



House of Commons
Home Affairs Committee

The Government's Counter–Terrorism Proposals

First Report of Session 2007–08

Volume I



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Report, together with formal minutes

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The Home Affairs Committee

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Committee staff

The current staff of the Committee are Elizabeth Flood (Clerk), Jenny McCullough (Second Clerk), Elisabeth Bates (Committee Specialist), Sarah Harrison (Committee Specialist), Mr Tony Catinella (Committee Assistant), Mr Ameet Chudasama (Chief Office Clerk), Sheryl Dinsdale (Secretary) and Ms Jessica Bridges-Palmer (Select Committee Media Officer).

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Summary

It is clear both from the evidence given to us and from other sources, such as the speech made by the Head of the Security Service to the Society of Editors on 5 November 2007 that the terrorist threat facing the UK is real, acute and growing. Therefore, any request by the police authorities to extend the maximum period for which terrorist suspects can be held without charge has to be treated with great seriousness.

However, neither the police nor the Government has made a convincing case that the current limit of 28 days is inadequate at this time.

In our Report last year, we said that the current limit might prove inadequate in future. Both the Home Secretary and more particularly the Commissioner of the Metropolitan Police said that they could foresee circumstances where an extension would be necessary. We also note that some of those opposing an extension at present, such as the Opposition Spokesmen and Lord Goldsmith, did not rule out the possibility that an extension might be needed in the future.

We considered the proposal from Liberty, that Part 2 of the Civil Contingencies Act (CCA) 2004 could be used in exceptional circumstances where the complexity of the suspected terrorist plots was likely to overwhelm the capacity of the police and security services. However, we concluded that this was not an intended use of the powers under the CCA, that there were significant legal problems and that it would not be sensible for a national state of emergency to be triggered in the middle of a major investigation.

If, in these exceptional circumstances, a temporary extension of the pre-charge detention period is deemed essential to secure successful prosecutions of terrorist suspects, the Government should consider building support for proposals that effectively reform the powers of the CCA, secure Parliamentary scrutiny and judicial oversight, but stop short of the requirement to declare a full-scale state of emergency. We urge the Government to begin urgent discussions with other parties on this basis.

We also recommend that the law is changed to allow the use in court of intercept evidence obtained by UK security agencies; that the police should be allowed to continue to question suspects after charge, and that inferences could be drawn from any refusal by suspects to answer such questions.

1 Introduction

1. On 27 June 2007 we announced that we would hold a short inquiry into the Government's proposals for new counter-terrorism legislation, as set out in the then Home Secretary's statement to the House on 7 June.¹ On 27 July we issued a further call for evidence, in the light of the more detailed position papers issued by the Government the previous day.

2. Much the most controversial of the Government's proposals is that to extend the right of the police to detain terrorism suspects without charge beyond the present limit of 28 days—itself agreed by Parliament less than two years ago. In our short inquiry we therefore focussed particularly on this proposal.

3. During October and November 2007 we took oral evidence from the Metropolitan Police, the independent reviewer of terrorism legislation (Lord Carlile of Berriew QC), representatives of JUSTICE and Liberty, the Home Secretary, the Director General of the Prison Service, the Governor of HM Prison Belmarsh, Mr Mohammad Abdulkahar and Mr Abul Koyair (members of the public who were arrested in the counter-terrorist operation in Forest Gate in June 2006 and subsequently released without charge), Rachel North (who was injured in the terrorist attacks in London on 7 July 2005), the Conservative and Liberal Democrat Shadow Home Secretaries, Rt Hon Lord Goldsmith, QC (the former Attorney General) and the Director of Public Prosecutions. We also met Mr Jonathan Evans, Director General of the Security Service, whose views, as expressed in his speech of 5 November 2007 to the Society of Editors, have informed this Report. We received 21 written submissions. We are grateful to all those who provided us with written or oral evidence.

4. The Government announced in the Queen's Speech on 6 November that it will bring forward legislation to strengthen the law on terrorism. The Bill is expected to be introduced early in 2008.

5. While we were considering this Report, the Home Secretary announced on 6 December updated proposals for a 42-day limit to pre-charge detention, amongst other things. We intend to look at these proposals in detail once the Government has published its Bill.

1 HC Deb, 7 June 2007, col 421–423

2 Pre-charge detention powers

Background

6. In early 2006 we carried out an inquiry into 'terrorism detention powers'. Our report, published in July 2006, contained a detailed examination of the original police case for an extension of the maximum limit on pre-charge detention to 90 days.² The paragraphs which follow present a summarised version of the background information given in that earlier report. Fuller information is given in the report itself, which is readily accessible on the internet.

7. One consequence of the adversarial nature of the criminal process in England and Wales and elsewhere in the UK is that once a person has been charged the police and other prosecuting authorities cannot question him further about the offence with which he has been charged. The police may detain a person for questioning but once the maximum period of detention has been reached the person must either be charged or released and if he is charged he may no longer be questioned.

Increases in police powers, 1974–2006

8. The Police and Criminal Evidence Act (PACE) 1984 gives the police a power to detain those suspected of an offence under the general criminal law for up to 36 hours before charges are brought. With the authority of a magistrate, this period can be extended to a total of 96 hours.

9. Since 1974 additional detention powers have been available to the police in respect of terrorism suspects. The *Prevention of Terrorism (Temporary Provisions) Acts* permitted police detention of a person suspected of involvement in acts of terrorism for up to 48 hours following arrest (72 hours in Northern Ireland), and for a further period of up to five days if approved by the Secretary of State.

10. The *Terrorism Act 2000* extended the maximum period of detention for terrorism suspects to seven days, subject to new arrangements for judicial rather than ministerial authorisation for detention beyond the initial 48 hours, by means of a 'warrant of further detention' issued by a judicial authority.

11. The *Criminal Justice Act 2003* amended the 2000 Act to increase the maximum period from seven to 14 days.

The current situation

12. The *Terrorism Act 2006* further extended the maximum period, from 14 to 28 days. Judicial authority is required for extensions beyond the initial 48 hours, in steps of seven days (or for shorter periods if the police so request). Up to 14 days the application is to a designated magistrate; between 14 and 28 days it is to a High Court judge. Between 14 and

2 Home Affairs Committee, Fourth Report of Session 2005–06, *Terrorism Detention Powers*, HC 910-I (hereafter 'Terrorism Detention Powers')

28 days, all applications to extend are considered and made by the Crown Prosecution Service. This 28-day limit has been in operation since 25 July 2006.

13. The Government's bill as originally introduced had proposed an extension to 90 days, but during passage of the bill the House agreed to an amendment proposed by Mr David Winnick MP substituting 28 days.³ During remaining proceedings the Government did not seek to overturn this decision.

The Home Affairs Committee's 2006 report

14. Our July 2006 report on *Terrorism Detention Powers* considered the arguments for extending the maximum pre-charge detention period; the value and effectiveness of safeguards provided by judicial oversight and possible alternatives to extending detention powers.

15. A précis of our main conclusions is set out below.

- The Government was at fault in not challenging critically the advice received from the police that an extension of the detention limit to 90 days was desirable, and there was a “lack of care” in the way the case was promoted.
- It is important to take into account the effect on the Muslim community of a longer period of detention, which carries the danger of antagonising many whose co-operation the police need.
- The nature of the terrorist threat has changed since the days of Irish republican terrorism. Recent developments have included the primacy of the intention to cause indiscriminate mass casualties; the new phenomenon of suicide bombers in the UK; and the international basis of terrorist conspiracies.
- The difficulties adduced by the police as reasons for extending the detention period often apply in combination in individual cases, with a cumulative impact on the progress of the investigation.
- There is an increased need for arrests at an early stage of investigations in order to safeguard the public and disrupt conspiracies. The preventative nature of some arrests under the Terrorism Acts should be given more explicit recognition. (In its reply the Government argued that “the idea that arrest and detention of some terrorist suspects is carried out solely as a ‘preventative’ measure is misleading”.⁴)
- Recent investigations have gone close enough to 14 days to justify Parliament's decision to extend the limit to 28 days, although this requires a strengthening of judicial oversight.
- “None of the evidence we have reviewed of current and recent investigations would have justified a maximum detention period longer than 28 days. But the growing number of cases and the increase in suspects monitored by the police and security

3 On 9 November 2005, during consideration stage of the Terrorism Bill

4 The Government reply to *Terrorism Detention Powers* was published as Cm 6906, 5 September 2006

services make it entirely possible, and perhaps increasingly likely, that there will be cases that do provide that justification. We believe, therefore, that the 28 day limit may well prove inadequate in future.” (paragraph 143)

- “We have seen no evidence that a maximum of 90 days pre-charge detention is essential, rather than useful. The police did not press strongly for this maximum, while technical witnesses, generally in favour of as long a time as possible, did not seek to argue that 90 days was in itself a significant period.” (paragraph 145)
- The passage of the Terrorism Bill 2006 through Parliament was divisive. A committee independent of Government should be created to keep the maximum detention period under annual review and to recommend any changes that may be desirable. A period of detention longer than 28 days should be proposed only if there is “compelling evidence” in favour. (In its reply the Government rejected “at this stage” the proposal for an independent committee.)

