



House of Lords
House of Commons
Joint Committee on
Human Rights

**Counter–Terrorism Policy and
Human Rights: Government
Responses to the Committee's
Twentieth and Twenty–first
Reports and other correspondence**

**Twenty-fourth Report of Session
2007-08**

*Report, together with formal minutes, and
appendices*

*Ordered by The House of Lords to be printed
17 June 2008*

*Ordered by The House of Commons to be printed
17 June 2008*

**HL Paper 127
HC 756**

Published on 26 June 2008
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

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.

Current membership

HOUSE OF LORDS

Lord Bowness
Lord Dubs
Lord Lester of Herne Hill
Lord Morris of Handsworth OJ
The Earl of Onslow
Baroness Stern

HOUSE OF COMMONS

John Austin MP (Labour, *Erith & Thamesmead*)
Mr Douglas Carswell MP (Conservative, *Harwich*)
Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Mr Virendra Sharma MP (Labour, *Ealing, Southall*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

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), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), James Clarke (Committee Assistant), Karen Barrett (Committee Secretary) and John Porter (Chief Office Clerk).

Contacts

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

Contents

Report	<i>Page</i>
1 Report	3
Formal Minutes	4
Appendices	5
Appendix 1: Government Response dated 5 June 2008 to the Committee's Twentieth Report of Session 2007-08	5
Appendix 2: Government Response dated 6 June 2008, to the Committee's Twenty-first Report of Session 2007-08	19
Appendix 3: Letter from the Rt Hon Tony McNulty MP, Minister of State, Home Office dated 4 June 2008	29
Appendix 4: Letter to the Rt Hon Jacqui Smith MP, Home Secretary, Home Office, dated 9 June 2008	29
Appendix 5: Letter from the Rt Hon Jacqui Smith MP, Home Secretary, Home Office, dated 11 June 2008	38
Reports from the Joint Committee on Human Rights in this Parliament	43

1 Report

As appendices to this Report we are publishing:

- the Government's response to our Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill* (HL Paper 108, HC 554);¹
- the Government's response to our Twenty-first Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies* (HL Paper 116, HC 635);²
- a letter to our Chair from Tony McNulty MP, Minister of State, Home Office, about special advocates, dated 4 June,³ which was in reply to the letter we published as Appendix 1 in our Twenty-first Report; and
- a letter from our Chair to the Home Secretary about pre-charge detention: adequacy of safeguards, dated 9 June,⁴ and her reply, dated 11 June.⁵

We are grateful to the Home Office for the speed with which these documents were produced, in order so that they could be made available in advance of the debate on the Counter-Terrorism Bill in the House of Commons on 10 and 11 June. We will comment on the contents of the documents as and when appropriate in future Reports on counter-terrorism policy and human rights.

¹ Appendix 1.

² Appendix 2.

³ Appendix 3.

⁴ Appendix 4.

⁵ Appendix 5.

Formal Minutes

Tuesday 17 June 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Lord Dubs	Mr Richard Shepherd MP
Lord Lester of Herne Hill	
The Earl of Onslow	
Lord Morris of Handsworth	
Baroness Stern	

Draft Report (*Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports and other correspondence*), proposed by the Chairman, brought up and read the first and second time, and agreed to.

Several papers were ordered to be appended to the Report.

Resolved, That the Report be the Twenty-fourth Report of the Committee to each House.

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

[Adjourned till Tuesday 24 June at 1.30pm.]

Appendices

Appendix 1: Government Response dated 5 June 2008 to the Committee's Twentieth Report of Session 2007-08

Counter-Terrorism Bill

This letter responds to the recommendations made in the report by the Joint Committee on Human Rights on the Counter Terrorism Bill which was published on 14 May 2008.

Recommendation 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.

We only legislate to create terrorism-specific offences and powers where this is necessary because of the particular nature of the terrorist threat and where there are not existing provisions in the criminal law. Our counter-terrorism legislation therefore contains some specific terrorism offences and powers. However, nearly half of alleged terrorists who are prosecuted in this country are prosecuted for ordinary offences under the criminal law. Prosecutions for terrorism offences and for general offences where these are related to terrorism are heard in open court using the normal rules of procedure.

Recommendation 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.

We acknowledge that a number of measures have either been enacted or proposed, which can reduce the pressure on investigation teams. We accept that they either have improved, or may improve, our ability to deal with terrorism cases through the ordinary criminal process, including by introducing more flexibility in charging, and therefore reduce the risk that investigation teams will come up against the limit of pre-charge detention. The Government has considered these measures, enacted and proposed, as a coherent package but believes that they cannot do more than reduce that risk - they cannot eliminate it entirely. They therefore do not remove the need for extended pre-charge detention to investigate and question suspects in exceptional circumstances.

For example it has been suggested that a version of the post-charge questioning regime might negate the need for extended pre-charge detention. Time is needed pre-charge to uncover and analyse evidence against a suspect as well as to put that evidence to the person in interview. Terrorist suspects very often give 'no comment' interviews in any event so post charge questioning does not address the same need as pre-charge detention.

We do, however, believe that post charge questioning for the offence for which the suspect has been charged would help the police and CPS to strengthen the case against terrorist suspects thereby helping to secure more successful prosecutions and an important element of this will be to allow adverse inferences to be drawn where the suspect refuses to answer questions. The police are already able to question a suspect post charge about other offences as, if the police have a reasonable suspicion (perhaps based on further evidence coming to light) that the suspect has committed another terrorist offence; they can question them under caution.

We therefore agree with the Home Affairs Select Committee that while post charge questioning will reduce the pressure on investigation teams, it will not eliminate the need for extended pre-charge detention because it will not reduce the evidential threshold that is needed to charge a person in the first place.

Intercept as evidence would not eliminate the need for extended pre charge detention for terrorist suspects. Not all cases involve the use of intercept. There will be times when intercept plays no part in the case against a particular suspect. Even in cases where intercept does provide compelling intelligence - we would have to look at the material and decide whether it could be used evidentially. That decision would of course depend on the scheme chosen - but there would be a number of considerations for example whether using the material evidentially might compromise other operations or would disclose sensitive techniques or technologies. This may mean that the intercept in any particular case cannot be used because of the sensitivities associated with it. Equally, in cases where it could be used, it may take some time properly to evaluate the sensitivities attached to it such that charges still cannot be brought more quickly than would otherwise be the case.

In any event, if intercept is allowed and as a result we find that it enables some suspects in a small number of cases to be charged more quickly then we would simply not need to invoke the higher pre-charge detention limit. That is the key thing about our proposal on pre-charge detention - we are not going for a higher limit now but only if there is a clear and exceptional need for it. If we find, in future, that we don't need the higher limit then it simply won't be brought into force.

Using the threshold test and extending pre-charge detention are not mutually exclusive. The threshold test is already fully used in terrorist cases. As the DPP made clear when he gave evidence to the Home Affairs Committee on 21 Nov last year, the threshold test was used in 2 cases where suspects were charged at the 27/28 day point.

But the threshold test cannot be used in every case. It does not mean you can just charge a suspect on the grounds of reasonable suspicion: It requires that there must be a clear likelihood that sufficient admissible evidence will become available within a reasonable time to meet the full code test. There may be a very small number of cases where this does not apply even at the 28 point - for example where material coming from overseas or from

analysis of computers is still being investigated but this has not yet been examined to the extent that the prosecutors can be confident this will yield sufficient evidential material to meet the full code test.

If we find that the threshold test - together with other measures such as intercept as evidence and post charge questioning - means that more than 28 days are not needed in future then we will not make the higher limit available but that is not a risk we can take now.

It has also been suggested that a system for 'plea bargaining' would remove the need for extended pre-charge detention. Part 2, Chapter 2, of the Serious Organised Crime and Police Act 2005 places the common law practice of 'Queen's evidence' on a statutory footing in England, Wales and Northern Ireland. It clarifies and strengthens the common law provisions that provided for immunity from prosecution, undertakings on the use of evidence and sentence reductions for defendants who co-operate in the investigation and prosecution of other offenders. This option can be used in terrorist cases, but there is no evidence to date that it will result in a substantial increase in prosecutions in these difficult cases.

Finally, the new offence of acts preparatory to terrorism, in s.5 Terrorism Act 2006, broadens the charges available to the CPS and has proved effective in a number of cases. But it will not be applicable in all cases and, where it is applicable, it will not always reduce the length of time required.

The fact that some of those charged at the current limit were charged with acts preparatory- on the threshold test - suggests that there may be cases where it simply takes a few days longer than 28 to secure sufficient evidence to charge persons even with this 'preparatory' offence, and even on the threshold test.

Recommendation 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 below.

- a. That reasoned explanations, rather than mere "statements" be given by Ministers to Parliament concerning extensions of pre-charge detention.**
- b. 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**

We have consulted widely on the issue of pre-charge detention - an approach that has been widely welcomed. Prior to introduction of the Counter-Terrorism Bill we conducted an extensive five month public consultation which involved consulting over 100 organisations as well as holding regional seminars across the UK. In addition we have met with representatives from the police, judiciary, civil liberties organisation and community representatives. There have been numerous evidence sessions before Parliamentary committees, including the JCHR and in each case, going back to April 2007, reasoned

explanations have been given, not mere 'statements'. The consultation did not give rise to any specific proposals for strengthening the role of the judiciary in relation to pre-charge detention. Judges are already responsible for authorisation of continued detention and the general view was that this aspect of the pre-charge detention process worked well and that judges rigorously scrutinise any applications for extending the detention of individual suspects.

As a result of the consultation, we have made one change in relation to pre-charge detention. For extension hearings beyond 14 days, the definition of a senior judge for England and Wales and Northern Ireland has been amended so that it is now a circuit judge designated by the Lord Chief Justice or a county court judge designated by the Lord Chief Justice of Northern Ireland or a high court judge. This change reflects the fact that it should be for the senior judiciary to designate the most appropriate judges to hear applications for extensions of detention. We have therefore also removed the requirement for the Lord Chancellor to be consulted on the designation of judges for this purpose. The most appropriate judge to hear the application may well be a circuit judge with experience in criminal law (rather than High Court judges who tend to specialise in civil matters).

c. That the Government bring forward the evidence relied on to demonstrate that the level of threat from terrorism has increased in the last year.

