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House of Commons
Joint Committee on Human
Rights

Counter–Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In

Sixteenth Report of Session 2009–10

*Report, together with formal minutes and oral
and written evidence*

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Joint Committee on Human Rights

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

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Summary

The Government states that “the protection of human rights is a key principle underpinning all the Government’s counter-terrorism work.” However, all too often human rights considerations are squeezed out by the imperatives of national security and public safety.

Since September 11th 2001 the Government has continuously justified many of its counter-terrorism measures on the basis that there is a public emergency threatening the life of the nation. We question whether the country has been in such a state for more than eight years. This permanent state of emergency inevitably has a deleterious effect on public debate about the justification for counter-terrorism measures.

In order to make judgments about the necessity and proportionality of counter-terrorism measures we need access to information about the scale and nature of the threat posed. We are disappointed that the Director General of the Security Service is prepared to give public lectures but is not prepared to give public evidence to us.

We are concerned about the Government’s narrow definition of what amounts to complicity in torture. The Government’s formulation appears to be carefully designed to enable it to say that, although it knew or should have known that some intelligence it received was or might have been obtained through torture, this did not amount to complicity in torture because it did not know or believe that such receipt would encourage the use of torture by other States. This is a significant and worrying change in definition. We also argue that, in light of recent developments such as the publication of the full High Court judgement in the Binyam Mohamed case, the case for setting up an independent inquiry into the allegations of complicity in torture is now irresistible.

There has been a dramatic growth of the use of secret evidence in the UK courts. It can now be used in a wide range of cases including deportation hearings, control order proceedings, parole board cases, asset-freezing applications, employment tribunals, and even claims for damages. In light of recent judgements we recommend an urgent and comprehensive review of the use of secret evidence and special advocates, in all contexts in which they are used.

Parliament still does not have the information it needs properly to evaluate whether the power to detain terrorism suspects pre-charge for up to 28 days continues to be necessary. We recommend that a thorough independent review be conducted of the pre-charge detention of all those individuals who were arrested in relation to the Heathrow airline plot and detained without charge for more than 14 days. We also recommend amendments to the Terrorism Act 2000 to introduce procedural safeguards surrounding the extension of pre-charge detention. In addition we support Lord Carlisle’s recommendation that training be provided to police officers on the effect of Article 5 ECHR on detentions under the Terrorism Act 2000.

The Government has still not given up on the possibility that pre-charge detention may be extended to 42 days. A draft bill exists that will be introduced if and when the need arises. We recommend that the Government withdraw its draft Bill which, if it were enacted, is likely to give rise to breaches of the right to liberty in Article 5 ECHR in the absence of a derogation. We also recommend that a clear statutory framework for future derogations

from the ECHR should be introduced at the earliest opportunity.

We remain of the view that the Terrorism Act 2000 should be amended to allow the granting of bail, subject to the full range of conditions available in relation to crime generally and in relation to control orders. Given the differing police views in this area, and the range of terrorism offences that now exist, we recommend that the Government hold a full consultation on whether bail should in principle be available in relation to terrorism offences.

The use of intercept as evidence has been an ambition since the Privy Counsellors reported in January 2008. However, designing a model for the use of intercept as evidence has proved difficult because of the tension between the operational and legal requirements which the Privy Counsellors stipulated any model must meet. The roadblock to progress is the insistence on ongoing agency discretion over the retention, examination and transcription of intercept material. This makes a legally viable regime impossible given the clear requirements of Article 6 ECHR. We do not see any difficulty in principle with independent judicial control over what material may be discarded. We therefore recommend that the operational requirements be revisited.

Finally, we considered the arrangements for oversight of counter-terrorism policies. We repeat our earlier recommendations that the ISC should be made a proper parliamentary committee, with an independent secretariat, independent legal advice and access to an independent investigator. We also recommend that human rights expertise be made available to the new Joint Committee on National Security Strategy, both in its membership and at staff level. The post of statutory reviewer of terrorism legislation should be appointed by Parliament and report directly to Parliament and be limited to a single term of five years.

1 Introduction

1. In the last year a number of international projects assessing the impact of counter-terrorism measures on human rights since 2001 have come to fruition, drawing out a number of important themes from experience around the world. Most notable among these is the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damage, Urging Action* (2009),¹ which urges governments to engage in a stock-taking process designed to ensure that respect for human rights and the rule of law is integrated into every aspect of counter-terrorism work.

2. The Report of the Eminent Jurists' Panel identifies a number of concerns that require urgent attention, many of them themes which have featured large in our work, for example:

- The use of preventative measures such as administrative detention;
- The need to re-establish the primacy of the criminal justice system in states' response to terrorism;
- The use of secret procedures; and
- The increase in international co-operation between intelligence agencies without appropriate safeguards and accountability mechanisms.

3. Our predecessor Committee began its work on Counter Terrorism Policy and Human Rights in 2004, with its Report on the *Review of Counter-Terrorism Powers*.² In this Parliament we have published 16 substantive reports in our ongoing inquiry into the subject, making many recommendations and proposing many amendments to the legislative framework to give effect to those recommendations.

4. The purpose of this report, which will be our final report on counter-terrorism policy and human rights in this Parliament, is to pick up some of the most significant themes in our work on this subject, with a view to identifying the most pressing human rights concerns in the area of counter-terrorism policy and suggesting the urgent action which is required to address them.

5. Reviewing our work over the course of this Parliament in this important field of policy, we find that there are several themes to which we have returned time and again, and we highlight some of these in this report. We welcome the fact that the Government has now accepted that political discussion about counter-terrorism policy should take place within the framework of human rights. In place of the supposed conflict between human rights on the one hand and public safety on the other, which pervaded political discourse in the immediate aftermath of 9/11, it is now widely accepted that human rights law itself imposes positive obligations on the State to take active steps to protect people from the real

1 *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (International Commission of Jurists, December 2008), at 40-42. The Eminent Jurists Panel is an independent Panel convened by the International Commission of Jurists, chaired by Justice Arthur Chaskalson (former Chief Justice of the South African Constitutional Court).

2 Eighteenth Report of Session 2003-04, *Review of Counter-terrorism Powers*, HL 158/HC 713.

risk of terrorism. Counter-terrorism measures may be positively required by human rights law, where they are necessary and proportionate, and human rights law provides the framework within which to assess the important evidential questions about the necessity and proportionality of those measures.

6. We are pleased to note that this shift in the terms of the debate is reflected in various Government statements that “the protection of human rights is a key principle underpinning all the Government’s counter-terrorism work.”³ It is expressly mentioned, for example, as being central to the Government’s National Security Strategy. All too often, however, we have identified examples in the Government’s counter-terrorism policy of human rights being squeezed out by the imperatives of national security and public safety. It is easy to pay lip-service to the importance of human rights but the test of that commitment is in the substantive policy outcomes. On that score there is an enormous amount of urgent work that remains to be done by the next Parliament. It is time to bridge the gap between the rhetoric and the reality in the field of counter-terrorism policy and human rights. In short, it is time to bring human rights back in, in substance as well as form.

³ See e.g. *Memorandum to the Home Affairs Committee: Post-Legislative Assessment of the Prevention of Terrorism Act 2005*, Cm 7797 (1 February 2010) at para. 58; Letter to the Chair of the Committee from Rt Hon Alan Johnson MP, Home Secretary, dated 15 September 2009, Ninth Report of Session 2009-10, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395 (hereafter “Report on 2010 Control Orders Renewal”) at p. 43.

2 Normalising the exceptional

Introduction

7. The recent Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights warned of the corrosive effect of open-ended departures from ordinary procedures and of the danger of special measures, introduced to deal with a temporary crisis, becoming permanent. It recommended that “all legislation intended to deal with terrorism should be regularly reviewed to ensure that the tests initially met still prevail, and to ensure that no unintended consequences have arisen”, and that departures from ordinary procedures should be time-limited.⁴

8. We have frequently commented in our work on counter-terrorism policy and human rights on the need to ensure that extraordinary measures, introduced in response to the threat from terrorism, must not only be demonstrated to be necessary and proportionate, but should be time-limited to ensure that there is a proper opportunity to scrutinise whether the original justification still subsists. The risk to be guarded against is that the exceptional becomes the norm. For the reasons we explain in this chapter, we are concerned that this may already have happened.

Is there a “public emergency threatening the life of the nation”?

9. In the immediate aftermath of 9/11, the UK derogated from the right to liberty in Article 5 ECHR when it enacted Part IV of the Anti-Terrorism, Crime and Security Act 2001, authorising the indefinite detention of foreign national terrorism suspects. It was alone amongst the Council of Europe Member States in doing so. As it must when invoking its right to derogate from Convention rights, the Government asserted the existence of “a public emergency threatening the life of the nation”.⁵

10. The UK withdrew its derogation from Article 5 in 2005, following the decision of the House of Lords in the *Belmarsh* case that it was incompatible with the Convention. The House of Lords, by a majority, upheld the Government’s argument that there was a public emergency threatening the life of the nation, largely on the basis that the court was not in a position to challenge that assertion, but held that the other condition of a lawful derogation, that the measure in question must be “strictly required by the exigencies of the situation”, was not satisfied. The European Court of Human Rights, when it considered the Convention compatibility of the 2001 legislation, similarly deferred to the Government’s assertion that there existed at the time of the derogation a public emergency threatening the life of the nation.

11. Although the Government withdrew its derogation, it has never relinquished its assertion that there is a public emergency threatening the life of the nation. In a letter dated

4 Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, above n. 1, at 47.

5 Article 15 ECHR allows States to derogate from some of the Convention rights in time of war or other “public emergency threatening the life of the nation.” Because of the seriousness of derogating from Convention rights, the “public emergency” condition is meant to impose a high threshold: it has been interpreted by the European Court of Human Rights to mean “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community” (*Lawless v Ireland (No 3)* (1961) 1 EHRR 15 at para. 28).

3 August 2007 the Government said that its position on whether or not the UK faces “a public emergency threatening the life of the nation” has not changed since 2001 when it derogated from Article 5 ECHR.⁶ Indeed, it claimed in that letter that “it is clear that the threat from international terrorism has increased since 2001.”

12. In the years since 2001, the Government’s maintenance of its assertion that the UK faces a public emergency threatening the life of the nation has often been publicly challenged.⁷ It has also been called into question by the introduction of a system for publicly reporting changes in the threat level, based on the analysis of the Joint Terrorism Analysis Centre (“JTAC”). Under that system, the reported threat level fluctuates, according to JTAC’s assessment.

13. On 30 June 2007, for example, the threat level was raised to “critical” (meaning a terrorist attack is expected imminently) in the wake of the attempted attacks in London and Glasgow. On 4 July 2007 the threat level was lowered from “critical” to “severe” (meaning an attack is highly likely). On 20 July 2009 it was reduced from “severe” to “substantial” (meaning an attack is a strong possibility). On 22 January 2010 it was raised to severe again.

14. At the time of our most recent evidence session with the Minister, on 1 December 2009, the threat level was at “substantial”. We asked the Minister whether it was still the Government’s view that the UK faces “a public emergency threatening the life of the nation”. He said “we would still uphold that there is a potential public emergency for consideration and for preparedness by the Government.”⁸ Pressed further on whether his position was that there is a “potential” public emergency or an “actual” public emergency, and on how low the threat level, as assessed by JTAC, had to drop before there was no longer a public emergency, the Minister replied “as long as the threat level remains as ‘substantial’, where an attack is a strong possibility, I think we are in a situation whereby we have a potential public emergency which we need to prepare for.”⁹ In subsequent correspondence, however, he changed this answer. He said that JTAC’s decision about the threat level and the Government’s decision about whether the “public emergency” test for derogation is met “are independent of each other. It is therefore possible that the Government could consider there to be a public emergency threatening the life of the nation even if JTAC lowered the threat level to one of those below SUBSTANTIAL.”¹⁰ There are two levels below ‘substantial’: ‘moderate’ and ‘low’.

15. We accept of course that JTAC’s setting of the threat level, in the light of the latest intelligence, and the Government’s decision on whether there is a public emergency threatening the life of the nation, are separate decisions. We do not accept, however, that the Government’s decision on the public emergency question can be entirely independent of JTAC’s assessment of the threat level. The Government’s approach, as

6 *Government Reply to the Nineteenth Report of the Joint Committee on Human Rights of Session 2006-07*, Cm 7215 p. 16.

7 See eg Sir Ken Macdonald QC (former Director of Public Prosecutions) in *Security and Rights*, a public lecture to the Criminal Law Bar Association (23 January 2007).

8 Q50, Ev 7

9 Q55, Ev7

10 Letter from David Hanson, 13 January 2010, published in Report on 2010 Control Orders Renewal, above n.3, at 49-53 (the letter is incorrectly dated 7 January 2010).

set out in the Minister's letter following our evidence session, seems to envisage that the Government could consider there to be a public emergency threatening the life of the nation even if the threat level as assessed by JTAC was at 'moderate' or 'low'. We are concerned that the Government's approach means that in effect there is a permanent state of emergency, and that this inevitably has a deleterious effect on public debate about the justification for counter-terrorism measures.

16. The Government's position that there is a public emergency threatening the life of the nation is important because it determines the starting point in any debate about the justification for counter-terrorism powers. Like the language of the "War on Terror", it asserts the existence of a state of exception, which implies that exceptional measures require less justification than when times are normal. It amounts to a permanent claim that courts and other accountability mechanisms should defer to the Government's assessment of what measures are required.

17. As we have always made clear in our previous reports, we accept that the UK faces a serious threat from terrorism. However, we question whether we still face a "public emergency threatening the life of the nation", more than eight years after the Government first declared that there was such an emergency. In our view, it devalues the idea of a "public emergency" to declare it in 2001 and then to continue to assert it more than eight years later, presumably based on legal advice which seeks to preserve the perceived advantage of both the House of Lords and the European Court of Human Rights having deferred to the asserted existence of this particular public emergency. In any event, we question the value, in legal terms, of the Government's continued assertion of the existence of a public emergency. If it were to seek to derogate from any Convention rights, it would be necessary to demonstrate that a "public emergency threatening the life of the nation" exists at the time of any new derogation, rather than rely on the public emergency which was asserted to exist in 2001.

Availability of information about the scale of the threat

18. In our work on counter-terrorism policy and human rights we have frequently pointed out the importance of having access to information about the scale and nature of the threat posed by terrorism in order to be able to make judgments about the necessity and proportionality of the responses.¹¹ Five years on, however, we find that we have no better understanding of the nature and scale of the threat posed by international terrorism than we had at the outset.

19. We have often been critical in the past of the refusal by the Director General of the Security Service to give public evidence to us about the nature and scale of the threat.¹² We have expressed our disappointment that the Director General is prepared to give interviews to the press and public lectures but is not prepared to give evidence to any parliamentary committee other than in private to the Intelligence and Security Committee ("the ISC"). In his recent public lecture, *Defending the Realm*, given at Bristol University in October 2009, the current Director General, Jonathan Evans, reflected on the nature of the threat posed

11 See e.g. Eighteenth Report of Session 2003-04, *Review of Counter-terrorism Powers*, HL 158/HC 713, at paras 15-23; Second Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights: 42 days*, HL 23/HC156 (hereafter, "Report on 42 days") at paras 24-33.

12 See e.g. Report on 42 days, above n. 11, at para. 31.

by Al Qaida and how the Security Service's understanding of that threat has changed since 2001.¹³

After 9/11 the UK and other western countries were faced with the fact that the terrorist threat posed by Al Qaida was indiscriminate, global and massive. Now, 8 years on, we have a better understanding of the nature and scope of Al Qaida's capabilities but we did not have that understanding in the period immediately after 9/11.

20. The evolution of the Security Services' understanding of the nature and scope of Al Qaida's capabilities is a matter of great relevance to the discharge of our function of reporting to Parliament on the human rights compatibility of counter-terrorism laws, policies and practices. It is frequently our task to assess whether a particular interference with a fundamental right caused by a proposed counter-terrorism measure is justified because of the nature and scope of the would-be terrorists' capabilities. What the Director-General had to say on this to his audience in Bristol raises a lot of questions that we would have liked the opportunity to pursue with him. Was he implying that, in the period immediately after 9/11, the Security Services in this and other countries over-estimated Al Qaida's capabilities? In what ways is the Security Services' understanding of the nature and scope of those capabilities "better" now? How does that "better understanding" affect the justification for some of the sweeping counter-terrorism powers that were enacted in the wake of 9/11?

21. In the light of the Director-General's public lecture we therefore asked the Minister whether the Director General's refusal to give evidence to us, in view of our legitimate interest in understanding the precise nature and scope of the threat posed by international terrorism, is acceptable. The Minister restated the familiar response of the Government that parliamentary scrutiny of the Security Services is carried out by the Intelligence and Security Committee.¹⁴ However, he offered to reflect on the issue and even to discuss it with the Director General himself.¹⁵

22. Disappointingly, in his subsequent letter, he merely repeated the Director General's standing offer of "an off-the-record confidential briefing on the current terrorist threat".¹⁶ This was also the Prime Minister's response when he was asked at the Liaison Committee whether he thought it was defensible that the Director General is prepared to talk openly to the press and the media and to give public lectures, but not to appear before a parliamentary committee.¹⁷

23. We have previously declined offers of a confidential briefing from the Director General of the Security Service about the threat level. The purpose of the Director General appearing before us to give evidence would be to enable us to question him publicly, in order to enhance the democratic accountability of the intelligence and security services, make parliamentary assessments of the necessity and proportionality

13 *Defending the Realm*, public lecture by the Director General of the Security Service, Jonathan Evans, Bristol University, 15 October 2009.

14 Qs 66-67, Ev 9

15 Qs 69 and 71, Ev 9-10

16 Letter from David Hanson, 13 January 2010, above n. 10.

17 Oral evidence taken before the Liaison Committee on 2 February 2010, HC (2009-10) 346-i, Q84.

of counter-terrorism measures more transparent, and so increase public confidence. These things cannot be achieved by off the record, secret briefings.

24. Making the intelligence and security services more accountable to Parliament was one of the themes of the Prime Minister's speech to the House of Commons on constitutional renewal in July 2007.¹⁸ It is a theme to which the House of Commons Reform Committee recently returned.¹⁹ **We do not accept the Government's argument that there is a neat division of responsibilities between different parliamentary committees, and that the ISC is the only appropriate committee before which the Director-General of the Security Service should appear. Ministers and officers such as the Director General should expect to be scrutinised by more than one committee. As Parliament's human rights committee, we have a legitimate interest in understanding the precise nature and scope of the threat posed by international terrorism. We consider it to be unacceptable in a democracy that the Director General of the Security Services should give public lectures about the state of the Security Service's understanding of Al Qaida's capabilities, and how that understanding has changed since 2001, but refuse to give evidence in public on the same issue to a parliamentary committee.**

A statutory framework for derogation

25. From time to time the possibility of derogating from the UK's obligations under the European Convention on Human Rights is raised, including by Government ministers, usually in the wake of a significant Court decision which goes against the Government's interpretation of the Convention. We saw it in the wake of the decision of the House of Lords in the *Belmarsh* case, declaring the indefinite administrative detention of foreign national terrorism suspects to be incompatible with the Convention, and again in the wake of the House of Lords decisions about control orders.²⁰ The issue was also the subject of much discussion during the parliamentary debates about the Government's proposal to increase the maximum period of pre-charge detention to 42 days.²¹ Most recently, in the House of Lords decision in *AF*, the possibility of derogating from the right to a fair hearing in Article 6(1) of the Convention was expressly discussed by some of the Law Lords themselves.²²

26. Although there has been no derogation from the Convention by the UK since the House of Lords held the 2001 derogation from the right to liberty in Article 5 ECHR to be incompatible with the Convention, the risk of one being proposed by the Government in response to a Court decision it does not like is ever-present. It is clear from the way in which the Government continues to insist that there is a public emergency threatening the life of the nation that the possibility of a derogation is under constant review in the Home Office.

18 HC Deb 3 July 2007

19 First Report of Session 2008-09, *Rebuilding the House*, HC1117 paras 57-59.

20 *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440 and *Secretary of State for the Home Department v AF and others* [2009] UKHL 28, [2009] 3 WLR 74.

21 See e.g., HC Deb, 11 June 2008. Cols 357–363; HL Deb, 8 July 2008, cols 671–673

22 See e.g. Baroness Hale who said, above n. 20 at para. [106]: "If the Government adjudges that it is necessary to impose serious restrictions upon an individual's liberty without giving that individual a fair opportunity to challenge the reasons for doing so, as to which it is not for us to express a view, then the Government will have to consider whether or not to derogate from art 6 of the Convention."

27. In our reports on 42 days and A Bill of Rights for the UK we advocated the adoption of a statutory framework for derogation.²³ We pointed out that under our current arrangements derogation is an essentially executive act and there is very little to ensure that there will be an opportunity for parliamentary scrutiny of the Government's justification for derogating in the event that it decides to do so. Providing legal frameworks for possible future events never seems as pressing as the urgent day to day business which the parliamentary business managers understandably prioritise.

