



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# Counter–Terrorism Policy and Human Rights: 42 days

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**Second Report of Session 2007–08**

*Report, together with formal minutes and  
appendices*

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## Joint Committee on Human Rights

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

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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### Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and Jacqueline Baker (Senior Office Clerk).

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## Summary

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In its last report into counter-terrorism policy the Committee welcomed the Government's commitment to consultation and consensus. On 25 July the Prime Minister outlined measures for possible inclusion in a Counter-Terrorism Bill in the autumn and the Home Office published more detailed documents. Together they maintained a highly consensual approach which the Committee welcomes. But the Government's new approach now faces a critical test since it seems to the Committee that, on one of the Government's most important proposals, to extend the period of pre-charge detention beyond 28 days, there is a clear national consensus that the case for further change has not been made by the Government. The Home Secretary nevertheless announced on 6 December the Government's intention to increase the pre-charge detention limit to 42 days. In the Committee's view a truly consensual approach should lead the Government to accept that it has failed to build the necessary national consensus for this very significant interference with the right to liberty and withdraw the proposal, to proceed with it as detailed by the Home Office calls into question the Government's commitment to a consensual approach and raises questions of compatibility with human rights. The Committee agrees that the Government is under a duty to protect people from terrorism. Indeed, this duty is imposed by human rights law itself and includes a duty to prosecute those whom it suspects of being involved in terrorist activity. The case for extension must therefore be treated with great seriousness, but the test which human rights law requires to be satisfied where measures would interfere significantly with personal liberty is that, on all the evidence, including the availability of alternatives, the measures are truly "necessary" to protect the public (paragraphs 1-23).

The first plank of the Government's case for extending pre-charge detention is that the threat from terrorism is "severe and shows no sign of diminishing. In fact, the reverse". But it is not clear if the Government claims the threat has increased since extension to 28 days in July 2006. The Committee has recently heard from the Minister of State at the Home Office that the threat level was broadly the same. The Committee is disappointed that the Director-General of the Security Service, whose recent public lecture was widely reported as signalling an increase in the threat, so far seems reluctant to give evidence to the Committee on the record. The relevant question is whether the Government has shown that the threat has increased since Parliament last considered the limit on pre-charge detention. The evidence the Committee has seen suggests that the threat level remains about the same as last year. It is not possible to infer an increase in the threat level from bare statistics about the number of people convicted of or charged with terrorism offences in the absence of any qualitative analysis of those statistics (paragraphs 24-33).

The second plank of the Government's case is the growing complexity of terrorist investigations. But the Committee has not yet seen a full analysis of the operation of the 28-day limit so far, and concludes that experience to date provides no evidence to support an extension of pre-charge detention beyond 28 days. It also draws attention to the evidence of the CPS that it is satisfied with the present limit, which seems devastating to the Government's case for an extension (paragraphs 34-43).

In the Committee's view, the Government has failed to consider how the alternatives to extension of pre-charge detention combine together to avoid the risk of investigation teams

running out of time. Given the range of alternatives already available, including broad offences such as acts preparatory to terrorism, charging suspects on the basis of reasonable suspicion, post-charge questioning, control orders and other forms of surveillance, the Committee does not believe that, without extension, there is a gap in public protection. And it notes other possible future changes which could help reduce the pressure on investigators. A power to go beyond these alternatives, and to have a power to detain in a case where even the lower threshold test cannot be met by the end of 28 days, would be dangerously close to a power of preventive detention which is prohibited by Article 5(1) ECHR. The Committee urges the Government to consider the interrelationship between various alternatives to extending pre-charge detention in order to bring forward a package of measures, taken together, in place of the 42-days proposal. It again calls on the Government to consider the introduction of bail with conditions for Terrorism Act offences (paragraphs 44-51).

The Committee has grave doubts about the suggestion by Liberty that instead of new legislation to deal specifically with terrorism the Government could rely on the Civil Contingencies Act 2004 (paragraphs 52-58).

Although the Committee welcomes any commitment to enhance parliamentary accountability for the use of powers which interfere with liberty, it is very concerned by the implication in the Government's proposals that there might be parliamentary debate about the appropriateness of exercising the new power to detain for up to 42 days in relation to specific investigations, which would carry a serious risk of prejudicing any eventual trial of the individuals concerned. It recommends ruling out any such role for Parliament (which, as set out in the Government's proposals, would in any case be virtually useless as a safeguard because any debate would be so circumscribed and almost certainly take place after the 42 day limit had expired) (paragraphs 59-63).

The Committee has previously welcomed the Government's apparent commitment to enhancing judicial safeguards surrounding pre-charge detention. But there are no additional judicial safeguards proposed as part of the Government's preferred option for extension to 42 days, which therefore depends on the adequacy of existing safeguards, about which the Committee has repeatedly expressed concerns on human rights grounds including the suspect's right to a fully adversarial hearing. Having heard evidence about the way in which applications for warrants for further detention operate in practice, the Committee is confirmed in its view that such hearings do not satisfy the requirement of human rights law that the process be fully adversarial. It recommends changes. It may propose amendments to the Counter-Terrorism Bill to ensure that judicial safeguards at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR that there is a truly "judicial" procedure (paragraphs 64 - 100).

In short, any extension to pre-charge detention is a serious interference with liberty that requires a compelling, evidence-based case, and the Committee does not accept that the Government has made such a case for extending pre-charge detention beyond the current limit of 28 days, for the following reasons:

- i) it can find no clear evidence of likely need in the near future;
- ii) alternatives to extension do enough, in combination, to protect the public and are much more proportionate;

- iii) the proposed parliamentary mechanism would create a serious risk of prejudice to the fair trial of suspects;
- iv) the existing judicial safeguards for extensions even up to 28 days are inadequate (paragraph 101).

# Introduction

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## Background

1. In our last report in our ongoing inquiry into Counter-Terrorism Policy and Human Rights, in July 2007, we welcomed the Government's announcement of a new approach to counter-terrorism policy, in particular its commitment to extensive consultation and to proceeding on the basis of national consensus.<sup>1</sup> We looked forward to the Government demonstrating this change of approach in practice and to playing our full part in the deliberative process.

2. On Wednesday 25 July 2007 the Prime Minister made an oral statement to the House of Commons on national security, in which he outlined some of the measures on which the Government proposed to consult for possible inclusion in a counter-terrorism bill in the autumn.<sup>2</sup> On the same day the Home Office published two documents: a "bill content paper" setting out more detail of the measures being considered for possible inclusion in a future bill<sup>3</sup> and an analysis paper on pre-charge detention.<sup>4</sup> The Home Office also placed two further documents on its website: one prepared by the Crown Prosecution Service outlining the current procedures for obtaining an extension of pre-charge detention<sup>5</sup> and one prepared by the Home Office analysing the French examining magistrates system.<sup>6</sup>

3. The publication of these detailed documents, and the opportunity given for their detailed consideration and debate, demonstrated the Government's seriousness of intent in signalling a change of approach to counter-terrorism legislation. In its bill content paper the Home Office expressly recognised that the fast tracking through Parliament of all counter-terrorism legislation since 2000 had resulted in criticisms and stated that it was committed to a wide discussion of the measures to be included in a counter-terrorism bill later this year, with the Opposition parties, parliamentarians, relevant organisations and with wider communities before the Bill is introduced in Parliament. In addition to the commitment to widespread consultation over a number of months, the Prime Minister's statement and the accompanying documents also maintained a highly consensual tone, stating that the Government's aim was to seek to achieve consensus where possible about the measures which are necessary to counter terrorism.

4. From a human rights perspective, we were very pleased with the change of approach, because of the greater opportunity consultation gives for rigorous scrutiny of proposed measures for human rights compatibility, and the smaller risk of counter-productivity posed by a genuinely consensual approach. The period of consultation has enabled us to

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<sup>1</sup> Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157/HC 394 (hereafter "JCHR Report on 28 days"), at paras 2-5.

<sup>2</sup> HC Deb 25 July 2007 cols 841-845.

<sup>3</sup> *Possible Measures for Inclusion in a Future Counter Terrorism Bill*, Home Office, 25 July 2007 (hereafter "bill contents paper").

<sup>4</sup> *Options for pre-charge detention in terrorist cases*, Home Office, 25 July 2007 (hereafter "pre-charge detention options paper").

<sup>5</sup> *Scrutiny of pre-charge detention in terrorist cases*, CPS, July 2007 (hereafter "CPS paper on pre-charge detention").

<sup>6</sup> *Terrorist investigations and the French examining magistrates system*, Home Office, July 2007 (hereafter "Home Office paper on examining magistrates").

take evidence from ministers and others about the measures being contemplated and to ask various questions in correspondence. Transcripts of the oral evidence and copies of the correspondence are appended to this Report.

5. In our view, however, the Government now faces a critical test of its commitment to a consensual approach and of the sincerity of its commitment to “winning the hearts and minds” of members of the communities from which the violent extremists are recruited. For it seems to us, for reasons that we explain in this report, that on one of the most important of the Government’s proposals, to extend the period of pre-charge detention beyond 28 days, there is now a very clear national consensus that the case for further change has not been made out by the Government.<sup>7</sup> Notwithstanding the failure of the Government to prove its case, on 6 December the Home Secretary announced the Government’s intention to legislate in the forthcoming counter-terrorism bill to increase the pre-charge detention period from 28 to 42 days, subject to various safeguards designed to ensure that the power to detain for that length of time is exceptional, time-limited and only triggered by “specific operational need”. **In our view, a truly consensual approach should lead the Government to accept that it has failed to build the necessary national consensus for this very significant interference with the right to liberty, and withdraw the proposal. To proceed with it, in these circumstances, calls into question the Government’s commitment to a consensual approach.**

6. The purpose of this report is to scrutinise the human rights compatibility of the Government’s proposal to extend the period of pre-charge detention from 28 to 42 days. As always, we ground our analysis in the human rights standards with which the Government’s counter-terrorism measures must be compatible. We agree with the Government that it has a duty to protect people from terrorism and to keep the legal framework under constant review to ensure that counter-terrorism measures remain adequate and proportionate to the threat posed by terrorism. Indeed, both we and our predecessor Committee have consistently drawn attention to the fact that these are duties imposed by human rights law itself, which imposes positive obligations on the state to take effective steps to protect people against the threat of terrorist attack.<sup>8</sup> The strength of these positive obligations is not to be underestimated: in our view they impose a duty on the State to prosecute those whom it suspects of being involved in terrorist activity in order to prevent loss of life in terrorist attacks.<sup>9</sup> **We therefore also agree that the case made by the police and the Government for additional powers to detain terrorist suspects before charge must be treated with great seriousness and considered very carefully. That careful consideration involves subjecting the case for extended pre-charge detention to rigorous scrutiny to ascertain whether, on all the evidence, including the availability of alternatives to extended pre-charge detention, there really exists a risk to the public of sufficient magnitude to make it truly “necessary” to extend the period of pre-charge**

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<sup>7</sup> The majority of respondents to the Government’s consultation were against an outright extension to the current 28 days: Home Office *Summary of Responses to the Counter Terrorism Bill Consultation*, Cm 7269, December 2007, para. 14.

<sup>8</sup> See e.g. Eighteenth Report of Session 2003-04, *Review of Counter-terrorism powers*, HL Paper 158/HC 713, at paras 7-14; Third Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I/HC561-I (hereafter “JCHR Report on the Terrorism Bill 2006”), at paras 5-6.

<sup>9</sup> Twenty-fourth Report of Session 2005-06, *Counter-Terrorism and Human Rights: Prosecution and Pre-Charge Detention*, HL Paper 240/HC 1576 (hereafter “JCHR Report on Prosecution and Pre-charge Detention”), at paras 15-17.



**detention from 28 to 42 days, which is the test which human rights law requires to be satisfied where measures would interfere significantly with personal liberty.**

### The Government's current position

7. On 6 December 2007 the Home Secretary announced that the Government is proposing to legislate in the forthcoming Counter-Terrorism Bill to increase the pre-charge detention limit beyond 28 days to 42 days, but only for a strictly limited period of time and in response to a specific operational situation. She also published a short paper, prepared by the Home Office, setting out the Government's case for extending the limit beyond 28 days, and describing in detail the Government's preferred option for achieving this;<sup>10</sup> the report of Lord Carlile, the reviewer of terrorism legislation, into the Government's proposed measures for inclusion in a counter-terrorism bill;<sup>11</sup> and the Home Office's summary of consultation responses.<sup>12</sup>

8. The Home Secretary's paper acknowledges that extending the current limit on the extension of terrorism suspects prior to charge is a contentious issue on which it has not been possible so far to achieve consensus. On the one hand, both the police and the Government's reviewer of terrorism legislation, Lord Carlile, have expressed their professional judgment that it is likely that, at some point in the near future, the situation will arise in a small number of exceptional cases where there will be a need to hold terrorist suspects for more than the current limit of 28 days. On the other hand, the paper says, concerns have been expressed "by community groups and others" that there has not yet been any firm evidence to support an extension to pre-charge detention.

9. The Home Secretary, in her introduction to the paper, declares her belief that there already exists a strong consensus that it is desirable to achieve the strongest level of public protection and to secure the successful prosecution of terrorists, but in a way that is compatible with human rights and which protects the hard won liberties of individuals. The purpose of the Government's proposal is said to be to set out the case for making it possible to go beyond 28 days, in a way which strikes this balance appropriately and which is therefore capable of commanding consensus.

### The Government's case for change

10. In the recent Home Office paper on pre-charge detention, the Government bases its case for extending pre-charge detention on two principal arguments:

- (1) the seriousness of the threat from international terrorism and "the way in which that threat is developing";
- (2) the trend for increasingly complex plots involving increasing amounts of evidence and data, in a great variety of forms, often with very significant international links,

<sup>10</sup> *Pre-Charge Detention of Terrorist Suspects*, Home Office, December 2007 (hereafter "pre-charge detention position paper").

<sup>11</sup> *Report on Proposed Measures for Inclusion in a Counter Terrorism Bill*, Lord Carlile of Berriew QC, December 2007, Cm 7262 (hereafter, Lord Carlile Report on Measures for inclusion in a Bill).

<sup>12</sup> Above fn. 7.

demonstrated by the fact that the full 28 days have been needed in two separate investigations so far.

11. The Government says that the combination of these factors gives rise to “the risk that, in the near future, it is possible that a serious terrorist suspect may need to be released because the police have insufficient time to bring a charge for a terrorist related offence.” Based on these trends, the Government believes that there is a clear case for going beyond 28 days in future in a small number of exceptional cases. The case is expressly a “precautionary” or “prudential” one.<sup>13</sup> The Government does not contend that the current limit has yet proved inadequate in any single case.

12. We subject this case to careful scrutiny below, after setting out the Government’s preferred option for extending pre-charge detention.

### The Government’s preferred option

13. In the most recent Home Office paper the Government has settled on a preferred option for extending pre-charge detention. The proposed approach is said to be guided by the approach taken by the Civil Contingencies Act 2004: any increase in pre-charge detention must be exceptional, temporary and dependent upon specific operational need.

14. The Government’s proposal is to legislate to increase the pre-charge detention limit from 28 to 42 days, but to impose a number of limits on the availability of the new 42 day limit:

- the 42 day limit would not come into force immediately but the Home Secretary would have the power to bring it into force by order;
- the Home Secretary would only have power to bring the 42 day limit into force after receiving a joint report from the DPP and the police setting out their reasonable grounds for believing that more than 28 days will be required to obtain, preserve or examine relevant evidence and stating that the investigation is being carried out diligently and expeditiously;<sup>14</sup>
- the Home Secretary’s decision to bring in the 42 day limit could be subject to judicial review;
- the 42 day limit would come into force on the day the Home Secretary signs the order making the higher limit available;
- if not agreed following a debate in both Houses of Parliament within 30 days of coming into force, the order bringing it into force would lapse after 30 days;
- the 42 day limit could only remain in force for a maximum of 60 days if approved by both Houses.

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<sup>13</sup> See e.g. pre-charge detention options paper, pp. 9 and 12: “the Government believes that it would be prudent and right to prepare for that now.”

<sup>14</sup> This is essentially the same as the current statutory test for an extension of detention in an individual case: see paragraph 32 of Schedule 8 to the Terrorism Act 2000.

- the Home Secretary would be required to provide a statement to Parliament within two days, or as soon as practicable, after bringing the order into force, including statements such as that:
  - a terrorist investigation is occurring which has given rise to an exceptional operational need
  - the investigation relates to the threat of serious damage as a result of terrorism
  - the higher limit is urgently needed and is necessary in order to prevent, control or mitigate terrorism
  - the higher limit is compatible with the ECHR
  - the Home Secretary has received the required report from the DPP and the police.
- Parliament would be informed (presumably by the Home Secretary) each time an application to hold someone for more than 28 days was approved by the courts;
- the Government's reviewer of terrorism legislation would report to Parliament both on the operation of the higher limit in individual cases and on the decision to bring the higher limit into force, and there would be a debate in Parliament on these reports.

**15. In relation to any statements to Parliament about the extension of pre-charge detention, we would expect reasoned explanations from Ministers, rather than mere assertions in the form of “statements”, to ensure that Parliament is transparently and fully informed about the justification for particular decisions and that ministerial reports to Parliament do not become simply formalities.**

16. The Home Secretary refers to this system imposing a “triple lock” on the new temporary limit of 42 days: (i) a report by the police and DPP demonstrating a specific operational need; (ii) the agreement of the Home Secretary; and (iii) a set of strong parliamentary and judicial safeguards.

17. The judicial safeguards envisaged are the same as those which already apply to extensions of detention beyond 14 days: they would require judicial authorisation at least every 7 days, which is only to be granted if the judge is satisfied that the suspect's continued detention is necessary to obtain or preserve evidence and that the investigation is being carried out diligently and expeditiously.<sup>15</sup> The only additional procedural safeguard proposed in relation to applications for warrants of further detention is that applications for extensions beyond 28 days would require the consent of the DPP.

18. The Government says that its proposed approach is “significantly different” from the one it originally proposed when it began the consultation in July. Then, the Government put forward four options for revising the current 28 day limit:

- (i) extending the 28 day limit with additional safeguards;
- (ii) extending the 28 day limit but deferring its coming into force;

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<sup>15</sup> Paragraph 32 of Schedule 8 to the Terrorism Act 2000.

- (iii) relying on the Civil Contingencies Act, as recommended by Liberty; and
- (iv) introducing judge-managed investigations.

19. The Government's preferred option in July was option (i): extending, with immediate effect, the maximum limit beyond 28 days to a new maximum limit to be set by Parliament. It accepted that any such increase in the limit should be balanced by strengthening the accompanying judicial oversight and Parliamentary accountability. The additional safeguards envisaged in the July consultation papers, however, were mainly improvements to the current parliamentary safeguards, including a requirement that the Home Secretary notify Parliament of any extension beyond 28 days as soon as practicable after it has been granted, with a requirement to provide a further statement to Parliament on the individual case and an option for the House to scrutinise and debate this. In addition, the independent reviewer would be required to report on the operation of the extended period in any individual case, to inform any parliamentary debate.

