



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# **Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4**

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**Sixth Report of Session 2003–04**





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Joint Committee on  
Human Rights

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**Sixth Report of Session 2003–04**

*Report, together with formal minutes and  
appendices*

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## JOINT COMMITTEE ON HUMAN RIGHTS

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Lord Campbell of Alloway  
Lord Judd  
Lord Lester of Herne Hill  
Lord Plant of Highfield  
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### Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Ian Mackley (Lords Clerk), Professor David Feldman (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

### Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is [jchr@parliament.uk](mailto:jchr@parliament.uk).

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## Summary

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This Report considers the human rights implications of the Anti-terrorism, Crime and Security Act 2001 in the context of (a) the review of the whole Act by a Committee of Privy Councillors chaired by Lord Newton of Braintree, (b) the report by Lord Carlile of Berriew QC on the operation in 2003–04 of Part 4 of the Act, which allow suspected international terrorists who are not United Kingdom nationals and cannot be removed from the country to be detained indefinitely without charge, and (c) the draft Order laid before each House to continue in force for a further twelve months from 14 March 2004 those provisions.

In relation to Part 4 of the Act, the Committee's conclusions are as follows:

a) there are serious weaknesses in the protection for human rights under the detention provisions of Part 4 of the Act (paragraph 33);

b) in the light of the evidence so far presented to Parliament, the Committee continues to doubt whether the powers under Part 4 are strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation, and so continues to doubt whether the derogation from ECHR Article 5 is justified (paragraphs 33 to 34);

c) even if the courts were ultimately to decide that the derogation from Article 5 is justified, the Committee would still consider an indefinite derogation from the important right to liberty under Article 5 to be deeply undesirable (paragraph 34);

d) the Committee remains of the view that there is a significant risk that the powers under Part 4 violate the right to be free of discrimination under ECHR Article 14 because they have a particular impact on only one part of the resident community of the United Kingdom (namely those who are not nationals of the United Kingdom) on the ground of nationality (paragraph 35);

e) a more satisfactory legal framework is urgently required which would be both effective and compatible with the United Kingdom's human rights obligations including full compliance with ECHR Article 5 (paragraph 36);

f) the Committee is not persuaded that it is appropriate to renew Part 4 when there is no end in sight to the "emergency" by reference to which the exceptional powers were considered to be justified (paragraph 37);

g) if the Government argues that it is necessary to continue Part 4 in force, it should be for a period of no more than six months, and the Government should give a firm undertaking that it will actively seek, as a matter of priority, a new legal basis for its anti-terrorism to be put in place speedily and in accordance with the principles developed in the Newton Committee Report (paragraph 37);

h) if the Government persuades Parliament that the powers should be continued, it should publish anonymised information about each individual Part 4 certification and the number of detentions there have been under the Terrorism Acts and their outcomes (paragraph 38);

i) the Committee supports the recommendations of Lord Carlile for improving the way in which the current procedures operate while they continue to have effect, subject to the outcome of appropriate consultations with the Bar Council and the Law Society on the ethical implications of requiring a Special Advocate to continue to act without the support of the appellant (paragraph 39);

j) the Committee draws the attention of each House to the substantial concerns expressed in its earlier reports on this Part of the Act, summarised in paragraphs 19 and 20 below, not least the need to ensure that detainees' conditions of detention reflect their status as people who have been neither charged with nor convicted of any offence (paragraph 40).

In relation to the Newton Committee's recommendations on other parts of the Act:

k) the Committee endorses the recommendations of the Newton Committee that freezing orders for specific use against terrorism should be addressed again in primary legislation and that such orders for other emergency situations, and the safeguards which should accompany them, should be reconsidered on their own merits in the context of more appropriate legislation for emergencies (paragraphs 41 to 43);

l) the Committee welcomes the Newton Committee's analysis of provisions on disclosure of information, and endorses its recommendations for independent external oversight of the whole disclosure regime and for prior authorisation by a senior person in terrorism cases and by a judge in other cases (paragraphs 44 to 47);

m) the Committee accepts the Newton Committee's conclusion that there was no reason to object to the provisions in Part 8 of the Act on security in the nuclear industry, in the light of assurances which the Government had given about the way in which the provisions would operate (paragraphs 48 to 49);

n) the Committee endorses the views of the Newton Committee that police powers conferred or extended by Part 10 of the Act to identify people and to retain fingerprints indefinitely ought not to have been included in emergency legislation, and should be limited to cases where a person has been charged with an offence, or is authoritatively certified as being of ongoing importance in a terrorist investigation (paragraphs 50 to 52), and that the power to remove and confiscate disguises should be limited to situations where a senior police officer believes that the measure is necessary in response to a specific terrorist threat (paragraphs 53 to 55);

o) the Committee endorses the conclusion of the Newton Committee that: retention of and access to communications data should be based on a coherent statutory framework, which should be part of mainstream legislation rather than terrorism legislation; retention should be limited to one year; and the whole retention and access regime should be subject to unified oversight by the Information Commissioner (paragraphs 56 to 59 below).

# 1 Introduction

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## The various statutory reviews of the Anti-terrorism, Crime and Security Act 2001

1. The Anti-terrorism, Crime and Security Act 2001 was passed at great speed by both Houses in the wake of the attacks on the World Trade Centre and other targets in the USA on 11 September 2001. The Act contained a number of provisions affecting human rights. One such set of provisions, sections 21 to 23 in Part 4 of the Act, provides for the indefinite detention without charge of people certified by the Secretary of State as being suspected of links to international terrorism, if they are not United Kingdom nationals and cannot be removed from the country for practical or legal reasons. The Government accepted that this is incompatible with the right to liberty of the person under ECHR Article 5, and that it necessitated a derogation from that right under Article 15 of the ECHR.

2. At a late stage in its passage through Parliament, a number of safeguards were inserted in the Bill. One of these is the 'sunset' clause which became section 29(1) of the Act. It provides that Part 4 of the Act will cease to operate at the end of 10 November 2006. Before that date, Part 4 was to cease to operate fifteen months after the Act received the Royal Assent, unless renewed earlier for a period of no more than one year by a statutory instrument made by the Secretary of State under section 29(2) and (3) of the Act. Further orders can renew Part 4 for subsequent periods of no more than one year, up to 10 November 2006, are permitted. Before the Secretary of State may make an order, section 29(3)(b) requires that a draft order has to be laid before each House and approved by both Houses by an affirmative resolution (except in cases of urgent necessity, when an order may be made temporarily under section 29(4) without first being laid and approved in draft).

3. Parliament thus has an annual opportunity to debate the continuance of the powers in Part 4 of the Act. As an additional safeguard, and in order to inform the debate, section 28 of the Act requires the Secretary of State to appoint a person to review the operation of the certification and detention provisions, who must report at least one month before the date when the provisions are due to expire if not renewed. This task is performed by Lord Carlile of Berriew QC. His report on the operation of sections 21 to 23 in 2003 was published on 11 February 2004.<sup>1</sup>

4. In addition, section 122 of the Act provided that the whole Act was to be subject to a single, comprehensive review by a committee of Privy Councillors appointed by the Secretary of State, which was to report to the Secretary of State not later than 13 December 2003, two years after the Act was passed. The committee's report was to be laid before Parliament. This task was undertaken by a committee under the chairmanship of Lord

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<sup>1</sup> Lord Carlile of Berriew QC, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003* (February 2004), hereafter the "Carlile Report".