28. There is a clear risk of a derogation being proposed by any Government in the wake of a terrorist atrocity, and the woeful lack of opportunities for parliamentary scrutiny of such a derogation under current arrangements, **we recommend that a clear statutory framework for future derogations from the ECHR, ensuring proper opportunities for parliamentary scrutiny, be treated as an urgent priority in the next Parliament. In our view this would be an important addition to the recent package of reforms strengthening Parliament's ability to hold the executive to account in an area of policy where proper democratic scrutiny for justification is vital but all too often lacking.**

23 Twenty-first Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, HL 116/HC 635 at para. 50; Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165-I/HC 150-I at paras 240-243; Thirtieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill*, HL 172/HC 1077 at paras 89-109.

3 Complicity in torture

The meaning of complicity

29. Our report, *Allegations of UK Complicity in Torture*, was published in August 2009.²⁴ We concluded that complicity in torture is a direct breach of the UK's international human rights obligations, and that, if the relevant facts are proved, complicity in torture exists where a state:

- asks a foreign intelligence service known to use torture to detain and question an individual;
- provides information to a foreign intelligence service known to use torture, enabling that intelligence service to apprehend an individual;
- gives questions to a foreign intelligence service to put to a detainee who has been, is being or is likely to be tortured;
- sends interrogators to question a detainee who is known to have been tortured by those detaining and interrogating him;
- has intelligence personnel present at an interview with a detainee in a place where he is being, or might have been tortured; or
- systematically receives information known or thought likely to have been obtained from detainees subjected to torture.

30. States are also complicit when they act in these ways in circumstances where they have constructive as well as actual knowledge – that is, they should have known of the use of torture.

31. We pointed out that the Government appeared to have been determined to avoid parliamentary scrutiny on this issue, and called on the Government to take a number of steps, including:

- Setting up an independent inquiry into the allegations about the UK's complicity in torture, without ruling out the possibility of future prosecutions;
- Publishing all versions of the guidance given to intelligence and security service personnel about detaining and interviewing individuals overseas;
- Publishing all relevant legal opinion provided to ministers; and
- Making the Intelligence and Security Committee a proper parliamentary committee, with independent legal advice, and reporting to Parliament not the Prime Minister.

²⁴ Twenty-third Report of Session 2008-09, *Allegations of UK Complicity in Torture*, HL Paper 152/HC 230 (hereafter "Report on Complicity in Torture").

32. Shortly after the publication of the Committee's Report, on 9 August 2009, the Foreign Affairs Committee raised very similar concerns about the UK's complicity in torture in its Report on the FCO Annual Human Rights Report:²⁵

We conclude that it is imperative that the UK fulfils its legal obligations in respect of the prevention of torture, including any duty to act positively to prevent it, investigate allegations that it has taken place, and expose it. We further conclude that there is a risk that use of evidence which may have been obtained under torture on a regular basis, especially where it is not clear that protestations about mistreatment have elicited any change in behaviour by foreign intelligence services, could be construed as complicity in such behaviour.

33. The Government's Reply to our report on Complicity in Torture rejected all of our recommendations:²⁶

The Government unreservedly condemns the use of torture and our clear policy is not to participate in, solicit, encourage or condone torture.

It would not be appropriate for the Government to comment on whether hypothetical examples would amount to complicity in torture or the provision of aid and assistance to the commission of torture. As the evidence before the Committee made clear, such hypothetical examples are generally not amenable to a straight yes or no answer in the abstract. Such matters need to be considered in light of all the facts and circumstances.

With regard to the question of receipt of intelligence, the suggestion from some quarters that the Government has a policy of accepting intelligence gained through torture is misleading. The reality of the situation is that the precise provenance of intelligence received from overseas is often unclear. However, we ensure that our partners are well aware that we find the use of torture unacceptable. ***The Government's position is that the receipt of intelligence should not occur where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture.*** (Emphasis added)

34. We were struck by the new formulation of the Government's position in the last sentence of the passage cited above. As far as we are aware, this goes beyond previous Government formulations relied on, which have tended to stay at the level of general assertion, such as that in the first sentence of the extract cited. The new formulation states the Government's position in relation to the specific example of receipt of intelligence. Our view, as stated in our Report, is that the systematic receipt of intelligence which is known or thought likely to have been obtained from detainees subjected to torture, or in circumstances where the use of torture should have been known, amounts to complicity in torture. The Government's view of what amounts to complicity, however, is very much narrower. Its view appears to be that receipt of intelligence obtained through torture only amounts to complicity "where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture."

25 Seventh Report of Session 2007-08, *Human Rights Annual Report 2008*, HC 557 at para. 83.

26 *Government Reply to the Twenty-Third Report of the Joint Committee on Human Rights 2008-09*, Cm 7714 (October 2009), p.3.

35. We sought some clarification about the Government's apparent change of position on complicity from the Home Office Minister of State, the Rt Hon David Hanson MP, when he gave oral evidence to us on 1 December 2009. We thought it appropriate to ask him because, as the Home Office counter-terrorism minister, he is accountable to Parliament for the actions of officials of the Security Service in relation to counter-terrorism. We wanted to ascertain what the basis is for the Government's position, in its Reply to our Report, that the receipt of intelligence information obtained by torture only amounts to complicity where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture. We asked him whether he agrees with our view, expressed in our report, that the systematic receipt of intelligence which is known or thought likely to have been obtained from detainees subjected to torture, or in circumstances where the use of torture should have been known, amounts to complicity in torture.

36. We regret to say that we found the Minister's answers to our questions on this subject unsatisfactory. In response to each of our questions²⁷ about whether different factual scenarios would, in the Government's view, satisfy the definition of "complicity" in international law, he repeated the formula that he and the Government "condemn the use of torture, do not endorse the use of torture, want to see the eradication of torture, will not support the use of torture by other regimes passing information to us and want to ensure that the information that we get has been secured through means which are supportive of human rights and are supportive of the non-use of torture."²⁸ This was not an answer to the questions we were asking. **We sought the Government's view as to whether a range of different situations would amount to complicity in torture, as defined in international law, if the relevant facts were proved. The Government refused to answer those questions in its response to our Report and the Minister's evasive replies maintained that refusal. These important questions therefore remain unanswered by the Government.**

37. The Minister did, however, candidly indicate that the Government was aware that some information which it had received and acted upon since 9/11 had come from sources of which it was not aware, and, implicitly therefore, that there was a risk that such information might have been obtained by torture:

I think it is fair to say, Chairman, that there will be information supplied to the British Government which potentially could save lives at certain times in the cycle since 9/11, and sometimes it is not clear about where that information has originally derived from. However, I think it is the duty of the Government to use that information for the protection of British citizens, while still maintaining ... that we believe, overall, that the use of torture is not a thing that we would support.²⁹

38. This acknowledgment by the Minister reflects similar statements made by the Director-General of the Security Service and the Home and Foreign Secretaries following the

27 Qs 2-17, Ev 1-3

28 Q2, Ev 1

29 Q15, Ev 3. See, to similar effect, Q3, Ev 1: "we have to look at these issues in the round; there will be occasions when information will come to us where we are not, occasionally, aware of the source of that information"; and Q6, Ev 2: "we will work with a number of regimes to secure information for the protection of the British public ... we have to look at what the security of the British public is and what regimes we work with, and there are regimes, occasionally, that we do not agree with, we do not support but, ultimately, we also have to work with."

publication of our report on complicity. In October 2009 the Director General of the Security Service, Jonathan Evans, addressed the question of complicity directly in his public lecture *Defending the Realm*. The significance of what he says warrants its citation at length:

We had seen nearly 3000 people killed in the United States, 67 of them British. We were aware that 9/11 was not the summit of Al Qaida's ambitions. And there was a real possibility that similar attacks were being planned, possibly imminently. Our intelligence resources were not adequate to the situation we faced and the root of the terrorist problem was in parts of the world where the standards and practices of the local security apparatus were very far removed from our own.

This posed a real dilemma. Given the pressing need to understand and uncover Al Qaida's plans, were we to deal (however circumspectly) with those security services who had experience of working against Al Qaida on their own territory, or were we to refuse to deal with them, accepting that in so doing we would be cutting off a potentially vital source of information that would prevent attacks in the West? In my view we would have been derelict in our duty if we had not worked, circumspectly, with overseas liaisons who were in a position to provide intelligence that could safeguard this country from attack. I have every confidence in the behaviour of my officers in what were difficult and, at times, dangerous circumstances. This was not just a theoretical issue. Al Qaida had indeed made plans for further attacks after 9/11: details of some of these plans came to light through the interrogation of detainees by other countries, including the US, in the period after 9/11; subsequent investigation on the ground, including in the UK, substantiated these claims. Such intelligence was of the utmost importance to the safety and security of the UK. It has saved British lives. Many attacks have been stopped as a result of effective international intelligence co-operation since 9/11.

I do not defend the abuses that have recently come to light within the US system since 9/11. Nor would I dispute the judgement of the Intelligence and Security Committee, in its 2005 Report on the Handling of Detainees and its 2007 Report on Rendition, that the Service, among others, was slow to detect the emerging pattern of US practice in the period after 9/11. But it is important to recognise that we do not control what other countries do, that operational decisions have to be taken with the knowledge available, even if it is incomplete, and that when the emerging pattern of US policy was detected necessary improvements were made. And we should recall that notwithstanding these serious issues, the UK has gained huge intelligence benefits from our co-operation with the US agencies in recent years, and the US agencies have been generous in sharing intelligence with us.

To quote the article written earlier this year by Alan Johnson and David Miliband:

Intelligence from overseas is critical to our success in stopping terrorism. All the most serious plots and attacks in the UK in this decade have had significant links abroad. Our agencies must work with their equivalents overseas... we have to work hard to ensure that we do not collude in torture or mistreatment. Enormous effort goes into assessing the risks in each case. But it is not possible to eradicate all risk. Judgements need to be made.

That is the reality of the situation: we do not solicit or collude in torture. We do not practice torture. But we are operating in a difficult and complex environment.

39. It seems to us that the Minister (in his evidence to us), the Director General of MI5, and both the Home and Foreign Secretaries, in their recent public statements, come very close to saying that, at least in the wake of 9/11, the lesser of two evils was the receipt and use of intelligence which was known, or should have been known, to carry a risk that it might have been obtained under torture, in order to protect the UK public from possible terrorist attack. This is no defence to the charge of complicity in torture.

40. We cannot find any legal basis for the Government's narrow formulation of the meaning of complicity in its Response to our Report on Complicity in Torture. The

Government's formulation of its position changes the relevant question from "does or should the official receiving the information know that it has or is likely to have been obtained by torture?" to "does the official receiving the information know or believe that receipt of the information would encourage the intelligence services of other states to commit torture?" As we made clear in our earlier report, 'complicity', in the sense used in the relevant international standards, does not require active encouragement. The systematic receipt of information obtained by torture is a form of acquiescence, or tacit consent, and the relevant state of mind is whether the official receiving the information knew or should have known that it was or was likely to have been obtained by torture.

41. The Government's formulation appears to us to be carefully designed to enable it to say that, although it knew or should have known that some intelligence it received was or might have been obtained through torture, this did not amount to complicity in torture because it did not know or believe that such receipt would encourage the use of torture by other States.

Guidance on interrogation overseas

42. In March 2009 the Government agreed to provide the ISC with its guidance to the intelligence services on the detention and interrogation of suspects overseas. In September, the ISC expressed its disappointment at the delay in providing it with the guidance, despite repeated requests, which meant it could not begin its inquiry. Following the ISC's public criticism, the Government finally provided the ISC with the guidance on 18 November, a delay of 8 months. The ISC states on its website:

We have been told that this delay was due to the complex legal nature of these issues, and the need to consolidate previously separate guidance into one version. The Committee will consider the material, take further evidence and seek independent legal advice, before reporting our findings to the Prime Minister.

43. We asked the Minister and his official, Ms Byrne, a number of questions about exactly what guidance has been provided to the ISC and in particular whether it has been provided with unedited versions of all the guidance that existed at the time of the various allegations of complicity. However, we remained unclear about whether all of the earlier versions have been provided. Ms Byrne said, for example (Q32), that "they have all the sets of material that we were able to give."

44. We therefore wrote to the Minister after our evidence session asking him to confirm that the ISC has been provided with all versions of the guidance that were current at the time of the various allegations of the UK's complicity in torture, and that nothing had been deleted from those versions of the guidance. The Minister's response was that "all *current* versions of relevant guidance were provided to the ISC in May. These were then consolidated into a single version which was provided to the ISC on 18 November 2009".³⁰ If all relevant versions were indeed provided to the ISC in May 2009, why would the ISC complain publicly in September that they had not received the guidance and why was it necessary to provide a consolidated version in November 2009?

³⁰ Letter from David Hanson, 13 January 2010, above n. 10 (emphasis added).

45. **We regret to say that, despite the clear intent of our questions, the Government’s answers leave us no clearer about whether the ISC has been provided with all versions of the guidance which was current at the time of the various allegations of complicity, which date back to 2002. We look to the ISC to provide clarification on this point.**

46. It is, however, clear that the Government does not intend to make public the guidance which was current at the relevant time to which the various allegations relate. The Prime Minister, in his evidence to the Liaison Committee, confirmed that the Government is refusing to publish the earlier guidance.³¹ Asked whether he will make public the guidance which was in place at the time the complicity in torture was alleged to have taken place, he said “I would not want to go back in time and publish previous recommendations. I would want to publish the recommendations that are going to be in force from now on.” He gave no reason for that refusal, other than to refer generally to the fact that there are cases about the allegations of complicity being dealt with at the moment through the courts.

47. **We welcome the Prime Minister’s commitment to publish the new guidelines which will be drawn up by the Intelligence and Security Committee. However, the Prime Minister’s statements on this issue, from his first written statement on 18 March 2009 on, are in the present tense. He draws a clear line between the new guidance, which will come out of the process that he has set in motion, and the old guidance, which the Government has decided not to publish. No convincing justification has been offered for the decision not to publish the previous guidance. As we have pointed out before, in the United States, the Obama administration has put into the public domain significant Justice Department memos, including legal advice, about matters as sensitive as interrogation techniques. In our view, there can be no justification for not publishing the guidelines that were in place at the time the alleged complicity in torture took place. In order to learn lessons for the future, as well as to ensure proper accountability for past wrongs where appropriate, it is essential that the earlier guidance be published. We also repeat our earlier recommendation that the relevant legal advice also be made public. The Government has not convincingly explained what makes the UK different from the United States, where the legal advice has been published.**

The urgent need for an independent inquiry

48. In our report on Complicity in Torture, we concluded that, in view of the large number of unanswered questions, there was now no other way to restore public confidence in the intelligence services than by setting up an independent inquiry into the numerous allegations about the UK’s complicity in torture.³² Since the publication of our report, there has been a number of significant developments which have led to many further calls for a public inquiry into these allegations about complicity in torture, both from within and outside Parliament.

49. On 24 November 2009 Human Rights Watch (“HRW”) published its Report, *Cruel Britannia: British Complicity in the Torture and Ill-Treatment of Terror Suspects in Pakistan*. The HRW Report contains accounts from victims and their families about the cases of five UK citizens of Pakistani origin who were tortured in Pakistan by Pakistani

31 Oral evidence taken before the Liaison Committee on 2 February 2010, HC (2009–10) 346-i, Qs 81–83

32 Report on Complicity in Torture, above n. 24, at para. 99

security agencies between 2004 and 2007. It claims that, while there is no evidence of UK officials directly participating in torture, UK complicity is clear. It argues that the UK government was fully aware of the systematic use of torture in Pakistan, and that UK officials knew that torture was taking place in these five cases. Some of the individuals are said to have met UK officials while detained in Pakistan, in some cases shortly after the individuals had been tortured. UK officials are said to have supplied questions and lines of enquiry to Pakistan intelligence sources in cases where detainees were tortured, and to have put pressure on Pakistani authorities for results, passing questions and offering other co-operation without ensuring that the detainees were treated appropriately. The Report claims that members of Pakistan's intelligence agencies have corroborated the information from the detainees themselves that UK officials were aware of specific cases of mistreatment.

50. On 10 February 2010 the Court of Appeal rejected the Foreign Secretary's attempt to prevent the publication of seven redacted sub-paragraphs in the judgment of the High Court in *Binyam Mohamed's* case.³³ The paragraphs were immediately published. In our view they represent strong evidence to suggest that the Security Service was complicit in the torture of Binyam Mohamed by the US authorities. Sub-paragraph (ix) states:

We regret to have to conclude that the reports provided to the SyS [Security Service] made clear to anyone reading them that BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment.

51. The publication of the previously withheld paragraphs led to a renewed flurry of calls for an independent inquiry into the extent of the UK's complicity in torture. These calls were fortified by the suggestion in the Court of Appeal's judgments that the apparent complicity in *Binyam Mohamed's* case called into question the reliability of the Security Services' denials of allegations that there was a wider problem of the Security Services' complicity in torture. In particular, the Master of the Rolls, Lord Neuberger, said in para. 168 of his judgment:

“168. Fourthly, it is also germane that the Security Services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that ‘they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training’ (paragraph 9 of the first judgment), indeed they ‘denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government’ (paragraph 44(ii) of the fourth judgment). Yet, in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether

³³ *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 (10 February 2010).

any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information.”

52. Paradoxically, the case for a wide-ranging inquiry was forcibly made by the barrister representing the Foreign Office in the Binyam Mohamed case, Jonathan Sumption QC, in his letter to the Court of Appeal asking for the first draft of this paragraph in the draft judgment to be removed. The essence of his objection was that there is a limit to the extent to which the litigation of an individual case can lead to credible findings on systemic issues. Objecting to a part of the paragraph which suggested that there was an obvious reason for distrusting any UK Government assurance based on Security Service advice and information, because of previous ‘form’,³⁴ which Mr. Sumption said constituted an exceptionally damaging criticism of the good faith of the Security Service as a whole, he identified a number of questions which would need answering before the Court was able to make findings as to how systemic the problem was, for which a much wider inquiry would be needed:

To categorise a problem as systemic is rarely a straightforward matter. In this case at the very least it would be necessary to examine the methods and procedures of the Security Service in relation to the interviewing of detainees as well as the giving of information and advice to ministers; the basis on which the statement to the Intelligence and Security Committee was made, and what further information was provided to them, in particular about the treatment of detainees; what (if any) other instances there are of the Services' knowledge of ill-treatment of the detainees interviewed by them, how information of this kind is stored, on what occasions it is retrieved, how widely it is disseminated within the Service and what the Service's response was. The Court has not been in a position to do any of this. It simply does not have the material.

53. To the extent that the analysis in the letter of Jonathan Sumption QC draws attention to the inherent limitations of litigation as a means of inquiring into a wider systemic problem, we agree. It powerfully makes the case for an independent inquiry into these grave matters, which would not be constrained from looking at the wider issues in the way that the court adjudicating on Binyam Mohamed's claims inevitably is. In our view, the case for setting up an independent inquiry into the allegations of complicity in torture is now irresistible.

³⁴ The first draft of the relevant paragraph of Lord Neuberger's draft judgment (para 168) is set out in full at para 18 of the Court of Appeal's judgment in *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (26 February 2010).

4 Secret evidence

Secret evidence and control orders

54. In our recent report on the annual renewal of the control orders regime, we concluded that the use of secret evidence and special advocates in the control order regime, as that regime is currently designed in law and operated in practice, could not be made to operate in a way which is compatible with the requirements of basic fairness inherent in both the common law and Article 6 ECHR.³⁵ We reached that conclusion in light of the decision of the Grand Chamber of the European Court of Human Rights in *A v UK*, that the UK violated the right to have the lawfulness of detention decided by a proper court, and the unanimous decision of the House of Lords in *AF*, that “a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against them”.

The growth in the use of secret evidence

55. As JUSTICE has pointed out in its report, *Secret Evidence*,³⁶ the use of secret evidence in UK courts has grown dramatically in the past ten years. It can now be used in a wide range of cases including deportation hearings, control order proceedings, parole board cases, asset-freezing applications, employment tribunals, and even claims for damages. We note that in Binyam Mohamed’s and others’ claim for compensation the High Court has held that special advocates and secret evidence may be used for the first time in a civil action for damages.³⁷ In July 2009 the Counter-Terrorism Minister, the Rt Hon David Hanson MP, took part in an on-line debate in *The Guardian On-Line* about secret evidence.³⁸ Responding to two commentators who argued that the use of secret evidence in a growing number of contexts is increasingly resulting in unfair trials and undermining the UK’s tradition of open justice, he wrote:

If you believe some commentators, you might think the government had discarded our age-old freedoms and set up a process of secret courts that operated outside our legal traditions and risked our fundamental civil liberties. The reality is far from this assertion.

56. He went on to assert that secret evidence is necessary in order to protect the public from terrorism, but, apart from a reference to the fact that the system “takes account of judgments from the European Court of Human Rights”, he did not address the implications of the Strasbourg and House of Lords judgments for the widespread and growing use of secret evidence. In view of his robust defence of the use of secret evidence, we asked the Minister in oral evidence how those unanimous judgments could be explained if the Government had not put civil liberties at risk.³⁹

35 Report on 2010 Control Orders Renewal, above n. 3, at paras 47-98.

36 *Secret Evidence*, JUSTICE, June 2009

37 *Al Rawi and others v The Security Service and others* [2009] EWHC 2959. Judgment is pending from the Court of Appeal.

