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**Human Rights Watch**  
**Briefing on the Counter-Terrorism Bill 2008**  
**Second Reading in the House of Lords**  
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## **Executive Summary and Recommendations**

Beginning on July 8, the House of Lords will debate new counterterrorism legislation—the day after the United Kingdom commemorates the third anniversary of the worst terrorist attack in the nation’s history.

On July 7, 2005, three bombs exploded virtually simultaneously on three London underground trains, while a fourth bomb exploded on a London bus an hour later. Fifty-six people, including the four bombers, were killed, while over 700 were injured. Human Rights Watch shares in the commemoration of those who lost their lives and expresses our solidarity with those who continue to struggle with the legacy of the attacks.

The British government has an obligation to protect everyone living in the UK from terrorist violence. But counterterrorism measures that violate international human rights and undermine fundamental values are wrong in principle and counterproductive in practice. Simply put, they will not make Britain safer.

This briefing paper analyzes those measures in the Counter-Terrorism Bill 2008 Human Rights Watch believes are incompatible with the UK’s obligations under international human rights law. The bill is the sixth major piece of counterterrorism legislation since 2000.

Much of the debate around the bill has focused legitimately on the government’s renewed effort to extend pre-charge detention beyond the already excessive 28-day period. Human Rights Watch is convinced that UK law in this respect already violates the right to liberty under the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Further extension would be unnecessary, disproportionate and counterproductive.

However, it is also important to recognize that the bill contains other provisions that raise serious human rights concerns. The idea of broadening of police powers to question terrorism suspects after they have been charged with a crime was initially proposed by parliamentary committees and others as an alternative (rather than a

complement) to extended pre-charge detention. But the measure in the bill lacks adequate safeguards against violations of the right to silence and against oppressive questioning, undermining the right to a fair trial.

The bill creates problematic notification requirements for those convicted of a terrorism or terrorism-related offence. Anyone sentenced to five years or more for a terrorism offense or a terrorism-related offense would be subject to these notification requirements for the rest of their lives. Any breach would be punishable by up to five years in prison. The requirements could be imposed on persons convicted outside the UK, without any regard to whether the conviction was the result of a fair trial according to international standards.

The bill adopted by the House of Commons also gives the Home Secretary (Interior Minister) the power to declare an inquest closed to the public and appoint a special security-cleared coroner to investigate in cases of death by the use of force. This procedure is unlikely to be compatible with the UK's obligation under international human rights law to ensure independent and impartial investigations into wrongful deaths.

Human Rights Watch's analysis of the bill is grounded in the belief that upholding human rights in the fight against terrorism is a principled imperative. Conversely, counterterrorism measures that violate human rights undermine a government's moral legitimacy and damage its ability to win the battle for "hearts and minds" that Prime Minister Gordon Brown has acknowledged to be central to long-term success in countering terrorism.

We urge the House of Lords to:

- Strike clauses 22 through 33 providing for a reserve power to extend pre-charge detention to 42 days;
- Until section 23 of the Terrorism Act 2006 is repealed, improve safeguards for current 28-day pre-charge detention, including:
  - Broadening the judicial scrutiny to require any judge authorizing extensions to detention to be satisfied that reasonable grounds exist to believe the detainee has committed a terrorist offense;

- Requiring the Director of Public Prosecutions to approve all applications for detention beyond seven days.
- Delete the amendment in clause 34 to the Criminal Justice and Public Order Act section 31(1) allowing for the drawing of adverse inferences in the context of post-charge questioning and make explicit that all post-charge questioning must take place in the presence of a lawyer (clauses 34-36) ;
- Amend Part 4 (clauses 51-68) to ensure that the system for imposing notification requirements is fair and proportionate by, at a minimum:
  - Making the decision to impose and the duration of such requirements the result of an individualized assessment of the risk of recidivism;
  - Striking the possibility for indefinite notification requirements;
  - Striking clause 66 and schedule 5 to remove notification requirements for persons convicted outside the UK.
- Amend clause 82 to narrow the definition of terrorism to ensure acts aimed at influencing the government are criminalized only where their purpose is to coerce or unduly compel it to act or abstain from acting.

## **Pre-charge Detention**

Human Rights Watch is resolutely opposed to any lengthening of pre-charge detention. We believe the current 28-day period is already excessive and in violation of the UK's obligations under international human rights law. The proposed safeguards are wholly inadequate to meet the requirements of international protection against arbitrary, unjust detention. Moreover, the government has failed to provide convincing evidence that a power to detain individuals for up to 42 days before charge is necessary. Instead of extending pre-charge detention, the House of Lords should improve the safeguards for the current 28-day period.