Newton of Braintree. After taking evidence and deliberating through much of 2003, it reported in December 2003. Its report was laid before Parliament on 18 December 2003.<sup>2</sup>

5. Section 123 of the Act allowed the committee of Privy Councillors to specify any provision of the Act as one which is to cease to have effect six months from the day on which the committee's report was laid before Parliament, unless the Committee's Report had first been debated by each House. The Committee was so concerned about the speed with which the Act had been passed and the lack of fit between the Act and other legislation in related areas that it designated the whole Act for the purpose of section 123.<sup>3</sup> The committee stressed that this was to enable Parliament to review the report and the Act as a whole, and made it clear that there were many parts of the Act which the committee considered to be unexceptionable.

6. As a result, the whole Act will automatically cease to have effect in June 2004 unless, before the relevant date, each House holds a debate on the committee's report. The House of Commons is expected to debate the report on 25 February 2004, and the House of Lords is expected to do so in the first week in March.

7. After our initial consideration of the committee's report, our Chair wrote to the Home Secretary on 21 January 2004 asking a number of questions about the Government's intentions in the light of it. The Home Secretary responded in a letter dated 6 February 2004.<sup>4</sup>

### **The draft Anti-terrorism, Crime and Security Act 2001 (Continuance in Force of Sections 21 to 23) Order 2004**

8. The Home Secretary has laid before each House the draft Anti-terrorism, Crime and Security Act 2001 (Continuance in Force of Sections 21 to 23) Order 2004, to continue sections 21 to 23 in force for a further twelve months from 14 March 2004. A standing committee of the House of Commons is expected to consider the draft Continuance Order on 26 February 2004, and the House of Lords is expected to debate the draft order in the first week in March.

### **Our report**

9. We have considered the Newton Committee report, the report by Lord Carlile of Berriew QC, and the draft Continuance Order, and now report our conclusions on their human rights implications to each House in the hope that it will help to inform the debates on the Newton Committee report and the draft Continuance Order in the two Houses from a human rights perspective.

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2 Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, HC 100 (December 2003), hereafter the "Newton Committee Report".

3 *ibid.*, paras. 12–13.

4 Appendices 1 and 2 below.

## 2 The Report of the Committee of Privy Councillors

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### The main arguments and conclusions of the Newton Committee

10. The Newton committee was concerned about the speed with which the Bill passed both Houses, and the difficulties each House faced in subjecting the Bill to proper scrutiny.<sup>5</sup> The committee was also conscious of a tendency for unnecessary or ineffective powers to be taken by governments in response to a terrorist threat merely in order to be seen to be doing something, with the result that legislation is passed which is either unused, unusable, or used for a purpose other than that originally offered as a justification for it.<sup>6</sup>

11. The Newton committee therefore developed some principles to govern the enactment and review of anti-terrorism legislation. These include the following propositions:

- a) such legislation should form a coherent whole, in which the need for security is properly balanced with the rights to liberty and privacy;
- b) counter-terrorism law should be kept distinct from mainstream criminal law, limited to dealing with terrorism, accompanied by tailored safeguards, and consistent with the counter-terrorism policies agreed and coordinated by the international community;<sup>7</sup>
- c) provisions not directly related to terrorism should be reviewed in the context of the areas of practice and law to which they properly related, instead of being swept up in an emergency Act justified by reference to a threat of terrorism;
- d) Parliament should be able to review the Act as a whole at regular intervals.

12. The Newton committee singled out a number of areas in which it considered that the Act was defective, and made recommendations including:

- a) changes to the procedure for forfeiting suspected terrorist property to protect sensitive security-related information (paragraph 124);
- b) repealing or improving the practicability of provisions for bank account monitoring orders (paragraph 127 ff);
- c) improving the mechanisms for sharing information about terrorist financing to make it easier to comply with reporting requirements (paragraph 132 ff);
- d) allowing additional protection for the privacy of innocent individuals affected by reporting requirements imposed on the financial industry (paragraph 134 ff);

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5 Newton Committee Report, op cit., p. 5.

6 *ibid.*, para. 107.

7 *ibid.*, para. 2.

- e) putting orders freezing assets thought to be intended for use in terrorism on a basis contained in primary legislation, and separating the legal basis for such orders from that for freezing orders in other emergencies (paragraph 146 ff);
- f) providing additional oversight and monitoring of disclosure of information by public bodies to guard against abuse (paragraphs 53 and 160 ff);
- g) replacing the detention provisions in Part 4 of the Act with a new regime which deals with all suspected terrorists and does not require a derogation from the ECHR (paragraphs 185 ff);
- h) taking a more proactive approach to deciding when it is possible to release people who have already been detained (paragraph 200), and publishing more information about the use of the detention power (paragraph 258);
- i) reconsidering enhanced sentences for religiously aggravated offences in the context of legislation to protect targets of hate crime (paragraph 267 ff);
- j) increasing the controls over pathogens and toxins which can be used as weapons (paragraph 294 ff);
- k) enhancing regulation of radioactive sources and parliamentary scrutiny of the regulation (paragraph 310 ff);
- l) putting extended police powers, which have mainly been used in non-terrorism cases, in the legislative context of police powers generally, rather than in a terrorism context (paragraph 333 ff), and protecting the privacy of innocent people through appropriate safeguards (paragraph 341 ff);
- m) putting the regime for retention of communications data under Part 11 of the Act into a mainstream data retention regime within a coherent legislative framework with time limits set by primary legislation, with strict regulation of access to data and oversight by the Information Commissioner (paragraphs 396 ff);
- n) radically simplifying the law of bribery and corruption (paragraph 421); and
- o) repealing the power to amend the primary legislation by order under section 124 of the Act (paragraph 442).

**13. We welcome the report of the Newton Committee, and also the opportunity for Parliament to reconsider the Act in the light of mature reflection and experience which was not available when the Act was originally passed.**

**14. We endorse the principles on which the report is based, namely:**

- a) **that the individual has a right to liberty and to privacy; and**
- b) **that the authorities have a duty to take the steps necessary to protect society from terrorism (page 8).**

**15. We endorse the discussion of the application of these principles in the report (paragraphs 79–91).**

## **Human rights issues arising from the report**

16. The Newton Committee report identifies a number of issues which are either expressed in terms of compliance with human rights or have distinctive human rights implications. These relate to Parts 2, 3, 4, 8, 10 and 11 of the Act. We consider first the Newton Committee's recommendations relating to Part 4, together with Lord Carlile of Berriew's report on the operation of Part 4 in 2003 and the draft Continuance Order. We then consider the human rights implications of those parts of the Newton Committee Report which relate to Parts 1, 2, 8, 10 and 11 of the Act (paragraphs 41-59 below).

## 3 The draft continuance order 2004

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### Background

17. Part 4 contains some of the most controversial aspects of the 2001 Act. It is also the one which raises the most intense problems of compatibility with human rights, and led to a derogation by the United Kingdom from the right to liberty of the person under ECHR Article 5. Part 4 contains the power in sections 21 to 23 of the Act to detain a person indefinitely without any criminal charge, let alone a trial, if:

- a) the Secretary of State has certified that he reasonably believes that the person is a terrorist (including in this category anyone who ‘has links with an international terrorist group’);
- b) the person is a foreign national; and
- c) for legal or practical reasons, the person cannot be removed from the United Kingdom.

