibilities in relation to the rule of law and a duty to defend the independence of the judiciary. The Lord Chancellor already has powers in relation to dismissal of coroners. We call upon the Government to think again (as they did in relation to the Legal Services Bill where the minister responsible was initially the Secretary of State before the Government conceded that the Lord Chancellor was the appropriate minister).(Para 57)**

In this part of the Bill, Secretary of State refers to the Secretary of State for Justice who is also of course the Lord Chancellor. The Secretary of State for Justice/Lord Chancellor is responsible for the law and policy relating to the current coroner system, although he has limited powers only with regard to the deployment of coroners, and none at all in relation to their selection and appointment. The Lord Chief Justice similarly has no powers in respect of the deployment, selection and appointment of coroners. Although the selection of specially vetted coroners will be an administrative rather than judicial process, we will consider whether to bring forward an amendment for the requirement to be on the Lord Chancellor, rather than the Secretary of State, to compile the list of approved coroners and deploy them to the occasional cases which will arise.

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