House of Lords
House of Commons

Joint Committee on Human Rights

Counter–Terrorism Policy and Human Rights (Tenth Report): Counter–Terrorism Bill

Twentieth Report of Session 2007-08

Report, together with formal minutes and written evidence

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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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The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), James Clarke (Committee Assistant), and Karen Barrett (Committee Secretary).

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Summary

The Joint Committee on Human Rights scrutinises Government Bills for their human rights compatibility. The Committee draws the special attention of both Houses to the Counter-Terrorism Bill.

This is the Committee's second Report on this Bill. The Committee has also published four other Reports relevant to the Bill. This Report updates them in light of the Government's replies to two of the Committee's Reports and puts forward amendments to the Bill to give effect to the Committee's recommendations. The Committee's approach is based on the human rights standards with which the Government's counter-terrorism measures must be compatible and on the belief that such measures should as far as possible be part of the ordinary criminal law (paragraphs 1-5).

In the Committee's view the Government has not made out its case to extend pre-charge detention beyond 28 days. There is no clear evidence of any likely need for more than 28 days in the near future and there is an alternative, human rights-compliant package of measures available which means there is simply no need to extend the maximum period of pre-charge detention (paragraphs 6-8).

The Committee is very disappointed by the Government's failure to respond fully to its earlier substantial report on 42 days and looks forward to a response to its detailed recommendations in that Report (paragraphs 9-11).

The Committee considers the Government's argument that the Parliamentary safeguards surrounding pre-charge detention are substantial and meaningful but concludes that they confuse parliamentary and judicial functions by attempting to give Parliament the function of extending detention to deal with particular individuals. In view of what is now known about the former Attorney General's view of the previous 90 day proposal, the Committee is disappointed that the Law Officers were not even able to confirm that in their view the proposal to extend pre-charge detention to 42 days is compatible with and will not lead to breaches of the UK's international human rights obligations. The Committee concludes that as the case has not been made out the proposals for 42 days pre-charge detention should be deleted from the Bill. It suggests amendments to the Bill to strengthen the existing judicial safeguards in applications to extend pre-charge detention up to the current limit of 28 days to make them compatible with the right to a judicial hearing in Article 5(4) ECHR (paragraphs 12-36).

Charges for terrorism offences may be brought on the basis of reasonable suspicion that an offence has been committed rather than the normal, higher threshold of a realistic prospect of conviction. The lowering of the charging threshold in terrorism cases therefore significantly reduces the force of the case for extending the maximum period of pre-charge detention. Although the Committee considers this lower Threshold Test in terrorist cases beneficial, it remains of the view that it should be scrutinised by Parliament and placed on a statutory footing with a number of independent safeguards. It proposes an amendment to the Bill to provide an opportunity for parliamentary debate (paragraphs 37-49).

Under the Terrorism Act 2000 there is no provision for bail prior to charge. In the Committee's view the unavailability of bail has become anomalous as the range of terrorist

offences has grown. Bail with conditions would be an important alternative to longer pre-charge detention of those suspected of terrorism offences who do not pose a risk to public safety or a flight risk because it would enable the police to continue their investigations while still maintaining some control over the suspects. The Committee suggests an amendment to the Bill to make court-ordered pre-charge bail with conditions available in relation to terrorism offences (paragraphs 50-56).

The Committee has long recommended a change in the law to permit post-charge questioning, subject to safeguards. The Government has rejected its recommendations that there be specific safeguards on the face of the Bill. The Committee is not persuaded that existing safeguards are adequate and now proposes that the Bill should be amended to include seven safeguards (paragraphs 57-66).

Although the Bill contains some detailed amendments to the control orders regime in the Prevention of Terrorism Act (PTA) 2005, the Government has rejected the Committee's view that more far-reaching amendments are needed to make the regime human rights compatible and to underpin the Government's professed preference for prosecution as the way to deal with terrorists. The Committee now puts forward a series of amendments to the PTA to give effect to its earlier recommendations (paragraphs 67-114).

The Government dismissed as "misplaced" the Committee's concerns about the serious human rights implications of the Bill's provisions on coroners' inquests involving material affecting national security. In the Committee's view the Government's justification, that the changes are necessary in order to make the law compatible with Article 2, is highly questionable. The law of public interest immunity already provides for non-disclosure of certain documents or information which would damage national security and this has been found to be compatible with Article 2 by the European Court of Human Rights. Appointment of the coroner by the Secretary of State would be fatal to any appearance of independence in any inquests where the State is potentially implicated in the death which is being investigated. The Committee therefore recommends that the clauses concerning coroners' inquests should be deleted from the Bill and that the issue should be returned to in the context of the forthcoming Coroners Bill (paragraphs 115-120).

1 Introduction

1. We reported on this Bill before its Second Reading in the Commons, to identify some of the most significant human rights issues raised by the Government's proposals.[1] We have also recently published two other reports of relevance to this Bill:

(1) our Report on 42 Days, published on 14 December 2007[2];

(2) our Report on the Annual Renewal of the Control Orders Legislation, published on 20 February 2008.[3]

2. Two of our earlier reports in our Counter Terrorism Policy and Human Rights series are also relevant: those on "28 days, intercept and post-charge questioning"[4] and "Prosecution and Pre-charge Detention".[5]

3. We now report again on the Bill as it comes out of Committee. The purposes of this further report are twofold:

(1) to comment further on the issues already reported on in the light of the Government's replies to two of our recent reports; and

(2) to suggest amendments to the Bill to give effect to the Committee's recommendations in this and its previous reports.

4. We may report again in relation to other provisions in the Bill which raise human rights issues on which we have not so far focused.

5. **As always, in this Report we ground our analysis in the human rights standards with which the Government's counter-terrorism measures must be compatible, and we proceed from a full recognition that the Government has a duty to protect people from terrorism, a duty imposed by human rights law itself. We also remind Parliament of one of the central and enduring insights of the Newton Committee of Privy Councillors which reported on the operation of the Anti-Terrorism, Crime and Security Act 2001: that counter-terrorism measures ought not to be extraordinary measures in a special category of their own, but, as far as possible, part of the ordinary criminal law of the land.**

[1] Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL Paper 50/HC 199 (hereafter "First Report on Counter-Terrorism Bill").

[2] Second Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights: 42 days*, HL Paper 23/HC 156 (hereafter "Report on 42 days").

[3] Tenth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, HL Paper 57, HC 356 (hereafter "Report on Control Orders renewal").

[4] Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157/HC 394 (hereafter "Report on 28 days, intercept and post-charge questioning").

[5] Twenty-fourth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention*, HL Paper 240/HC 1576 (hereafter "Report on Prosecution and Pre-charge Detention").

2 Pre-charge Detention

Background

6. We have set out our views on the human rights compatibility of the Government's proposal to extend the maximum period of pre-charge detention to 42 days at length in our 42 Days Report (published on 14 December 2007)[6] and our first Report on the Counter-Terrorism Bill (published on 20 February 2008).[7] Our view is that the Government has not made out its case for the need to extend pre-charge detention beyond the current limit of 28 days. Not only have we found no clear evidence of any likely need for more than 28 days in the near future, we have demonstrated, in a series of reports, that there is now an alternative, human rights compliant package of measures which does enough, in combination, to protect the public. Many of the elements of this package of measures are already in place; others are in train and still others are proposed in this Bill. There are also other measures which we propose in this report, which would serve the same purpose. In our view, when these alternative measures are taken in combination, and their interrelationship properly understood, there is simply no need to extend the maximum period of pre-charge detention.

7. The most important elements of the alternative package are:

- The lowering of the charging threshold for terrorism cases (the so-called "Threshold Test")
- The introduction of new offences, such as acts preparatory to terrorism
- The introduction of post-charge questioning with adverse inferences
- The availability of control orders and other forms of surveillance to limit and monitor risk
- The possible future availability of bail with conditions for terrorism offences
- The future admissibility of intercept evidence
- Greater specialisation within the CPS and more active prosecutorial involvement in investigations
- More active case management of terrorism cases by the judiciary, including a more robust approach to defence delaying tactics
- Incentives to those on the periphery of terrorism offences to give evidence, e.g. in the form of better witness protection and the possibility of plea bargaining.

8. As we have said in previous reports, in our view **the Government has failed to consider these alternatives to extending pre-charge detention as a coherent package. Taking these measures in combination, we do not think it can be said that there is really any**

[6] *Report on 42 Days*, paras 1-101.

[7] *First Report on Counter-Terrorism Bill*, paras 10-21.

gap in public protection which warrants taking the extraordinary step proposed by the Government to increase pre-charge detention up to a maximum of 42 days.

The Government's failure to respond to 42 Days Report

9. No reply to our 42 Days report was received by the end of the two month period by which Government responses are due. On 26 March 2008, however, the Government published its Reply to our later Report on the Counter-Terrorism Bill.[8] The Government's Reply responds to the chapter on pre-charge detention in our report on the Bill, but not to our earlier and much more detailed 42 Days Report, in which we had subjected the Government's 42 days proposal to detailed scrutiny after taking a considerable amount of oral evidence on the subject. We therefore enquired as to when we could expect to receive a Government response to that Report.

10. We were astonished to be told that the Reply to the Committee's Report on the Counter-Terrorism Bill is intended by the Government to respond to both reports and the Home Office has no plans to respond further to the Report on 42 days. This had not been agreed with the Committee in advance. Moreover there is no mention of the 42 Days Report in the Government Reply. That Reply contains only four short paragraphs dealing with the compatibility of the 42 days proposal with Article 5 ECHR, and fails to respond to much of the detailed analysis and a number of relevant recommendations contained in the 42 Days Report. We set out below a list of the main recommendations in that Report which have not been responded to at all by the Government:

- That reasoned explanations, rather than mere "statements", be given by Ministers to Parliament concerning extensions of pre-charge detention (para. 15)
- That the Government bring forward the evidence relied on to demonstrate that the level of threat from terrorism has increased in the last year (para. 33)
- That the Government consider the inter-relationship between the various alternatives to pre-charge detention and bring forward a package of alternative measures in place of the 42 days proposal (para. 50)
- That the Government urgently consider introducing bail with conditions for Terrorism Act offences (para. 51)
- That the Home Secretary explain to Parliament why the Government has decided not to propose any additional judicial safeguards surrounding pre-charge detention, when this was one of the questions on which it consulted (para. 70)
- That a number of detailed amendments be made to the statutory regime governing hearings at which pre-charge detention is extended, to make them proper "judicial" hearings (para. 89)

[8] Cm 7344, *The Government Reply to the Ninth Report from the Joint Committee on Human Rights, Session 2007-08 HL Paper 50, HC 199, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter Terrorism Bill* (26 March 2008) (hereafter, "the Government Reply.").

- That the test applied by the court when deciding whether to extend pre-charge detention be amended to require the court to be satisfied that there is a sufficient basis for arresting and continuing to question the suspect (para. 96)
- That legal aid be made available for representation by counsel at hearings to extend pre-charge detention (para. 98).

11. **We are extremely disappointed by the Government's failure to provide a substantive response to a substantial report on the issue which has proved the most controversial in the context of the current Bill. We look forward to the Government at the very least responding to the recommendations we have identified above.**

The Government's response

12. The Government's Response to our Counter Terrorism Bill Report is, for the most part, a restatement of the case it has already made in favour of the 42 days proposal, rather than a response to specific points made by us in our Reports. The Government argues that its proposal will ensure that the higher limit can only be made available when there is a clear and exceptional need to do so, that it will be temporary and subject to "strong oversight from Parliament" and "stringent judicial safeguards". The only new argument contained in the Government Response on this issue is in the form of a more detailed elaboration of the Government's reasons for arguing that the proposed parliamentary oversight of pre-charge detention would be meaningful.

Parliamentary safeguards

13. In our previous reports we pointed out that, because the power to extend the period of pre-charge detention will be exercised in relation to a specific, ongoing investigation, any parliamentary debate about the justification for exercising the power will necessarily be so circumscribed as to be virtually useless as a safeguard against the wrongful exercise of the power.[9] We also pointed out that the order by which the Secretary of State can make the reserve power available is a wholly executive order which is not subject to any parliamentary procedure, and that by the time Parliament expresses a view on whether the reserve power should be made available it is likely that the full 42 day period will have expired.[10] The Government argues that its proposal does contain "substantial and meaningful opportunities" for Parliament to consider whether a higher limit of pre-charge detention should be made available and to ensure that any such extension is accompanied by adequate safeguards. It argues that Parliament will have four opportunities to exercise such meaningful oversight:

(1) when debating and scrutinising the proposal contained in the Bill itself;

(2) when the Home Secretary makes a statement to Parliament as she would be required to do within 2 days of making the higher limit available;

[9] *Report on 42 Days*, above, at para. 61.

[10] *First Report on Counter-Terrorism Bill*, at para. 13.

(3) when Parliament is asked to approve the Home Secretary's decision to make the higher limit available, following a debate in both Houses, which must be within 30 days of that decision; and

(4) when it debates the report of the independent reviewer of terrorism legislation on the way in which individual suspects were detained and on the reasonableness of the Home Secretary's decision.

14. The Government argues that there would be meaningful debates on these occasions, which would not be mere "rubber-stamping" exercises. Although such debates could not discuss details relating to individual suspects, and the Government accepts that "the continued detention of individual suspects is a matter for the courts, not Parliament", the Government would nevertheless expect debates on the Home Secretary's decision to make the reserve power available to be "serious and detailed", and so provide a meaningful opportunity to hold the Home Secretary to account for her decision. It is envisaged by the Government that such debates would be able to cover such things as the exceptional nature of the investigation under way, information relating to the incident or plot involved and the complexities involved in the investigation. It also envisages that the debates following publication of the independent reviewer's report would provide an opportunity "to raise questions about whether individual suspects had been held in accordance with the correct procedures."

15. In our view, while it would clearly be possible for there to be a parliamentary debate of some kind on the Home Secretary's statement to Parliament about having made the 42 day limit available, it would not be possible for that debate to go into the details of the justification for extending the time limit for the purposes of the particular, ongoing investigation. The nature of that decision requires justification by reference to the particular circumstances of the investigation of the individual suspects. The Home Secretary would tell Parliament that she has been advised by the police and the CPS that more time is required in order to investigate the individual suspects who are already being detained. In order for Parliament meaningfully to debate the correctness of that assertion, it will be necessary to refer to the detailed factual circumstances of the individual suspects, but such reference will be impossible because, as the DPP made clear in his evidence to the Home Affairs Committee, it might prejudice subsequent prosecutions. In our view, **the fundamental flaw in the Government's proposal therefore remains: it confuses parliamentary and judicial functions by attempting to give to Parliament what is unavoidably a judicial function, namely the decision about whether it is justifiable to detain individual suspects for longer.**

16. The same problem arises with any parliamentary debate on the report of the Government's reviewer. The Government suggests that this will provide an opportunity "to raise questions about whether individual suspects had been held in accordance with the correct procedures." But that is precisely the sort of issue likely to arise in the course of subsequent prosecutions or other court proceedings, and the scope for parliamentary debate about that issue will therefore inevitably be severely circumscribed by the same concerns about prejudicing future trials.