Clauses 22-33 (Part 2) of the bill give the Home Secretary a reserve power to temporarily authorize 42 days of pre-charge detention in terrorism cases. She would act on advice from the Director of Public Prosecutions and a chief police officer (or their equivalents in the case of Scotland and Northern Ireland) that an extension beyond current upper limit of 28 days is needed to investigate properly. In order to take the power, she would have to declare the existence of an "exceptionally grave

terrorist threat.” Parliament would have to approve the authority within seven days, and the power would lapse after 30 days.

It is well established in international human rights law that any interference with the fundamental right to liberty must be shown to be strictly necessary and proportionate. The government has acknowledged that there has yet to be a terrorism investigation where more than 28 days was required. Indeed, the Crown Prosecution Service has not made any application to extend pre-charge detention beyond 14 days since the summer of 2007. The government has failed to provide any evidence that the 28-day limit, when used, either prevented the police from bringing charges at all or forced them to bring lesser charges. Nor has it provided convincing evidence that the level of the threat is growing to support its thesis that a power to detain suspects for six weeks may become necessary in the future.

The exercise of a power to detain terrorism suspects for up to six weeks creates a significant risk of unjust detention. According to Home Office statistics, 669 out of 1,228 individuals arrested as part of terrorism investigations between September 11, 2001, and March 31, 2007, were released without charge.<sup>1</sup> It is therefore reasonable to expect that the new powers would lead to terrorism suspects—many if not most of whom would doubtless be British Muslims—being detained for the equivalent of a three-month prison sentence and then released without charge.

The measure is likely to have a damaging impact on the battle for “hearts and minds.” Since the July 2005 attacks in London, preventing radicalization and recruitment (the “prevent” strand) has been at the heart of the UK’s counterterrorism strategy.<sup>2</sup> The strategy states that one of the key elements of prevention is:

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<sup>1</sup> Home Office, “UK police terrorism arrest statistics (excluding Northern Ireland) from 11 September 2001 – 31 March 2007,” <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/> (accessed October 2, 2007).

<sup>2</sup> The strategy was first developed in 2003. It contains four elements: Prevent (tackling the radicalization of individuals), Pursue (disrupting terrorists and their operations), Protect (reducing the vulnerability of the UK to a terrorist attack), and Prepare (preparedness for the consequences of a terrorist attack). The current iteration of the strategy dates from July 2006.

Engaging in the battle of ideas—challenging the ideologies that extremists believe can justify the use of violence, primarily by helping Muslims who wish to dispute these ideas to do so.<sup>3</sup>

Extended pre-charge detention runs directly counter to this goal. Dr. Muhammad Abdul Bari, Secretary-General of the Muslim Council of Britain, has said he is “very concerned” that the measure could negatively impact relations between Muslim youths and the police, and warned that while “it is right that we take proper precautions against the threat of terrorism...it is our view that this legislation will be counterproductive and will play into the hands of extremist groups.”<sup>4</sup>

Extending pre-charge detention also risks undermining community confidence in the police, thereby jeopardizing a crucial source of cooperation for successful counterterrorism policing. The House of Commons Home Affairs Committee has acknowledged “the danger, which should not be underestimated, of antagonizing many who currently recognize the need for cooperating with the police.”<sup>5</sup>

A broad consensus of individuals and groups in Britain oppose the measure. This includes the current Director of Public Prosecutions Sir Ken MacDonal, former Lord Chancellor (Justice Minister) Lord Falconer, former Attorney General Lord Goldsmith, some senior police officers currently in service, civil rights groups Liberty and Justice, and Muslim organizations. The Parliamentary Joint Committee on Human Rights (JCHR) has called the 42-day detention plan “fundamentally flawed” and warned that it violates “on its face” the European Convention on Human Rights.<sup>6</sup>

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<sup>3</sup> Home Office, “Countering International Terrorism: The United Kingdom’s Strategy,” July 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/general/Contest-Strategy?view=Binary> (accessed July 1, 2008).

<sup>4</sup> Muslim Council of Britain Press Release, “Not a Day Longer – MCB Joins Coalition to Oppose Extension of Pre-Charge Detention,” June 11, 2008, <http://www.sacc.org.uk/index.php?option=content&task=view&id=571&catid=45> (accessed June 23, 2008).

<sup>5</sup> House of Commons Home Affairs Committee, “Terrorism Detention Powers,” Fourth Report of Session 2005-06, Volume I, July 3, 2006, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/910i.pdf> (accessed August 30, 2007), para. 38.