20. The Government's second option was to legislate for such a power now but provide for that power to be triggered at a later date by an affirmative resolution in both Houses. The Government was less keen on this option because it would require a parliamentary debate in the middle of what might be a national emergency. The Government's current preferred option is something of a hybrid of its original options (i) and (ii): an extension to 42 days, only to be brought into force by the Home Secretary at a future date, with an opportunity for parliamentary debate and with a limited form of parliamentary approval (the approval of both Houses is required, not to bring the order into force, but for the order to continue in force for more than 30 days).

21. The third option was Liberty's suggestion that the Government need not legislate to extend the pre-charge detention limit but instead can rely on the Civil Contingencies Act to extend the period of pre-charge detention by a further 30 days to a total of 58 days. We consider this proposal in detail below.

22. The fourth option was to introduce judge-managed investigations. We gave this option careful consideration in our report on *Prosecution and Pre-Charge Detention* in 2006.<sup>16</sup> After visiting France and Spain to see at first hand how judge-managed investigations work in practice, we reached the firm conclusion that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements, nor did we think that there was anything in the investigative approach which might be borrowed or grafted on to our more adversarial common law tradition. We are pleased to note that the accompanying Home Office paper on terrorist investigations and the French examining magistrates system reaches a similar conclusion: that if we were to try to emulate the examining magistrates system here, we would need to import the system in its entirety rather than borrow specific aspects and bolt them on to our criminal justice system, and this would require fundamental changes to our adversarial, common law tradition. **We do not propose to give this option any further consideration.**

23. We now turn to consider the two main arguments relied on by the Government to make the case for a further extension of the limit on pre-charge detention.

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<sup>16</sup> JCHR Report on Prosecution and Pre-charge Detention, above, at paras 45-76.

# Assessment of Human Rights Compatibility of the Government's Proposals

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## The threat level

24. The first plank of the Government's case for extending pre-charge detention is the scale and nature of the threat from terrorism. This is said to be "severe and shows no sign of diminishing. In fact, the reverse." The Government says that there are about 30 known plots, over 200 groupings or networks and about 2,000 individuals known to the police and security services. This figure is said to be the highest it has been: "not a spike but a new and sustained level of activity."

25. In 2007, a total of 42 individuals have been convicted of terrorist offences in 16 cases. The number of people charged with terrorism offences has increased from just over 50 in 2004 to around 80 in 2006 (no up to date figure is provided for 2007).

26. It is not clear from the Government's own consultation papers, however, whether the Government claims that the scale of the threat from terrorism has *increased* since the pre-charge detention limit was extended to 28 days in July 2006. Scrutinised carefully, the Government's statements about the level of the threat are shy of categorically claiming that the level of the threat has increased since the 28 day limit was enacted.

27. We therefore asked the Minister, Mr Tony McNulty, in September, whether the scale of the threat from international terrorism had increased since the limit was extended to 28 days in July 2006. He said that the threat was at a very high level, but agreed that it was "pretty well the same" as it was at the same time last year.<sup>17</sup> We received a similar message in an informal meeting with senior police officers in October. In an interview with the Daily Telegraph on 26 November, DAC Peter Clarke, head of the Metropolitan Police's Counter Terrorism Command, emphasised "the increasing complexity of cases, the computers, the false names employed by terrorists, the number of jurisdictions over which they operate" as the basis for the proposal to extend the pre-charge detention period, rather than any increase in the threat level.<sup>18</sup>

28. On 5 November 2007 the Director General of the Security Service, Jonathan Evans, gave a public lecture to the Society of Editors, in Manchester, in which he said that, compared to a year earlier, there were now 400 more people in the UK who pose a direct threat to national security and public safety because of their support for terrorism.<sup>19</sup> His speech, delivered on the eve of the Queen's Speech, which included the Government's Counter-Terrorism Bill, was widely reported as signalling that there had been a significant increase in the level of the threat from terrorism in the past year.

29. Following his public lecture, we wrote to the Director General asking him to give evidence to us about the level of the threat and in particular if it had increased. We

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<sup>17</sup> Oral evidence, 20 September 2007, Qs 7-8.

<sup>18</sup> "Counter terror Yard chief's fears", Daily Telegraph, 26 November 2007.

<sup>19</sup> *Counter-Terrorism and Public Trust*, speech by Jonathan Evans to the Society of Editors conference in Manchester, 5 November 2007.

explained that the level of the threat posed by terrorism is central to our work in scrutinising the human rights compatibility of the Government's proposed counter-terrorism measures, and that, if the threat from terrorism had increased significantly in the last year, contrary to what we had been told by the Minister, this had considerable implications for the proportionality of the Government's response. The Director General replied that the Security Service's parliamentary accountability is to the Intelligence and Security Committee, but offered to provide us with a private briefing on the current terrorist threat to the UK.<sup>20</sup> However, in our view it is important that the information about the level of the threat should be made available to both Parliament and the public.

30. The Director General's lecture raises important questions about whether and, if so, the extent to which there has been an increase in the level of threat in the last year. We would like to be able to ask him, for example, whether the significant increase in the number of individuals of interest to the Security Service is due to the Service's coverage of extremist networks being more thorough (which presumably would tend to reduce the threat), or due to a rapidly growing number of people becoming involved in terrorism, which would obviously bear the opposite interpretation. The answers to these and other questions about the current level of the threat should be available to parliamentarians and the public. We would also like to ask him, for example, for more information to enable us to assess how likely terrorists are to have the capability to use chemical and biological weapons. The Government's consultation papers refer to terrorists having "a clear intent (if not necessarily capability) to use chemical and biological attacks." Publicly accessible information about this likely capability is crucial to any attempt to arrive at a meaningful assessment of the level of the threat.

31. It has been a constant theme of our reports on counter-terrorism and human rights that there are far too few opportunities for independent democratic scrutiny of the Government's assessment of the level of the threat from terrorism. We have pointed out several times that unless both Parliament and the public are better informed about the nature and the level of that threat, it is impossible for them to make meaningful judgments about whether particular measures proposed by the Government to counter that threat are proportionate.<sup>21</sup> We have said before that we consider it important that the Director General of the Security Service be prepared to answer questions from the parliamentary committee with responsibility for human rights. We had hoped that there might be a change of approach in light of the Government's commitment in its *Governance of Britain* Green Paper to strengthen Parliament's role in holding the executive accountable, and in particular the explicit recognition in that document that "as security issues rise up the political agenda, government decisions on security and intelligence must be subject to proper scrutiny."<sup>22</sup> **We are therefore disappointed that the Director-General of MI5 is prepared to give a public address about the level of the terrorist threat, but so far appears reluctant to give public evidence on the subject to the parliamentary committee whose role it is to advise Parliament about the human rights compatibility of the Government's counter-terrorism measures.**

<sup>20</sup> Letter from Jonathan Evans, Director General of MI5, dated 27 November 2007, Appendix 7.

<sup>21</sup> See e.g. JCHR Report on Prosecution and Pre-charge Detention, above, at paras 159-161.

<sup>22</sup> *The Governance of Britain*, CM 7170, July 2007, para. 88.



32. Lord Goldsmith, the former Attorney General, gave evidence to the Home Affairs Committee on 21 November 2007 to the effect that he had not seen any evidence during his time as Attorney General to indicate that longer than 28 days' pre-charge detention was necessary.<sup>23</sup> He acknowledged that he had been out of government for several months and that things might have changed since then, but if they had he would expect to see the new material on which any new proposals were formulated.<sup>24</sup> Lord Goldsmith stepped down as Attorney General on 27 June 2007. We have therefore written again to the Director General of the Security Service, renewing our invitation to give evidence to us on the record, and asking specifically whether the level of threat from terrorism has increased since that date, if so to what extent, and asking him to provide us publicly with as much information about the basis of his assessment of the increase in the threat level as it is possible to provide consistently with the obvious public interest in not disclosing information which would harm national security.<sup>25</sup>

33. As we have often made clear in previous reports, we do not underestimate the seriousness of the threat this country faces from terrorism. **In the context of the Government's proposal to extend still further the limit on pre-charge detention, however, the relevant question is whether the Government has provided the evidence to demonstrate that the threat from terrorism has increased since Parliament last considered the question of the appropriate limit in 2006. We have not seen any evidence to suggest that the level of threat from terrorism has increased in the last year. The evidence that we have seen on this question suggests that the threat level remains about the same as last year. Nor is it possible to infer an increase in the scale of the threat from bare statistics about the number of convictions or the number of people charged with terrorism offences, in the absence of any more qualitative analysis of, for example, the seriousness of the charges brought and the number of convictions secured in the last year compared to previous years.**

### Complexity of terrorism investigations

34. The second basis of the Government's case for extending pre-charge detention is what it says is the trend towards the increasing complexity and scale of terrorist investigations, in terms of material seized, use of false identities, multiple languages and international links. The arguments relied on by the Government here are identical in nature to those relied on when the previous extension from 14 to 28 days was made in 2006. The pre-charge detention options paper contained some "case studies" providing statistics about matter such as the number of computers, DVDs, mobile phones etc. seized in some recent investigations. However, the main evidence relied on to demonstrate that terrorism investigations are now so complex that there is a danger that 28 days pre-charge detention will soon be insufficient is the fact that in two recent investigations suspects have been charged on the 28<sup>th</sup> day.

35. In our last report on counter-terrorism policy and human rights, in July 2007, we pointed to the urgent need for Parliament to be provided with more detailed information

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<sup>23</sup> Oral evidence to HAC, 491.

<sup>24</sup> *Ibid*, Q518.

<sup>25</sup> Appendix 8.

about how the extended period of pre-charge detention has operated in practice since it was introduced in July 2006.<sup>26</sup> We identified a number of detailed questions which in our view needed to be answered in order for Parliament to be fully informed about how the extended period of pre-charge detention has operated in practice since its introduction.<sup>27</sup>

36. We asked the Minister, Tony McNulty, on 20 September 2007 whether the Government would be carrying out its own detailed research about how the power to detain for up to 28 days before charge had been used in practice and make that information available to Parliament. The Minister said that the Government was “not minded to because we think Lord Carlile picks up all of that in his broader role” [as reviewer of the terrorism legislation].<sup>28</sup> In fact, as we pointed out in our last report,<sup>29</sup> Lord Carlile’s most recent report on the operation of the Terrorism Act 2000 did not even state in how many cases the power to authorise extended detention had been exercised, let alone provide the detailed information which we thought Parliament required.

37. We subsequently wrote to the Minister asking what steps he was taking to obtain more information about the use so far made of the power to detain pre-charge for more than 14 days.<sup>30</sup> In response the Minister referred us to a letter from the Home Secretary to David Davis MP dated 6 November 2007,<sup>31</sup> in which she addresses the concern that an extended period of pre-charge detention simply allows the police to take more time over the same tasks they would have done much more quickly if they only had a shorter period. The Home Secretary says that she has asked for further information from the police about the conduct of the investigation into the alleged airline plot, and that the police are satisfied that there were not unnecessary delays in interviewing, charging or releasing suspects.

38. It is clear that the Government itself does not intend to conduct the research necessary to provide Parliament with the answers to the questions identified at paragraph 40 of our earlier report. It also seems that no steps have so far been taken by any independent body or reviewer to obtain this information. In an attempt to find some answers about the lessons to be learned from the operation of the 28 day limit so far, we took evidence from Sue Hemming, Head of the Counter Terrorism Division at the Crown Prosecution Service, who has taken many of the charging decisions in recent significant terrorism investigations, including in the alleged airline bomb plot case, in which the power to detain for up to 28 days pre-charge was first used, and Mr Ali Naseem Bajwa, a barrister specialising in terrorism cases who acted for some of the suspects in the same case and in other terrorism investigations.

39. The Government argues that the experience of the alleged airline bomb plot, in which six people were charged after being held for more than 14 days, shows that the increase from 14 to 28 days was justified, because it enabled people to be charged who could not otherwise have been charged. This was confirmed in evidence by Ms Hemming of the CPS

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<sup>26</sup> JCHR Report on 28 days, above, at paras 29-44.

<sup>27</sup> *Ibid* at para. 40.

<sup>28</sup> Oral evidence, 20 September 2007, Q2.

<sup>29</sup> JCHR Report on 28 days, above, at para. 41.

<sup>30</sup> Letter to Tony McNulty, 24 October 2007, Appendix 1.

<sup>31</sup> Appendix 2.



who was personally involved in all of the relevant charging decisions.<sup>32</sup> Ms. Hemming also referred to the Dhiren Barot case, in which she made the charging decision, as “an example of a case where we really were very, very concerned that 14 days was not going to be enough. Fortunately it was.”<sup>33</sup> The Government also rely on the fact that three suspects have been charged at the very end of the 28 day period as demonstrating that the 28 day period may in some cases prove insufficient.

40. As Mr. Bajwa pointed out to us in his evidence, however, reliance by the Government on these cases to demonstrate that 14 or even 28 days may not be enough to bring charges is somewhat premature, because none of the cases in question has yet come to trial, and until the outcome of those cases is known it is difficult to draw any lessons from them about the adequacy or otherwise of the 14 or 28 day limit. In addition, while they are pending trial it would be inappropriate to conduct any in-depth qualitative analysis to attempt to determine whether they show the increase to 28 days to have been justified and whether they show 28 days to be insufficient, or the opposite, because this would risk prejudicing the trials of the individuals concerned. Although we heard some evidence of a general nature about the urgency with which the police pursued the investigation in the cases which went beyond 14 days, and the frequency of interviews, we found that these were not matters that we could satisfactorily explore in evidence while the cases themselves were *sub judice*. **We conclude that until it is possible to conduct the necessary qualitative research into the actual use which has been made of the power to detain for up to 28 days pre-charge, which must await the outcome of the criminal trials of those charged, the experience of the use of the power to date provides no evidence to support an extension of pre-charge detention beyond 28 days.**

41. In the Home Office’s recent paper on pre-charge detention, the Government accepts that there has not yet been a case in which the current limit of 28 days has proved inadequate. However, it relies on statements by Ken Jones of ACPO and Lord Carlile that “there may well arise in the future a very small number of extremely important cases in which 28 days would prove insufficient.” We found no such anxiety on the part of the CPS. Ms Hemming told us quite robustly that she had never found the current 28 day limit on pre-charge detention too restrictive. She said:

“The Crown Prosecution Service has made its position clear, that we think the 28 days has been sufficient in each case that we have had. We have not seen any evidence that we have needed beyond 28 days.”<sup>34</sup>

42. This was entirely consistent with what the DPP told the Home Affairs Committee on 21 November, that the CPS “have not asked for an increase”<sup>35</sup>, was “satisfied with the position as it stands at the moment”<sup>36</sup> and that “our experience so far has been that we have managed and managed reasonably comfortably”.<sup>37</sup>

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<sup>32</sup> Oral evidence, 5 December 2007, Q122.

<sup>33</sup> *Ibid*, Q138.

<sup>34</sup> *Ibid*, Q119.

<sup>35</sup> Evidence of Sir Ken Macdonald QC to HAC, 21 November 2007, Q545.

<sup>36</sup> *Ibid*, Q546.

<sup>37</sup> *Ibid*, Q551.

43. We find the evidence of the CPS, that they have managed comfortably within the current 28 day limit, devastating to the Government's case for an extension. The essence of that case is that there is a risk that, in the near future, a terrorism suspect may have to be released because the investigation into the plot he was involved in proves so complex or of such a scale that he cannot be charged within 28 days. But the very body with the responsibility for making the charging decisions, and with all the knowledge and experience of making them to date, working closely alongside the police who conduct the investigations, is quite confident that 28 days is enough time in which to charge. In our view, this fundamentally calls into question whether it really is "likely", or even whether there is any "risk" at all, that at some point in the near future a case will arise in which 28 days is insufficient.

### Alternatives to extended pre-charge detention

44. In its initial consultation papers, the Government expressly accepted that a combination of other measures (e.g. the availability of the offence of acts preparatory to terrorism and greater flexibility on charging through use of the threshold test (see paragraph 46 below)) has already reduced the pressure on investigation teams, and that future possible measures (e.g. post-charge questioning and the use of intercept as evidence) might further reduce that pressure.<sup>38</sup> However, the Government's position in its consultation papers was that while these other measures may reduce the risk of investigation teams coming up against the 28 day limit on pre-charge detention, they cannot eliminate that risk entirely, and it is therefore necessary to debate whether the current limit on pre-charge detention needs to be reviewed.

45. At the end of its consultation, however, the Government appears even more resistant to the idea that other alternative measures are capable of removing the need to extend the pre-charge detention limit. The threshold test, for example, is said to be useful in some cases but is not the whole answer because it cannot be used in all instances; post-charge questioning will reduce the pressure on investigation teams but will not eliminate the need for extending pre-charge detention because it will not reduce the evidential threshold needed to charge a person in the first place; allowing intercept to be admissible might help bring charges earlier in some cases but there is no reason to suppose this would assist in all the cases in which there might be a need for longer pre-charge detention.

46. **In our view the Government's rather perfunctory dismissal of the alternatives to extending pre-charge detention suffers from the basic flaw that it takes each one in isolation and asks whether it eliminates entirely the risk that investigators will run out of time. It fails to consider how they operate together.** For example, the combination of the threshold test and post-charge questioning must potentially go quite a long way to reducing the risk of an investigation running out of time. Ms Hemming from the CPS explained to us exactly what the "threshold test" means, as contained in the Code for Crown Prosecutors:

"The threshold test requires a Crown Prosecutor to decide whether there is at least a reasonable suspicion that a suspect has committed an offence and if there is, whether it is in the public interest to charge that suspect. In that particular test it has to be not

<sup>38</sup> See e.g. Pre-charge detention options paper, p. 6; bill contents paper, para. 37.

appropriate to release a suspect on bail after charge, but obviously we are in a slightly different position with terrorism cases because we have no bail. In order for us to decide on the reasonable suspicion we have to look at the following factors, which are the evidence available to us at the time we make the decision, the likelihood and nature of further evidence being obtained, the reasonableness for believing that that evidence will become available, the time it will take to gather that evidence and the steps being taken to do so, the impact the expected evidence will have on the case and the charges that the evidence will support.”<sup>39</sup>

47. The “full code test”, by comparison, requires the prosecutor to be satisfied that there is a realistic prospect of conviction. Comparing the two tests, it is obvious that the availability of the threshold test is of major significance to the debate about the need to extend the 28 day limit on pre-charge detention, because it enables prosecutors to charge at an earlier stage than would otherwise be possible. As the DPP told the Home Affairs Committee on 21 November, so far the CPS have been able to obtain the evidence that is necessary before the 28 days because “given the nature of the threshold test, the evidence is only required to demonstrate a reasonable suspicion that the defendant committed the offence.”<sup>40</sup> Contrary to the Government’s earlier responses to our reports on this subject, which suggested that the threshold test was of little relevance in terrorism cases, Ms Hemming told us that the threshold test was used by prosecutors in just under 50% of the last 18-20 charging decisions made in terrorism cases, and probably in just over 50% of the charging decisions made in relation to suspects held for more than 14 days.<sup>41</sup> Indeed, we were told that the two suspects in the alleged airline bomb plot case who were charged at the very end of the 28 day period were charged with acts preparatory to terrorism on the threshold test.<sup>42</sup> We think that this demonstrates very well the utility, from the prosecution’s point of view, of the *combination* of broad offences such as acts preparatory to terrorism and the threshold test, which in turn will be further enhanced if the possibility of post-charge questioning is introduced. We intend to report at a later date on post-charge questioning and other counter-terrorism matters.