17. We have also found nothing in the Government's Reply responding to the criticism that by the time Parliament expresses a view on whether the reserve power should be made

available it is likely that the full 42 day period will have expired. It has been suggested in the press that the Government might be prepared to agree to an amendment which would guarantee Parliament an opportunity to debate the justification for invoking the reserve power before the expiry of the 42 days. In our view, however, even if the Bill were amended in this way, it would not meet the objection above that any parliamentary debate will be so circumscribed by the need to avoid prejudicing fair trials as to be a virtually meaningless safeguard against wrongful exercise of the power.

18. The Government also states in its Response that the purpose of legislating now, away from the heat of any operation, is so that Parliament can ensure that the law contains the appropriate and meaningful safeguards against the wrongful exercise of the power, but "so far we have received no suggestions for how the safeguards contained in the Government's proposal might be strengthened." **In fact, we have made a number of very specific suggestions in our Reports about how to strengthen both the parliamentary and the judicial safeguards which accompany extended pre-charge detention.**

19. As far as parliamentary safeguards are concerned, we made detailed suggestions about how to strengthen the safeguards in July 2007 in our Report on 28 days, intercept and post-charge questioning.[11] We recommended that, whether or not the current limit of 28 days was further extended, parliamentary oversight be improved by:

(i) requiring annual renewal of the power by affirmative resolution in both Houses;

(ii) the Home Secretary providing, at least a month before the annual renewal debate, a detailed annual report to Parliament on the use which has been made by the police of the power to detain without charge for more than 14 days;

(iii) an independent reviewer providing, at least a month before the annual renewal debate, an annual report on the operation in practice of pre-charge detention for more than 14 days and on the necessity for the power.

20. The Government's Response to that report, in September 2007, did not respond at all to these recommendations.[12] To date, no response to them has been received. In our recent report on the renewal of the control orders legislation, we expressed our disappointment at the Government's failure to respond to our constructive proposals for improved parliamentary review, especially in light of the Prime Minister's renewed commitment to the importance of parliamentary oversight in relation to the unusual powers required to counter terrorism.[13]

Judicial safeguards

21. As for judicial safeguards, we made a number of detailed suggestions for improving the judicial safeguards which currently apply to extended pre-charge detention in our Report on 42 days.[14] These included a number of suggested amendments to the statutory regime to ensure that hearings for warrants of further detention are truly adversarial in nature, e.g. by

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[11] *Report on 28 days, intercept and post-charge questioning*, above, at para. 63.

[12] Cm 7215 (September 2007).

[13] *Report on Renewal of Control Orders*, above, at para. 29.

[14] *Report on 42 days*, above, at paras 89, 96 and 98.

providing for special advocates to represent the interests of the detained suspect at any closed part of the hearing, and by providing that any restrictions on disclosure to the suspect or on the suspect's participation in the hearing be subject to the overriding requirement that the hearing of the application be fair.[15] The suggested improvements also included amending the test to be applied by the court when deciding whether or not to authorise further pre-charge detention, requiring that the court be satisfied that there exists a sufficient basis for arresting and continuing to question the suspect.[16] These detailed recommendations were made after hearing evidence from both the Head of the Counter-Terrorism Division at the CPS and a defence barrister with experience of pre-charge detention hearings in terrorism cases. The Government has not responded at all to these recommendations.

Compatibility with the right to liberty

22. The Government's Response to our detailed consideration of the compatibility of its proposal with the right to liberty in Article 5 ECHR comprises four short paragraphs.[17] These largely comprise counter-assertions that, in the Government's view there is no incompatibility with Article 5(1), 5(2), 5(3) or 5(4). However, they also contain two inaccuracies.

23. First, the Government asserts that "no challenge has ever been made" on grounds of incompatibility with Article 5 where suspects have been held under the existing maximum period of 28 days "and if there was even an arguable case you would expect there to have been such a challenge." In other words, the Government is inviting Parliament to infer from the fact that there have not been any Article 5 challenges under the existing law that there is not even an arguable case that the regime of extended pre-charge detention is in breach of Article 5. **In fact, there has been such a challenge, by one of the first people to have their pre-charge detention extended beyond 14 days, a suspect arrested in connection with the alleged Heathrow bomb plot in August 2006.** In the case of Nabeel Hussain, referred to in the Committee's Report on 42 Days,[18] the suspect applied for judicial review of the High Court Judge's decision to extend his pre-charge detention from 14 to 21 days.[19] All applications to extend detention beyond 14 days are decided by a High Court Judge. However, there is no right of appeal against a judicial decision extending pre-charge detention. As the judgment records, in the case of Nabeel Hussain, the suspect sought to challenge the decision to extend his detention:

> "on two grounds: namely, (1) that insufficient particulars were provided of the justification for continued detention; and (2) the judge failed to supply adequate reasons demonstrating that he had considered whether there was sufficient evidence to charge the applicant. Those submissions draw heavily upon the jurisprudence under Article 5(3) and (4) of the European Convention on Human Rights."[20]

[15] *Report on 42 Days*, para. 89.

[16] *Report on 42 Days,* para. 96.

[17] *Government Reply,* p. 3.

[18] *Report on 42 Days*, para. 77.

[19] *R on the application of Nabeel Hussain v The Hon. Mr. Justice Collins* [2006] EWHC 2467 (Admin).

[20] Ibid at para. 5.

24. The application for judicial review was rejected on the basis that the High Court does not have jurisdiction to review a decision of a High Court Judge acting in his capacity as a High Court Judge.

25. Second, the Government asserts that there is no incompatibility with the right to a judicial hearing under Article 5(4) ECHR because a detainee "may also issue habeas corpus proceedings if appropriate." In our view, this is incorrect. **In fact, as we pointed out in our Report on 42 Days,[21] the High Court in Nabeel Hussain's case held that a warrant of further detention hearing is the "judicial hearing" to which a suspect is entitled under Article 5(4) ECHR.[22]** There is no doubt, in light of this case law, that a detainee who applied for habeas corpus after a court had extended his detention would have his application struck out for abuse of process.

26. The Government has not addressed the Nabeel Hussain case because it has not replied to our Report on 42 Days. Until it does so, and explains why our interpretation of that case is wrong, there is a risk that these inaccuracies in the Government's Reply may mislead Parliament.

The view of the Law Officers

27. On 21 November 2007 the former Attorney General, Lord Goldsmith, giving evidence to the Home Affairs Committee about the proposal for 90 days pre-charge detention in the 2006 Terrorism Bill, said:

> "if the 90-day proposal had come from the Commons unamended, I would have not found it possible to vote for it in the Lords and that would have had an obvious consequence in terms of my position within government."[23]

28. Although Lord Goldsmith said that his view was not that the proposal for 90 days was illegal,[24] he explained that his reason for thinking that 28 days is the right limit was that, to keep somebody in detention without charging them, you need to continue to have reasonable suspicion that they have committed an offence, and that "this is probably required by our international obligations".[25] He thought it unlikely that there could still be a reasonable suspicion if no evidence had been found of any offence after a period as long as 28 days. This was also the view expressed by the DPP in an interview with The Times newspaper.[26]

29. It is also a matter of public record that the Law Officers will be called upon to advise Ministers about the human rights compatibility of measures in Bills in difficult or sensitive cases. As Lord Goldsmith explained in his public lecture, *Government and the Rule of Law in the Modern Age*, at the LSE on 24 February 2006:

[21] *Report on 42 Days*, fn. 72.

[22] [2006] EWHC (Admin) 2467 at para. 26.

[23] House of Commons Home Affairs Committee, First Report of Session 2007-08, *The Government's Counter-Terrorism Proposals*, Volume II, HC 43-II, Ev 78, Q492.

[24] Ibid. Q500.

[25] Ibid. Q496.

[26] *The Times,* 1 April 2008.

> "the Minister giving the certificate needs to be satisfied that it is more likely than not that the courts will uphold the proposal as compliant. The Minister's judgment is necessarily made on the basis of legal advice. That advice comes from departmental lawyers, sometimes supplemented by external advice or advice from the Law Officers. The Law Officers will normally only be called upon to advise in the most difficult or sensitive cases. But called upon, we are."

30. In the light of the Government's failure to respond to our detailed proposals in our 42 Days Report and Lord Goldsmith's candid admission that extending the period beyond 28 days may fall foul of our international obligations, we wrote to the Law Officers to ask for their view, including whether they disagree with our analysis of the human rights compatibility of the 42 day proposal in our 42 Days Report.[27]

31. The Attorney General refused to answer our questions, citing "the long-standing convention, set out in the Ministerial Code, that neither the fact that the Law Officers have advised (or have not advised), nor the content of any advice they may have given, is disclosed outside Government" and referring to the Home Secretary's s. 19 certificate and the Explanatory Notes to the Bill as providing Parliament with the Government's views on this issue.[28]

32. **We would not expect to have received the legal advice provided by the Law Officers to the Home Office, which we accept would be legally privileged. However, we are disappointed that the Law Officers were not even able to confirm that, in their view, the Bill is compatible with the UK's human rights obligations and does not risk giving rise to breaches of human rights in individual cases. We see no reason why Parliament should not have received at the very least a summary of the reasons why the Law Officers regard the Government's 42 days proposal as being compatible with the UK's human rights obligations. In our view, on a matter as significant and sensitive as the proposal to increase the maximum period of pre-charge detention, it is important that Parliament is fully informed about the views of the Law Officers, especially in light of what has subsequently been learned about Lord Goldsmith's view at the time of the 90 day proposal.**

Strengthening the judicial safeguards

33. In the absence of any explanation from the Government as to why we are wrong in our analysis in our previous reports that the existing judicial safeguards are inadequate, we now recommend that the relevant part of the legal framework (Schedule 8 to the Terrorism Act 2000) be amended to ensure that the judicial safeguards which apply at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR that there be a truly "judicial" procedure. We suggest below some amendments to the Bill which are designed to ensure that the suspect has an effective opportunity, at an open hearing and with access to the relevant material, to challenge the reasonableness of the suspicion on which the prosecution relies as the basis for the original arrest and continued detention.

[27] Letter from the Chair to the Law Officers, 3 April 2008 (Appendix 4).

[28] Letter from the Attorney General to the Chair, 23 April 2008 (Appendix 5).

New clause

'Extension of detention under section 41 Terrorism Act 2000

(1) The Terrorism Act 2000, Schedule 8, Part III (Extension of Detention under Section 41) is amended as follows.

(2) After sub-paragraph (6) of paragraph 29 (Warrants of further detention) there is inserted –

> '(7) Nothing in this Part is to be read as requiring the judicial authority to act in a manner inconsistent with the right of the specified person to a fully judicial procedure in Article 5(4) of the European Convention on Human Rights.'

(3) After sub-paragraph (d) of paragraph 31(Notice) there is inserted -

> '(e) a statement of the suspicion which forms the basis for the person's original arrest and continued detention, and
>
> (f) the gist of the material on which the suspicion is based.'

(4) Before sub-sub-paragraph (a) of sub-paragraph 32(1) (Grounds for extension) there is inserted –

> '(aa) there are reasonable grounds for believing that the person has been involved in the commission, preparation or instigation of a terrorist offence,'

(5) Sub-paragraph (1) of paragraph 33 (Representation) is deleted and there is inserted in its place -

> '(1) The person to whom an application relates shall be entitled –
>
> > (a) to appear in person before the judicial authority and make oral representations about the application,
> >
> > (b) to be legally represented by counsel at the hearing,
> >
> > (c) to legal aid for such representation,
> >
> > (d) to be represented by a special advocate at any closed part of the hearing of the application, and
> >
> > (e) through his representative, to cross examine the investigating officer.

(6) After sub-paragraph (3)(b) of paragraph 33 there is inserted –

> 'if the judicial authority is satisfied that there are reasonable grounds for believing that the exclusion of the person and/or his representative is necessary in order to avoid any of the harms set out in sub-paragraphs (a)-(g) of paragraph 34(2) below.".'

Impact on affected communities

34. The Government in its Reply does not expressly address the argument that the power to extend pre-charge detention for up to 42 days is likely to have a disproportionate impact on Muslim communities. Elsewhere in its Reply, however, the Government implicitly appears to concede the point. Responding to our recommendation that the threshold test for charging be put on an explicit statutory footing for terrorism offences, the Government states:

> "The problems highlighted in terrorism cases also occur in other serious offences. Communities most likely to be affected may react adversely if they perceive that terrorist cases are uniquely charged on a lower evidential threshold."[29]

35. This is precisely the argument that is made against the Government's proposal to extend pre-charge detention to 42 days in terrorism cases.

Conclusion

36. For the reasons we have given above and in our previous reports**, we remain of the view that the Government has not made out its case for extending the period of pre-charge detention beyond the current limit of 28 days, In our view, there is a package of human rights compatible alternatives to extending pre-charge detention. We therefore recommend the deletion of the relevant provisions from the Bill** and suggest the following amendments:

> Page 16, line 14, leave out clause 22.
>
> Page 61, line 2, leave out schedule 1.

[29] Government Reply, p. 9.

3 Lowering the Charging Threshold

Background

37. In our previous reports on Counter Terrorism Policy and Human Rights we have sought to demonstrate the importance of the charging threshold in the debate about whether there needs to be a further extension of the period of pre-charge detention beyond 28 days.[30] Since 2004 the charging threshold for terrorism and other serious cases has been lowered by the introduction of the so-called "Threshold Test" for charging. Because of the importance of the Threshold Test for the debate about extending pre-charge detention, and because the meaning of the phrase itself is hardly self-evident, it is worth repeating the explanation of what the Threshold Test is and why it matters.

38. The normal test applied by a Crown prosecutor deciding whether or not to charge a suspect is that on the material available there is "a realistic prospect of conviction." As the DPP explained in Public Bill Committee, "that means that there is a better than evens chance that the verdict will be guilty."[31] This charging standard is deliberately a high one: it is designed to protect potential defendants from being charged with weak cases where there is no prospect of a successful prosecution and to prevent the waste of public funds involved in bringing charges which are subsequently abandoned.

39. If the prosecutor is considering a case that is sufficiently serious that a remand in custody would be appropriate in the event of a charge, the prosecutor may charge on the "Threshold Test" which is a lower test: the prosecutor can charge on the basis of reasonable suspicion that the offence was committed. That reasonable suspicion must be based on material that either is or will be admissible at trial. The Threshold Test is therefore a higher test than is required to be satisfied to arrest a terrorism suspect (where the reasonable suspicion can be based on inadmissible material such as intelligence or intercept), but a significantly lower test than the "realistic prospect of conviction" test which is the normal charging standard.