The JCHR report (July 2007)

16. The Joint Committee on Human Rights (JCHR) issued a report on 30 July 2007 which dealt with pre-charge detention amongst other issues.⁵ It welcomed “the recent significant change of approach and tone in Government pronouncements on counter-terrorism”.⁶

17. The report called for greater scrutiny of the operation of the existing 28-day power: in particular, an annual independent review, available to Parliament in advance of each annual renewal of the power, setting out the circumstances in which the power had been used in the previous year; and an in-depth scrutiny of the operation in practice by the Metropolitan Police of the power to detain beyond 14 days (possibly to be carried out by the Metropolitan Police Authority).⁷

18. The JCHR was “not convinced” of a need to increase the limit on pre-charge detention from 28 days.⁸ It argued that any extension would be “an interference with liberty that requires a compelling, evidence-based demonstrable case”, and that:

In our view, on the information currently available to us, the justification which is offered for further extending the 28 day period does not meet the strict test of necessity which must be satisfied where any new power would constitute an interference with personal liberty. A power with such a significant impact on liberty as the proposed power to detain without charge for more than 28 days should in our view be justified by clear evidence that the need for such a power already exists, not by precautionary arguments that such a need may arise at some time in the future.⁹

5 JCHR, 19th Report of Session 2006–07, *Counter-terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning*, HC 394/HL Paper 157

6 *Ibid.*, summary

7 *Ibid.*, paras 43–44

8 *Ibid.*, summary

9 *Ibid.*, paras 42, 52

19. The report recommended “thorough scrutiny of the evidence, stronger judicial safeguards and improved parliamentary oversight”. It considered that there should be an upper limit on pre-charge detention and that Parliament, not the courts, should decide that limit after considering all the evidence. It argued that there were alternatives which would “significantly reduce the need for longer pre-charge detention”: for example, the flexibility introduced by a lower ‘threshold test’ for charging developed by the CPS, and active judicial oversight of the application of the post-charge timetable.¹⁰

The Government's July proposals

20. In its July 2007 papers, the Government argued that the decision to increase pre-charge detention limits to 28 days had been justified by subsequent events: “we have been able to bring forward prosecutions that otherwise may not have been possible”. They stated that the Government believed it was right to increase the limit beyond 28 days but wished if possible to build broad agreement on the way forward.¹¹

21. Given the sensitivity of the issue, the Government issued a separate paper, *Options for pre-charge detention in terrorist cases*. This argued that there was fresh evidence for extending the limit, and set out four “serious options that should be considered”: (1) legislation to extend the limit coupled with additional safeguards; (2) the same option but with the powers not coming into force until after a further parliamentary vote; (3) using powers under the Civil Contingencies Act 2004 to authorise a temporary extension of the limit in an emergency; and (4) setting up a system of judge-managed investigations on the continental model. Further details of these options are given in the boxes below.

Option (1): Legislation to extend limit coupled with additional safeguards

This was originally the Government's preferred option. No new limit was specified—it would be for Parliament to set down a maximum. The suggested safeguards would be:

Each application for seven days' extension beyond 28 days to be approved by the Director of Public Prosecutions before being decided by a High Court judge

Home Secretary to notify Parliament of any extension beyond 28 days, giving detail of the individual case, with an option for the House to “scrutinise and debate this”

The independent reviewer of terrorism legislation to make an individual report on any case going beyond 28 days

Continuation of the present requirement for an annual parliamentary debate on renewal of the powers.¹²

10 JCHR, 19th Report of Session 2006–07, *Counter-terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning*, summary and paras 53–54

11 Home Office, *Possible measures for inclusion in a future counter-terrorism bill*, 25 July 2007, para 12

12 Home Office, *Options for pre-charge detention in terrorist cases*, 25 July 2007, p 10

Option (2): As Option (1), but with the powers only to come into operation following a further decision in Parliament

This option envisaged primary legislation to extend the limit, as in option (1) above, but with secondary legislation under the affirmative procedure needed to activate the new powers. It was assumed that this would happen "in the middle of what might be a national emergency in the wake of major foiled or actual attacks". The Government did not propose a specific new limit but argued that there should be a maximum laid down by Parliament.¹³

Option (3): Use of powers in the Civil Contingencies Act

The Government drew attention to a proposal by Liberty that emergency powers under Part II of the Civil Contingencies Act (CCA) 2004 could be invoked in specified circumstances. This would enable suspects to be held for a further 30 days beyond the initial 28 days. However, it would require the declaration of a state of emergency, and approval by Parliament within seven days.¹⁴

Option (4): Judge-managed investigations

This is arguably the most radical of the options. It would involve specialist circuit judges assigned to cases after 48 hours detention:

"They would oversee the investigation to its conclusion and would reflect the rights of the suspect as well as the needs of the investigation. This would be similar to the examining magistrates' model in some other countries, such as France and Spain. This would require a major shift in the way in which cases are investigated and in the adversarial system of prosecution used in this country. But given the scale of the challenge we face, we believe it is right to consider this option alongside the others."¹⁵

The case for extending the 28-day limit

22. The Government's July 2007 paper set out similar arguments to those we considered in 2006: that the threat from terrorism is severe, that it is quantitatively and qualitatively different from previous threats, and that the complexity of cases is increasing, in terms of material seized, use of false identities and international links.¹⁶

23. The paper provides the following evidence in support of these contentions, in addition to that presented in 2006:

- The police and security service are currently working to contend with around 30 known plots, and over 200 groupings or networks, totalling around 2,000 individuals. This is not a spike but a new and sustained level of activity.
- The number of people charged with an offence after arrest under terrorism legislation grew from just over 50 in 2004 to around 80 in 2006.
- The most recent operation in Glasgow involved a mix of nationalities and an arrest in Australia. The paper sets out cases studies illustrating the complexities of cases: the

13 Home Office, *Options for pre-charge detention in terrorist cases*, 25 July 2007, p 10

14 *Ibid.*, p 11

15 *Ibid.*, p 11

16 *Ibid.*, pp 2-4

Dhiren Barot case (August 2004), the 21/7 attempted bombings (July 2005) and the alleged airline plot (August 2006). Details of these are given in the box below.

The Dhiren Barot Case (August 2004)	
274 computers seized / examined	591 floppy discs seized / examined
920 CDs / DVDs / mini discs seized / examined	274 zip discs seized / examined
397 videos seized / examined	2,894 statements taken
8,224 exhibits	5,800 documents
59 premises searched and officers carried out enquiries in the USA, Pakistan, Malaysia, Philippines, Indonesia, France, Spain and Sweden	
The attempted bombings on 21/7 (July 2005)	
10,490 actions	405 interview tapes, 303 hours of interviews
10,711 statements	16,319 telephone records created
28,000 CCTV tapes seized	7,500 tapes viewed (18,000 hours of viewing)
25,000 forensic exhibits seized	34 premises searched
12 other searches (e.g. bins, scenes of crime)	
49 computers, laptops or hard drives seized and interrogated	
2,500 items submitted for forensic analysis	
103 mobile phones and 126 sim cards seized and interrogated	
48 phone numbers attributed and used in the trial	
3,500 individual calls analysed	5,193 phone and internet enquiries
The alleged airline plot (August 2006)	
200 mobile phones, 400 computers and a total of 8,000 CDs, DVDs and computer disks, containing 6,000 gigabytes of data, were seized	
Nearly 70 homes, businesses and open spaces were searched	
<i>Source: Home Office, Options for pre-charge detention in terrorism cases (July 2007)</i>	

24. Deputy Assistant Commissioner Peter Clarke told us that the trend which the police had outlined—towards conspiracies of ever growing scale and complexity in terms of the number of people involved, the use of computers and encrypted data, and international connections—has continued. He added:

Without going too deeply into statistics, what we can say is that taking the totality of the cases we have had fewer cases actually under investigation in the last year,

marginally, but the number of documents, exhibits, computers, telephones and the rest has increased. So the scale of each case is getting larger.¹⁷

25. Rt Hon David Davis MP, Conservative Frontbench Spokesman on Home Affairs, challenged the argument that encryption techniques used by terrorists were a major factor in making an extension of the detention period necessary, pointing out that withholding an encryption key was already illegal, and the provision increasing the maximum penalty for this in terrorism cases from two to five years' imprisonment had come into effect only in 2007.¹⁸ He was also of the view that statistics about the number of bytes of data to be sifted were misleading, as these totals included the significant amount of memory needed for standard software which could be checked for tampering relatively easily.¹⁹

26. We subsequently received a further short written submission from Sir Ian Blair which gave greater detail about the amount and complexity of the computer data which had to be analysed in connection with one plot.²⁰

27. It is clear from informal soundings that we have taken among experts that opinion is divided as to whether a longer period for forensic examination of (often encrypted) electronic records would or would not make it more likely that encryption algorithms would be broken, and useful evidence obtained. Some encryption algorithms are, to all intents and purposes, unbreakable. A longer period of work might help in other cases. However, there is greater consensus that the amount of data to be sifted can be very large and the work very time-consuming, especially in complex cases with international ramifications.

