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The Rt Hon Charles Clarke MP  
House of Commons  
London SW1A 0AA

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Thanks you for your letter of 10 June about my proposals on pre-charge detention.

#### **Definition of the threat - derogation**

We can, and indeed have, argued, as did you when you were Home Secretary, that the threat we face from terrorism amounts to an emergency threatening the life of the nation. But this doesn't mean that we can, or should, derogate.

Article 15 ECHR requires there to be **both** such an emergency **and** measures that the State strictly requires to put in place to deal with that emergency that are otherwise inconsistent with the Convention right to be derogated from. We cannot therefore simply derogate from Article 5 (right to liberty) "at large". We can only derogate if "strictly required".

Given that my PCD scheme, containing as it does substantive safeguards and judicial oversight, is fully compatible with Article 5, a derogation is not strictly required (or even required at all). Accordingly, it would be wholly inappropriate to seek to derogate when PCD measures can be put in place entirely compatibly with the ECHR.

#### **Independent legal advice**

The intention behind my new clause 32 is to ensure that Parliament has before it the fullest practicable information, including its own source of legal advice, independent of Government, to enable it to exercise effective scrutiny of any decision to invoke

the reserve power. Such a provision is unusual but warranted in my view by the exceptional nature of what we are proposing.

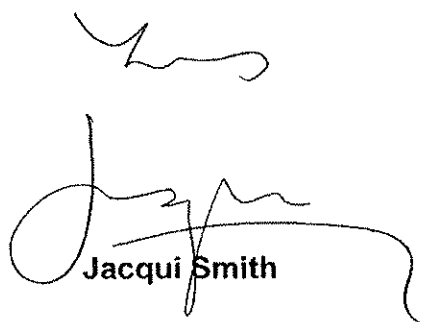
I do not think it sets a precedent as regards Parliamentary consideration of a Secretary of State's certificate of ECHR compliance on any legislation. In practice the JCHR already obtains its own legal advice on the ECHR compatibility of Bills, which illustrates that there are different ways of handling the Parliamentary consideration of legal issues. The purpose of obtaining legal advice is to inform Parliament and the chairs of certain committees and is defined in the Bill as "independent" purely on the basis that it is obtained from outside Government.

### **Judicial Review**

My decision to make an order making the reserve power available may well be challenged. But it will be for the courts to determine the extent to which the validity of the order can be challenged and the grounds on which such a challenge might be based. The making of the statement to Parliament, within 2 days of the order being made, is rather different in that it is a statutory obligation on me as Secretary of State so that Parliament is informed as to my reasons for making the order in advance of its debate.

It is not meaningful to talk about Parliament or the judiciary having precedence – they perform different functions. The Judiciary will only have a role in determining the legality of the Home Secretary's exercise of the power to make the order. In considering whether or not to approve the order within 7 days, Parliament is not limited in what it can take into account.

Lastly may I say that I do not believe that the proposals I have put forward are worthless. They represent a careful balance between giving the police the powers they need but subject to appropriate and effective safeguards.



**Jacqui Smith**