<sup>6</sup> Joint Committee on Human Rights (JCHR), “Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies,” Twenty-first report of the Session 2007-2008, June 5, 2008, <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/116/116.pdf> (accessed June 10, 2008), paras. 15 and 42.

The government's efforts to extend pre-charge detention—already the longest in Europe and among countries with comparable legal systems—have attracted international concern and criticism. In April, Justice Minister Michael Wills was questioned repeatedly about pre-charge detention at the United Nations Human Rights Council during its Universal Periodic Review of the UK's human rights record.

The UN Human Rights Committee, which will consider in its July session the UK's sixth periodic report on compliance with the International Covenant on Civil and Political Rights (ICCPR), has asked the UK to explain how 28 days pre-charge detention is compatible with the ICCPR, and to provide information about plans for a further extension. While the Parliamentary Assembly of the Council of Europe plans to draw up a detailed report on pre-charge detention in the UK, the Council of Europe's Commissioner for Human Rights Thomas Hammarberg has said that 28 days without charge is already far too long and warned that the plan to extend the period to 42 days is “not in line with the spirit of the [European] Convention.”

### **Inadequate judicial safeguards**

Both the European Convention on Human Rights (ECHR, article 5) and the International Covenant on Civil and Political Rights (article 9) guarantee that every person has the right to liberty and security of the person. Any person lawfully arrested on suspicion of having committed an offense must be “informed promptly” of the reason for the arrest and the charges, and be “brought promptly” before a judge or other officer authorized by law to exercise judicial power. Finally, such persons must have the right to challenge the lawfulness of the detention.

While international law does not establish a precise time-limit for preliminary detention, the consensus among human rights authorities is that the requirement of promptness should be interpreted conservatively. The European Court of Human Rights (ECtHR) takes the view that “the degree of flexibility to the notion of ‘promptness’ is limited” and that consideration of the special features of any given

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<sup>7</sup> World at One, BBC Radio 4, interview with Thomas Hammarberg, June 2, 2008.

case, including those involving terrorism investigations, cannot be taken “to the point of impairing the very essence of the right.”<sup>8</sup>

Judicial control is an essential feature of the requirements of article 5 of the ECHR and article 9 of the ICCPR. In our view, the scope of judicial oversight currently in place for the 28-day period fails to meet these requirements, and the provisions in the bill for 42-day detention do nothing to remedy the failing. Individuals detained on suspicion of terrorism do not now have, nor would they have under the terms of this reserve power, an effective right to challenge the legality of the detention.

Under the current procedure, the police must apply to the District Judge for extensions of detention beyond 48 hours up to 14 days. For extensions beyond 14 days, the Crown Prosecution Service (CPS) must submit an application to a High Court judge. The detainee is entitled to have a lawyer represent his or her interests before the judge. However, the judge can deny the detainee and his or her legal representative the right to be present at any part of the hearing, and the judge can deny them access to material used by the CPS to argue for further detention.<sup>9</sup> We echo the repeated concern of the Joint Committee on Human Rights that these provisions deny the detainee the right to a full adversarial hearing under fair trial standards. Under the bill currently before the House, a senior judge reviewing an application for extension beyond 28 days would have the same authority to exclude the detainee and his or her counsel.

In applications for extending pre-charge detention under the Terrorism Act 2000, the judge—either the District Judge or the High Court Judge—is asked to assess two things. First, whether there exist reasonable grounds for believing that continued detention is necessary to obtain, preserve, and adequately analyze evidence. Second, whether the police are showing due diligence and expediency in the conduct of the investigation.<sup>10</sup> Crucially the judge is not required to assess whether reasonable grounds exist for believing the individual detained has committed a

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<sup>8</sup> European Court of Human Rights, *Brogan and Others v. the United Kingdom*, Judgment of 29 November 1988, Series A no. 145-B, available at [www.echr.coe.int](http://www.echr.coe.int), para. 59.

<sup>9</sup> These powers are provided in paragraphs 33 and 34 of Schedule B of Terrorism Act 2000.

<sup>10</sup> These powers are laid out in paragraph 32 of Schedule 8 of Terrorism Act 2000, as amended by paragraph 24 of Terrorism Act 2006.



terrorism offense. This violates article 5(4) of the ECHR guaranteeing the right to challenge the legality of detention. The judicial review to determine this question should be, according to European Court case-law, “wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5(1).”<sup>11</sup>

We welcome the stipulation that the Director of Public Prosecutions (DPP) approve all applications to a senior judge for extension beyond 28 days (Schedule 2, Part 1). Indeed, we argue that this could usefully be instituted for all extensions of pre-charge detention beyond seven days. However, like parliamentary oversight (see below), review by the DPP is no substitute for proper judicial scrutiny.