48. The Government’s position on pre-charge detention is premised on the assumption that, without extending the period of pre-charge detention, there is a gap in the protection of the public, because there is a risk that a terrorist suspect may have to be released from custody because there is insufficient evidence on which to charge him with a terrorism offence. **Looking at the picture as a whole, we do not think that there can really be said to be a gap in protection, when one considers, for example, the availability of offences as broad as acts preparatory to terrorism; the possibility of charging suspects with such offences on the basis of reasonable suspicion; the possibility of post-charge questioning and the drawing of adverse inferences from refusal to answer such questions; and the availability of control orders and other forms of surveillance to limit and monitor the risk posed by the individual concerned. Insofar as the Government wish to go beyond these alternatives, and to have available a power of pre-charge detention “in a case where although there is reasonable suspicion that an offence has been committed, and**

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<sup>39</sup> Oral evidence, 5 December 2007, Q149.

<sup>40</sup> Evidence of Sir Ken Macdonald to HAC, 21 November 2007, Q 551.

<sup>41</sup> Oral evidence, 5 December 2007, Qs 151 and 154-155.

<sup>42</sup> *Ibid*, Qs 146-148.

evidence is anticipated to be found in the material to be examined, the likelihood of that evidence being available within a reasonable time is not sufficiently certain for the threshold test to be met”,<sup>43</sup> we consider this to be dangerously close to a power of preventive detention, which the Government itself accepts would be in breach of Article 5(1).<sup>44</sup>

49. In addition, there are other possible future changes which could also reduce the pressure on investigators, including allowing for the admissibility of intercept, which is likely to allow suspects to be charged at an earlier stage because it expands the range of evidence which can be taken into account when deciding whether they should be charged; and providing for bail with conditions for terrorism offences, which would enable terrorism suspects who do not pose a threat to public safety to be released but subject to conditions.<sup>45</sup> Ms. Hemming from the CPS agreed that bail with conditions could be seen as an alternative to pre-charge detention for those accused of lesser terrorism offences:

“I think there is a real argument for there being the ability to bail people with conditions, particularly people that the police do not necessarily believe would cause any harm to public safety. They can look at the computers and see if what they expected to be there was there while they were bailed.”<sup>46</sup>

**50. We urge the Government to consider the interrelationship between the various alternatives to extending pre-charge detention, in order to bring forward a package of measures, taken together, in place of the 42 days proposal.**

**51. We again call on the Government to give serious and urgent consideration to introducing bail with conditions for Terrorism Act offences, or to explain its reasons for refusing to do so.**

## The Civil Contingencies Act option

52. In its pre-charge detention options paper the Government included as one option Liberty’s suggestion that the Government need not legislate now to extend the period of pre-charge detention in anticipation of a future grave emergency involving multiple plots, but can rely instead on the Civil Contingencies Act 2004. In Liberty’s view, that Act provides a power to extend pre-charge detention periods in any future emergency, subject to parliamentary and judicial control, and a targeted and temporary extension of pre-charge detention periods in a genuine emergency, contained in an executive order which could be quashed by the courts if incompatible with the ECHR, which would be preferable to a permanent change to the legal framework contained in primary legislation which can only be declared incompatible by the courts and could not be struck down.

53. The Prime Minister indicated some scepticism about this proposal in his comments in the House of Commons on 25 July when he asked whether advocates of this option believe that “the declaration of a state of emergency in the circumstances that we have been talking

<sup>43</sup> Pre-charge detention position paper, p. 9.

<sup>44</sup> *Government Reply to the Twenty-fourth Report of Session 2005-06, HL Paper 240/HC1576*, Cm 6920 (29 September 2006), p. 11.

<sup>45</sup> JCHR Report on 28 days, above, paras 173-175.

<sup>46</sup> Oral evidence, 5 December 2007, Q139.

about would not send out a message about how we deal with things in this country that is exactly the opposite of the message that we want to send out?”<sup>47</sup> In the Home Office’s recent paper, the Government rejects the Civil Contingencies Act option for a number of reasons, including uncertainty about whether it would cover the sorts of situations which the Government wishes to cover (e.g. complex investigations falling short of an emergency).

54. We note that according to the Home Office’s summary of consultation responses, the majority of respondents preferred the Civil Contingencies Act option, being attracted in particular by the understanding that it is linked to specific operational circumstances and time limited. However, we have grave doubts about Liberty’s Civil Contingencies Act proposal, for a number of reasons. We doubt whether the power of the executive to make emergency regulations under the Civil Contingencies Act includes a power to authorise detention. The power to make emergency regulations<sup>48</sup> is a general power, to make provision of any kind that could be made by Act of Parliament or exercise of the Royal Prerogative, but does not expressly include deprivation of liberty. In our view the “principle of legality” which is well established in our common law of human rights,<sup>49</sup> requires such general powers to be read strictly and requires deprivations of liberty to be expressly authorised by Parliament in the regulation making power. In the absence of such express authorization to deprive of liberty, any regulation extending the period of pre-charge detention would be *ultra vires*.

55. The Act also expressly limits the regulation making power by providing that emergency regulations “may not alter procedure in relation to criminal proceedings”.<sup>50</sup> We find it hard to believe that the limit on pre-charge detention in Schedule 8 to the Terrorism Act 2000 does not count as part of the “procedure in relation to criminal proceedings”. To confine the limitation to post-charge proceedings would be highly artificial (a pre-charge detention hearing is clearly not civil), and again we think that the common law principle of legality, that the phrase be interpreted with a presumption in favour of liberty, would come into play. In our view, therefore, the limitation on the power to make emergency regulations altering procedure in relation to criminal proceedings would apply, and make a regulation extending the period of pre-charge detention *ultra vires*. In short, we do not agree that the Civil Contingencies Act authorizes executive preventive detention in times of emergency. If the Government wishes to take that step, there would need to be a proper parliamentary debate about whether the strict conditions for derogating from the right to liberty in Article 5 ECHR were met.

56. We are also concerned by the lack of safeguards involved in the Civil Contingencies Act option: it leaves it to the emergency regulations themselves to provide the necessary safeguards, such as appropriate judicial scrutiny of extended detention, which both the Government and Parliament may be less inclined to provide when regulations are being made in the context of an emergency.

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<sup>47</sup> HC Deb 25 July 2007 col. 849.

<sup>48</sup> s. 22(3) Civil Contingencies Act 2004.

<sup>49</sup> *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115.

<sup>50</sup> s. 23(4)(d) Civil Contingencies Act 2004.

57. We also share the concern expressed by the DPP to the Home Affairs Committee, that the difficulty with the Civil Contingencies Act option proposed by Liberty is that there would have to be a debate in Parliament about an order extending the period of pre-charge detention in respect of a particular case, and this would risk prejudicing the trial of those concerned (and see paragraph 60 below).<sup>51</sup>

**58. Our conclusion is that the Civil Contingencies Act option is inappropriate, for the reasons we have given above. In addition, we expect Parliament to legislate on the basis of clear evidence, not hypothetical nightmare scenarios.**

### Parliamentary safeguards

59. Leaving aside for a moment the question of whether the case for such a change has been made out, we welcome any commitment to enhance parliamentary accountability for the use of powers which interfere with important human rights such as the right to liberty. As we noted in our recent report, there is already considerable scope for improving parliamentary accountability for exercise of the extended power to detain for between 14 and 28 days.

**60. However, we are very concerned by the unavoidable implication in the Government's preferred option that there might be parliamentary scrutiny and debate about the appropriateness of the exercise of the extended power to detain for up to 42 days in relation to specific, ongoing investigations. In our view this gives rise to the same concern as was raised by the DPP in the context of the Civil Contingencies Act option: any parliamentary debate about whether it is justifiable to invoke the higher 42 day limit in relation to a particular investigation will carry a serious risk of prejudicing the eventual trial of the individuals who are detained in the course of that investigation.** The nature of the concern was explained by Ms Hemming of the CPS:<sup>52</sup>

“We have real concerns that if there is an open Parliamentary debate about particular individuals, what would be said in those open debates would become public before that individual went to trial, and there may be issues over fair trial.”

61. Lord Carlile has expressed similar concerns about the potential unfairness to the uncharged suspect under the Government's original option (ii), which envisaged a debate in Parliament before the extended detention powers could be used.<sup>53</sup> **We agree. Because the power to extend will be in relation to a specific, ongoing investigation, any parliamentary debate about the justification for exercising the power will necessarily be so circumscribed as to be virtually useless as a safeguard.**

62. Parliament's proper role is to create the framework within which counter-terrorism is investigated and prosecuted. It is not appropriate for Parliament to debate and decide on whether particular individuals should be detained pre-charge beyond 28 days. That is an inherently judicial, not a legislative, function. **We recommend that the Government rule**

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<sup>51</sup> Evidence of Sir Ken Macdonald QC to HAC, 21 November 2007, Q580.

<sup>52</sup> Oral evidence, 5 December 2007, Q207.

<sup>53</sup> *Report on Government's proposed counter-terrorism measures*, December 2007, at para. 48.



**out enabling Parliament to debate and decide on pre-charge detention beyond 28 days in relation to specific ongoing investigations.**

63. Although, for the reasons given above, we object in principle to a legal framework which envisages parliamentary debate about the merits of extensions of pre-charge detention in relation to specific investigations, we think it is also worth pointing out that, even on their own terms, the parliamentary safeguards which are proposed are hardly “substantial” as the Government claims. **On closer inspection, the bringing into force of the proposed 42 day limit is not really “subject to parliamentary approval” at all, despite the Home Secretary’s claims in her letter of 5 December. Even if both Houses vote to disapprove the order, it will remain in force for 30 days, and therefore, assuming that the order bringing into force the 42 day maximum will only be made towards the end of the current 28 day maximum period, the order will nearly always lapse only after the relevant individuals have been detained for the full 42 days.**

## Judicial safeguards

### *The promise of “stronger judicial safeguards”*

64. The importance of the judicial safeguards which accompany pre-charge detention has been consistently emphasised by the Government throughout its consultation on whether there should be an extension beyond 28 days. Indeed, the Government’s preferred option has always been to extend the current 28 day limit with “additional safeguards”. Both the Prime Minister in his statements to the Commons and the bill contents paper refer to *enhancing* the judicial safeguards which already exist and about “further” judicial scrutiny, and the pre-charge detention options paper talked of balancing any increase in the limit by “strengthening the accompanying judicial oversight”. Judicial safeguards continue to be part of the Government’s description of what it proposes: in the Home Secretary’s letter of 5 December to the Chairman of the Home Affairs Committee, she emphasises that “the higher limit would be ... subject to ... strong judicial safeguards.”

65. In our last report, we welcomed the Government’s apparent commitment to enhancing the judicial safeguards surrounding pre-charge detention, and in particular the Prime Minister’s acknowledgment that proper judicial scrutiny is essential in order to guarantee against arbitrariness in the exercise of powers which take away liberty.<sup>54</sup> Our welcome proved misplaced: **there are no additional judicial safeguards proposed as part of the Government’s preferred option for extending pre-charge detention.**

66. We have been puzzled by this aspect of the Government’s proposals since the beginning of the consultation in July, for although there are repeated references in the consultation documents to increased judicial safeguards, no specific proposals were made in any of the consultation papers which amount to improving judicial scrutiny or strengthening the judicial safeguards. We were particularly concerned because we had very recently made detailed and specific recommendations about how to improve the current judicial safeguards surrounding pre-charge detention.<sup>55</sup> When the Minister, Tony McNulty, gave evidence to us in September he again referred to there being stronger

<sup>54</sup> JCHR Report on 28 days, above, at para. 58.

<sup>55</sup> *Ibid*, at paras 59 and 61 (summarised below at para 72).

judicial safeguards if the power to detain pre-charge were to be extended beyond 28 days,<sup>56</sup> so we pressed him as to exactly what sorts of additional judicial safeguards the Government had in mind.<sup>57</sup>

67. We received a disarmingly candid answer from Mr David Ford, Head of the Counter Terrorism Bill team. He said:

“In terms of judicial safeguards, they are not really extensions. What we are saying is that it would be a High Court judge who would hear extensions beyond 28 days. The only change in terms of judicial safeguards would be that you could not apply for an extension beyond 28 days without the consent of the Director of Public Prosecutions. So you would continue with a High Court judge for any extension hearings beyond 28 days but there would be the additional thing that you would require the consent of the Director of Public Prosecutions.”<sup>58</sup>

Elsewhere in his evidence, however, Mr. Ford said that there may also be an additional role for the judiciary in terms of oversight of the pre-charge detention period.<sup>59</sup> We therefore wrote to the Minister again asking what stronger judicial safeguards the Government has in mind when it talks of strengthening those safeguards.<sup>60</sup> In the Minister’s response, he said that one of the options set out in the consultation papers was increased judicial involvement in the pre-charge detention period, and he said that the Government was now considering the nature of the judicial safeguards for any extended period of pre-charge detention and would keep the Committee informed of developments.<sup>61</sup>

68. In the event, Mr. Ford’s candid answer proved correct. **In the Government’s announcement of its preferred way forward, the only additional “safeguard” surrounding applications for warrants of further detention is that applications for extension would require the consent of the DPP. It hardly needs pointing out that this is not a “judicial” safeguard, and it hardly seems a very substantial safeguard as it is already the case that applications for extension of detention are made by the Crown Prosecution Service not the police,<sup>62</sup> and it is inconceivable that the DPP would not be asked to consent to the making of such an exceptional application as one to extend pre-charge detention beyond 28 days.**

69. The Home Office’s summary of consultation responses states that any support for an extension of pre-charge detention was on the understanding that there would be additional oversight to ensure that any further detention beyond 28 days was justified, and that most respondents echoed the view that there should be added judicial or Parliamentary scrutiny should the Government decide to go beyond 28 days.<sup>63</sup>

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<sup>56</sup> Oral evidence, 20 September 2007, Qs 2 and 24.

<sup>57</sup> *Ibid*, Q25.

<sup>58</sup> *Ibid*, Q25.

<sup>59</sup> *Ibid*, Q27.

<sup>60</sup> Letter dated 24 October 2007 to Tony McNulty (Appendix 1).

<sup>61</sup> Letter Tony McNulty to JCHR, 16 November 2007 (Appendix 4).

<sup>62</sup> Oral evidence, 5 December 2007, Q171.

<sup>63</sup> Summary of Consultation Responses, above, para. 17.



**70. In light of the Government’s previous statements of intent to provide additional judicial safeguards surrounding pre-charge detention, and the apparent views of most respondents to the Government’s consultation that such additional judicial safeguards should be provided if any extension to 28 days is proposed, we recommend that the Home Secretary provide Parliament with a full explanation as to why the Government has decided not to propose any additional judicial safeguards.**

### *The adequacy of existing judicial safeguards*

71. In the absence of any proposals by the Government to introduce additional judicial safeguards, the Government’s proposals for pre-charge detention up to 42 days will therefore depend on the adequacy of the existing safeguards.

72. In previous reports we have repeatedly expressed concerns about the adequacy of the judicial safeguards at the hearings of applications for a warrant of further detention.<sup>64</sup> We have two main concerns. First, we are concerned that the hearing of an application for a warrant of further detention is not a fully adversarial hearing, because of the power to exclude the suspect and his representative from the hearing and to withhold from the suspect and his lawyer information which is provided to the judge. Second, we are concerned about the adequacy of the judicial oversight because of the narrowness of the questions which the court is required to answer when it decides whether or not to authorise further detention.

73. Since our last report we have sought to understand better the way in which the judicial safeguards which currently exist actually operate in practice, by taking evidence on the subject from Ms Hemming and Mr. Bajwa. We have revisited our earlier recommendations in light of their very useful evidence.

### *The relevant human rights standards*

74. We have explained the human rights standards which apply to pre-charge detention in previous reports on this subject.<sup>65</sup> In short, the Government’s proposal to extend pre-charge detention of terrorism suspects to 42 days engages a number of aspects of the right to personal liberty in Article 5 ECHR:

- (1) the requirement that deprivations of liberty must be “in accordance with a procedure prescribed by law” and “lawful, which means that there must be sufficient guarantees against the detention being either arbitrary or disproportionate;<sup>66</sup>
- (2) the right of an arrested person to be informed “promptly” not only of the reasons for his arrest but also “of any charge against him”;<sup>67</sup>
- (3) the right of a person arrested on reasonable suspicion of having committed an offence to be brought promptly before a judge;<sup>68</sup> and

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<sup>64</sup> See, most recently, JCHR Report on 28 days, above, at paras 58-61.

<sup>65</sup> See e.g. JCHR Report on the Terrorism Bill 2006, above, at para 74.

<sup>66</sup> Article 5(1) ECHR.

<sup>67</sup> Article 5(2) ECHR.

(4) the right of an arrested or detained person to a judicial hearing to determine the lawfulness of their detention.<sup>69</sup>

75. The right of the defence to a fully adversarial hearing at applications for extended pre-charge detention is well established in ECHR case-law. Article 5(4) ECHR provides:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

76. In *Garcia Alva v Germany*<sup>70</sup> the European Court of Human Rights said this about the minimum content of a “judicial procedure” for the purposes of Article 5(4):

“39. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine “not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention”.

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required

...

The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect’s lawyer.”

77. We note that in response to concerns we have already expressed about the limited opportunity to challenge the basis on which a suspect has been arrested and continues to be detained, the Government has suggested that this is not the role of the court at the hearing of a warrant for further detention, because it is already possible to make a judicial challenge to unlawful detention through the use of habeas corpus proceedings.<sup>71</sup> In our

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<sup>68</sup> Article 5(3) ECHR.

<sup>69</sup> Article 5(4) ECHR.

<sup>70</sup> [2003] 37 EHRR 12 at paras 39-43.