The level of threat has been at severe or critical since 7 July 2005 — the only difference between the two being that severe indicates the highest level of heightened and sustained general threat with an attack very likely, and critical indicates a higher level of threat with an attack imminent. The threat level has been at critical in the immediate aftermath of 7/7, 21/7, operation Overt, London/Glasgow and severe at all other interim times. A sustained level of threat at severe indicates the highest possible ongoing threat level.

Experience of prosecuting cases since 2001 has clearly demonstrated that they are growing in scale and complexity - in terms of material seized, use of false identities, multiple languages and dialects and international links. Recent operations have shown that the amount of material involved in cases is increasing and that plots are making greater use of complex technology.

The type of plots that are now being dealt with are very different from Northern Ireland terrorism in terms of scale, number of international connections involved, material seized and use of sophisticated technology.

In one recent terrorist prosecution, the investigation involved 270 computers, 2000 discs and 8224 exhibits spread across eight different countries.

There is a clear trend shown over a number of years which continues to grow upwards. For example, the material handled by the Metropolitan Police CT branch trebled between 2004 and 2007- they dealt with 69,000 records in 2004 compared with nearly 200,000 records in 2007.

In 2007 thirty-seven people were convicted in fifteen different terrorist cases and in the first four months of this year twenty-eight people have been convicted in just eight cases. The rising trend of complexity in terrorist related cases is not therefore something that can be ignored.

We have consulted with the Opposition, with community groups and with organisations such as Liberty and have made further changes to our original proposal. We have listened and we have moved a long way from our original position. We do not want a permanent, automatic or immediate extension to pre-charge detention beyond the current maximum limit of 28 days. Instead, we are now proposing a reserve power that could only be activated if there is a grave exceptional terrorist threat (as defined in the legislation) and if a report (as defined in the legislation) has been received from the police and DPP. The reserve power would need to be approved by Parliament and would remain in force for a temporary period before automatically lapsing.

d. 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

See response to recommendation 2. The Government has considered such an inter-relationship, but does not accept that the measures are an alternative to pre-charge detention at all, but they may mitigate the use of pre-charge detention in some cases.

e. That the Government urgently consider introducing bail with conditions for Terrorism Act offences

We have consulted with the police and they did not recommend making police bail available for terrorist suspects because of the risks to public safety that might be involved.

We must remember that we are dealing with individuals who wish to commit, or to enable others to commit, serious acts of violence against large numbers of innocent members of the population. The arrest and detention powers under the Terrorism Act 2000 are exceptional and reflect the unique threat which is posed by terrorism. To say that people can be held under those powers and can also safely be released pending further inquiries is inconsistent.

Those detained under section 41 of the Terrorism Act 2000 are precisely the people who would be able, if released, to secure false passports or who might even have the motivation to carry out a terrorist attack. The possibility of such an attack being perpetrated by a person on bail for a terrorism offence is a risk that we are unwilling to take.

Furthermore, we do not believe that denying bail is against our obligations under the ECHR, notably article 5(3). Detention can be justified if there are "relevant and sufficient" reasons. The reasons applicable under the regime in the 2000 Act satisfy that test: namely (in brief) that there is reasonable suspicion that the person has committed a terrorist offence, that his detention is necessary to gather further evidence and the investigation is being carried out diligently and expeditiously.

f. 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

We note the absence of an extended definition of the term 'proper "judicial" hearings' and the use of quotation marks which begs the question what is precisely meant by this phrase.

At the Public Bill Hearing on 22 April, Sue Hemming said:

'...The notice that is served on the suspect before the hearing takes place is not particularly detailed, but suspects' solicitors are given, as a matter of practice rather than law, a summary of the evidence so far and an overview of the investigation so far. The actual application is generally very detailed and the ex parte part of any application will depend on each individual case. Our experience is that, as time goes on, the ex parte applications become less and shorter. Clearly, at the very beginning of an investigation you are in a very different situation than at 14 or 21 days. In only one of the applications that have been made by prosecutors against 17 individuals was there any form of ex parte application and that was a tiny part of it'. Official Report, Counter-Terrorism Public Bill Committee, 22 April 2008; c 56, Q145.

We believe that proceedings for extensions to detention are already fully adversarial, with the suspect entitled to legal representation and to be present at the open part of the hearing. The information provided to the suspect both in writing in advance, and during the proceedings through representations and evidence is extensive and the suspect's lawyer is able to cross-examine the investigating officer to challenge the application rigorously. A senior judge hears the application (for applications beyond 14 days) and ensures that the tests for further detention are satisfied before any extension is granted.

A suspect is entitled to be present at the hearing and is excluded only on limited and proportionate grounds from any closed part of the hearing. Video links are often used for the suspect's appearance as both the security risks and resources implications justify such an approach; in any event video link is routinely used in other judicial hearings. The judge may order the suspect to be present in person if there is reason (see para 33(9) of Schedule 8)

We therefore dispute the assertion that such hearings are not already 'proper "judicial" hearings'.

g. 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

In relation to the first limb of this proposed two limb test, it is implicit in any successful application for a warrant of further pre-charge detention that the court would need to be satisfied that there are reasonable grounds for suspecting the person has committed a terrorist offence. The test for a lawful arrest under section 41 of the Terrorism Act 2000 is that the constable reasonably suspects that the individual is a terrorist (as defined in section 40 of that Act). This reasonable suspicion is an implicit pro requisite for the test which is currently required to extend pre charge detention. If a court is to be satisfied that there are reasonable grounds for believing further detention is necessary for the purposes of obtaining etc. relevant evidence, there must inevitably be a reasonable suspicion that the person committed the offence. The minimum standard that the prosecution/police must demonstrate is that there are reasonable grounds upon which to suspect that person. Conversely, without reasonable grounds to suspect that person, the prosecution/police could not even commence an application for further detention on grounds of securing relevant evidence.

In relation to the second limb, namely that further detention should (only) be for 'continuing to question the suspect'; we contend that this is too narrow to deal with a major terrorist investigation. Were that to be the test, it raises questions such as 'when would such questioning have to commence in order to satisfy the requirements?' It should be noted that often in the early stages of a detention under section 41 of the Terrorism Act 2000, interviews are delayed while the evidence seized during arrests and searches are analysed; such an investigative approach would potentially fall foul of the suggested test as drafted.

Furthermore, it is well documented that evidence, or material capable of forming the basis of a charge, has to be obtained from (inter alia) such sources as computers and other forms of electronic media, forensic analysis, and foreign jurisdictions. Some of this may need extensive translation, often from languages where the number of interpreters is limited. It may also require comparison with or linking to other existing material, before it could either be used for questioning or as the basis of a charge.

There may also be compelling but sensitive information that needs to be converted into a form that is capable be used for questioning or presented as part of the evidence upon which the decision to charge may be made. The process of converting sensitive information into usable material can be complex and may take a period of time.

All these grounds are appropriate bases upon which warrants of further detention may currently be sought but appear to fall outside the test as suggested above. We therefore strongly contend that the ability to detain suspects in order obtain evidence by ways other than questioning is essential, as is the ability to detain suspects to preserve or analyse evidence.

h. That legal aid be made available for representation by counsel at hearings to extend pre-charge detention

Warrants of further detention are already in scope of Criminal Defence Service funding and the Legal Services Commission will make provision for appropriate legal representation, including representation by Counsel, if required.

Recommendation 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.

There is no confusion between the role of Parliament and the role of the judiciary. This represents a complete misreading of the provisions. The role of Parliament is clearly to discuss and, if so minded, approve the order commencing the temporary extension of the power to detain pre-charge to up to 42 days. The Home Secretary will lay a statement before Parliament within 2 days of making the order or as soon as practicable and setting out that she is satisfied that there is a grave exceptional terrorist threat, that the reserve power is urgently needed for the purpose of investigating that threat and bringing those responsible to justice and that the provision is compatible with Convention rights. The

Home Secretary will at the same time lay before Parliament an independent legal advice as to these matters (redacted as necessary to protect sensitive information and anything prejudicial to a prosecution). Then there will be a full debate within 7 days. The debates would not be dissimilar to previous debates after such incidents in the past - covering matters such as the general security threat, the progress of investigation, the police numbers involved, the number of suspects detained, the outline of the plot, the number of countries involved, if there are any, the number of exigencies, whether the Home Secretary's decision was properly founded, if she had indeed received the police and DPP report in the first place, other information received and other broad discussions. The Bill expressly prohibits any mention of individual cases in the Home Secretary's statement. It is for both Houses to determine whether, given the grave, exceptional circumstances, it is justifiable for the order commencing the 42 day provision to remain in force for the limited duration of 30 days.

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

Nowhere in the provisions of the Bill are these two distinct constitutional functions confused or conflated at all.

Recommendation 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.

The Government recognises that Parliament and the public are entitled to an explanation of the legal basis for key actions and decisions, however it is standard Government practice neither to confirm or deny.

The Secretary of State considers that the provisions allowing for a temporary extension to pre-charge detention in defined circumstances, both under the Bill and our proposed amendments, are compatible with Article 5 of the ECHR (right to liberty).

Article 5(1)(c) permits detention for the purpose of bringing an individual before the competent legal authority on reasonable suspicion of having committed an offence. The provisions fall within this limb of Article 5(1) as they provide for the continued detention of persons reasonably suspected of having committed terrorist offences for the purpose of enabling the charging of that person.

There is no specific ECtHR jurisprudence on the length of time that a person can be detained before he is charged but there is the overarching principle that detention under Article 5 must not be arbitrary. Extended pre-charge detention under these provisions is not arbitrary. This is because of the motivation and effect of the detention - the prevention of suspected terrorists from absconding or having further involvement in terrorism while the expeditious investigation into a terrorist offence proceeds -- and because the detention is in keeping with the reasons for detention in Article 5(1) and Article 5 more generally.

The detention is proportionate to the attainment of its purpose. The need to detain terrorist suspects for longer than others before charge is necessary for a number of reasons, including the following. First, with recent terrorist attacks designed to cause mass casualties, the need to ensure public safety by preventing such attacks means that it is necessary to make arrests at an earlier stage than in the past. This often means that less evidence has been gathered at the point of arrest, which means that more time is needed to gather sufficient evidence to charge a suspect. Secondly, longer time limits are needed to cope with the fact that terrorist networks are often international, requiring enquiries to be made in many different jurisdictions and often requiring finding interpreters for rare and remote dialects. Thirdly, terrorist networks are increasingly using sophisticated technology and communications techniques: in recent cases a large number (sometimes in the hundreds) of computers and hard drives have been seized with much of the data on those computers having been encrypted.