### **Inadequate additional safeguards**

It is our view that the duration and lack of proper judicial safeguards render the 42-day detention plan wholly incompatible with the ECHR. It is worthwhile, nonetheless, to examine the other safeguards the government has introduced: the “exceptionally grave terrorist threat” trigger, parliamentary oversight, and the 30-day limit on the power. None of these safeguards stand up to scrutiny.

Under the bill, the Home Secretary must declare that an “exceptionally grave terrorist threat” exists in order to take the power to detain terrorism suspects for up to 42 days. The bill defines this as “an event or situation involving terrorism which causes or threatens serious loss of human life; serious damage to human welfare in the United Kingdom, or serious damage to the security of the United Kingdom” (clause 22). “Damage to human welfare” is defined as including “human illness or injury, homelessness, damage to property, disruption of a supply of money, food, water, energy or fuel, disruption of a system of communication, disruption of facilities for transport, or disruption of services relating to health.” The concept covers events or situations anywhere in the world, and those still in the planning or preparation stage.

In our view, this definition is far too broad and open to discretionary interpretation. The threshold for what constitutes “exceptional” remains undefined, since any

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<sup>11</sup> European Court of Human Rights, *E. v. Norway*, Judgment of 29 August 1990, Series A, no. 181, available at [www.echr.coe.int](http://www.echr.coe.int), para. 50.

terrorist attack would presumably involve the threat of serious loss of life, while the definition of damage to human welfare includes a very wide variety of vaguely defined consequences. We note too that there is no basis for challenging the Home Secretary's assertion that an "exceptionally grave terrorist threat" exists; it is enough for her to make a statement to this effect to Parliament.

Finally, the power to detain for up to 42 days would affect all individuals in custody or taken into custody while the power is in force. This means that individuals who are arrested in the course of terrorism investigations unrelated to the declared "exceptionally grave terrorist threat" that triggered the power could potentially be held for the six weeks.

The government has emphasized the role of parliamentary oversight. Parliament must approve the power within seven days lest it lapse, while it would cease immediately if Parliament were to vote against the power (clause 28). Human Rights Watch is not convinced that this parliamentary scrutiny amounts to a proper safeguard. As an elected body, Parliament is not the appropriate institution for scrutinizing decisions on individual cases. That is a judicial function properly exercised by the courts. Under the terms of clause 27, the statement to be laid before Parliament must not include any information that could prejudice future prosecution of any individual.

The bill, as amended in the House of Commons, stipulates that the authority to hold suspects for up to 42 days will lapse after 30 days. We acknowledge that the government responded to concerns and shortened its original proposal from 60 days. However, there is nothing in the bill to prevent the Home Secretary from immediately reauthorizing a new extension. This raises the potential for rolling periods of 42-day pre-charge detention, which would affect not only those arrested in connection with an investigation into an "exceptionally grave terrorist threat" but any individual arrested under Terrorism Act 2000.

Human Rights Watch urges the Lords to reject absolutely any extension of pre-charge detention. We believe the current 28-day period already violates article 5 of the European Convention, and that section 23 of Terrorism Act 2006 should be repealed. Until section 23 is repealed, safeguards during the 28-day period should be

improved, including by broadening the scope of judicial scrutiny to require any judge authorizing extensions to detention to be satisfied that reasonable grounds exist to believe the detainee has committed a terrorist offense, and requiring the Director of Public Prosecutions to approve all applications for detention beyond seven days.

## **Post-charge Questioning**

Human Rights Watch considers that the broadening of police post-charge questioning powers may be a reasonable measure only if accompanied by robust safeguards. The current provisions in Counter-Terrorism Bill 2008 do not provide for such safeguards. We are concerned about the broad scope to draw adverse inferences from failure or refusal to answer questions. The scope envisioned violates the right to silence and the prohibition against self-incrimination. We also regret that the bill lacks critical safeguards against oppressive questioning.