38 “The case for secret evidence”, *Guardian Online*, Thursday 16 July 2009.

39 Q72, Ev 10

57. The Minister responded purely in terms of how the Government had responded to those judgments in relation to control orders, that is, by reviewing the cases of the individuals currently subject to control orders and deciding whether or not to disclose further material or to drop the orders. He did not mention the use of secret evidence or special advocates in other contexts, other than to assert that he believed that the Government had considered the implications of the judgment of the European Court of Human Rights in *A v UK* for all other contexts in which special advocates and secret evidence are used.⁴⁰ He agreed to provide a note to confirm this. Because we were not at all confident that the Government had carried out a thoroughgoing review of the implications of the *A v UK* judgment for the widespread use of secret evidence, we wrote following the evidence session, asking for a comprehensive schedule of the different contexts in which secret evidence and special advocates are used, and, in relation to each, an explanation of the changes, if any, the Government has decided are necessary in the light of the Strasbourg and House of Lords judgments.⁴¹

58. The Government replied that it was difficult to provide a comprehensive list of all the contexts in which closed material (as it prefers to call secret evidence) and special advocates are used, because in addition to the contexts in which the use of special advocates is provided for by legislation, the courts have an inherent jurisdiction to request that the relevant law officer consider appointing special advocates if they should become necessary in a particular case where there is no such express provision.⁴² However, the Government provided a list of 21 different contexts in which it was “aware” that special advocates have been or may be used. In subsequent written answers to questions asked by our Chair, the Solicitor General confirmed that special advocates had been used in 14 of the 21 contexts identified in the Government’s response to our inquiry.⁴³ However, in a further written answer she declined to say in how many cases in each of these contexts special advocates were used, on the basis that this information is not recorded centrally and could only be obtained at disproportionate cost.⁴⁴

The implications of recent court judgments

59. Significantly, however, the Government “does not consider that there is automatic read across of the judgment [in *AF*] to all other proceedings involving the use of closed material and special advocates.”⁴⁵ Although it was considering whether changes to the Parole Board’s procedures are needed to comply with the principle that fairness requires a minimum amount of disclosure, in relation to all other contexts the Government takes the view that “it will generally be for the courts to consider the applicability of the principle to such proceedings.”⁴⁶

40 Q85, Ev 12

41 Letter to David Hanson, 17 December 2009, published in Report on 2010 Control Orders Renewal, above n. 3, at p. 48.

42 Letter from David Hanson, 13 January 2010, above n. 10.

43 HC Deb, 22 Feb 2010 cols 245W and 382W

44 HC Deb, 3 Mar 2010, col. 1191W

45 Letter from David Hanson, 13 January 2010, above n. 10.

46 Ibid.

60. We asked the special advocates who recently gave evidence to us in relation to control orders whether in their view the decision in *AF* has implications for the use of secret evidence and the role of special advocates in other types of cases. They clearly thought it did have such implications.⁴⁷ The Government argued that it did not apply to bail hearings before the Special Immigration Appeals Commission, but that argument was rejected by the court.⁴⁸ The Government also argues that the case does not apply to deportation proceedings in SIAC, on the grounds that, as it has previously argued successfully, Article 6 does not apply to such proceedings.⁴⁹ The Government has also, so far, lost the argument that *AF* does not apply to so-called “light touch control orders”.⁵⁰ Whether the principle in *AF* applies in the context of employment tribunal proceedings is currently being litigated.

61. In *AF*, the Government sought to argue that it is not unfair to keep secret even the gist of the allegations against someone. It is now clear that the Government has lost that argument. The question is, how wide is the basis of the Court’s decision. In our view, the terms in which the Government’s argument was rejected are not specific to the control order regime, but may well be relevant to other contexts in which special advocates are used. Many of these uses of secret evidence are controversial. When the special advocates gave evidence to us in 2007 they expressed their concern about the extension of special advocates into other areas for which they are manifestly unsuitable.⁵¹ In their view, special advocates provided a safeguard where they were adding some protection against otherwise purely arbitrary decision-making, but they should not be used to reduce standards of fairness where the common law, or statute, or human rights law, or Article 6 say that it is a minimum requirement that you must know the case against you.

62. The Government’s response to the *A* and *AF* judgments suggest that it considers itself free to press on with the use of secret evidence and special advocates in the other contexts in which they are used, without pausing to take stock of the wider implications of these significant rulings. Although the Government says that it is considering whether changes to the Parole Board’s procedures are needed, we have not seen any evidence to suggest that the Government has in fact considered the implications of the judgment of the European Court of Human Rights in *A v UK* for all the other contexts in which special advocates and secret evidence are used. We recommend that the Government urgently conduct a comprehensive review of the use of secret evidence and special advocates, in all contexts in which they are used, in light of the judgments of the European Court of Human Rights and the House of Lords, to ascertain how often they are used and whether their use is compatible with the minimum requirements of the right to a fair hearing as interpreted in those judgments, and to report to Parliament on the outcome of that review.

47 Report on 2010 Control Orders Renewal, above n. 3, Ev 13-14, Qs 68-71.

48 *R (Cart) v Upper Tribunal; U v SIAC* [2010] 2 All ER 908

49 *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2009] 2 WLR 512.

50 *R (on the application of Secretary of State for the Home Department) v BC and BB* [2009] EWHC 2927 Admin. See Report on 2010 Control Orders Renewal, above n. 3 at para 25.

51 Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL 157/HC 394, Ev 11-12, Qs 39-40.

Keeping law accessible

63. The special advocates also drew to our attention another difficulty which has arisen as a result of the growing use of secret evidence: the extent to which law reporting is being impeded by closed hearings, closed arguments and closed judgments.⁵² Our Chair, in a written question, asked the Minister whether the restrictions on the law reporting of control order judgements enable counsel and courts to follow precedent effectively. The Minister replied that “where sensitive intelligence material is used in control order proceedings, a closed judgment will normally be handed down by the court. These judgments cannot be made publicly available for public interest reasons. An accompanying open judgment will usually contain the court’s findings on legal arguments of principle and is publicly available.⁵³ There are working practices which allow for judges and the special advocates appointed to act in the interests of the controlled person to access closed judgments in other cases where appropriate.”

64. We are not satisfied that the Minister’s answer meets the special advocates’ concerns about the difficulty of distilling the relevant principles from closed judgments, or about the necessary accessibility of the law. We recommend that the Government include arrangements for law reporting in the review of the use of secret evidence that we have recommended above.

⁵² Report on 2010 Control Orders Renewal, above n. 3, Ev 14-15 Qs 71-88.

⁵³ HC Deb 10 Feb 2010 col. 1053 W and 1054W

5 Pre-charge detention

Is the power to detain for up to 28 days still necessary?

65. In our last report on the annual renewal of the power to detain terrorism suspects pre-charge for up to 28 days, we pointed out that the information required for Parliament to be able to evaluate the need for the power was not available, because there had still been no proper review of the cases where the extended power had been used.⁵⁴ We were particularly disappointed that there had been no review of why, in Operation Overt (the Heathrow liquid bomb plot case), three people had been detained for almost 28 days before being released without charge.

66. During the 2008 renewal debate, the then Minister (Tony McNulty MP) expressly accepted the need for detailed information to be available about how the power to detain beyond 14 days has been used in practice when debating future renewals. He said “as and when greater collective awareness of the ins and outs of those detained beyond 14 days is possible, that will happen ... it will be right and proper to dissect that information retrospectively.”⁵⁵ **This commitment to review the cases of those detained for more than 14 days in relation to the Heathrow bomb plot case has not been fulfilled.**

67. Lord Carlile’s review of the “Operation Pathway” case,⁵⁶ the police operation which led to the arrest of 12 students from Pakistan on suspicion of terrorism in April 2009, is precisely the kind of detailed review for which we have consistently called in relation to previous exercises of the power to extend pre-charge detention, in particular those suspects arrested following the Heathrow plot who were released without charge after almost 28 days in pre-charge detention. However, the Government has still not undertaken that exercise, despite previously accepting in principle the desirability of doing so. In fact, it now appears that the Government has no intention of doing so: in its most recent correspondence on this subject, it said “we have never promised to specifically review the pre-charge detention of the individuals who were arrested in relation to ‘Operation Overt’ (the Heathrow Airline Plot).”⁵⁷

68. When the Prime Minister was recently asked about this at the Liaison Committee, he rightly pointed out that when the Government was proposing to extend the period of pre-charge detention beyond 28 days, part of the proposal was that an independent report would be done in every individual case in which the power was used.⁵⁸ That is precisely what we have been asking for in relation to every individual who has been held for more than 14 days before charge. It is not an onerous task. The power has not been used for two years and eight months. The number of individuals in respect of whom it has ever been used is small. **We recommend that a thorough independent review be conducted of the**

54 Eighteenth Report of Session 2008-09, *Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days 2009*, HL 119/HC 726 (hereafter “Report on 2009 Renewal of 28 days”), at paras 16-24.

55 HC Deb 23 June 2008 col 95

56 *Operation Pathway: Report following review by Lord Carlile of Berriew QC* (October 2009) (“Carlile Report on Operation Pathway”).

57 Letter from David Hanson, 13 January 2010, above n. 10.

58 Oral evidence taken before the Liaison Committee on 2 February 2010, HC (2009–10) 346-i, Q77.

pre-charge detention of all those individuals who were arrested in relation to the Heathrow airline plot and detained without charge for more than 14 days, in order to ensure that Parliament is properly informed about the operation of this power in practice when it debates whether it should be renewed in June this year.

Adequacy of procedural safeguards on extension of pre-charge detention

69. In our last report on the renewal of the 28 day pre-charge detention power we also repeated our longstanding concerns that the current arrangements for judicial authorisation of extended pre-charge detention are not compatible with the right to a judicial determination of the lawfulness of detention and will lead in practice to breaches of the right to liberty in Article 5 ECHR in individual cases.⁵⁹ We pointed out that the decisions of the European Court of Human Rights in *A v UK* and of the House of Lords in *AF* increased the risk of such breaches of Article 5. The risk is that the current statutory provisions governing extensions of pre-charge detention may lead to a suspect's pre-charge detention being extended on the basis of allegations the essence of which the suspect does not have the opportunity to contest.

70. On 23 November 2009 the Government published Lord Carlile's Report on "Operation Pathway".⁶⁰ The individuals concerned in that case were arrested on 8 April 2009, their period of pre-charge detention was subsequently judicially extended, and they were transferred, without charge, to immigration detention on 22 April, just before the expiry of the 14 day period. Lord Carlile's report, which is the first review of the operation in practice of the extended periods of pre-charge detention in terrorism cases, is of considerable interest to us in view of our previous work on the issue of pre-charge detention. In particular, its detailed review of the way in which the procedures for extending their pre-charge detention operated in practice confirms many of our concerns about the adequacy of the safeguards in that process and the risk of breaches of Article 5 ECHR unless the procedures are reformed to ensure that suspects are told clearly the offences they are suspected of having committed and the reasons for the suspicions leading to their arrest.

71. Lord Carlile's report reveals an interesting difference of view between the police and the CPS as to whether there were grounds to apply for an extension of pre-charge detention beyond 14 days to allow inquiries to continue.⁶¹ The CPS's view was unequivocally that there were no grounds to apply for a further extension of their pre-charge detention, as there was insufficient evidence in relation to each of the suspects. In Lord Carlile's words

The police were surprised to receive this advice, as their understanding and experience was that it was enough for them to show that more time was needed to convert intelligence to evidence and that the inquiry was being progressed diligently and expeditiously. The CPS responded that the detentions in their view might be held unlawful if continued.

59 Report on 2009 Renewal of 28 days, above n. 54, at paras 26-31.

60 Carlile Report on Operation Pathway (above, n. 56).

61 *Ibid.*, para. 86

72. Lord Carlile records the fact that the police remain of the view that all the suspects should have been kept in custody longer to allow for continuing questioning and inquiries into the case. Lord Carlile, however, finds it very difficult to understand what it was believed that further questioning would have achieved, given the number of questions already asked of the suspects in interview.⁶² He expresses surprise that the police did not anticipate that they would be required to clarify the evidential basis for the arrests before a judge during the period of detention “given the long history of arrest law ... and the provisions of the ECHR.”

73. We are less surprised. The police’s expectation that the extension judge would only consider whether more time is needed and whether the investigation is being conducted diligently and expeditiously by the police was not at all surprising given the statutory framework and the way in which such extension hearings had always operated in the past. As we said in our last report on the 28 day renewal, we were “concerned about the adequacy of the judicial oversight at extension hearings, because the judge is only empowered to consider the future course of the investigation and whether it is being conducted diligently and expeditiously by the police, rather than whether there is sufficient evidence to justify the suspect’s original arrest and continued detention.”⁶³ It is therefore no surprise to us, in view of the language of the statute, that the police in Operation Pathway expected their application for an extension of detention to be granted if they could show that they were conducting their investigation diligently and expeditiously. They would have had to have quite a sophisticated understanding of human rights law to appreciate that the extension judge might read into the statutory framework words which are not there, in order to make it compatible with the right to liberty in Article 5 ECHR.

74. What had changed since the date of our report, it appears, is that the extension judges in the Operation Pathway cases had adopted a new interpretation of the relevant provisions of the Terrorism Act 2000 in order to make them compatible with Article 5 ECHR, by reading in an “evidential test” that is not present on the face of the statute: they made it clear that continued detention would be likely to become unlawful if the suspects were not told clearly the offences they were suspected of committing and the reasons for the suspicions leading to their arrests.⁶⁴ There is, however, no publicly available report of the judge’s reasons.

75. Lord Carlile makes two recommendations on the back of these findings:

(1) that the police and the CPS should take immediate steps to ensure that their procedures reflect the need for legal advice to the police at an early stage – expert CPS lawyers should be informed, well before arrests take place, of ongoing inquiries likely to result in arrests, and asked to advise on the state of the intelligence, information and evidence as the inquiry progresses: and

(2) all police officers involved in counter-terrorism policing should be trained in the law of arrest and its potential effect on detentions under the Terrorism Act.

62 Ibid., para. 88

63 Report on 2009 Renewal of 28 days, above n. 54, at para. 27.

64 Carlile Report on Operation Pathway, above n. 56 at para. 85.

76. The Government's written response to Lord Carlile's report⁶⁵ is terse and disappointing. It contains no commitment to do anything in response even to his modest recommendations. In response to the recommendation about improved procedures between the police and the CPS, the Home Secretary simply says that "action has already been taken to streamline and clarify police procedures where appropriate in line with your suggestions." The Minister in his evidence to us elaborated on this, explaining that the police and the CPS have agreed a procedure whereby all counter-terrorism units brief CPS officials in advance of arrests, unless there are exceptional circumstances such as the need for urgent action.⁶⁶ He said that the CPS is already involved pre-arrest in many terrorism cases and they are consulted by the police. **We recommend that any Memoranda of Understanding or specific protocols designed to ensure that the police inform and consult appropriate CPS lawyers well before arrests take place are made publicly available for scrutiny.**

77. The Home Secretary's response to Lord Carlile's Report does not respond at all to his specific recommendation about police training. The Minister did say in evidence to us, albeit in very general terms, that the Government was "very happy to look at" further guidance and possibly training to police officers to ensure that they have the necessary knowledge and understanding of the relevant part of the Terrorism Act 2000.⁶⁷ However, his subsequent letter appeared to contradict this: he said "the police are fully trained on the lawfulness of arrests. Suspects are told as much as possible about the reasons for their arrest and the allegations against them within the confines of an ongoing terrorist investigation and that this is in accordance with Article 5(2)."⁶⁸ It therefore seems that the Government does not intend to make any changes to police training notwithstanding Lord Carlile's findings in his report and his specific recommendation. **We recommend that training be provided to police officers as recommended by Lord Carlile and that such training should expressly cover the effect of Article 5 ECHR on detentions under the Terrorism Act 2000.**

78. We also asked the Minister whether the Government would now consider amending the legislative framework and the relevant PACE Code of Practice to reflect the additional words that had effectively been read into the relevant provision by the extension judge in order to make the provision compatible with Article 5. He replied that the Government does not consider it necessary to amend Schedule 8 of the Terrorism Act 2000.⁶⁹ The reasons given, however, do not address our concern that, unless the relevant statutory provision and Code of Practice are amended to reflect the Convention-compatible interpretation of the provision, police officers in future cases will labour under the same misapprehension as those in Operation Pathway who assumed that their application for extension would be granted by the extension judge. This could result in suspects being detained before charge for longer than is justified by the evidence against them. The law in this area is complex and there is no law report of the reasons given by the extension judge

65 Letter dated 23 November 2009 from the Home Secretary to Lord Carlile, deposited in the House of Commons Library.

66 Q89, Ev 12

67 Schedule 8

68 Letter from David Hanson, 13 January 2010, above n. 10.

69 Ibid.

in the Operation Pathway case. In these circumstances there is an urgent need for the law itself, and the guidance upon it, to be clarified.

79. In view of our previous, consistently held concerns about the adequacy of the procedural safeguards surrounding the extension of pre-charge detention, which are confirmed by Lord Carlile's report, we recommend that:

(1) Schedule 8 of the Terrorism Act 2000 is amended to make clear that the extension judge must apply an evidential test when deciding whether or not to extend pre-charge detention; and

(2) Code H of the PACE Codes of Practice be amended to explain to police why Article 5 ECHR is relevant to extensions of pre-charge detention and what its requirements are, and to make clear that continued detention of terrorism suspects is likely to become unlawful if the suspects are not told clearly the offences they are suspected of committing and the reasons for the suspicions leading to their arrests.

80. We also recommend that, in the absence of any accessible report of the extension judge's reinterpretation of Schedule 8 of the Terrorism Act 2000, the Crown Prosecution Service adopt clear guidance about when extension should be sought, reflecting that interpretation.

Draft Bill on 42 days

81. When the Government was defeated in the House of Lords on its proposal to extend pre-charge detention to 42 days, the then Home Secretary published a draft Bill, the Counter Terrorism (Temporary Provisions) Bill, which she said the Government would introduce if and when the need arose.

82. The Bill would make temporary provision, lasting for 60 days, enabling the DPP to apply to the courts to detain a terrorism suspect for up to a maximum of 42 days. It contains a sunset clause after 60 days and for review and report by Lord Carlile or his successor, but it contains no additional judicial or parliamentary safeguards. Compared to even the 42 day proposal that was defeated, it is an alarmingly broad power with very little in the way of independent safeguards.

83. We asked the Minister whether this draft Bill still featured in the Government's plans in any way. We are not entirely reassured by his answer. He did not envisage that the maximum period of pre-charge detention would be revisited before the general election "unless there is a major spike in some public emergency issue between now and then."⁷⁰ That is precisely our concern. As the Government itself argued during the debate on the 42 days proposal, in the wake of a terrorist attack Parliament does not always scrutinise emergency measures as thoroughly as it might. **We recommend that the Government withdraw its draft Bill which, if it were enacted, is likely to give rise to breaches of the right to liberty in Article 5 ECHR in the absence of a derogation.**

Alternatives to extended pre-charge detention

Bail for Terrorism Act offences

84. Lord Carlile in his Operation Pathway report recommended that consideration should be given to amending the Terrorism Act 2000 to allow the granting of bail by a judge for a period of up to the 28th day following arrest, subject to the full range of conditions available in relation to crime generally and in relation to control orders, to allow further inquiries to continue.⁷¹ He pointed out that the unavailability of bail where a person has been arrested under the Terrorism Act 2000 is to be contrasted with the situation in Northern Ireland, where bail has always been available from a High Court judge even when the arrest was in respect of terrorism, and under immigration law, where the Special Immigration Appeal Commission has the power to grant bail.

85. The Home Secretary rejected this recommendation on precisely the same basis as the Government opposed our recommendation and proposed amendment to the Counter-Terrorism Bill in the last session: bail should not be available for terrorist suspects “because of the risks to public safety” and the denial of bail to this class of suspect does not breach Article 5(3) ECHR.

86. We put to the Minister Lord Carlile’s question of why bail should have been available in relation to terrorism offences in Northern Ireland, even during the Troubles, but is not available in relation to terrorism offences in the rest of the UK. His response was that the Government accepted the operational advice of ACPO that bail should not be available in relation to terrorism offences because of the risk to public safety that might be involved.⁷²

87. The Minister also said in evidence that the advice of the Crown Prosecution Service is also that bail should not be available in relation to terrorism offences.⁷³ That is the first time we have heard that suggestion and we find it surprising in view of the clear risk of breach of Article 5(3) ECHR.⁷⁴ We have been unable to find any public statement of the CPS’s view on the question.

88. We remain of the view expressed in our earlier reports that bail ought in principle to be available in relation to terrorism offences. Whether it is granted in any particular case, of course, will be a matter for a court to determine. The range of terrorism offences is now so broad that many people arrested under the Terrorism Act are arrested on suspicion of some involvement at the periphery of terrorist-related activity.

89. Views are clearly divided on whether bail ought to be available, including within the police service. While ACPO is opposed to bail being available, the police officers we spoke to at Paddington Green police station in 2006, who deal with terrorism suspects routinely, were in favour. We recommend that the Government hold a full consultation on whether bail should in principle be available in relation to terrorism offences.