In the light of this, the Secretary of State considers that detention for up to 42 days is not arbitrary for the following reasons:

In accordance with section 19 of the Human Rights Act 1998, it is for the Minister in charge of a Bill to certify whether in his view its provisions are compatible with the Convention rights. In this case the Home Secretary has stated that, in her view, the provisions of the Bill are compatible.

Recommendation 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.

The Code for Crown Prosecutors, which contains the Threshold Test, is annexed to each CPS annual report so it is laid before Parliament for scrutiny each year so the CPS has imposed a duty upon itself which goes over and above the requirements of section 10(3) of the Prosecution of Offences Act 1985. The Code is also subjected to extensive public consultation when it is revised. This last occurred in 2004. Parliament has already considered the point and given the Director powers to issue guidance under the Prosecution of Offences Act 1985 and (as amended) the Police and Criminal Evidence Act 1984.

Recommendation 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.

Parliament gave the DDP the power to issue guidance on the general principles to be applied when determining whether a case should proceed or not (section 10 Prosecution of Offences Act 1985). As recently as the Criminal Justice Act 2003, Parliament gave the DPP the power to issue guidance on charging.

It would not be possible for the Threshold Test to be placed on the statute book without the Full Code Test being similarly so placed. To do so would be inconsistent and, done in the CT bill, may give the impression that terrorist cases are being routinely charged on a lower standard than other serious criminal matters.

Special legislative provision would have the potential to undermine public confidence in the communities likely to be most affected if the perception were to arise that lower charging standards were being applied only to terrorism cases.

An important safeguard is the fact that prosecutors, who are independent from investigators, review cases using the Threshold Test. The Threshold Test is an objective test. It emphasises the fact that it is only a temporary measure to be used by prosecutors in the most serious cases, when a suspect is not suitable for bail and the prosecutor decides that there is evidence to support at least a reasonable suspicion that the suspect has committed an offence, and that it is in the public interest to charge that suspect. In making that decision, the prosecutor must reasonably expect that further relevant evidence exists and will be available within a reasonable period of time so that the Full Code Test will be applied as soon as reasonably practicable. A decision to charge under the Threshold Test and withhold bail must be kept under regular review by the prosecutor, and in any event, is overseen by the court.

In addition, the Human Rights Act 1998 is an important independent safeguard.

The Committee acknowledges that there has been no abuse and the mere fact that their draft clause mirrors the draft CPS guidance on the Threshold Test is ample testament to the fact that the CPS acts with the utmost scrupulousness in respect of the rights of the suspect.

The clause states that the person shall be informed that they have been charged on 'reasonable suspicion'. This is only part of the Threshold Test, as the Committee acknowledges in its draft clause.

The defence can already inquire if a charging decision was made using the Threshold Test or 'Full Code Test'.

Although the court, in determining questions of bail or custody, may take into account the strength of the Crown's evidence against the defendant, the court should accept the prosecution case as opened by the prosecutor. The defence can comment on the strength of the Crown's evidence but a bail application is not the hearing for an exploration and testing of the Crown's case. To make it mandatory to inform the court that a charging decision

was made under the 'Threshold Test' may effectively invite such inappropriate challenges, and even lead to the release of people on bail who really are a bail risk and should be remanded in custody.

There appears to be no apparent purpose to imposing a duty on the prosecutor to inform the court.

The judicial process already provides independent scrutiny of the prosecution and safeguards the suspect's rights. For example:

At an early stage in proceedings, the prosecution will be revealing the nature of its case to the defence and court via pre-interview disclosure, 'Advance' or 'Preliminary' Information at first appearance, bundles of statements, exhibits, unused material schedules and unused material that falls to be disclosed under the Criminal Procedure and Investigations Act 1996.

The defence can apply for the case to be dismissed at case service/committal.

At any stage in proceedings, the defence can raise issues with the prosecutor, and if they are dissatisfied with the prosecution response, seek to raise it with the court.

Throughout the pre-trial stage, the court will scrutinise the conduct of the prosecutor during the criminal process, and can set timetables for the service of material.

HMCPSP already thematically inspecting charging across criminal case work and this will include the 'Threshold Test'. In respect of terrorism cases, there is the practical difficulty caused by the highly sensitive nature of the material held which means that the ability of a non-security cleared person to consider these cases is severely restricted.

Recommendation 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.

See response to recommendation 3(e) above.

Recommendation 9

A prison governor fails 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.

The experience of senior police officers is that prison governors do thoroughly scrutinise their applications for production of a suspect for police questioning.

The Government has considered whether judicial oversight of post-charge questioning, in the manner proposed by the JCHR would be appropriate. However, we have decided against this model because of it could potentially slow down the process too much. This is supported by the evidence given to the Public Bill Committee by the Director of Public Prosecutions at which he said:

'I do not believe that judicial oversight is necessary, although that is a matter for Parliament. A difficulty with judicial oversight of the sort that you are suggesting is that it could significantly slow down the process. I imagine that the judge would be relatively reluctant to make an order of that sort until he was well seized of the case. We are envisaging here questioning that takes place fairly swiftly after charge. However, I do believe that some element of supervision would be desirable. It seems natural that the police should consult the prosecutor in the case, so that a decision can be taken on whether post-charge questioning in the circumstances of that case is appropriate. An element of supervision is desirable, but judicial supervision could slow the process down too much.' Official Report, Counter-Terrorism Public Bill Committee, 22 April 2008; c. 45-46, QI 18.

However, following the concerns expressed by the JCHR and at Public Bill Committee, we have developed a proposal which introduces supervision for post-charge questioning but which doesn't unnecessarily hinder the use of the power. In particular we have proposed that a number of safeguards should be on the face of the Bill which would mean that:

- Post-charge questioning must be authorised for a period of up to 24 hours in the first instance by an officer of the rank of superintendent;
- Any subsequent questioning would require authorisation by a magistrate who could authorise a period of post-charge questioning of up to 5 days. Further periods of questioning of up to 5 days would require further application to a magistrate. Magistrates could only authorise post-charge questioning if they believe it to be in the interests of justice and that the investigation is being conducted diligently and expeditiously;
- All post-charge interviews would be video-recorded.

We have also produced draft codes of practice for post-charge questioning which specify additional safeguards for post-charge questioning. The codes would ensure that every suspect has a right to legal representation during questioning and that questioning would require authorisation not only by a police officer of rank of at least Superintendent, but also in conjunction with the prosecutor of a case.

The draft PACE codes also make clear that police and prosecutors should seek to avoid post charge questioning taking place which may limit or restrict the ability for the person or his or her defence to prepare adequately for court proceedings. We are not making express provision for this in the Bill as there may be situations when questioning close to the trial is unavoidable, for example to prevent the person causing injury to others, in these cases, every effort would be made to discuss with the suspect or his or her legal representatives in order to minimise any disruption to the court process.

Recommendation 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.

It would not be appropriate or practical to confine post-charge questioning to new evidence which has become available following charge. We believe to do so would make all post-charge questioning subject to challenge on the basis of whether or not the evidence was available at charge.

We also believe that there may be circumstances in which it would be appropriate to question the suspect about evidence available pre-charge; for example analysis of evidence collected after charge could cast a new light on evidence that was available pre-charge. In addition, and most importantly, we would not want to risk the prohibition of post-charge questioning about evidence available pre-charge where the purpose of the interview would be to prevent injury to others.

Recommendation 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.

We continue to disagree with the JCHR's recommendations in relation to control orders. As we have stated in response to previous JCHR reports, as a result of the House of Lords judgments, the Prevention of Terrorism Act 2005 is fully compatible with human rights and no amendments to the legislation are necessary.

Recommendation 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.

Public Interest Immunity (P11) is not the answer to the problem that these proposals address. P11 would enable the coroner to withhold material from both the public and the jury as fact-finder. However, the difficulty the proposal is addressing is how to ensure that all relevant material including sensitive material can be put before the fact-finder. As the sensitive material cannot be shown to a jury, there is a need to have a different fact-finder, hence why the coroner will be the fact-finder in every inquest under the proposal.

Recommendation 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

The fact that a judicial officer is appointed by the executive does not fatally undermine their independence for Article 6 or Article 2 purposes. However, as there is no policy imperative in having the Secretary of State make the appointments, the Government agreed to consider an alternative mechanism.

We have therefore tabled amendments for consideration at Report stage which add a requirement for the Secretary of State (for Justice) to establish and maintain an approved list of coroners eligible to be appointed to hold certified inquests. The Secretary of State (for Justice) must seek the agreement of the Lord Chief Justice before a coroner can be placed on the approved list, and those appointed to the list will be drawn from the existing pool of independent district coroners. The Lord Chief Justice's agreement must also be sought when there is a need to appoint a person to hold a certified inquest. Similarly, if there is a need for the Secretary of State to revoke an appointment - because, for example, of a coroner's incapacity or illness, or because the inquest is no longer subject to a certificate and can therefore be conducted by the coroner for the relevant district - then the appointment can only be revoked with the agreement of the Lord Chief Justice.

The amendments respond to concerns raised during the passage of the Bill regarding the appointments system for specially appointed coroners. The amendments address these concerns by requiring the agreement of the Lord Chief Justice to the inclusion of a coroner on the approved list of coroners, and with each individual appointment of a specially appointed coroner whenever a certificate under section 8A(1) is issued.

Recommendation 14

We therefore recommend that the clause concerning coroners' inquests be deleted from the Bill and the issue returned to in the context of the forthcoming Coroners Bill.

We are aware of a current inquest which may need to consider material that cannot be disclosed publicly without harming the public interest, and which has stalled because the coroner is unable to see the material. It was therefore necessary to take action to address this problem now, rather than wait a further year for a Coroners Bill even though the latter has been confirmed in the draft programme for the next Parliamentary session.

There may be circumstances such as these in which a coroners' inquest may need to consider material that cannot be disclosed publicly for very important public interest reasons, for example because its disclosure might damage national security and place sources' lives in danger. We must therefore find a way of allowing the inquest to be able to consider all such material so coroners' inquests can always comply with Article 2.