As currently drafted, the bill would allow a senior police officer (with the rank of superintendent or above) to authorize post-charge questioning in terrorism cases for up to 24 hours. A justice of the peace, who is a lay magistrate, must authorize further questioning for periods of up to five days.<sup>12</sup> Nothing in the bill limits the amount of times a justice of the peace may authorize consecutive five-day periods. The justice of the peace must be satisfied that such questioning is necessary and will occur in the context of an investigation that is being conducted diligently and expeditiously. Questioning would also be allowed after a person has been sent to trial.<sup>13</sup>

Cause 34 (subsection 8) amends the Criminal Justice and Public Order Act (CJPOA) 1994 to allow the court to draw adverse inferences if, upon post-charge questioning, a person charged with a terrorism offense:

- Failed to or refused to answer questions about any objects, substances or marks on his person, in or on his clothing or footwear, in his possession, or in any place in which he was at the time of arrest;

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<sup>12</sup> In Scotland, the sheriff must authorize post-charge questioning on the same conditions.

<sup>13</sup> A judge of the Crown Court would have to authorize such questioning in cases involving an offense with a terrorist connection.

- Failed to or refused to account for his presence at a particular place.

Human Rights Watch is of the view that drawing adverse inferences from a failure or refusal to answer questions fundamentally undermines the right to silence and the prohibition on self-incrimination guaranteed under article 6 of the European Convention on Human Rights and article 14 of the International Covenant on Civil and Political Rights. We believe that attributing probative value to silence alone, undermining the free choice of an accused to exercise his or her right to silence, effectively shifts the burden of proof to the accused, and undermines the presumption of innocence.

We believe that after an accused has been charged, the obligation to respect the will of the accused person to remain silent is of even greater importance. At that moment, the right to an effective defense, including through exercising the right to silence, enters a critical phase. The accused is facing trial and may be in pre-trial detention. In that context, permitting negative consequences to flow from exercising the right to silence becomes more coercive than in the pre-charge context. After much consideration, we have concluded that permitting any adverse inferences to be drawn in the context of post-charge questioning would be incompatible with the right to a fair trial.

We acknowledge that UK law currently permits adverse inferences to be drawn from silence and that allowing adverse inferences to be drawn from a failure to mention questions about objects or marks, or presence, would mirror the position for pre-charge questioning under the CJPOA 1994.

We are also aware that the European Court of Human Rights has held that in certain circumstances adverse inferences can be drawn from silence during pre-charge questioning and at trial. Human Rights Watch takes the view that the scope for interference with the right to silence in the European Court's jurisprudence is too broad.

Nonetheless, the European Court of Human Rights has also been clear that any infringement on the right to silence and prohibition against self-incrimination must

not involve improper compulsion or the use of evidence obtained through methods of coercion which defies the will of the accused.

We note that the statute of the International Criminal Court—the authoritative articulation of international criminal justice norms—explicitly guarantees the right to silence during the investigation and at trial “without such silence being a consideration in the determination of guilt or innocence.”<sup>14</sup> The UN Human Rights Committee expressed concerns in 1995 that the scope for drawing adverse inferences from silence in the UK’s CJPOA violates provisions of article 14 of the International Covenant on Civil and Political Rights <sup>15</sup>

It is our understanding that a Home Office Working Group on the Right to Silence in 1989 and the Royal Commission on Criminal Justice in 1993 came to the same conclusion.<sup>16</sup> We also note that a parliamentary inquiry in Victoria, Australia, concluded in 1999 that legislative changes with respect to the right to silence along the lines of the CJPOA carried an unacceptable risk of miscarriages of justice.<sup>17</sup>

Human Rights Watch welcomes the amendment adopted in the House of Commons to require that all post-charge interrogation sessions be subject to video- and audio-recording; we are, however, concerned that the Home Secretary may order otherwise (clause 37). It is unclear under what conditions the Home Secretary may order exceptions, or to what kind of review this decision would be subject.

The bill provides for codes of practice to be drawn up on post-charge questioning. We regret that amendments proposed in the House of Commons to ensure that such

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<sup>14</sup> Statute of the International Criminal Court, [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf) (accessed December 18, 2007), articles 55 and 67.

<sup>15</sup> UN Human Rights Committee, “Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland,” CCPR/C/79/Add.55, July 27, 1995, <http://www.unhcr.ch/tbs/doc.nsf/o/8e805b3f251698d6c12563f00056a5a9?Opendocument> (accessed December 18, 2007).

<sup>16</sup> Parliament of Victoria, Australia, Scrutiny of Acts and Regulations Committee, “The Right to Silence: An Examination of the Issues, Chapter 6- The Right to Silence in the United Kingdom, (Issue Paper), June 1989, [http://www.parliament.vic.gov.au/sarc/Right\\_to\\_Silence/Issues\\_Paper/Issuesch6.htm#chapter%206](http://www.parliament.vic.gov.au/sarc/Right_to_Silence/Issues_Paper/Issuesch6.htm#chapter%206) (accessed November 26, 2007).