40. The significance of the availability of the lower test for charging in terrorism cases is that it undermines the case for further extending the maximum period of pre-charge detention. As the DPP has explained, if, by the end of the period of 28 days, there is not even enough evidence to ground a reasonable suspicion that the suspect has committed a terrorism offence, it is extremely unlikely both that such material will in fact be found and that a judge can be persuaded that there is a reasonable likelihood that such material will be found. The lowering of the charging threshold in terrorism cases therefore significantly reduces the force of the case for extending the period of pre-charge detention, especially when combined with the recent advent of broader terrorism offences such as acts preparatory to terrorism and, in future, the availability of post-charge questioning.

41. As we pointed out in our first Report on this Bill, of the eight individuals who have so far been charged after being held for more than 14 days, four have been charged on the

[30] See e.g. *Report on Prosecution and Pre-charge Detention at* paras 122-129; *Report on 28 days* at paras 180-182; *Report on 42 days* at paras 44-48.

[31] PBC 22 April 2008 col. 56.

threshold test.[32] Of those four, one was charged after 20 days' detention, and the other three at the end of the maximum period, at 27/28 days. Two of the four charged on the threshold test were charged with acts preparatory to terrorism. In our view these statistics suggest that the threshold test, in combination with the new offence of acts preparatory to terrorism, is already assisting with the task of enabling appropriate charges to be brought in terrorism cases, without the need for extending pre-charge detention beyond 28 days.

Statutory authority and independent safeguards

42. We have therefore consistently welcomed the lowering of the charging threshold in terrorism cases as an important constituent element in the package of measures which make it unnecessary to extend the period of pre-charge detention. In our first report on the Counter Terrorism Bill, however, we considered in more detail the extent to which there had been parliamentary consideration of the lowering of the charging threshold and whether there exist satisfactory independent safeguards to ensure that the Threshold Test does not operate in practice in a way which impinges disproportionately on the liberty of the individual, for example by resulting in terrorism suspects being detained for longer than necessary before being released without trial.

43. We considered that, although the lowering of the charging threshold in terrorism cases had been a beneficial development, and there was no evidence that it had operated unsatisfactorily in practice, there had been no parliamentary consideration of the lowering of the charging threshold and there was room to introduce some independent safeguards to ensure that it is not operated in a way which has a disproportionate impact on liberty. We therefore recommended that the Threshold Test for charging in terrorism cases be put on an explicit statutory footing and that certain independent safeguards be introduced. The present Bill provides an opportunity to do this and we indicated that we hoped to propose amendments to give effect to our recommendations. The purpose of this part of this report is to consider the Government's response to our recommendations, to explain why we find them unpersuasive, and to explain the amendments we now propose to give effect to our earlier recommendations.

44. Since the publication of our first Report on this Bill we have also received a response from the DPP to our letter in which we enquired about the genesis and application of the Threshold Test and asked to be provided with a copy of the DPP's Explanatory Guidance on the Application of the Threshold Test issued in September 2005 but which had not found its way into the public domain.[33] We are grateful for the DPP's detailed response[34] and for providing us with a copy of the Explanatory Guidance.[35] We found the DPP's explanation of the background to the introduction of the Threshold Test extremely helpful and it confirms our previously expressed view that the lowering of the charging standard in terrorism and other serious cases has been a beneficial development which is to be welcomed from a human rights perspective. We note with interest the explicit acknowledgment in the DPP's own Explanatory Guidance that "the Threshold Test is

[32] *First Report on Counter-Terrorism Bill*, para. 77.

[33] Letter from the Chair to Sir Ken Macdonald QC, 17 January 2008 (Appendix 1).

[34] Letter from Sir Ken Macdonald QC to the Chair, 8 February 2008 (Appendix 2).

[35] *Explanatory Guidance on the Threshold Test* (Appendix 3).

potentially a grave infringement on the liberty of the individual."[36] It is for precisely that reason that we have recommended that it should have a statutory basis, rather than depend on the exercise of the DPP's discretion, and be subject to certain independent safeguards to ensure that the proportionality of the infringement on individual liberty is scrutinised by someone other than the DPP himself.

The Government's response

45. In its Reply to our first Report on the Counter-Terrorism Bill, the Government rejected all of our recommendations in relation to the threshold test for charging. It sees no benefit for the defence in being informed that the Threshold Test rather than the Full Code Test has been applied when a suspect is charged. It claims that there has already been an opportunity for parliamentary scrutiny of the Threshold Test because the Code for Crown Prosecutors (which contains the Threshold Test) is required to be laid before Parliament annually, when there is an opportunity to hold a debate on its contents. It says that Parliament has "already considered the point" and given the DPP powers to issue guidance under the Prosecution of Offences Act 1985 and the Police and Criminal Evidence Act 1984.[37]

46. We do not accept that there has already been meaningful parliamentary scrutiny of the Threshold Test. The Government's assertion that the Code for Crown Prosecutors is laid before Parliament annually, when its contents can be debated, is simply wrong. The DPP's annual report to the Attorney General is laid before Parliament annually, but the Code itself is only set out in the DPP's report in the year in which the Code is issued which, in the case of the current Code, was 2004.[38] **We remain of the view that the Threshold Test would benefit from proper parliamentary scrutiny and debate, which to date it has never received.**

47. The Government is also opposed to putting the threshold test in terrorism cases on a statutory footing, and to specify some independent safeguards. They state that enshrining the Threshold Test in statute would necessitate similar treatment for the Full Code Test, and the standard required to be met to bring a prosecution has never been specified in primary legislation before. To do so, the Government argues, "would restrict the ability of the DPP to react to legal situations which may demand a change in the Code. … The fact that Parliament would effectively determine the test for bringing a prosecution in such sensitive cases may be seen as unwarranted political interference in the prosecution process."

48. We do not accept that putting the Threshold Test on a statutory footing would amount to an unwarranted political interference with the independence of the prosecution process. On the contrary, we are concerned by the amount of discretion to interfere with liberty that is currently delegated to the DPP, without any independent safeguards. **Given the importance of where the threshold for prosecution is set, and in particular the implications for an individual's liberty, in our view the Government's approach fails**

[36] Ibid at para. 3.

[37] As amended by the Criminal Justice Act 2003, giving the DPP a guidance making power in relation to charging: see s. 37A.

[38] Prosecution of Offences Act 1985, s. 10(3).

properly to reflect the strong constitutional presumption that interferences with an individual's liberty require express statutory authorisation, or leaves too much discretion to the DPP. We are not therefore persuaded by the Government's argument that it would be constitutionally improper to place the Threshold Test on a statutory footing or to introduce some independent safeguards.

Conclusion

49. We therefore remain of the view that we reached in our first Report on this Bill, that the Threshold Test should be placed on a statutory footing and some necessary basic safeguards inserted into the legal framework. We suggest an amendment to the Bill below which is designed to stimulate parliamentary debate about this recommendation. In recommending this amendment, we think it is important to acknowledge that, to the best of our knowledge, there have been no cases concerning terrorism in which charges brought on the threshold test have been dropped and the suspect subsequently released without trial. We regard that as a testament to the conscientious way in which the test is currently being operated by the CPS, but we remain concerned for the longer term by the lack of statutory authority for the test and the absence of independent safeguards.

New clause

'Lower threshold for charging in terrorism cases

(1)When deciding whether there is sufficient evidence to charge a person with an offence having a terrorist connection, a Crown Prosecutor may apply the "Threshold Test" for charging if the conditions in subsection (3) below are satisfied.

(2) The "Threshold Test" for charging is met where there is at least a reasonable suspicion that the suspect has committed an offence having a terrorist connection.

(3) The conditions which must be satisfied for the Threshold Test to apply are:

> (a) it would not be appropriate to release the suspect on bail after charge
>
> (b) the evidence required to demonstrate a realistic prospect of conviction is not yet available, and
>
> (c) it is reasonable to believe that such evidence will become available within a reasonable time.

(4) The factors to be considered in deciding whether the Threshold Test of reasonable suspicion is met include

> (a) the evidence available at the time;
>
> (b) the likelihood and nature of further evidence being obtained;
>
> (c) the reasonableness for believing that evidence will become available;
>
> (d) the time it will take to gather that evidence and the steps being taken to do so;
>
> (e) the impact the expected evidence will have on the case;

(f) the charges that the evidence will support.

(5) Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the person charged shall be immediately informed of the fact that they have been charged on the standard of reasonable suspicion.

(6) When the person charged on the Threshold Test is brought before the Court it shall be the duty of the Crown Prosecutor to inform the Court of that fact.

(7) The Court shall set a timetable for the receipt of the additional evidence and for the application of the normal test for charging as set out in the Code for Crown Prosecutors.

(8) The Chief Inspector of the Crown Prosecution Service Inspectorate shall report annually on the operation of the Threshold Test in terrorism cases.'

4 Making Bail Available in Terrorism Cases

50. As the law currently stands, there is no provision for bail under the Terrorism Act 2000 prior to charge.[39] A suspect who has been arrested on suspicion of having committed a non-terrorism offence can be bailed, subject to conditions, while the police continue to investigate the case, but not if they have been arrested in relation to a terrorism offence. Since 2006, conditions attached to the grant of police bail can include various restrictions similar to those contained in control orders, such as curfews, tagging, limits on the places a person can visit, or on people with whom they can speak or meet.[40] There is also no provision in the Terrorism Act 2000 for bail to be granted by the judge who hears the application to extend the period of pre-charge detention.[41]

51. In an earlier report we pointed out that the police at Paddington Green police station had indicated to us that they would often prefer to bail a person who is being detained in respect of a less serious terrorism offence rather than keep them in lengthy pre-charge detention.[42] We thought it highly significant that the police who are most closely involved in dealing with terrorism suspects consider that some of the suspects with whom they deal do not pose a risk to public safety and could therefore be released on bail.

52. We also asked both Sue Hemming of the CPS and Mr. Ali Bajwa, a barrister specialising in terrorism cases, whether they agreed that making bail available in terrorism cases would relieve the pressure for longer pre-charge detention.[43] Mr. Bajwa agreed that bail should be extended to terrorism investigations, and said that if there were a power to grant bail with conditions,

> "it would help at least to answer some of the arguments mounted to make a case for more than 28 days because then the persons that it is claimed are too dangerous to be released after 14 or 28 days whilst the investigation continued can be at least monitored and controlled to a certain extent if bail is granted."

53. Ms. Hemming also agreed that bail with conditions would be an alternative to pre-charge detention "for some individuals." She said:

> "I think there is a real argument for there being the ability to bail people with conditions, particularly people that the police do not necessarily believe would cause any harm to public safety. They can look at the computers and see if what they expected to be there was there while they were bailed."

54. In our view, there is a compelling case for making bail available in principle for terrorism offences. The current unavailability of bail has become increasingly anomalous as the number of terrorism offences has grown significantly. The range of terrorism related

[39] See PACE Code H, para. 1.6.

[40] Police and Justice Act 2006.

[41] Under Schedule 8 to the Terrorism Act 2000.

[42] *28 days Report* paras 173-175.

[43] *42 Days Report*, Ev 23, Qs 137-140.

offences now includes many activities at the periphery which are not inherently of such a nature as to make the suspect's release on bail a threat to public safety. The withholding of information by a family member, for example, or the wearing of a T-shirt expressing support for a proscribed organisation, may constitute terrorism offences, but there seems to us to be no good reason why pre-charge bail should not be available in respect of such offences.

55. We also consider that the power to grant bail should include the power to impose conditions. Those conditions should not be so severe as to amount, cumulatively, to a deprivation of liberty, which, in the absence of a derogation, would be contrary to the right to liberty in Article 5 ECHR. Subject to that important constraint, however, we see no reason in principle why the range of conditions available should not be as extensive as those which can currently be contained in a control order. If the range of possible conditions is to be that wide, however, we consider it important that the power is exercised by a court rather than the police, so that the suspect has the benefit of a full adversarial hearing before what may be onerous bail conditions are imposed.

56. **In our view, the availability of bail with conditions would enable the police to continue their investigation of those suspected of terrorism offences who do not pose a risk to public safety or a flight risk, while at the same time maintaining some control over them through bail conditions. We therefore recommend that the Bill be amended to make court-ordered pre-charge bail with conditions available in relation to terrorism offences.** We acknowledge that this will be a significant reform which will require careful and detailed drafting, but we suggest the following amendment to the Bill to give Parliament an opportunity to debate our recommendation in principle:

New clause

'Bail for terrorism offences

(1) The Terrorism Act 2000, Schedule 8, is amended as follows.

(2) After paragraph 37 there is inserted:

> "Part IV: Bail
>
> 38. The judicial authority with power to extend detention under section 41 has power to release the suspect on bail, with conditions.".'

5 Post-charge Questioning

Background

57. We have long recommended that the law be amended to permit post-charge questioning and the drawing of adverse inferences, as an important element in the package of measures which in our view make it wholly unnecessary to extend the maximum period of pre-charge detention. We have also consistently emphasised the critical importance of the accompanying safeguards.

58. In our first report on this Bill, we considered carefully the evidence that stronger safeguards are required than are currently contained in the Bill and we concluded that, while we still strongly supported the introduction of post-charge questioning as an important measure reducing the pressure to extend pre-charge detention, it should be accompanied by a number of detailed safeguards on the face of the Bill to ensure that this potentially oppressive power is not used oppressively in practice. We recommended a number of detailed safeguards and pointed out that the overriding requirement must be to ensure that a fair trial is possible.

The Government's response

Judicial authorisation and time limits

59. The Government in its Reply to our first Report on this Bill rejected our recommendation that there should be explicit safeguards against abuse on the face of the legislation. It said that prior judicial authorisation and explicit time limits on post-charge questioning are "not necessary" because existing safeguards will be enough. The Government says that the prison governor, who is responsible for ensuring the welfare of the suspect, is a sufficient safeguard which makes judicial authorisation and time limits unnecessary, and that trial judges will be able to rule evidence inadmissible where it has been obtained by police questioning which is deemed to be oppressive.

60. We are not persuaded that the Government's reliance on existing safeguards satisfies our concern in our earlier reports to ensure that the potentially oppressive power of post-charge questioning is not used oppressively in practice. **A prison governor falls a long way short of a judge as an independent safeguard against abuse and we note that the Government has provided no evidence to substantiate its assertion that prison governors thoroughly scrutinise any police requests for production of a suspect for questioning. "After the event" judicial powers to exclude evidence obtained by oppressive means are also inferior to legal safeguards designed to prevent such oppressive questioning happening in the first place. We therefore remain of the view that the requirement of judicial authorisation and strict time limits must be set out on the face of the legislation.**

Limiting to new evidence

61. The Government also rejected our recommendation that post-charge questioning be confined to questioning about new evidence which has come to light, because this "would prevent the police from being able to question the suspect about, for example, computer material which raises further questions as a result of analysis undertaken after charge."

62. Clearly post-charge questioning should in principle be possible about computer material which it has only been possible to analyse after charge. **In our view, it should be possible to draft a limitation on the scope of post-charge questioning which confines it to new evidence but defines new evidence in such a way as to include material which has only become available, for example, as a result of analysis of computer material which was already physically available.**

Post-charge questioning after commencement of trial

63. The Government agrees that there should be no post-charge questioning once a trial has commenced but does not believe it is necessary to prohibit it because a trial judge would be "very likely" to rule any evidence arising from such an interview inadmissible because it might prejudice the right to a fair trial.