Inquests are unlike criminal proceedings where a decision can be made not to prosecute if there is sensitive material that cannot be disclosed to the defendant as would be required in criminal proceedings by Article 6. If the death occurred in circumstances where Article 2 requires the UK to hold an inquest, and the sensitive material is relevant to how the individual met their death, there is the insurmountable difficulty that the investigation into the death must proceed but such material cannot be disclosed in open court without damaging an important public interest such as national security. In such a case, the inquest cannot safely be held by a coroner sitting with a jury.

The proposals have been drafted very carefully to ensure that coroners' inquests can always be compatible with Article 2 even when there is material which is central to the inquest but which cannot be disclosed publicly.

We believe that this proposal is fully compliant with the ECHR and represents the best way of achieving an appropriate balance between the concerns of bereaved families and the need to protect the public interest.

Appendix 2: Government Response dated 6 June 2008, to the Committee's Twenty-first Report of Session 2007-08

Counter-Terrorism Bill

This letter responds to the recommendations made in the report by the Joint Committee on Human Rights on the Counter-Terrorism Bill published on 5 June 2008.

Recommendation 1

It remains our view, expressed consistently in previous reports, that the Government has failed to make its case for further extending the maximum period of pre-charge detention and that there is therefore no need to make any provision for the extension of the current maximum. We explain why the safeguards in the Bill, even after the potential Government amendments, are inadequate to protect individuals against the risk of arbitrary detention. We also spell out explicitly all the necessary safeguards in the event that the public emergency, which is the premise of the Government's proposal, were ever to materialise.

I have explained the threat facing the country in my letter to you of 6 June in response to the JCHR report of 14 May 2008.

Recommendation 2

We still have not seen any evidence which demonstrates that the threat level is growing. (Paragraph 6) In our view, the questions we have consistently raised about the precise evidential basis for assertions by Ministers and others that the threat from terrorism is "growing" have never been satisfactorily answered. We recommend that the Government provides Parliament with the evidence on which it relies when it says that the threat from terrorism is growing; if this is not done, we draw the attention of both Houses to the absence of evidence demonstrating that the threat level is growing.

I have given the evidence which explains the threat from terrorism is increasing in my letter to you of 6 June. I would direct you particularly to my response to recommendation 3(c) in that letter.

Recommendation 3

We recommend that the Home Secretary make the information [about the operation of the extended period of pre-charge detention since its last renewal] available in time to inform the debate on this issue at the Bill's Report stage. If this is not done, we draw the attention of both Houses to the absence of this information.

The Home Secretary wrote to you on 4 June 2008 with the information on the operation of the extended period of pre-charge detention since its last renewal.

Recommendation 4

We look forward to a response to our queries [about improved parliamentary review of pre-charge detention] in time to inform debate at Report stage. (Paragraph 18) In the meantime, we think it is important for the arrangements for parliamentary review to be improved by providing for the independence of the reviewer, some parliamentary input into the appointments process and for direct and timely reporting to Parliament. We also feel that there is now more work than one reviewer can reasonably do and that a panel of independent reviewers would be desirable.

The Government does not consider this to be necessary and that the current situation remains appropriate. The reviewer's role and responsibilities are set out in section 36 of the Terrorism Act 2006. We do not believe a panel of reviewers is required to fulfil this role. Lord Carlile of Berriew QC has done, and continues to do, an excellent job as the independent reviewer of terrorism legislation.

Recommendation 5

It follows that we would also be opposed to any proposal to amend the Civil Contingencies Act to provide the Secretary of State with the power to extend the period of pre-charge detention beyond 28 days by way of emergency regulations. In our view the existing safeguards against the wrongful use of such a power in the Civil Contingencies Act itself are neither sufficiently strong nor appropriate for an exercise of power which deprives individuals of their liberty.

We agree that it would not be appropriate to use the Civil Contingencies Act to extend the pre-charge detention limit in terrorist cases. Our proposals tabled on 3 June amend the Civil Contingencies Act to make it clear that that Act cannot be used to extend pre-charge detention in terrorist cases.

The definition of grave exceptional terrorist threat which we now propose would cover events or situations similar to the bombings in July 2005, or a plot to blow up a shopping centre or a plot to commit terrorist atrocities overseas involving serious loss of life.

We do not think that any of these are covered by the Civil Contingencies Act definition of an emergency. But we must cover such events or situations in the event of a grave

exceptional terrorist threat and the potential need to detain suspects beyond 28 days in order to investigate the threat and bring to justice those responsible.

Recommendation 6

On the other hand, a substantial threat to the nation, which appears to be what was contemplated by Tony McNulty MP in a radio interview on BBC Radio 4 on 2 June 2008, or a “grave terrorist emergency” would set the bar rather higher. We would also point out, however, that, as presently drafted, the Bill merely requires that the Secretary of State make a statement to Parliament that she is satisfied of certain matters. It does not make those matters preconditions to the exercise of the power.

After making the order to increase the pre-charge detention period, the Home Secretary must lay before Parliament a statement that she is satisfied among other things that there is a grave exceptional terrorist threat. This is defined as an event or situation which causes or threatens serious loss of human life or serious damage to human welfare in the UK or to the security of the UK. At the same time she must lay before Parliament legal advice obtained from outside Government that that she can properly be satisfied of the matters contained in her statement.

The order by the Home Secretary to bring the reserve power into force is debated by Parliament. Unless each House passes a resolution approving the order, it lapses seven days after the date on which it was laid before Parliament. If this were to happen, anyone who had been held for over 28 days would need to be released immediately but their detention up to that point would not be unlawful.

Recommendations 7 and 8

Requiring the Secretary of State to declare there is an exceptional need for a reserve power, or even that there is an emergency which makes such a power necessary, is not, in reality, much of a safeguard, at least without some meaningful opportunity for that assertion to be tested by independent scrutineers, whether in Parliament or the courts.

Even if the Bill were amended to provide for parliamentary authorisation of the Secretary of State's decision within a very short period such as seven days, this would not be a very significant safeguard so long as the exceptional need relates to a specific, ongoing investigation, because the debate would be heavily circumscribed by the risk of prejudicing future trials.

Parliament will be able to debate the decision to trigger the extension of pre-charge detention. Under the new proposal tabled by the Government on 3 June, the role of Parliament is to approve the Order making extended pre-charge detention available. This may involve a debate on whether the Home Secretary correctly assessed the existence of a grave exceptional terrorist threat as defined, as well as whether the reserve power is urgently needed to investigate the threat and bring to justice those responsible, and is compatible with the Convention rights.

Obviously some information on the threat cannot be disclosed. However we understand that there would be a need for Parliament to hold as informed a debate as possible. We have also proposed to notify the Chairs of the Joint Committee on Human Rights, the

Home Affairs Select Committee and the Intelligence Services Committee, on Privy Council terms, that the order has been made forthwith and also as soon as reasonably practicable provide them with full versions of both the DPP/police report and the legal advice obtained from outside government. This will provide added assurance to Parliament that the power has been properly and responsibly exercised.

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

Recommendation 9

We note, however, that neither the Bill as drafted, nor any of the potential Government amendments to it provide any additional judicial safeguards for the Individual.

We believe that the proposal already contains adequate safeguards which ensure we comply with our human rights obligations, whilst also creating a reserve power which can properly protect the public.

The judicial safeguards in the Bill provide that individual detention beyond 28 days would, as under present proposals, be considered by a judge (as it is for detention up to 28 days). Any application for an extension beyond 28 days would require DPP approval.

The judge may issue a warrant of further detention only if he is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary for the investigation into a serious terrorist offence (one carrying a life penalty) and that the investigation is being conducted diligently and expeditiously.

Recommendations 10, 11 and 12

The lack of proper judicial safeguards is one of the principal reasons why, in our view, extending the maximum period of pre-charge detention to 42 days, without providing any additional judicial safeguards, would be in breach of the right to liberty in Article 5 and therefore require a derogation from that Article.

We are not therefore, persuaded that the additional safeguards being considered for the Bill, modelled on those in the Civil Contingencies Act 2004, provide sufficiently strong safeguards to meet the human rights concerns that we have expressed about this particular aspect of the Bill.

No amount of additional parliamentary or judicial safeguards can render the proposal for a reserve power of 42 days' pre-charge detention compatible with the right to liberty in Article 5 ECHR. In our view such provision inevitably involves derogation from the right to liberty in Article 5. Inserting safeguards such as those apparently suggested by the Government does not change our view that a derogation from the UK's obligations under Article 5 would be required to make available a reserve power of 42 days pre-charge detention.

We are satisfied that the proposals fully comply with Article 5 ECHR. Article 5(1) (c) of the ECHR permits deprivation of liberty in the case of “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence”. There has been no case where the detention of a terrorist suspect being held under the existing maximum period of pre-charge detention has found to be incompatible or unlawful. Pre-charge detention is subject to regular judicial oversight, complying with the requirement in Article 5(3) that such a person be brought promptly before a judge or other officer authorised by law to exercise judicial power. At these hearings a detainee may challenge the lawfulness of his detention, as required by Article 5(4) ECHR. Therefore we do not think it is necessary to derogate from our obligations under article 5 ECHR.

The Government does not believe the extension of pre-charge detention beyond 28 days raises any new human rights issues.

It is already open to any suspect to argue that his detention is in breach of the Human Rights Act, and the OPS, police and courts are all subject to the requirements of that Act

Recommendation 13

As we have made clear above, we remain firmly of the view that the Government has not made out its case for changing the law to extend the maximum period of pre-charge detention to 42 days. Our clear recommendation therefore remains the deletion of the relevant provisions from the Bill, as we recommended in our last report.

We are proposing a reserve power that could only be used in very exceptional circumstances, only with the support of the Director of Public Prosecutions, and it could only continue with the backing of Parliament in a vote in both Houses following a statement by the Home Secretary and with the benefit of legal advice from outside Government, only subject to judicial supervision and only for a temporary period before automatically lapsing.

Recommendations 14, 15 and 16

We remain firmly of the view that if there is a genuine emergency within the terms of Article 15 of the ECHR the Government should make its case for such a derogation [from Article 5 ECHR] and not seek new legislation.