<sup>71</sup> *Government Reply to the Nineteenth Report from the Joint Committee on Human Rights Session 2006-07 HL Paper 157/HC 394*, September 2007, Cm 7215 at p. 4.

view, however, there is no doubt that hearings of applications for warrants of further detention must comply with the requirements of Article 5(4).<sup>72</sup>

78. We have also made clear in earlier reports that ever longer periods of pre-charge detention risk giving rise to independent breaches of the right not to be subjected to inhuman and degrading treatment in Article 3 ECHR, because of the oppressiveness of lengthy detention without charge, and also to statements obtained from suspects after lengthy pre-charge detention being ruled inadmissible at trial for the same reason.<sup>73</sup>

### ***Power to exclude the suspect and his representative and to withhold information***

79. Our consistent concern about the adequacy of the existing judicial safeguards has been that the hearing at an application for a warrant of further detention is not a proper “adversarial” hearing because the statutory framework (Schedule 8 of the Terrorism Act 2000) expressly allows:

(1) the suspect and their legal representative to be excluded by the judge from any part of the hearing;<sup>74</sup> and

(2) information to be provided to the judge but withheld from the suspect and their legal representative if the judge is satisfied that there are reasonable grounds for believing that if the information were disclosed certain harms would be caused, including that “the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with.”<sup>75</sup>

80. The effect of these provisions is that pre-charge detention can be extended for up to 28 days on the basis of material which is not made available to the suspect or his lawyer and which is considered by the judge at a closed hearing from which the suspect and his lawyer are excluded.

81. In response to our recommendation in our last report that, for there to be proper judicial scrutiny of applications to extend pre-charge detention, there should be a full adversarial hearing before a judge, subject to the law of public interest immunity to protect sensitive information, the Government asserted in its response to our report that there is “already a full adversarial hearing”, although it accepts that “on occasion, at the initial applications to extend detention that are made before the 14 day period has elapsed, the judge is given sensitive information to allow him to make an informed decision.”<sup>76</sup> Such information is unsafe to disclose to the suspect or cannot be disclosed at this early stage of an ongoing investigation.” Mr. Ford in his oral evidence also said that “the hearings that we have are already full adversarial hearings.”<sup>77</sup> We were surprised to hear the Government

<sup>72</sup> See *R on the application of Nabeel Hussain v The Hon. Mr. Justice Collins* [2006] EWHC 2467 (Admin) in which a warrant of further detention hearing was held to be the judicial hearing to which a suspect is entitled under Article 5(4) ECHR.

<sup>73</sup> See e.g. JCHR Report on the Terrorism Bill 2006, above, at para. 87.

<sup>74</sup> Schedule 8 para. 33(3).

<sup>75</sup> Schedule 8, para. 34(1) and (2)(f).

<sup>76</sup> Government Reply to JCHR Report on 28 days, above, at p. 4.

<sup>77</sup> Oral evidence, 20 September 2006, Q26.

describe extension hearings as “full adversarial hearings” when both we and our predecessor Committee have consistently pointed out that such hearings fall well short of a full adversarial hearing because under the relevant provisions of the Terrorism Act 2000 detention can be extended in the absence of the detainee and on the basis of material not available to them. The Government, however, continues to maintain that the hearings are “fully adversarial”: see, for example, the letter dated 5 November 2007 from the Home Secretary to the Chair of the Home Affairs Committee.

82. We have sought to ascertain how often, in practice, the suspect and their lawyer are excluded from the hearing or parts of the hearing, how often information is provided to the judge which is not disclosed to the defendant or their lawyer and what sort of information might be provided to the judge but withheld from the suspect and their lawyer.

83. We heard from Sue Hemming of the CPS that, although she has not herself conducted any of the applications for further detention, she had made inquiries about how often the power to exclude the suspect is exercised and had been told that in a total of 17 applications made by Crown prosecutors for an extension of detention between 14 and 28 days an application to exclude the suspect from the hearing had been made in only one of them.<sup>78</sup> She had also asked two senior investigating officers from the police who had been involved in a large number of these hearings and they had only made two applications to exclude the suspect from the hearing. Although she could not say from her own experience what sort of information might be provided to the judge but withheld from the suspect, she had also asked about this and was satisfied that the sort of material withheld in the cases that she had been told about was the type of material where the police are carrying out investigations and they do not want to alert the suspect to that material because they want to be able to question him about it in due course, i.e. it is information which forms part and parcel of the investigation, and is therefore squarely within the scope of the power to withhold.<sup>79</sup> From the information she had been given by those who had dealt with such hearings, Ms. Hemming did not think that the information withheld from the defence and their lawyer at such hearings included information derived from intelligence sources which formed the basis for the reasonable suspicion that the suspect has committed a terrorism offence.<sup>80</sup> However, she very fairly made clear that she did not have sufficient experience of these hearings to be able to answer that question directly.

84. Mr. Bajwa, on the other hand, who has been involved in three separate investigations and has direct experience of conducting extension of detention hearings, said that he could not recall a case in which there was *not* a closed hearing of some kind.<sup>81</sup> He said

“Plainly, I do not know what was discussed and how much evidence, if any, was called at the closed hearing, but we are told routinely, before we enter the room: ‘We have been to see the judge in private and we have had a private hearing’. What was discussed we do not know.”

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<sup>78</sup> Oral evidence, 5 December 2007, Q171.

<sup>79</sup> *Ibid*, Qs 174 and 176.

<sup>80</sup> *Ibid*, Q179.

<sup>81</sup> *Ibid*, Q172.

85. Mr. Bajwa also said that the defence does not have access to very much material at all, which makes it difficult for them to mount an effective challenge to applications for further detention at such hearings.<sup>82</sup> He told us that at the time of arrest a terrorism suspect is told that they are suspected of being involved in the commission, preparation or instigation of a terrorist offence which, he said, tells the arrested person nothing except “I believe you are a terrorist”.<sup>83</sup> He said that they are then taken to the police station where they are told nothing for very many days as to the basis of why they are there. The statutory notice indicating that there will be an application for more time to the court contains very little information, and is usually worded identically whether it is an application at the 7, 14 or 21 day stage. So it is only at a very late stage that a suspect is given any idea as to the state of the evidence against them. Ms. Hemming accepted that the statutory notices say very little but pointed out that more details are given in the course of the oral application for more time before the judge. Mr. Bajwa responded that it was unfair to suspects if they are given no prior notice of the information that forms the basis for the grounds of application and only find out at the oral hearing before the judge.<sup>84</sup>

86. We also noted that the CPS Note on scrutiny of pre-charge detention in terrorist cases states that the defence is allowed to cross-examine the senior investigating officer at these hearings but that this is “not a legal entitlement”, rather it is done “to assist the court and speed up the process.” Ms. Hemming said that there is nothing, in statute for example, that specifically says that the investigating officer can be cross-examined, but that Crown prosecutors would want the judge to have as much information as possible to make a proper decision.<sup>85</sup>

87. While we recognise that a hearing takes place before a judge, at which the suspect can be legally represented, and the prosecution case for extending detention can be tested, the evidence we have heard has confirmed us in our earlier view that the proceedings are not adversarial in the sense required by Article 5(4). We fully acknowledge the point made by Ms Hemming, that these hearings are not a trial process but concern an investigative stage in the process, and the police are entitled to carry out an investigation and to investigate properly, rather than give full disclosure of absolutely everything to the suspect whilst they are investigating and whilst they are questioning.<sup>86</sup> We accept of course that where an application for further detention is made on the ground that continued detention is necessary to obtain relevant evidence by questioning the suspect, the police’s proposed interview strategy, including lines of future questioning, is information which the police are entitled to withhold from the suspect at these hearings. Indeed, this was very recently confirmed by the House of Lords.<sup>87</sup>

88. As the statutory scheme stands, however, it enables material to be withheld from the suspect if the judge decides that disclosure of the information would, for example, interfere with the gathering of information about acts of terrorism, which might well include intelligence information on the basis of which the original arrest was made. Although we

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<sup>82</sup> *Ibid*, Q181.

<sup>83</sup> *Ibid*, Qs 190-191.

<sup>84</sup> *Ibid*, Q194.

<sup>85</sup> *Ibid*, Q180.

<sup>86</sup> *Ibid*, Q178.

<sup>87</sup> *Ward v Police Service of Northern Ireland* [2007] UKHL 50 (21 November 2007).

have been unable to establish whether information of this kind is routinely, or ever, withheld from suspects, we have heard enough about the extremely limited nature of the disclosure to the suspect in advance of these hearings to be seriously concerned that, in practice, the hearings do not operate fairly to the suspect. This is because the suspect may not have an effective opportunity to challenge before the judge the information forming the basis for their arrested and continued detention. The statutory scheme makes no provision for special advocates to ensure that the interests of the suspect are represented in closed hearings before the judge.

**89. We recommend that the statutory regime governing hearings for warrants of further detention be amended to ensure that the hearings are truly adversarial by, for example:**

- **imposing more stringent requirements about the information which must be contained in the statutory notice given to a suspect before such a hearing;**
- **defining more closely the power to withhold information from the suspect and their lawyer;**
- **providing for special advocates to represent the interests of the suspect at any closed part of the hearing for more time;**
- **providing expressly for the right of the suspect to cross examine the investigation officer;**
- **providing expressly that any restrictions on disclosure or participation are subject to the overriding requirement that the hearing of the application be fair.**

### ***The test applied by the court***

90. In an article in the New Law Journal in 2006, Mr. Bajwa wrote that the reason why warrants of further detention are granted by courts against individuals who are subsequently released without charge is that under the current statutory framework the court's two-stage test is framed in too limited a way:

“There is at no stage in the whole process a requirement for the police to demonstrate to the suspect's representative or the court that there is sufficient evidence to justify the decision to arrest and detain. All that the court is required to be satisfied of is that the police are awaiting the result of an examination or analysis of any relevant evidence, and that the investigation is being conducted diligently and expeditiously. This can, in most cases, be established even where the detainee is manifestly innocent.”



91. In oral evidence on 20 September, Mr. Ford (head of the Counter-Terrorism Bill team) said that he would expect already to be built into the procedure in these cases the requirement that the extension judge be satisfied that there are reasonable grounds to believe that the suspect has committed a terrorist offence in the first place.<sup>88</sup> In light of that acceptance, the Committee wrote to the Minister asking if the Government had any objection to making explicit on the face of the Bill that this is one of the requirements that must be satisfied by the prosecution when they are applying for an extension of detention. The Minister replied that the Government has no plans to do so.

92. Mr. Bajwa told us that the test for extending detention<sup>89</sup> is such a low test and the material that the defence has is so little and so vague, that the defence really does not have a chance successfully to object to detention being extended. He pointed out that there was not a single case that could be cited where an application for a warrant of further detention or an extension to that warrant has been refused.<sup>90</sup>

“The threshold is so low that, I dare say, if any of us in this room were arrested and we own a computer and a mobile ‘phone, we could be detained – any one of us - for 28 days on the tests as currently framed. “Pending further analysis or examination” can be satisfied for any one of us because it will take more than 28 days to examine a mobile ‘phone and a computer. The second part of it - that the police are acting diligently and expeditiously - a judge would be hard-pressed to say that the police are not acting diligently and expeditiously. So it can be satisfied for any one of us. That is the greatest concern that I have about the tests as currently framed. It makes it next to impossible for us to successfully resist the application, and I think it makes it next to impossible for a judge to refuse the application.”

93. Ms Hemming told us that she did know of some cases where the application had been made by the police at an earlier stage in the process and been refused, and also that the high success rate was because such applications were very carefully prepared.<sup>91</sup> She also told us that although there is nothing in the legislation that requires the judge at an extension hearing to look at the evidence for the original arrest of the suspect and his continued detention, in practice there is a discussion of the evidence that already exists, as well as the evidence for which the prosecution is waiting.<sup>92</sup>

**94. We remain extremely concerned that as the statutory test for further detention currently stands there is no onus on the police or prosecution to satisfy the court that there is material giving reasonable grounds to believe that the suspect has committed a terrorism related offence in the first place. In our view the current two-stage test sets the threshold too low.**

**95. We have already expressed our view, that the adequacy of the judicial control being exercised in practice has been seriously called into question in that three of the suspects arrested in connection with the August 2006 alleged airline bomb plot were authorised**

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<sup>88</sup> Oral evidence, 20 September 2007, Q38.

<sup>89</sup> In paragraph 32 of Schedule 8 to the Terrorism Act 2000.

<sup>90</sup> Oral evidence, 5 December 2007, Q181.

<sup>91</sup> *Ibid*, Q182.

<sup>92</sup> *Ibid*, Q183.

by the judge to be detained for up to 28 days yet were eventually released without charge at the very end of that period.<sup>93</sup> In addition, so far as we have been able to establish, they are not subject to control orders or other ongoing investigations.

96. Extending the period of pre-charge detention to 42 days, without any improvement in the judicial safeguards, raises the prospect of suspects being held for even longer before being released without charge. We recommend that the statutory regime be amended to introduce an additional express requirement that a court authorising extended detention must be satisfied that there is a sufficient basis for arresting and questioning the suspect. Since the Government regards this as being already implicit in the statutory framework, we cannot see any objection to making it explicit.

### *The availability of legal aid*

97. We were surprised to learn from Mr. Bajwa that legal aid is not available for suspects to be represented by counsel at hearings for extension of detention. Legal aid is only available for a solicitor to attend the police station to represent the suspect. He told us that he represents suspects *pro bono* at such hearings, but that many suspects are not represented by a barrister, even though it is an adversarial procedure involving cross examination of witnesses in which the person's liberty is at stake.

98. We recommend that legal aid be made available for representation by counsel at hearings of applications for further pre-charge detention in light of the importance of the consequences for the individual's liberty and the nature of the hearing.

### *Assessment of adequacy of judicial safeguards*

99. Having now taken evidence about the way in which applications for warrants of further detention operate in practice, we find we are confirmed in our view that the process does not satisfy the requirement that the process be fully adversarial. A number of factors leave us with a general concern that the hearings are not treated sufficiently as "judicial hearings": the power to exclude the suspect and their lawyer and to withhold information from them, the view that there is no right physically to attend, the perception that there is no right (merely permission) to cross-examine, the lack of special advocates, the unavailability of legal aid for counsel, the lack of an explicit test focusing on the lawfulness of the detention: the cumulative effect of these is, in our view, a procedure which falls far short of a fully adversarial judicial procedure capable of satisfying the stringent requirements of Article 5(4) ECHR.

100. We anticipate that we will be proposing amendments to the Counter-Terrorism Bill to amend Schedule 8 of the Terrorism Act 2000 to give effect to the recommendations above, in particular to ensure that the judicial safeguards which apply at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR – ie that there is a truly "judicial" procedure, in which the suspect has an effective opportunity, at a proper adversarial hearing in which the parties are on equal terms, to challenge the reasonableness of the suspicion on which reliance is placed as the basis for the original arrest and continued detention.

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<sup>93</sup> JCHR Report on 28 days, above, paras 58-61.



## Conclusion

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101. Any extension to pre-charge detention is a serious interference with liberty that requires a compelling, evidence-based demonstrable case. We do not accept that the Government has made out a case for extending pre-charge detention beyond the current limit of 28 days, for the following reasons:

- (1) We can find no clear evidence that it is likely that at some point in the near future more than 28 days will be needed. In particular, this is not the view of the CPS who say they have been operating perfectly "comfortably" within the current limit.
- (2) The alternatives to extension do enough to protect the public and are much more proportionate, especially the combination of the threshold test (charging on reasonable suspicion), post-charge questioning and making intercept admissible.
- (3) The proposed parliamentary mechanism creates a serious risk of prejudice to the fair trial of suspects, because it involves parliamentary debate about the merits of extending the limit in relation to specific ongoing investigations.
- (4) The existing judicial safeguards for extending *even up to* 28 days are inadequate because they do not provide a full adversarial hearing or an opportunity to challenge the basis on which someone is being detained.

## Conclusions and recommendations

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1. In our view, a truly consensual approach should lead the Government to accept that it has failed to build the necessary national consensus for this very significant interference with the right to liberty, and withdraw the proposal. To proceed with it, in these circumstances, calls into question the Government's commitment to a consensual approach (Paragraph 5)
2. We therefore also agree that the case made by the police and the Government for additional powers to detain terrorist suspects before charge must be treated with great seriousness and considered very carefully. That careful consideration involves subjecting the case for extended pre-charge detention to rigorous scrutiny to ascertain whether, on all the evidence, including the availability of alternatives to extended pre-charge detention, there really exists a risk to the public of sufficient magnitude to make it truly "necessary" to extend the period of pre-charge detention from 28 to 42 days, which is the test which human rights law requires to be satisfied where measures would interfere significantly with personal liberty. (Paragraph 6)
3. In relation to any statements to Parliament about the extension of pre-charge detention, we would expect reasoned explanations from Ministers, rather than mere assertions in the form of "statements", to ensure that Parliament is transparently and fully informed about the justification for particular decisions and that ministerial reports to Parliament do not become simply formalities. (Paragraph 15)
4. We do not propose to give this option any further consideration. (Paragraph 22)
5. We are therefore disappointed that the Director-General of MI5 is prepared to give a public address about the level of the terrorist threat, but so far appears reluctant to give public evidence on the subject to the parliamentary committee whose role it is to advise Parliament about the human rights compatibility of the Government's counter-terrorism **measures**. (Paragraph 31)
6. In the context of the Government's proposal to extend still further the limit on pre-charge detention, however, the relevant question is whether the Government has provided the evidence to demonstrate that the threat from terrorism has increased since Parliament last considered the question of the appropriate limit in 2006. We have not seen any evidence to suggest that the level of threat from terrorism has increased in the last year. The evidence that we have seen on this question suggests that the threat level remains about the same as last year. Nor is it possible to infer an increase in the scale of the threat from bare statistics about the number of convictions or the number of people charged with terrorism offences, in the absence of any more qualitative analysis of, for example, the seriousness of the charges brought and the number of convictions secured in the last year compared to previous years. (Paragraph 33)
7. We conclude that until it is possible to conduct the necessary qualitative research into the actual use which has been made of the power to detain for up to 28 days pre-charge, which must await the outcome of the criminal trials of those charged, the

experience of the use of the power to date provides no evidence to support an extension of pre-charge detention beyond 28 days. (Paragraph 40)