64. In our view, relying on the likelihood of a trial judge excluding evidence is not a satisfactory safeguard. If the Government agrees that post-charge questioning is never justifiable after the commencement of a trial the legislation ought to make this clear by prohibiting it. Otherwise, it leaves scope for uncertainty. It is possible to envisage circumstances in which there may be a temptation to use the power, for example where a trial is adjourned almost as soon as it has commenced and new material comes to light in the course of the long adjournment. So long as such a possibility exists it should be ruled out by the Bill.

Conclusion

65. **We therefore recommend that clause 23 (and clauses 24 and 25 as appropriate to apply to Scotland and Northern Ireland) be supplemented to include the safeguards we recommended in our earlier report:**[44]

(1) that there should be a requirement that post-charge questioning be judicially authorised;

(2) that the purpose of post-charge questioning be confined to questioning about new evidence which has come to light since the accused person was charged and could not reasonably have come to light before;

(3) that the total period of post-charge questioning last for no more than 5 days in aggregate;

(4) that post-charge questioning always take place in the presence of the defendant's lawyer;

[44] *First Report on Counter-Terrorism Bill*, above, at para. 37.

(5) that post-charge questioning always be DVD- or video-recorded;

(6) that the judge which authorised post-charge questioning review the transcript of the questioning after it has taken place, to ensure that it remained within the permitted scope of questioning and was completed within the time allowed; and

(7) that there should be no post-charge questioning after the beginning of the trial.

66. We suggest the following amendment to the Bill to achieve this:

New clause

'Post-charge questioning: safeguards

(1) Reference in this section to "post-charge questioning" relate only to post-charge questioning for terrorism offences.

(2) Post-charge questioning must be judicially authorised in advance.

(3) Post-charge questioning shall be confined to questioning about new evidence which has come to light since the accused person was charged and which could not reasonably have come to light before.

(4) The total period of post-charge questioning shall last for no more than 5 days in aggregate.

(5) Post-charge questioning may only take place in the presence of the defendant's lawyer.

(6) Post-charge questioning shall always be video-recorded.

(7) The judge who authorised post-charge questioning shall review the transcript of the questioning after it has taken place, to ensure that it remained within the scope of questioning under subsection (2) and was completed within the time allowed under subsection (3).

(8) Post-charge questioning for a terrorism offence shall never be permissible after the beginning of the defendant's trial for that offence.'

6 Control Orders

Background

67. The Bill contains some detailed amendments to the control orders regime contained in the Prevention of Terrorism Act 2005.[45] However, as we noted in our first report on the Bill, these amendments are largely in the nature of relatively minor "tidying up" amendments in the light of the first few years of the regime's operation. They do not address at all the most controversial aspects of the control orders regime which have been the subject of intense parliamentary debate; frequent adverse comment by us; and now, important judgments of the House of Lords in the first cases concerning control orders to reach them.[46]

68. We pointed out in our previous report that the Bill provides an opportunity for Parliament to rectify some of the most significant defects in the control orders regime which have been identified in the course of the many legal challenges to that regime and to particular orders made under it. We have also indicated, in both that report and our report on this year's renewal of the control orders legislation, a number of amendments to the control orders regime which in our view are necessary to render it human rights compatible. In its response to our report on control orders, the Government disagrees that there is any need to amend the control orders legislation. In its view, "as a result of the House of Lords' judgments in October 2007, the control orders legislation is fully compliant with the European Convention on Human Rights."

69. In this part of our report we bring together the most significant of the amendments that we have proposed to the control orders regime and provide suggested text for such amendments.

The priority of prosecution

70. In our report on this year's renewal of the control orders legislation, we welcomed the Government's professed policy that prosecution is and will remain its preferred way of dealing with terrorists (we refer to this as the policy of "the priority of prosecution"). We also welcomed the fact that since last year's renewal of the control orders legislation the Government has taken some steps towards facilitating prosecutions of individuals for offences relating to terrorism. However, we considered it significant that no individual who has been made the subject of a control order has subsequently been prosecuted for a terrorism offence, other than for breach of a control order. We therefore questioned the extent to which, in relation to certain individuals, priority is really given to criminal prosecution rather than the extensive and indefinite control which is currently available through the use of control orders.

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[45] Clauses 71-74.

[46] *Secretary of State for the Home Department v JJ* [2007] UKHL 45; *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v E* [2007] UKHL 47 (31 October 2007).

71. We suggested three amendments to the control orders framework which in our view would provide a more effective underpinning to the Government's professed policy of preferring to prosecute as a first resort:

> (1) making it a new pre-condition of the making of a control order that the Secretary of State be satisfied that there is no reasonable prospect of a successful prosecution for a terrorism-related offence;
>
> (2) imposing new duties on the Secretary of State to keep the possibility of prosecution under review and to facilitate such review by sharing relevant information with the police; and
>
> (3) increasing the transparency of decisions about prosecution by requiring the giving of reasons for a decision not to prosecute and providing for disclosure of those reasons to the controlled person to the extent that such disclosure would not be contrary to the public interest.

72. The Government does not agree that any amendments to the control orders framework are necessary to make its policy of the priority of prosecution more effective. It points to improvements in procedures in relation to prosecution that it has put in place in response to recommendations by Lord Carlile and various court judgments, such as the quarterly review of the possibility of prosecution by the Control Order Review Group, the greater detail provided in the letters from the police to the Home Office explaining the police's conclusion about prosecution, and new procedures which have been put in place in relation to the ongoing prospect of prosecution. It also relies on the decision of the House of Lords in *E* as having clarified the extent of the Secretary of State's duties in relation to prosecution and as making clear that no amendments to the Prevention of Terrorism Act 2005 are necessary.

(1) New precondition for making of control order

73. The Government points out that the decision on whether or not to prosecute a particular individual is an operational matter for the police and the Crown Prosecution Service, not the Secretary of State. To make it a precondition of the making of a control order that the Secretary of State must be satisfied that there is no reasonable prospect of a successful prosecution would therefore, the Government argues, undermine the role of the independent prosecuting authorities.

74. We accept that the question of whether there is a reasonable prospect of prosecution is not, constitutionally speaking, a matter for the decision of the Secretary of State. However, the purpose of our recommendation was to seek to ensure that control orders are only resorted to in cases where a proper decision about the prospects of a prosecution has first been made by the relevant decision-maker. We remain concerned that a mere procedural duty on the Secretary of State to consult the police about the prospect of prosecution, which is not even a condition precedent to the making of the order, is a very weak way of trying to ensure that prosecution is the instrument of first resort. We cannot see any objection in principle to making it a precondition to the making of a control order by the Secretary of State that the DPP has certified that on the material then available there is no

reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence.

75. The Government also invokes the "strong practical reasons" cited by the House of Lords in *E* for not making it a condition precedent of the making of a control order that there be no realistic prospect of prosecution. The House of Lords said that there may be a need to act with great urgency and that such a condition precedent could potentially emasculate what was intended by Parliament to be an effective procedure. However, as we pointed out in our report on this year's renewal of the control orders legislation, most control orders are made using the non-urgent procedure (only one control order was made using the urgent procedure in 2007), and the concern about preserving the efficacy of control orders in urgent cases can be easily accommodated by making an exception for urgent cases.

76. We therefore recommend that the PTA 2005 should be amended to provide that, except in urgent cases, the Secretary of State may only make a control order where the DPP has certified that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence. We suggest the following wording to give effect to this recommendation:

New clause

'Control orders: pre-conditions

After sub-paragraph (b) in section 2(1) of the Prevention of Terrorism Act 2005 there is inserted –

> "; and (c) unless section 3(1)(b) below applies, the DPP has certified that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence.".'

77. We accept that this goes beyond what is required by the judgment of the House of Lords in *E*. Our purpose here is to strengthen the control orders framework in pursuit of the important goal that control orders are only resorted to in cases where criminal prosecution is simply not possible, as required by the principle of proportionality.

(2) Duty to keep possibility of prosecution under review

78. The Government does not agree with our recommendation that an express duty be imposed on the Secretary of State to ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of a control order for a terrorism-related offence is kept under review at least every 3 months. The Government argues that prosecution is the responsibility of the police and the CPS and that the police are already under an obligation to keep the possibility of prosecution under review and to consult the CPS "as appropriate". The result of the mandatory review by the police is then fed into the Control Order Review Group, consisting of law enforcement agencies and the Home Office, which meets quarterly to review the possibility of prosecution. The Government also considers it unnecessary to impose a duty on the Secretary of State to consult the police before reviewing the prospects of prosecution and to share with the

police any information available to her which is relevant to the prospects of a successful prosecution. The Government says that the House of Lords in the case of *E* has made clear the extent of the Secretary of State's duties under s. 8 of the Prevention of Terrorism Act 2005 and that no changes to this section of the Act were required by the judgment.

79. In the *E* case the Secretary of State's argument was that all that s. 8 PTA 2005 required was that she consult the chief of police at the outset and then make periodic inquiry as to whether the prospect of prosecution had increased. The courts rejected that argument, holding that there is an implied continuing duty to review, and that it is implicit in that duty that the Secretary of State must do what she reasonably can to ensure that the continuing review is meaningful, by providing the police with relevant material. As we observed in our report on this year's annual renewal of the control orders legislation, we are not at all confident that the police see very much of the material on the basis of which the Home Secretary imposes control orders on individuals. It remains our view that the policy of giving priority to prosecution would be better served if these implied duties recognised by the courts, in the face of the Government's argument to the contrary, were turned into express duties spelled out clearly on the face of the legislation. We suggest the following amendment to give effect to this recommendation:

New clause

'Control orders: ongoing review of possibility of prosecution

After subsection (6) of section 8 of the Prevention of Terrorism Act 2005 there is inserted –

> "(6A) The Secretary of State shall, throughout the period during which the control order has effect
>
> (a) ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence is kept under review at least every 3 months;
>
> (b) consult the police prior to such review;
>
> (c) share with the police such information as is available to him which is relevant to the prospects of a successful prosecution.".'

(3) Transparency of prosecution decisions

80. The Government does not accept our recommendations for making prosecution decisions more transparent by requiring the police to provide reasons when advising the Secretary of State that there is no realistic prospect of prosecution and by requiring such reasons to be disclosed to the controlled person to the extent that such disclosure is not contrary to the public interest. The Government does not consider it appropriate for any further detail to be included in the letters from the police, and argues that it would be "highly unusual" to provide reasons for not proceeding with the prosecution of a particular individual to that individual, and could risk prejudicing future prosecutions.

81. In our view, however, the imposition of a control order is itself a highly unusual step, and since the scheme of the Act is that such unusual orders should only be made where an

individual cannot be prosecuted for a terrorism-related offence, providing the reasons for not prosecuting the person who is the subject of the order is an essential part of justifying the making of the control order. We therefore maintain our recommendation that the PTA 2005 be amended to secure greater transparency of decisions that prosecution is not possible. We suggest the following amendment to give effect to this recommendation.

New clause

'Control orders: reasons for decisions on prospects of prosecution

After subsection (2) of section 8 of the Prevention of Terrorism Act 2005 there is inserted -

> "(2A) If the chief officer advises the Secretary of State that there is no realistic prospect of prosecution, he shall give reasons for his view.
>
> (2B) The chief officer's reasons shall be disclosed to the controlled person to the extent that such disclosure would not be contrary to the public interest.".'

Deprivation of liberty

(1) Clarify the meaning of 'deprivation of liberty' in Article 5 ECHR

82. In our report on this year's annual renewal of the control orders legislation we recommended that the PTA be amended to clarify the approach to be taken by courts to the question whether the effect of a control order is to deprive a person of their liberty in the sense required by Article 5 ECHR, for example by spelling out the factors to which the courts must have regard when deciding whether there is a deprivation of liberty.

83. The Government considers that such an amendment is unnecessary, because the European Court of Human Rights has already made this clear, and this has also been reflected in the judgments of domestic courts, including the House of Lords.

84. As the Government also points out, however, the majority of the House of Lords in *JJ* treated the length of the curfew as being of "prime importance" in determining whether there was a deprivation of liberty. As we said in our recent report on control orders, in our view this approach does not reflect the true nature of the approach taken by the European Court of Human Rights when determining whether a variety of restrictions on an individual amount to a deprivation of liberty. Although the period of daily confinement will be an important factor in any overall assessment, it should not be treated as being of "prime importance" in determining whether a control order amounts to a deprivation of liberty: the Strasbourg approach to Article 5 requires a much more nuanced assessment of the overall effect of the various restrictions on the individual's liberty.

85. We therefore maintain our recommendation that this Bill be used to amend the PTA to clarify the approach to be taken by courts when deciding whether the effect of a control order is to deprive of liberty in the Article 5 ECHR sense. We suggest the following amendment to give effect to this recommendation:

New clause

'Control orders: cumulative effect of restrictions relevant to determination about deprivation

After subsection (10) of section 3 of the Prevention of Terrorism Act 2005 there is inserted -

"(10A) In determining whether the effect of a non-derogating control order is to deprive a person of their liberty, the factors to which the court shall have regard must include,

(a) the nature, duration, effects and manner of implementation of the restrictions, and

(b) the cumulative effect of the obligations.

10B) The combination of obligations may amount to a deprivation of liberty even if no individual obligation amounts to such a deprivation.".'

86. As well as clarifying the function of the court when supervising the making of a control order under s. 3(10) PTA 2005, such an amendment would also remove any scope for misunderstanding caused by the reference in s. 3(10)(b) to the court's function being to determine whether the Secretary of State's decisions on the imposition of *each* of the obligations imposed by the order was flawed.

(2) 12 hour limit on daily length of curfew

87. We also recommended that the PTA should be amended to impose a maximum daily limit of 12 hours on the curfew which can be imposed in a control order, to make it less likely that control orders will be found to be in breach of Article 5.

88. The Government disagrees. It claims that introducing a maximum curfew of 12 hours for controlled individuals would "significantly damage the Government's ability to protect the public from the threat of terrorism." We note, however, that the Government cites no evidence in support of this assertion and that for some time the Home Secretary had reduced the curfews in the most onerous control orders from 18 to 12 hours in light of the judgments of the lower courts. We would expect to see some evidence of the significant damage done to the public's protection against the threat of terrorism during this period to substantiate the Government's assertion.

89. The Government also states that introducing a maximum curfew of 12 hours is not necessary as a matter of law because a majority in *JJ* effectively held that a 16 hour curfew would not breach Article 5. As we stated in our report on control orders, we find Lord Brown's indication in *JJ*, that in his view 16 hour curfews would not amount to a deprivation of liberty, to be a very slender legal basis on which to increase the curfews in existing control orders from 12 to 16 hours. We remain of the view that, in the wake of clear judicial differences of view about what is an appropriate maximum daily curfew, it is

incumbent on Parliament to reach its own view about what the right to liberty in Article 5 ECHR requires in this particular context and we maintain our recommendation that a maximum daily limit on curfews should be 12 hours. We suggest the following amendment to give effect to this recommendation.