<sup>17</sup> Parliament of Victoria, Australia, Scrutiny of Acts and Regulations Committee, “The Right to Silence, Final Report,” Chapter 2- Pre-Trial Silence, March 1999, [http://www.parliament.vic.gov.au/sarc/Right\\_to\\_Silence/Final\\_Report/RTStoc.html](http://www.parliament.vic.gov.au/sarc/Right_to_Silence/Final_Report/RTStoc.html) (accessed November 26, 2007).

codes of practice explicitly require the presence of a lawyer during post-charge questioning, and impose a time limit on questioning to prevent oppressive interrogations were not adopted. These are in our view critical safeguards that should be included in the text of the bill.

Unless amended to ensure protection against interference with the right to silence and the prohibition on self-incrimination, and against oppressive questioning in the terms proposed in the Commons amendments above, Human Rights Watch believes clauses 34-39 should be struck from the bill.

## **Notification Requirements**

Part 4 of the bill (clauses 51-68) creates notification requirements for individuals convicted of a terrorism offense or an offense with a terrorist connection, and sentenced to at least one year imprisonment. Upon release from custody, any such person would be required to register his or her name and address at the local police station, and inform police of any other address used for seven days or more, or for two periods during a year which taken together add up to seven days.<sup>18</sup> Those sentenced to between one and five years imprisonment would be subject to notification obligations for a ten-year period, while those sentenced to more than five-years would be subject to lifetime notification obligations.

The bill would allow the Home Secretary to prescribe other information to be notified to the police on a case by case basis (clause 58), including advance details of foreign travel (clause 63), subject to affirmative resolution procedure. This procedure requires both houses of Parliament to approve the draft order before it is made. A breach of notification requirements would be a criminal offense punishable by up to five years in prison.

Those subject to notification requirements could also be subject to an order prohibiting foreign travel (Schedule 6). A chief officer of police could apply to the

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<sup>18</sup> Notification requirements would also apply to those found not guilty by reason of insanity or found to have acted under a disability and who are placed under a hospital order, confining them to a hospital.

local magistrate's court for such an order to be imposed. The order could be appealed to the Crown Court.

Notification requirements may be a reasonable measure for particularly serious crimes where there exists a risk of recidivism. Insofar as these requirements infringe on protected rights, they must be proportionate and necessary, and must not be imposed in an arbitrary manner.

Human Rights Watch believes that notification requirements are only appropriate, in that they are designed to meet a legitimate aim, when subject to judicial scrutiny and tailored to suit the circumstances of a particular case. We are concerned, therefore, that the bill envisions the automatic imposition of notification requirements of *all* individuals sentenced to 12 months or more for a terrorism-related offense. The measure in this way is linked to the nature of the crime rather than to an individualized assessment of the risk of recidivism, and the procedure denies qualified experts the opportunity to evaluate whether the measure is necessary and proportionate. The UN Human Rights Committee has taken the view that the ICCPR prohibits depriving fundamental rights without regard to personal circumstances or based solely on the category of the crime for which the offender is found guilty.<sup>19</sup>

The decision to impose notification requirements should be based on an individualized assessment of the risk of recidivism. Such an assessment could be usefully incorporated into the general evaluation conducted when an individual becomes eligible for release from prison. This would minimize the additional burden on the system and would help ensure that those individuals who have been genuinely rehabilitated and do not pose a risk of re-offending are not subject to ten-year or lifelong notification obligations and the liability of a criminal sanction for breach of those obligations.

We are also concerned that notification requirements are imposed for an indefinite period of time where an individual has been sentenced to five years or more for a

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<sup>19</sup> *Mr. Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998 (2002), para. 7.3; *Eversley Thompson v. St. Vincent and the Grenadines*, Communication No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000), para. 8.2.

terrorism-related offense. The period is ten years for those sentenced to between 12 months and 5 years. Although the imposition of notification requirements may be appealed to the Crown Court, the bill does not provide for any procedure for periodic review of the continuing need for notification requirements. In our assessment, imposing lifelong notification obligations under penalty of serious criminal sanction, without the possibility of amendment or removal, is a disproportionate response to a genuine public safety concern.

We note that clause 55 provides for notification requirements to be imposed retroactively on individuals who are, immediately before the measures enter into force, in prison or detention, released on license or unlawfully at large. We are concerned that there appears to be no means for informing individuals unlawfully at large of their new obligations. Retroactive imposition on those unlawfully at large creates a situation in which these individuals will automatically be in breach and liable to a severe criminal sanction without having been duly informed.