18. In order to avoid a situation in which this detention would be held to amount to a violation of the right to liberty of the person under ECHR Article 5.1, the Secretary of State made a derogation order under section 14 of the Human Rights Act 1998 designating a derogation from Article 5 for the purpose of combating the threat of terrorism as one of the derogations to which the Convention rights are subject under section 1 of that Act. The Government subsequently gave notice to the Secretary General of the Council of Europe that it considered that sections 21 to 23 of the 2001 Act were a justifiable derogation under Article 15 of the ECHR, on the ground that the terrorist attacks on the USA in September 2001 showed that there was a public emergency threatening the life of the nation and the measures derogated from the United Kingdom’s obligations under Article 5 no further than was strictly required by the exigencies of the situation and consistently with the United Kingdom’s other obligations under international law. An equivalent notice of derogation was given under the International Covenant on Civil and Political Rights, Article 4, in respect of the right to liberty of the person under Article 9. No other State party to the Convention or the International Covenant has made such a derogation in the wake of 11 September 2001.

### *Our previous reports relating to Part 4 of the Act*

19. When we considered the derogation and this Part of the Bill in 2001, we noted that we had not been shown any evidence of a public emergency threatening the life of the nation, although we accepted that there might be such evidence. We considered that the safeguards attached to the powers were insufficient to ensure that the measures in the Bill could be said to be strictly required by the exigencies of the situation.<sup>8</sup> We also drew attention (a) to the risk that the provisions would unlawfully discriminate on the ground of nationality, since only foreign nationals would be liable to be detained,<sup>9</sup> (b) to the need for stronger

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<sup>8</sup> Joint Committee on Human Rights, Second Report of Session 2001-02, *Anti-terrorism, Crime and Security Bill*, HL Paper 37, HC 372, para. 30.

<sup>9</sup> *ibid.*, paras 38–39.

procedural protections for appellants before the Special Immigration Appeals Commission and the courts, and (c) to the need for more frequent reviews of detention.<sup>10</sup> In addition, we drew attention to a number of other procedural problems.

20. The sections were to cease to have effect after fifteen months (in March 2003) unless continued by affirmative resolution of each House. In preparation for the debate, Lord Carlile of Berriew QC conducted a statutory review of the operation of sections 21 to 23.<sup>11</sup> We then reported to each House on its view as to the propriety of continuing the operation of the sections.<sup>12</sup> We adopted the following position:

- a) we expressed doubts about the compatibility of the derogation with the Convention;<sup>13</sup>
- b) we took the view that the derogation was likely to have been valid and effective in municipal law under the Human Rights Act 1998, although we considered that it had not been proper to make the order in the abstract, before the detailed provisions to which it related had been endorsed by Parliament;<sup>14</sup>
- c) we recognised that it was for the courts to decide whether the detention of particular suspects was vitiated by unlawful discrimination;<sup>15</sup>
- d) we repeated its earlier recommendation, and endorsed that of Lord Carlile of Berriew, that the nature of the “links” with international terrorism sufficient to form the basis of a certificate made by the Secretary of State should be clarified;<sup>16</sup> and
- e) we came to the conclusion that the two Houses could legitimately rely on the review by Lord Carlile of Berriew and decide that the measures were being operated fairly,<sup>17</sup> although we drew attention to systemic weaknesses in the protection for human rights, which might properly be reasons for refusing to continue the measures in force, stemming from:
  - i) the time it had taken the Special Immigration Appeals Commission to hold any substantive hearing into the merits of the detainees’ appeals;<sup>18</sup>
  - ii) the shortage of properly qualified, high-quality legal advice available to detainees;<sup>19</sup>
  - iii) doubts as to whether evidence was being categorized as “open” or “closed”, for the purpose of withholding it from appellants and their legal advisers, in a way that properly reflected the importance to procedural due process of withholding evidence from parties only when making it available would compromise the effort

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10 *ibid.*, paras. 49–50.

11 *Anti-terrorism, Crime and Security Act 2001, Part IV section 28 Review by Lord Carlile of Berriew QC*, February 2003.

12 Joint Committee on Human Rights, Fifth Report of Session 2002–03, *Continuance in Force of Sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001*, HL Paper 59, HC 462.

13 *ibid.*, paras. 18–22.

14 *ibid.*, paras. 23–27.

15 *ibid.*, paras. 28–33.

16 *ibid.*, paras. 34–35.

17 *ibid.*, paras. 36–38 and 53–54.

18 *ibid.*, paras. 39–41.

19 *ibid.*, para. 42.

to protect the public against the national emergency which gave rise to the derogation under ECHR Article 15 and justified the detention;<sup>20</sup>

- iv) concern to ensure that the services of the special advocate, who could see and make submissions in the detainees' interests about 'closed' material, would be able to participate in proceedings in the Court of Appeal and House of Lords on appeal from the Special Immigration Appeals Commission;<sup>21</sup> and
- v) concern to ensure that the detainees' conditions of detention should reflect their status as people who have been neither charged with nor convicted of any offence.<sup>22</sup>

21. In the event, the operation of the powers was extended for twelve months from March 2003, and the two Houses must now consider whether to renew them again for a further twelve months.

### **The views of the Newton Committee on Part 4 of the Act**

22. The Newton Committee drew attention to a number of features of Part 4 of the Act which, in its view, make it an inappropriate basis for continuing to deal with the threat from international terrorists. Several of these features stem from the fact that the detention power is based on immigration law, rather than being a measure specifically designed for the needs of counter-terrorism. There are objections of principle, namely:

- a) the need for the United Kingdom, alone among Council of Europe member states, to derogate from Article 5 of the ECHR; and
- b) the indefinite period for which detention can continue; and the fact that selective use of a power such as this opens the door to arbitrary action.<sup>23</sup>

23. The Newton Committee thought that there were also objections relating to efficacy, since the terrorist threat is not limited to foreign nationals.

24. Finally, the Newton Committee thought that there was evidence of a lack of proactive, focused, case-management in determining whether any particular detainee should continue to be detained.<sup>24</sup>

25. The Newton Committee considered the shortcomings to be sufficiently serious to allow it to recommend strongly that the provisions of Part 4 should be replaced as a matter of urgency. The Committee recommended that new legislation should deal with all terrorism, whatever its origin or the nationality of its suspected perpetrators, and should not require a derogation from the ECHR.<sup>25</sup>

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20 *ibid.*, paras. 43–48.

21 *ibid.*, paras. 49–50.

22 *ibid.*, paras. 51–52.

23 Newton Committee Report, paras. 186–191.

24 *ibid.*, paras. 192–201.

25 *ibid.*, para. 203.

## The Home Secretary's views

26. These factors are relevant to the continuance in force of sections 21 to 23 of the Act after 13 March 2004. Our Chair therefore asked the Home Secretary for the Government's response. The Home Secretary replied, "The need for these powers will continue to exist whilst the public emergency remains and whilst we are unable to take action to remove suspected international terrorists". However, he continued, "It is not possible to predict for how long the current state of public emergency will continue to subsist".<sup>26</sup> The Home Secretary told us he plans to launch a consultation exercise on possible measures to replace or complement the detention powers, looking towards a possible reform "in the longer term" (answers to questions 2 and 4).<sup>27</sup> It is clear that no developed proposal will be ready before the debates take place in the two Houses.

27. In a written statement made by the Home Secretary on 20 January 2004 when he laid the draft Continuance Order before each House, he said that the detention powers in Part 4 of the Act "are a cornerstone of the UK's anti-terrorism measures. It is essential that we are able to take firm, swift action against those who threaten the safety of this country....[W]e continue to believe that the Part 4 powers are a necessary and proportionate response to the current threat".<sup>28</sup> He disclosed that 16 people had been detained under the Part 4 powers. Two had subsequently left the country. The Special Immigration Appeals Commission (SIAC) had rejected appeals by ten detainees, and judgment is awaited in respect of two more.