As we stated in paragraph 45, above, the Government has not made its case for any increase in the period of pre-charge detention. There is a case for legislation which would provide in advance a detailed framework for the exercise of the power to derogate from particular rights in a particular context in a public emergency. Indeed, such legislation could be beneficial by enshrining clearly into law the requirements which must be met in order for such a derogation to be valid, and ensuring that the necessary safeguards against disproportionate exercise of the derogating power are already in place in advance of the power being used. In our view, this would be positively beneficial from a human rights perspective by ensuring that the necessary safeguards are firmly in place. (Paragraph 50) This alternative, it seems to us, would provide much more stringent safeguards than are currently proposed by the Government. It would ensure that there was an opportunity for both Parliament and the courts to scrutinise the derogation from

Article 5, which in our view is inevitably involved in extending the period of pre-charge detention beyond 28 days.

We therefore recommend that the opportunity be taken in the Bill to provide a clear framework for any future derogation from the right to liberty in this particular context. This is not an alternative to, but complements, the other elements in the package of measures we have recommended in our previous reports. We remain of the view that the case for 42 days detention has not been made, that the availability of alternatives makes it unnecessary, and that it would inevitably breach Article 5 ECHR. In our view, however, providing a detailed framework for any future derogation is a human rights compliant alternative to the Government's approach: it both recognises that human rights law can accommodate a wholly exceptional power to extend the pre-charge detention limit in a case of genuine public emergency, and at the same time ensures that the scope of any such future derogation will be strictly confined to that which is permitted by the ECHR.

As I have made clear above, our proposal is compatible with our obligations under article 5 ECHR. There is no need to derogate from the Convention to bring the reserve power into force, because extension of pre-charge detention beyond 28 days raises no new legal issues.

Recommendation 17

We urge the Minister to meet the special advocates to discuss our recommendations and to report to Parliament on the outcome of that meeting.

I wrote to you on 4 June 2008 confirming that I am happy to have a further meeting with representatives of the special advocates to discuss control orders legislation and the JCHR's concerns. The outcome of this meeting will be reported to Parliament.

Recommendation 18

We welcome the Government's proposal to place the disclosure and use of Information by the intelligence services on a statutory footing, as a potentially human rights enhancing measure.

Clauses 19—21 do not provide a new legal basis for the acquisition and disclosure of information by the intelligence and security agencies. In fact, there are already statutory provisions regulating the acquisition and disclosure of information in the governing legislation of the intelligence and security agencies, i.e. the Security Service Act 1989 and the Intelligence Services Act 1994. For convenience, these provisions are:

Security Service Act 1989 extract:

...Section 2(2) The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure—

(a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of [the prevention or detection of] serious crime [or for the purpose of any criminal proceedings];...

Intelligence Services Act 1994 extracts:

...Section 2(2) The Chief of the Intelligence Service shall be responsible for the efficiency of that Service and it shall be his duty to ensure—

(a) that there are arrangements for securing that no information is obtained by the Intelligence Service except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary —

(i) for that purpose;

(ii) in the interests of national security;

(iii) for the purpose of the prevention or detection of serious crime; or

(iv) for the purpose of any criminal proceedings;...

...section 4(2) The Director shall be responsible for the efficiency of GCHQ and it shall be his duty to ensure—

(a) that there are arrangements for securing that no information is obtained by GCHQ except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary for that purpose or for the purpose of any criminal proceedings;...

Broadly speaking, the effect of these provisions is that the intelligence and security agencies may only obtain or disclose information where this is necessary for the proper performance of their statutory functions (functions which are set out in the two pieces of legislation referred to above). Clause 20 (1) makes it clear that clause 19 does not affect the above provisions, and that these remain the regulating provisions for the acquisition and disclosure of information by the intelligence and security agencies.

The purpose of clauses 19 to 21 is to clarify, and remove any doubt over, the ability of the intelligence and security agencies to obtain, use and disclose information, rather than to provide any new statutory footing for such activities.

In addition, clause 19(6)(a) articulates the existing common law position that a disclosure of information made to one of the intelligence and security agencies for the purposes of their statutory functions will not breach any duty of confidence owed by the person making the disclosure. This reflects the existing common law position that a duty of confidence can be overridden where a greater public interest exists, such as countering terrorism or the protection from other national security threats. Clause 19(6)(b) also disappplies, for the avoidance of doubt, any other restriction on disclosures to the intelligence and security agencies.

Recommendation 19

We cannot accept the Government's argument that the existing safeguards are working well and there is therefore no need for express safeguards to accompany the statutory power to acquire, use and disclose information.

Our view is that the following interlocking oversight and governance mechanisms are working well. The mechanisms are:

The roles and activities of the intelligence and security agencies are set within a strict statutory framework that include:

The Security Service Acts 1989 and 1996,

The Intelligence Services Act 1994, and the

The Regulation of Investigatory Powers Act 2000 that governs the use of covert investigatory techniques that form a major part of the intelligence and security agencies' activities.

Furthermore, the intelligence and security agencies are subject to particular provisions of the Official Secrets Act 1989. The intelligence and security agencies are also subject to the Data Protection Act 1998.

The intelligence and security agencies are subject to oversight by the independent Intelligence Services Commissioner and the independent Interception of Communications Commissioner. In both cases, by law the Commissioner must hold, or have held, high judicial office and report directly to the Prime Minister who in turn is under a statutory duty to publish the report in each House of Parliament excluding only that information that would be contrary to the public interest or prejudicial to (a) national security, (b) the prevention and detection of serious crime, (c) the economic well-being of the UK, or (d) the continuing discharge of any public authority whose activities include activities that are subject to review by that Commissioner.

Any one who is aggrieved by conduct that he or she believes to have been carried out by or on behalf of any of the intelligence and security agencies in relation to him or her or his or her property may complain to the independent Investigatory Powers Tribunal. The Tribunal has full powers to investigate any complaint and where it upholds a complaint may order any remedy that it sees fit. In particular, the Tribunal is the appropriate forum for the purposes of section 7 of the Human Rights Act for proceedings against the intelligence and security agencies. The members of the Tribunal must hold, or have held, high judicial office.

By law, members of the intelligence and security agencies must co-operate with the Commissioners and the Tribunal.

The intelligence and security agencies are subject to the parliamentary oversight of the Intelligence and Security Committee (ISC). The statutory role of the ISC is set out in the Intelligence Services Act 1994 and it is expressed in the same terms as a departmental select committee, i.e. to examine the expenditure, administration and policy of the three intelligence and security agencies. The nine members of the committee are drawn from both Houses of Parliament and are appointed by the Prime Minister after consultation with the Leader of the Opposition. The Committee reports annually to the Prime Minister who is under a duty to lay the report before both Houses of Parliament but may exclude, after consultation with the Committee, any matter that would be prejudicial to the continued discharge of one of the agencies. There are provisions to allow a Head of Agency

not to disclose information to the Committee if it is “sensitive” or because the Secretary of State has determined that it should not be disclosed.

The Intelligence and security agencies are subject to scrutiny by the National Audit Office.

Not least, the intelligence and security agencies come under the authority of the Secretary of State. This is the Foreign Secretary for the SIS and GCHQ and the Home Secretary for the Security Service. Secretary of State oversight includes regular meetings with Heads of Agency, visits to HQ buildings (Home Secretary visited Thames House on 5 June 2008), daily contact between agency and sponsoring departmental officials who advise the Secretary of State on such things as warrant applications, the scrutiny of the Heads of Agency statutory annual report, the consideration of annual performance reports and whether Public Service Agreement (PSA) targets have been met

Against this background the Government is confident that there are more than adequate safeguards for the way the intelligence and security agencies currently work.

Recommendation 20

in our view, clauses 19-21 of the Bill provide a formal legal basis for the disclosure and use of information by the intelligence services, but they fail to provide sufficient substantive legal safeguards to guarantee against the arbitrary and disproportionate use of the power to disclose and use such information.

The report fails to recognise that clauses 19-21 do not create a new legal basis for the acquisition, use and disclosure of information. This basis already exists in the Security Service Act 1989 and the Intelligence Services Act 1994 as detailed above. Additionally, to understand the many safeguards that apply to the intelligence and security agencies it is necessary to consider the full range of governance and oversight arrangements as set out above.

For example, the Regulation of Investigatory Powers Act 2000 contains its own safeguards relating to the obtaining, use and disclosure of information from covert and intrusive investigative techniques and, of course, the intelligence and security agencies have to comply with these safeguards when employing the relevant techniques.

Recommendation 21

We therefore recommend that clause 20(2) of the Bill be amended to provide that nothing in clause 19 authorises a disclosure that breaches (1) the Human Rights Act (2) UNCAT and (3) any other relevant international obligation concerning the disclosure and use of information.

The proposed amendment would not have the effect intended. The intelligence and security agencies are already under a duty not to disclose information except where this is necessary for the performance of their statutory functions and for certain other defined purposes

In addition, the intelligence and security agencies are subject to and act in accordance with the Human Rights Act 1998.

As to torture and similar activity, the Government unreservedly condemns the use of torture as a matter of fundamental principle and works hard with its international partners to eradicate this abhorrent practice worldwide.

The UK security and intelligence agencies do not participate in, solicit, encourage or condone the use of torture or inhuman or degrading treatment for any purpose, including obtaining information. Nor would the security and intelligence agencies instigate others to do so. The Government abides by its commitments under international law, including the UN Convention against Torture and the European Convention on Human Rights, and expects all other countries to comply with their international obligations.

The provenance of intelligence received from foreign services is often obscured. Where it is clear it has been obtained from individuals in detention, such intelligence is carefully evaluated. The prime purpose for which the intelligence and security agencies need intelligence on counter terrorism targets is to avert threats to British citizens' lives. Where there is reliable intelligence bearing directly on such threats, it would be irresponsible to reject it out of hand.

Recommendation 22

We also recommend the insertion of further safeguards to require the intelligence services to take active steps to ascertain whether information it is acquiring was obtained by torture.

The proposed requirement - of requiring every acquisition of information, obtained by the intelligence and security agencies, for the purpose of any criminal proceedings, from authorities or persons outside of England and Wales, be accompanied by a statement setting out the steps taken to ascertain the circumstances in which the information was obtained and that it had not been obtained by torture — is simply unworkable and unnecessary.