Finally, Human Rights Watch is deeply concerned about the imposition of notification requirements on those convicted outside the UK of a terrorism-related offense. Clause 66 gives effect to Schedule 5 of the bill, allowing chief officers of police to apply for notification requirements to be imposed on UK and foreign nationals living in their area who have been convicted abroad of terrorism offenses. Paragraph 3 of Schedule 5 laying out the three basic conditions for making a notification order in these cases does not provide for any assessment of whether the conviction in question was the result of a fair trial according to international standards. This carries an unacceptable risk of individuals convicted after trials tainted by egregious rights violations (for example, the use of torture evidence) being subjected to notification requirements. Furthermore, the burden of proof is improperly placed on the individual concerned to prove that the conditions for imposing notification requirements are not met (Paragraph 2 of Schedule 5).

Human Rights Watch urges the House of Lords to amend the bill to:

- Provide for individualized assessment of risk of recidivism; this could be incorporated into a general evaluation of eligibility for release from custody;



- Link the duration of notification requirements to the individualized risk assessment, allowing for renewal, subject to review, where appropriate. Indefinite imposition should not be permitted;
- Provide a mechanism for periodic review to assess whether continuing need exists;
- Strike clause 66 and schedule 5 to remove notification requirements for persons convicted outside the UK.

## **Definition of Terrorism**

Human Rights Watch believes the definition of terrorism must be crafted narrowly and interpreted conservatively to limit the scope for arbitrary and discriminatory enforcement.

Clause 82 (Part 7) of the bill proposes amending the definition of terrorism in relevant provisions of UK legislation to ensure that acts done for the purpose of advancing a racial cause are included explicitly. The bill would modify the definition in Terrorism Act 2000 to read: “the use or threat [of action] designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purposes of advancing a political, religious, *racial* or ideological cause.”

The definition of terrorism under the Terrorism Act forms the basis for a number of criminal offenses, including the encouragement of terrorism, and triggers wide-ranging powers, including the designation and proscription of terrorist organizations, and police powers to stop and search without suspicion, to arrest a terrorism suspect without a warrant, and, notably, to detain terrorism suspects without charge for 28 days.

The definition has been the subject of significant criticism as overly broad and lacking in legal precision, including by the Joint Committee for Human Rights.<sup>20</sup>

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<sup>20</sup> JCHR, “Counter-terrorism Policy and Human Rights: Terrorism Bill and related matters,” Third Report of Session 2005-06, December 5, 2005, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf> (accessed August 30, 2007), para. 13. See also Justice, “The Definition of ‘Terrorism’ in UK Law: Justice’s Submission to the Review by Lord Carlile of Berriew QC,” March 2006, <http://www.justice.org.uk/parliamentpress/parliamentarybriefings/index.html> (accessed August

International human rights law requires that any law creating a criminal offense must be clear and precise enough for people to understand what conduct is prohibited and to regulate their behavior accordingly.<sup>21</sup>

The government-proposed change is one of two amendments recommended by Lord Carlile in order to “cement into the law clarity that terrorism includes campaigns of terrorist violence motivated by racism.”<sup>22</sup> In addition to including racism as a motivating cause of terrorism, Lord Carlile recommended amending the definition so that only actions or the threat of action designed *to intimidate* the government, instead of the much broader *influence*, fall within it.

We are concerned that the bill does not take up Lord Carlile’s proposed amendments to the definition to ensure that only actions or the threat of action designed *to intimidate* the government fall within the definition, instead of the much broader current formulation of *to influence*.

We understand that there are concerns that the use of the verb “to intimidate” in the definition may cause difficulties when applied to a government but we do not believe this should be an obstacle to narrowing the definition in line with Lord Carlile’s suggestion. Alternatives used in international treaties include *to coerce*, *to unduly compel*, and *to subvert*. EU Framework Decision of 2002 and the Council of Europe Convention on the Prevention of Terrorism 2005, for example, use the formula *to unduly compel* a government to do or abstain from doing any act.

The UN Special Rapporteur on human rights and terrorism, Martin Scheinin, argues for a cumulative characterization of terrorism with reference to agreed-upon offenses in existing counterterrorism conventions when committed “with the intention of causing death or serious bodily injury, or the taking of hostages; and for the purposes of provoking a state of terror, intimidating a population, or compelling a

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30, 2007); Amnesty International, “United Kingdom: Human Rights: a broken promise,” February 23, 2006, <http://www.amnesty.org/en/library/asset/EUR45/004/2006/en/dom-EUR450042006en.pdf> (accessed June 26, 2008).

<sup>21</sup> ECHR, art. 7.