8. We find the evidence of the CPS, that they have managed comfortably within the current 28 day limit, devastating to the Government's case for an extension. The essence of that case is that there is a risk that, in the near future, a terrorism suspect may have to be released because the investigation into the plot he was involved in proves so complex or of such a scale that he cannot be charged within 28 days. But the very body with the responsibility for making the charging decisions, and with all the knowledge and experience of making them to date, working closely alongside the police who conduct the investigations, is quite confident that 28 days is enough time in which to charge. In our view, this fundamentally calls into question whether it really is "likely", or even whether there is any "risk" at all, that at some point in the near future a case will arise in which 28 days is insufficient. (Paragraph 43)
9. In our view the Government's rather perfunctory dismissal of the alternatives to extending pre-charge detention suffers from the basic flaw that it takes each one in isolation and asks whether it eliminates entirely the risk that investigators will run out of time. It fails to consider how they operate together. (Paragraph 46)
10. Looking at the picture as a whole, we do not think that there can really be said to be a gap in protection, when one considers, for example, the availability of offences as broad as acts preparatory to terrorism; the possibility of charging suspects with such offences on the basis of reasonable suspicion; the possibility of post-charge questioning and the drawing of adverse inferences from refusal to answer such questions; and the availability of control orders and other forms of surveillance to limit and monitor the risk posed by the individual concerned. Insofar as the Government wish to go beyond these alternatives, and to have available a power of pre-charge detention "in a case where although there is reasonable suspicion that an offence has been committed, and evidence is anticipated to be found in the material to be examined, the likelihood of that evidence being available within a reasonable time is not sufficiently certain for the threshold test to be met", we consider this to be dangerously close to a power of preventive detention, which the Government itself accepts would be in breach of Article 5(1). (Paragraph 48)
11. We urge the Government to consider the interrelationship between the various alternatives to extending pre-charge detention, in order to bring forward a package of measures, taken together, in place of the 42 days proposal. (Paragraph 50)
12. We again call on the Government to give serious and urgent consideration to introducing bail with conditions for Terrorism Act offences, or to explain its reasons for refusing to do so. (Paragraph 51)
13. Our conclusion is that the Civil Contingencies Act option is inappropriate, for the reasons we have given above. In addition, we expect Parliament to legislate on the basis of clear evidence, not hypothetical nightmare scenarios. (Paragraph 58)
14. However, we are very concerned by the unavoidable implication in the Government's preferred option that there might be parliamentary scrutiny and debate about the appropriateness of the exercise of the extended power to detain for

up to 42 days in relation to specific, ongoing investigations. In our view this gives rise to the same concern as was raised by the DPP in the context of the Civil Contingencies Act option: any parliamentary debate about whether it is justifiable to invoke the higher 42 day limit in relation to a particular investigation will carry a serious risk of prejudicing the eventual trial of the individuals who are detained in the course of that investigation. (Paragraph 60)

15. We agree. Because the power to extend will be in relation to a specific, ongoing investigation, any parliamentary debate about the justification for exercising the power will necessarily be so circumscribed as to be virtually useless as a safeguard. (Paragraph 61)
16. We recommend that the Government rule out enabling Parliament to debate and decide on pre-charge detention beyond 28 days in relation to specific ongoing investigations. (Paragraph 62)
17. On closer inspection, the bringing into force of the proposed 42 day limit is not really “subject to parliamentary approval” at all, despite the Home Secretary’s claims in her letter of 5 December. Even if both Houses vote to disapprove the order, it will remain in force for 30 days, and therefore, assuming that the order bringing into force the 42 day maximum will only be made towards the end of the current 28 day maximum period, the order will nearly always lapse only after the relevant individuals have been detained for the full 42 days. (Paragraph 63)
18. there are no additional judicial safeguards proposed as part of the Government’s preferred option for extending pre-charge detention. (Paragraph 65)
19. In the Government’s announcement of its preferred way forward, the only additional “safeguard” surrounding applications for warrants of further detention is that applications for extension would require the consent of the DPP. It hardly needs pointing out that this is not a “judicial” safeguard, and it hardly seems a very substantial safeguard as it is already the case that applications for extension of detention are made by the Crown Prosecution Service not the police, and it is inconceivable that the DPP would not be asked to consent to the making of such an exceptional application as one to extend pre-charge detention beyond 28 days. (Paragraph 68)
20. In light of the Government’s previous statements of intent to provide additional judicial safeguards surrounding pre-charge detention, and the apparent views of most respondents to the Government’s consultation that such additional judicial safeguards should be provided if any extension to 28 days is proposed, we recommend that the Home Secretary provide Parliament with a full explanation as to why the Government has decided not to propose any additional judicial safeguards. (Paragraph 70)
21. We recommend that the statutory regime governing hearings for warrants of further detention be amended to ensure that the hearings are truly adversarial by, for example:

- imposing more stringent requirements about the information which must be contained in the statutory notice given to a suspect before such a hearing;
  - defining more closely the power to withhold information from the suspect and their lawyer;
  - providing for special advocates to represent the interests of the suspect at any closed part of the hearing for more time;
  - providing expressly for the right of the suspect to cross examine the investigation officer;
  - providing expressly that any restrictions on disclosure or participation are subject to the overriding requirement that the hearing of the application be fair. (Paragraph 89 )
22. We remain extremely concerned that as the statutory test for further detention currently stands there is no onus on the police or prosecution to satisfy the court that there is material giving reasonable grounds to believe that the suspect has committed a terrorism related offence in the first place. In our view the current two-stage test sets the threshold too low. (Paragraph 94)
23. We have already expressed our view, that the adequacy of the judicial control being exercised in practice has been seriously called into question in that three of the suspects arrested in connection with the August 2006 alleged airline bomb plot were authorised by the judge to be detained for up to 28 days yet were eventually released without charge at the very end of that period. In addition, so far as we have been able to establish, they are not subject to control orders or other ongoing investigations. (Paragraph 95)
24. Extending the period of pre-charge detention to 42 days, without any improvement in the judicial safeguards, raises the prospect of suspects being held for even longer before being released without charge. We recommend that the statutory regime be amended to introduce an additional express requirement that a court authorising extended detention must be satisfied that there is a sufficient basis for arresting and questioning the suspect. Since the Government regards this as being already implicit in the statutory framework, we cannot see any objection to making it explicit. (Paragraph 96)
25. We recommend that legal aid be made available for representation by counsel at hearings of applications for further pre-charge detention in light of the importance of the consequences for the individual's liberty and the nature of the hearing. (Paragraph 98)
26. We anticipate that we will be proposing amendments to the Counter-Terrorism Bill to amend Schedule 8 of the Terrorism Act 2000 to give effect to the recommendations above, in particular to ensure that the judicial safeguards which apply at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR – ie that there is a truly “judicial” procedure, in which the suspect has an effective opportunity, at a proper adversarial hearing in which the

parties are on equal terms, to challenge the reasonableness of the suspicion on which reliance is placed as the basis for the original arrest and continued detention. (Paragraph 100)

27. Any extension to pre-charge detention is a serious interference with liberty that requires a compelling, evidence-based demonstrable case. We do not accept that the Government has made out a case for extending pre-charge detention beyond the current limit of 28 days, for the following reasons:

(1) We can find no clear evidence that it is likely that at some point in the near future more than 28 days will be needed. In particular, this is not the view of the CPS who say they have been operating perfectly "comfortably" within the current limit.

(2) The alternatives to extension do enough to protect the public and are much more proportionate, especially the combination of the threshold test (charging on reasonable suspicion), post-charge questioning and making intercept admissible.

(3) The proposed parliamentary mechanism creates a serious risk of prejudice to the fair trial of suspects, because it involves parliamentary debate about the merits of extending the limit in relation to specific ongoing investigations.

(4) The existing judicial safeguards for extending even up to 28 days are inadequate because they do not provide a full adversarial hearing or an opportunity to challenge the basis on which someone is being detained. (Paragraph 101)

# Formal Minutes

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**Monday 10 December 2007**

Members present:

Mr Andrew Dismore MP, in the Chair

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

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Draft Report [Counter-Terrorism Policy and Human Rights: 42 Days], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 101 read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

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

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

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[Adjourned till Monday 17 December at 4pm.]

# List of Witnesses

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## Thursday 20 September 2007

**Mr Tony McNulty MP**, Minister of State for Policing, Security and Community Safety, **Mr David Ford**, Head of Counter-Terrorism Bill Team and Mr Charles Farr, Director of the Office of Security and Counter-Terrorism, Home Office Ev 1

## Wednesday 5 December 2007

**Ms Sue Hemming**, Head of Counter-Terrorism Division, CPS, and **Mr Ali Bajwa**, Barrister, 25 Bedford Row, London Ev 19



## List of Written Evidence

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Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156

### Session 2006-07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
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Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
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Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
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Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
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Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights:	HL Paper 240/HC 1576

	Prosecution and Pre-Charge Detention	
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716

# Oral evidence

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## Taken before the Joint Committee on Human Rights

on Thursday 20 September 2007

Members present:

Mr Andrew Dismore, in the Chair

Judd, L  
Lester of Herne Hill, L  
Plant of Highfield, L  
Stern, B

Nia Griffith  
Dr Evan Harris

*Witnesses:* **Mr Tony McNulty**, a Member of the House of Commons, Minister of State for policing, security and community safety, **Mr David Ford**, Head of the Counter-Terrorism Bill Team and **Mr Charles Farr**, Director of the Office of Security and Counter-Terrorism, Home Office, examined.

**Q1 Chairman:** Good afternoon everybody. This is a special evidence session with Home Office Minister Tony McNulty as part of our ongoing inquiry into counter-terrorism policy. We are particularly focusing around the Government's recent announcements and its consultation on the future legislation. Welcome everybody and good afternoon. I hope everybody had a happy summer break. Tony, do you want to make any opening remarks?

**Mr McNulty:** Save to introduce these to people who do not know. David heads up legislation and is responsible for the Bill and Charles is Director-General of the Office of Security and Counter-Terrorism.

**Q2 Chairman:** We would like to start with questions on pre-charge detention and the debate over the possible increase from 28 days and also increase to 28 days. In our recent report we recommended that there should be an independent body scrutinising the operation in practice of the power to detain beyond 14 days. We would like to know whether the Government will be carrying out its own detailed research into those cases, like the alleged airline plot, where detention beyond 14 days was used and where some people were released without charge as well as a couple being charged.

**Mr McNulty:** Much of the background on Overt and the use of 14 and 28 days is already in the public domain as part of the documents which went round when we announced the Bill. Going further than that in terms of independent review I think, as we say in this document, we are not minded to because we think Lord Carlile picks up all of that in his broader role. In terms of whether we go beyond 28 days, that is a matter for the consultation that is part of the process that is ongoing now. As the Committee will know, the last time I was here in April, I spent time—I had to—doing all this, “If there is going to be a Bill it might include this or it might include that”. Subsequently we have now established there will be a Bill, it will not be introduced prior to the Queen's Speech in mid-November but is very likely to be introduced before Christmas so it will be an early

Bill for the new session. Much of what we are doing now on pre-charge detention and a whole range of other issues that we think we need to legislate on are a matter for broader consultation that we can talk about. Equally, because I know people were exercised by this, although not this Committee necessarily, the scope of the Bill will be broad enough for Members of each House to address other aspects that the Government is not seeking to address in terms of the broad sweep of counter-terrorism legislation. You will know there are some small elements in there to refine things in terms of control orders. If people want to revisit the whole issue of control orders it is in there. There will certainly be scope for people to look at pre-charge detention. As I say, that is a matter of consultation. Our broad perspective is that in most circumstances 14 days and not 28 should be sufficient. We have had a year or so now of the exercise of up to 28 days and it did prove very useful in terms of Overt and more generally I think the Committee know about six individuals who have gone to full term, ie the full 28 days, three subsequently charged and three released. We do think, on all the evidence that we have thus far—and by the nature of the area the evidence is going to be the last plot or the last range of plots, there is not some pool of evidence that we are overlooking in some way—given the increased global dimensions to some of these plots, the increased complexity, the increased use of a variety of languages and a variety of IT technology, there may be cases in extremis that need to go beyond 28 days with the appropriate stronger judicial oversight included. I would really pan it out that way and say that it is more and more in extremis. Going beyond 14 clearly, as someone said after the last Committee session, is an extreme position in the context of human rights and that is about balance but we do think, given all that we know so far, there needs to be some legislative device going potentially beyond 28 days. That is part of the wider consultation and we will report on that in due course.

**Q3 Chairman:** If we look at the actual evidence of that so far, there were six cases held beyond the 14 days, of which, going up to 28 days, three were

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released and two were charged but the independent reviewer has not really got into the detail of those cases. For example, in relation to the ones who were released, which are obviously the ones we must be particularly concerned about, we do not know whether they are subject to a control order, whether they are still under suspicion or whether they are entirely exonerated. I think that is the sort of information that Parliament ought to have in looking at this issue as to whether an extension beyond 28 days, or indeed up from 14 to 28 days, is justified.

**Mr McNulty:** I think the closer we get to determining what we think we might do in terms of the Bill, it is perfectly fair that as much of that sort of information as possible is in the public domain. I would simply say that I think given where we are at now, given what we know about the level, nature and sophistication of some of the threats, any full understanding of that will not obviate Parliament having to make a decision on whether we go beyond 28 days or not. I do accept the import of what you are saying and will make sure, once we alight on the Government direction in terms of the Bill, that information is forthcoming.

**Q4 Chairman:** It is important—we only have a very small sample indeed—that we have as much information as possible about those cases. In relation to the ones who were charged, for example, how often they were interviewed and so forth, and whether in fact charges could have been brought at an earlier stage but were held off whilst further evidence was collected.

**Mr McNulty:** It is, but without going to the absolute interviewing strategy and overall investigative strategy of the cases hanging together, bearing in mind this is a case that is yet to come before the courts it will by definition be fairly limited. I would say, in passing, those who suggest, and I have gone back to the police forces and asked them precisely this question, that somehow because they had 28 days they were lax and rather leisurely in their interview strategies, a point put by the opposition shadow certainly in terms of his points on 28 days, is simply not the case. If he has substantial evidence to go beyond that and stand up that claim he should bring it forth or desist from impugning the police in such a fashion.

**Q5 Chairman:** The Metropolitan Police Commissioner said that he does not see the need for more than 28 days at the moment. He says he may see a need at some stage in the future.

**Mr McNulty:** With respect, we have to legislate for the future. There is no point hopefully disrupting the next plot or next couple of plots and then saying, “It would have been a good idea if we had at least in absolute extreme cases . . . ” and it is absolutely extreme, I start from the premise, as I say, even given the complexities, I think broadly, albeit on a small sample the rough matrix of when people are charged or released given our knowledge thus far, ie most before 14 days, will still prevail I hope. I do not have the crystal ball either in terms of the complexity but

with the best will in the world we need, as a responsible Government, to plan for all eventualities with appropriate safeguards and oversight and everything else, of course. If we do go beyond 28 days I can assure the Committee that it will be in the context of, where we can, far greater oversight than up to 28 days but, given the nature and sensitivity of all the things we are doing in this area, we cannot simply say everything has been fine so far, 28 days we think will pretty much cover everything so we cannot possibly go beyond that given what we do know about the quantum in terms of sophistication, complexity and the global dimension of some of these plots.

**Q6 Chairman:** From what you are saying, therefore, you would agree with the Commissioner that there is no need for it at the moment but it might be necessary at some stage in the future?

**Mr McNulty:** By definition that is the position we are in. I am afraid the people who perpetrate these things do not put out little bulletins about what the level of complexity or sophistication of the next plot is going to be.

**Q7 Chairman:** In your response to our report you refer to the level of emergency to the nation as we see it. In what ways has the scale of the threat from international terrorism increased since the limit was increased to 28 days just a year ago?

**Mr McNulty:** It has been at severe for nearly all of that period and severe is a very, very high level. The only difference between severe and critical is that critical means we have a degree of knowledge about some impending attack rather than at severe there being knowledge that there is likely to be an impending attack. It has been at that very high level all the time. It has only gone beyond that up to critical over the last couple of years, I think, in the immediate wake of Overt whilst they were seeking to square off all the participants as much as they could in terms of that alleged plot and in the immediate wake of London-Glasgow for the same reasons. People need to understand that severe is a very, very high level to sustain the threat at and the only essential difference between that and critical is a level of specific knowledge about a specific plot.

**Q8 Chairman:** The threat, basically, is pretty well the same as it was this time last year?

**Mr McNulty:** Yes, very high.

**Q9 Chairman:** If 28 days was adequate last year, why not now?

**Mr McNulty:** I think that misses the point in terms of what I say about globalisation, the sophistication and the complexity of the matter. You could just as well argue, and I at one level hope this is the case, that with all that we have done in terms of acts preparatory to terrorism, with all that we may do in terms of post-charge questioning and some of the other elements around the Bill, that again, potentially, lessens the need or desire for going beyond 28 days but we need to work out what in extremis we need to take on this threat and work

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backwards rather than otherwise, which is I think an entirely fair and responsible way for the Government to go.

**Q10 Chairman:** Will the Government be producing more detailed evidence of the threat? Will it be producing qualitative analysis of the cases so far as this goes before Parliament?

**Mr McNulty:** I do not think we can for the same reasons I have outlined in terms of the alleged plot over Project Overt, given that any number of the reasons why the threat level of sustained and severe, any number of the plots involved are plots that are either ongoing yet to be disrupted or at the very, very start of the judicial process with the people charged but yet to come before the courts which would make it very, very difficult, even in a redacted sense, to go to what the individual circumstances of each of those disrupted plots are or will be that put us in the position to sustain the severe level and potentially up to critical level of threat.

**Q11 Chairman:** You said in your earlier remarks, and also in the response to our report, that you are looking at a 28 day extension only for exceptional circumstances like multiple plots, multiple countries having complex investigation. If that is the case, are you planning to put that restriction on the face of the Bill so that any extension beyond 28 days could only be applied if those circumstances arose?

**Mr McNulty:** That is a matter we are looking at certainly. I think I described it the last time I was at the Committee as some sort of keyhole to get through to those cases in extremis. It may well be that is something we look at to make it absolutely exceptional to go beyond 28 days because we are not talking about a blanket provision that we think we need in every single case and we are not talking about internment, all those sorts of things that Liberty and others come up with, I think rather erroneously. We are talking about very, very exceptional cases, maybe that multiplicity that you refer to, maybe just an astonishing level of complexity concerning a couple of plots. I have turned that round and asked many in the services and the police, which is a perfectly legitimate question, "Well, doesn't that just go to resources?" They tell me that is simply not the case given the level of complexity, given the order in which there would need to be an interview strategy alongside an investigation strategy for one alleged plot, let alone two or three running at the same time, not least with the engagement of, in some cases, overseas countries and a reliance on their processes as well as our own. It is not just resources. I do think it would be remiss of Government to come back to the Committee or both Houses with a notion of going beyond 28 days with all that entails in terms of human rights and civil liberties purely because it was a resource driven decision and that is absolutely not the case.

**Q12 Chairman:** Judging by what you have said, you do not think very much about the Liberty proposal on the Civil Contingencies Act?

**Mr McNulty:** 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 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.

**Q13 Lord Lester of Herne Hill:** First of all, could I just say that although I am independent adviser to the Government on constitutional reform I am not advising on any of this and, therefore, this is a declaration of no interest, as it were. As I read your response, you are indicating—

**Mr McNulty:** I do apologise. Is it possible that people could make a reference when they talk about the response.

**Q14 Lord Lester of Herne Hill:** I am looking at the answer on page three under nine. What you are saying there, with which everyone would agree, is about the role of the Government in ensuring the safety of its citizens: "This must include looking at what powers the law enforcement agencies may need in future instead of waiting until current powers have been proved inadequate in an area as significant as national security". That could be read as indicating that what you are engaged in is seeking powers at this stage hypothetically to deal with a future situation even though it has not been shown that the current powers have been proved to be inadequate. I am sure that is not how you would like it to be read, so the first question is am I right in thinking that you do not mean that, you do not mean to suggest you are simply grabbing new powers on a hypothetical basis, you would only seek the powers if you were satisfied that they were really needed now?