Extending pre charge detention beyond 28 days

International comparisons

28. Since the Government introduced its proposals for extending the limit on the pre-charge detention period, some civil liberties groups and others have sought to draw comparisons between the Government's proposals for the UK and current pre-charge detention limits in other countries.²¹

29. The Government's paper on pre-charge detention of terrorist suspects argues that such comparisons can be misleading, citing the example of France. Whilst Liberty says that the maximum period of pre-charge detention in terrorism cases is six days, the Government—both in its proposal paper and in a document published by the Foreign and Commonwealth Office in 2005—states that it is possible for a suspect to be detained for up

17 Q 6

18 Q 461

19 Q 481

20 Appendix 22

21 See, for example, *Terrorism pre-charge detention comparative law study*, Liberty, November 2007

to four years before trial, “while the investigation continues but before a formal charge of the kind recognised in UK law is made”.²²

30. Whilst we agree with Liberty that comparisons with some of the United Kingdom's closest neighbours are “more difficult” to draw than comparisons with countries outside the EU which have adopted the common law system—such as the United States, Canada, Australia, and New Zealand—we share the Government's view that in examining the systems which operate even in those countries in relation to UK law on pre-charge detention, “it is simply not a case of comparing like for like”.²³

Has the 28-day limit proved problematic to date?

31. The Government argued that the police have needed to make full use of the current powers to detain up to 28 days. DAC Clarke told us that since the permissible time for detention was increased to 28 days in July 2006 some 204 people had been arrested under provisions of the Terrorism Act. Of those, 11 had been detained for between 14 and 28 days and, of those 11, eight were subsequently charged or were charged with terrorism offences.²⁴ In the alleged airline plot, nine people were detained for between 14 and 28 days; three were released without charge at the end of that period and six were charged, two on the 27th day. In an operation led by Greater Manchester police in September 2006, an individual was charged on the 28th day of his detention. In relation to events in Glasgow in July, one of three people charged was charged on the 19th day of detention.

32. The Government conceded that “in the year since the 2006 legislation came into effect, there has been no case in which a suspect was released but a higher limit than 28 days would definitely have led to a charge”.²⁵ When asked whether it was the case that none of those released had subsequently been charged with terrorism offences, DAC Clarke replied, “That is my understanding”.²⁶ Sir Ken Macdonald, the Director of Public Prosecutions (DPP), said this was also his understanding.²⁷ On the question of whether the Crown Prosecution Service was satisfied with the current limit, the DPP said:

It seems to us that 28 days has been effective ... We have not had any cases which would require a longer period than that and indeed in one case, which is very well known involving an airline plot, I think two or three men were charged on the 27th or 28th day and three men were released without charge and have not since been charged, so our day-to-day experience as prosecutors has been that the 28-day period has been useful and effective.²⁸

22 Set out in the Government's latest (December 2007) proposals: *Pre-charge detention of terrorist suspects*, Home Office, December 2007, p10; *Counter-terrorism legislation and practice: a survey of selected countries*, Foreign and Commonwealth Office, 2005 on <http://www.fco.gov.uk/Files/kfile/Q5%20Draft%2010%20FINAL1.pdf>

23 *Pre-charge detention of terrorist suspects*, Home Office, December 2007, p 10

24 Q 7

25 *Options for pre-charge detention in terrorist cases*, 25 July 2007, p 8

26 Q 8

27 Qq 561–562

28 Q 539

33. When pressed on this issue, the DPP reiterated that the Crown Prosecution Service was satisfied with the 28-day limit and was not asking for an increase.²⁹ We asked whether the Home Secretary, the Prime Minister or the Metropolitan Police Commissioner had sought his views on the adequacy of the present time limit; he replied that none of them had done so.³⁰

34. Liberty cited the Government's statement that there had not yet been an instance where a suspect had to be released who, if a longer period of detention had been available, would have been charged as "an important admission" that the case for further extension "does not have any evidential basis".³¹ They argued that no extension beyond 28 days can be justified. JUSTICE likewise stated that they were not aware of any additional evidence that had come to light that would support the further extension of the limit, "nor is there anything in the Government's options paper to show that the current 28-day limit has prevented the bringing of charges in even a single case".³² The Law Society was also opposed to any extension on the grounds that the case had not been made out and that the current period is sufficient even in cases of great complexity such as the airline plot.³³ Lord Goldsmith, Attorney General at the time of the Terrorism Act 2006 and until June 2007, said that during his period of office he had seen no evidence that 28 days was insufficient.³⁴ Neither Nick Clegg MP nor David Davis MP, respectively the Liberal Democrat and the Conservative Front Bench Spokesman on Home Affairs, had seen evidence that convinced them that any extension to the period of detention was necessary, though both they and Lord Goldsmith conceded that they did not rule out the possibility that 28 days might prove inadequate at some time in the future.³⁵

35. Sir Ken Macdonald said:

Of course it is always possible to set up hypothetical situations in which it [the 28-day limit] could become extremely challenging, and it is for Parliament to decide whether it wants to proceed on the basis of hypotheticals rather than on the basis of the evidence which we have experienced so far.³⁶

36. We explored with Sir Ian Blair and DAC Clarke whether it would be possible to limit any extension in the detention period to tightly-defined circumstances, such as multiple plots, complex international links, and so on. Sir Ian said that he did not know of a recent plot that did not involve complex international links, and DAC Clarke argued that, because terrorist methods and the nature of terrorist plots were changing constantly, the legislation would quickly become out-of-date.³⁷

29 Qq 545–546

30 Qq 570–576

31 Appendix 13, para 4

32 Appendix 4, para 8; Appendix 5, para 14

33 Appendix 1, para 1; Appendix 2, para 4

34 Q 491

35 Qq 394 (Clegg), 458–459 and 477 (Davis)

36 Q 551

37 Qq 25–26

Precautionary principle v. civil liberties

37. However, in the light of indications that both the threat and the complexity of cases are increasing, “the Government believes that there will be cases in the future, possibly quite soon, in which more than 28 days will be needed for charges to be brought”. The July 2007 paper said this view was supported by senior figures in the Police, including the Metropolitan Police Commissioner and the President of ACPO, as well as by Lord Carlile, the independent reviewer of terrorism legislation.³⁸ Lord Carlile estimated that over the next five years there might be two or three cases in which a full investigation by the police might be hamstrung significantly by the absolute limitation of 28 days.³⁹

38. When Sir Ian Blair was asked whether it would be right to extend the limit on a purely precautionary basis, he replied that it would be: “if you can see [an] epidemic moving towards you then you start to take precautions before it arrives and that is the position that we are in, I think”.⁴⁰ He added that “we all need to think very hard about what the consequences would be of a catastrophic incident on public opinion and public safety”.⁴¹

39. The Home Secretary gave a similar answer:

Had there been a case where the decision that Parliament had previously made to limit the time to 28 days had resulted in somebody having to be, for example, freed without charge who potentially might then have gone on and committed another terrorist offence, I would be in front of the Committee today, Chairman, answering questions, quite rightly, about why all of us in the Government had not proposed and had not succeeded in putting in place the necessary ability to bring that person to justice. Given the trend of evidence that we are seeing ... [and] that we believe it is very likely in a very small number of cases that there will come a time when more than 28 days will be needed to question somebody, then it is reasonable and proportionate for us to be asking Parliament to discuss that now ...⁴²

40. In contrast, Lord Goldsmith said:

I frame the question for myself in terms of ‘Is it necessary to do this?’, not simply ‘Might it be helpful to do it?’, which would be a different test. I suggest the test is whether it is necessary to do it because, if you are changing important principles of civil liberties like freedom, liberty, detention without trial, then it is important that you do have the necessity to do so.⁴³

41. Nick Clegg MP, David Davis MP and Rachel North, a survivor of the 7 July bomb blasts in London, argued vehemently that extending the limit without absolute proof of need represented a surrender of liberties which amounted to doing the terrorists’ work for

38 *Options for pre-charge detention in terrorist cases*, 25 July 2007, p 8

39 Q 60

40 Q 5

41 *Ibid.*

42 Q 178

43 Q 508

them.⁴⁴ They and Lord Goldsmith were also concerned about the impact this would have on public opinion, especially in Muslim communities.⁴⁵

Potential divisive impact on communities

42. In our 2006 report on *Terrorism Detention Powers*, we commented:

It is important to take into account the effect on the Muslim community of a longer period of detention. Muslims were amongst the casualties in the atrocities of 7 July, and the authorities cannot combat terrorism without the confidence and trust of Muslims. Extended pre-charge detention carries the danger, which should not be underestimated, of antagonising many who currently recognise the need for co-operating with the police, and hence the need to be very cautious before extending the period of detention beyond 28 days.⁴⁶

43. In its reply, the Government stated:

The arrest of suspects for terrorism raises many community issues for the police service regardless of the background of those arrested. The Government recognises the potential for the extension of pre-charge detention time limits to 28 days to magnify these, especially in instances where charges may not subsequently be brought.⁴⁷

They also said it was their intention that any future legislative proposals would be discussed with a full range of stakeholders including community representatives.