New clause

'Control orders: maximum limit on daily curfews

After subsection (5) of section 1 of the Prevention of Terrorism Act 2005 there is inserted -

> "(5A) The duration of any prohibition or restriction on the controlled person's movements shall not exceed 12 hours in any 24 hour period.".'

Due process

90. In our first report on the Counter-Terrorism Bill we explained why, in our view, the opportunity should be taken in this Bill to make a number of amendments to the control order regime to ensure that in future hearings are much more likely to be fair. We recommended six amendments to the legal framework for control orders designed to have that effect:

> (1) the insertion of an express reference to the right to a fair hearing, making clear that nothing in the PTA requires a court to act incompatibly with the right of a controlled person to a fair hearing;
>
> (2) the addition of an obligation on the Secretary of State to give reasons for the making of a control order;
>
> (3) the imposition of an obligation on the Secretary of State to provide a statement of the gist of any closed material on which fairness requires the controlled person have an opportunity to comment;
>
> (4) provision for judicially authorised communication between the special advocate and the controlled person without having to disclose the questions to the Secretary of State;
>
> (5) the insertion of an entitlement of the controlled person to such measure of procedural protection (including the standard of proof) as is commensurate with the gravity of the potential consequences for the controlled person; and
>
> (6) the provision of a power for special advocates to call witnesses to rebut closed material.

91. The Government has rejected our recommendation that it is necessary for Parliament to reconsider what constitutes a "fair hearing" in this particular statutory context, in light of the judgment of the House of Lords in the *MB* case. The Government's argument, in short, is that Parliament has already decided what is required to provide a fair hearing in the Prevention of Terrorism Act 2005, and this has now been supplemented by the House of Lords in the *MB* judgment to render Parliament's framework compatible with the requirements of Article 6 ECHR. In the Government's view, the requirements of the

existing statutory framework, as reinterpreted by the House of Lords in *MB*, are now clear and satisfy the requirements of Article 6 in all cases: "the effect of the *MB* judgment is to ensure the procedures set out in the 2005 Act are compliant with Article 6 in every case." Our detailed recommendations as to how to amend the statutory framework to ensure that control order proceedings are "fair" in future are all rejected as either "unnecessary" or not required by the judgment in *MB*. The Government also states that it continues to disagree with our conclusion in our July 2007 report, "that the system of special advocates, as currently conducted, fails to afford individuals a fair hearing, or even a substantial measure of procedural justice."

92. Some of the criticisms made by us, however, were upheld by the House of Lords in *MB*. As we pointed out in our first report on this Bill, the House of Lords in *MB* rejected the Government's argument that the statutory regime will always provide the individuals concerned with a substantial measure of procedural justice. The Government's assertion that it is unnecessary to amend the statutory framework in the light of the judgment in *MB* also ignores the evidence of the special advocates of the potential unfairness inherent in the current regime, as well as the obvious judicial difficulty in working out exactly what the House of Lords judgment in *MB* requires.[47] Indeed, in July this year the Court of Appeal will be hearing three appeals from decisions of the High Court in control order cases in which the principal issue is precisely what is required by the decision of the House of Lords in *MB*. It seems likely that the fairness of the operation of the control order regime will before long be back before the House of Lords. This constant litigation about the fundamentals of the statutory framework cannot be desirable, particularly where in the meantime individuals are subjected to very onerous restrictions and obligations. The case for legislative clarification is in our view compelling.

93. We accept that some of our recommendations are not required by the judgment in *MB*. However, in our view the Bill provides an opportunity for Parliament to improve the statutory framework of control orders in order to reduce the risk of procedural unfairness which the operation of the regime in practice has revealed.

(1) Express reference to the right to a fair hearing

94. We recommended two amendments to the control orders statute to make explicit the words "read in" to the statutory framework by the House of Lords, rather than leaving them in case-law.

95. First, we recommended that the relevant provisions in the statutory framework, which expressly require non-disclosure, even where disclosure would be essential for a fair hearing, be amended by the insertion of qualifying words, such as "except where to do so would be incompatible with the right of the controlled person to a fair hearing".

96. Second, we recommended that the relevant power for making rules of court in the control orders regime be amended to make explicit reference to the right to a fair hearing

[47] As Collins J. said in *Bullivant* [2007] EWHC 2938 (Admin) at para. 7: "How then is it to be decided whether a particular matter should be disclosed to avoid a breach of Article 6? Regrettably, the House of Lords has provided no ready answer."

in Article 6 ECHR, in the same way as the Bill itself qualifies the power to make rules of court for asset freezing.[48]

97. The Government says that these amendments are not necessary because the judgment in *MB* already makes this clear. We do not agree that the effect of the judgments in *MB* are as clear as the Government contends, as is borne out by the continued litigation and appeals about precisely what the case requires. We remain of the view that it is better that words appear on the face of a statute than that they are "read in" to the statute by a judgment the precise effect of which might not be very clear even after careful study. We suggest the following amendment to give effect to these recommendations.

New clause

'Control orders: right to a fair hearing

"(1) At the end of subsection (13) of section 3 of the Prevention of Terrorism Act 2005 there is inserted –

> 'except where to do so would be incompatible with the right of the controlled person to a fair hearing'.

(2) At the end of paragraph 4(2)(a) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> 'except where to do so would be incompatible with the right of the controlled person to a fair hearing'.

(3) At the end of paragraph 4(3)(d) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> 'except where to do so would be incompatible with the right of the controlled person to a fair hearing'.

(4) After paragraph 4(5) in the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> '(6) Nothing in this paragraph, or in rules of court made under it, is to be read as requiring the court to act in a manner inconsistent with the right to a fair hearing in Article 6 of the European Convention on Human Rights.".'

(2) Obligation to give reasons for making control order

98. We recommended that an obligation on the Secretary of State to give reasons for the making of a control order be inserted into the statutory framework.

99. The Government disagrees, arguing that this was not a requirement of the judgment in *MB* as being necessary to provide individuals with a substantial measure of procedural justice. In fact, one of the ways mentioned by Baroness Hale in her judgment in *MB*,[49] to ensure that the principles of judicial inquiry are complied with to the fullest extent possible,

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[48] Clause 58(6).

[49] Ibid. at para. 66.

is for the Secretary of State to give as full as possible an explanation of why she considers that the grounds for making a control order[50] are made out.

100. As we commented in our first report on this Bill, we consider that an explicit obligation on the Home Secretary to give as full an explanation as possible of her reasons for making a control order would both provide the controlee with some material which he may be able to contest and would facilitate more open judicial scrutiny of the adequacy of the Home Secretary's reasons for making an order. **We therefore maintain our recommendation that the control orders framework be amended to include an obligation on the Secretary of State to give reasons for the making of a control order. We suggest the following amendment:**

New clause

'Control orders: obligation to give reasons

After subsection (4) of section 2 of the Prevention of Terrorism Act 2005 there is inserted –

> "(4A) A non-derogating control order must contain as full as possible an explanation of why the Secretary of State considers that the grounds in s. 2(1) above are made out.".'

(3) Obligation to provide gist of closed material in some cases

101. In earlier reports, we have recommended that there should be an obligation on the Secretary of State to provide a statement of the gist of the closed material. According to the judgments of the majority in *MB*, the concept of fairness imports a core irreducible minimum of procedural protection.[51] To give full effect to the judgment in *MB*, we therefore recommended that the statutory framework be amended to provide that rules of court for control order proceedings "must require the Secretary of State to provide a summary of any material which fairness requires the controlled person have an opportunity to comment on."

102. The Government disagrees. It argues that this was not a requirement of the judgment in *MB* and that the mandatory provision of the gist of closed material would not be a desirable change. It says that the effect of *MB* is not that the Secretary of State must provide a summary of any material which fairness requires the controlled person have an opportunity to comment on. Rather, the Secretary of State may be made to choose whether to disclose information which the court concludes it is necessary to disclose in order for the controlled person to have a fair hearing, or withdraw it from the case so that it cannot be relied upon by the Secretary of State.

103. We remain of the view that *MB* requires the Secretary of State to provide the gist of any closed material on which she intends to rely and on which fairness demands the controlled person has an opportunity to comment. It is true that the Secretary of State may prefer to withdraw the closed material from the case, but this is a consequence of the requirement that the gist of the closed material be disclosed because fairness requires an

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[50] In s. 2(1) PTA 2005.

[51] See e.g. *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para. 43 (Lord Bingham).

opportunity to comment. We suggest the following amendment to give effect to our recommendation:

New clause

'Control orders: obligation to provide gist of closed material

'(1) At the end of paragraph 4(3)(e) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> 'and must require the Secretary of State to provide a summary of any material on which he intends to rely and on which fairness requires the controlled person have an opportunity to comment'.

(4) Communication between special advocate and controlee

104. We recommended that special advocates be given the power to apply ex parte to a High Court judge for permission to ask the controlee questions, without being required to give notice to the Secretary of State.

105. The Government disagree that this is a requirement of the judgment in MB and does not believe "unfettered communication" between the individual and the special advocate after service of the closed material is a desirable change.

106. Our recommendation was not that there should be "unfettered communication" between controlees and special advocates but that a process be put in place to enable the controlled person to give meaningful instructions about the allegations against him when it is possible to do so, without having to disclose anything to the Secretary of State. We suggest the following amendment:

New clause

'Control order: communications between special advocate and controlled person

After subparagraph 7(5) in the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> "(5A) Rules of court must secure that persons appointed under this paragraph may apply to a High Court judge, without notice to the Secretary of State, for permission to communicate with the controlled person after the service of closed material.".'

(5) Standard of proof

107. We recommended that the Prevention of Terrorism Act 2005 be amended to provide that, in a hearing to determine whether the Secretary of State's decision is flawed, the controlled person is entitled to such measure of procedural protection (including, for example, the appropriate standard of proof) as is commensurate with the gravity of the potential consequences of the order for the controlled person.[52]

[52] Using the formulation of Lord Bingham in *MB* at para. 24.

108. The Government disagrees with our recommendation, arguing that a change in the statutory test of reasonable suspicion was not a requirement of the judgment in MB and would not be desirable. The judgments in *MB* make clear that the standards of procedural protection are to be commensurate with the seriousness of the consequences for the controlee, and in our view this must include the standard of proof. We consider that this should be made clear in the legislation itself. The following amendment would give effect to this recommendation.

New clause

'Control orders: proportionality of procedural protection

After subsection 3(11) of the Prevention of Terrorism Act 2005 there is inserted –

> "(11A) In a hearing to determine whether the Secretary of State's decision is flawed, the controlled person is entitled to such measure of procedural protection as is commensurate with the gravity of the potential consequences of the order for the controlled person.".'

(6) Power for special advocates to call witnesses

109. We recommended that the PTA 2005 be amended to provide that, where permission is given by the relevant court not to disclose material, special advocates may call witnesses to rebut the closed material.

110. The Government states that it is already open "in principle" to special advocates to apply to the court to call expert witnesses, and in any event special advocates receive training from the Security Service to enable them to understand the closed evidence.

111. As far as we are aware there is no legal basis for special advocates to call expert witnesses to rebut closed material in control order proceedings. Nor do we consider that training of the special advocates by the Security Service is an adequate substitute for the ability to call expert witnesses. We consider that the control order statute should be amended to give effect to one of the ways suggested by Baroness Hale in *MB* to make the hearing fairer by permitting special advocates to call witnesses to rebut closed material, and we suggest the following amendment to achieve this.

New clause

'Control orders: Power of special advocates to call expert witnesses

After paragraph 4(3)(e) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> "(ea) that, where permission is given by the relevant court not to disclose material, persons appointed under paragraph 7 may call witnesses to rebut the closed material.".'

Maximum duration of control orders

112. In our report on this year's annual renewal of control orders we stated that we are in favour of a maximum limit on the duration of a control order, both as an important safeguard of the liberty and mental health of the individuals concerned, and as a discipline on the investigative and enforcement authorities to find material capable of being the basis for a criminal prosecution within a reasonable time.

113. The Government does not agree. It accepts that control orders should be imposed for as short a time as possible, commensurate with the risk, but does not accept that there should be "an arbitrary end date for individual control orders." It argues that if the Government considers it necessary and proportionate to extend a control order in order to protect the public from a risk of terrorism, it is the Government's responsibility to do so, and points to the danger of individuals merely disengaging from terrorist activity for the duration of a control order and then re-engaging when it expires.

114. We remain of the view that there should be a maximum limit on the duration of a control order, for the reasons we gave in our earlier report. As we pointed out in that report, human rights law does not provide any clear answer as to what that limit should be, beyond prohibiting severe controls of indefinite duration. We believe it is desirable that Parliament should debate the principle of whether control orders should have a maximum duration and, if so, whether there should be provision for any exception to that limit. We therefore suggest the following amendment in order to give Parliament an opportunity to debate the issue in principle:

New clause

'Control orders: maximum duration

After section 3 of the Prevention of Terrorism Act 2005 there is inserted -

> "3A Duration of non-derogating control orders
>
> A non-derogating control order ceases to have effect at the end of the period of two years from the date on which it was made, unless there are exceptional circumstances justifying its renewal.".'

7 Coroners' Inquests and National Security

115. In our first Report on this Bill we drew the attention of both Houses to the serious human rights implications of the provisions in the Bill concerning coroners' inquests involving material affecting national security. We pointed out that the provisions have the most serious implications for the ability of the UK to comply with the positive obligation implicit in the right to life in Article 2 ECHR, to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents.

116. The Government in its Reply to that Report dismissed our concerns as "misplaced". The Government's argument is that the provisions in question, which would allow the Secretary of State to certify that an inquest should be held without a jury and by a coroner specially appointed by the Secretary of State, are in fact facilitative of independent coroners' inquests and would overcome a potential incompatibility with Article 2 under the present law where there exists material that is, or could be, central to an inquest, but which cannot be disclosed publicly because of the damage it would cause to the public interest. A "specially appointed coroner", the Government argues, will still be a coroner holding judicial office and so will be entirely independent of the Government as required by Article 2.