<sup>22</sup> Lord Carlile, “The Definition of Terrorism,” March 2007, <http://www.homeoffice.gov.uk/documents/carlile-terrorism-definition?view=Binary> (accessed September 25, 2007), para. 66.

Government or international organization to do or abstain from doing any act.”<sup>23</sup> This is based on the language in Security Council Resolution 1566 (2004) calling on states to prevent and punish such acts.<sup>24</sup>

The current definition of terrorism in the UK is at odds with this formulation, because it includes actions other than those taken with intent to cause death or serious injury and hostage taking. Human Rights Watch considers that, at a minimum, the definition should be narrowed so that only acts designed to “coerce” or to “unduly compel” the government are criminalized. We urge the House of Lords to amend clause 82 to that effect.

## Secret Inquests

Clause 77 (Part 6) gives the Home Secretary broad scope to declare an inquest closed to public scrutiny. Inquests subject to a security certificate “in the interests of national security, in the interests of the relationship between the UK and another country, or otherwise in the public interest” would be held by a specially appointed coroner behind closed doors and without a jury. Human Rights Watch believes that secret inquests led by coroners appointed by the Home Secretary are incompatible with the UK’s obligations to protect the right to life under article 2 of the ECHR.

Under article 2, the UK has a positive obligation to conduct effective investigations of deaths resulting from the use of force. The European Court of Human Rights has established that to be effective, an investigation must be independent, take reasonable steps to collect the evidence necessary to reaching a determination, be carried out with promptness and reasonable expedition, and be subject to public scrutiny.<sup>25</sup> The Court recognizes that the degree of public scrutiny may vary from case

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<sup>23</sup> UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, December 28, 2005, <http://www.icj.org/IMG/Scheininreport.pdf> (accessed October 2, 2007), para. 42.

<sup>24</sup> UN Security Council, Resolution 1566 (2004), S/RES/1566/2004, <http://daccessdds.un.org/doc/UNDOC/GEN/NO4/542/82/PDF/NO545282.pdf?OpenElement> (accessed October 2, 2007), para. 3.

<sup>25</sup> European Court of Human Rights, *Hugh Jordan v. the United Kingdom*, Judgment of 4 May 2001, no. 24746/94, ECHR 2001-III, paras. 105-109; *McKerr v. the United Kingdom*, Judgment of 4 May 2001 no. 28883/95, ECHR 2001-III, paras. 144 – 148;

to case, and while it has found that limited application of the public interest immunity system in the UK does not necessarily violate article 2 obligations,<sup>26</sup> it has also found that its use has prevented review of potentially relevant material and therefore prevented an effective investigation.<sup>27</sup> Moreover, next-of-kin of victims have a right to participate in the proceedings, a right which must be safeguarded by the process so that they always have access to the investigation “to the extent necessary to safeguard [their] legitimate interests.”<sup>28</sup>

Both the JCHR and the House of Commons Justice Committee raised serious concerns about the lack of independence of inquests conducted by specially appointed coroners as well as the limits on the involvement of victims’ families.<sup>29</sup> The JCHR stated unequivocally that the proposal is “clearly not...compatible” with article 2 of the ECHR, and stressed that the appointment of a coroner by the Home Secretary “would be fatal to any appearance of independence.”<sup>30</sup>

Human Rights Watch believes Part 6 should be struck from the bill, and any changes to the inquests system be considered in separate legislation at a later date.

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*Finucane v the United Kingdom*, Judgment of July 1 2003, no. 29178/95, Reports of Judgments and Decisions 2003-VIII, paras. 68 – 71.

<sup>26</sup> European Court of Human Rights, *Hugh Jordan v. the United Kingdom; McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A, no. 324.

<sup>27</sup> European Court of Human Rights, *McKerr v. the United Kingdom*, Judgment of 4 May 2001, ECHR 2001-III no. 28883/95 paras. 150-151.

<sup>28</sup> European Court of Human Rights, *Hugh Jordan v. the United Kingdom*, para. 109; *McKerr v. the United Kingdom*, para. 148; *Finucane v the United Kingdom*, para. 71.

<sup>29</sup> JCHR, “Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism bill,” Twentieth Report of Session 2007-08, May 14, 2008, <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/108/108.pdf>, paras. 115-119; House of Commons Justice Committee, “Counter Terrorism Bill,” Third Report of Session 2007-08, March 20, 2008, <http://publications.parliament.uk/pa/cm200708/cmselect/cmjust/405/405.pdf>, para. 5.

<sup>30</sup> JCHR, “Counter-Terrorism Policy and Human Rights (Tenth Report),” para. 119.