44. Responding to the Government's July 2007 proposals, the Muslim Council of Britain (MCB) said:

There is evidence that some of the counter-terrorism measures introduced since 2001 have been viewed by some Black and other Minority Ethnic (BAME) communities, particularly the Muslim community, as being targeted disproportionately at them. There is a risk that the resulting resentment and fear may lead to an increased reluctance among these communities to provide vital co-operation and assistance to the police and security services.⁴⁸

The MCB believed that the proposal to extend the pre-charge detention period beyond 28 days was likely to be counter-productive, not least "when it is the Muslims who are being disproportionately affected by the imposition of these measures" and could "discourage individuals from coming forth with intelligence given the grave consequences on potential suspects". The MCB drew parallels with the effects on the Northern Irish Catholic community of internment. It also argued that such an extension would do nothing to resolve the actual problem as it was unlikely to act as a deterrent to terrorists, and

44 Qq 386 (Rachel North), 394–395 (Clegg) and 465 (Davis)

45 Qq 370, 372–373 (Rachel North), 412, 414 and 426 (Clegg), 463–466 (Davis) and 508 (Goldsmith)

46 Para 38

47 Cm 6906, p 4

48 Appendix 18, para 6

suggested that a more effective approach would be to provide better equipment and more resources to the security services and to use post-charge questioning and admit intercept evidence in court proceedings.⁴⁹

45. The Muslim Safety Forum told us:

Suspects have been kept for over 10 days and then released without charge who have then gone on to make comments in the media which spoke negatively of the police and conveyed their anguish and injustice that they felt through the ordeal only went to put further strain on police community relations. No doubt this reflects negatively on the police service and strengthens community fears and erodes confidence.

From our experiences over the last few years it is clearly evident that the Muslim community has felt a great sense of injustice in how counter terror operations are carried out.⁵⁰

46. Liberty argued that, if the pre-charge detention period were extended:

Anyone who, in the words of Admiral Sir Alan West, should 'snitch' on friends and relatives will be far less likely to do so when aware that a person might be held for many weeks as a consequence. A valuable supply of intelligence might be jeopardised.⁵¹

Jago Russell, Policy Officer for Liberty, said succinctly "I do not think it is rocket science to imagine that a person who is held for 57 days and then released without charge may feel animosity to the Government and that their friends and family may share that feeling of animosity".⁵² David Davis suggested that, because the police and prosecuting authorities would be keen to build up the case against and charge those they perceived as most dangerous, they would concentrate on these and leave those they considered more peripheral to a plot until later, which meant that—perversely—the people least likely to be charged with anything would be detained for longest.⁵³

47. Some of our witnesses raised concerns that the police would simply use an extended period of pre-charge detention to slow down their inquiries. The MCB cited those detained for as long as three days without questioning under the current limit to suggest that increasing that limit might provide the police with a "limited incentive" to operate fast and efficiently.⁵⁴ This suspicion was reiterated by Nick Clegg,⁵⁵ but was expressed in its starkest form by one of the two brothers who were detained in the Forest Gate operation in June 2006, Mr Mohammed Abdulkahar. He commented that the Muslim community in his area was terrified by the proposal for a longer period of detention because:

49 Appendix 18, paras 17, 21, 14 and 15

50 Appendix 16, paras 4, 8–9

51 Appendix 13, para 9

52 Q 138

53 Q 665

54 Appendix 18, para 11

55 Q 398

They all believe if this goes ahead the police will have more power to detain innocent people for no reason. ... They kept us for seven days. They delayed our interviews into the fourth and fifth day, so if you give them more time they do everything slower, every process slower, it is unnecessary things they do.⁵⁶

48. In contrast, Sir Ian Blair, Metropolitan Police Commissioner, commented that the police had exercised their new powers “immensely sparingly”.⁵⁷ Lord Carlile pointed out that in practice the length of detention was determined by judges, not by the police; and the DPP argued that the judges examined requests to increase the time of detention very rigorously.⁵⁸ **However if, as those arrested in Forest Gate and the Muslim Safety Forum say, the Muslim communities perceive the police to be slow in sifting evidence and reluctant to release those against whom they are unable to bring charges, then this damages police credibility. The police must make greater effort to show that they are using the time during which people are detained effectively.**

49. On the question of extending the detention limit, Lord Carlile told us that “there is no evidence whatsoever that this issue would cause difficulties with the Muslim community”.⁵⁹ He said that UK foreign policy was a greater factor than counter-terrorism measures in radicalising young Muslims.⁶⁰ The Home Secretary argued that “the most difficult thing that could happen for the way in which we live together in this country” would be a successful terrorist attack and its aftermath; hence an extension of the 28-day limit, by making it more likely that such attacks could be foiled, might indirectly benefit community relations.⁶¹

50. Sir Ian Blair argued that effort needed to go into explaining to the Muslim community why a longer period of pre-charge detention was needed in a small number of cases, and into communicating the message that it was in the interests of all sections of society to try to prevent atrocities.⁶² **We believe that, even with the current period of detention, more effort needs to be made in explaining the process and reassuring the Muslim communities.** There are precedents and ideas as to how this could be done. Lord Goldsmith commended the way in which the Crown Prosecution Service had “gone out into the communities” to explain the way in which they took decisions to prosecute, emphasising that it was on the basis of an objective view of the evidence and not any form of stereotyping. He thought it important that such work should be continued and perhaps increased.⁶³ While not commenting on the Government’s proposal specifically, the National Association of Muslim Police considered that better use could be made of existing

56 Q 359

57 Q 9

58 Qq 86–88 (Lord Carlile) and 588 (DPP)

59 Q 76

60 Qq 76–78

61 Q 193

62 Qq 11, 22

63 Q 509

Muslim police officers in community outreach in general and saw a particular role for them in mentoring young British Muslims.⁶⁴

Practicalities

For how long should the period be extended?

51. Both the Association of Chief Police Officers (ACPO) and the independent reviewer of terrorism legislation, Lord Carlile, have been quoted as arguing that there should be no statutory maximum limit on pre-charge detention; instead, it should be for judges to decide how long an individual's detention can be extended. Ken Jones, President of ACPO, told the *Observer* on 15 July that the police were “up against the buffers” with the 28-day limit and that they needed to be able to detain suspects for “as long as it takes”.⁶⁵

52. Lord Carlile commented to the BBC that the issue was not simply about the number of days someone should be detained:

My view is that people should not be detained a day longer than necessary or a day shorter than necessary in the interests of justice. ... The cases should be considered by senior judges on an evidence basis. It would strengthen the rights of those detained with a higher level of judges and subject to appeal.⁶⁶

53. Giving evidence to us, Lord Carlile clarified his position on this issue:

I would like to see stronger judicial supervision than we have at the present time ... It is not for me to judge what is the correct maximum number of days—that is a political decision. The intellectually respectable view, in my opinion, if I may say so, is that we need a proper system of checks and balances. Now, in a world of absolute perfection you would say to yourself: “Well, the judges are going to provide that ultimate decision, so you do not need to set down the number of days at all.” ... [However,] if one had to choose an arbitrary figure an absolute maximum of 90 days might be an appropriate figure.⁶⁷

54. Sir Ian Blair argued that there should be a statutory maximum but would not commit himself to a specific number of days: “this has got to be decided by Parliament.” He added:

it is very difficult because you are selecting something entirely arbitrary but I think I have enough faith in the officers of the Metropolitan Police and other services that there will be a time by which we have extracted all the evidence that is available. Somewhere out there between 50 and 90 days is a limit which would seem very sensible.⁶⁸

64 Appendix 19

65 *Observer*, ‘Lock terror suspects up indefinitely say police’, 15 July 2007

66 BBC News website, ‘Police defend longer terror limit’, 16 July 2007

67 Qq 63, 70 and 72

68 Q 15

The Home Secretary also would not specify in October what she thought the increased limit should be, but indicated that she would be responsive to what emerged from the current national debate, in which she was seeking a consensus.⁶⁹

55. Liberty argued that whatever maximum period was proposed by the Government:

must by definition be a speculative guess as to how much might be needed at an indeterminate point in the future. The fact that the most frequently cited extension figure of 56 days has been arrived at by doubling the existing period demonstrates the arbitrary nature of determination.⁷⁰

The Opposition spokesmen who gave evidence to us also thought that any new maximum by its nature would be arbitrary as no one yet knew what might be required.⁷¹

56. The Government has subsequently produced proposals for a maximum limit of 42 days for pre-charge detention, on which it is now consulting. The Government states: "Such powers should only be used where there is a clear operational need related to a particular operation or investigation and should be supported by strong parliamentary and judicial safeguards."⁷² However, the Government's consultation paper does not explain the reason why a limit of 42 days has been chosen.

57. Leaving aside for a moment the question of the necessity for an extension beyond 28 days, there is no basis on which we could recommend a particular maximum limit on pre-charge detention.

The Government's options

58. The first two of the Government's four listed Options for extending the time limit⁷³ are very similar and are based upon the existing procedure for applications under the 28-day limit, though with the addition of the option of parliamentary scrutiny of each individual case after the extension has been granted (Option 1) or a parliamentary 'trigger' for the activation of the new powers (Option 2). Options 3 and 4 are more radical.