The intelligence and security agencies are not primarily crime investigation or evidence gathering organisations. Their main area of activity is protecting national security. While they support law enforcement on combating serious crime it would be unusual for the agencies to be used as a conduit for overseas evidence to be used in a UK court.

UK law also already contains extensive safeguards in relation to evidence obtained by torture. The Courts will have regard to the UK's international obligations, including under the European Convention on Human Rights and the Convention against Torture, in exercising these powers. No matter how well intended, the amendment would not add to those safeguards — least of all because clause 19 is not a new and exclusive information gateway for the intelligence and security agencies (see the explanation given in the response to Recommendation 18).

At one level the amendment is unworkable given the intrinsic difficulty of proving a negative - the information had not been obtained by torture! In the vast majority of cases a definitive assurance would not be possible. Rather than to go into an unnecessarily long explanation here, it would be better to consider the detailed consideration of such matters by the House of Lords in their Judgement of the case of A (FC) and others (FC)

(Appellants) v. Secretary of State for the Home Department (Respondent) (2004) and A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals) - reference [2005] UKHL 71.

Another reason why the proposal is unworkable is that the intelligence and security agencies often carry out their work under considerable time pressure. The sheer bureaucracy that would be created by this proposal would impede the rapid acquisition and dissemination of what could be time critical intelligence.

Furthermore, even the limited volume of evidential information involved would make such a proposal impractical to implement. Such a requirement would hamper the intelligence and security agencies in doing their vital work and would divert valuable resources away from that important work.

Lastly, and perhaps least, the proposed amendment is unworkable due to construction. As drafted, SIS officers serving aboard or Security Service officers in Northern Ireland or Scotland would have to produce such statements for each item of information and intelligence obtained. Technically, this would include relevant local items of media reporting that the officer had obtained and wished to share with a departmental official.

Appendix 3: Letter from the Rt Hon Tony McNulty MP, Minister of State, Home Office dated 4 June 2008

Counter-Terrorism Bill: Special Advocates

Thank you for your letter of 16 May. As I indicated on 14 May, I am happy to meet the special advocates again to discuss control orders legislation and your Committee's related recommendations.

Unfortunately, existing diary commitments mean that this will not be possible before Report stage in the Commons. My office will be in touch with the Special Advocates Support Office (SASO) to arrange a meeting in due course.

I am copying this letter to the recipients of yours – Martin Chamberlain, Judith Farbey, Neil Garnham QC, Andrew McNicol QC, and SASO.

Appendix 4: Letter to the Rt Hon Jacqui Smith MP, Home Secretary, Home Office, dated 9 June 2008

Pre-Charge Detention: Adequacy of Safeguards

As you know, my Committee recently reported on the adequacy of the additional safeguards which the Government indicated it intended to bring forward to meet the human rights concerns about its proposal to extend the maximum period of pre-charge detention to 42 days (*42 Days and Public Emergencies*). Now that the text of those amendments is available, I am writing to ask a number of questions about the adequacy of those safeguards. It would be useful if your answers could be available in time to inform the parliamentary debate about the amendments on Wednesday.

(1) The trigger: a “grave exceptional terrorist threat”

The Government amendments re-define the “trigger condition” for the reserve power to be brought into effect by the Secretary of State. In the Bill as published, the trigger is a particular terrorism investigation giving rise to an “exceptional operational need” for the reserve power.⁶ The Government’s amendments require the Secretary of State to be satisfied that “a grave exceptional terrorist threat” has occurred or is occurring before the new 42 day limit can be made available.⁷

A “grave exceptional terrorist threat” is defined⁸ to mean an event or situation involving terrorism which causes or threatens

- (a) serious loss of human life,
- (b) serious damage to human welfare in the UK, or
- (c) serious damage to the security of the UK.

Damage to human welfare is further defined to include: human illness or injury; homelessness; damage to property; disruption of a supply of money, food, water, energy or fuel; disruption of a system of communication; disruption of facilities for transport; or disruption of services relating to health. The event or situation involving terrorism may be outside the UK, and includes “planning or preparation for terrorism” which, if carried out, would cause or threaten one of the harms set out.⁹

A further amendment to the Bill which, according to the Government, tightens the definition of the trigger condition is that the reserve power will only be available in relation to investigations “that relate to the commission by the detained person or persons of a serious terrorist offence.”¹⁰ “Serious terrorist offence” is defined to mean an offence under the Terrorism Act 2000 or the Terrorism Act 2006, or any offence that has a terrorist connection, which carries a sentence of life imprisonment.¹¹

I note that in his letter to Dominic Grieve, Tony McNulty states that the effect of the Government’s amendments redefining the trigger is that the 42 day limit can only be made available if there is a grave exceptional terrorist threat, and the power can only be triggered by an investigation into “the most serious terrorist related offences.” The Government argues that its amendment defining the trigger in terms of a grave exceptional terrorist threat is an important new safeguard which ensures that the power to extend detention to 42 days could only be used in very exceptional circumstances.

It appears, however, that the Secretary of State’s power to extend the maximum period of pre-charge detention to 42 days would remain extremely broad even after the Government’s amendments, for two main reasons.

⁶ Clause 41(2).

⁷ NC25(2)(a).

⁸ NC20(1).

⁹ NC20(3).

¹⁰ NC22(3)(a).

¹¹ NC22(4).

First, the definition of a “grave exceptional terrorist threat” is extraordinarily broad and includes events or situations which fall well short of constituting a genuine emergency in any meaningful sense of that word. A terrorist threat is always grave, given the seriousness of the harm which it might cause, and there is nothing in the definition of “grave exceptional terrorist threat” to confine the reserve power to situations such as “two or three 9/11s on one day” or the other extreme scenarios which the Government has said it wishes to ensure are provided for.

Second, the definition of a “serious terrorist offence” is also extremely broad. The new offence of “acts preparatory to terrorism”, for example, carries a maximum sentence of life imprisonment, and virtually any terrorism investigation will include an investigation into the possibility that the suspect has committed that offence. This makes the definition of the trigger in the Bill very much wider than that in the Civil Contingencies Act.

I am therefore concerned that the Government’s definition of the “exceptional” nature of the threat fails to provide any guarantee that the power will only be used in truly exceptional circumstances. Not only does it fall well short of any meaningful sense of being an “emergency power”, it is so broad as to make the power in principle capable of being applied in relation to virtually any terrorism investigation. It seems quite clear, for example, that the new trigger condition of a “grave exceptional terrorist threat” would have been satisfied in relation to the investigation into the alleged Heathrow bomb plot in 2006. In that case three suspects were released without charge towards the very end of the 28 day period. Had the 42 day period been available, it is possible that they might have been detained for even longer before being released without charge.

I would be grateful for your answer to the following questions:

Q1. Is it correct that it will be within the Secretary of State’s power to make the reserve power available in relation to *any* investigation of a terrorism offence or offence with a terrorism connection which carries a maximum sentence of life imprisonment?

Q2. Given the seriousness of terrorism, is it not the case that every investigation into a possible terrorism offence or offence with a terrorism connection, may result in the suspect being charged with an offence which carries a possible sentence of life imprisonment?

Q3. Would the “grave exceptional terrorist threat” requirement, as defined in the Government’s amendment, have been satisfied in the case of the investigation into the alleged Heathrow bomb plot?

(2) Parliamentary scrutiny

I note that the Government argues that it is strengthening the role of Parliament by its amendment which brings forward the vote in Parliament to within seven days of the order being made, instead of 30 as in the original Bill.¹²

My Committee commented on this likely Government amendment in its most recent report on 42 Days and Public Emergencies.¹³ The Government’s amendment strengthens

¹² NC26.

¹³ Paras 33-36.

Parliament's role to the extent that it meets the objection to the provision in the original Bill¹⁴ that the entire 42 days period would have expired by the time Parliament debates whether the reserve power to extend it should have been made available by the Secretary of State. However, as the Committee pointed out in both its Second Report on the Bill and its most recent Report, the Government amendment does not meet the objection that any parliamentary debate will be so circumscribed by the need to avoid prejudicing future trials as to be a virtually meaningless safeguard against wrongful exercise of the power.

Now that the text of the Government's amendments is available, I am concerned that the scope of any parliamentary debate will be even more circumscribed than the Committee has previously appreciated. This is because the test to be applied by the Secretary of State when deciding whether or not to make the order to make the reserve power available (and therefore by Parliament when it considers whether or not to approve the order), is in important respects identical to the test which will have to be applied by the court when deciding whether to authorise further detention of an individual suspect. There is therefore a risk that the parliamentary debate will not only prejudice possible future trials, but will pre-judge some of the very issues which a court will have to decide very shortly afterwards, when an application is made to a court to extend the detention of the suspects who are already being investigated.

The questions for the court which is asked to extend pre-charge detention in relation to a particular suspect are whether (a) there are reasonable grounds for believing that the further detention is necessary and (b) the investigation is being conducted diligently and expeditiously. Further detention is necessary for these purposes if it is necessary:

- (a) to obtain relevant evidence, whether by questioning him or otherwise;
- (b) to preserve relevant evidence, or
- (c) pending the result of an examination or analysis of any such evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining such evidence.¹⁵

To bring the reserve power into effect, under the Bill as the Government proposes to amend it, the Secretary of State must be satisfied that it is "needed for the purpose of investigating the threat and bringing to justice those responsible."¹⁶ That decision will be made in light of the report from the DPP and police that they are satisfied that there are reasonable grounds for believing that the detention of one or more persons beyond 28 days will be necessary for one or more of the following purposes:¹⁷

- (a) to obtain, whether by questioning or otherwise, evidence that relates to the commission by the detained person or persons of a serious terrorist offence,
- (b) to preserve such evidence, or

¹⁴ See First Report on the Counter-Terrorism Bill at para. 13.

¹⁵ Para 32(1) and (1A) of Schedule 8 to the Terrorism Act 2000.

¹⁶ NC25(2)(b).

¹⁷ NC22(2)(a) and (3)

(c) pending the result of an examination or analysis of any such evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining such evidence.

The DPP and police must also be satisfied that “the investigation in connection with which the detained person or persons is or are detained is being conducted diligently and expeditiously.” These are the same questions as the court will have to decide in due course.