71 Carlile Report on Operation Pathway, above n. 56, at paras 93-94.

72 Qs 95-96, Ev 13

73 Q98, Ev 14

74 Article 5(3) ECHR contains the right to release pending trial.

Intercept as evidence

90. We welcomed the Government's announcement in June 2007 that the prohibition on the use of intercept as evidence would be reviewed by a small cross-party group of Privy Counsellors. We had long been calling for the relaxation of the prohibition in order to facilitate more use of criminal prosecutions in terrorism cases and noted the growing frustration at the lack of progress on this issue in the face of steadily mounting evidence that it required urgent reconsideration. We have also said that if intercept were admissible as evidence it would reduce the pressure for an extension of pre-charge detention.

91. The Privy Counsellors, chaired by Sir John Chilcot, reported in January 2008, concluding that the ban on intercept as evidence should be substantially relaxed, although certain procedural safeguards would need to be legislated for so as to minimise the risks to national security and to the operational effectiveness of intercept as intelligence.

92. On 6 February 2008 the Prime Minister affirmed his commitment to the principle of using intercept as evidence and the case for doing so, provided it could be done consistently with national security (and subject to nine specified operational requirements). He agreed that the programme of work recommended by the Chilcot report be taken forward, with the objective of legislation.

93. In our reports on the Counter-Terrorism Bill in 2008, we were extremely disappointed that the Bill did not contain measures to give effect to the Chilcot review.⁷⁵ We asked the Government to disclose details of the "Public Interest Immunity Plus (PII+)" model that was being developed by the Government as the possible vehicle for implementation but the Government refused to do so.⁷⁶

94. On 9 February 2009 the Advisory Group of Privy Counsellors issued an interim report on progress as it stood at the end of the first of the three phases of work: designing a model for the use of intercept as evidence. It reported that the work was proving both complex and demanding. It supported the implementation project's move into its second phase of "building" the model, before the third phase of testing it, but sounded "a clear note of caution": there remained key issues to resolve, in particular in terms of reconciling legal and operational requirements in complex counter-terrorism and serious organised crime cases.

95. The Report concluded that "because of the intrinsic tension between operational and legal issues", securing the intended increase in successful prosecutions while ensuring fairness of trial remains difficult and may not prove possible in the most complex cases. The Progress Report clearly warned that future progress may not be possible.

96. In May 2009, the Government, in its *Reply to the Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, highlighted the fact that a review of nine control order cases had been conducted by independent senior criminal counsel and that he had concluded that the ability to use intercepted material in

75 See e.g. Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL 50/HC 199 at para. 87.

76 *The Government Reply to the Ninth Report of the Joint Committee on Human Rights Session 2007-08*, Cm 7344 (March 2008) at p. 9 (the Government said that a description of the model had been included in the report of the Chilcot review).

evidence would not have enabled a criminal prosecution to be brought in any of the cases studied.

97. Subsequently, in December 2009, the earlier warnings were made out when the Home Office published a paper entitled *Intercept as Evidence*, concluding that the reports they had received were such that “no responsible government” could proceed with implementing the introduction of intercept evidence on the basis of the proposed model. The Home Secretary, Alan Johnson, said: “The issues involved are complex and difficult, and addressing them commensurately challenging. But the importance of our interception capabilities to national security and public protection means that there can be no short cuts.” The Government has not, however, entirely dismissed the idea of using intercept evidence and its advisory group has been asked to explore other avenues to allow intercept to be admitted as evidence.

98. One issue raised in the *Intercept as Evidence* paper was the impact of the recent case of *Natunen v Finland* (application no. 21022/04). In that case, the European Court of Human Rights determined (unanimously) that there had been a violation of Article 6 (right to a fair hearing) of the European Convention on Human Rights, on account of recorded telephone conversations obtained through secret surveillance not having been disclosed at the applicant’s trial for drug trafficking. The case makes clear that full retention, or judicial control over what may be discarded, is likely to be essential in order to ensure the equality of arms required by the guarantee of the right to a fair trial.

99. Finally, the Government’s Independent Reviewer of Counter-Terrorism Legislation, Lord Carlile QC, who had previously supported the use of intercept as evidence, indicated in a report issued in November 2009 that despite his willingness for it to be introduced in appropriate circumstances, he had “yet to see material to justify the conclusion that the permitting of such evidence in terrorism cases would do more good than harm” and that he believed that “this debate should now be drawn to a conclusion, against the introduction of intercept evidence in terrorism cases, with an undertaking to keep the matter under review in the light of any changing circumstances.”

100. On 4 February 2010 we received an informal briefing from the “Intercept as evidence implementation team”. We are grateful to them for keeping us informed and for their informative presentation. We do not underestimate the practical difficulties which are presented by relaxing the prohibition on the use of intercept as evidence. We also recognise the considerable amount of work which has gone into trying to develop a viable legal model for doing so. However, **it has become increasingly clear to us that the roadblock to progress is certain of the operational requirements which were stipulated by the Chilcot Review. In particular, the insistence on ongoing agency discretion over the retention, examination and transcription of intercept material (the fourth and fifth operational requirements) makes a legally viable regime impossible given the clear requirements of Article 6 ECHR.**

101. **We welcome the fact that the advisory group is continuing to explore ways of allowing intercept to be admitted as evidence, but unless these two operational requirements are revisited the next stage of the review is, in our view, already doomed to failure. We do not think the Government can be surprised by the decision of the European Court of Human Rights in *Natunen v Finland*: it has long been clear that**

Article 6 ECHR requires a full retention regime or judicial control over what may be discarded. We understand the agencies' anxieties about ceding their discretion in favour of judicial control, but, as we have seen in other contexts, this is an inevitable consequence of the agencies engaging with legal processes. In our view, the rule of law requires no less.

102. We do not see any difficulty in principle with independent judicial control over what material may be discarded. We therefore recommend that the fourth and fifth operational requirements of the Advisory Group of Privy Counsellors (requiring ongoing agency discretion over the retention, examination and transcription of intercept material) be revisited in the next stage of its work. Otherwise, we are concerned that the intelligence and security services continue to exercise a de facto veto over this beneficial reform by stipulating pre-conditions which are impossible to meet.

Impact on communities

103. During debates about extended pre-charge detention in 2008 the Government undertook to conduct a risk-assessment on the effect of the 28-day extension on communities. Asked when this community-impact review would be complete, Lord West told the House of Lords that “we hope to have the initial findings out by the end of the year”.⁷⁷

104. Since no impact assessment had been made available to Parliament by the end of 2008, we asked the Government whether it would be publishing its assessment of the impact of the 28 day extension on communities. The Government acknowledged its commitment to undertake a review of the impact of all counter-terrorism legislation on our communities, but said that its assessment had been delayed due to extensive scoping work. It envisaged publishing a research report by late November 2009.

105. When we asked the Minister on 1 December 2009 when the report would appear, he told us that “the commitments that were given ... to produce a report by the end of November, whilst not being met in practice, will be met in spirit very shortly.” On 5 March 2010 the Government finally published its “Rapid Evidence Assessment of Public Perceptions of Counter-Terrorism Legislation.”

106. We are disappointed that this important information was not made available before the parliamentary debates on the renewal of the control orders regime. As we observed in our report on that subject, the impact of control orders on the communities of those affected is one of the most controversial aspects of those measures, with many people believing that the impact is so severe and disproportionate that the use of control orders is counterproductive.

77 HL Deb 1 July 2008 col. 203

6 Democratic Accountability for Counter-Terrorism Policy

Introduction

107. One of the lessons to be learnt since 2001 is the serious democratic deficit in the making of counter-terrorism policy. We now know a great deal more about the degree of the UK's involvement in US policies concerning extraordinary rendition, the use of torture itself and the use of intelligence obtained by torture. Much of what we now know has only seen the light of day because of litigation or the release of previously classified documents by foreign governments. We think it is legitimate to look back and ask what our own democratic accountability mechanisms were doing to find out exactly what was going on at the time of these events. Which bodies were investigating? How hard were they looking? Who was asking the right questions? How did the different accountability mechanisms perform? Could any of them have been more effective and if so how? The conclusion this leads to is that the mechanisms of democratic accountability for counter-terrorism policy have largely been found wanting.

The Intelligence and Security Committee

108. In their joint article in *The Sunday Telegraph* in August 2009, responding to our report on *Complicity in Torture*, the Home Secretary and Foreign Secretary argued that the Intelligence and Security Committee provides an effective mechanism for parliamentary accountability of the intelligence and security services.⁷⁸

109. However, the effectiveness of the ISC has now been seriously called into question by the Court of Appeal's finding that the ISC's conclusions in 2005 that the Security Services "operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" was at odds with the evidence which the Court of Appeal has now seen.⁷⁹

110. We have consistently expressed our concern about the adequacy of the parliamentary mechanisms for oversight of the intelligence and security services, most recently in the context of current allegations about the UK's complicity in torture.⁸⁰ In our report on the Constitutional Reform and Governance Bill we recommended that the Intelligence Services Act 1994 be amended to change the formal system of nomination to the ISC and the method of appointment of its Chair, in accordance with the reforms recommended by the House of Commons Reform Committee to the system of election of members and Chairs of House of Commons select committees.⁸¹

78 "We firmly oppose torture", Rt Hon David Miliband MP and Rt Hon Alan Johnson MP, *The Sunday Telegraph*, 9 August 2009.

79 See *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 (10 February 2010), above n. 33, at para. 168 of Lord Neuberger's judgment.

80 Report on *Complicity in Torture*, above n. 24, at paras 57-66.

81 Fourth Report of Session 2009-10, *Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill*, HL 33/HC 249 at para. 1.92.

111. One of the concerns we have previously expressed is the lack of an independent secretariat and independent legal advice. The secretariat for the ISC is provided by the Cabinet Office and we understand that the Committee's legal advice has originated from the same source as the Government's. This raises the possibility, for example, that the Committee receives advice about the meaning of "complicity" from the very same source as the Government itself. We welcome the fact that the ISC has announced that it will be taking independent legal advice on the proposed guidance for departments about interrogation overseas and we look forward to these arrangements being made transparent.

112. We repeat our earlier recommendations about reform of the ISC to make it a proper parliamentary committee, with an independent secretariat, independent legal advice and access to an independent investigator.

The Joint Committee on National Security Strategy

113. The Government says that human rights are at the heart of its national security strategy.⁸² In the Home Office's recent Memorandum to the Home Affairs Committee concerning post-legislative scrutiny of the control orders legislation, for example, it said "the protection of human rights is a key principle underpinning all the Government's counter-terrorism work."⁸³

114. Yet, when we requested a role in scrutinising the Government's National Security Strategy, on the basis of our expertise in counter-terrorism policy and human rights and the importance of human rights being central to the strategy, it was denied us. Nor is our Chairman included amongst the membership of the new Joint Committee on National Security Strategy.

115. Placing human rights at the heart of the Government's National Security Strategy is easy to say, but it has to find institutional expression if it is to be meaningful. We recommend that human rights expertise be made available to the new Joint Committee on National Security Strategy, both in its membership and at staff level.

The Independent Reviewer of Terrorism legislation

116. We have previously recommended that the post of statutory reviewer of terrorism legislation should be reformed so as to be Parliament's reviewer rather than the Government's: appointed by Parliament and reporting directly to Parliament.⁸⁴ During this year's renewal of the control order regime we heard evidence⁸⁵ which confirmed points made by others on previous occasions⁸⁶, that a reviewer with a supporting secretariat in the

82 *The National Security Strategy of the United Kingdom: Security in an interdependent world*, Cm 7291 (March 2008), at para. 2.1: "Our approach to national security is clearly grounded in a set of core values. They include human rights, the rule of law, legitimate and accountable government, justice, freedom, tolerance, and opportunity for all."

83 *Memorandum to the Home Affairs Committee: Post-Legislative Assessment of the Prevention of Terrorism Act 2005*, Cm 7797 (1 February 2010), at para. 58.

84 Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL 157/HC 394 at para. 63; Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*, HL 108/HC 5549 at paras 13-20.

85 See the evidence of Gareth Peirce as to why she did not complain to Lord Carlile, Report on 2010 Control Orders Renewal, above n. 3, Ev 3-4, Qs 8-13.

86 See e.g., HL Deb, 13 October 2008, col 586.

Home Office and who has been in post for many years may suffer from a perceived lack of independence from the Government. This is a structural criticism of the post, not its holder, whose reports we have often found useful, as in chapter 5 of this Report.

117. We repeat our earlier recommendations that the post of statutory reviewer should be appointed by Parliament and report directly to Parliament. We also recommend that the post should be limited to a single term of five years.

7 Conclusion

118. In May 2009, the Secretary of State for Justice was reported in the press as having indicated, in a public lecture at Clifford Chance, that UK counter-terrorism laws built up in the wake of the 9/11 attacks on New York and the 7/7 attacks on London should be reviewed and may need to be scaled back.⁸⁷ He is reported to have said

There is a case for going through all counterterrorism legislation and working out whether we need it. It was there for a temporary period.

119. When the Prime Minister was asked at the Liaison Committee whether he agreed with his Secretary of State's reported comments that the time had come for a fundamental review of counter-terrorism legislation, he said that "there is always a case for consolidation". Disappointingly, however, he interpreted the question as asking whether there was any longer any need for counter-terrorism legislation.⁸⁸

120. In our view, **the question is not whether counter-terrorism legislation is needed at all, but whether the counter-terrorism legislation that we have got is justified and proportionate in the light of the most up to date information about the nature and scale of the threat we face from terrorism. What is needed is not consolidation, but a thoroughgoing, evidence-based review of the necessity for, and proportionality of, all the counter-terrorism legislation passed since 11 September 2001. That review should be carried out in the light of evidence of how it has worked in practice and the reasons why it is said to remain necessary and proportionate in the circumstances in which we find ourselves today.**

121. Such a review could take a number of forms. We are not advocating an internal Home Office review of counter-terrorism legislation of the kind conducted by the Government in 2004. Nor do we think that a review of the scale we envisage should be conducted by a single individual such as the statutory reviewer of terrorism legislation. One possibility would be to appoint a national version of the ICJ's Eminent Jurists' Panel, comprising experienced and distinguished lawyers. In our view, however, it is important that the body which conducts the review has a degree of democratic legitimacy and we therefore prefer the review to be carried out by a body of parliamentarians. The Canadian Senate Review Committee on the Anti-Terrorism Legislation provides an interesting precedent.⁸⁹ It conducted evidence hearings, heard from a variety of witnesses and produced a well-regarded and substantial report reviewing the necessity for Canada's anti-terrorism legislation. Alternatively, the Committee of Privy Counsellors ("the Newton Committee"), which produced the widely praised report on the Anti-Terrorism Crime and Security Act 2001,⁹⁰ could be reconvened for the purpose, or a similar Committee of Privy Counsellors be created for the purpose, or an ad hoc joint committee if both Houses saw fit.

87 "Terror laws built up after 9/11 and 7/7 may be scaled back, says Jack Straw", *The Guardian*, 13 May 2009.

88 Oral evidence taken before the Liaison Committee on 2 February 2010, HC (2009–10) 346-i, Q72

89 *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act* (February 2007). The Special Committee of the Canadian Senate was appointed to undertake a comprehensive review of the provisions and operation of the Anti-Terrorism Act.

90 Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, HC 100 (December 2003).

122. Whatever precise form the review body might take, in our view, the case is made out for a fundamental parliamentary review of the necessity and proportionality of all counter-terrorism laws passed since 2001. We recommend that this be treated as an urgent priority by the next Parliament.

Conclusions and recommendations

Is there a “public emergency threatening the life of the nation”?

1. We accept of course that JTAC’s setting of the threat level, in the light of the latest intelligence, and the Government’s decision on whether there is a public emergency threatening the life of the nation, are separate decisions. We do not accept, however, that the Government’s decision on the public emergency question can be entirely independent of JTAC’s assessment of the threat level. The Government’s approach, as set out in the Minister’s letter following our evidence session, seems to envisage that the Government could consider there to be a public emergency threatening the life of the nation even if the threat level as assessed by JTAC was at ‘moderate’ or ‘low’. We are concerned that the Government’s approach means that in effect there is a permanent state of emergency, and that this inevitably has a deleterious effect on public debate about the justification for counter-terrorism measures. (Paragraph 15)
2. As we have always made clear in our previous reports, we accept that the UK faces a serious threat from terrorism. However, we question whether we still face a “public emergency threatening the life of the nation”, more than eight years after the Government first declared that there was such an emergency. In our view, it devalues the idea of a “public emergency” to declare it in 2001 and then to continue to assert it more than eight years later, presumably based on legal advice which seeks to preserve the perceived advantage of both the House of Lords and the European Court of Human Rights having deferred to the asserted existence of this particular public emergency. In any event, we question the value, in legal terms, of the Government’s continued assertion of the existence of a public emergency. If it were to seek to derogate from any Convention rights, it would be necessary to demonstrate that a “public emergency threatening the life of the nation” exists at the time of any new derogation, rather than rely on the public emergency which was asserted to exist in 2001. (Paragraph 17)

Availability of information about the scale of the threat

3. We have previously declined offers of a confidential briefing from the Director General of the Security Service about the threat level. The purpose of the Director General appearing before us to give evidence would be to enable us to question him publicly, in order to enhance the democratic accountability of the intelligence and security services, make parliamentary assessments of the necessity and proportionality of counter-terrorism measures more transparent, and so increase public confidence. These things cannot be achieved by off the record, secret briefings. (Paragraph 23)
4. We do not accept the Government’s argument that there is a neat division of responsibilities between different parliamentary committees, and that the ISC is the only appropriate committee before which the Director-General of the Security Service should appear. Ministers and officers such as the Director General should expect to be scrutinised by more than one committee. As Parliament’s human rights

committee, we have a legitimate interest in understanding the precise nature and scope of the threat posed by international terrorism. We consider it to be unacceptable in a democracy that the Director General of the Security Services should give public lectures about the state of the Security Service's understanding of Al Qaida's capabilities, and how that understanding has changed since 2001, but refuse to give evidence in public on the same issue to a parliamentary committee. (Paragraph 24)

A statutory framework for derogation

5. We recommend that a clear statutory framework for future derogations from the ECHR, ensuring proper opportunities for parliamentary scrutiny, be treated as an urgent priority in the next Parliament. In our view this would be an important addition to the recent package of reforms strengthening Parliament's ability to hold the executive to account in an area of policy where proper democratic scrutiny for justification is vital but all too often lacking. (Paragraph 27)

The meaning of complicity

6. We sought the Government's view as to whether a range of different situations would amount to complicity in torture, as defined in international law, if the relevant facts were proved. The Government refused to answer those questions in its response to our Report and the Minister's evasive replies maintained that refusal. These important questions therefore remain unanswered by the Government. (Paragraph 35)
7. It seems to us that the Minister (in his evidence to us), the Director General of MI5, and both the Home and Foreign Secretaries, in their recent public statements, come very close to saying that, at least in the wake of 9/11, the lesser of two evils was the receipt and use of intelligence which was known, or should have been known, to carry a risk that it might have been obtained under torture, in order to protect the UK public from possible terrorist attack. This is no defence to the charge of complicity in torture. (Paragraph 38)
8. We cannot find any legal basis for the Government's narrow formulation of the meaning of complicity in its Response to our Report on Complicity in Torture. The Government's formulation of its position changes the relevant question from "does or should the official receiving the information know that it has or is likely to have been obtained by torture?" to "does the official receiving the information know or believe that receipt of the information would encourage the intelligence services of other states to commit torture?" As we made clear in our earlier report, 'complicity', in the sense used in the relevant international standards, does not require active encouragement. The systematic receipt of information obtained by torture is a form of acquiescence, or tacit consent, and the relevant state of mind is whether the official receiving the information knew or should have known that it was or was likely to have been obtained by torture. (Paragraph 39)
9. The Government's formulation appears to us to be carefully designed to enable it to say that, although it knew or should have known that some intelligence it received

was or might have been obtained through torture, this did not amount to complicity in torture because it did not know or believe that such receipt would encourage the use of torture by other States. (Paragraph 40)

10. We regret to say that, despite the clear intent of our questions, the Government's answers leave us no clearer about whether the ISC has been provided with all versions of the guidance which was current at the time of the various allegations of complicity, which date back to 2002. We look to the ISC to provide clarification on this point. (Paragraph 43)
11. We welcome the Prime Minister's commitment to publish the new guidelines which will be drawn up by the Intelligence and Security Committee. However, the Prime Minister's statements on this issue, from his first written statement on 18 March 2009 on, are in the present tense. He draws a clear line between the new guidance, which will come out of the process that he has set in motion, and the old guidance, which the Government has decided not to publish. No convincing justification has been offered for the decision not to publish the previous guidance. As we have pointed out before, in the United States, the Obama administration has put into the public domain significant Justice Department memos, including legal advice, about matters as sensitive as interrogation techniques. In our view, there can be no justification for not publishing the guidelines that were in place at the time the alleged complicity in torture took place. In order to learn lessons for the future, as well as to ensure proper accountability for past wrongs where appropriate, it is essential that the earlier guidance be published. We also repeat our earlier recommendation that the relevant legal advice also be made public. The Government has not convincingly explained what makes the UK different from the United States, where the legal advice has been published. (Paragraph 45)

The urgent need for an independent inquiry

12. To the extent that the analysis in the letter of Jonathan Sumption QC draws attention to the inherent limitations of litigation as a means of inquiring into a wider systemic problem, we agree. It powerfully makes the case for an independent inquiry into these grave matters, which would not be constrained from looking at the wider issues in the way that the court adjudicating on Binyam Mohamed's claims inevitably is. In our view, the case for setting up an independent inquiry into the allegations of complicity in torture is now irresistible. (Paragraph 51)

The implications of recent court judgments

13. The Government's response to the *A* and *AF* judgments suggest that it considers itself free to press on with the use of secret evidence and special advocates in the other contexts in which they are used, without pausing to take stock of the wider implications of these significant rulings. Although the Government says that it is considering whether changes to the Parole Board's procedures are needed, we have not seen any evidence to suggest that the Government has in fact considered the implications of the judgment of the European Court of Human Rights in *A v UK* for all the other contexts in which special advocates and secret evidence are used. We

recommend that the Government urgently conduct a comprehensive review of the use of secret evidence and special advocates, in all contexts in which they are used, in light of the judgments of the European Court of Human Rights and the House of Lords, to ascertain how often they are used and whether their use is compatible with the minimum requirements of the right to a fair hearing as interpreted in those judgments, and to report to Parliament on the outcome of that review. (Paragraph 60)

Keeping law accessible

14. We are not satisfied that the Minister's answer meets the special advocates' concerns about the difficulty of distilling the relevant principles from closed judgments, or about the necessary accessibility of the law. We recommend that the Government include arrangements for law reporting in the review of the use of secret evidence that we have recommended above. (Paragraph 62)

Is the power to detain for up to 28 days still necessary?