59. Option 3, that the emergency powers under Part II of the Civil Contingencies Act (CCA) 2004 could be invoked in specified circumstances, would require the declaration of a state of emergency and approval by Parliament within seven days. Liberty submitted to us Counsel's opinion that the CCA could be used in an emergency of the type described by the Government and would allow for further detention.⁷⁴ Sir Ken Macdonald was also of the view that the CCA could be used in this way.⁷⁵ Liberty argued that these powers could be employed in the "nightmare scenario" where the complexity of suspected plots was

69 Q 191

70 Appendix 13, para 4

71 Qq 396 and 398 (Clegg) and 454 (Davis)

72 *Pre-charge detention of terrorist suspects*, December 2007, pp 2-3

73 For details of which see the text box following para 21 above

74 Appendix 13, para 10, and annex. The opinion was submitted to us in confidence and is not printed.

75 Q 580

likely to overwhelm the capacity of the police and intelligence services.⁷⁶ JUSTICE also supported this proposal.⁷⁷

60. Giving evidence to the JCHR on 20 September, Tony McNulty MP, Minister of State at the Home Office, gave his view of the Liberty proposal:

I think it is mad. In the end that is twice as draconian as anything the Government is remotely looking at. Are you seriously suggesting that in the wake of Overt [the alleged airline plot] we slap on the emergency powers provision of civil contingencies for as long as that threat or sustained two or three threats last with all the powers that entails and gives to the state and then step down from that as and when we thought such a plan or project was disrupted and we had all the bad guys? I think that is just a woeful use of jurisprudence and the law, to be perfectly honest, and worse than anything that this or any other government has suggested.⁷⁸

61. Sir Ian Blair subsequently told us that while he did not think the proposal was “mad”, he did not support it, because it would require declaring a state of emergency in the middle of a major investigation. He added: “The right proposal is for Parliament to draw its own conclusions at the right moment, when there is not some dreadful event going on”.⁷⁹ Lord Carlile said that the proposal (together with the Government’s Option (2)) was “completely unrealistic”.⁸⁰ The DPP highlighted a difficulty that Liberty had not, in his view, identified, which was that the need for Parliament to approve the order carried the risk that comments in the debate on the order might seriously put into question whether those charged could obtain a fair trial.⁸¹

62. Professor Clive Walker of Leeds University stated that Liberty’s proposal was “impractical, unprincipled and poorly conceived”. He argued that, first, most terrorist attacks do not justify the declaration of a state of emergency, and second, that:

Liberty seem to be unaware that the Government has refused to publish any drafts of Part II regulations. In other words, there is no certainty that, if invoked, the regulations about pre-charge detention will be as limited or as carefully designed with safeguards as would legislation in advance of an emergency. Nor is there certainty that emergency powers would be confined to detention without charge. For Liberty to encourage the potentially widespread use of the ‘Domesday’ powers in Part II is astonishing.⁸²

63. Shami Chakrabarti, the Director of Liberty, defended to us her organisation’s proposal against these various criticisms. In particular, she argued that the need for Parliament to take extraordinary action to activate the powers under the Act was a desirable check on the

76 Appendix 13, para 13

77 Appendix 5, paras 21–23

78 Q 12 (uncorrected evidence)

79 Q 40

80 Q 92

81 Q 580

82 Appendix 14, para 14

abuse of those powers, “an inbuilt political disincentive to activating [them] too lightly”.⁸³ She also noted that regulations made under the Act would be secondary legislation “and, therefore, subject to quashing if they are abused in the courts”.⁸⁴

64. Under Option 4, specialist court judges would be assigned to terrorism cases after suspects had been detained for 48 hours and the model followed would be similar to the examining magistrates of Continental Europe. At the same time as its Options paper, the Government published a short summary of the results of a Home Office-led study into the French examining magistrates system.⁸⁵ The study concluded that:

There are significant cultural and constitutional differences between the French and English criminal justice systems, but one is not necessarily more effective than the other. A fundamental conclusion of this study is that if we were to try and emulate the examining magistrate system here, we would need to import the system in its entirety rather than borrow and graft certain elements on to our CJS. This would require fundamental changes to our adversarial, common law tradition. This was also the conclusion of the Runciman report on criminal justice in 1993 and more recently the Joint Committee on Human Rights in their report on prosecution and pre-charge detention.⁸⁶

65. JUSTICE welcomed the Home Office study, which they argued bore out their case that “the Government should not seek to import features from other systems of law without first understanding the very different distribution of checks and balances in those systems”.⁸⁷ Neither the Home Secretary nor Sir Ian Blair thought a mix of the two systems was practical and Ms Chakrabarti of Liberty told us: “it is inherently dangerous to think you can do a pick and mix of different legal systems”.⁸⁸

66. Finally, Lord Carlile commented that although he did not support Option (4) in its entirety, as this would involve “an absolute sea-change” in the criminal justice system, he believed that elements of the continental system could be introduced with advantage into the Government's preferred option: “Option (1) with the importation of a judge in a special role would provide the best of both systems, really—or the best we could do, anyway”.⁸⁹ He added that what was needed was:

a properly experienced judge, which is why I am in favour of a senior circuit judge with long criminal experience—to supervise and approve or disapprove the activities of the police during the detention period. It would require very careful thinking out. I do not think it would be realistic to have oral adversarial proceedings during the course of a period of detention in Paddington Green. I think most of the representation, if not all, could be done in writing. We might consider importing a

83 Q 152

84 *Ibid.*

85 *Terrorist Investigations and the French Examining Magistrates System*, Home Office, July 2007

86 *Ibid.*, p 12. The reference is to the JCHR's 24th Report of Session 2005–06, *Counter-terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, HC 1576 / HL Paper 240, para 76

87 Appendix 5, para 25

88 Qq 41 (Blair) and 158 (Ms Chakrabarti)

89 Q 101

special advocate into the procedure as well. I believe that it would provide the extra protection with an element imported from abroad.⁹⁰

How would the powers be used?

67. Sir Ken Macdonald gave us a useful summary of the way that prosecutors decide when and how to charge those arrested for serious crimes such as terrorism. He explained that there were two alternative tests that could be applied:

- The full test, which requires the prosecutor to judge that there is a realistic prospect of conviction. “That simply means that, on the basis of the evidence the prosecutor has before him or her, a court is more likely than not to convict”.
- The other is relevant where, if there was a charge, bail would be inappropriate (which, in Sir Ken’s view, would be likely to cover all terrorist cases). In these circumstances, the prosecutor can apply ‘the reasonable suspicion test’ or threshold test: the prosecutor can charge on the basis of reasonable suspicion as long as the case is kept under review and the full code test is applied as soon as practically possible. In deciding on bringing such a charge, the prosecutor has to bear in mind the likelihood of further evidence being obtained, the time it would take to gather that further evidence and the charges that that further evidence would be likely to support.⁹¹

Sir Ken added:

Our experience has been that in every case where a terrorist suspect has been charged on the threshold test, the evidence to justify the full test being passed has arrived, the full test has been applied and the matter has proceeded to trial.⁹²

68. Sir Ken further explained that in the airport case, two of those charged towards the end of the 28-day period were charged on the basis of reasonable suspicion. He commented:

I think an analysis might lead you to conclude that, if after 25 or 26 days you could not find a reasonable suspicion to justify a charging decision, it might be quite difficult for a prosecutor to persuade a court that, even though there is not presently reasonable suspicion to justify the threshold charge, a man or a woman should be kept in custody for a longer period, so that is a practical problem which could face prosecutors.⁹³

This view was echoed by Lord Goldsmith.⁹⁴

69. Sir Ken also said that, even under the current limit, courts scrutinise applications for extensions very rigorously and “the longer you have got someone in custody without

90 Q 100

91 Qq 541 and 566

92 Q 566

93 Q 541

94 Q 495

finding evidence to charge, the tougher it is to make these applications".⁹⁵ When we pressed him on this point, he said:

I think the experience of prosecutors is that, when they apply for seven days at the beginning of the period or a period over 14 days, it is tough, but it gets tougher the longer you have had someone in custody and for very obvious reasons, that the courts become more sceptical about the likelihood that material [to justify a charge] is going to be forthcoming.⁹⁶

70. Neither the police nor the Government have made a convincing case for the need to extend the 28-day limit on pre-charge detention. We consider that there should be clearer evidence of need before civil liberties are further eroded, not least because without such evidence it would be difficult to persuade the communities principally affected that the new powers would be used only to facilitate evidence gathering and not as a form of internment.

71. The DPP's evidence about the existence and use currently made of the 'reasonable suspicion' test by prosecutors convinces us that there is flexibility in the system if the police need a little extra time to gather evidence sufficient for a charge subsequently to be made with 'a realistic prospect of conviction'. We also note the implication in his words that judges will probably be increasingly sceptical about the likelihood of gathering such evidence the longer a suspect is kept in custody—which may make an extension beyond 28 days ineffective in practice.

72. It is clear to us from other sources such as the speech made by the head of the Security Service to the Society of Editors on 5 November 2007 that the terrorist threat facing the UK is real and acute. Therefore any request made by the police authorities to extend the maximum period for which terrorist suspects can be held without charge has to be treated with great seriousness.

73. We considered the proposal from Liberty, that Part 2 of the Civil Contingencies Act (CCA) 2004 could be used in exceptional circumstances where the complexity of the suspected terrorist plots was likely to overwhelm the capacity of the police and security services. However, we concluded that this was not an intended use of the powers under the CCA, that there were significant legal problems and that it would not be sensible for a national state of emergency to be triggered in the middle of a major investigation.

74. If, in these exceptional circumstances, a temporary extension of the pre-charge detention period is deemed essential to secure successful prosecutions of terrorist suspects, the Government should consider building support for proposals that effectively reform the powers of the CCA, secure Parliamentary scrutiny and judicial oversight, but stop short of the requirement to declare a full-scale state of emergency. We urge the Government to begin urgent discussions with other parties on this basis.

75. Although we have set this out in detail, we reiterate that we do not consider that a convincing case for an extension to the limit at present has been made out.

95 Q 542

96 Q 547

76. We also heard evidence that other options, in particular the admissibility of intercept evidence in court and changes in the rules governing post-charge questioning, could make it easier for the police to gather and present evidence sufficient to convict terrorist suspects. We now turn to these issues.