28. In his letter to our Chair, the Home Secretary informed us that he did not accept the criticisms made by the Newton Committee about the management of individual cases. In his written statement of 20 January 2004 he had already stated, "My decisions to certify and detain these individuals were made on the basis of detailed and compelling evidence".<sup>29</sup> In his letter, he further assured us that the cases had been fully considered again in preparation for the detainees' appeals to the SIAC, and that the individual cases were kept actively under review, a process which had led to one detainee being convicted on criminal charges and another currently being prosecuted. He pointed out that some delay had occurred in getting individual cases heard by SIAC as a result of the need to litigate the lawfulness of the derogation from rights under ECHR Article 5 as a preliminary issue, and mentioned that some difficulty was being experienced in returning detainees to their countries of origin because SIAC had imposed an order requiring the detainees' anonymity to be maintained.<sup>30</sup>

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26 See Appendix 2, reply to question 1, pp. 28–9.

27 See Appendix 2, reply to questions 2 and 4, pp. 29–30.

28 HC Deb., 20 January 2004, c 56WS.

29 HC Deb., 20 January 2004, c 56 WS.

30 See Appendix 2, reply to question 3, p. 29.

## Lord Carlile's Report on the operation of sections 21 to 23 in 2003

### *The context of Lord Carlile's Report*

29. Lord Carlile begins his report by pointing out that he is required to report on the operation of sections 21 to 23 of the Act on the premise that they are in effect, whereas the Newton Committee was required to advise as to whether they considered that those sections should remain in effect.<sup>31</sup> He referred to comparisons with other countries which he had undertaken, and mentioned the risk of “*function creep*”—the tendency of the control authorities such as the police to want to use information provided for counter-terrorism purposes in a wider context.<sup>32</sup>

30. Lord Carlile noted that we had not been persuaded in 2001 that the conditions for the derogation had been met, but that the SIAC and the Court of Appeal had concluded that they were met, although the matter is subject to an appeal to the House of Lords in which judgment is expected early in the Spring of 2004. He also commented on the fact that the detention provisions “are wide in their scope and have a significant impact on a particular group of the resident community ... who do not hold British nationality”.<sup>33</sup> He agreed with a view expressed by the SIAC that grounds for detention which may be reasonable for an arrest and a short period of detention “may be insufficient for indefinite detention. Taking into account all the circumstances as one should, the passage of time may alter significantly the threat posed by an individual or even a group or former cell”.<sup>34</sup>

31. Lord Carlile noted that the Government had rejected his suggestion, in his report last year, that the “links” to international terrorism which would justify detention under section 21(2) and (4) of the Act should be clarified. He accepted the rejection, and drew attention to the judgment of the SIAC that it is possible, within the scope of the SIAC’s powers under section 25, to allow a detainee “to contend that even if what is said against him were true, recourse to so draconian a power was disproportionate in the light of other circumstances”.<sup>35</sup> Lord Carlile considered that this set the notion of “links” in “an acceptable context”.<sup>36</sup>

### *Lord Carlile's findings and recommendations*

32. After a full and careful examination of the operation of the whole of the procedure for operating sections 21 to 23 of the Act, Lord Carlile concluded that:

- a) “there remain in the United Kingdom individuals and groups who pose a present and real threat to the safety of the public here and abroad”;<sup>37</sup>
- b) in every individual case, the criteria for detention were met;<sup>38</sup>

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31 Carlile Report, p. 4, para. 7.

32 *ibid.*, pp. 5–6, para. 11.

33 *ibid.*, p. 7, paras 18 and 21.

34 *ibid.*, p. 9, para. 25, citing *Ajouau and A, B, C and D* [2003] Appeal Nos. *SC/1/2002; SC/6/2002; SC/7/2002; SC/10/2002*, SIAC judgment of 29 October 2003 (hereafter ‘the generic judgment’), paras. 46–48.

35 Generic judgment, para. 24.

36 Carlile Report, p. 12, paras. 33–35.

37 *ibid.*, p. 13, para. 42.

- c) civil servants in the Home Office exert pressure to decrease rather than increase the level of detentions;<sup>39</sup>
- d) criminal charges are being brought whenever possible (although not necessarily for terrorism-related offences), in order to bring the detention into line with conventional ideas of lawfulness and due process: like the Newton Committee, Lord Carlile considered (as we do) that normal criminal proceedings should be the preferred approach;<sup>40</sup>
- e) the Home Secretary considers each case in an active and inquiring way;<sup>41</sup>
- f) appropriate levels of political executive judgment are generally being applied to certification decisions;<sup>42</sup>
- g) there is, however, a tendency to over-estimate the risk that a person would be exposed to the risk of death, torture, or inhuman or degrading treatment or punishment, in violation of ECHR Article 2 or 3, if returned to his or her country of origin; the Foreign and Commonwealth Office is inclined to rely on a generic assessment of risk in a country, rather than to enter into bilateral discussions with the country as to the likely experience of the people being considered for removal to that country; and the Government should investigate the possibility that in some cases it might be possible to return a person to his or her country of origin, avoiding the need for indefinite detention in this country;<sup>43</sup>
- h) overall, the SIAC procedure is proceeding according to “a determined and managed timetable” (albeit one which faces delays because of the preliminary litigation over the lawfulness of the derogation from ECHR Article 5 rights and a possible future application to the European Court of Human Rights); it “operates effectively and proportionately to the risks of national security, especially in the light of the disclosure and hearing constraints applicable”;<sup>44</sup>
- i) the statutory review periods, which we had considered to be insufficiently frequent, have not caused difficulties to the SIAC;<sup>45</sup>
- j) at present a detainee who leaves the country cannot continue his or her appeal from outside the country; the Act should be amended to allow such a person to protect his or her future position by continuing an appeal on the merits against certification from outside the country;<sup>46</sup>
- k) the Special Advocates (who represent the interests of appellants in relation to material which is too sensitive to be disclosed to the appellants or their legal advisers) have done

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38 *ibid.*, p. 12, para. 36.

39 *ibid.*, pp. 12–13, para. 38.

40 *ibid.*, p. 27, para. 101 and p. 30, para. 113.

41 *ibid.*, p. 13, para. 39.

42 *ibid.*, p. 13, para. 40.

43 *ibid.*, pp. 25–26, paras. 94–96

44 *ibid.*, p. 17, paras. 55–57.

45 *ibid.*, p. 17, para. 62.

46 *ibid.*, p. 18, para. 66.

a good job within the scope of their powers, and “the special advocate procedure works reasonably well to achieve its purpose of assisting SIAC to reach decisions correct in fact and law”;<sup>47</sup>

- l) however, as the shortage of Special Advocates has delayed hearings, there should be—
  - i) organised training opportunities at which Special Advocates can share problems and develop common approaches to procedural and ethical issues, and receive training,
  - ii) a security-cleared assistant in every case to help the Special Advocate, for example by categorising papers and acting as a conduit of information, and
  - iii) a widening in the range of people who are appointed as Special Advocates beyond the ranks of those with specialist knowledge in administrative law, for example by including people with expertise in the practise of criminal law;<sup>48</sup>
- m) it should be made clear that the Special Advocate should continue to represent the interests of the appellant in closed proceedings before the SIAC even if the appellant instructs his or her representatives to withdraw from the open proceedings;<sup>49</sup>
- n) those in authority should consider whether Special Advocates should have greater access to the appellants in relation to the closed material, to assist the Special Advocates in the performance of their duties and the SIAC in its procedure;<sup>50</sup>
- o) as much relevant information as possible should disclosed;<sup>51</sup> but that
- p) taken as a whole, the present system is “workable and working reasonably well”.<sup>52</sup>

## Our conclusions in the light of the two reports

33. We consider that the reports of the Newton Committee and Lord Carlile in relation to Part 4 of the Act are valuable and complementary. In the light of them, and of our previous scrutiny of the Act and its operation, we have come to the conclusion there are serious weaknesses in the protection for human rights under Part 4. We continue to doubt whether the very wide powers conferred by Part 4 are, in Convention terms, strictly required by the exigencies of the situation.