15. This commitment to review the cases of those detained for more than 14 days in relation to the Heathrow bomb plot case has not been fulfilled. We recommend that a thorough independent review be conducted of the pre-charge detention of all those individuals who were arrested in relation to the Heathrow airline plot and detained without charge for more than 14 days, in order to ensure that Parliament is properly informed about the operation of this power in practice when it debates whether it should be renewed in June this year (Paragraphs 64 and 66).

Adequacy of procedural safeguards on extension of pre-charge detention

16. We recommend that any Memoranda of Understanding or specific protocols designed to ensure that the police inform and consult appropriate CPS lawyers well before arrests take place [in terrorism cases] are made publicly available for scrutiny. (Paragraph 74)
17. We recommend that training be provided to police officers as recommended by Lord Carlile and that such training should expressly cover the effect of Article 5 ECHR on detentions under the Terrorism Act 2000. (Paragraph 75)
18. In view of our previous, consistently held concerns about the adequacy of the procedural safeguards surrounding the extension of pre-charge detention, which are confirmed by Lord Carlile's report, we recommend that:
 - (1) Schedule 8 of the Terrorism Act 2000 is amended to make clear that the extension judge must apply an evidential test when deciding whether or not to extend pre-charge detention; and (Paragraph 0)
 - (2) Code H of the PACE Codes of Practice be amended to explain to police why Article 5 ECHR is relevant to extensions of pre-charge detention and what its requirements are, and to make clear that continued detention of terrorism suspects is likely to become unlawful if the suspects are not told clearly the offences they are

suspected of committing and the reasons for the suspicions leading to their arrests. (Paragraph 77)

19. We also recommend that, in the absence of any accessible report of the extension judge's reinterpretation of Schedule 8 of the Terrorism Act 2000, the Crown Prosecution Service adopt clear guidance about when extension should be sought, reflecting that interpretation. (Paragraph 78)

Draft Bill on 42 days

20. We recommend that the Government withdraw its draft Bill [to permit 42 days pre-charge detention for terrorism offences] which, if it were enacted, is likely to give rise to breaches of the right to liberty in Article 5 ECHR in the absence of a derogation. (Paragraph 81)

Alternatives to extended pre-charge detention

21. We remain of the view expressed in our earlier reports that bail ought in principle to be available in relation to terrorism offences. Whether it is granted in any particular case, of course, will be a matter for a court to determine. The range of terrorism offences is now so broad that many people arrested under the Terrorism Act are arrested on suspicion of some involvement at the periphery of terrorist-related activity. (Paragraph 86)
22. Views are clearly divided on whether bail ought to be available, including within the police service. While ACPO is opposed to bail being available, the police officers we spoke to at Paddington Green police station in 2006, who deal with terrorism suspects routinely, were in favour. We recommend that the Government hold a full consultation on whether bail should in principle be available in relation to terrorism offences. (Paragraph 87)
23. It has become increasingly clear to us that the roadblock to progress [in allowing intercept material to be used in court as evidence] is certain of the operational requirements which were stipulated by the Chilcot Review. In particular, the insistence on ongoing agency discretion over the retention, examination and transcription of intercept material (the fourth and fifth operational requirements) makes a legally viable regime impossible given the clear requirements of Article 6 ECHR. (Paragraph 98)
24. We welcome the fact that the advisory group is continuing to explore ways of allowing intercept to be admitted as evidence, but unless these two operational requirements are revisited the next stage of the review is, in our view, already doomed to failure. We do not think the Government can be surprised by the decision of the European Court of Human Rights in *Natunen v Finland*: it has long been clear that Article 6 ECHR requires a full retention regime or judicial control over what may be discarded. We understand the agencies' anxieties about ceding their discretion in favour of judicial control, but, as we have seen in other contexts, this is an inevitable consequence of the agencies engaging with legal processes. In our view, the rule of law requires no less. (Paragraph 99)

25. We do not see any difficulty in principle with independent judicial control over what material may be discarded. We therefore recommend that the fourth and fifth operational requirements of the Advisory Group of Privy Counsellors (requiring ongoing agency discretion over the retention, examination and transcription of intercept material) be revisited in the next stage of its work. Otherwise, we are concerned that the intelligence and security services continue to exercise a de facto veto over this beneficial reform by stipulating pre-conditions which are impossible to meet. (Paragraph 100)

Impact on communities

26. We are disappointed that this important information [on the impact on communities of 28 day pre-charge detention] was not made available before the parliamentary debates on the renewal of the control orders regime. As we observed in our report on that subject, the impact of control orders on the communities of those affected is one of the most controversial aspects of those measures, with many people believing that the impact is so severe and disproportionate that the use of control orders is counterproductive. (Paragraph 104)

Parliamentary accountability

27. We repeat our earlier recommendations about reform of the ISC to make it a proper parliamentary committee, with an independent secretariat, independent legal advice and access to an independent investigator. (Paragraph 110)
28. Placing human rights at the heart of the Government's National Security Strategy is easy to say, but it has to find institutional expression if it is to be meaningful. We recommend that human rights expertise be made available to the new Joint Committee on National Security Strategy, both in its membership and at staff level. (Paragraph 113)

The Independent Reviewer of Terrorism legislation

29. We repeat our earlier recommendations that the post of statutory reviewer should be appointed by Parliament and report directly to Parliament. We also recommend that the post should be limited to a single term of five years. (Paragraph 115)

Conclusion

30. The question is not whether counter-terrorism legislation is needed at all, but whether the counter-terrorism legislation that we have got is justified and proportionate in the light of the most up to date information about the nature and scale of the threat we face from terrorism. What is needed is not consolidation, but a thoroughgoing, evidence-based review of the necessity for, and proportionality of, all the counter-terrorism legislation passed since 11 September 2001. That review should be carried out in the light of evidence of how it has worked in practice and the reasons why it is said to remain necessary and proportionate in the circumstances in which we find ourselves today. (Paragraph 118)

31. Whatever precise form the review body might take, in our view, the case is made out for a fundamental parliamentary review of the necessity and proportionality of all counter-terrorism laws passed since 2001. We recommend that this be treated as an urgent priority by the next Parliament. (Paragraph 120)

Formal Minutes

Tuesday 9 March 2010

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness Lord Dubs Baroness Falkner of Margravine Lord Morris of Handsworth The Earl of Onslow	Dr Evan Harris MP Mr Virendra Sharma MP
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Draft Report (*Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*), proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 36 read and agreed to.

A paragraph—(*Dr Evan Harris MP*)—brought up and read, as follows:

“The continued failure of the Government to answer these questions, or to publish the guidance to the Intelligence Services on the detention and interrogation of suspects overseas, leads us to believe that the Government is seeking to hide activity and policies – past and/or present – which amount to or may amount to complicity in torture.”

Question put, That the paragraph be read a second time.

The Committee divided

Content, 1

Not Content, 4

Dr Evan Harris MP

Lord Bowness
Mr Andrew Dismore MP
Lord Dubs
Lord Morris of Handsworth

Paragraphs 37 to 41 agreed to.

Another paragraph—(*Dr Evan Harris MP*)—brought up and read, as follows:

“We conclude that while the Government holds this view, it has explicitly failed to establish that it is not, or its agencies are not, complicit in torture.”

Question put, That the paragraph be read a second time.

The Committee divided

Content, 1

Dr Evan Harris MP

Not Content, 5

Lord Bowness
Mr Andrew Dismore MP
Lord Dubs
Lord Morris of Handsworth
The Earl of Onslow

Paragraphs 42 to 47 agreed to.

Another paragraph—(*Dr Evan Harris MP*)—brought up and read, as follows:

“In the absence of even a semblance of a convincing justification for keeping the guidance secret, we have no alternative but to conclude that the guidance provides evidence and perhaps proof that the Government, and/or its agencies, were complicit in torture. If the Government denies this, it should publish the guidance, or provide a convincing justification for not publishing it.”

Question put, That the paragraph be read a second time.

The Committee divided

Content, 2

Dr Evan Harris MP
The Earl of Onslow

Not Content, 4

Lord Bowness
Mr Andrew Dismore MP
Lord Dubs
Lord Morris of Handsworth

Paragraphs 48 to 87 agreed to.

Paragraph 88.

Amendment proposed, in line 3, after “**determine**” to insert “, **taking into account in each case the issue of public safety that the Government cites as a basis for its blanket policy of denying bail in terrorism cases**”.—(*Dr Evan Harris MP.*)

Question put, That the amendment be made.

The Committee divided

Content, 1

Not Content, 5

Dr Evan Harris MP

Lord Bowness

Mr Andrew Dismore MP

Lord Dubs

Lord Morris of Handsworth

The Earl of Onslow

Paragraph agreed to.

Paragraphs 89 to 122 agreed to.

Summary agreed to.

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

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

Written evidence reported and ordered to be published on 12 January was ordered to be reported to the House for printing with the Report

[The Committee adjourned.]

Witnesses

Tuesday 1 December 2009

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Rt Hon David Hanson MP, Minister of State for Security, Counter-Terrorism, Crime and Policing, **Ms Catherine Byrne**, Head of Office of Security and Terrorism, and **Ms Jennifer Morrish**, Legal Adviser, Home Office

Ev 1

List of written evidence

- 1 Letter to the Chair of the Committee from Rt Hon David Hanson MP, Minister of State for Security, Counter-Terrorism, Crime and Policing, dated 10 December 2009 Ev 17

Oral evidence

Taken before the Joint Committee on Human Rights on Tuesday 1 December 2009

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L
Dubs, L
Morris of Handsworth, L
Onslow, E

Mr Edward Timpson
Mr Virendra Sharma

Witnesses: **Rt Hon David Hanson MP**, a Member of the House of Commons, Minister of State (Security, Counter-Terrorism, Crime and Policing), **Ms Catherine Byrne**, Head of Office of Security and Counter-terrorism, and **Ms Jennifer Morrish**, Legal Adviser, Home Office, gave evidence.

Q1 Chairman: Good afternoon, everybody. This is a session on Counter-terrorism Policy and Human Rights of the Joint Select Committee on Human Rights. We have been joined by the Minister of State for Policing, Crime and Counter-terrorism, David Hanson, MP, by Catherine Byrne, who is head of the Office of Security and Counter-terrorism in the Home Office, and Jennifer Morrish is from the Legal Advisors branch of the Home Office. Welcome to you all. Do you want to make any opening remarks, David?

Mr Hanson: No, I am quite happy, Chairman, for the Committee to ask any questions it wishes.

Q2 Chairman: Perhaps we can start off with some questions on the question of torture. We have obviously had your response to our comments on that. I think one of the real concerns we have is over the definition of torture which the Government has come up with. Perhaps we can ask you some questions around that. Do you agree with the Committee's view that the systematic receipt of intelligence which is known or thought likely to have been obtained from detainees subject to torture, or in circumstances where the use of torture should have been known, amounts to complicity in torture?

Mr Hanson: Thank you, Chairman. I want to state at the outset that the British Government, myself as the Minister and the Home Secretary, condemn the use of torture, do not endorse the use of torture, want to see the eradication of torture, will not support the use of torture by other regimes passing information to us and want to ensure that the information that we get has been secured through means which are supportive of human rights and are supportive of the non-use of torture. That is the position that we take, and in fact, the Prime Minister in his Written Ministerial Statement, which the Committee will be aware of, on 18 March this year, reaffirmed that principle very strongly, and I have reaffirmed it publicly since then, and I think that is a principle we would seek to uphold.

Q3 Chairman: I think the real difficulty is the definition that you produce in your reply, when we are talking about what "complicity" means. Our

report, I think, came up with what is generally recognised as the international definition of complicity, but the definition that your response came up with was "The Government's position is that the receipt of intelligence should not occur where it is known or believed that receipt would amount to encouragement to the Intelligence Services or other States to commit torture." That is a much more restricted definition of what "complicity" would be, compared to what our understanding of international law is, as set out in our report. Where does that definition come from?

Mr Hanson: Again, Chairman, all I can do is reiterate what our view is, that we do not believe we are complicit with the use of torture. Our definition of "complicit" means, as I have said, that we do not support it, work to remove it, signed up to agreements to end it, will not work with regimes that use it and are trying to have some integrity about the information that we get. Again, we have to look at those issues in the round; there will be occasions when information will come to us where we are not, occasionally, aware of the source of that information; we will take stringent efforts to make sure that we do not use torture in any of the regimes that we work with or operate upon, and from my perspective when I say we are not complicit I mean we are not complicit in the use of torture.

Q4 Chairman: Perhaps I could put some specific points to you, as our understanding of what "complicity" means and you can respond when you agree with our definition. We are not talking about individual cases, we are talking about the context. Would you agree that complicity would include asking a foreign intelligence service known to use torture to detain and question an individual?

Mr Hanson: I am sorry?

Q5 Chairman: Would you agree with us that the definition of complicity in international law would include asking a foreign intelligence service known to use torture to detain and question an individual?

Mr Hanson: Well, again, I can only re-emphasise, Chairman, that we would not regard, from my perspective, the Government as being complicit in

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the use of torture, so we would not endorse the use of torture by another regime, nor would we ask a regime to use torture, nor would we knowingly receive information from a regime that used torture, nor would we encourage that use; indeed, as the Prime Minister has said, we would seek to eradicate that use by working through international agreements to do so.

Q6 Chairman: I have got that, but what we are trying to work through is a very specific definition in international law of what “complicity” is. I understand the Government’s policy is it does not like anything to do with torture, and that is fine, but it has a very specific meaning in international law, and the definition that you came up with in your response to our report on that does not match, as far as we can see, international law; in fact, it is an entirely new definition. That is our main concern, which is why I am putting these very specific points to you. So the first point that is part of international law is this: it is complicit if you were to ask a foreign intelligence service known to use torture to detain and question an individual. Would you agree with that?

Mr Hanson: We have to work, Chairman, with a number of regimes and we will work with a number of regimes to secure information for the protection of the British public, which is what the whole service that we operate in is about, but we would not encourage, solicit or endorse the use of torture. It does not mean, from my perspective, that we would not work with regimes potentially who have information which is secured by other means but not in relation to the information that we are supplied with, because from my perspective we have to look at what the security of the British public is and what regimes we work with, and there are regimes, occasionally, that we do not agree with, we do not support but, ultimately, we also have to work with.

Q7 Chairman: I will come back to that more general point in a minute, but I am asking you some very specific questions. Let me try the second one: would you agree that a State is complicit if it provides the information to a foreign intelligence service known to use torture enabling that intelligence service to apprehend an individual?

Mr Hanson: Again, Chairman, we are going down the route of a number of specific points. I am trying to say to you, in overall terms, that the British Government does not support torture and will not encourage the use of torture and will not work with regimes that use torture, but we will examine information that comes to us and have to make judgments about it with regimes sometimes that are not supportive of that. I cannot specifically comment on a range of individual, specific points without further consideration.

Q8 Chairman: These were, actually, in our report as an analysis of what international law requires and states as being the definition of “complicity”. I fully understand the general point you are making, but it has to be tested against the very specific requirements of international law of what complicity actually means. It is not as though you have not had notice of

this because it was in our report from ages ago about what all this was, and you responded to it by the very general assertion about encouragement, or not encouragement—however you want to put it. What I am doing is testing that definition you have come up with against the actual definition in international law. So the third question (I will put this one to you): do you agree that a State which gives questions to a foreign intelligence service to put to a detainee who has been, or is being or is likely to be, tortured amounts to complicity?

Mr Hanson: Again, Chairman, I can only reiterate my general point on that which is that we would not work with a regime that undertakes torture in the way in which you describe there, because from my perspective the purpose of British Government policy is, as the Prime Minister has indicated and I have indicated, exactly as I said to the Committee this afternoon.

Q9 Chairman: What about setting interrogators to question a detainee who was known to have been tortured by those detaining and interrogating him?

Mr Hanson: Again, Chairman, I can be no clearer than saying what I have said to date, in that we have condemned the use of torture across the board, and I cannot go down the route of hypothetical questions which you are putting to us today because the principle position of Government is not to involve ourselves in torture, not to encourage it and not to be complicit with it in the broader sense that I am describing to the Committee.

Q10 Chairman: These are not hypothetical questions, David; this is actually the definition in international law. I am simply asking you whether you accept what international law says amounts to complicity. I am not saying whether the Government has done it or not done it; I am simply putting to you the definition in international law of what complicity is and trying to establish whether the Government actually accepts what international law says about this rather than the new definition that you have come up with.

Mr Hanson: We have been very clear, and I hope I had been clear to the Committee, and the Prime Minister has been clear to the House, that we accept the principles of international law in relation to torture.

Q11 Chairman: If that is the case, why can you not accept the premises that I am putting to you as to what international law says amount to complicity?

Mr Hanson: Chairman, I have tried to be clear in my terms as to what I understand, what I mean and what the Government policy is in relation to torture; I can only be as clear as I can in relation to the Committee as to what our belief is.

Q12 Chairman: Let me try another one: is a State complicit if it has intelligence personnel present at an interview with a detainee in a place where he is being or might have been tortured?

Mr Hanson: Again, Chairman, without going into the micro-focus of that I can only simply say what I have said already, which is we are not supportive of

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the use of torture. Therefore, by implication, the British Government would not support the individuals being present when torture is undertaken.

Q13 Chairman: What about a State that systematically receives information known or thought likely to have been obtained from detainees subjected to torture?

Mr Hanson: Again, Chairman, on all of these issues I have become a bit of a repetitive record, in the sense that I can only say to you the broad government policy. The guidance which we have already indicated we are going to be publishing, which is currently before the ISC Committee, which the Prime Minister has indicated in his—

Q14 Chairman: We will come back to that.

Mr Hanson:—WMS of the 18th—that guidance will be specific about the circumstances in which British Government operatives will be working in relation to the broad objectives I have set.

Q15 Chairman: I am not going to put to you any more of that, because I do not think we are going to get very much further with that, but we have obviously had correspondence with the Foreign Secretary and the Home Secretary, who would not appear before our Committee, and, also, with MI5, who would not either, although there have been lots of statements from them elsewhere. Is it a fair interpretation of the comments of the Director General of MI5 in his lecture called *Defending the Realm* and the position of the Home and Foreign Secretaries that they are saying that, at least in the wake of 9/11, the receipt and use of intelligence which was known, or should have been known, to have been obtained under torture, in order to protect the UK public from possible terrorist attack, was the lesser of two evils?

Mr Hanson: I think it is fair to say, Chairman, that there will be information supplied to the British Government which potentially could save lives at certain times in the cycle since 9/11, and sometimes it is not clear about where that information originally has derived from. However, I think it is the duty of the Government to use that information for the protection of British citizens, while still maintaining, as we have tried to do, through the written ministerial statements on 18 March and through statements I have given to the Committee today, that we believe, overall, that the use of torture is not a thing that we would support, and all the issues I have mentioned earlier.

Q16 Chairman: In our previous work on torture, what we have said is: “Look, if you get an odd bit of intelligence coming in that would protect or defend the British public from terrorist attack, nobody in their right mind would say that that information should not be used.” We accept that. What we are putting to you, though, is a rather different position when it comes to the definition of complicity—all the things I have mentioned. You talk about encouragement, but the systematic receipt and use of evidence that might have come from torture,

ultimately, will start to create a position of, as you called it, “encouraging” and, as we would say, “complicity”. What we are concerned about is not the one-off piece of intelligence; it is consistently receiving this information and using it which, ultimately, amounts to the systematic receipt which, ultimately, is *de facto* encouragement.