3 Alternatives to Extended Detention

77. Civil liberties organisations have urged the adoption of other measures as an alternative to extended detention, such as allowing the use of intercept evidence in court, and increasing the scope for post-charge questioning.⁹⁷ However, the Government have argued that, even if those measures were to be adopted, this would not entirely eliminate the need for extended detention powers.⁹⁸

Intercept as evidence

78. Intercept evidence gathered by intelligence services from other jurisdictions may be produced in evidence in court here, but not intercept evidence gathered by the UK intelligence services. In our 2006 inquiry, many witnesses argued in favour of allowing the full use of telephone intercept evidence in courts, as is done in many foreign jurisdictions, saying that there were no human-rights difficulties. Lord Carlile supported this, as did (with some reservations) the Metropolitan Police. However, the then Home Secretary, Rt Hon Charles Clarke MP, said this was not a “silver bullet”, and that the risk of changing the law outweighed the benefits. Those risks were of: (a) damaging intelligence interests by revealing the sources of intelligence; and (b) massive data collection demands by the defence. We noted that there was universal support for the idea outside the Government, and concluded that there was no convincing evidence that the difficulties were insuperable.⁹⁹

79. Assistant Commissioner Hayman told the Committee:

I think I am moving, as I know ACPO is, to a conclusion that in a selected number of cases, not just for terrorism but also for serious crime, [use of intercept] would be useful. I think also it does make us look a little bit foolish that everywhere else in the world is using it to good effect.¹⁰⁰

80. In July 2007 the Government announced that it had commissioned a review on Privy Counsellor terms “to advise on whether a regime to allow the use of intercepted material in court can be devised that facilitates bringing cases to trial, while meeting the overriding imperative to safeguard national security”. The Review Committee is chaired by Sir John Chilcott; its other members are Rt Hon Lord Archer of Sandwell, Rt Hon Alan Beith MP and Rt Hon Lord Hurd of Westwell.¹⁰¹ It is due to report early in 2008.

81. JUSTICE strongly welcomed the announcement of a review. In October 2006 they produced a report entitled *Intercept Evidence: Lifting the Ban*, which argued that the current ban was “archaic, unnecessary and counter-productive”. They noted that the UK

97 See, e.g., Appendix 13, paras 11–13 (Liberty)

98 See *Possible measures for inclusion in a future counter terrorism bill*, 25 July 2007, para 37

99 *Terrorism Detention Powers*, para 116

100 *Ibid.*, para 113

101 *Possible measures for inclusion in a future counter terrorism bill*, 25 July 2007, paras 17 and 20

was the only country in the common-law world which prohibited completely the use of intercepted communications in criminal proceedings:

the experience of other common law countries shows that the fears of the intelligence services that intercept evidence would lead to their interception capabilities being compromised are unfounded. Established common law principles of public interest immunity work well in other countries to prevent the unnecessary disclosure of sensitive intelligence material, such as methods of interception and the identity of informants.¹⁰²

82. Liberty accepted that intercept might not be a 'magic bullet' allowing charges always to be brought, but "maintain that the admissibility would ensure that charges could be brought in most situations".¹⁰³ The DPP thought that intercept evidence would be quite a powerful tool and might lead to charges being brought more quickly.¹⁰⁴ Lord Goldsmith believed that not only would such evidence help in prosecuting offences but also that the UK authorities should be seen to have tried all avenues within the ordinary criminal justice process rather than making exceptions to that process (presumably a reference to extended detention before charge).¹⁰⁵

83. DAC Clarke told us: "[this is] an area rich in anecdote and quite often light in fact. ... [in respect of terrorism] there have been very few cases where intercept evidence could have made very much difference to the case. ... [it is] easy to overstate its importance".¹⁰⁶ He also said that it would be "very difficult indeed" to devise ways of allowing intercept evidence while imposing some limits on the sheer amount of material that might be needed to be disclosed to the defence.¹⁰⁷ Likewise Lord Carlile said that in his view allowing intercept evidence would make a big difference in other types of crime, but he doubted it would make much difference in terrorism cases. He was in favour of it in principle but thought it raised "considerable logistical difficulties".¹⁰⁸

84. During our visit to Washington DC in October 2007, we explored with our interlocutors at the Department of Homeland Security and the Department of Justice the extent to which difficulties of the kind raised by our police witnesses had impeded the use of intercept evidence in the courts in the United States. We received the strong impression that, while some such difficulties, for instance in relation to logistics, may well arise from time to time, these are eminently surmountable given the political and judicial will to do so, and should not be regarded as constituting an objection to the principle of using intercept evidence.¹⁰⁹

102 Appendix 4, para 23 See also Q 427 (Clegg)

103 Appendix 13, para 11

104 Q 569

105 Q 519

106 Q 50

107 Q 48

108 Q 102

109 David Davis MP was also of this view: Q 480

85. While not underestimating the practical difficulties, the Crown Prosecution Service thought they were not insuperable.¹¹⁰ Sir Ken Macdonald helpfully explained that the 'disclosure' problem—the fear that the defence might require transcription of huge amounts of intercept evidence which the police or security services had obtained but which the prosecutors were not intending to use—was not as serious as some people feared. He said:

actually, if we apply the law properly, the legislation governing disclosure, which dates back to 1996, it does not mandate the disclosure of all material to the defence. That became the practice, but we got the practice back very firmly on track so that what we disclose now is our case, the material that we intend to rely on, and anything that is in our possession which, although we do not intend to rely on, undermines our case or might assist the defence case.¹¹¹

86. While we do not suggest that intercept evidence would provide the solution to all the problems in bringing charges against terrorist suspects, we do consider it ridiculous that our prosecutors are denied the use of a type of evidence that has been proved helpful in many other jurisdictions and which, even if not conclusive itself, appears often to provide useful avenues for further inquiry. We can learn from other similar countries, such as the USA and Australia, how to protect our intelligence sources. After all, it would not be compulsory to use intercept evidence if it were felt that the damage from doing so outweighed the benefit. We found the DPP's clarification of the problems surrounding disclosure very helpful: if the Crown Prosecution Service has already rowed back from a misinterpretation of the extent of disclosure required under 1996 legislation, then it should be possible to cope with the amount of transcription that the defence could legally require.

Post-charge questioning

87. Under PACE, suspects can be questioned after charge in defined circumstances, including "to prevent or minimise harm or loss to some other person, or the public".¹¹² In our 2006 inquiry, civil liberties organisations argued that this police power rendered a further extension of pre-charge detention unnecessary. Liberty further argued that the circumstances could be extended to include those where the Secretary of State considered it necessary in the interests of national security or if the person were arrested in connection with terrorism. Other witnesses opposed this suggestion. We concluded that post-charge questioning alone would not be sufficient to replace extended pre-charge detention, but it could be a useful addition. We encouraged the Government to consult on this as a priority.¹¹³

110 Q 555

111 Q 556

112 Section 16.5 of Code C of the Police and Criminal Evidence Act 1984

113 *Terrorism Detention Powers*, para 109

88. In July 2007 the Government announced that it plans to legislate:

So that in *terrorist* cases (that is, those arrested under the Terrorism Act 2000) suspects can be questioned after charge on any aspect of the offence for which they have been charged. Such questioning would not require the consent of the defendant. Any answers that are given as part of a post-charge interview could be used for evidential purposes.¹¹⁴

89. The JCHR has welcomed the Government's decision, but suggested that the change could be introduced more quickly by amending the PACE Codes rather than through primary legislation.¹¹⁵ The Crown Prosecution Service strongly supported the proposed change, as did Lord Goldsmith and David Davis.¹¹⁶ Nick Clegg was in favour provided that there were protections in place to prevent the use of peripheral charges as a 'hook' to keep people under detention.¹¹⁷

90. Liberty claimed that removal of the bar on intercept and reviewing post-charge questioning would together have a huge impact upon the ability to charge.¹¹⁸ JUSTICE commented that under PACE Code C, there is already limited provision for questioning of suspects post-charge. They have supported the view that these grounds could be extended to include any case in which fresh evidence came to light. They noted that questioning post-charge would have to be attended by the same safeguards that apply to pre-charge questioning, that is, the right to legal advice, the right against self-incrimination, and freedom from oppressive questioning. Subject to these safeguards, they supported the Government's proposal.¹¹⁹

91. The Home Secretary commented that in the responses to the Government's consultation there had been "pretty widespread support for the proposals around post-charge questioning. There have been some questions about the safeguards and the way in which it will be implemented but it has been pretty well received".¹²⁰

92. We support allowing the use as evidence of information obtained in post-charge questioning of terrorist suspects, including the ability to draw an inference against an individual who refuses to answer, subject to the same safeguards as apply to pre-charge questioning: the right to legal advice, the right against self-incrimination and freedom from oppressive questioning.