34. Like the Newton Committee, we have grave concerns about long-term detention without trial on the basis of suspicion of links with international terrorism, necessitating an indefinite derogation from the important right to liberty under ECHR Article 5. Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation. Even if the derogation

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47 *ibid.*, p. 23, para. 85.

48 *ibid.*, pp. 20–21, paras. 69–75.

49 *ibid.*, p. 22, para. 80.

50 *ibid.*, p. 22, para. 81.

51 *ibid.*, p. 23, paras. 84 and 86–89.

52 *ibid.*, p. 31, para. 123.

were found by the courts to be justified under Article 15 we would still consider it to be deeply undesirable.

35. We remain deeply concerned about the human rights implications of making the detention power an aspect of immigration law rather than anti-terrorism law. We agree with the Newton Committee that applying the power only to people who are not United Kingdom nationals reduces its efficacy as an anti-terrorism tool, and with Lord Carlile that it has a particular impact on one part of the resident community. We have previously expressed the view that this means that Part 4 is incompatible with the right to be free of discrimination in the enjoyment of Convention rights under ECHR Article 14. The SIAC took the same view, but the Court of Appeal considered that the difference of treatment was justifiable as having an objective and rational justification. Until the matter is finally and authoritatively settled (which may require an application to the European Court of Human Rights in Strasbourg) we remain of the view that there is a significant risk that Part 4 violates the right to be free of discrimination under ECHR Article 14.

36. As both the Newton Committee and Lord Carlile accept, we are convinced that there is a need for other measures to respond to the threat of terrorism. While we note that Lord Carlile has found that the certification and detention of those detained so far under Part 4 was fully in accordance with the statutory criteria, and that the SIAC is capable of applying those criteria in a proportionate and context-sensitive way, provided that it acts in accordance with the requirements of Article 6 of the Convention; and while we appreciate that at least some of those who are currently in detention may pose a threat which would make it undesirable to release them while a search is taking place for an alternative; we are nevertheless certain that a more satisfactory legal framework is urgently required which would be both effective and compatible with the United Kingdom's human rights obligations including full compliance with Article 5 of the ECHR.

**37. We are not persuaded that it is appropriate to renew Part 4 when there is no end in sight of the “emergency” by which these exceptional powers were considered to be justified. If the Government argue that it is necessary to continue Part 4 in force this should be limited to six months and should be subject to a firm undertaking that the Government will actively seek, as a matter of priority, a new legal basis for its anti-terrorism tactics to be put in place speedily and in accordance with the principles developed in the Newton Committee Report.**

**38. In the event that the Government persuades Parliament that these exceptional powers should be continued, we support the recommendation of the Newton Committee that the Government should publish up-to-date, anonymised information about each individual Part 4 certification and the number of detentions there have been under the Terrorism Acts (including the Terrorism Act 2000 as well as the 2001 Act) and their outcomes (for example prosecution, certification under Part 4, release, etc.).<sup>53</sup> This would help Parliament to assess the continuing need for these, or other, measures, as well as providing a degree of openness for the process which could be a safeguard for the human rights of detainees.**

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<sup>53</sup> Newton Committee Report, para. 258.

39. We also support the recommendations of Lord Carlile for improving the way in which the current procedures operate while they continue to have effect, particularly those noted above in paragraph 32 g), j), l), m) (subject to the outcome of appropriate consultations with the Bar Council and the Law Society on the ethical implications of requiring a Special Advocate to continue to act without the support of the appellant), n) and o).

40. Finally, we draw the attention of each House once more to the substantial concerns which we expressed in our earlier reports on this Part of the Act, summarised in paragraphs 19 and 20 above, not least to those in paragraph 20(e)(v) about which we believe there are real grounds for anxiety.

## 4 Recommendations of the Newton Committee relating to the human rights implications of other Parts of the Act

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### *Part 2 of the Act: Freezing Orders*

41. We did not raise any issue relating to freezing orders when we first examined the Bill in 2001. However, it has subsequently become clear that freezing orders may have human rights implications. They would be made by the Treasury, rather than by a judge, and would freeze the assets of named people. They would engage the right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the ECHR, and the Human Rights Act 1998. They would also engage the right to honour and reputation of the people named, which arises under ECHR Article 8<sup>54</sup> (which is part of UK law) as well as under Article 17 of the International Covenant on Civil and Political Rights (which does not form part of municipal law in the United Kingdom but which binds the United Kingdom in international law).

42. At present, the power under the 2001 Act is not being used, because freezing orders are made under the Terrorism (United Nations Measures) Order 2001, which itself was made under powers conferred by the United Nations Act 1946, section 1. The operation of the freezing orders made under that Order and Act are questionable in human rights terms, because there is no right to appeal against the orders and (despite the Government's contrary view) we consider that judicial review provides only a very limited protection against legislative orders of this kind, except where they contravene European Community law.

43. **We therefore endorse the recommendation in the Newton Committee that “freezing orders for specific use against terrorism should be addressed again in primary legislation” and that “freezing orders for other emergency situations, and the safeguards which should accompany them, should be reconsidered on their own merits in the context of more appropriate legislation for emergencies” (paragraphs 149 to 150 of the Newton Committee report).**

### *Part 3 of the Act: Disclosure of Information*

44. We have, on a number of occasions, drawn attention to the shortage of safeguards for the right to respect for private life (ECHR Article 8) in the provisions of Part 2, which permit a wide range of public authorities to disclose information to investigators in the UK or abroad in respect of any crime, and to the Security and Intelligence Services in the UK.

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54 See *Fayed v. United Kingdom* (1994) 18 EHRR 393, Eur. Ct. HR.

We drew attention to the threat to Article 8 rights when the precursors of the present provisions were contained in the Criminal Justice and Police Bill in the 2000–01 session.<sup>55</sup>

45. The provisions were dropped before the Bill became an Act, but were reintroduced in the Anti-terrorism, Crime and Security Bill in November 2001. Again, we drew attention to the significant risk of a violation of Article 8 rights because of the range of offences covered, the lack of any statutory criteria to govern the disclosure of information, and the lack of procedural safeguards.<sup>56</sup> Nevertheless, the provisions were passed without amendment, and became Part 3 of the Act.

46. The Newton Committee endorsed the Joint Committee's concern (at paragraph 165), and recommended independent external oversight of the whole disclosure regime (at paragraph 166) and prior authorisation by a senior person in terrorism cases and by a judge in other cases (at paragraphs 170 to 171).

**47. We welcome the analysis by the Newton Committee, and endorse its recommendations.**

### ***Part 8 of the Act: Security of Nuclear Industry***

48. When reporting on the Bill in December 2001, we drew attention to the new criminal offences, in what are now sections 79 and 80 of the 2001 Act, committed by someone who makes an unauthorized disclosure of sensitive information about the security of nuclear sites, nuclear material or uranium enrichment nuclear technology. We pointed out that this might prevent people from making important disclosures about threats to health from the escape or negligent handling of nuclear material, particularly as the provisions contain no exception for disclosures in the public interest. We drew attention to the risk that this might lead to a violation of:

- a) the right of people whose health is threatened to have information about the risk, as an aspect of the right to respect for private life under ECHR Article 8; and
- b) the right of people with disclosures to make to freedom of expression under ECHR Article 10.<sup>57</sup>

49. The Newton Committee noted these concerns, but drew attention to certain assurances which the Government had given about the way the provisions would operate, and in the light of them concluded that there was no reason to object to the sections.<sup>58</sup> **We accept this conclusion, and may seek information in the future about the way in which the assurances are being put into practice.**

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55 Joint Committee on Human Rights, First Report of Session 2000–01, *Criminal Justice and Police Bill*, HL Paper 69, HC 427, paras. 58–66.