**Mr McNulty:** I think we are broadly satisfied that given the development of this threat over time we may need the further powers. It is appropriate, given the forthcoming Bill, to seek those powers now but, as the Chairman referred to, maybe with all sorts of caveats around them before you even get to an extension to 28 days and a subsequent strengthening of the oversight and scrutiny. I understand what you say about it could be read as simply, "Well, we had better do this just to cover ourselves and hope and pray that what already prevails is appropriate", but it is based on informed judgments about the nature of the threats and plots there have been up until now, the quantum and how they have developed over time and potentially may develop further and in the end that is a matter of judgment, I accept that.

**Q15 Lord Lester of Herne Hill:** As I read this passage as well you are seeking a broad consensus by consulting, you are not in favour of playing party political games of the kind that some governments



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have scoring points off opposition parties to say they are weaker on terrorism than the government, you are not engaged in that and I do not think you are. Is it not then extremely important to be as forthcoming as you can with Parliament and the public about exactly what we are talking about? You said you cannot redact material which concerns pending trials but what I do not understand is why you cannot give us as a Committee and give Parliament as the legislative body a coherent account of exactly what kind of practical problems there are which require you to even think about going beyond 28 days. It seems to me that it should not be beyond the wit of you and your advisers to be forthcoming and it is not good enough, it seems to me, simply to say, "Well, there are these trials and we cannot tell you much more. Trust us". You must do better than that if you are to win confidence among the population at large, the civil liberties lobby, the opposition parties and your own backbenchers. Can you think about ways of being much more forthcoming than you have so far?

**Mr McNulty:** I will, as I have said to the Chairman. As the Chairman indicated, part of the difficulty is we are still talking relatively small numbers so there is not a whole lot you can do or say to disguise and put it back to particular individuals or particular alleged plots and trails. I thought it was very useful that the CPS and Peter Clarke from the Metropolitan Police did put in the public domain, not alluding to any individual in terms of that alleged plot last summer, the extent and complexity of some of the evidence that they have to go through in terms of memory sticks, mobile phones, to an extent links abroad, the number of computers and all those sorts of things. We are still talking very, very few actual cases disrupted and awaiting trial. It would be difficult to really unpick that and protect, quite rightly, the individuals concerned. To the extent that we can go further, talking about the broader issues, as I have said, I think we shall. The extent to which our thinking is what is the portico or keyhole between 28 days and beyond 28 days, as we refer to in our response, it is not the case that we are seeking, as the Chairman implied, to go beyond 28 days either in unlimited fashion or for every single case. There would need to be some kind of qualifying criteria, a good reason why things could not be done within 28 days. We are very, very clear, as I hope we have showed you in the consultation process thus far, that we do still seek consensus and we do seek to at least explain and be very clear with people why we are going in the direction we seek on pre-charge detention and why we can build that consensus. On your opening point, I am absolutely not interested in playing petty party politics or being partisan in any way on this.

**Q16 Dr Harris:** If I could just follow up on the same set of questions as well. Minister, we said in our report that: "We remain of the view that any extension, that is beyond 28 days, is an interference with liberty that requires a compelling, evidence-based demonstrable case and that the most important evidence capable of justifying such an

extension would be firm statistical evidence demonstrating the number of actual cases in which the current limit had either prevented charges from being brought at all or required the police to bring the wrong or inappropriate charges". You respond to that recommendation on page three of your report but you do not directly respond. I would be interested to know whether you agree or disagree with that.

**Mr McNulty:** I agree with the broad import and thrust of that, of course I do, and we do not take these decisions lightly, which is why I repeat that we are talking about in extreme circumstances in terms of the number of plots and the other dimensions.

**Q17 Dr Harris:** I understand that.

**Mr McNulty:** I happily will look again but I repeat the caveat about there being so few cases and pending trials that we cannot blot or contaminate people's rights in terms of pending trials, they have a right to due process the same as anybody else.

**Q18 Dr Harris:** I understand that. We discussed in our report some of the information that was available about the case that we have been discussing and it turns out that three of the five suspects who were authorised to be detained for the full 28 days were released without charge very close to the end of that period. In our report we said there were at least eight further questions that needed to be answered that were not in any way addressed by Lord Carlile's report, which you relied upon in your very first answer to say that there has been independent review of the data. For example, if the police just ran out of time and they were very worried about some of these people they could have put them on control orders. The fact that they have not, if indeed they have not, would suggest that was not a problem and, therefore, you could not argue that having to release those people without charge coming up to 28 days was a problem because you had real suspicions about them.

**Mr McNulty:** You highlight my own difficulties. If indeed some are on control orders then the judges quite rightly impose, it is not in statute, anonymity on those so I cannot talk about those any further. If indeed they are released then the individual should be left to get on with their own devices and if they want to report further on that from their own perspective they can do. If they are not released their trial will be pending. We are talking of very, very few numbers at that high end. You will know there are over 100 individuals awaiting trials of one sort or another but in terms of the pre-charge detention issue and those between 14 and 28 days the numbers are very, very limited. It is right that they are afforded due process and that I do not speculate further on their particular circumstances or how they arrived at them.

**Q19 Dr Harris:** Basically what I am asking is that even though the numbers are small there is data that could potentially at some point be available to usefully inform the decision that Parliament has to make as to whether the police are actually having

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difficulties within the current limits. Of course, with regard to due process what I am essentially asking is do you accept that beyond what Lord Carlile was able to say and analyse, which we thought was not very much and we were very clear about that, and I suspect that he would agree that it was not very much, there is more that could be—

**Mr McNulty:** I suspect he would not go to your conclusion.

**Q20 Dr Harris:** --- there is more that could be brought before Parliament in some way or, indeed, some parts of Parliament under Privy Council terms or under strict confidential terms that would enable us to have some confidence that even with the small numbers we were getting to the real issues.

**Mr McNulty:** I have said, notwithstanding everything I have said to the Chairman and Lord Lester, if there is that sort of scope to go further on Privy Council terms which may be helpful or otherwise I will undertake to look at that and get back to the Committee. I am not sure there is but I will happily look at that further.

**Mr Ford:** I thought it might be useful to say that as part of the consultation we are doing two things that have been touched on here. One thing we are looking at is how the pre-charge detention period has operated so far, and we are discussing with the judiciary and the police and others whether there are any lessons to be learnt from that under the current limit in terms of the legislation as part of the consultation on the Bill. Secondly, we are looking at the statistical information to see if there are any improvements we can make on the information that is made available in pre-charge detention cases.

**Q21 Dr Harris:** My final question, and the Chairman will check if this has not been covered or is due to be covered, is that we made a recommendation that you might find it useful to commission research into why some countries, other countries, do not require extended pre-charge detention but we do. We made that recommendation and I think you said that such international comparisons are not straightforward. That is a statement of the obvious but it is not a good reason not to do that work because even if it was not useful it could help the public understand what the special circumstances were about this liberal Western democracy that did not seem to apply in any or many others. Would you recognise your apparent rejection of that suggestion at the top of page four of your response? I should have said that at the beginning.

**Mr McNulty:** That is why it is helpful to have the reference at the start rather than spend my time looking for it as well as seeking to answer. Secure and further research is incumbent on all of us in this area regardless of where we go on legislation. It is the case, I think, from the little I have seen and done in terms of comparison that things are starkly different in one way or another with other even similar jurisdictions to make comparison almost meaningless. People know the obvious distinction between our legal base and the European legal base, particularly the French, the examining magistrate

and all the other elements the Committee have looked at. We all know that Australia, whilst on the face of it having a far lesser period of detention, operates as far as I can tell on a sort of clock basis, so the time allowed for pre-charge detention goes to the amount of almost face time when the individual is interviewed by the Australians and actually there is no limit on the gaps in-between that, so any comparison on seven, 14 or 28 days with the Australian model is just not appropriate at all.

**Q22 Dr Harris:** It seems you are halfway to a report.

**Mr McNulty:** I would think the parliamentarians in both Houses will go to that research and make their own judgments, as we have done in terms of coming to the Government's position. There are things in all jurisdictions that make their response to this sort of threat really quite unique in all circumstances and there is no obvious parallel. Without labouring the point, I should say I am no lawyer behind each of those statements.

**Q23 Chairman:** The basic question that we are grappling with, and I think you are grappling with too, is that you are asking Parliament, and indeed the public, to take an awful lot on trust, in terms of the scale, and growing scale as you describe it, of the terrorist threat the country faces when 28 days was enough last year but is not this year although the threat has not particularly changed. That is question number one, a huge amount of trust in relation to the scale of the problem which, for whatever reason, you are not able to expand upon. Secondly, taking on trust the fact that you think 28 days for the future will not be enough yet there is very little evidence to suggest that 28 days has been inadequate so far. Only one case has come close to the 28 day wire, that was dealt with perfectly adequately within the 28 days and there is no suggestion that any of those who were released, if they had been held longer, might have had a case brought against them. Without the qualitative analysis it is not just statistics about how many people have been held, even though the statistics are very, very small, even on small numbers with a proper qualitative analysis we might be able to get behind the case as to whether or not 28 days is or is not adequate if you delve down deep in those cases, but you are asking us as a Parliament, if I may, to take both those issues on trust.

**Mr McNulty:** You will not get that far and you will not be able to draw that conclusion because central to that conclusion is what is the nature of the next series of threats and that is where we have to make an assessment as well as the point about has 28 days been sufficient up to now. By definition at least some of that does call for informed, very informed actually, speculation about what some of those who would murder and maim are seeking to do based on what we disrupt and otherwise. As a Government at least you need both parts of that equation. In this area of all areas we cannot simply be reacting to events without at least understanding that we need to make provision in extremis for the defence of the public realm and public safety.

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**Q24 Chairman:** We all accept that human rights legislation principles require the protection of the public, that is a given, but equally what we have to be satisfied is whether our draconian measures are justified. Part of the problem is that we are asked to take so much on trust.

**Mr McNulty:** It is a matter of temperament of language but I do not accept that what we are doing is draconian to begin with. I think it is a proportionate response to a very, very serious threat and given, I repeat, the quantum increase in the sophistication, complexity and all the other elements I spoke of in terms of plots that we have disrupted and plots that are ongoing it would be remiss and irresponsible of the Government to at least not look at this area. At the same time keep that broad qualitative as well as quantitative review that you speak about, I think we need that from anything post-14 days frankly, and we will; keep and look very, very carefully at anything post-28 days in terms of judicial oversight and, as I say, the sort of portico criteria to go beyond 28 days in the first place, but I do think given all that we know thus far it is important to go down those lines. It is a bit like saying, which again I hope is the case, as I said earlier, given what we are doing on acts preparatory, given what we are doing on potentially post-charge questioning, and may or may not do on the intercept as evidence or some of the other elements in the proposed Bill, they all mean that all of a sudden the whole landscape changes and we can do things in a completely differently way. I doubt it, I think there will still be, if I may, a little twilight zone around control orders and equally something post-28 days but I am not afforded the luxury to wait and see if acts preparatory, post-charge questioning and a range of other things work before we make this provision which on all our best judgment, given where we are, we think is important but absolutely in extreme cases. As I say, someone said after the last time we met that everything beyond seven days should only be in extremis. It is, but there are degrees of in extremis given the nature and complexity of the threat.

**Chairman:** Lord Plant, who I think wants to declare an interest as well.

**Q25 Lord Plant of High field:** It is my first contribution so I should declare an interest about something that occurs later in that I am a member of the Nuffield Council on Bioethics which produced the report on DNA retention, and there will be questions on that later. For the moment I would like to focus a bit on the conditions, as it were, of scrutiny under which beyond the 28 day proposal might turn. Obviously your preferred position is to extend the current 28 day limit with what you call additional safeguards, and those safeguards are broadly speaking, on the one hand, judicial and, on the other hand, parliamentary. Could I ask you about the judicial safeguards first of all. You have not actually spelt out at the moment, I think I am right in saying, what you think the judicial safeguards should be, so would you like to make some suggestions on that front?

**Mr McNulty:** Mr Ford, I think, would like to. He seems to be desperate to.

**Mr Ford:** In terms of judicial safeguards, they are not really extensions. What we are saying is that it would be a High Court judge who would hear extensions beyond 28 days. The only change in terms of judicial safeguards would be that you could not apply for an extension beyond 28 days without the consent of the Director of Public Prosecutions. So you would continue with a High Court judge for any extension hearings beyond 28 days but there would be the additional thing that you would require the consent of the Director of Public Prosecutions.

**Q26 Lord Plant of Highfield:** As I understand it, in terms of your response to our report, and this is paragraph 16, you do not believe that a physical appearance before a judge is necessary and equally you do not regard a physical appearance by the suspect as, indeed, one of the rights of the suspect. It is a bit unclear to us how there can be a proper adversarial kind of hearing of an extension application without the physical presence of the alleged perpetrator of a plot. You do cite on the positive side the idea of video-conferencing and on the negative side the fact that it would disrupt traffic in London to bring these people before a judge. Given, as the Minister has said, that these circumstances will be in extreme cases, and probably not covering that many people, do you think these are sufficient grounds for denying a physical appearance before the judge who will be making a judgment about the extension?

**Mr Ford:** As we have said in our response, the hearings that we have are already full adversarial hearings but, as I mentioned earlier, we are continuing to discuss with the judiciary and others about how pre-charge detention is operated and whether there are any changes that might be needed in terms of legislation. That is part of the consultation process we are going through at the moment and we are going through it in a very detailed way with the people who actually operate these systems currently to see if there are any of those changes that need to be considered.

**Q27 Lord Plant of Highfield:** We made some proposals in our report about improving judicial safeguards, including a full adversarial hearing by which we meant the physical presence of the person involved, subject to the ordinary law of public interest immunity, and by introducing an additional requirement that the court be satisfied that there is a sufficient basis for arresting and continuing to question the suspect. Leaving aside the physical appearance which you have just addressed, do you see your own proposals as moving in the direction of those recommendations?

**Mr Ford:** It is being looked at in terms of going beyond 28 days but one of the things that we are considering is if we were to go beyond 28 days what additional oversight mechanisms might there be. There might be an expanded role for the independent reviewer of terrorism in these cases looking at individual cases rather than doing a

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general report once a year. There may also, and it is one of the options that has been published, be an additional role for the judiciary in terms of oversight of the pre-charge detention period, and we know that several people have advocated this. It is certainly something we are consulting on and as part of that consultation we are looking at that.

**Q28 Lord Plant of Highfield:** If we could now move to the parliamentary side of scrutiny. I think it would be fair to say we were a bit stumped as to precisely how it is assumed that this would work because, as I understand it, there is a proposal that the Home Secretary should notify Parliament of any extension beyond 28 days as soon as practicable after it has been granted with a requirement to provide a further statement to Parliament on the individual case and an option for the House to scrutinise and debate this. How is it envisaged that would work? Is that not giving Parliament almost a sort of judicial role? Given, perfectly legitimately, the Minister's reticence to talk about the detail of cases that are falling under this sort of procedure, how is Parliament going to be able to debate an individual case? What can be said beyond the Minister getting up and saying, "We think that there is a good case" and sitting down again because you cannot really provide any evidence because that might prejudice the whole process.

**Mr Ford:** Yes, indeed. What we are currently looking at in terms of additional parliamentary oversight would be that Parliament would be notified every time an application for an extension beyond 28 days had been approved and Parliament would be notified every time there was a further extension beyond that—obviously the extension beyond the 28 days might be up to seven days but there might be a further extension—and Parliament would be notified when those people were either released or charged. In terms of other things, what we are looking at is a role for the independent reviewer of legislation to look at individual cases that have gone beyond 28 days. We are currently working out how that would operate in detail because, as you have pointed out, there are issues about what an independent reviewer could say. An independent reviewer, for example, might be able to report that the people who had been detained had been detained properly under PACE Code H and that their welfare had properly been dealt with and the procedural matters had been fully complied with, and that could be a fairly detailed report on those individual cases. That quarterly report would be provided to Parliament and then Parliament would have the opportunity to debate those issues. There are very difficult areas about what you could and could not say in terms of interfering with judicial process.

**Q29 Chairman:** You are mixing up two different things, are you not? On the one hand there are the general matters of principle and the general oversight, which is Parliament's role, and on the other hand you have got the individual cases. Frankly, what is achieved by the Home Secretary

making a statement to Parliament, "We have detained somebody for an extra seven days or whatever, but I cannot answer any questions about it"?"

**Mr McNulty:** I think you need to unpick the two. On the individual cases what we are seeking is some way, notwithstanding Lord Plant's and my own comments, of keeping Parliament informed about the use of the provision for more than 28 days without going into substantive detail about the cases. That may be on Privy Council terms, it may be through the ISE or whatever, but so that Parliament is informed about the use of the provision because of the sensitivities that we are all alive to. Away from that and more generally, rather like we do currently on control orders, for example, a quarterly report, potentially with some debate or otherwise, to Parliament on the use of these powers in a collective fashion. If I am right and we are talking about very, very small numbers we could not go into much detail about the individuals for the reasons we have alluded to but could at least tell Parliament—

**Q30 Chairman:** This is exactly my point, they are two completely separate issues. One is the general scrutiny role of Parliament, which is the broader points that you have just raised, but I do not see what is achieved by simply reporting to Parliament that someone has been held for 28 days, particularly if it is on Privy Council terms or to the ISC, that is not telling anybody except a close circle. If you are looking at issues about compliance with PACE, surely that should be the responsibility of the High Court judge who is asked to authorise an extended detention. Surely the High Court judge should be asking questions about whether people have been treated properly while authorising that.

**Mr McNulty:** Absolutely so, and we are not seeking to subvert that at all, but this is a significant departure from the criminal law for exceptional circumstances in this country and it is right and proper if Parliament goes down that route that Parliament is at least informed of its use. It is not about, as implied, reopening debates that are quite properly done with the judge in terms of the circumstances of an individual case, it is about Parliament saying, "This has been passed and we would like to know as and when it is being used, in what circumstances" rather like the way we do with control orders. For at least the early stages, were such a measure to be passed, if I am right and the numbers are going to be very, very limited, you are right, the conflation between individual cases and the broad principles, there is not going to be much between them. To go back to the Committee's broader point, the cumulative use of this power over time, if passed, and the circumstances longer term within which it is used, how long beyond 28 days before people were charged or released or whatever, the longer time goes on the—

**Q31 Chairman:** Nobody would argue about that sort of response. The real issue is how on earth can Parliament get involved in scrutinising an individual case and I think what you are saying—

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**Mr McNulty:** Well, it cannot and probably neither should it, unless you are suggesting otherwise.

**Q32 Chairman:** Exactly, I think we agree on that.

**Mr McNulty:** Absolutely.

**Q33 Chairman:** That is why the issue is as to why this has suddenly come up.

**Mr McNulty:** Because of the broad departure, I think. The broad principle that says if this is being used Parliament should at least know about it, given the extraordinary nature is still a reasonable principle but not for permanent debate on an individual case or anything like that, that is more properly done by the judge.