117. **In our view, the Government's justification for this measure, that the current law may be incompatible with Article 2 ECHR in this respect, is highly questionable. The law of public interest immunity applies to inquests and already provides the Government with the opportunity to persuade the coroner not to disclose certain documents or information because to do so would damage the public interest, including national security.**

118. The Strasbourg case-law on Article 2 ECHR acknowledges that such restrictions on disclosure at inquests is in principle compatible with Article 2. In both *McCann v UK* and *Jordan v UK*, for example, which are two of the main cases in which the European Court of Human Rights spells out the requirements of the procedural obligation in Article 2 to provide an effective investigation, the Court rejected complaints about the use of public interest immunity certificates at the coroners' inquests to prevent disclosure of certain categories of information on grounds of national security. In both cases, the Court found no indication that these PII certificates had prevented examination of any circumstances relevant to the death.[53]

119. In any event, even if the Government were correct that there is a risk of incompatibility with Article 2 under the law as it stands, **the proposed solution of specially appointed, security-cleared coroners would, in our view, clearly not be compatible with Article 2. In any case where the State is potentially implicated in the death which is being investigated, a coroner appointed by the Secretary of State, instead of by the normal method, would not satisfy the requirement in Article 2 ECHR that the**

[53] *Jordan v UK* (2001) 37 EHRR 70 at para. 135; *McCann v UK* (1995) 21 EHRR 97.

investigation be carried out by a person independent from those implicated in the events. The fact that the coroner has been directly appointed by the Secretary of State for the purposes of the particular inquest would be fatal to any appearance of independence.

120. **We therefore recommend that the clauses concerning coroners' inquests be deleted from the Bill and the issue returned to in the context of the forthcoming Coroners Bill.** We suggest the following amendments:

> Para 44, line 35, leave out clause 64.
>
> Para 46, line 1, leave out clause 65.

Annex: Proposed Committee amendments

In this Annex, we suggest amendments to give effect to some of our recommendations in this Report.[54]

Pre-Charge Detention: Strengthening the judicial safeguards

In the absence of any explanation from the Government as to why we are wrong in our analysis in our previous reports that the existing judicial safeguards are inadequate, we now recommend that the relevant part of the legal framework (Schedule 8 to the Terrorism Act 2000) be amended to ensure that the judicial safeguards which apply at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR that there be a truly "judicial" procedure. We suggest below some amendments to the Bill which are designed to ensure that the suspect has an effective opportunity, at an open hearing and with access to the relevant material, to challenge the reasonableness of the suspicion on which the prosecution relies as the basis for the original arrest and continued detention.[55]

New clause

Extension of detention under section 41 Terrorism Act 2000

(1) The Terrorism Act 2000, Schedule 8, Part III (Extension of Detention under Section 41) is amended as follows:

(2) After sub-paragraph (6) of paragraph 29 (Warrants of further detention) there is inserted –

> '(7) Nothing in this Part is to be read as requiring the judicial authority to act in a manner inconsistent with the right of the specified person to a fully judicial procedure in Article 5(4) of the European Convention on Human Rights.'

(3) After sub-paragraph (d) of paragraph 31(Notice) there is inserted -

> '(e) a statement of the suspicion which forms the basis for the person's original arrest and continued detention, and
>
> (f) the gist of the material on which the suspicion is based.'

(4) Before sub-sub-paragraph (a) of sub-paragraph 32(1) (Grounds for extension) there is inserted –

> '(aa) there are reasonable grounds for believing that the person has been involved in the commission, preparation or instigation of a terrorist offence,'

(5) Sub-paragraph (1) of paragraph 33 (Representation) is deleted and there is inserted in its place -

> '(1) The person to whom an application relates shall be entitled –

[54] Page, clause and line references are to Bill 63.

[55] Paragraph 33 of this Report.

(a) to appear in person before the judicial authority and make oral representations about the application,

(b) to be legally represented by counsel at the hearing,

(c) to legal aid for such representation,

(d) to be represented by a special advocate at any closed part of the hearing of the application, and

(e) through his representative, to cross examine the investigating officer.

(6) After sub-paragraph (3)(b) of paragraph 33 there is inserted –

‘if the judicial authority is satisfied that there are reasonable grounds for believing that the exclusion of the person and/or his representative is necessary in order to avoid any of the harms set out in sub-paragraphs (a)-(g) of paragraph 34(2) below.’

Pre-Charge Detention: 42 days

For the reasons we have given this Report and in our previous reports**, we remain of the view that the Government has not made out its case for extending the period of pre-charge detention beyond the current limit of 28 days, In our view, there is a package of human rights compatible alternatives to extending pre-charge detention. We therefore recommend the deletion of the relevant provisions from the Bill** and suggest the following amendment:[56]

Page 16, line 14, leave out clause 22.

Page 61, line 2, leave out schedule 1.

Lowering the Charging Threshold

This amendment would place the threshold test for charging on a statutory footing and would insert some necessary basic safeguards.[57]

New clause

‘Lower threshold for charging in terrorism cases

(1)When deciding whether there is sufficient evidence to charge a person with an offence having a terrorist connection, a Crown Prosecutor may apply the “Threshold Test” for charging if the conditions in subsection (3) below are satisfied.

(2) The “Threshold Test” for charging is met where there is at least a reasonable suspicion that the suspect has committed an offence having a terrorist connection.

(3) The conditions which must be satisfied for the Threshold Test to apply are:

[56] Paragraph 36 of this Report.

[57] Paragraph 49 of this Report.

(a) it would not be appropriate to release the suspect on bail after charge

(b) the evidence required to demonstrate a realistic prospect of conviction is not yet available, and

(c) it is reasonable to believe that such evidence will become available within a reasonable time.

(4) The factors to be considered in deciding whether the Threshold Test of reasonable suspicion is met include

(a) the evidence available at the time;

(b) the likelihood and nature of further evidence being obtained;

(c) the reasonableness for believing that evidence will become available;

(d) the time it will take to gather that evidence and the steps being taken to do so;

(e) the impact the expected evidence will have on the case;

(f) the charges that the evidence will support.

(5) Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the person charged shall be immediately informed of the fact that they have been charged on the standard of reasonable suspicion.

(6) When the person charged on the Threshold Test is brought before the Court it shall be the duty of the Crown Prosecutor to inform the Court of that fact.

(7) The Court shall set a timetable for the receipt of the additional evidence and for the application of the normal test for charging as set out in the Code for Crown Prosecutors.

(8) The Chief Inspector of the Crown Prosecution Service shall report annually on the operation of the Threshold Test in terrorism cases.'

Making Bail Available in Terrorism Cases

In our view, the availability of bail with conditions would enable the police to continue their investigation of those suspected of terrorism offences who do not pose a risk to public safety or a flight risk, while at the same time maintaining some control over them through bail conditions. We therefore recommend that the Bill be amended to make court-ordered pre-charge bail with conditions available in relation to terrorism offences. We acknowledge that this will be a significant reform which will require careful and detailed drafting, but we suggest the following amendment to the Bill to give Parliament an opportunity to debate our recommendation in principle:[58]

New clause

'Bail for terrorism offences

[58] Paragraph 56 of this Report.

(1) The Terrorism Act 2000, Schedule 8, is amended as follows.

(2) After paragraph 37 there is inserted:

> "Part IV: Bail
>
> 38. The judicial authority with power to extend detention under section 41 has power to release the suspect on bail, with conditions.".'

Post-Charge Questioning

This amendment would supplement the provisions in the Bill dealing with post-charge questioning with a number of additional safeguards.[59]

New clause

'Post-charge questioning: safeguards

> "(1) Reference in this section to "post-charge questioning" relate only to post-charge questioning for terrorism offences.
>
> (2) Post-charge questioning must be judicially authorised in advance.
>
> (3) Post-charge questioning shall be confined to questioning about new evidence which has come to light since the accused person was charged and which could not reasonably have come to light before.
>
> (4) The total period of post-charge questioning shall last for no more than 5 days in aggregate.
>
> (5) Post-charge questioning may only take place in the presence of the defendant's lawyer.
>
> (6) Post-charge questioning shall always be video-recorded.
>
> (7) The judge who authorised post-charge questioning shall review the transcript of the questioning after it has taken place, to ensure that it remained within the scope of questioning under subsection (2) and was completed within the time allowed under subsection (3).
>
> (8) Post-charge questioning for a terrorism offence shall never be permissible after the beginning of the defendant's trial for that offence.".'

Control Orders

Priority of prosecution

We therefore recommend that the Prevention of Terrorism Act 2005 should be amended to provide that, except in urgent cases, the Secretary of State may only make a control order where the DPP has certified that there is no reasonable prospect of successfully prosecuting

[59] Paragraph 65 of this Report.

the subject of the order for a terrorism-related offence. We also recommend that the Secretary of State should be subject to an express statutory duty to review the possibility for prosecution on a regular basis.[60] We suggest the following wording to give effect to these recommendations:[61]

New clause

'Control orders: pre-conditions

After sub-paragraph (b) in section 2(1) of the Prevention of Terrorism Act 2005 there is inserted –

> "; and (c) unless section 3(1)(b) below applies, the DPP has certified that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence.".'

New clause

'Control orders: ongoing review of possibility of prosecution

After subsection (6) of section 8 of the Prevention of Terrorism Act 2005 there is inserted –

> "(6A) The Secretary of State shall, throughout the period during which the control order has effect
>
> (a) ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence is kept under review at least every 3 months;
>
> (b) consult the police prior to such review;
>
> (c) share with the police such information as is available to him which is relevant to the prospects of a successful prosecution.".'

This amendment proposes to amend the Prevention of Terrorism Act 2005 to increase the transparency of decisions that prosecution is not possible.[62]

New clause

'Control orders: reasons for decisions on prospects of prosecution

After subsection (2) of section 8 of the Prevention of Terrorism Act 2005 there is inserted -

> "(2A) If the chief officer advises the Secretary of State that there is no realistic prospect of prosecution, he shall give reasons for his view.

[60] Paragraph 79 of this Report.

[61] Paragraph 76 of this Report.

[62] Paragraph 81 of this Report.

(2B) The chief officer's reasons shall be disclosed to the controlled person to the extent that such disclosure would not be contrary to the public interest.".'

Deprivation of liberty

This amendment is intended to clarify the approach to be taken by courts when deciding whether the effect of a control order is to deprive a person of their liberty in the Article 5 ECHR sense.[63]

New clause

'Control orders: cumulative effect of restrictions relevant to determination about deprivation

After subsection (10) of section 3 of the Prevention of Terrorism Act 2005 there is inserted -

"(10A) In determining whether the effect of a non-derogating control order is to deprive a person of their liberty, the factors to which the court shall have regard must include,

(a) the nature, duration, effects and manner of implementation of the restrictions, and

(b) the cumulative effect of the obligations.

(10B) The combination of obligations may amount to a deprivation of liberty even if no individual obligation amounts to such a deprivation.".'

This amendment is intended to impose a 12 hour maximum limit on daily curfews imposed by control orders to make it less likely that control orders will be in breach of Article 5 ECHR.[64]

New clause

'Control orders: maximum limit on daily curfews

After subsection (5) of section 1 of the Prevention of Terrorism Act 2005 there is inserted -

"(5A) The duration of any prohibition or restriction on the controlled person's movements shall not exceed 12 hours in any 24 hour period.".'

Due process

This amendment is intended to include express references to the right to a fair hearing for those subject to control orders in the Prevention of Terrorism Act 2005.[65]

[63] Paragraph 85 of this Report.

[64] Paragraph 89 of this Report.

New clause

Control orders: right to a fair hearing

(1) At the end of subsection (13) of section 3 of the Prevention of Terrorism Act 2005 there is inserted –

> 'except where to do so would be incompatible with the right of the controlled person to a fair hearing'.

(2) At the end of paragraph 4(2)(a) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> 'except where to do so would be incompatible with the right of the controlled person to a fair hearing'.

(3) At the end of paragraph 4(3)(d) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> 'except where to do so would be incompatible with the right of the controlled person to a fair hearing'.

(4) After paragraph 4(5) in the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> '(6) Nothing in this paragraph, or in rules of court made under it, is to be read as requiring the court to act in a manner inconsistent with the right to a fair hearing in Article 6 of the European Convention on Human Rights.'

This amendment is intended to create a statutory obligation for the Secretary of State to give reasons for make control orders.[66]

New clause

'Control orders: obligation to give reasons

After subsection (4) of section 2 of the Prevention of Terrorism Act 2005there is inserted –

> "(4A) A non-derogating control order must contain as full as possible an explanation of why the Secretary of State considers that the grounds in s. 2(1) above are made out.".'

This amendment is intended to give full effect to the judgment of the Court in *MB*; on information available to a controlled person and the right to a fair hearing. It intends that the Secretary of State should be obliged to provide a summary of any material on which he used to rely.[67]

1.

[65] Paragraph 97 of this Report.

[66] Paragraph 100 of this Report.

[67] Paragraph 103 of this Report.

New clause

'Control orders: obligation to provide gist of closed material

"(1) At the end of paragraph 4(3)(e) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> "and must require the Secretary of State to provide a summary of any material on which he intends to rely and on which fairness requires the controlled person have an opportunity to comment."'.

This amendment intends to allow a High Court judge to sanction communication between special advocates and controlled persons, on application by the special advocate.[68]

New clause

'Control order: communications between special advocate and controlled person

After subparagraph 7(5) in the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

> "(5A) Rules of court must secure that persons appointed under this paragraph may apply to a High Court judge, without notice to the Secretary of State, for permission to communicate with the controlled person after the service of closed material.".'

The judgments in *MB* make clear that the standards of procedural protection are to be commensurate with the seriousness of the consequences for the controlee, and in our view this must include the standard of proof. We consider that this should be made clear in the legislation itself. The following amendment would give effect to this recommendation.[69]

New clause

'Control orders: proportionality of procedural protection

After subsection 3(11) of the Prevention of Terrorism Act 2005 there is inserted –

> "(11A) In a hearing to determine whether the Secretary of State's decision is flawed, the controlled person is entitled to such measure of procedural protection as is commensurate with the gravity of the potential consequences of the order for the controlled person.".'

This amendment is designed to allow special advocates to call expert witnesses.[70]

New clause

'Control orders: Power of special advocates to call expert witnesses

After paragraph 4(3)(e) of the Schedule to the Prevention of Terrorism Act 2005 there is inserted –

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[68] Paragraph 106 of this Report.

[69] Paragraph 108 of this Report.

[70] Paragraph 111 of this Report.

> "(ea) that, where permission is given by the relevant court not to disclose material, persons appointed under paragraph 7 may call witnesses to rebut the closed material.".'

Maximum duration of control orders

This amendment is designed to set a statutory maximum duration of 2 years for a non-derogatory control order.[71]

New clause

'Control orders: maximum duration

After section 3 of the Prevention of Terrorism Act 2005 there is inserted -

> "3A Duration of non-derogating control orders
>
> A non-derogating control order ceases to have effect at the end of the period of two years from the date on which it was made, unless there are exceptional circumstances justifying its renewal.".'

Coroners' inquests and national security

We recommend that the clauses concerning coroners' inquests be deleted from the Bill and the issue returned to in the context of the forthcoming Coroners Bill. We suggest the following amendments:[72]

> Para 44, line 35, leave out clause 64.
>
> Para 46, line 1, leave out clause 65.

[71] Paragraph 114 of this Report.

[72] Paragraph 120 of this Report.