56 Joint Committee on Human Rights, Second Report of Session 2001–02, *Anti-terrorism, Crime and Security Bill*, HL Paper 37, HC 372, para. 24.

57 Joint Committee on Human Rights, Fifth Report of Session 2001–02, *Anti-terrorism, Crime and Security Bill: Further Report*, HL Paper 51, HC 420, paras. 25–26.

58 Newton Committee Report, paras. 302–306.

### **Part 10 of the Act: Police Powers**

50. The Newton Committee drew attention to measures in Part 10 of the 2001 Act (sections 89 to 93) to make it easier to identify people in custody. These apply generally, not only in terrorism investigations. The provisions allow the police in non-terrorism cases to search and examine a person for any identifying mark which might identify him or her as an individual involved in the commission of any offence, or facilitate the ascertainment of his or her identity; to take fingerprints using reasonable force if necessary where they will facilitate ascertainment of the person's identity; and to take photographs, removing face coverings (including face paint) in order to make the photographs useful. In addition, the provisions allow the police to take fingerprints from those detained under the Terrorism Act 2000 to ascertain their identities. Once fingerprints and photographs have been taken, they can be retained indefinitely for the general purpose of preventing and detecting crime.

51. The Newton Committee noted that the use of these powers is not being systematically recorded. Their usefulness in relation to non-terrorism crimes is difficult to assess, and none of the cases which the committee discovered had resulted in the identification as a terrorist of someone arrested for another reason.<sup>59</sup> The Committee observed that each extension of the powers had been controversial, and opined that the provisions ought not to have been included in emergency legislation. It recommended limiting the powers to cases where a person has been charged with an offence, or where he or she is authoritatively certified as being of ongoing importance in a terrorist investigation.<sup>60</sup>

52. These concerns echo those which we had expressed about the extensions to the powers when they were contained in the Anti-terrorism, Crime and Security Bill in November 2001.<sup>61</sup> At that time we drew attention to the need for additional safeguards to protect the rights of detainees under ECHR Articles 3 and 8. **We remain of that view, and endorse the views of the Newton Committee.**

53. The Newton Committee suggested that limits should be placed on the power under sections 94 and 95 of the 2001 Act to remove and confiscate disguises. It noted that the powers have been used against hunt saboteurs rather than suspected terrorists, and that there is no evidence that it has been useful in counter-terrorism operations. The Committee considered that the use of the power should be limited to situations where a senior police officer believes that the measure is necessary in response to a specific terrorist threat.<sup>62</sup>

54. This is in line with the concerns which we expressed about these provisions in 2001, arguing that they gave rise to a potential threat to the right to respect for private life under ECHR Article 8, and, if used particularly against Muslims (a danger which, the Newton Committee found, there is no evidence of having materialized), the right to freedom to manifest one's religion under ECHR Article 9.

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59 *ibid.*, paras. 340–343.

60 *ibid.*, paras. 344–345.

61 Joint Committee on Human Rights, Second Report of Session 2001-02, *op cit.*, paras. 62–62.

62 Newton Committee Report, paras. 351–354.

55. We therefore endorse the views of the Newton committee on this matter.

### **Part 11 of the Act: Retention of Communications Data**

56. Part 11 of the Act contains provisions allowing the Secretary of State to require communications system providers to retain certain information about the use which customers make of their services, and to make that information available to investigators on request. The powers were to be regulated in accordance with a code of practice. The provisions were immediately highly controversial. Many people, including the Information Commissioner, drew attention to the lack of safeguards for the right to respect for private life and correspondence under ECHR Article 8.<sup>63</sup> When a draft code of practice was eventually promulgated in 2003, we drew attention to a number of threats to human rights. In particular:

- a) we considered it unlikely that the service providers, when retaining and disclosing the data, would be public authorities, so it was unlikely that they would be subject to the duty to act in a manner compatible with Convention rights under section 6 of the Human Rights Act 1998;<sup>64</sup> and
- b) we were not satisfied that the arrangements in the draft code would ensure that the interference with rights under ECHR Article 8.1 would be proportionate to legitimate objectives so as to be justifiable under ECHR Article 8.2.<sup>65</sup>

57. Despite this, we were prepared to accept that, as a matter of policy, it should be possible to access communications data which are available, if they are relevant to a particular case and the access is necessary for and proportionate to a legitimate aim under ECHR Article 8.2.<sup>66</sup>

58. The Newton Committee, after a full review, stressed its belief that “it would be beneficial for both users and subjects of the data if retention and access were based on a coherent statutory framework”.<sup>67</sup> This should be part of mainstream legislation, not special terrorism legislation.<sup>68</sup> The maximum period of retention should be one year, to strike a balance between the justifiable need for access to the data when combating terrorism and other serious crimes and the protection of the right to privacy.<sup>69</sup> The Newton Committee also recommended that the whole retention and access regime should be subject to unified oversight by the Information Commissioner, and that a coherent legislative framework, going beyond that currently available in the Regulation of Investigatory Powers Act 2000, should be put in place to govern both retention of and access to communications data.<sup>70</sup>

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63 See the evidence of the Commissioner to the JCHR; Joint Committee on Human Rights, Fifth Report of Session 2001–02, *op cit.*, pp. 1–3.

64 Joint Committee on Human Rights, Sixteenth Report of 2002–03, *Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001*, HL Paper 181, HC 1272, paras. 11–12.

65 *ibid.*, paras. 18–19.

66 *ibid.*, para. 25.

67 Newton Committee Report, para. 391.

68 *ibid.*, para. 396.

69 *ibid.*, paras. 401–404.

70 *ibid.*, paras. 405–406.

**59. We endorse these conclusions of the Newton Committee, as being likely to allow, for the first time, some confidence that rights under ECHR Article 8 would be properly safeguarded in this field.**

# Formal Minutes

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**Monday 23 February 2004**

Members Present:

Jean Corston MP, in the Chair

Lord Bowness	Mr David Chidgey MP
Lord Campbell of Alloway	Mr Kevin McNamara MP
Lord Judd	Mr Paul Stinchcombe MP
Lord Lester of Herne Hill	
Lord Plant of Highfield	
Baroness Prashar	

The Committee deliberated.

\* \* \* \* \*

Draft Report [Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4], proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 33 read and agreed to.

Paragraph 34 read as follows:

“Like the Newton Committee, we have grave concerns about long-term detention without trial on the basis of suspicion of links with international terrorism, necessitating an indefinite derogation from the important right to liberty under ECHR Article 5. Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation. Even if the derogation were found by the courts to be justified under Article 15 we would still consider it to be deeply undesirable.”

Amendment proposed, to leave out the first sentence of the paragraph and to insert the following sentence in its place: “ In the absence of clear and sufficient evidence to the contrary, we cannot accept that derogation under Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation”.—(*Mr Kevin McNamara*.)

Question put, That the Amendment be made.

The Committee divided:

Content, 2

Not Content, 5

Lord Judd

Jean Corston MP

Mr Kevin McNamara MP

Lord Bowness

Lord Plant of Highfield

Baroness Prashar

Mr Paul Stinchcombe MP

Paragraph 34 agreed to.

Paragraph 35 agreed to.