Mr Hanson: Again, Chairman, I hope I can be clear for the Committee that it is our policy that we should not be receiving information where it is known or believed that the use of torture has elicited that information. That is a clear policy statement from the Government which will be put into practice through guidance to operatives on the ground: we should not be receiving information elicited through torture. What I am saying to the Committee is there are occasions where relations with governments means that sometimes we are not sure of the provenance originally of some of the information, and if it does show information which is of concern to the Government we need to act upon that. It is a clear statement that we should not be encouraging or deliberately receiving it.

Q17 Chairman: As I have said to you, nobody on this Committee would argue that if there is a piece of intelligence that comes forward that can save lives we should not use it. We have accepted that in our previous reports about this. The real issue is whether this is systematically coming from the same or similar sources or from the same or similar countries which are known to have a bad reputation, and nothing has been done about it. I think most of our Committee would say that that is, effectively, condoning it and making our country complicit in what is going on in those bad practices.

Mr Hanson: Again, Chairman, if I can re-emphasise to the Committee that it is quite clear from ourselves that we do not even wish to encourage the receipt of information which has been undertaken through the committing of torture and, as a government, we would not encourage that receipt of information. Again, I cannot be any clearer than what I have tried to say in relation to the Government’s overall policy; that has downstream consequences for operatives. The downstream consequences are being worked through now with guidance which is before the ISCT and we want to ensure that that is put into practice in an effective and fair way to implement British Government policy in whichever far-flung corner of the world our operatives are working.

Q18 Chairman: Have you seen the Human Rights Watch report that came out last week called *Cruel Britannia—British complicity in the torture and ill-treatment of terror suspects in Pakistan*?

Mr Hanson: I have seen the report, but I have not, as yet, looked at it in great detail. I am aware of it.

Q19 Chairman: That document is an account from victims and families about the cases of five UK citizens of Pakistani origin who were tortured in Pakistan by Pakistan security agencies between 2004 and 2007, and it very much chimes with evidence that we have received from a number of different

sources in our inquiries. Will the Government now consider an independent public inquiry into all these allegations to try and get the air cleared and to prove beyond a shadow of a doubt that what you have been telling us today is, in fact, the case?

Mr Hanson: The government has rejected the idea of a public inquiry for the simple reason that these allegations have been made, we have responded to the allegations in Parliament, those allegations have been, in some cases, referred to in court cases, where the judges who have examined those court cases have rejected those allegations. In one particular case the judge in Mr Ahmed's case said: "I specifically reject the allegations that British authorities were outsourcing torture". The judgments are available publicly and I think that has been a fair assessment of the allegations that have been made.

Q20 Chairman: We can look at the court judgments and, in particular, Binyam Mohamed, which goes the other way. If you are not going to have a public inquiry, fine, but will any of these allegations be referred to the police to investigate?

Mr Hanson: At the moment, those allegations, I think, we have responded to. I will look at the report in detail, which I have not had a chance to do as yet, but I do not believe they form the basis of any further allegations that need to be investigated.

Q21 Lord Dubs: Have there been in the past any instances where you have had to take action because operatives have been present when, by your policy, they should not have been?

Mr Hanson: I certainly have not had anything across my desk to that effect, my Lord, but I cannot speak for Ministers previous to myself, but I am sure that would be the case.

Q22 Earl of Onslow: Minister, I must admit I think it is very unsatisfactory that a Minister cannot answer a totally straightforward question on the legal meaning of "complicity". It seems to me that that is what Ministers are for, to give accurate answers and well-thought through answers to a Select Committee. May I ask you, please: it is alleged, and is I think reasonably well established, that the Pakistani intelligence services have been, at the minimum, roughing people up or, rather more accurately, beating people up. Has the Government any knowledge of this or is it going to say that it does not happen and it knows nothing about it?

Mr Hanson: Again, I would welcome specific allegations. I have not seen any specific allegations in front of me, with the exception of those allegations that have been made that have been before the courts where they have been addressed by the courts and where no allegations have been found to have fact based upon them. I will simply say, again, in relation to the British Government's policy, that the Foreign Office, through the Foreign Secretary, will and has made representations to the Pakistani Government about British Government policy, and British Government policy, as I have described it to the

Committee, will be the cornerstone of how we approach our relations with other governments, including Pakistan.

Q23 Chairman: You say you have not had any notice of these, but they are in our report: pages 7 and 8 about Pakistan, and page 9 about Egypt; the allegations about complicity in Uzbekistan—there are four or five pages of these allegations about which, obviously, there is more detail in the evidence at the back, but just in highlighting them in our own report. So it is not as though you have not had notice of them.

Mr Hanson: I am saying, Mr Chairman, that in relation to the specific question from the noble Lord, Lord Onslow, in relation to what action the British Government has had in receipt of information about allegations in Pakistan, and what action we have taken, I have simply said to the noble Lord that we have, through the Foreign Office, made our position very clear, are upholding the position in relation to torture, as I have described to the Committee, and will continue to do so, and will not receive, as I have described to the Committee, information that we knowingly have had which has been derived from the use of torture.

Q24 Chairman: The Foreign Affairs Committee have also come to the conclusion that the Pakistan security services are involved—

Mr Hanson: I cannot be any clearer than what I have tried to be, Mr Chairman, which is to simply say that we will not accept information that we believe has been derived from torture, and if allegations are shown to the effect that information has come, we will not accept it. We have made, and will continue to make, representations about standards through the Foreign Secretary to other governments, including Pakistan, if those allegations come forward for investigation.

Q25 Earl of Onslow: The new Government Bribery Bill, on whose Select Committee I sat, is very clear about making it extremely difficult for those who bribe foreign governments. The argument there is that if anybody bribes it encourages it. Presumably, exactly the same argument applies to receiving information derived from torture: the more you receive information derived from torture the more you encourage the ungodly to reach for the electrodes.

Mr Hanson: Again, if I can say, my Lord, I cannot be any clearer than I have tried to be to date: the Government would not willingly receive information from Pakistan or any other source if it knew it was derived from the use of torture; it will not condone it; it will seek to eradicate; it has campaigned against it. There will be occasions where, potentially, we do not know the source of information, as I have indicated, but that source of information, when we know it, will not be used by this Government.

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Q26 Lord Dubs: Could we turn to another issue, please? In March 2009 the Government agreed to provide the ISC with its guidance to the intelligence services. It took eight months for the ISC to get that. Was there any reason why it took so long?

Mr Hanson: I think, my Lord, I am as frustrated, if I may say so, as indeed I know the Committee will be, about the slowness of this process. The Prime Minister indicated in March in the WMS we would supply guidance and tried to get this matter resolved. We have had to have serious discussions in government with the Ministry of Defence, with the security services and with others to prepare the guidance. That guidance has been submitted to the ISC and I would want to see that guidance produced following consultations, as soon as possible, and I want to see it for the Committee's benefit but, also, for the public benefit, published in a form which the public can see, understand and scrutinise.

Q27 Lord Dubs: One of the reasons given to the ISC was due to the "complex legal nature of these issues." That sounds a bit like out of Yes, *Minister*, does it not?

Mr Hanson: There are complex issues, and anybody—as the Committee will have—who has looked at this issue in detail will know that there are a range of issues in relation to the guidance and how it will be used downstream by people who are putting their lives at risk for this country. I think that is a fair assessment to make in relation to our legal obligations. I want to see it published; I want to see it made public for scrutiny and I want to see that as soon as possible. I hope that the ISC will complete its conclusions shortly so that the Home Secretary, Foreign Secretary and Prime Minister can finally deliberate upon it.

Q28 Lord Dubs: Thank you. I think the Government referred to "consolidating" the previous separate guidelines into one version. Have there been any changes in that process of "consolidation" or has anything been left out or put in? Or is it a straightforward consolidation without any changes to the original versions?

Mr Hanson: The guidance, ultimately, will be published, and I think it is fair to say that until such time as it is published I cannot comment upon what the format of that guidance is, because it has gone through several alliterations, there are discussions in government and now with the ISC. I hope the Committee will understand it will not have to wait too long, I hope, before that guidance is published.

Q29 Chairman: What has gone to the ISC is the issue here; it is not what was published, because, obviously, we accept that it may not be entirely publishable, but what has gone to the ISC. Does the ISC material that has been given to them have everything that was in the previous versions, or have they been given an updated version that leaves bits out—effectively, sanitising it?

Mr Hanson: We have agreed, as you know, not to publish previous versions of the guidance, and I stick by that principle. We are publishing, in due course—

Q30 Chairman: It is not publishing—it is to the ISC.

Mr Hanson: The ISC will independently make their judgment on the guidance that we have submitted to them and we have given them a version of guidance that we have submitted following discussions in government. We have submitted it to the ISC; they have had it since May, the consolidated version, and we are now at the stage where we are waiting for—

Q31 Chairman: "Consolidated" means everything, all together. Is it consolidated or is it somehow redacted compared to everything—

Ms Byrne: They had the raw material from the different sets of guidance that existed, and they have now got the consolidated version that brings all of that together. That is what they are looking at.

Q32 Chairman: Nothing has been left out?

Ms Byrne: They have all the sets of material that we were able to give.

Q33 Chairman: So what they have is—nothing has been left out of previous versions, compared to what has gone to the ISC?

Ms Byrne: Some words may have changed because we have brought the guidance together in a consolidation.

Q34 Chairman: I understand that.

Ms Byrne: What they have got is what we had.

Q35 Chairman: So they have got everything that was originally there without any redaction.

Ms Byrne: Yes.

Q36 Chairman: From that you have synthesised it into a consolidated version.

Ms Byrne: I am sorry, can you say that again?

Q37 Chairman: From that you have synthesised it into a consolidated version.

Ms Byrne: Yes.

Q38 Chairman: So there is nothing at all that you have produced on this that they have not seen?

Ms Byrne: They have got what existed in May and they have got the consolidated version.

Q39 Chairman: Have they got all the earlier versions as well?

Ms Byrne: I am not sure how many earlier versions they have had, but they have the guidance that existed in May and they now have a consolidated version.

Q40 Chairman: What about that from before May? Do not forget you are going back here a number of years.

Mr Hanson: I have been in this post since June; I do not know what the guidance was prior to May. My colleague, Catherine Byrne, has indicated that it is a Cabinet Office initial responsibility. I will be very happy to follow up to the Committee with a letter on the detail of that post-session today.

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Q41 Chairman: I think what we would like to know is roughly what dates there were versions available. Obviously, there is an argument about what was published but, presumably, the date of a particular document—

Mr Hanson: I will give a commitment to the Committee to formally drop a note to the Committee about the guidance and on what it was based. Whatever I can tell the Committee I will do so, but some of this is before my time and I am afraid I do not know the detail.

Q42 Lord Dubs: Just one last question on that: you did say that the Government had refused to publish the original version of the guidance. I am not quite clear why you have refused that, given that it is going to be in the consolidated version.

Mr Hanson: Again, we have taken a decision to publish the guidance that we finalise in due course. I think it is fair that we publish that guidance in due course, and we do not have historical examination of what guidance was operated previously. That is a judgment we have made, it is the judgment the Prime Minister has made in relation to his WMS in March, and I hope the Committee can accept that. The principle that we are putting to the Committee, and to the public, is that we will compile guidance, it will reflect the policy I have outlined to the Committee today and it will be open to public scrutiny—and it will be, which is equally important, open to scrutiny from independent sources on a day-to-day basis as to how it is executed downstream.

Q43 Lord Dubs: You will see this question coming: I suppose if we look at the events documented in the Human Rights Watch report we do not know what guidelines were relevant at the time to see whether they were being adhered to or not. That is the difficulty with the way it is happening.

Mr Hanson: I accept that. My assessment is that the Government's policy has been implemented previously as well as now, and I hope that the Committee will accept that we are going through a stage whereby, previously, there was no published guidance, there was no external scrutiny, there was no reporting to Parliament as there will be once this guidance has been completed.

Q44 Chairman: That is all very helpful but it does not actually get over the problem. You say “the Government has taken a view” and it is your policy—I understand that—that there should not be historical analysis of what has gone on as regards the documentation, but that is exactly what is needed to check whether, in fact, the allegations that have been made, if they were true, were in accordance or contrary to the guidance that was in force at the time. It is impossible to hold the security services properly to account—whether it be the ISC or otherwise—without access to the guidance in force at the time the allegations were supposed to have happened.

Mr Hanson: I think, Mr Chairman, you will accept that the allegations that have been made have been tested in court and have been rigorously examined by the judicial process.

Q45 Chairman: Not all of them.

Mr Hanson: What we are trying to do is to put on a square and even footing with public scrutiny and with independent examination what operatives will undertake on the ground in relation to British Government policy on the use of torture.

Q46 Chairman: If there is nothing to hide why not produce the documentation?

Mr Hanson: The Prime Minister and colleagues have taken decisions in relation to the previous guidance. The decision has been taken by the Prime Minister in relation to the examination because, as has been said by myself earlier, the previous guidance has not been open to scrutiny; it would not be, in my view, fair and proper to open that up to scrutiny; any allegations that have been made have been tested in court and the principle of this is now that we are putting on to the record a fair and open guidance for public scrutiny for future use.

Q47 Earl of Onslow: If it is consolidated—Ms Byrne said it was—

Ms Byrne: Yes.

Q48 Earl of Onslow: If it is consolidated, you are telling us that there is no change. If there is no change why not publish the original documents? Just because the Prime Minister has made up his mind, that seems—any sensible man when faced with something which might be wiser should be open to changing their mind. I know this is impossible in politics, but there you are. We could have a first.

Mr Hanson: It does happen occasionally, Lord Onslow, as you know. I think several allegations have been made in the last week that have been changed by the Leader of the Opposition, so it can happen. The Prime Minister has determined, and I think that this is a right and proper thing to do, that certain allegations have been tested in the courts, the guidance that was operational prior to the existing procedure is historical, and the Prime Minister and colleagues have determined that we want to be open about this. That is the process that we are under now.

Chairman: Let us move on.

Q49 Mr Timpson: Can I ask some questions around the scale of the terrorist threat facing the UK. In the letter dated 3 August 2007, the Government said that its position on whether or not the UK faces “a public emergency threatening the life of the nation” has not changed since 2001 when it derogated from Article 5 of the ECHR. Is it still the Government's view that the UK faces a public emergency threatening the life of the nation?

Mr Hanson: The public emergency threat, Mr Timpson, as you will know, is assessed by JTAC which is the Joint Terrorism Analysis Centre, which reports to Ministers in terms of advice, but is independent of Ministers in terms of its assessment. It has recently, in the last few months, looked at the current terrorist threat and has downgraded the threat from “severe” to “substantial”. The definition of “substantial” is still extremely serious for the potential threat to this country, in that “substantial” means an attack

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remains a strong possibility. JTAC, on a weekly basis, examine the level of threat and look at this issue on a regular basis. The threat could go up or down at any particular time but the current assessment is “substantial”, which means an attack is a strong possibility. If we look at the position since 9/11—which was now eight years ago—we have had, since that time, some 217 convictions for terrorist activity in the United Kingdom and we currently have 29 individuals awaiting trial. So that there is a real and present threat which, on a weekly basis, as a Minister with the Home Secretary, we see and are aware of acutely.

Q50 Mr Timpson: We have seen, from June 2007, when the level was raised to “critical”, then it was dropped in July 2007 to “severe” and then in July this year to “substantial”, yet throughout that whole period since 2001 the Government has still said the UK is facing a public emergency threatening the life of the nation. How does the downgrading of the threat to “substantial” from “critical” sit with the Government’s position, which you seem to still be holding today, that we are facing a public emergency?

Mr Hanson: I think, Mr Timpson, that if you examine, as we do, on a regular basis the intelligence that crosses our desk in relation to the potential threat to the United Kingdom, we would still uphold that there is a potential public emergency for consideration and for preparedness by the Government, not just in terms of the major threat to the United Kingdom, which is still Al-Qaeda-inspired terrorism, but if we look at the situation in my old government post in Northern Ireland there is a dissident Republican threat to parts of the United Kingdom which is severe. There is a small but significant extreme right-wing threat to the United Kingdom from internal sources. The main thrust is still there and the JTAC assessment is still, from my perspective, that an attack is a strong possibility. That is the definition of “substantial”. I think we would be failing our duty to the British people if we did not prepare both the response to that attack and, secondly, the prevention of that attack through disruption of terrorist means and, thirdly, the longer-term examination which we are undertaking through the preventative agenda of how we can stop some of the potential radicalisation of individuals in the United Kingdom as a long-term objective. That is part of our response to that emergency situation.

Q51 Mr Timpson: In answer to that question you have talked about the potential public emergency as opposed to a public emergency, which would seem to fit in more with the downgrading of the threat; rather than it being a public emergency, it is now a potential public emergency. Which are we dealing with here? Is it not important that the whole idea of a public emergency is not devalued by the fact that we have a changing threat level throughout that period?

Mr Hanson: The threat level—and this is the key point for the Committee to recognise—at “substantial” still is, and I quote, “an attack is a strong possibility”. As long as an attack on the United Kingdom is a strong possibility I think, as Minister,

with the Home Secretary, with the Prime Minister and with colleagues in the security services, we have to ensure that we plan for that attack, we disrupt those attacks and we look at monitoring the potential for those issues on a regular basis. The information that crosses my desk and my colleague, the Home Secretary, on a regular basis indicates that there are still live individuals who are seeking to do great damage to the United Kingdom and we need to both work with those in terms of preventing that emergency position and ensure that we keep our security forces and our responsive forces at high critical alert to ensure that if that attack happens, which is a strong possibility, we are prepared for it, and indeed we are prepared to try to prevent it happening in the first place.

Q52 Mr Timpson: What would the threat level have to drop to for there to no longer be a public emergency?

Mr Hanson: The threat level has two further stages to go, which is “moderate”, which is an attack is possible but not likely, or low—

Q53 Mr Timpson: Would there, therefore, no longer be a public emergency?

Mr Hanson: I think, as a Member of Parliament and, indeed, as Members of the Committee, you would expect the Government to maintain a strong focus on the potential for public emergency. From my perspective, when we are faced with an attack being a strong possibility that, for me, remains a public emergency. We need to have the response from the security services but, also, the response and planning from police, fire, from health services and others to ensure that in the event of that happening—which it could tomorrow, which it could next week, which it could next month—we have both the preparedness to disrupt it but, also, the response capability to deal with it in the unlikely event, I hope, of it happening, but in the potential that it is still a strong possibility.

Q54 Chairman: Does “low” still count as a public emergency?

Mr Hanson: “Low”, as you will know, Chairman, is an attack is unlikely, but if I sat here and I was asked by the Committee “Are we preparing for an attack”, even if we were at the “low—an attack is unlikely” scenario, and I said to the Committee: “No, we are not”, the Committee would be challenging me—

Q55 Chairman: That is not the question. The question is: does “low” equate to a public emergency threatening the life of the nation?

Mr Hanson: I will give you my definition: as long as the threat level remains as “substantial”, where an attack is a strong possibility, I think we are in a situation whereby we have a potential public emergency which we need to prepare for.

Q56 Chairman: When was the last time we were at “low”?

Mr Hanson: That is a very good question, Mr Chairman. It is not in my time. Not in Catherine’s time. Again, if the Committee wishes—

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Q57 Chairman: It is probably decades. The inference is that we are in a permanent state of emergency threatening the life of the nation. How can that be?

Mr Hanson: I am sorry, I missed that question.

Q58 Chairman: The inference is, because it is probably decades since we were last at low—whether it is the IRA or the Al Qaeda, or whatever it happens to be—that we are in a permanent state of public emergency threatening the life of the nation. Is it not?

Mr Hanson: I am afraid, Chairman, that, at the moment, I think that probably is the case, in that at any time—

Q59 Chairman: Not “at the moment”, but going back decades. If you are using the same test, and the criteria have not changed much, and if we have not been at “low” for decades, which I think is probably the case—probably even before the Troubles in Northern Ireland—then that means that the country is in a permanent state of public emergency threatening the life of the nation. Does it not?

Mr Hanson: We can make judgments about that particular inference, Mr Chairman, but from my perspective I am simply saying to the Committee that as long as we face an attack as a strong possibility I think we need to have our resources and our emergency services focused on—

Q60 Chairman: I do not think anybody would dispute that; it is not a question of emergency response, it is a question of the impact on civil liberties of having this permanent state of emergency. That is the real issue we are talking about here; not the fact we should be prepared with all the emergency services and the intelligence going on, or all the rest of it. The question is about the restrictions on public liberty, civil liberties, that come from having this sort of permanent arrangement.

Mr Hanson: This may be controversial and the Committee may not agree with my assessment of this, but I think that most of my constituents (and I represent 60,000 people in the House of Commons, as people in this room do) will accept those limited impositions on civil liberties for the greater protection of the British public at large. I think we can have that debate and I am happy to have that debate, because the measures we are taking, and have taken, I believe, are proportionate to the level of threat and strong possibility of attack that we face—unlikely as I still believe it will be but it is a strong possibility.

Q61 Chairman: For example, even section 44?

Mr Hanson: As the Committee will know, I sign off every section 44 agreement that is put to me by the police throughout the United Kingdom, and over the past year we have seen a 40 per cent reduction in the applications for section 44 from police forces because I have asked the Met, particularly, to look at better definition of how they use section 44.