**Q34 Lord Lester of Herne Hill:** Can I just say that unfortunately I have got to leave after you have answered this question and I apologise to you. Going back to the judicial role, can you tell us exactly what role is. Am I right in thinking that what you should be doing, and what the judge should be doing, is scrutinising the request for an extension on the basis of a test of necessity and that you have to come up with sufficient information and facts to satisfy the judge that it is really necessary for there to be that extension? It is not good enough merely to assert, you have to make full disclosure to the judge in order that he or she can be satisfied. I am very interested to know your answer to that because on Lord Plant's questions about safeguards we really need to know how effective that safeguard is and that depends upon candour from the Home Office vis-à-vis the judge and the judge knowing what test he is applying.

**Mr McNulty:** Certainly in terms of going beyond 28 days that is a very fair description of what is in our minds.

**Q35 Lord Lester of Herne Hill:** I did not mean only an extension beyond 28 days. Even on arrest and detention before you get to extension, is it not vital that the Home Office plays with all cards face up on the table when they are with the judge and the judge applies the test of necessity, not of convenience but of real necessity?

**Mr McNulty:** I do not think it would be fair, and I am not saying you are, to simply say that it is done on convenience rather than necessity.

**Q36 Lord Lester of Herne Hill:** No, I am not saying that.

**Mr McNulty:** I was going to the point of saying, as we were talking about earlier, if we go beyond 28 days then yes all that candour should be there, yes the test of necessity should be there, but there should be, as we allude to in the report and we are still thinking this through, a portico switch of some sort that says, "Because, amongst other things, there are all these cases going on but all are interlinked, whatever in terms of the interview strategy, the investigation strategy, and going further is dependent on this, this and this source of evidence"

then there should be an even stronger test to go beyond 28 days, quite rightly, given that it is a departure from the norm.

**Q37 Lord Lester of Herne Hill:** Could you give us a note on the test and how it would work in practice, not in the new legislation but right now in terms of the 28 days because I am not clear myself on exactly what the test is and what standards of evidence you provide to the judge.

**Mr Ford:** The current test for the extensions is the judge has to be satisfied that there are reasonable grounds for believing that further detention of a person is necessary, and it needs to be necessary for one of the following reasons: to obtain relevant evidence, whether by questioning or otherwise; or to preserve relevant evidence. The second role of the judge in approving a grounds for extension is to satisfy himself that the investigation in connection with that person is being conducted diligently and expeditiously.

**Q38 Chairman:** But he does not have to be satisfied that there are reasonable grounds to believe the suspect has committed a terrorist offence in the first place.

**Mr Ford:** Given those extension warrants we are saying we would expect that to be built in. When meeting this requirement, if the judge believes that the person should not be detained in the first place he would not agree an extension.

**Q39 Chairman:** But that is not one of the questions that he is allowed to ask.

**Mr Ford:** He has to believe that the person is being detained diligently and expeditiously.

**Q40 Chairman:** That is not the same as saying are there reasonable grounds to believe he committed a terrorist-related offence in the first place, is it?

**Mr Ford:** I think a judge would throw it out if he believed that continued detention was not necessary for the purposes of obtaining evidence.

**Q41 Lord Lester of Herne Hill:** Am I right in thinking that also the suspect must be informed about the nature of what is being done unless there is some overwhelming public interest to prevent his being informed, otherwise it is not a truly adversarial process?

**Mr Ford:** I would need to check on that. I think that is right but I would need to check.

**Mr McNulty:** We will provide Lord Lester with the note that he requested.

**Q42 Dr Harris:** Can I follow up one of Lord Plant's questions. Although Mr Ford answered this, the response was in the Minister's name. Are you really saying that you do not want to have—

**Mr McNulty:** Please reference, Dr Harris, it is terribly useful.

**Q43 Dr Harris:** I will reference you to page five under paragraph 16 where we have our recommendation that "suspects should be formally

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notified of their right to appear physically before the judge at the hearing of applications by the police for extended detention, and required formally, in writing, to waive their right to do so if they choose to have the hearing conducted by video-link". In your name, or the Secretary of State's name, it states in defence of rejecting that recommendation that "The use of video is cost-effective", to which I would say what price fundamental liberties, "and removes the disruption to London traffic and to the court caused by the necessary security convoys". We have a monarchy and that causes security convoys, and some people would argue we have a fundamental right to a monarchy, but the fundamental right to have the opportunity to appear physically before a judge contemplating detaining you without charge for very long periods of time does not seem to me one to which traffic jams should be weighed in the balance.

**Mr McNulty:** As it says there, there is no right to a physical appearance before the District judge. You cannot invent rights that simply are not there. When you talk about waiving rights, the right is not there in the first instance. Actually, I think it is broadly in the individual's interest as well as everybody else's to get that part of the process despatched in the most convenient and comfortable way possible for all concerned. The notion that physical appearance in front of a judge is absolutely part of that process and if that is not happening then somehow the defendant is less than adequately served is not the case at all.

**Q44 Dr Harris:** The Committee on Torture shares my view. You could say it is not a fundamental right but it is something that the Committee on Torture, which inspected Paddington Green, was very specific about wanting to see provided.

**Mr McNulty:** We have said very, very clearly, which goes partly to the point, that the Committee's view about videoing and, more generally, video-links being compulsory rather than otherwise as part of this whole process is something that if we are minded to we will look at very seriously after they have reviewed it. I know that is not specific to the point about physical appearance but I think it is germane to the question nonetheless. I think that is a fair point.

**Q45 Dr Harris:** The point I am making is if it is doable and it might reassure some people and get more support for your proposals then it might be worth doing that if it is doable, it is not a fundamental philosophical objection you have.

**Mr McNulty:** No, it is not, but it does go to operational, strategic and other considerations, not least the traffic, as to why we think it more appropriately done that way based on the experience that particularly the Met have had with Paddington Green up until now. If I thought that absolutely the only substantial objection to physical appearances was some minor inconvenience in terms of traffic then I think I would be with you, but it does go beyond that in terms of the safety and welfare of the individual defendant as well as a range of other matters.

**Q46 Dr Harris:** On the issue of parliamentary scrutiny, you say in your Bill contents document that you recognise that the legislation on counter-terrorism since 2000 has been fast-tracked through Parliament and you recognise this has resulted in criticisms. One of the issues is not just fast-tracking of the legislation but the ability of Parliament to digest and think about and, if necessary, select committees to conduct inquiries into, or take as evidence, reports from the likes of Lord Carlile in adequate time before coming to a decision. One of our recommendations was to ask you whether it was possible in respect of these issues of providing extended parliamentary oversight if the Home Secretary could provide at least a month before any renewal debate a detailed annual report to Parliament.

**Mr McNulty:** Honestly, it is more useful if you tell me the page number just so I can go direct to it.

**Q47 Dr Harris:** It is page one of our report, paragraph four, which is one of our recommendations. I am drawing your attention to the specification that we need a month—MPs, select committees—to consider, think about, perhaps question the author of critical reports which provide the alleged evidence base supporting this. Given that you are saying there is no need to fast-track so much now—

**Mr McNulty:** With respect, when there is paucity involved in terms of the evidence, and it is not an alleged evidence base, it is an evidence base --- You might think it inadequate but there is nothing alleged about the evidence as a base.

**Q48 Dr Harris:** I know a little bit about the way you deal with evidence from my previous work. I do not think we need to argue about the terms. The key question is whether there will be satisfactory opportunity for Parliament to digest and reflect on these critical reports before being put to a vote. It does not matter how many votes there are if there is no chance to reflect. Given that the pressure is off, or ought to be off, in terms of very tight timetables, can you give us that undertaking?

**Mr McNulty:** I think I can in the sense that as far as we can draft clauses, reports that are germane to the final content of the Bill, and other supporting documents not in the public domain now, I would like to make available as early as we possibly can. You will know too that we have said before now and the introduction of the Bill that we are perfectly happy to work with this Committee—you will have to ask Lord Carlile if he is—and the Home Affairs Committee to get as much discourse on these matters as possible before introduction. I think I have said that given the nature of the processes that are going towards the creation of the Bill, for example I am thinking of John Chilcott's review of intercept as evidence, I cannot absolutely guarantee that the timing of that if it needs legislation will absolutely be in time for the introduction of this Bill at first or second reading. As I said last time I was here, if there is post-introduction scrutiny required then I think that can go to be reflected in what

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business managers do with the time allotted to the Bill. In that context we are trying to be as flexible as possible so that there is as great a scrutiny by Parliament as possible added to the significant consultation and discourse that there has been with any number of groups over the summer and yet to come before introduction.

**Dr Harris:** That would be helpful.

**Q49 Nia Griffith:** Perhaps we could turn to Paddington Green, which the Committee had the opportunity to visit earlier this year. We made a number of recommendations, and the page references are pages six and seven.

**Mr McNulty:** Thank you.

**Q50 Nia Griffith:** If I could just briefly mention some of the concerns that we have and perhaps you could tell us now whether the Government agrees with those concerns. We had concerns about the lack of opportunity for exercise, about privacy within the cells, about the safety interviews and the way that they were recorded. These are the interviews that take place in the immediate aftermath of some sort of attack where there has not been time for appropriate solicitors to be contacted on the grounds that possibly another bomb is about to go off. We had concerns about the videoing with the judge at distance taking place in a sort of corridor, the overcrowding, because quite clearly some of these operations involve a large number of people being brought in at any one time, and the issue with the medical examinations of exactly how much privacy there is, the type of forms that are used to be filled in, who pays the medical officers in order to ensure their independence, and your response that no female detainee had actually asked for a female medical officer whereas our concern would be they probably would not feel able to and it should be offered. That is a brief outline of some of the issues that we wanted to raise with you.

**Mr McNulty:** They go to two or three different levels of response, some in the context of Code H of PACE that are clearly in the report, some that in the first instance are matters for the Metropolitan Police—we have certainly made them more than aware of what you say—and some that are directed towards Government. I have had the opportunity since I was last at this Committee to go down to Paddington Green fairly recently and the broad points that there need to be significant improvements just in terms of the fabric and things are points well made. As I was saying a moment ago, specifically in terms of video we are minded to say that the use of video should be compulsory for interviews, as I say in the report, although we have to wait for the MPS to come back to us with a review. The MPS themselves understand clearly that Paddington Green is not entirely satisfactory and are factoring that into their overall estates management and everything else. They are trying to see what they can do in that regard, which is principally a matter for them but I will keep in discussions with them on that. The broad point made in the original report rather than the response that in all circumstances it is still better that a

Paddington Green-type facility is part of a regular police station rather than otherwise is one well made and one that I would accept, albeit if necessary they can turn the whole custody suite into a safe and secure facility rather than go elsewhere. I take the point about the female doctor and I think that MPS need to be advised on that. The balance as between as and when someone asks will they get it or whether it is offered in the first place is a matter of judgment, but I take the point nonetheless. I know it is getting down to fine levels of detail but on balance I am probably with the MPS on the issue of having full access to the entire cell in terms of the CCTV, albeit they assured me when I was there suitably pilloried for private dignity. In normal circumstances, not in terms of just Paddington Green, the notion that is suggested that somehow the lavatory area and facility of a cell should not be part of the CCTV goes to bigger issues about welfare, self-harm and a whole series of other issues. As I say, they assured me that they can maintain the individual's dignity. I was perplexed, I think, by the point which we discussed before that—this is the way you could read it rather than the way it is read—that it is terribly disruptive for a defendant to be taken away from Paddington Green after 14 days, but that is clearly what PACE under Code H says, quite rightly, that we think being at Paddington Green the notion of even longer periods of detention in what is essentially a short-stay facility probably is not appropriate and they should be removed, in this case invariably to Belmarsh. The broad notion in the mid-term, long-term, that we really do need a different or refurbished type facility in terms of Paddington Green I think is well accepted by the Met, as elsewhere. They accept too that certainly in terms of that rather narrow reception area where that is the first port of call for video, it is not ideal and in the context of perhaps some short-term refurbishments and improvements that may be dealt with. All told, given the circumstances and limitations there, I think they do a very good job. The point about exercise I take but that is always going to be rather limited at somewhere like Paddington Green. They do assure me that as and when they have occupants in the safe and secure element, parts of the car park out back are put to one side for the purpose of exercise. It is not ideal but in all circumstances I think that does work well. Within the body of those recommendations there are others that are more directed at MPS. I have pointed to what I think MPS's response will be in consultation but there is still more that they can and are looking to do.

**Q51 Chairman:** What plans do you have for a replacement?

**Mr McNulty:** I do not have any plans. It is not in my gift; that is precisely the point I am making. It is the Metropolitan Police Service's estates management people who deal with it. Following your report and my visit, talking to them, and clearly there is a Government dimension to having a safe and secure facility, geographically where Paddington Green is it is appropriately located, and notwithstanding the point made by the Committee that I agree with that



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it should be part of a regular police station, I think that is right for all sorts of reasons. I can discuss with them but I cannot enforce them to make those modernising plans. Certainly with my current brief and portfolio it is something of interest that I will carry on discussing with the Metropolitan Police Service.

**Q52 Lord Judd:** First, Minister, my apologies, I hope you forgive me for not being here at the beginning of the session but Virgin North-West seemed determined that I should not get here and took me on a tour of the Birmingham suburbs on diversion.

**Mr McNulty:** Not a conspiracy, I am sure!

**Q53 Lord Judd:** Are you satisfied that the current inspections regime is appropriate for places where pre-charge detention of up to 28 days may take place?

**Mr McNulty:** I think so, but it is something we do need to keep under constant review, especially if we go beyond 28 days and especially if it is used far more readily than I am suggesting it may be.

**Q54 Lord Judd:** Could we just look at that for a moment in the context of the exchanges that have just been taking place. If you look, for example, at the whole issue of the video-link where the judge is conducting a hearing, is it really satisfactory for lay visitors to be assessing whether the judge can do the job properly, get the whole atmosphere of the room in which the interview is taking place, see all the body language, see everybody in the room all at the same time? How many lay visitors are present or have been able to be present to watch these proceedings when they are taking place?

**Mr McNulty:** I have no specific response to the second point but, as I say, I do think we need to keep the matter constantly under review. It is a balance between what we can do with the provision that we have, what we can and should do within the context of principally Code H of PACE, and the broader issue of whether there should be, which rather like the Committee I disagree with, a separate location away from a police station under a separate framework à la PACE and whatever other piece of legislation with an absolutely separate inspections regime.

**Q55 Lord Judd:** Minister, you say keep under constant review but we have a very specific commitment because under the Optional Protocol to the Convention Against Torture, which the UK has ratified, places of pre-charge detention must be inspected and monitored by an independent inspectorate. Are lay visitors really regarded as an independent inspectorate?

**Mr McNulty:** They are not agents of government, so in that regard they are independent, yes. Anyone can question and challenge the veracity or integrity of their independence but by definition they are not agents of government so, therefore, are independent. If we need to go in some other direction beyond that, if we need to inspect with a greater degree of

regularity or whatever, I think it is perfectly fair to say that Government should keep that under constant review. They are not agents of government.

**Q56 Lord Judd:** Inspection, as we have seen in the Prison Service and elsewhere, is a very detailed and professional task. People no less than Sir Louis Blom-Cooper, the former Independent Commissioner for Holding Centres, has suggested that there should be an equivalent independent commissioner with responsibility for inspecting and monitoring places where terrorism suspects are held before charge. He has made that quite a specific recommendation. Do you not take a recommendation of that kind seriously?

**Mr McNulty:** We take them seriously but it does not follow that we always agree with them.

**Q57 Lord Judd:** You do not agree with it?

**Mr McNulty:** I have said that we keep it under constant review and I think that is the right and proper thing to do.

**Q58 Lord Judd:** But this process is going on at the moment and has been going on and if we are just keeping it under constant review it does not seem to me that we are necessarily satisfied that the proper arrangement is in place.

**Mr McNulty:** No, I do not think that is fair in the sense that every element and all individuals involved in the process of pre-charge detention put their view into the mix on all occasions, so it is not simply if there is no inspection that meets either Louis Blom-Cooper's or your own requirement that it is not adequate, given everything else that is going on I do not think that is sufficient.

**Q59 Lord Judd:** One last question, Minister. If we are to win, and I am sure you and I are 200 per cent on the same side on this, the battle of hearts and minds is it not essential that in a crucial area like this the world can see that we have a rigorous, independent, tough inspecting regime and not what can be seen and perceived as, portrayed as, a rather cosy arrangement *en famille*?

**Mr McNulty:** I do not accept the tail end of that statement so I do not accept the import of the statement. I do accept that people are afforded, quite rightly and properly, under specific codes of PACE and more generally the defence of their rights and their welfare when held in pre-charge detention and that is very, very appropriate and something that we will guard and hold dear. The inference that because there is not any inspection regime that is sufficiently independent, upon whoever's definition, means that there is something cosy or less than appropriate in terms of due process at play I do not accept as an inference.

**Q60 Chairman:** Could we ask one or two questions about intercept. Could you let us know where you have got to with the Privy Counsellor review? When do you expect them to report and are they going to publish a report that is fully reasoned and will be published?

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**Mr McNulty:** I know that the Committee exhorted that review to be expeditious and, as I alluded to early, I rather hope it is. In the best of circumstances Sir John Chilcott in his review will report prior to the introduction and second reading of the Counter-terrorism Bill. If they have made a decision that says it is appropriate to use intercept as evidence and offered the legislative and appropriate framework for us so to do, and we can factor that into the Terrorism Bill, that is how it will work. I am not party to the review but I believe that we are roughly on that timescale in terms of it reporting before the Bill. Clearly, given I am not party to its conclusions either, if there are any yet, I cannot speculate as to whether they will say yes or no to intercept as evidence, and, if yes, in what form and with what legal framework requiring what primary legislation. If it requires legislation we do hope that the timing will work so that it can go in this particular Bill. If it requires legislation there is that broad consensus that everybody agrees and if it misses the timing in terms of this Bill then it is important that the Government makes sure that legislation is forthcoming. I cannot really speculate as to whether it is going to say absolutely no to intercept as evidence, yes, or something with a caveat in-between, we will just have to wait and see. In terms of timing I do hope it reports before Christmas and in time for discussion as part of the Bill.

**Q61 Chairman:** In April you told us that you were working on the Public Interest Immunity Plus model and you hoped to have a report on that soon, ie then, but nothing has been published and you have now said you do not think it is appropriate to publish the report. Why is that?

**Mr McNulty:** Because it is feeding into the Chilcott review and what Chilcott comes up with will be part of that process. It may well be if they say that is the appropriate model, that intercept as evidence is appropriate and should happen and that is agreed cross-party and by Government, then we need to go back to the work done on that framework. It seems rather lopsided now that the Privy Counsellor review is happening in terms of the broad principles to talk about and publish that framework and the work on that prior to the decision and outcome of the review.