Before making an order making the reserve power available, the Secretary of State is also required to obtain independent legal advice as to whether she can be properly satisfied of various matters. Those matters include that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible.¹⁸ In order to be able to advise the Secretary of State about the need for the reserve power in this sense, the independent lawyer will have to ask the same questions as the DPP and police address in their report, which are also the same questions as the court itself will have to ask when deciding whether or not to grant a further extension of detention in relation to the particular suspect.

The Secretary of State then has to decide, in the light of this material, whether she is satisfied that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible. If she is satisfied of that and the other relevant matters, she may make the order declaring the reserve power to be exercisable, and must lay before Parliament both a copy of the independent legal advice, and a statement containing such of her reasons for her decision as she considers appropriate. Neither the legal advice nor the Secretary of State's statement should contain any material which might prejudice the prosecution of any person.

So the scheme of the Bill, with the Government's amendments, is:

- (1) the DPP and police make a report to the Secretary of State in essentially the same terms as they will later make an application to court to extend the individual suspect's detention;
- (2) An independent lawyer advises the Secretary of State on essentially the same issues as the court will later have to determine;
- (3) The Secretary of State decides whether to make the order, which requires her to be satisfied of the same matters as the court will later have to be satisfied;
- (4) Parliament decides whether to approve the order.

I am concerned by the extent to which the Bill seeks to give, in the first place to the Secretary of State and then to Parliament, what is really, by its nature, an inherently judicial function, namely the power to determine whether the further detention of an individual suspect is necessary. In order to avoid pre-judging the very issues which the court will be asked to determine shortly after Parliament approves the order, the material before Parliament (including the independent legal advice) will therefore have to be limited and the parliamentary debate itself will also have to be correspondingly circumscribed, avoiding any consideration of whether the further detention of the particular suspect or suspects is necessary.

¹⁸ NC23(1).

Q4. Is it acceptable in your view for Parliament to debate whether there are reasonable grounds for believing that the detention of one or more persons beyond 28 days will be necessary, or whether the investigation is being conducted diligently and expeditiously?

Q5. If not, how can Parliament debate in any meaningful sense whether the reserve power is needed?

(3) Parliamentary review

The Government's proposal provides that the statutory reviewer of terrorism legislation will report within 6 months of the reserve power ceasing to be available, and the report will cover matters such as whether it was reasonable in all the circumstances for the Home Secretary to make the order bringing the extended 42 day period into effect. A parliamentary debate would take place on the reviewer's report.

Q6. How will a parliamentary debate on the reviewer's report be able to provide a meaningful safeguard, when any such debate will almost certainly take place before any trial of the suspects who were the subject of the extension and therefore be severely circumscribed by the need not to prejudice any future trials?

(4) Judicial safeguards for the individual

As my Committee has said in its reports, decisions concerning the liberty of particular individuals require judicial not parliamentary safeguards. Neither the Bill, nor the Government's amendments, however, do anything to improve the judicial safeguards surrounding the extension of pre-charge detention. The Committee has found those safeguards to be inadequate because of the power both to exclude the suspect and their lawyer and to withhold from them information which is seen by the judge.

Q7. Why did you decide not to include any additional judicial safeguards for the individual at the hearings for extension of further detention when this was something on which you explicitly consulted?

(5) Duration

One of the Government's amendments reduces the time the 42 day limit is available from 60 days to 30 days.¹⁹

Q8. What is the value of this as a safeguard when the new clause also provides that "nothing in this section prevents the making of a new order", which was not in the original Bill?

(6) Judicial review

I note that the letter from the Minister states that "the decision of the Home Secretary [to declare that the reserve power is exercisable] would be subject to judicial review." The possibility of judicial review of the Secretary of State's order making the reserve power exercisable is in principle an important safeguard against its wrongful use. The Government's clarification that the lawfulness of the Secretary of State's order will be

¹⁹ NC28.

controlled by the courts is therefore welcome. However, the Government's amendments leave considerable uncertainty about two things:

(i) whether a court could quash the order for incompatibility with the right to liberty under the HRA; and

(ii) the precise grounds on which judicial review of the order could be sought.

(i) Can courts quash the order for breach of the right to liberty in Article 5 ECHR?

The first uncertainty concerns whether the order can be quashed by the courts on judicial review on the ground that it is incompatible with the right to liberty in Article 5 ECHR. This is an important question because breach of Article 5 is likely to be one of the main grounds on which any challenge to the lawfulness of the order could be made.

Under the Human Rights Act, subordinate legislation which is incompatible with a Convention right can be quashed by the courts. Primary legislation, however, cannot be quashed by the courts if it is found to be incompatible with a Convention right, it can only be declared incompatible.²⁰ A declaration of incompatibility leaves the provision in question in force until Parliament decides to repeal or revoke it.

The Secretary of State's order declaring the reserve power exercisable looks to all intents and purposes like subordinate legislation. However, the Human Rights Act defines "subordinate legislation" for the purposes of that Act to mean "any ... order ... made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force)".²¹ It is not clear from the Bill or the Government's amendments whether, for the purposes of the Human Rights Act, the Secretary of State's order declaring that the reserve power is exercisable is an order bringing the reserve power in the primary legislation into force. If it is such an order, it constitutes primary legislation for the purposes of the HRA and cannot be quashed if it is found by the courts to be incompatible with the right to liberty in Article 5.

In the Civil Contingencies Act, there is an express provision to make clear that emergency regulations made under that Act "shall be treated for the purposes of the Human Rights Act 1998 as subordinate legislation and not primary legislation (whether or not they amend primary legislation)".²² That provision was inserted by the Government in response to concerns expressed by the JCHR and others about whether emergency regulations could be quashed by the courts under the Human Rights Act. There is no equivalent provision in relation to the order making the reserve power available in the Counter-Terrorism Bill.

In view of this uncertainty, I would be grateful if you could clarify by answering the following questions:

Q9. Is it the Government's intention that the Secretary of State's order declaring that the reserve power is exercisable is primary or subordinate legislation for the purposes of the Human Rights Act?

²⁰ Under s. 4 HRA 1998.

²¹ S. 21(1)(f) HRA 1998.

²² Civil Contingencies Act 2004, s. 30(2).

Q10. If the Government intends that courts should be able to quash the Secretary of State's order if it is incompatible with Convention rights, what is the Government's reason for not including in the Bill an equivalent provision to that in the Civil Contingencies Act, making clear that the Secretary of State's order shall be treated for the purposes of the Human Rights Act as subordinate legislation and not primary legislation?

(ii) On what grounds can the order be challenged in court?

The second uncertainty about the scope for judicial control concerns the grounds on which the Secretary of State's order could be judicially reviewed.

Under the Bill, there are two preconditions to the making of an order by the Secretary of State declaring that the reserve power is exercisable:

- (1) an order extending the maximum period of pre-charge detention to 28 days²³ must already be in force; and
- (2) the Secretary of State must have received the necessary report from the DPP and the police stating the operational need for a further extension.

It is clear that these are preconditions to the exercise of the power: New Clause 21(2) provides expressly "No such order may be made unless-". The order could clearly be challenged by way of judicial review on the basis that one of these conditions was not satisfied and the order is therefore unlawful for that reason.

The Bill also provides that the Secretary of State must lay a statement before Parliament, after making the order, stating that she is satisfied of four things:

- (a) that a grave exceptional terrorist threat has occurred or is occurring;
- (b) that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible;
- (c) that the need for that power is urgent; and
- (d) that the provision in the order is compatible with Convention rights.

However, the Bill does not provide that these are preconditions to the exercise of the power. They are merely matters in respect of which the Secretary of State must state to Parliament that she is satisfied.

Under the Civil Contingencies Act, by comparison, there is power to make emergency regulations if the Minister is satisfied that three prescribed conditions are satisfied:²⁴

- (a) that an emergency has occurred, is occurring or is about to occur;
- (b) that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency; and

²³ Under s. 25 of the Terrorism Act 2006.

²⁴ The power to make emergency regulations is in s. 20 Civil Contingencies Act 2004. The conditions for making emergency regulations are specified in s. 21.

(c) the need for the provision is urgent.

The Civil Contingencies Act also provides for the maker of the emergency regulations to make a statement at the beginning of the regulations declaring that they are satisfied that the specified conditions are met.

It is not clear, therefore, whether, under the Counter-Terrorism Bill, the Secretary of State's order declaring that the reserve power is exercisable is subject to judicial review on the basis that these conditions are not satisfied, or only on the narrower basis that the Secretary of State's decision that she is satisfied of those things is so unreasonable that no reasonable Secretary of State could have reached that view (a very high threshold which it is quite difficult to meet in judicial review proceedings).

Again, I would be grateful if you could clarify by answering the following questions:

Q12. Can the Secretary of State's decision be judicially reviewed on the basis that

- (a) a grave exceptional terrorist threat has not occurred or is not occurring;**
- (b) the reserve power is not needed for the purpose of investigating the threat and bringing to justice those responsible; or**
- (c) the need for the power is not urgent?**

Q13. If not, is the Secretary of State's decision only judicially reviewable on the basis that her decision on each of those matters was so unreasonable that no reasonable Secretary of State could have made that decision?

Q14. Is the degree of judicial control of the Secretary of State's decision making the reserve power available intended to be any weaker than the judicial control of emergency regulations made under the Civil Contingencies Act?

(7) Independent legal advice

I note that the Government's amendments include a new requirement that the Secretary of State obtain independent legal advice, from a non-government lawyer, as to whether she can properly be satisfied of the various matters of which she must be satisfied before making the 42 day power available.²⁵ That advice must be laid before Parliament²⁶ as soon as practicable after the order is made, except to the extent that it contains material which would be damaging to the public interest or might prejudice the prosecution of any person.²⁷

The central question to be addressed by such legal advice will be whether the reserve power is needed for the purpose of investigating the threat and bringing the perpetrators to justice. This will involve the independent lawyer considering the very same questions as have to be determined by the court which will hear any application for an extension of detention. This will be the heart of the independent legal advice but it will be material

²⁵ NC23.

²⁶ NC23(6).

²⁷ NC23(7).

which should not be laid before Parliament because it directly prejudices the very issues which will have to be determined at the application for judicial authorisation of extended detention which would follow if Parliament approved the Secretary of State's order.