Conclusions and recommendations

1. As always, in this Report we ground our analysis in the human rights standards with which the Government's counter-terrorism measures must be compatible, and we proceed from a full recognition that the Government has a duty to protect people from terrorism, a duty imposed by human rights law itself. We also remind Parliament of one of the central and enduring insights of the Newton Committee of Privy Councillors which reported on the operation of the Anti-Terrorism, Crime and Security Act 2001: that counter-terrorism measures ought not to be extraordinary measures in a special category of their own, but, as far as possible, part of the ordinary criminal law of the land. (Paragraph 5)

2. The Government has failed to consider these alternatives to extending pre-charge detention as a coherent package. Taking these measures in combination, we do not think it can be said that there is really any gap in public protection which warrants taking the extraordinary step proposed by the Government to increase pre-charge detention up to a maximum of 42 days. (Paragraph 8)

3. We are extremely disappointed by the Government's failure to provide a substantive response to a substantial report on the issue which has proved the most controversial in the context of the current Bill. We look forward to the Government at the very least responding to the recommendations we have identified above. (Paragraph 11)

4. The fundamental flaw in the Government's proposal therefore remains: it confuses parliamentary and judicial functions by attempting to give to Parliament what is unavoidably a judicial function, namely the decision about whether it is justifiable to detain individual suspects for longer. (Paragraph 15)

5. We would not expect to have received the legal advice provided by the Law Officers to the Home Office, which we accept would be legally privileged. However, we are disappointed that the Law Officers were not even able to confirm that, in their view, the Bill is compatible with the UK's human rights obligations and does not risk giving rise to breaches of human rights in individual cases. We see no reason why Parliament should not have received at the very least a summary of the reasons why the Law Officers regard the Government's 42 days proposal as being compatible with the UK's human rights obligations. In our view, on a matter as significant and sensitive as the proposal to increase the maximum period of pre-charge detention, it is important that Parliament is fully informed about the views of the Law Officers, especially in light of what has subsequently been learned about Lord Goldsmith's view at the time of the 90 day proposal. (Paragraph 32)

6. We remain of the view that the Threshold Test would benefit from proper parliamentary scrutiny and debate, which to date it has never received. (Paragraph 46)

7. Given the importance of where the threshold for prosecution is set, and in particular the implications for an individual's liberty, in our view the Government's approach fails properly to reflect the strong constitutional presumption that interferences with

an individual's liberty require express statutory authorisation, or leaves too much discretion to the DPP. We are not therefore persuaded by the Government's argument that it would be constitutionally improper to place the Threshold Test on a statutory footing or to introduce some independent safeguards. (Paragraph 48)

8. In our view, the availability of bail with conditions would enable the police to continue their investigation of those suspected of terrorism offences who do not pose a risk to public safety or a flight risk, while at the same time maintaining some control over them through bail conditions. We therefore recommend that the Bill be amended to make court-ordered pre-charge bail with conditions available in relation to terrorism offences. (Paragraph 56)

9. A prison governor falls a long way short of a judge as an independent safeguard against abuse and we note that the Government has provided no evidence to substantiate its assertion that prison governors thoroughly scrutinise any police requests for production of a suspect for questioning. "After the event" judicial powers to exclude evidence obtained by oppressive means are also inferior to legal safeguards designed to prevent such oppressive questioning happening in the first place. We therefore remain of the view that the requirement of judicial authorisation and strict time limits must be set out on the face of the legislation. (Paragraph 60)

10. In our view, it should be possible to draft a limitation on the scope of post-charge questioning which confines it to new evidence but defines new evidence in such a way as to include material which has only become available, for example, as a result of analysis of computer material which was already physically available. (Paragraph 62)

11. The Government says that amendments to the control orders framework are not necessary because the judgment in *MB* already makes it human right compatible. We do not agree that the effect of the judgments in *MB* are as clear as the Government contends, as is borne out by the continued litigation and appeals about precisely what the case requires. We remain of the view that it is better that words appear on the face of a statute than that they are "read in" to the statute by a judgment the precise effect of which might not be very clear even after careful study. We suggest the amendments to give effect to these recommendations. (Paragraph 97)

12. In our view, the Government's justification for this measure, that the current law may be incompatible with Article 2 ECHR in this respect, is highly questionable. The law of public interest immunity applies to inquests and already provides the Government with the opportunity to persuade the coroner not to disclose certain documents or information because to do so would damage the public interest, including national security. (Paragraph 117)

13. The proposed solution of specially appointed, security-cleared coroners would, in our view, clearly not be compatible with Article 2. In any case where the State is potentially implicated in the death which is being investigated, a coroner appointed by the Secretary of State, instead of by the normal method, would not satisfy the requirement in Article 2 ECHR that the investigation be carried out by a person independent from those implicated in the events. The fact that the coroner has been

directly appointed by the Secretary of State for the purposes of the particular inquest would be fatal to any appearance of independence. (Paragraph 119)

14. We therefore recommend that the clauses concerning coroners' inquests be deleted from the Bill and the issue returned to in the context of the forthcoming Coroners Bill. (Paragraph 120)

Formal Minutes

Monday 12 May 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness
Lord Dubs
Lord Morris of Handsworth
Mr John Austin MP
Virendra Sharma MP

****

Draft Report (Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill), proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 120 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

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

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

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[Adjourned till Wednesday 21 May at 2pm.

Appendices

Appendix 1: Letter to Sir Ken Macdonald QC, Director of Public Prosecutions, Crown Prosecution Service, dated 17 January 2008

As you will know, we are currently engaged in an inquiry into counter-terrorism policy and human rights. We were helped considerably by the oral evidence we heard from Sue Hemming from the CPS on 5 December 2007. One of the issues we covered with her was the application of the threshold test in charging terrorism suspects. My Committee is interested to know more about the genesis and application of the threshold test. In particular, we would like to scrutinise the Explanatory Guidance on the Application of the Threshold Test which was issued in September 2005 but is not yet publicly available. I would be grateful if you could send me a copy of the Guidance at your earliest convenience, to assist with our continuing scrutiny of the Government's counter-terrorism proposals.

Appendix 2: Letter from Sir Ken MacDonald QC, Director of Public Prosecutions, Crown Prosecution Service, dated 8 February 2008

Thank you for your letter of 17 January 2008. I have now received a report from Mr Mike Kennedy, Chief Operating Officer.

I am pleased that your Committee found Sue Hemming's evidence of assistance but note that further information is required on the genesis and application of the Threshold Test. To assist in this, I have enclosed, as requested, a copy of the internal guidance concerning the Threshold Test which was issued to crown prosecutors in August 2005.

As might be expected, there are a number of police investigations which do not produce sufficient evidence to satisfy the Code for Crown Prosecutors' realistic prospect of conviction standard within the pre charge custody time limits but there may clearly be further significant evidence to be obtained. The dilemma facing the police and crown prosecutors in a limited number of these cases is that a proper risk assessment reveals a dangerous suspect or one that would, if released, flee the jurisdiction or interfere with witnesses or hinder the recovery of evidence.

The statutory framework provided by the Police and Criminal Evidence Act 1984 (PACE) does not provide for any specific interim assessment to justify charging in such circumstances. Prior to the changes brought about by the Criminal Justice Act 2003, PACE allowed the police to charge on a rather vague notion of there being '*sufficient evidence to charge*'. This standard is not defined in the Act and bears no relation to other more objective standards such as 'a realistic prospect of conviction' or 'beyond reasonable doubt' as required to satisfy a jury. Rather it provided a standard that was as flexible as the circumstances required.

It is a matter of history and part of the methodology of police working that their pre 2003 charging decisions were largely based on oral exchanges between the investigating and custody officer, occasionally supported by documentary evidence, but often with much of the key evidence that would now be necessary to satisfy the requirements of the Code for

Crown Prosecutors still to be obtained. The low evidential standard demanded by 'sufficiency to charge' facilitated a generous interpretation and for the dangerous offender dilemma to be dealt with pragmatically.

The application of this standard to casework led to high levels of discontinuance and many aborted trials, even in cases where defendants had been held in custody. This was mostly due to the failure of the police to produce any additional necessary evidence or a failure to produce it within a timetable acceptable to the court and the interests of justice.

This was one of the reasons underlying Lord Justice Auld's recommendations for the transfer of responsibility for charging to the Crown Prosecution Service (CPS). For this purpose, the Criminal Justice Act 2003 empowers the Director of Public Prosecutions to issue guidance to enable custody officers (and crown prosecutors) to decide how persons should be dealt with when a custody officer believes there is sufficient evidence to charge a person.

Guidance for crown prosecutors has also been published by successive Directors of Public Prosecution (DPP) under the Prosecution of Offences Act 1985 through the Code for Crown Prosecutors. The Code is published after wide public consultation and since 2004 has included specific guidance on how crown prosecutors should determine whether and what to charge. The required standard to charge is set by the DPP and can be changed should the circumstances demand it following consultation. The current standard is designed to protect potential defendants from being charged with weak cases where there is no prospect of a successful prosecution and to prevent the wasteful expenditure of public money.

As part of the strategy for dealing with the annual one and a half million prosecutions, I decided that the CPS should charge the more serious and complex cases, with the police dealing with volume straight forward admitted lower level offences. It was clearly inappropriate for the police to be able to charge on a different standard from crown prosecutors and I required that the police charge using the Full Code Test of there being a realistic prospect of conviction. Indeed the 2003 PACE Codes of Practice made this a requirement. This split of work naturally meant that crown prosecutors would make the charging decision for cases where the intention was to seek a remand into custody post charge.

The Code for Crown Prosecutors requires that assessments of cases to be charged are based on a proper review of the evidence. This requires the production to and assessment of statements or other evidence by crown prosecutors. This increased standard of scrutiny has led to dramatic reductions in the discontinuance of cases and the number of abandoned trials. It did however raise the issue of what to do in cases where the PACE detention clock, with extensions, defeated the ability of the police to produce sufficient evidence to charge to the Full Code Test standard.

In cases where the suspect was suitable to be released on bail, there was no issue since the suspect would be so released while the investigations were completed. However, the issue with the offender who is a bail risk or a risk to public safety is obviously much more difficult. Let me provide you with a hypothetical example of the dilemma facing the police

and prosecution, although recent examples of those who have allegedly killed while on bail is example enough of the tragic consequences that can arise.

Typically the profile which is often considered is that of an offender who presents as an alleged deranged axe murderer. The evidence at the critical time is not sufficient to pass the Full Code Test as no forensic examination results have yet been received on blood and other items recovered from the scene. However, let us say that the suspicions are based on the recovery of an axe from an area associated with the defendant who provides a no comment interview. There is at present no further evidence. From the above, and from enquiries and other evidence yet to be obtained, there is now at least a reasonable suspicion that the police have arrested the right man. The police believe that these other enquiries and the laboratory results are highly likely to link the man to the scene of the crime. The retention in custody of this man in the meantime provides the opportunity to avoid the risk of the loss of further life or serious injury which from the indications and risk assessment the police have made seem a distinct possibility.

The Threshold Test was developed to deal with this dilemma and is fully compliant with Article 5 of the European Convention. The effect of any charging is to bring a suspect who on reasonable suspicion has committed an offence promptly under the jurisdiction of a court. That court's sole or principal concern will be to determine whether the suspect should be bailed or remanded in custody. The Threshold Test goes beyond the Article 5 requirements by requiring that there is a future realistic prospect of conviction through the obtaining of further identified significant evidence within a reasonable time.

At any such hearing, the court and defence will receive at least an outline of the case and the reasons why the prosecution will be seeking a remand into custody. Case progression rules require an explanation for the delays being sought which in the above case would be the need for further enquiries and examination of the laboratory results. The strength of the evidence is a factor the court would take into account under the Bail Act which the defence would be free, as they do, to exploit on their client's behalf. The court would then determine whether the prosecution's application could be sustained.

The Threshold Test itself has already been explained to you; its precise wording is to be found in the Code for Crown Prosecutors. It is applied objectively by the charging crown prosecutor and is based on the evidence produced by the investigator and the evidence to be obtained. It can never be founded on inadmissible evidence, mere intelligence or intercept material, for which in the latter case there is specific statutory exclusion. The onus on the crown prosecutor is always to apply the Full Code Test of the Code for Crown Prosecutors. If this cannot be done, then the suspect must be bailed while the required evidence is obtained. Only exceptionally if the suspect on a proper risk assessment is not suitable to be bailed, even with conditions, and the objections to bail can be sustained at court will the Threshold Test be applied.

The Threshold Test itself was developed for the generality of casework and not for any specific cases such as those charged under the Terrorism Acts which represent a very small percentage of the CPS's business. It is an open, transparent and accountable process and the CPS is following its published policy set out in the Code for Crown Prosecutors. At every initial remand hearing, a copy of the evidence or a summary is disclosed to the defence. The reason for its application is as explained in this letter.

The PACE review currently taking place is to be asked to reassess the workings of Section 37 of the Act which provides the current statutory standard of the evidence justifying charge so that it and other drafting issues criticised by the judiciary can be clarified and improved in possible future legislation.

I trust the information contained in this letter will provide the detail you and the Committee require.

Appendix 3: Explanatory Guidance on the Threshold Test

ISSUED BY THE DIRECTOR OF PUBLIC PROSECUTIONS UNDER SECTION 37A OF THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (AS AMENDED)

Appropriate application of the Threshold Test when making charging decisions or releasing persons on bail for referral to a prosecutor

Interpretation Difficulties

1. Feedback received from CPS Direct, some of the recent post-implementation reviews and the outcome of a number of cases recently is indicating that there may be misunderstanding on the part of both police officers and prosecutors as to the circumstances in which the Threshold Test may be applied in reaching a charging decision and the extent to which a prosecutor has to be satisfied that there are lawful grounds to justify the continued detention of an individual.

2. This misunderstanding is leading in some cases to the Threshold Test being inappropriately applied where either the suspect ought to be released on bail or where, in the circumstances of the case, there is no likelihood of further significant evidence being obtained. In both such circumstances the Full Code Test should properly be applied.

Justification for the Threshold Test and Limitations

3. The Threshold Test is potentially a grave infringement on the liberty of the individual. It allows charging on reasonable suspicion only, which for obvious reasons does not require a high standard of evidence during what will be the early stages of generally serious cases. The justification for this is the requirement to minimise the risk to the public by seeking to ensure the continued detention of individuals who may pose a substantial bail risk. This is set out in more detail in section 38 PACE (see further below).

4. The Threshold Test is not to be regarded as a shortcut to obtaining a charging decision to place offenders before a court quickly. The amendments to section 37 (7) of the Police and Criminal Evidence Act are intended to ensure that in any case where a suspect is suitable to be released on bail the evidence required to satisfy the Full Code Test is gathered before charging takes place.

5. Application of the Threshold Test is only permitted in the limited circumstances set out in the Code for Crown Prosecutors and in the Guidance on Charging that I have issued under section 37A of the Police and Criminal Evidence Act. These restrictions on the use of the Threshold Test are obligatory and prosecutors must record, as part of the charging decision, that the circumstances giving rise to the use of the Threshold Test are applicable.