114 *Possible measures for inclusion in a counter terrorism bill*, 25 July 2007, para 35

115 HC (2006–07) 394, para 172

116 Qq 577–579 (DPP), 522 (Goldsmith) and 482 (Davis)

117 Qq 428–429

118 Appendix 13, para 11

119 Appendix 4, paras 10–11 See also Qq 522–523 (Goldsmith)

120 Q 220

Related issues

Enhanced sentences for non-terrorism specific offences

93. The Government propose that sentences for terrorists who are convicted on non-terrorist specific offences should be enhanced to reflect the additional seriousness that terrorist involvement represents. Examples of such offences might include forging documents in order to assist a terrorist act, or committing burglaries in order to raise cash to buy weapons for terrorist purposes. It would be left to the court to determine whether an offence was terrorism-related, and there would be no extension to the current maximum penalty for such offences. This implements a recommendation by Lord Carlile in his report on the definition of terrorism published on 15 March 2007.¹²¹

94. Liberty stated that they did not have an issue with this proposal in principle, but wished there to be a requirement that the jury should be convinced that there was an intention on the defendant's part that the offence was committed for purposes connected with terrorism.¹²² The Law Society argued that enhancement should not be dealt with at the point of sentence but should be determined during the trial as one of the elements of the offence, as with racially aggravated offences.¹²³ JUSTICE shared this view.¹²⁴

95. British-Irish Rights Watch stated that they had grave concerns about this proposal. They opposed what they saw as an increasing trend for terrorists to be treated differently from other criminals, and more harshly, because of the motive for their crimes.¹²⁵

96. Sir Ken Macdonald stated that some of the offences mentioned—such as financing terrorism—are already covered by terrorist legislation. He also suggested that if the investigators did not have evidence of terrorist involvement, it would be difficult to prove that there was such an aggravating feature and, if they did have such evidence, they would probably seek a charge under the terrorism Acts in the first place. However, he did not rule the proposal out completely.¹²⁶ Lord Goldsmith thought that the courts already had the power to treat a terrorism link as, in effect, an aggravating feature.¹²⁷

97. Some of the examples given to us of offences linked to terrorist activity for which enhanced sentences might be appropriate may already fall within the definition of, for example, acts preparatory to terrorism. There also appears to be some doubt over the extent to which a connection with terrorism is regarded as an aggravating circumstance currently. However, if the Government can clarify that there are activities which assist terrorists but do not at present fall within the definition of acts preparatory to terrorism, or other such provisions, we accept the case for regarding the connection with terrorism as an aggravating factor that should lead to an enhanced sentence.

121 *Possible measures for inclusion in a future counter terrorism bill*, 25 July 2007, paras 38–41

122 Appendix 12, para 10

123 Appendix 1, paras 10–11

124 Appendix 5, paras 13–15

125 Appendix 3, para 13.1

126 Qq 581–582 see also Qq 430 (Clegg) and 484 (Davis)

127 Qq 529–530

Requirement to notify police of whereabouts and travel plans

98. The Government proposes that terrorism offenders should be required, following their release from prison, to notify the police of their whereabouts and travel plans, in the same way that sex offenders are already required to.¹²⁸ Under the Sex Offenders Act 1997, those convicted or cautioned in relation to sex offences are required to notify the police of their name and address (including any change of address and significant periods away from home), date of birth, and national insurance number. The particular period for which notification is required depends on the sentence received—for example, for someone sentenced to imprisonment between 6 and 30 months, the notification period is 10 years.¹²⁹

99. Liberty stated:

we accept that [notification requirements and travel restrictions] could ... be appropriately used against those convicted of terrorism offences. We might raise concerns over the detail of what offences are covered by travel orders; what details are required for notification; who is notified and so on. We will wait for further development of these suggestions.¹³⁰

100. JUSTICE welcomed the creation of a terrorist offenders register as “a sensible practical measure” to ensure that those convicted of terrorist offences were subject to proper monitoring following the end of their sentences.¹³¹ The DPP thought the proposal very sensible.¹³² Lord Goldsmith, David Davis and Nick Clegg also supported it.¹³³

101. Professor Clive Walker of Leeds University expressed concerns about this proposal. He called for greater clarity as to what restrictions would apply, how long the order would last, whether there was any possibility of redemption for an individual and what facilities for rehabilitation would be available in these cases, bearing in mind that many convictions under the Terrorism Act 2000 are for low level offences, such as the withholding of information in a specific relationship with a relative or partner. He added:

This proposal will create extra workload for the police, and one wonders whether its blanket application will be worthwhile. The extension to overseas applicants is especially problematic. ... There is the added point as to why the existing device of control orders fails to achieve all these restrictions?¹³⁴

102. On the other hand, Nick Clegg felt that this requirement would at least be transparent and limited in scope, whereas control orders—which should be used for more serious purposes—were often, he argued, used simply to impose travel restrictions on suspects.¹³⁵

128 *Possible measures for inclusion in a future counter terrorism bill*, 25 July 2007, paras 42–48

129 Appendix 4, para 12

130 Appendix 13, para 19

131 Appendix 4, para 12

132 Q 589

133 Qq 534, 485 and 432 respectively

134 Appenix 14, paras 28–30

135 Q 435

103. **Some aspects of the proposed legislation—the length of sentence and the length of the notification period—differ from the approach taken in respect of sex offenders. It would be helpful for the Government to explain its reasons for these differences. Subject to these clarifications, we recommend the imposition of a requirement for terrorist offenders to notify police of their whereabouts and travel plans.**

104. At present, investigating officers have the right to detain property of individuals suspected of wanting to travel abroad for terrorism-related purposes. The Government wishes to extend this power to allow officers temporarily to seize travel documents from such suspects to enable further investigations to be undertaken.¹³⁶ **We support this proposal.**

Data-sharing and use of the DNA database

105. The Government also proposes to establish the police counter-terrorism database on a statutory footing, ensuring that DNA samples obtained under the Terrorism Act 2000 can be placed on the national DNA database, allowing the security services to cross-reference material they obtain with the national DNA database, and providing equivalent powers relating to DNA and fingerprints after a control order is served, as currently apply when arrests are made under PACE and the Terrorism Act. It also wishes to place the intelligence and security agencies on a similar statutory footing to the Serious and Organised Crime Agency in respect of their ability to acquire and disclose information.¹³⁷

106. Liberty stated that they had no issue in principle with either of these proposals, but they were concerned about their practical implementation. They argued that:

Moves towards use of data mining and data matching techniques used to imply potential illegality without the use of human intelligence sources ... are undermining data protection principles and are increasingly disproportionate. Similarly, ... permanent DNA retention is now permitted on arrest even if no charge follows. This, coupled with the difficulty in having samples removed, means that many thousand innocent persons are now on the database.¹³⁸

Other witnesses, such as the DPP and David Davis, thought it right in principle to ensure that resources of information such as the DNA database should be readily available to the police and security agencies tackling terrorism.¹³⁹

107. **Although a number of witnesses shared Liberty's concerns about data protection and the retention of DNA samples in certain circumstances, these issues are much wider than the present discussion over counter-terrorism measures and need to be addressed elsewhere. We are reviewing aspects of them in relation to our concurrent inquiry into 'A surveillance society?'. We consider the Government's proposals about information sharing to be a proportionate response to the need to increase the efficiency of our counter-terrorism services.**

¹³⁶ *Possible measures for inclusion in a future counter terrorism bill*, 25 July 2007, paras 49–53

¹³⁷ *Ibid.*, paras 23–31

¹³⁸ Appendix 12, para 15

¹³⁹ See, for example, Qq 552 (DPP) and 487 (Davis)

Conclusions and recommendations

1. If, as those arrested in Forest Gate and the Muslim Safety Forum say, the Muslim communities perceive the police to be slow in sifting evidence and reluctant to release those against whom they are unable to bring charges, then this damages police credibility. The police must make greater effort to show that they are using the time during which people are detained effectively. (Paragraph 48)
2. We believe that, even with the current period of detention, more effort needs to be made in explaining the process and reassuring the Muslim communities. (Paragraph 50)
3. Leaving aside for a moment the question of the necessity for an extension beyond 28 days, there is no basis on which we could recommend a particular maximum limit on pre-charge detention. (Paragraph 57)
4. Neither the police nor the Government have made a convincing case for the need to extend the 28-day limit on pre-charge detention. We consider that there should be clearer evidence of need before civil liberties are further eroded, not least because without such evidence it would be difficult to persuade the communities principally affected that the new powers would be used only to facilitate evidence gathering and not as a form of internment. (Paragraph 70)
5. The DPP's evidence about the existence and use currently made of the 'reasonable suspicion' test by prosecutors convinces us that there is flexibility in the system if the police need a little extra time to gather evidence sufficient for a charge subsequently to be made with 'a realistic prospect of conviction'. We also note the implication in his words that judges will probably be increasingly sceptical about the likelihood of gathering such evidence the longer a suspect is kept in custody—which may make an extension beyond 28 days ineffective in practice. (Paragraph 71)
6. It is clear to us from other sources such as the speech made by the head of the Security Service to the Society of Editors on 5 November 2007 that the terrorist threat facing the UK is real and acute. Therefore any request made by the police authorities to extend the maximum period for which terrorist suspects can be held without charge has to be treated with great seriousness. (Paragraph 72)
7. We considered the proposal from Liberty, that Part 2 of the Civil Contingencies Act (CCA) 2004 could be used in exceptional circumstances where the complexity of the suspected terrorist plots was likely to overwhelm the capacity of the police and security services. However, we concluded that this was not an intended use of the powers under the CCA, that there were significant legal problems and that it would not be sensible for a national state of emergency to be triggered in the middle of a major investigation. (Paragraph 73)
8. If, in these exceptional circumstances, a temporary extension of the pre-charge detention period is deemed essential to secure successful prosecutions of terrorist suspects, the Government should consider building support for proposals that effectively reform the powers of the CCA, secure Parliamentary scrutiny and judicial

oversight, but stop short of the requirement to declare a full-scale state of emergency. We urge the Government to begin urgent discussions with other parties on this basis. (Paragraph 74)