Q15. Please explain how this will provide a meaningful safeguard when the most important parts of the legal advice will have to be withheld from Parliament.

(8) Notification of chairmen of certain committees

The Government's amendments provide that on making the order the Secretary of State must notify the chairs of the Home Affairs Committee, the JCHR and the Intelligence and Security Committee and, as soon as reasonably practicable, provide them with copies of the report from the DPP and police and of the independent legal advice on Privy Council terms (or corresponding terms if not a Privy Counsellor).²⁸

I am concerned that in practical terms this will not operate as much of a safeguard. Disclosure on Privy Council terms would limit considerably the use which can be made of the information. The chairs of the relevant committees will not be able to take advice on the information they receive, including any legal advice in relation to the independent legal advice received by the Secretary of State. Nor will it be possible for the chair to share the information with the rest of their Committee.

Q16. How do you propose the Committee chairs can take advice on the information they receive, or consider it with other members in Committee, if they receive it on Privy Council terms?

Appendix 5: Letter from the Rt Hon Jacqui Smith MP, Home Secretary, Home Office, dated 11 June 2008

Pre-Charge Detention: Adequacy Of Safeguards

Thank you for your letter of 9 June on pre-charge detention proposals in the Counter-Terrorism Bill. The answers to the questions raised in your letter are given below.

Q1 Is it correct that it will be within the Secretary of State's power to make the reserve power available in relation to *any* investigation of a terrorism offence or offence with a terrorism connection which carries a maximum sentence of life imprisonment?

After making the order, the Home Secretary must be in a position to state that she is satisfied there is a grave exceptional terrorist threat and that the power is needed to investigate that threat and bring those responsible to justice. It is in that context that the power is made exercisable and the order may only be made available if there is a report as required under the proposed new clause 22 from the DPP/police. This can only be made in relation to persons being questioned for a serious terrorist offence). The reserve power could not, therefore be made available simply because the police were investigating a terrorism offence that carries a sentence of life imprisonment. For example, it could not be used in relation to an investigation into a plot to kidnap and maim a group of people

²⁸ NC24(1)-(3).

because this would not constitute serious loss of human life or serious damage to human welfare or the security of the UK.

However it is correct that once the order is in force it is available in relation to those suspected of the commission of a serious terrorist offence. It is not practical to limit the operation of the power to those suspected of involvement in a specific terrorist threat. In a fast-moving situation, multiple conspiracies or other threats could be revealed and it would be impractical in those circumstances to be required to make multiple, possibly overlapping, orders. The order will in any event expire after 30 days and then only if it has been approved by a resolution of each House of Parliament within seven days of the order being laid before Parliament.

Q2 Given the seriousness of terrorism, is it not the case that every investigation into a possible terrorism offence or offence with a terrorism connection, may result in the suspect being charged with an offence which carries a possible sentence of life imprisonment?

No. An investigation into membership of a proscribed organisation, fundraising for terrorist purposes, the provision of false passports (for terrorist purposes), the encouragement of terrorism or the dissemination of terrorist publications or the provision or receipt of weapons training would not involve offences carrying a sentence of life imprisonment.

Q3 Would the “grave exceptional terrorist threat” requirement, as defined in the Government’s amendment, have been satisfied in the case of the investigation into the alleged Heathrow bomb plot?

The alleged airline plot would be covered by ‘grave exceptional terrorist threat’, as it involved terrorism which threatened serious loss of human life inside or outside the UK. In our view it is absolutely right that it should be so covered.

Q4 Is it acceptable in your view for Parliament to debate whether there are reasonable grounds for believing that the detention of one or more persons beyond 28 days will be necessary, or whether the investigation is being conducted diligently and expeditiously?

It would not be for Parliament to debate whether there were reasonable grounds for believing that any individual should be detained or whether a particular investigation into an individual was being conducted diligently and expeditiously. These are matters for the police, prosecutors and the courts. The report from the DPP/police to the Home Secretary will address these issues as part of the information that is necessary to enable the Home Secretary to decide whether the reserve power should be made available.

Q5 If not, how can Parliament debate any meaningful sense whether the reserve power is needed?

Parliament can have a full and meaningful debate on whether the reserve power should be made available. Although they will not be able to discuss the details of individual suspects, Parliament will be able to fully discuss and, if so minded, approve the order commencing the reserve power. In doing so, Parliament could debate the general security threat, the

progress of the investigation, the police numbers involved, the number of suspects detained, the outline of the plot, the number of countries involved and whether the Home Secretary's decision was properly founded and all the statutory requirements had been met. Indeed, it is already the case that there have been statements and debates in Parliament following major terrorist incidents (for example in relation to the alleged airline plot and following the incidents in London/Glasgow). Although these occasions do not deal with details that would be prejudicial to the ongoing investigations it would be wrong to say that they are not meaningful – they provide a very real and important opportunity for Parliament to question the Government about events and the response to them from law enforcement agencies and others.

Q6 How will Parliamentary debate on the reviewer's report be able to provide a meaningful safeguard, when any such debate will almost certainly take place before any trial of the suspects' who were the subject of the extension and therefore be safely circumscribed by the need not to prejudice any future trials?

One of the purposes of requiring the independent reviewer to provide a report to Parliament on whether the procedure for detaining individual suspects beyond 28 days was in accordance with the relevant legislation and codes of practice is to meet the concern that the JCHR has previously raised about not having enough information on the operation of pre-charge detention. It is perfectly possible for the proposed report to address whether the pre-charge detention procedures have been met without prejudicing any trial. If the detainee was held in breach of the PACE codes, the defence could raise this issue at trial in any event and seek to have evidence excluded.

I believe that a report by the independent reviewer, and the accompanying parliamentary debate, are an important addition to parliamentary oversight of the reserve power as they will enable Parliament to consider in some detail how the power has operated in practice.

Q7 Why did you decide not to include any additional judicial safeguards for the individual at the hearings for extension of further detention when this explicitly consulted?

I have responded to this point in my letter to you dated 5 June.

Q8 What is the value of this as a safeguard (reducing period 42 day limit is available from 60 to 30 days) when the new clause also provides that "nothing in this section prevents the making of a new order", which was not in the original Bill?

Under the original proposal, the higher limit would have expired at 30 days unless it was agreed by Parliament (within 30 days) in which case it would remain in force for a total of 60 days. Furthermore, there was nothing in the original proposal to prevent the reserve power being triggered more than once.

Under the new proposal, whilst the reserve power can again theoretically be triggered more than once, it only remains available for 30 days even if approved by Parliament. This therefore reduces by half the amount of time during which individuals can be detained beyond 28 days.

Q9 Is it the Government's intention that the Secretary of State's order declaring that the reserve power is exercisable is primary or subordinate legislation for the purposes of the Human Rights Act?

The order brings into effect the amendments to Schedule 8 to the Terrorism Act 2000 set out in Schedule 2 to the Bill. If this question is aimed at seeking the government's position as to whether or not the order would be subject to judicial review, the answer is that we do consider the Secretary of State's decision to make the order would be amenable to judicial review by the courts.

Q10 If the Government intends that courts should be able to quash the Secretary of State's order if it is incompatible with Convention rights, what is the Government's reason for not including in the Bill an equivalent provision to that in the Civil Contingencies Act, making clear that the Secretary of State's order shall be treated for the purposes of the Human Rights Act as subordinate legislation and not primary legislation?

See the answer above.

Q11 This seems to be missing ?

Q12 Can the Secretary of State's decision be judicially reviewed on the basis that

- (a) A grave exceptional terrorist threat has not occurred or is not occurring;**
- (b) The reserve power is not needed for the purposes of investigating the threat and bringing to justice those responsible; or**
- (c) The need for the power is not urgent?**

Q13 If not, is the Secretary of State's decision only judicially reviewable on the basis that her decision on each of those matters was so unreasonable that no reasonable Secretary of State could have made that?

Q14 Is the degree of judicial control of the Secretary of State's decision making the reserve power available intended to be any weaker than the judicial control of emergency regulations made under the Civil Contingencies Act?

The Secretary of State's decision can be judicially reviewed, subject to normal judicial review principles. While we consider there would be wider scope for judicial review under the Civil Contingencies Act, the level of scrutiny available to the court under our proposals is appropriate to the action taken by the Home Secretary. Under our proposals, the order made by the Secretary of State brings into force amendments to the 2000 Act already extensively debated in Parliament and exhaustively set out in Schedule 1 to the Bill. This is in contrast to the regulations made under the CCA, which can include any number of as yet unspecified measures.

Q15 Please explain how this [independent legal advice] will provide a meaningful safeguard when the most important parts of the legal advice will have to be withheld from Parliament.

Parliament should have the fullest practicable information, including its own source of legal advice, to enable it to exercise effective scrutiny of any decision to invoke the reserve power.

Parliament will receive this advice as part of a package of information the Home Secretary must lay before Parliament within two days after the order itself is made (or as soon as practicable).

In the event of an order being made, the legal advice that will be published (in redacted form to protect sensitive information) will be the advice obtained specifically for the purpose of informing Parliament and the chairs of the committees. We believe that even in a redacted form, the advice will provide an important contribution to the Parliamentary debates on the reserve power. It will cover matters concerning the definition of the grave exceptional terrorist threat, and, most importantly, analysis and conclusions about the lawfulness of making the reserve power available. These parts of the advice will be the most significant for the purpose of assisting Parliament, rather than the detailed intelligence etc. surrounding the operation and the particular individuals involved, which are likely to be the parts redacted.

Q16 How do you propose the Committee chairs can take advice on the information they receive, or consider it with other members in Committee, if they receive it on Privy Council terms?

I think it is important that Parliament can have as an informed debate as possible on making the reserve power available. Providing information to the Chairs of the relevant parliamentary committees will help provide an assurance that the power has been properly and responsibly exercised and will help inform any reports that these committees publish in support of the debates in Parliament. This is different, however, from providing information to all committee members or indeed to MPs and Peers more generally. The Chilcot review is an example of how making information available on Privy Council terms can help inform debates on security issues, and more general briefing on privy councillor terms happens regularly for the same purpose.

I am placing a copy of this letter in the Library.

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
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC756

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	HL Paper 134/HC 790

	Report of this Session: The Treatment of Asylum Seekers	
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 Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
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