6. Paragraph 3.2 of the Code for Crown Prosecutors requires that charging decisions will be made in accordance with the Full Code Test *except in the limited circumstances where the Threshold Test applies*. Paragraph 3.3 and the whole of paragraph 6 of the Code set out in detail the circumstances in which a Crown Prosecutor may apply the Threshold Test. This test may only be applied where the case is one in which it is proposed to keep the suspect in custody after charge because he presents a substantial bail risk, but much of the evidence is not available at the time the charging decision has to be made and the pre-charge time limits for custody are about to run out.

7. To make it perfectly clear, prosecutors should, wherever possible, always seek to apply the Full Code Test when considering the charging of a case. The Threshold Test is **not** an interim stage to be reached in every case. It is a temporary test *which may only be applied* when:

- The pre-charge custody time limit is about to or will shortly run out, but
- The evidence to allow consideration of the Full Code Test is not yet available, and
- Steps are being or are about to be taken to obtain this evidence, and
- This evidence will have a significant impact on the case and will be available in a reasonable time (see 6.4 of the Code for Crown Prosecutors for full list of requirements or Paragraph 3.10 of my Guidance on Charging)
- The Custody Officer has decided it would be appropriate to detain the suspect in custody after charge until the next court hearing, and
- An application to withhold bail *can properly be made that court* by a prosecutor.

Responsibilities of the Custody Officer

8. Subsection (1)(a) of section 38 PACE sets out the duties of the Custody Officer after charge and lists the detention provisions in respect of adults. When someone who has been arrested without warrant (or under a warrant not endorsed for bail) is charged, the Custody Officer must release him with or without bail unless it is decided one or more of the following conditions apply:

i. It appears that he has not provided a satisfactory address for service of a summons.

ii. There are reasonable grounds for believing that he will fail to appear at court to answer bail.

iii. Where someone is arrested for an imprisonable offence, where there are reasonable grounds for believing that detention is necessary to prevent him from committing an offence.

iv. Where someone is arrested for an offence that is not imprisonable, and there are reasonable grounds for believing that the detention is necessary to prevent him from causing physical injury to anyone (e.g. assault) or from causing loss of or damage to property (e.g. theft or criminal damage).

v. If there are reasonable grounds for believing that the detention is necessary to prevent him from interfering with the administration of justice or with the investigation of offences.

vi. If there are reasonable grounds for thinking that detention is needed for his own protection (and if a youth, that he ought to be detained for his own interests).

9. In deciding whether such conditions apply (except for (i) and (vi)), the Custody Officer is required to have in mind the same considerations as magistrates when considering whether to grant bail for a person arrested for an imprisonable offence, namely:

i. The nature and seriousness of the offence and probable penalty;

ii. The defendant's character, antecedents, associations and community ties;

iii. His record in regard to any previous grant of bail; and

iv. The strength of the evidence; together with any other relevant considerations.

10. Home Office Circular 111/92 gave further guidance on the matters that Custody Officers should take into account, including:

a. The suspect's intentions as expressed: e.g. any threats

b. His disposition as expressed in violent behaviour; and

c. His prior record.

A Crown Prosecutor's Responsibility

11. A Crown prosecutor will make precisely the same assessment; experience will help inform the decision as to whether the magistrates would be likely to accept such reasoning. Paragraphs 3.3 and 6.3 of the Code requires Crown Prosecutors to be satisfied in all the circumstances of the case that there are grounds for believing that the suspect in custody presents a substantial bail risk justifying continued detention and that application of the Threshold Test is therefore appropriate. Prosecutors must be so satisfied and should not accept, without proper enquiry, any unjustified or unsupported assertions about risk if release on bail were to take place.

The Charging Initiative - Changes in Procedure

12. Although PACE and other guidance continues to emphasise the role of the Custody Officer in making assessments about bail post charge, the decision as to whether an application to remand into custody will be made to the court lies wholly with the prosecutor. Indeed it always has done so.

13. What is now different is that the charging initiative has moved the prosecutor's involvement forward in time and requires this judgement to be made at the time of the assessment of the case. No reasonable prosecutor on discovering the police proposals for the prisoner post charge could properly close his mind to how the case will in fact be handled by the CPS after charge. To make no objections to bail (or approve conditions that could have been granted by the police themselves) concerning someone held in custody

post charge damages the credibility of both the police and the CPS, and is, other than in exceptional circumstances, grossly unfair on the defendant and invites legal action against those responsible.

The Need for Improved Communications

14. Clearly the Prosecution Team needs to act cohesively, and must be seen to do so, so that only where it is strictly necessary do defendants appear in custody at court with an application for bail to be withheld. Placing inappropriate cases before the court in such circumstances will make sustaining proper applications for remand in custody more difficult.

Early use of the MG7

15. To assist in improving communication and making a co-ordinated approach, Custody Officers will ensure a properly completed MG7 accompanies the MG3 to provide the prosecutor with sufficient information to assess the justification for withholding bail and fully understand the police concerns.

The Prosecutor's Approach and Assessment Procedure

16. Accordingly, in the light of the fullest information, the prosecutor should consider whether, in all the circumstances of the case, the Custody Officer's decision is consistent with the legal requirements to withhold bail and that such withholding can be sustained when application is made to the court. If the conclusion is in the negative, the prosecutor must discuss this with the Custody Officer ensuring that all current information about the case and police objections to bail have been received and are fully explained. Prosecutors should aim to come to a mutually acceptable agreement wherever possible.

17. If after any further information has been provided and discussions have taken place (including possible consultation between the prosecutor and line management), it is concluded that an application to withhold bail cannot be sustained at court then the Threshold Test must not be applied and the Custody Officer must be advised that the Full Code Test will be applied instead.

18. If the case does not meet the Full Code test, the suspect may not be charged though the Custody Officer may still release the suspect on pre-charge bail (including the imposition of conditions) under S37 (7) (a) if the Custody Officer is satisfied that in fact the case did pass the Threshold Test (see later) and further evidence is to be gathered to meet the Full Code Test to allow a further referral for a charging decision.

Escalation procedure

19. Where the Custody Officer is not in agreement with the prosecutor's decision, the case may be escalated in accordance with paragraph 11.2 of the Guidance on Charging

Public Confidence

20. The above is an example of how an independent prosecution service working closely with the police should operate. It will prevent cases appearing in the remand court where the prosecutor will not be seeking a remand into custody and ensures that cases do not

proceed to charge unless the appropriate test is met. CPS managers will of course want to discuss any such cases with senior police managers urgently to safeguard the cohesion of the prosecution team.

The evidential decision under the Threshold Test

21. The Threshold Test is an interim judgement that may be applied only where further evidence is being gathered. This requires that further enquiries are proposed or being undertaken that are likely to result in further significant evidence, sufficient to meet the Full Code Test, becoming available in a reasonable time. If there is no reasonable likelihood that further evidence will become available to meet the Full Code Test standard, the Threshold Test may not be applied. Paragraph 6.4 of the Code sets out the factors that must be considered in making this assessment.

22. In such circumstances, the Full Code Test would have to be applied and appropriate decisions taken in the light of all the circumstances at the time. Where the decision is made not to charge, the suspect may only be released on unconditional bail for further enquiries under section 34(5), since the Threshold Test could not have been passed - there being no reasonable prospect of evidence sufficient to meet the Full Code test becoming available.

Charging decisions – recording and completion of MG3

What must be recorded on the MG3

23. Consideration of the factors that will determine whether it is appropriate to apply the Threshold Test in each particular case will be made in consultation with the Police; prosecutors should ensure they are acquainted with all relevant evidence and factors appropriate to the case. Where it is decided to apply the Threshold Test, the MG3 must record the circumstances justifying application of this interim test, record a date for a further review to be undertaken when the Full Code Test will be applied, and record the specific actions agreed with the investigator to gather the further evidence that will allow that test to be applied. CPS managers must ensure that the Threshold Test is only applied in appropriate cases and that action plans are properly completed.

Audit trail of decisions

24. The Guidance on Charging is a public statement of our policy and is now contained in published legal text books. We can expect increased scrutiny of the decisions of Custody Officers and prosecutors leading to possible legal challenges by the defence. Prosecutors should be able to demonstrate that the Code and our policy have been properly applied and that they have acted with due diligence and expedition.

Ensuring that dangerous offenders who present a substantial bail risk are detained

25. Area managers will need to discuss this further guidance with their staff and local police force and put in place appropriate protocols and liaison arrangements to ensure that the police retain the ability to deal effectively with dangerous and difficult offenders for whom the Threshold Test was properly developed.

File Inspections

26. This early involvement in cases is an important task that prosecutors have been entrusted with on behalf of the public and I am determined to see that it is working properly. This will require local managers to supervise their prosecutors and I may ask to see files on Area visits to satisfy myself that the highest priority is being given to raising and maintaining the necessary standards.

Explanation of the Application of the Threshold Test by the police before referring cases to prosecutors

What if a Case does not meet the Threshold Test Standard?

27. The Threshold Test is the evidential standard that must be met before a case has to be referred to a prosecutor for a charging decision. If a case does not meet that standard, the Custody Officer may determine that it should not be referred to a prosecutor at that stage for a charging decision. This does not prevent a Custody Officer referring the case to a prosecutor for advice. However if the Threshold Test evidential standard is not met, only unconditional bail may be imposed (under section 34(5)). Once a case does reach this standard, the detained person may be released on pre-charge bail, including with the imposition of conditions for referral to a prosecutor.

Custody Officer to Initially Determine if Threshold Test Passed before Charging Decision Sought

28. Application of the threshold test for this purpose requires an overall assessment of whether there is at least a reasonable suspicion against the person for having committed an offence and that there is a realistic prospect of further evidence being obtained to satisfy the full Code test. Of course it must also be in the public interest to proceed at that stage. It is for Custody Officers to determine in their judgement whether the Threshold Standard is met at this early stage. If it is, a charging decision may be sought or pre-charge bail under section 37(7) including where appropriate bail conditions may be imposed.

29. Further enquiries on this guidance should be addressed to David Evans at Policy Directorate or Paul Whittaker, CCP Merseyside.

Appendix 4: Letter to the Rt Hon Baroness Scotland of Asthal QC, Attorney General and Vera Baird QC MP, Solicitor General, dated 3 April 2008

Pre-charge detention

I am writing to you both in connection with the proposal in the Government’s Counter-Terrorism Bill to introduce a reserve power for the Home Secretary to increase the maximum period of pre-charge detention of terrorism suspects to 42 days.

As you will both be aware, on 21 November 2007 the former Attorney General, Lord Goldsmith, giving evidence to the Home Affairs Committee about the proposal for 90 days pre-charge detention in the 2006 Terrorism Bill, said (Q492)

> "if the 90-day proposal had come from the Commons unamended, I would have not found it possible to vote for it in the Lords and that would have had an obvious consequence in terms of my position within government."

Although Lord Goldsmith said (Q500) that his view was not that the proposal for 90 days was illegal, he explained (Q496) that his reason for thinking that 28 days is the right limit was that, to keep somebody in detention without charging them, you need to continue to have reasonable suspicion that they have committed an offence, and that "this is probably required by our international obligations". He thought it unlikely that there could still be a reasonable suspicion if no evidence had been found of any offence after a period as long as 28 days. This is also the view expressed by the DPP in his interview this week with *The Times* newspaper (*The Times*, 1 April 2008).

It is also a matter of public record that the Law Officers will be called upon to advise Ministers about the human rights compatibility of measures in Bills in difficult or sensitive cases. As Lord Goldsmith explained in his public lecture, *Government and the Rule of Law in the Modern Age*, at the LSE on 24 February 2006

> "the Minister giving the certificate needs to be satisfied that it is more likely than not that the courts will uphold the proposal as compliant. The Minister's judgment is necessarily made on the basis of legal advice. That advice comes from departmental lawyers, sometimes supplemented by external advice or advice from the Law Officers. The Law Officers will normally only be called upon to advise in the most difficult or sensitive cases. But called upon, we are."

I am sure you would agree that on a matter as significant and sensitive as the proposal to increase the maximum period of pre-charge detention, it is important that Parliament is fully informed about the views of the Law Officers, especially in light of what has subsequently bean learned about Lord Go1dsmith's view at the time of the 90 day proposal.

I would therefore be grateful if you could answer the following questions:

1. Are you persuaded that the case has been made for extending the maximum period of pre-charge detention beyond the current limit of 28 days?

2. If so, what evidence has persuaded you that the current limit of 28 days is inadequate?

3. Are you persuaded that extending the maximum period of pre-charge detention is necessary having regard to the alternatives, including new offences such as acts preparatory to terrorism, charging at the lower threshold of the "threshold test", and post-charge questioning?

4. An you satisfied that the hearings of applications for warrants of further detention are fully adversarial in the sense required by human rights law?

5. Do you disagree with the JCHR's analysis of the human rights compatibility of the 42 days proposal in its Report on the subject, *Counter Terrorism Policy and Human Rights:42 Days* (Second Report of Session 2007-08, HL 23/HC 156), which I have enclosed, and if so why?

I would be grateful for your response to these questions by Friday 25 April 2008.

Alternatively, if you would prefer to respond to these questions orally, the Committee would be pleased to hear evidence from you on the afternoon of Tuesday 6th May.

Appendix 5: Letter from the Rt Hon the Baroness Scotland QC, Attorney General, to the Chairman of the Committee, dated 23 April 2008

Pre-charge detention

Thank you for your letter of 3 April to me and to Vera Baird. You ask for our views on a number of issues related to the Government's proposal to enable the maximum period of pre-charge detention of terrorism suspects to be increased to 42 days in future if there is an exceptional need to so do, including the compatibility of the proposal with the ECHR.

So far as the policy justification for the proposal is concerned, the Government has made clear its position on a number of occasions — not least in response to questions from your Committee.

As to the legal position, you will be aware of the long-standing convention, set out in the Ministerial Code, that neither the fact that the Law Officers have advised (or have not advised), nor the content of any advice they may have given, is disclosed outside Government. That convention would clearly be undermined if the Law Officers were simply required to give their views publicly on issues which they may (or may not) have advised the Government, or be called on to do so.

The Government recognises that Parliament and the public are entitled to an explanation of the legal basis for key actions and decisions. This does not entail disclosing the legal advice received by Government, whether from the Law Officers or any other lawyer.

The Government has recently reaffirmed its position on these questions in the White Paper *The Governance of Britain — Constitutional Renewal* (see paragraphs 66-69).

In this case, the Home Secretary has signed a certificate under section 19 of the Human Rights Act 1998 to the effect that she considers the provisions in the Terrorism Bill (including those on pre-charge detention) to be compatible with the Convention Rights; and the Home Office has set out, in the Explanatory Notes to the Bill, the basis on which it considers those provisions to be compatible. Hence Parliament has received an explanation of the Government's position on these issues.

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty–First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter–Terrorism Policy and Human Rights: 28 days, intercept and post–charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993

Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/ HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh	Legislative Scrutiny: Corporate Manslaughter	HL Paper 246/HC 1625

Report	and Corporate Homicide Bill	
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716