Q62 Chairman: Was it not rather peculiar that Lord West got stopped under section 44 at security in the House of Lords?

Mr Hanson: I am not able to comment on any individual who has been stopped on section 44 because that would be a breach of their civil liberties to put that publicly without charge.

Q63 Earl of Onslow: On the actual definition of “threatening the life of the nation”, does this not occur to you that that, in itself, is hyperbolic? The nation has gone through much, much worse times. I am old enough—and you probably are not—to remember the last War. The last War was a real threat; there were dirty great German tanks with broken crosses sitting on the cliffs above Calais. Of course the bombs on the London Underground are absolutely horrendous; of course the number of people killed is completely and utterly unacceptable, but if you use hyperbole like that it is like the little girl who shouts “Fire” the whole time; it loses its meaning. Yes, I completely agree with you that there is a serious threat (nobody is arguing that), but what I am saying is that there is a difference between a serious threat which will cause major, uncomfortable and disgusting upheaval, but it is not a threat to the life of the nation. This nation is far too grand, far too great and far too mature to be just knocked off its perch by one or two bombs on the Underground.

Mr Hanson: Sadly, I am 52 years old; it is an accident of birth, unfortunately; I cannot do much about that—

Q64 Earl of Onslow: I was an accident of birth too!

Mr Hanson: Self-evidently we are not in the parlous state that we were when my uncle was killed in the Second World War, when my father was bombed in Liverpool in the Second World War and when those issues were threatening to the life of the nation in the sense of World War and that particular situation. I have to say, in our modern examination of that, I do believe that I have a duty, as does the Government, to protect British citizens, and the indiscriminate murder in the Underground, on Tubes and on other potential targets that are focused by the threat on a regular basis is a matter of national security which we have to undertake. I do not think anybody would argue that an attack of the nature of 9/11 on New York is not an attack on a nation state, and exactly that type of attack could happen to the United Kingdom in the future if we are maintaining an attack is a strong possibility. There are forces at large who seek to not just disrupt a city like London with an attack of the nature that we have had but seek to undertake major disruption. We have to protect against it and we have to, in my view, reflect that in terms of government practicalities.

Q65 Chairman: I do not think anybody disputes that. The difference between us is whether all the preparations and the steps that we need to take, which we fully accept are necessary, are in the context of a public emergency threatening the life of the nation, or whether these steps are the things that

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any good government would do to protect its people against a terrorist threat. There is a difference between the two.

Mr Hanson: I accept that, and I think that a good government would take steps to protect against a terrorist threat. Our assessment, at the moment, based on the international terrorism threat level provided by JTAC, is that there is a substantial threat, and a substantial threat (without repeating myself) is that a strong possibility of attack is the assessment currently. Therefore, we have to prepare for that. From my perspective, it is an emergency. If we look at recent judgments in the European Court of Strasbourg in relation to Case A, for example, that upheld the Government's view of where we are currently in relation to the threat.

Chairman: We may come back to that later on.

Q66 Mr Timpson: As part of this Committee's work to look at counter-terrorism policy and human rights over the last five years it has been trying to understand the precise nature and scope of the threat posed by international terrorism, and, frankly, it is really no further on in understanding that than it was five years ago. Bearing that in mind, is it acceptable in your view that the Director General of MI5 should give a public lecture about the state of MI5's understanding of Al Qaeda's capabilities and how that understanding has changed since 2001, but refuses to give evidence to this Committee?

Mr Hanson: I think there are two separate but distinct issues there. I think it is a positive policy development for the Director of MI5 to be open, to be transparent, to be giving public lectures and to be open to scrutiny in a way which I think is the right thing to do in a modern democracy. I think, also, that it is right that he is subject to Parliamentary scrutiny. I think the difference would be as to where his Parliamentary scrutiny lies, and my perspective, and his, and Parliament itself, is that that lies with the Intelligence and Security Committee, and that is where he does provide information and is open to questioning and to scrutiny.

Q67 Chairman: Would you not accept there is a difference here? I will put it to you this way: this Committee was very concerned to see the former Director of MI5 prepared to give a lecture to the Society of Newspaper Editors and answer their questions, in general terms, about the terrorist threat, but not ours. There are two issues here: the ISC obviously has the role of overseeing the security services in detail. Our job is to look at the human rights of the people of this country in the context of any counter-terrorism policy, and we have explored some of the issues already. To do that we do not want to pry into details of operational activities, and all that sort of thing, which is the ISC role; what we want to do is simply ask questions as part of our role, our terms of reference in this House, about the level of the threat, to inform us so we can actually form a view about some of the things we have been asking you about. You have made your assertions about the level of threat and "substantial" and "severe" and all that sort of thing. Fine. That is your view, and we

have got no grounds to challenge it because we do not have any evidence one way or the other to question that. I do not want to start questioning you about why you think one thing is "severe" or not because that is not your job; you go on the basis of the advice you are given. However, I think it is perfectly appropriate for my Committee to be able to ask the same questions on the record in the House of Commons as a newspaper editor is able to ask the Director General of MI5 after a lunch or a dinner.

Mr Hanson: I can accept the frustration that you would have with that view, Mr Chairman, and I fully understand where the Committee will be coming from. I think, again, in public session here there are points that are made with regard to the security assessment and threat which are made to the Security Committee on a regular basis where that committee meets in private and is the responsible committee of this House to look at those assessment issues. That is where the division of responsibility lies currently.

Q68 Chairman: I would challenge that, you see, because you can be responsible to more than one committee. That is the point. The fact that you are here as a Home Office Minister shows that you take your responsibility in these issues seriously because there are two Committees that have different responsibilities in the same policy area: Home Affairs has a responsibility for counter-terrorism policy, of course, but so do we, and we approach it from a different angle. The ISC has a very clear responsibility in terms of holding security services to account. Our approach is very different to the ISC; we want to be able to satisfy the public that the position taken by the Government and the security services is proportionate and necessary in the light of the threat. That is basically the human rights test here. Unfortunately, we cannot give that assurance because we are not allowed to ask the same questions as a newspaper editor. That cannot be right.

Mr Hanson: I have already indicated this in the broader sense. I think that the operational discussions and—

Q69 Chairman: We are not talking about that; that is not what we are talking about.

Mr Hanson: The nature of the discussion from the Director General of MI5 to a Committee like this in public session will be very different than the information he is able to supply to the ISC in a private session, to whom he has an accountability. I will happily, Mr Chairman, reflect on these points and, indeed, discuss them with the Director General of MI5, who directly is not accountable to me, but I will happily raise those issues with him. I think the division to date has been simply on the grounds that the ISC has been charged by this House to look at security matters, to do that in a way that does not compromise the security of the nation and to allow that scrutiny to take place in private session.

Q70 Chairman: Look, I assure you we have no wish to compromise the security of the nation.

Mr Hanson: I did not expect you to, Mr Chairman.

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Q71 Chairman: In fact, one of the overriding human rights obligations of the State is to protect us all from terrorist attack. That is a fundamental human right guaranteed by the European Convention. So that is not what we are about; what we are about, though, is to make sure that what is happening we can satisfy the public, so far as we can, is proportionate and necessary in the light of the threat. We cannot test government policy if we have no way of assessing what the threat is, other than “there is a threat”, which is effectively what you are saying to us today.

Mr Hanson: I am saying to you today that the JTAC assessment is that it is at level 3 “substantial”. I am sure that we can supply information to you which covers why JTAC have made that assessment in detail. In relation to the Director General of MI5, I will reflect on that point; I am simply stating to you today what the traditional House of Commons view has been in relation to the responsibilities of various committees.

Chairman: Let us move on.

Q72 Earl of Onslow: In your article “The case for secret evidence”, you say that the Government has not discarded our age-old freedoms and set up a process of secret courts operating outside our legal traditions and risking our fundamental civil liberties. How then do you explain the unanimous decision of the Grand Chamber of the European Court of Human Rights that the UK violated that right to have the lawfulness of detention decided in a proper court, and the unanimous decision of the Appellate Committee of the House of Lords that “a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him”?

Mr Hanson: I think, Lord Onslow, that we have reflected upon that decision and, as you will know, the Home Secretary responded accordingly, and we have looked at the information that has been held by individuals. We have shared that information, where it is appropriate to do so, and in two cases we have therefore ended the particular action that we had taken against those individuals on the basis that we could not disclose that information. I think we have responded to that judgment in a fair and a practical way which has, hopefully, met the terms of the judgment at the same time as, in my view, helping to maintain the protection of British society.

Q73 Earl of Onslow: I know, and rightly so, that the Government’s first duty is to protect British subjects—no argument about that. However, British subjects also have very, very serious rights, and that is that when they are tried for anything they know the evidence against them. This is something which goes back deep, deep, deep into our history, and if we throw it overboard we go down the road to perdition. Do you accept that the Government has now lost the argument that it is not unfair to keep secret even the gist of allegations against someone?

Mr Hanson: I think that is a fair reflection of how we have interpreted the judgment. Strasbourg, and the House of Lords judgment, did not rule out closed hearings altogether but simply said there should be a minimum level of disclosure. What we have done,

which I believe is compliant with the Human Rights obligations that we have under those laws of judgment, is we have reviewed, as you will know, all of the current cases that we had in relation to that; we have disclosed to individuals the reasons why we believe we needed to take action against them and in two cases, known as *AF* and *AE*, because we did not have sufficient wish to disclose that information in terms of our strong level of evidence we have now dropped the orders and actions against those individuals. So I think we have complied with the order whilst maintaining, from our perspective, actions that we have needed to take in relation to these issues for the reasons I have outlined.

Q74 Earl of Onslow: We have heard that on some control orders the people have vanished into the ether or the suburbs of Bradford (nobody is quite sure which). Under those circumstances, has there been a great damage to national security where people have vanished?

Mr Hanson: Can I say at the outset that it is not the intention of government policy to allow individuals to vanish or to abscond, and I accept that that is not a positive development in relation to the way in which we have approached this issue. I am as disappointed as the Committee will be that seven individuals have absconded in two years; one has been recaptured, and six individuals have not been recaptured. The situation is that those individuals, if we knew where they were, we would try to discover them again and bring them back to our knowledge, but we do not. On the question of whether they are still a threat to society as a whole, the reason we took the initial action is because we believed they were. If we could find them we would still take action upon them. That means that we do accept that they are still a potential danger from the information that we have supplied to them.

Q75 Chairman: Can I put this to you? I wrote to you and you have given us a letter back, as far as you can, about the costs, just the lawyers’ costs, of control orders. You wrote and told me that between April 2006 and October 2009 the Home Office has spent £8,134,012.49 on legal costs. We can park the 49p.

Mr Hanson: I always like to give accurate answers, Chairman.

Q76 Chairman: I am very pleased with a very accurate answer. I think it is fair to assume that the costs of defending control orders and their lawyers is not going to be far different, because the costs of both sides are not usually very far apart. So that is about £16 million. Then you have got the costs of the court hearings themselves, and we know a High Court hearing is several thousand pounds a day incurred in terms of the MoJ. Let us just park that. Let us suppose, once again—and I think this is probably about right—the total cost for lawyers and the legal system is going to be in the order of £20 million over that period. What does it cost, instead of us spending £20 million on lawyers, to spend that

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money on policeman to actually keep proper tabs and surveillance on these individuals instead of the control order regime?

Mr Hanson: There are judgments that we have to make, Mr Chairman, and a lot of those costs that I have indicated to you—and I have indicated to the Committee I will give a fuller breakdown in due course—

Q77 Chairman: That is fair.

Mr Hanson: —are costs related to some of the defence issues in relation to the legal challenges, that Lord Onslow has made reference to, to date. So they are not all in relation to the costs of the control orders themselves; there are significant costs—

Q78 Chairman: You would not be bringing those cases if you did not have the control orders in the first place.

Mr Hanson: We would not be defending those cases had we not been challenged about them, and I think once we have decided government policy in relation to security we need to defend that policy, and sometimes that does result in incurring legal costs that, quite frankly, I wish we had not incurred, but we have. The question for the Committee is: are those costs relevant; are those costs proportionate? Again, given the action that we have taken and the judgment that we have made in relation to the fact that we wish to prosecute where we can, we will deport where we can but there are cases where we cannot do either and, therefore, we found the need to take some action. That is the action we have determined to take.

Q79 Chairman: Exactly. The point I am putting to you, bearing in mind that you have had a number of absconders, and bearing in mind the relatively small number of people on control orders, less than 20 as I understand it—it is about 17 now, is that right? Fifteen now—is it not better to spend £20 million on extra policemen (that is more than £1 million each) to keep these people under very close surveillance, than it is to spend it on QCs and people dressed up in horse-hair wigs? Is it not better to spend that money on more police to keep a very close watch on these people, so they cannot abscond, and keep the public safe, without having to infringe their civil liberties through the control order regime which has proved ineffective?

Mr Hanson: I do not agree that the control order regime has proved ineffective because it has dealt with, so far, 44 individuals in total, and there are currently 15 as of 10 September on control orders now. I regret the fact that individuals have absconded and it is certainly not part of government policy to allow them to abscond. There is an argument that we should have closer surveillance and more involvement in police; we would find similar legal challenges, undoubtedly, in relation to those issues should I have pursued that view. What we are trying to say, and what I have said to you in the letter, is that the £8 million is a cost for our legal

costs but the vast majority of that has been incurred in relation to the legal European battles that we have had.

Q80 Chairman: But if you did not have control orders you would not have those battles.

Mr Hanson: I suspect, Mr Chairman—I cannot give you chapter and verse on this—that had we had individual policemen monitoring individual citizens in their individual properties in the way in which you have described we would also face legal challenges and incur costs in that surveillance.

Q81 Earl of Onslow: One further point on that. The control order system has been used to what we called “internal exile” which was normally used by the Tsars of all the Russias, and, as my Chairman informed me before, also by the Greek colonels. Is this a role model for a Labour Government?

Mr Hanson: Certainly not, but as somebody who both opposed the Greek colonels and has opposed many other oppressive regimes in my time, including the ones in South Africa, I do not agree with that in any way, shape or form. I would simply say that the control order model—and let me put two matters of defence to it—when this order was up for annual renewal before the House of Commons and the House of Lords in June of this year the overwhelming majority of Members of Parliament, including the main Opposition, supported that regime in the House of Commons—

Q82 Chairman: I think that is slightly overstating the case, David; I was there and I spoke in that debate and I heard what Dominic Grieve had to say as well. The view of the Opposition, and indeed, this Committee, was that we were not in a position to challenge the control order regime because we simply did not have the evidence and data and information that we needed to do so. It was not an overwhelming endorsement of the system; it was because we did not have the information we needed to propose an alternative system. That was the nature of that debate. It was only the Liberal Democrats, I think, who were opposing it.

Mr Hanson: There was always an opportunity, after 18 years in the House of Commons myself, to vote against anything I did not agree with, and on the occasion of the last control order debate in both the House of Commons and the House of Lords, there were not sufficient votes against to ensure anywhere near a defeat for the proposal.

Q83 Chairman: I can certainly accept that the Government won the vote but I certainly would not characterise the debate in the way that you did. Let us move on.

Mr Hanson: In response to Lord Onslow, again, I would say that not only do we have Parliamentary oversight and a renewal sunset clause on control orders each year for Parliamentary scrutiny and for Parliamentary approval, we also have judicial oversight and we have Lord Carlile independently

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looking at these issues on a regular basis. I think that level of scrutiny does not strike me, with due respect, as being either Greek or military.

Q84 Earl of Onslow: To go back to the internal exiles, there is a case—and I will not refer to it directly—where somebody who lives in one part of the country is being told to move to another part of the country where his control will take place. That cannot be right, can it?

Mr Hanson: There are occasions—and again I cannot go into individual details—whereby the presence of an individual in a particular community is one of the reasons why that individual has been assessed to have a need for a control order in the first place, because the potential that individual has in a particular community is the reason why we have assessed that he is a potential danger to society in the first place. Those are judgments we have had to make, they are very difficult judgments, they are very small numbers in total—44 and currently 15—but they are judgments that we have had to make in very difficult circumstances.

Q85 Lord Morris of Handsworth: Minister, can we turn, please, to special advocates and secret evidence? Can the Government demonstrate that it has now considered the implications of the judgment of the European Court of Human Rights in *A v UK* for all other contexts in which special advocates and secret evidence are used?

Mr Hanson: I believe we have; I believe we have, Lord Morris.

Q86 Lord Morris of Handsworth: You are confident about it?

Mr Hanson: Yes.

Q87 Lord Morris of Handsworth: If you are, is it possible to give a note to the Chairman just to confirm that?

Mr Hanson: I will happily drop a note to the Chairman, Lord Morris.

Q88 Lord Bowness: Minister, can I go to pre-charge detention? You will know that in our last report at the annual renewal of the terrorist legislation we said, as the Chairman has just referred to, we did not have information really to evaluate the necessity for renewal, and we have also said on a number of occasions that we are concerned about the current arrangements for judicial authorisation of extended pre-charge detention, principally that we think it is not compatible with the right to a judicial determination of the lawfulness of detention. Lord Carlile (if I can just skip ahead) in his Operation Pathway report homed in on, in a very detailed way, and reviewed, the way in which the procedures for extending pre-charge detention operated in practice, which confirmed many of our concerns about the adequacy of the safeguards, and suggested certain reforms. In particular, he made two recommendations: that the police and the CPS should take immediate steps to ensure that their procedures reflect the need for legal advice to the

police at an early stage—expert CPS lawyers should be informed, well before arrests take place, of ongoing inquiries likely to result in arrests, and asked to advise on the state of the intelligence, information and evidence as the inquiry progresses, and, secondly, that all police officers involved in counter-terrorism policing should be trained in the law of arrest and its potential effect on detentions under the Terrorism Act. I think the Home Secretary's response to that report said that action had been taken to streamline and clarify police procedures in line with Lord Carlile's suggestions. Can you tell us what actions have been taken to ensure that the police inform and consult appropriate CPS lawyers before arrests take place? Are there some sort of protocols or memoranda in place dealing with this, and, if so, can we see them?

Mr Hanson: Yes, certainly. I would, also, if I can, Chairman, publicly thank Lord Carlile for his examination of the Pathways report. He has made a number of recommendations and we have issued a letter to Lord Carlile which I am sure I can issue in due course to the Committee in response to those, if the Committee has not had the letter from the Home Secretary; it is in the library in the House, I have been informed, so it is available, but I will make sure, if the Committee wishes it, it can look at that, in due course.

Q89 Chairman: We have got it.

Mr Hanson: Okay. In relation to recommendation three, Lord Carlile did ensure that he said all police officers involved in counter-terrorism policing should be trained in the law of arrest and its potential effect on detentions under Schedule 8 of the Terrorism Act 2000, and we are certainly going to ensure that further guidance is needed on counter-terrorism that looks at investigations and gives training for police officers to ensure that they do have the knowledge and understanding of that legislation, and that is certainly an area that we are very happy to look at. In regards to his recommendation on the police and the CPS, the police and the CPS have agreed a procedure whereby all counter-terrorism units brief CPS officials in advance of arrests, unless there are exceptional circumstances, such as, in the case of Pathway, the need for quick and, in the case of Pathway, unexpected action on that particular day. The CPS is already involved pre-arrest in many terrorism cases and they are consulted by the police. The recommendation does reflect what I believe is normal practice and what I believe should be normal practice for the future. He has made a number of other recommendations which we are currently considering, but I think it is also important that we reflect upon what Lord Carlile said in relation to Pathway in particular, and I quote from his report that he says: "The police had no realistic alternative to arresting . . . some of the suspects . . . that the arrests were made on the basis of intelligence assessments . . . the way in which the arrests were carried out was correct and . . . the current law relating to the use of intercept material would not have made any difference in this particular case".

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Whatever recommendations he has made, which we will consider seriously, his view, I believe, and I reflect this, is that Operation Pathway, urgently undertaken though it was, did have the basis for action and was justified in relation to the evidence before the officers at the time.

Q90 Lord Bowness: You mentioned Schedule 8 of the Terrorism Act. Will you consider amending it to make it clear that the judge who hears the application for an extension must apply an evidential test when deciding whether or not to extend the detention?

Mr Hanson: If I may, I would like to consider that point because to-date I have not had that point looked at in detail, but I will certainly respond to the Committee in due course, if that is acceptable.

Q91 Lord Bowness: I think it is suggested that if you have not thought about that, Minister, then maybe the PACE Code of Practice could be amended to ensure that it is explained to police why Article 5 of the ECHR is relevant to extensions of pre-charge detention and what its requirements are, and to make it clear that continued detention of terrorism suspects is likely to become unlawful if they are not told what offences they are supposed to have committed, and the reasons for their arrest.

Ms Byrne: They are, in the course of the investigation, given some material and are questioned about what they know which has prompted the police to take action. If the police do apply to the courts to hold people for longer than the initial period then they increasingly have to tell the courts why they are applying to hold somebody for longer; they have to give more detail, they have to justify that the detention, if it continues, is for the purposes of the investigation and that they are proceeding as quickly and diligently as possible. We will certainly look at the point you have raised again.