9. We also heard evidence that other options, in particular the admissibility of intercept evidence in court and changes in the rules governing post-charge questioning, could make it easier for the police to gather and present evidence sufficient to convict terrorist suspects. (Paragraph 76)
10. While we do not suggest that intercept evidence would provide the solution to all the problems in bringing charges against terrorist suspects, we do consider it ridiculous that our prosecutors are denied the use of a type of evidence that has been proved helpful in many other jurisdictions and which, even if not conclusive itself, appears often to provide useful avenues for further inquiry. We can learn from other similar countries, such as the USA and Australia, how to protect our intelligence sources. After all, it would not be compulsory to use intercept evidence if it were felt that the damage from doing so outweighed the benefit. We found the DPP's clarification of the problems surrounding disclosure very helpful: if the Crown Prosecution Service has already rowed back from a misinterpretation of the extent of disclosure required under 1996 legislation, then it should be possible to cope with the amount of transcription that the defence could legally require. (Paragraph 86)
11. We support allowing the use as evidence of information obtained in post-charge questioning of terrorist suspects, including the ability to draw an inference against an individual who refuses to answer, subject to the same safeguards as apply to pre-charge questioning: the right to legal advice, the right against self-incrimination and freedom from oppressive questioning. (Paragraph 92)
12. Some of the examples given to us of offences linked to terrorist activity for which enhanced sentences might be appropriate may already fall within the definition of, for example, acts preparatory to terrorism. There also appears to be some doubt over the extent to which a connection with terrorism is regarded as an aggravating circumstance currently. However, if the Government can clarify that there are activities which assist terrorists but do not at present fall within the definition of acts preparatory to terrorism, or other such provisions, we accept the case for regarding the connection with terrorism as an aggravating factor that should lead to an enhanced sentence. (Paragraph 97)
13. Some aspects of the proposal to require terrorism offenders to notify police of their whereabouts and travel plans—the length of sentence and the length of the notification period—differ from the approach taken in respect of sex offenders. It would be helpful for the Government to explain its reasons for these differences. Subject to these clarifications, we recommend the imposition of a requirement for terrorist offenders to notify police of their whereabouts and travel plans. (Paragraph 103)
14. The Government wishes to legislate to allow officers temporarily to seize travel documents from any one suspected of wanting to travel abroad for terrorism-related purposes. We support this proposal. (Paragraph 104)

15. Although a number of witnesses shared Liberty's concerns about data protection and the retention of DNA samples in certain circumstances, these issues are much wider than the present discussion over counter-terrorism measures and need to be addressed elsewhere. We are reviewing aspects of them in relation to our concurrent inquiry into 'A surveillance society?'. We consider the Government's proposals about information sharing to be a proportionate response to the need to increase the efficiency of our counter-terrorism services. (Paragraph 107)

Formal Minutes

Tuesday 11 December 2007

Members present:

Rt Hon Keith Vaz, in the Chair

Mr Jeremy Browne	Margaret Moran
Ms Karen Buck	Gwyn Prosser
Mr James Clappison	Bob Russell
David TC Davies	Martin Salter
Mrs Janet Dean	Mr Gary Streeter
Patrick Mercer	Mr David Winnick

Draft Report (The Government's Counter-Terrorism Proposals), proposed by the Chairman, brought up and read.

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

Paragraphs 1 and 2 read and agreed to.

Paragraph 3 read, amended and agreed to.

Paragraph 4 read and agreed to.

New paragraph—(*The Chairman*)—brought up, read the first and second time and inserted (now paragraph 5).

Paragraphs 5 to 24 (now 6 to 25) read and agreed to.

Two new paragraphs—(*Margaret Moran*)—brought up, read the first and second time, and inserted (now paragraphs 26 and 27).

Three new paragraphs—(*Martin Salter*)—brought up, read the first and second time, and inserted (now paragraphs 28 to 30).

Paragraphs 25 to 53 (now paragraphs 31 to 59) read and agreed to.

Paragraph 54 (now paragraph 60) read, amended and agreed to.

Paragraph 55 (now paragraph 61) read and agreed to.

New paragraph—(*The Chairman*)—brought up, read the first and second time, and inserted (now paragraph 62).

Paragraphs 56 to 65 (now paragraphs 63 to 72) read and agreed to.

Paragraph 66 read:

“66. If in the future the police were to find the 28-day period inadequate because of a major incident which required multiple and more complex investigations than have been experienced to date, we consider that any mechanism for increasing the limit would have to comprise the following elements. On receipt of a certificate signed by both the DPP and the relevant Chief Constable that the current period was inadequate, the Home Secretary would have to submit to Parliament an affirmative instrument to allow an extension in that case, with a specified upper time limit. The extension of the time limit would be subject to the same judicial process as under the current legislation: in other words, the police would have to persuade the CPS to apply for an extension for no more than seven days at a time, and there would be a hearing before a judge on each application.”

Paragraph disagreed to.

A new paragraph—(*Mr David Winnick*)—brought up and read, as follows:

“However, in conclusion we have not been persuaded that an extension to the period of detention without charge is needed. In particular, we note again the comments of the Director of Public Prosecutions that the Crown Prosecution Service was satisfied with the current limit of 28 days. Moreover, the point Sir Ken made regarding the difficulties of a successful prosecution where a person has been held for a period of, say, 25 or 26 days and where no charge of reasonable suspicion has been made carries in our view much weight.”

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

The Committee divided.

Ayes, 2

Bob Russell
Mr David Winnick

Noes, 8

Ms Karen Buck
David T C Davies
Mrs Janet Dean
Patrick Mercer
Margaret Moran
Gwyn Prosser
Martin Salter
Gary Streeter

New paragraph disagreed to.

Two further new paragraphs—(*Martin Salter*)—brought up and read, as follows:

“We considered the proposal from Liberty, that Part 2 of the Civil Contingencies Act (CCA) 2004 could be used in exceptional circumstances where the complexity of the suspected terrorist plots was likely to overwhelm the capacity of the police and security services. However, we concluded that this was not an intended use of the powers under the

CCA, that there were significant legal problems and that it would not be sensible for a national state of emergency to be triggered in the middle of a major investigation.

“If, in these exceptional circumstances, a temporary extension of the pre-charge detention period is deemed essential to secure successful prosecutions of terrorist suspects, the Government should consider building support for proposals that effectively reform the powers of the CCA, secure Parliamentary scrutiny and judicial oversight, but stop short of the requirement to declare a full-scale state of emergency. We urge the Government to begin urgent discussions with other parties on this basis.”

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

The Committee divided.

Ayes, 11

Noes, 1

Mr Jeremy Browne

Mr David Winnick

Ms Karen Buck

Mr James Clappison

David T C Davies

Mrs Janet Dean

Patrick Mercer

Margaret Moran

Gwyn Prosser

Bob Russell

Martin Salter

Mr Gary Streeter

Paragraphs inserted (now paragraphs 73 and 74).

Paragraphs 67 to 95 (now paragraphs 75 to 103) read and agreed to.

New paragraph—(*Mr James Clappison*)—brought up, read the first and second time, and inserted (now paragraph 104).

Paragraphs 96 to 98 (now paragraphs 105 to 107) read and agreed to.

Summary read, amended and agreed to.

Question put, That the Report, as amended, be the First Report of the Committee to the House.

The Committee divided.

Ayes, 11

Noes, 1

Mr Jeremy Browne
Ms Karen Buck
Mr James Clappison
David T C Davies
Mrs Janet Dean
Patrick Mercer
Margaret Moran
Gwyn Prosser
Bob Russell
Martin Salter
Mr Gary Streeter

Mr David Winnick

Ordered, That the Chairman make the Report to the House.

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

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 18 December at 10.00 am

Witnesses

Tuesday 9 October 2007

Page

Sir Ian Blair QPM, Commissioner of Police of the Metropolis, and **Mr Peter Clarke CVO OBE QPM**, Deputy Assistant Commissioner, Head of Counter Terrorist Command and National Co-ordinator of Terrorist Investigations Ev 1

Tuesday 11 October 2007

Dr Eric Metcalfe, Director, Human Rights Police, Justice, and **Ms Shami Chakrabarti**, Director, and **Mr Jago Russell**, Policy Officer, Liberty Ev 19

Monday 22 October 2007

Rt Hon Jacqui Smith MP, Secretary of State for the Home Department, and **Mr David Ford**, Head, Counter-Terrorism Bill Team, Home Office Ev 33

Wednesday 7 November 2007

Ms Claudia Sturt, HM Prison Belmarsh, and **Mr Phil Wheatley**, Director General, HM Prison Service Ev 45

Mr Mohammed Abulkahar and **Mr Abul Koyair** Ev 52

Tuesday 13 November 2007

Ms Rachel North, writer and 7/7 survivor Ev 58

Mr Nick Clegg MP, Liberal Democrat Shadow Home Secretary Ev 62

Rt Hon David Davis MP, Conservative Shadow Home Secretary Ev 70

Wednesday 21 November 2007

Rt Hon Lord Goldsmith QC, a Member of the House of Lords, former Attorney General Ev 78

Sir Ken Macdonald QC, Director of Public Prosecutions Ev 83