Paragraph 36 read as follows:

“As both the Newton Committee and Lord Carlile accept, we are convinced that there is a need for other measures to respond to the threat of terrorism. While we note that Lord Carlile has found that the certification and detention of those detained so far under Part 4 was fully in accordance with the statutory criteria, and that the SIAC is capable of applying those criteria in a proportionate and context-sensitive way, provided that it acts in accordance with the requirements of Article 6 of the Convention; and while we appreciate that at least some of those who are currently in detention may pose a threat which would make it undesirable to release them while a search is taking place for an alternative; we are nevertheless certain that a more satisfactory legal framework is urgently required which would be both effective and compatible with the United Kingdom’s human rights obligations including full compliance with Article 5 of the ECHR.”

Amendment proposed, in line 6, to leave out the words from “Convention” to the end of the paragraph and insert in their place the words “and while it is essential to take all necessary measures to defend society from the threat or acts of terrorism it is unacceptable to rely upon indefinite detention without trial thereby denying rights guaranteed by the ECHR; a satisfactory legal framework is urgently required that would be both effective and compatible with UK obligations, including full compliance with Article 5 of the ECHR.”.—  
(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 1

Not Content, 6

Mr Kevin McNamara MP

Jean Corston MP

Lord Bowness

Mr David Chidgey MP

Lord Plant of Highfield

Baroness Prashar

Mr Paul Stinchcombe MP

Paragraph 36 agreed to.

Paragraphs 37 to 59 agreed to.

Summary agreed to.

*Resolved*, That the Report be the Sixth Report of the Committee to each House.

*Ordered*, That certain papers be appended to the Report.

*Ordered*, That the Chairman do make the Report to the House of Commons and that Baroness Prashar do make the Report to the House of Lords.

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[Adjourned till Monday 1 March a quarter past Four o'clock.

# Appendices

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## 1. Letter from the Chair to Rt Hon David Blunkett MP, Secretary of State for Home Affairs

### **Draft Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23 ) Order 2004 and Report of the Newton Committee**

The Committee has noted the laying of the draft Anti-terrorism, Crime and Security Act 2001(Continuance in force of sections 21 to 23 ) Order 2004 on 20 January, and the Written Statement in Hansard for that day at columns 56-7WS.

You will recall that in its Fifth Report of last session the JCHR reported on the draft Order laid a year ago. The Committee may wish to report again on the latest renewal order. In order to assist its consideration of whether and when to do so, it seeks some further information.

In your written statement, you assert that the state of emergency which necessitated the adoption of these powers continues to exist, and you draw attention to the decisions of the SIAC on the cases of the individual detainees.

**1. Since the powers contained in sections 21 to 23 of the Act were determined by Parliament to be so exceptional as to be justified only on a temporary basis, and subject to annual renewal, have you formed any view as to how long you consider that this state of emergency is likely to persist, and in what foreseeable circumstances the need for these powers will cease to exist?**

In your written statement, you also draw attention to the report of Lord Newton of Braintree's Committee's report on the operation of the whole of the 2001 Act. You will be aware that that Committee recommended the urgent replacement of Part 4 of the Act, and offered some alternative methods of achieving the objectives sought which would, in particular, remove the necessity for continuing the derogation from the Human Rights Act and the ECHR.

**2. Do you intend to respond formally and in writing to the comments of the Newton Committee, at least so far as they relate to Part 4, before you invite Parliament to agree the draft Order relating to Part 4 of the Act?**

**3. In particular, how do you intend to respond to the criticisms of that Committee concerning the management of the cases of the individuals detained under the Part 4 powers, and the lack of evidence of active efforts to find alternatives to continued detention?**

**4. If you consider that there is no foreseeable end to the state of emergency that you believe necessitates the continuation of these powers, what active consideration are you giving to finding alternative means of achieving the ends you seek which would obviate the need for the continuation of the derogation and would be able to be passed in a form which Parliament might consider appropriate to agree to on a long-term basis?**

**5. The meaning of section 123(3) of the 2001 Act, relating to the effect of any "motion ... passed in each House of Parliament considering the report" is unclear. How do you interpret its effect? Is it your intention to table a substantive motion which will enable each House to express approval or**

**disapproval of the recommendations of the Committee of Privy Councillors in relation to the separate provisions of the Act? And how do you intend to respond to any decision of either House which indicates disapproval of the continuance in force of any provision of the Act?**

In view of the need to consider the motion of approval for the draft Order in good time for 13 March, the Committee would be grateful for a reply to these questions by 11 February. Taking account of the half-term recess, that would enable the Committee to agree any report by 23 February at the latest. Any such report could then be published by 1 March at the latest, which would be in time for any debate to take place after the report was made available to the two Houses. If the response is received sooner, it may be possible for the Committee to report earlier.

*21 January 2004*

## **2. Response from Rt Hon David Blunkett MP, Secretary of State for Home Affairs, to the Chair**

### **Draft anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21-23) Order 2004 and Report of the Newton Committee**

Thank you for your letter of 21 January.

I should say at the outset that arrangements for the two debates are still being finalised, but we expect that both debates will take place in the week commencing 23 February. It would be immensely helpful if your Committee could report before that timescale, and I hope that my responses below to your questions will help this. I know my officials would be very willing to answer any follow up enquiries which may help you to produce your Report.

Turning to the questions:

**1. Since the powers contained in sections 21 to 23 of the Act were determined by Parliament to be so exceptional as to be justified only on a temporary basis, and subject to annual renewal, have you formed any view as to how long you consider that this state of emergency is likely to persist, and in what foreseeable circumstances the need for these powers will cease to exist?**

It is not possible to predict for how long the current state of public emergency will continue to subsist. I have recently reviewed the position, based on an updated assessment of threat. I am satisfied that there is a continuing state of public emergency threatening the life of the nation and that the powers are strictly required by the exigencies of the situation and are proportionate.

The attacks in November, against British interests in Istanbul gives further evidence of the continuing threat posed by Al Quaida.

Both the Special Immigration Appeals Commission and the Court of Appeal have upheld the Home Secretary's conclusion that there is a public emergency threatening the life of the nation within the terms of Article 15 of the ECHR. Whilst the Commission considered that the provisions of the Act were incompatible with Articles 5 and 14 ECHR, in so far as they permitted detention of suspected international terrorists in a way that discriminated against them on the ground of nationality, the Court of Appeal reversed that decision. The House of Lords has granted permission to appeal.

The need for these powers will continue to exist whilst the public emergency remains and whilst we are unable to take action to remove suspected international terrorists, for example, if deportation would result in treatment contrary to ECHR Article 3 within their countries of origin.

**2. Do you intend to respond formally and in writing to the comments of the Newton Committee, at least so far as they relate to Part 4, before you invite Parliament to agree the draft Order relating to Part 4 of the Act?**

The Newton report specifies the whole of the ATCS Act 2001 under the section 123 provisions. This means that the whole of the Act must be debated. We therefore need to debate both the renewal of the part 4 powers and the "Newton Report". I am giving careful consideration to the recommendation of the report and intend to issue, at the time of the debate, a discussion paper on the Part 4 powers. The discussion paper on Part 4 is important. Unlike the coverage of my comments in Pakistan suggests, there is no settled solution to the way in which we will seek to improve the current way in which we detain foreign nationals without charge suspected of terrorism. There are a range of options, which need careful exploration, and I want an open, transparent, debate about this, which will be assisted by the discussion paper I propose to publish. I would very much welcome the JCHR's thoughts on the ideas in the Paper.

**3. In particular, how do you intend to respond to the criticisms of that Committee concerning the management of the cases of the individuals detained under the Part 4 powers, and the lack of evidence of active efforts to find alternatives to continued detention?**

I should say that I do not accept the criticisms made by the Newton Committee about the individual management of the cases. The first tranche of individual appeals (to date all eleven appeals have been dismissed) took longer to come before SIAC because of the legal challenges made by the appellants to the derogation that had to be heard first.