Q92 Lord Bowness: Are you going to have a similar detailed review of the pre-charge detention of the individuals who were arrested in relation to the Heathrow airline plot?

Ms Byrne: I do not think we have had a retrospective one.

Q93 Chairman: We have been promised one. That has been promised to the House on a number of occasions. Every time we have debated pre-charge detention in the House we have been told: “Yes, there will be analysis of these cases in due course”.

Mr Hanson: Again, we will certainly look into that and report back to the Committee, Mr Chairman.

Q94 Chairman: It is a question I have raised, I think, three years running on the extension of the current powers.

Mr Hanson: Part of the problem with ministerial life is I was in the Ministry of Justice at the time sorting out other matters, but we will look back at those issues for you and promises given by previous Ministers.

Chairman: Thank you very much.

Q95 Lord Dubs: Just turning to something which you may remember from your Northern Ireland days, which is about bail. Lord Carlile pointed out that bail has always been available in relation to terrorism offences in Northern Ireland, even during the Troubles. Why should it be available there but not in the rest of the UK?

Mr Hanson: It is an interesting point. We have discussed this with the police, with ACPO, and with other agencies, and the advice that we have been given is that the level of offence for individuals and the type of offence that has been considered to date is not suitable for bail, and that was the advice given to us by operational police officers, and that is the advice we have accepted.

Q96 Chairman: That is funny, because they told us different when we met them at Paddington Green, for example, and other offices. The point about it is that you have got two different types of terrorist offences, have you not? You have got the guys who go around planting the bombs and all the rest of it (and I do not think anybody would argue that bail should be for them), but you also have people very much on the periphery of these terrorist plots who are not themselves likely to go around planting bombs; they are people involved in, maybe, raising the money or writing the computer information for them and all the rest of it, and the reason that they are under arrest is while their computers are analysed; they have no direct knowledge about them. Is there a case for saying that people—because we have a law that says you have to shop a terrorist—who have a relation who has shopped them, for example, and they are not a terrorist threat in their own right and who are very much on the outskirts of the plot, should be entitled to bail?

Mr Hanson: I think there could be an argument that an individual may not always be known to be on the periphery and somebody might be on the periphery but may not be. I think the judgments that we have had from the police is that in these types of offences bail should not be available because of the risk to public safety that might be involved.

Q97 Chairman: Just because bail is available does not mean to say it is going to be granted. That is the point. At the moment, even if it turns out to be someone right on the edge of a plot—a conspirator, third cousin fourth-removed, who has heard a whisper at the mosque and did not bother to shop the individual concerned and is then rounded up in the “usual suspects” sort of way—those people themselves are not potentially dangerous but because there is no option but to keep them in pre-charge detention they are held in detention. Should there not be, at least, an availability of bail—I am not saying it should be granted—in the cases where people are very much on the outskirts of these plots; where they are not a flight risk, where they can be subjected to the sort of restrictions of a control order as a bail condition, and all the rest of it? Is there not a case for saying that bail should, at least, be

available in those cases? Or are we saying: “No matter how remote you are from a particular plot, no matter how much you are just on the edge of it, you will be banged up until we have completed our investigations”, which could be for up to 28 days?

Mr Hanson: The judgment that we have made at the moment is that those who are detained under section 41 of the Terrorism Act 2000 are precisely the sort of individuals who we need to examine in detail before the 28-day period to look at those charges. The advice to us from the police is that it would not be appropriate, and that is the formal operational advice that we have had. I accept what Lord Dubs has mentioned in relation to potentially different regimes operating in Northern Ireland. We have, from the police, operational advice and, I am afraid, I do not want to be the Minister who supports the application for bail for individuals and then finds that those individuals undertake actions against the State.

Q98 Chairman: We did not think up this idea of bail; I did not think up this idea of bail; this idea of bail came to us when we visited Paddington Green and when a senior officer said it would make a lot of sense if we could bail some of these people on the outside of the—This is the guy who is actually running Paddington Green.

Mr Hanson: The guy who is running Paddington Green might want to make representations to ACPO, who are running the police advice to Ministers about these matters, and ACPO’s advice to us is that we should not have bail. Indeed, as Catherine has just mentioned to me, the CPS advice, also, is the same.

Q99 Chairman: Let us move on. After the 42-day issue—

Mr Hanson: That is a good word for it.

Q100 Chairman: I am trying to think of a neutral word! I am pleased we both agree it is an issue. The Government published a draft Bill on the 42-day pre-charge detention published by Jacqui when she was Home Secretary, following the 42-day defeat. This was the draft thing that was to have a sunset clause of up to 60 days, and all the rest of it. Is this still part of the Government’s plans?

Mr Hanson: We have a draft Bill, and it is in reserve and it is available, but we have not, as yet, determined through policies and the Home Secretary to bring that Bill forward because the debate on 28 days is, effectively, the settled will of both Houses of Parliament for the moment. We have the renewal order on 28 days, it has been renewed for a period post the General Election, and unless the circumstances change I do not envisage that situation changing.

Q101 Chairman: Of course, we had that statement from the Secretary of State for Justice that the time had come to review counter-terrorism policy with a view to, probably, downgrading some of this, which was in a speech I think he made in May.

Mr Hanson: I think there are two issues. We have the renewal of 28 days for a period which takes us beyond the General Election. I do not envisage the circumstances changing between now and the General Election, and that will be revisited either with the 28-day renewal order or, if circumstances change, the draft Bill being brought forward.

Q102 Chairman: In what way would circumstances have changed that would encourage you to bring this Bill forward again to the House?

Mr Hanson: In the event that I hope will not occur when the terrorist threat increases dramatically or when other serious offences happen, there may be, as there will be, examination of the Government’s response to those issues. The Government has had a view on 42 days; the Houses of Parliament, both Houses, have expressed their strong reservations about that view. We have settled on 28 days, we have an order which is now operational for a period of time to its expiry, which will be in mid-2010, and that will be post the General Election and I think, unless there is a major spike in some public emergency issue between now and then, that will not be revisited between now and then.

Q103 Chairman: What about going below 28 days back to 14 days, bearing in mind that 28 days has hardly ever been used?

Mr Hanson: At the moment—and I cannot comment in any other way that I have done—28 days is the option. It has always been, as it was in the debate we had during the previous Parliamentary consideration of this matter, up to—

Q104 Chairman: Twenty-eight days is the exception, is it not?

Mr Hanson: As I say, it is up to 28 days. The point I am making is that in the Parliamentary debate we had in the summer the fact is that most detentions have not been 28 days. We have given an order for up to 28 days—

Q105 Chairman: That has not been used for two-and-a-half years.

Mr Hanson: That order is available until it is renewed next year, and the government will consider between now and then issues we have talked about already: the scale of the threat, the use of the order to date in pre-charge detention terms and the amount of hours and days that people have been held. We will re-visit that dependent on the level of the threat and the consideration at that time of the renewal next year.

Q106 Chairman: One of the other things that we have been promised repeatedly on these renewal debates, and indeed on the 42-day debate as well, although I could not swear to that but certainly on the renewal debate, is that we were going to get a research study on the impact upon the communities most directly affected of counter-terrorism legislation, including pre-charge detention. We were

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told that we were going to get this by late November 2009. We are now in early December. When is it going to appear?

Mr Hanson: I accept that, Chairman, and the report was due to be produced by the end of November, which, as I recall, was yesterday and today is the beginning of December, and I believe that we will be able, hopefully, to look at producing this report in relatively short order for the public and for the Committee.

Q107 Chairman: Before the Christmas recess?

Mr Hanson: I think we need to say in relatively short order, but please rest assured that the commitments that were given by the previous Home Secretary to produce a report by the end of November, whilst not being met in practice, will be met in spirit very shortly.

Q108 Earl of Onslow: The House of Commons Reform Committee recommended that the Chair of the Intelligence and Security Committee be elected by the House of Commons rather than appointed by the Prime Minister. Any plans?

Mr Hanson: No plans at the moment.

Q109 Earl of Onslow: Why not?

Mr Hanson: The position at the moment is that to date the Intelligence and Security Committee has been an appointment in the gift of the Prime Minister. That was established under the former Prime Minister, Tony Blair, and it has been continued under the current Prime Minister, my right hon friend, the Member for Dunfermline East, and I expect that will continue for the future. However post general election all issues can be examined. I am sure that my right hon friend reflects on these matters on a regular basis but I cannot see at the moment any circumstances, and that decision anyway, Lord Onslow, with due respect to myself, is likely to be above my pay grade.

Earl of Onslow: I think we had better let it go at that. It is fairly obvious that no Executive is going to allow some power to slip through its fingers without it being prised away.

Q110 Chairman: Can we move on, you will be pleased to hear, from terrorism policy and I just want to ask you some questions about policing and protest. Denis O'Connor published his report last week and certainly I thought it was a very good analysis of the position of how we drifted into the scenario that created the G20 protest and all the problems with that and he came forward with some very sensible ideas for looking forward. In your interim letter to us earlier on in the year one of the key things you agreed with us about was good communication between police and protesters, and that containment (kettling) and force should be used proportionately. We have actually moved on from that in Denis O'Connor's report where he talks about the "minimum" use of force rather than the "proportionate" use of force, which is again a very welcome consideration. How do you think these

things can be achieved and what are you going to do to try and make sure that all police officers comply with these goals?

Mr Hanson: I very much welcome Denis O'Connor's report and indeed I very much welcome the report from the Committee here today on these issues because I think we need to get a general consensus where the public, protesters and the police know the framework and operational boundaries of where they are operating, and there is a general understanding of what are acceptable forms of protest and how they are policed and managed. We are currently examining Denis O'Connor's report. Again I will tempt the Committee by saying that in very short order we will be producing a White Paper which will, I hope, respond to some of these issues and set a framework for discussion with a clear timetable as to when we can reach a conclusion on these issues. I hope that again very shortly that White Paper will do several things: set the broad principles of policing of protests; set the responsibilities and areas of work we believe the public, protesters and the police should operate within; and set a timetable for us to discuss with the police and others how we reach a conclusion on these issues over the next few weeks and months.

Q111 Chairman: You promised us a response by 9 December so are we talking about that sort of order for your White Paper?

Mr Hanson: The White Paper will be produced in very short order, Chairman. I am not at liberty through parliamentary protocol to say when but I would not expect it to be too far away.

Q112 Chairman: Thank you very much. Are we going to be seeing a timescale for dealing with Denis O'Connor's recommendations?

Mr Hanson: The intention, without trailing too much the contents of the White Paper that I have just told you I cannot tell you about, is the White Paper itself will indicate, I am sure, that we will wish to have discussions with senior officials of ACPO and with other interested parties, with a view to embedding the comments and suggestions of Denis O'Connor, and indeed the JCHR Committee, in guidance to police forces over a short period of time.

Chairman: That is very helpful. There is obviously no point in me asking you any more questions about it because you will not answer them with the White Paper coming. Perhaps we can go on to a couple of questions on human trafficking to wind up.

Q113 Lord Bowness: Do you have any plans to close the UK Human Trafficking Agency in Sheffield or relocate it within SOCA or the UK Border Agency? I should say, Minister, that some of us went there a week or so ago and were really very impressed with what they were doing. I suppose I am indicating where my question is coming from. There are 38 people there, a very small management board, and they seem to be extremely efficient and very focused on what they are doing. I think we would fear that some of that might be lost if it wound up in a division of a much larger body.

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Mr Hanson: I hope I can help the noble Lord, Lord Bowness, by saying there are no plans to close the centre in Sheffield.

Q114 Lord Bowness: Are there any plans as of 1 April 2010 to end its current legal status, which I believe, although perhaps something of an anomaly, but because it started there, for pay and rations, is strictly speaking part of South Yorkshire Police even though the money comes from the Home Office? My understanding, and I think the understanding of others who were there, was that that situation was not being tolerated any longer by government and it had to go somewhere else.

Mr Hanson: I think we are looking at it as a legal entity and there are technical issues around its legal status, but that will not, in my view, impact upon the location or the operations in Sheffield. It is simply the legal technicality of where that ultimately reports to.

Q115 Lord Bowness: So there is a possibility that it could actually go to SOCA or the Border Agency and become part of that organisation?

Mr Hanson: We are currently considering the legal nature of the Human Trafficking Centre, but I want to reassure the Committee that that will not alter its location or its operation. It is simply the legal technical view of the legal entity which we have not yet finalised in terms of decisions. I am sorry if through my colleague who is dealing with this matter, Alan Campbell, the Member for Tynemouth and Parliamentary Under Secretary of State, that the impression has been given of the potential closure of the centre. That is not the case.

Q116 Lord Bowness: Perhaps I should not have used the word “relocated”. I do not think we were under the impression that it was going to be moved out of the building. It is a question of where it rests as an entity.

Mr Hanson: I appreciate that and my colleague, the Parliamentary Under Secretary of State, is currently considering that and he has not reached a final decision. He is looking at the legal entity, which I believe is of a technical nature, but there are no plans in relation to relocation in the broader sense, so I hope that be will resolved through discussion and negotiation when the Minister has made a final decision on it.

Q117 Lord Bowness: Is it becoming a separate entity, I suppose to be strictly accurate, an option?

Mr Hanson: All options are options and the Minister, my colleague, is looking at these options now and has not made a final decision but is aware of the concerns that have been expressed. The objective is to look at the legal entity, which I think is a technical matter, and to ensure that we build on the success of the Human Trafficking Centre, not to put its future into doubt.

Q118 Chairman: Before we move on, this is very, very important to us, David, and in particular that if any decision is taken it should not be the UK Border

Agency because when we started looking at trafficking, which was pretty well at the start of this Parliament or maybe a year in, one of the real issues that was coming up was the way that trafficking was seen as a migration issue rather than a criminal justice issue. One of the problems we had all the way along was getting the Home Office to accept the Convention and all the rest of it because of the alleged pull factor which was coming out of the immigration department of the Home Office, whatever it happened to be called at the particular time. We think it would send entirely the wrong message, even if it made no difference to the operation, if somehow it was reporting to the UK Border Agency. SOCA would be a better home for pay and rations reporting arrangements but the UK Border Agency would be entirely the wrong place to put it, in our view.

Mr Hanson: Can I say again that no decision has been taken. My colleague is looking at this as part of his ministerial duties.

Q119 Chairman: I am just putting in a plea.

Mr Hanson: I note the view of the Committee and of Lord Bowness in relation to those matters and I will reflect those back to the Parliamentary Under Secretary who is currently considering these issues.

Earl of Onslow: It just seems that if it is really working well—and I was not one of those who went there—it seems an awful pity to mess about with it, even legally. Is it not possible to say that technically, yes, it would be better in house A as opposed to house B and leave it where it is because it is working so well? Do not mess it about if it is working well and it is working well under its present umbrella.

Chairman: It is the old saying “if it ain’t broke don’t fix it”.

Q120 Earl of Onslow: It was rather a pompous way of saying exactly that.

Mr Hanson: Those are the very issues that we are currently considering. I cannot prejudge the outcome of those but I do understand the views of the Committee and the very strong affinity with the work that is being undertaken in Sheffield currently.

Q121 Lord Bowness: In a trafficking sense can I touch on the Metropolitan Police Unit which I guess you might say is a matter for the Metropolitan Police Authority, Minister.

Mr Hanson: I fear I may say that.

Q122 Lord Bowness: I fear you may but what is not a matter for the Metropolitan Police Authority is where the money comes from and in 2007 it was fully funded by the Home Office. It was cut by 50 per cent for this current year and now the money will disappear altogether for 2010. This is the trouble with all government initiatives under governments of all colours: they encourage local government or things similar to local government to embark on initiatives that are funded; it all gets started and then suddenly the funding trails off. Is it not really

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unfortunate and ought it not to be reconsidered whether the funding should be reinstated or maintained at the very least at its current level?

Mr Hanson: Again, I fear I may say that these are operational decisions for the Metropolitan Police Authority and for the Commissioner of Police in London. We give a grant to them to undertake policing activities. We have funded initially the Human Trafficking Centre but it was on the understanding that that funding would end and on the ending of that funding they have to make operational priorities as to where they want to put those resources. That is a decision that the Mayor and the Commissioner and the Authority have taken and it is not for me to interfere in that, simply to say that only last Thursday we have given an overall increase of 2.7% for next year, and in an inflationary time of lower than 2.7% that gives some flexibility for them to look at using some of that resource in other ways if they so wish.

Q123 Chairman: You have two different things here, David. On the one hand, if I go and see my borough commander, as I regularly do, he tells me the pressure is on the OTU budget for his particular borough and you get the trade-off between the safer neighbourhood team and the Human Trafficking Centre. It is not a very healthy position to be in. I think there is one particular point that needs to be borne in mind here and that is the 2012 Olympics. We know from around the world that when you have these enormous sporting occasions, whether it be the Olympics or the World Cup or whatever it is, there is a tendency for a greater degree of prostitution to arrive and a lot of the prostitutes may well end up being trafficked. It is going to be a growing problem in the run-up to the 2012 Olympics. Is there any prospect of looking at this again in the context of the 2012 Olympics to ensure that the Met are able to continue this without impinging on the day-to-day policing of the city in my constituency or indeed Virendra's or any other London MP's constituency?

Mr Hanson: Again, the job of the Policing Minister is to set some overall priorities and to set overall budgets, but the bottom line is local policing is about local policing, and the funding of that Centre and the priorities that the Metropolitan Police put to that Centre are, quite rightly, matters for the Metropolitan Police, the Commissioner and the Mayor. It is the same in my own constituency and others. I would not expect to be operationally

deciding budget allocations for chief constables across the board. Those decisions have been taken and it is not for me to criticise them or support them; it is simply for me to say that is their priority at a local level and that is what we are trying to do in terms of our approach to policing.

Q124 Chairman: The Metropolitan Police area is the biggest place for these problems, although I fully accept it is all over the country, and really where the wealth is driven from and, with the 2012 Olympics coming, do you not agree it would be a bit of a shame, having got the specialist unit set up in the Met, if we did not have a unit with this experience and an intelligence centre that had developed over the years on how to deal with this particular problem simply because it is a choice between whether we have a safer neighbourhood team in my constituency or whether we have this in Scotland Yard?

Mr Hanson: It is a choice between how we use the resources generally. It is not a choice necessarily between a safer neighbourhood team and a human trafficking unit in a particular police area. It can be the choice between how we use those resources, and I know the Met for example are looking now in certain areas at single policing patrols to reduce costs, they are looking at back room staff, they are looking at better procurement, and the White Paper indeed itself will look at equipment procurement that will save resources. That resource can be used according to operational needs. It is not my job, with due respect to the Committee as a whole, to be the Metropolitan Police Commissioner or the Metropolitan Police Authority. They have made those choices as to how to allocate those resources based on their operational needs at a local level and I have to respect that.

Q125 Chairman: I think we have finished our questioning. Is there anything else you would like to add to anything you have had to say to us?

Mr Hanson: No, Chairman. What I will do is I will reflect upon the points that we have mentioned today and if there are issues that I have said I will write to you on, I will write to you within a week on those issues. If there are other points that I think I should elucidate upon I shall try to do so accordingly. Thank you for your interest in these matters.

Chairman: Thank you for answering our questions. The Committee is adjourned.

Letter from the Rt Hon David Hanson MP, Minister of State, Home Office to the Chair of the Committee

During my oral evidence session on Tuesday 1 December I undertook to write to the Committee on a number of points.

You asked me to provide details of which versions of the guidance to the security and intelligence agencies on the detention and interviewing of detainees overseas have been provided to the Intelligence and Security Committee (ISC). The ISC does not discuss evidence provided to it except through its published reports. However, I can confirm that following the Prime Minister's statement in March this year, all current versions of relevant guidance were provided to the Committee in May. These were then consolidated into a single version which was provided to the ISC on 18 November 2009. The consolidated guidance is based on the same principles set out in previous documents. It differs in that it applies to both Ministry of Defence

(MOD) and Agency personnel, and that it aims to achieve two key objectives: to provide clear guidance to staff on issues relating to the interviewing and detention of individuals overseas, and to provide public reassurance as to the practices of Agency and MOD personnel engaged in this work.

The ISC reports on *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* (Cm 6469, published 2005) and *Rendition* (Cm7171, published July 2007) clearly show that the ISC has previously been provided with earlier guidance material.

The Committee also raised the issue of the Director General of the Security Service (MI5) giving evidence to the Committee. As I agreed to do, I have raised the Committee's request with Jonathan Evans and he is currently considering it.

As I mentioned at the evidence session, the current threat to the UK from international terrorism is judged by the Joint Terrorism Analysis Centre (JTAC) to be substantial, meaning that an attack is a strong possibility. Substantial indicates a continuing high level of threat and that an attack might well occur without further warning. Decisions on the threat level are taken by JTAC independently of Ministers and are based on the very latest intelligence, considering factors such as current capability, intent and timescale. For obvious operational reasons, I cannot go into the details or discuss the specific intelligence that JTAC uses to come to its overall judgement.

The threat level is kept under constant review and can change—up or down—at any time in the future. As substantial continues to represent a high level of threat and that an attack could take place at any time, there has been no significant change to policing arrangements and security procedures.

I will write to the Committee on the other commitments I gave in due course.

10 December 2009