In the preparation for the individual appeals each of the cases was fully considered. This included the threat posed by the individual, the ability to deport and any changes in circumstances.

The individual cases are kept actively under review. One individual has been convicted on criminal charges and another is currently being prosecuted—both cases based on evidence that came to light after certification.

We are actively pursuing a broader policy of seeking removal whilst ensuring that rights of the individual, and the UK's obligations under ECHR are not breached. The individuals are of course free to leave the country at any time should they choose to do so. I should say that we are experiencing some trouble convincing origin countries to accept back detainees because of the anonymity order imposed by SIAC in relation to the detainees' identity.

The first set of reviews—six months after the determination of the appeals—will start in April, with subsequent reviews conducted at three monthly intervals. The reviews will reassess all of this information as well as any new information on the detainees, including a threat assessment and any changes that there may be in ability to remove.

The detainees can of course apply for bail at any time.

**4. If you consider that there is no foreseeable end to the state of emergency that you believe necessitates the continuation of these powers, what active consideration are you giving to finding alternative means of achieving the ends you seek which would obviate the need for the continuation of the derogation and would be able to be passed in a form which Parliament might consider appropriate to agree to on a long-term basis?**

We are already looking at whether there are new measures that we could take, and or refinements that could be made to existing provisions. As I've mentioned, I will be issuing a paper to coincide with the debates, outlining a range of possible options that we could take in the longer term.

**5. The meaning of section 123(3) of the 2001 Act, relating to the effect of any "motion ... passed in each House of Parliament considering the report" is unclear. How do you interpret its effect? Is it your intention to table a substantive motion which will enable each House to express approval or disapproval of the recommendations of the Committee of Privy Councillors in relation to the separate provisions of the Act? And how do you intend to respond to any decision of either House which indicates disapproval of the continuance in force of any provision of the Act?**

I am clear that section 123(3) would be satisfied if, within the period specified in section 123(2), a motion is made in each House that it considers the report.

In this context, a motion along the lines that you suggest (that is one that seeks approval or disapproval of the recommendations of the Committee in relation to the separate provisions of the Act) would fall outside section 123(3). Accordingly, any such motion would not secure the continuance in force of the 2001 Act.

It follows that, under the motion which section 123(3) requires, there will be no decision of either House indicating disapproval of the continuance in force of particular provisions of the 2001 Act. There will only be expressions of opinion by individual speakers. As I understand it, therefore, I do not think it will be necessary to respond to any decision of the House in the way you describe.

I hope this is helpful, and I do hope we will be able to engage with you in the important matters raised by the forthcoming debates, particularly in relation to the Part 4 provisions.

*6 February 2004*

# Reports from the Joint Committee on Human Rights since 2001

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## The following reports have been produced

### Session 2003–04

First Report	Deaths in Custody: Interim Report	HL Paper 12/HC 134
Second Report	The Government's Response to the Committee's Ninth Report of Session 2002-03 on the Case for a Children's Commissioner for England	HL Paper 13/HC 135
Third Report	Scrutiny of Bills: Progress Report	HL Paper 23/HC 252
Fourth Report	Scrutiny of Bills: Second Progress Report	HL Paper 34/HC 303
Fifth Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HL Paper 35/HC 304

### Session 2002–03

First Report	Scrutiny of Bills: Progress Report	HL Paper 24/HC 191
Second Report	Criminal Justice Bill	HL Paper 40/HC 374
Third Report	Scrutiny of Bills: Further Progress Report	HL Paper 41/HC 375
Fourth Report	Scrutiny of Bills: Further Progress Report	HL Paper 50/HC 397
Fifth Report	Continuance in force of sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 59/HC 462
Sixth Report	The Case for a Human Rights Commission: Volume I Report	HL Paper 67-I HC 489-I
Seventh Report	Scrutiny of Bills: Further Progress Report	HL Paper 74/HC 547
Eighth Report	Scrutiny of Bills: Further Progress Report	HL Paper 90/HC 634
Ninth Report	The Case for a Children's Commissioner for England	HL Paper 96/HC 666
Tenth Report	United Nations Convention on the Rights of the Child	HL Paper 117/HC 81
Eleventh Report	Criminal Justice Bill: Further Report	HL Paper 118/HC 724
Twelfth Report	Scrutiny of Bills: Further Progress Report	HL Paper 119/HC 765
Thirteenth Report	Anti-social Behaviour Bill	HL Paper 120/HC 766
Fourteenth Report	Work of the Northern Ireland Human Rights Commission	HL Paper 132/HC 142

Fifteenth Report	Scrutiny of Bills and Draft Bills: Further Progress Report	HL Paper 149/HC 1005
Sixteenth Report	Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 181/HC 1272
Seventeenth Report	Scrutiny of Bills: Final Progress Report	HL Paper 186/HC 1278
Eighteenth Report	The Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child	HL Paper 187/HC 1279
Nineteenth Report	Draft Gender Recognition Bill Vol I: Report	HL Paper 188-I/HC 1276-I
Nineteenth Report	Draft Gender Recognition Bill Vol II: Evidence	HL Paper 188-II/HC 1276-II

#### Session 2001–02

First Report	Homelessness Bill	HL Paper 30/HC 314
Second Report	Anti-terrorism, Crime and Security Bill	HL Paper 37/HC 372
Third Report	Proceeds of Crime Bill	HL Paper 43/HC 405
Fourth Report	Sex Discrimination (Election Candidates) Bill	HL Paper 44/HC 406
Fifth Report	Anti-terrorism, Crime and Security Bill: Further Report	HL Paper 51/HC 420
Sixth Report	The Mental Health Act 1983 (Remedial) Order 2001	HL Paper 57/HC 472
Seventh Report	Making of Remedial Orders	HL Paper 58/HC 473
Eighth Report	Tobacco Advertising and Promotion Bill	HL Paper 59/HC 474
Ninth Report	Scrutiny of Bills: Progress Report	HL Paper 60/HC 475
Tenth Report	Animal Health Bill	HL Paper 67/HC 542
Eleventh Report	Proceeds of Crime: Further Report	HL Paper 75/HC 596
Twelfth Report	Employment Bill	HL Paper 85/HC 645
Thirteenth Report	Police Reform Bill	HL Paper 86/HC 646
Fourteenth Report	Scrutiny of Bills: Private Members' Bills and Private Bills	HL Paper 93/HC 674
Fifteenth Report	Police Reform Bill: Further Report	HL Paper 98/HC 706

Sixteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 113/ HC 805
Seventeenth Report	Nationality, Immigration and Asylum Bill	HL Paper 132/ HC 961
Eighteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 133/ HC 962
Nineteenth Report	Draft Communications Bill	HL Paper 149 HC 1102
Twentieth Report	Draft Extradition Bill	HL Paper 158/ HC 1140
Twenty-first Report	Scrutiny of Bills: Further Progress Report	HL Paper 159/ HC 1141
Twenty-second Report	The Case for a Human Rights Commission	HL Paper 160/ HC 1142
Twenty-third Report	Nationality, Immigration and Asylum Bill: Further Report	HL Paper 176/ HC 1255
Twenty-fourth Report	Adoption and children Bill: As amended by the House of Lords on Report	HL Paper 177/ HC 979
Twenty-fifth Report	Draft Mental Health Bill	HL Paper 181/ HC 1294
Twenty-sixth Report	Scrutiny of Bills: Final Progress Report	HL Paper 182/ HC 1295