**Q62 Chairman:** Would that not help inform the debate on the issue?

**Mr McNulty:** We have said clearly to Sir John Chilcott and his colleagues, "Please go away and come up with a review on the principles about whether this is an appropriate way to go or not". That is the important issue at this stage. Then their job will be to say, if appropriate, with what framework, PII or whatever else, should this be taken forward. At that stage, I think you are absolutely right, it will inform the process but we did not want anything to get in the way of the point of first principles and discussion of, which is what we have charged Sir John with in the review, looking at the principle of whether intercept as evidence is doable or otherwise. Reading through the

proceedings that preceded mine when I was here in April I know there was a range of views from the three or four people you had in front of you at the one time.

**Q63 Chairman:** We had a range of views because we wanted to have a range of views, but the overwhelming view seemed to be in one direction, I think you would have to concede that.

**Mr McNulty:** I think the Interception Commissioner and others would counter the view that most of the evidence at the time was broadly in favour. I am not going to speculate on what my view or the Government's view is or is not before Sir John reports.

**Q64 Chairman:** What are the objections to our recommendation that you should have an independent and expert disclosure judge looking at these things rather than the prosecution deciding what material is exculpatory and should be disclosed to the accused?

**Mr McNulty:** That gets into complicated legal matters that, as a mere humble MP, are for others rather than me. There are issues around, it is not exactly straightforward. The whole point about defence lawyers quite properly saying, "We don't just want the bit of intercept as evidence that you have produced on your terms, we would rather have in the broader sense all the intercept material"—

**Q65 Chairman:** That is the issue. We came up with a proposal to resolve that issue.

**Mr McNulty:** In legal terms I do not know whether that is an appropriate model or otherwise, that is all I am saying. That is part of the work, having done the principal work in the first place, of Sir John's review with legal support.

**Q66 Chairman:** Perhaps Mr Ford might like to comment as he is your lawyer.

**Mr Ford:** I am not the lawyer.

**Mr McNulty:** He is not a lawyer. He is Head of the Bill but he is not a lawyer.

**Q67 Chairman:** That inspires confidence!

**Mr McNulty:** Usually it does. It certainly would to me, Chairman.

**Q68 Chairman:** Judicial authorisation is the other point I want to raise with you, and that is whether it is appropriate for ministers to authorise intercepts or whether, in fact, it should have the additional safeguard of judges authorising intercepts as happens in lots of other places around the world.

**Mr McNulty:** I think in the context of democratic scrutiny and accountability it is appropriate that ministers do it, I have to say, rather than judicial because that is where our law is at the moment, that is what Parliament has determined. Given that intercept warrants are an intrusion I think it is right and proper that the Home Secretary, and in this case other secretaries also have the power, should be held accountable for that.

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**Q69 Dr Harris:** I just turn to an area where there might be some more agreement between us and that is the area of post-charge questioning. Insofar as it relates, I guess that is on page ten of your report. You said in your document *Possible Measures for Inclusion in the Counter-Terrorism Bill* that you think there is merit in introducing this change in relation to terrorism, and we agree, and you said there is merit in doing it now and went on to say that it is therefore a measure you would like to implement quickly. We suggested to you that you could do this, in fact, by simply amending the PACE codes and you could do that pretty quickly, it does not need to await legislation or inclusion in the Bill but you did not directly address that timetabling point in your response to our recommendation. Could you just tell us now if you can do it quickly because there appears to be little opposition to that, certainly from our Committee and the Home Affairs Committee?

**Mr McNulty:** We are in the middle of consultation on amendments and changes to PACE and I am not quite sure when that finishes and whether that would mean that we can make the changes faster rather than otherwise. My second point in passing, and only in passing, is despite there being a modicum of agreement, or strong agreement on this, the technical details and substance would still need working through. I am inclined to that being more appropriately done by the parliamentary scrutiny process rather than otherwise, but I am agnostic. David?

**Mr Ford:** It is exactly the second point. As one of the things that would be associated with post-charge questioning is the ability to draw adverse inferences from silence there probably is a case to say that this is something that should go through full parliamentary scrutiny and debate so that all of the issues surrounding that, including the safeguards that will need to be built in to make sure that post-charge questioning is not misused, are properly aired and debated.

**Q70 Dr Harris:** That does not have to be three readings of a bill and a committee stage in two Houses because there is already the provision for post-charge questioning under PACE Code C in some circumstances. The issues are well-known, I agree they would have to be finalised, so you could actually move along with this quite quickly including some form of parliamentary motion or approval instrument.

**Mr McNulty:** The balance between whether it is more appropriately done under scrutiny through a bill or during what is now the relative tail end of our consultation process on the review of all the rest of PACE—you will know the review of the terrorism bit of PACE was done earlier—I am happy to look at both of those and if it is more appropriately done with the caveat about still a sufficient degree of scrutiny via PACE then I am happy to explore that. On balance, given that it is a departure, nonetheless a departure with a degree of consensus, I think that is still better done with due parliamentary scrutiny. I like parliamentary scrutiny.

**Q71 Dr Harris:** So say all of us, but it does not necessarily have to await the full process of a bill because where there is broad agreement it is already in place. Obviously there is the point which you conceded previously that while it does not necessarily negate the need for pre-charge detention or, indeed, refute the argument for potential extension it has the potential to help and, therefore, if Parliament is facing a difficult decision about whether to proceed with an extension to pre-charge detention, having some experience of the ability to do post-charge questioning along with the operation of the CPS threshold test, that might aid Parliament in making that decision, which is another reason to proceed more quickly. Do you accept that?

**Mr McNulty:** I accept that we will have a look at it. What I am not clear about is when we could do it and whether there would be appropriate scrutiny. It would be wrong, I think, in the middle of a very, very elaborate already ten month, almost year long process of reviewing PACE and all its codes to do it outwith that process, that would be quite strange. To do it outwith the bill process would be quite strange. If the alignment of those two processes in terms of timing mean that due scrutiny can be done more appropriately as part of the overall review of PACE rather than in a bill, which in any terms would be a 12 month process through its various stages, as we know, then that is something I am perfectly happy to look at and get back to the Committee on. It is more a matter of timing than otherwise and my concern about due scrutiny.

**Q72 Dr Harris:** I think it is fair to say that we are keen to see it happen sooner for the reasons I have given. I had some technical questions on the issue but in view of the time I am going to pass over those.

**Mr McNulty:** I will get back to the Committee on that. I do take the point too, with a very, very strong emphasis on the “may”, that it may influence what we require pre-charge in terms of detention and it may at least influence that debate if that bit was brought in prior to the process. I accept all of those elements. We will get back to the Committee in terms of the issues around the PACE review, which I am not terribly hopefully about, or the Bill being the issue about how that was introduced.

**Q73 Chairman:** One issue that was raised when we were visiting Paddington Green was the question of bail for terrorist offences. What the police said to us was that sometimes people are arrested under counter-terrorism legislation who are very much on the fringe, who are not a flight risk, for example on the fringe of financing issues, and they saw no reason in principle, subject to the appropriate conditions, as in a control order, that they should not be bailed and that would obviate the need for holding people indefinitely beyond 28 days or whatever. Have you given any thought to providing for bail for these relatively peripheral cases because at the moment there is no bail at all allowed under the Terrorism Act?

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**Mr McNulty:** It is certainly worth looking at and exploring given the evidence of the last couple of alleged plots where there has been a degree of success where you do happen to swoop up not only very active players and participants but many on the edge as well. The experience is still relatively new in that regard. Yes, we need to look and explore it. I suspect not as part of this Bill necessarily but it is something we do need to keep under review in the context of experience as that develops. It is a fair point for those around the periphery although after the event almost in terms of the investigation and interview strategy it is very easy to see who were the ones around the edge and on the periphery but it is not as easy during the process. It is something we need to look at and consult on.

**Mr Ford:** Following your specific recommendation we have discussed this with the police in the context of whether this is something worth doing. I must say, there does seem to be a bit of a conflict. Some of the police we have spoken to, like yourselves, have said that this might be quite useful in terms of some of the lower players because we could get them out of detention and we could focus on the more serious ones, but other police officers have given a different view. It is something that we are actively looking at.

**Q74 Lord Plant of Highfield:** If we could now move to the retention of DNA material. There are three issues here, I think. First of all, as you know because you commented on it, Lord Justice Sedley advocated the introduction of a universal system on the grounds of fairness and I think you said that while you were not saying never you thought that there were major practical issues of a logistical, civil liberties and ethical sort. I wonder if you could just elaborate on those things a little.

**Mr McNulty:** I think the one thing that that series of interviews taught me in terms of the subsequent coverage is that you should say “Never” really! When you try and qualify statements by saying “in the fullness of time” or “never say never” that is taken as entirely supportive. When I said that I was broadly sympathetic, and I thought meant very clearly to the logic of his case in the sense that a 100 per cent universal DNA database does things that a partial database, voluntary or otherwise, does not do, that is translated as broadly sympathetic to the Government bringing it in tomorrow, neither of which cases I meant. For the reasons I have outlined that you have kindly quoted, I think there are enormous difficulties with it and there are no plans whatsoever for the Government to pursue a compulsory DNA database, even on a voluntary basis, for many of the reasons I have suggested there and that you imply. I have actually as part of the broader PACE review a meeting, I think in a couple of weeks, with Chief Constable Tony Lake, who is the ACPO lead on these matters, who has some issues that he wants to discuss as part of PACE that go to retention of DNA on the database for younger people and especially for those who have not in their brush, if I can use it in those terms, with the criminal justice system been subsequently found guilty or charged with anything. The only caveat I would

make is that I am loath to talk about the guilty and innocent because it is an investigatory device that works terribly well with a huge amount of cold cases being resolved satisfactorily, and by doing so there are points of tension especially for those who have not subsequently been charged with anything or younger people who have not been charged with anything. To talk about getting innocent people off the database is not strictly accurate in the sense that any number of the cold cases that have gone to rape, murder, and a series of other issues being resolved, start with a latter-day brush with the law, maybe about a road traffic accident, maybe about some fairly minor thing that finds a hit going back to some cases that are 10 or 15 years old, but it is an interesting area and one that I think there needs to be substantive debate on.

**Q75 Lord Plant of Highfield:** You did mention specifically civil liberties issues to do with Stephen Sedley’s proposal. Could you elaborate on those for a second?

**Mr McNulty:** I understand entirely people’s concerns on a civil liberty basis of an absolutely compulsory, state-inspired register of the DNA of each and every individual in the country and visitors. I think there are huge civil liberties issues there. Would I be in all circumstances as a minister of the Crown or as an individual happy for my DNA to be in a national database? I would of course, I have got no problem with that at all.

**Q76 Lord Plant of Highfield:** So looking at this in relation to terrorism, a counter-terrorism DNA database will contain “samples legally obtained from international partners where agreements are in place to do so and samples legally obtained from terrorist-related investigations both in the UK and abroad”. Will the agreements with international partners be publicly available and will they ensure that the safeguards in the supplying country are at least as good as those that apply here?

**Mr McNulty:** I think they probably will and should be. I am not entirely sure, to be perfectly fair. Maybe I should get back to the Committee on that, unless you can elaborate David. I think they are.

**Q77 Lord Plant of Highfield:** We would welcome a note on that. Then finally—and this relates to my declaration of interest—do you have a view, I suppose it is implicit in what you said but it would be useful to have a comment on the recommendations of the Nuffield Council, that for people who are subsequently not convicted of a crime, except those charged with serious violent or serious sexual offences, their DNA should be removed from the register?

**Mr McNulty:** I think that is an issue I am looking forward to talking through with Chief Constable Tony Lake and I will take his advice based on his experience. He has been the ACPO lead on this for some time. I read the recommendations of the report with interest. I think there does need to be a broader debate. Any number of the samples loaded on the DNA database are unknown from crime scenes. In

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any number of cases innocent people, ie those not charged, who are on the database precisely because they are on the database have been excluded from investigations because it did not match to some further crime they were charged with. It is an interesting area and I think as the use of DNA and the automaticity, if you like, of collecting DNA at crime scenes becomes the norm, as the technology becomes all the better, I think there are real issues for us in terms of not necessarily a database but, where appropriate, in a given area much more use of voluntary swabs from individuals to eliminate them. In the serious crime world there is a broader debate needed to be had that is not just about a DNA database versus no database and the civil liberties issues that pertain but in terms of the broad use of it as an increasingly useful tool. The one caveat I put on that is that DNA does not talk, in the sense it can tell you that someone was at a location without fear of contradiction but it cannot tell you that individual did this or that at that particular location unless used with other forensics and other information, so it does not do the job for people, but I think certainly on terrorism it is very, very useful to deploy that.

**Q78 Lord Plant of Highfield:** On that specific point that you have just made, you have got 200,000 samples from people neither charged nor convicted which in the past would have been removed. This is the Home Office responding to a *BBC News* item on the Nuffield report I think and a Home Office spokesman said: “8,500 were subsequently matched to crime scenes involving some 14,000 offences, including 114 murders, 55 attempted murders and 116 rapes.” One thing that is implicit in what you have just said is matching those with crime scenes; it is another to actually secure convictions. It seems to me that what the spokesman said needed another sentence “to give us the results of those matchings.” The matchings occurred but what has happened? I am not suggesting you can perhaps answer now but what are the figures?

**Mr McNulty:** I think the figures are not a million miles away from those figures in the sense that there is a high success and hit rate. I am sure we have got that information because I think I have seen it before. There are some remarkable things on it but I think there does need to be a debate in the sense it is useful for anyone who has ever encountered, in whatever capacity, the criminal justice system for perhaps a given period to have their DNA retained and then subsequently destroyed or is that absolutely verboten and we should not do it and only those who have been charged with something should be on the database? I do not have all the answers to that. I just think there could be a very useful debate around that. Should we possibly have one with international colleagues in terms of terrorists from legally sourced international databases? We think in terms of this Bill that would be very, very useful, not least given the international global dimension to this struggle and this threat. In the broader sense of the Nuffield piece I think that it is part of—which is why I welcomed it—a real broad debate on DNA as a useful tool for the police and for

the protection of society. I think that is a very good debate that we need to have. The Nuffield people have very kindly invited me to have such a debate some time before the end of this year. As I say, on the serious point in terms of retention and in terms of young people, I am talking to ACPO and others as part of the PACE process to see if there are issues that we should take forward perhaps more readily than we have done.

**Q79 Chairman:** If you could let us have a note on the number of convictions and the number of different individuals being convicted because presumably some of those may be multiple convictions of the same individual?

**Mr McNulty:** It is a rather esoteric point, but yes.

**Q80 Lord Judd:** The Government is proposing to remove barriers to both the acquisition and disclosure of information by intelligence and security agencies where this is operationally important and, as we understand it, the proposal is to legislate to place those agencies on a similar statutory footing to the Serious and Organised Crime Agency by giving them specific data sharing powers and subjecting them to independent oversight. I must say personally—and I probably speak for a lot of us on the Committee—there is a lot there for us to welcome and to say is a very healthy development, but of course the detail does have to be watched and what I think it would be helpful for the Committee to know a little bit more about is the oversight arrangements as you see them and how they would be designed to give close attention to lessons to be learnt from reports covering matters like rendition and, in particular, those cases such as the *Arar* case in Canada and the *al-Rawi* case and the *El-Banna* case in the UK where individuals were exposed to rendition and torture as a result of information being provided by intelligence and security agencies? What lessons has the UK Government drawn from the report on the Arar Commission for example?

**Mr McNulty:** In terms of your specific point about data sharing I welcome the welcome, if I can say it in that fashion, and we think it is the appropriate way to go. It is about regularising things that are out there now. We are still talking about whether it is simply the independent intelligence service interception commissioners who are appropriate to carry out the oversight you suggest or whether there should be some movement into a new area. I think that we think broadly that it is appropriate. It will go in part to the very early thoughts the Prime Minister has shared with individuals about the overarching functions of the Intelligence and Security Committee whether much of that can come into a more public domain as well, because I think the broad points about scrutiny and oversight are points that are well made, and central to that is data sharing and central to that is a statutory leg to stand on, as you suggest.

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**Q81 Lord Judd:** Minister, I think you personally have a very good understanding of many of the anxieties that exist amongst responsible people outside the system and of course one of the big anxieties is about the danger of the sharing of information which has either been obtained from or might be used in acts of torture or other serious violations of human rights. There is a lot of anxiety about that and I am sure you understand that.

**Mr McNulty:** There certainly is, I agree with that.

**Q82 Lord Judd:** What therefore are the specific proposals that you are making for how that can be dealt with effectively?

**Mr McNulty:** We utterly condemn the use of torture, we do not condone it in any regard and, as far as I am aware, we do not use or seek to use information as a result of torture in any way, shape or form. I know the Committee asked me to make that as clear as I could at the last Committee meeting and I do not think anything substantive has changed in that regard.

**Q83 Lord Judd:** Forgive me, Minister, this standard response has become a refrain.

**Mr McNulty:** Yes but it has the virtue of being true.

**Q84 Lord Judd:** Absolutely and I think it is very good to have it as a refrain.

**Mr McNulty:** And it has meant that many of the allegations—because many of them are simply allegations around the cases you refer to—remain simply that; allegations.

**Q85 Lord Judd:** It is great to have a refrain and it is jolly good to have this one.

**Mr McNulty:** There are allegations that are constantly invoked as assertions of fact rather than allegations. Not in all cases, I accept.

**Q86 Lord Judd:** I am serious, I am not being cynical, if you are going to have refrains it is jolly good to have this, it is a standard position of the Government and it is repeated by everyone. That is good but what I think people are concerned about is just what the nitty-gritty is for making sure that the good intentions of the Government in this respect are actually followed through in detail.

**Mr McNulty:** They are as far as I am aware a matter of law. It is rather like the opening statement from your last report where the Committee would welcome “an unequivocal public commitment to the existing international human rights law framework”, with a clear implication that somehow the Government are not unequivocal in their support for the international human rights framework, which is not true, so I am sorry if it is a refrain but it is true and the nitty-gritty is the law of the land and the rule of the law, which we do not transgress as far as I am aware.

**Q87 Chairman:** It is the *Chahal* case which is potentially undermining the international framework.

**Mr McNulty:** That is a matter of judgment and not simply a factual assertion. We think the interpretation of Article 3 in terms of *Chahal* is wrong. Where you go subsequently from that is a matter to be looked at once *Chahal* or the Italian case are dealt with and that is a matter for debate and discourse certainly but the Government challenging the interpretation in the *Chahal* case with the Dutch in terms of Article 3 does not, I would suggest, lead to an assertion rather than a fact that says somehow the Government are less than unequivocal in their support for the international human rights framework. That does not follow at all. It is a perfectly fair opinion for someone to have but it does not follow as a matter of fact that the challenge in the *Chahal* judgment equals the Government are less than utterly unequivocal about the human rights framework; it is just not the case.

**Q88 Dr Harris:** I thought the *Chahal* judgment stated that you could not balance the real risk of torture against national security because there is an absolutely unqualified right to be free from being exposed to a real risk of torture, so it follows therefore that if you are against that you are not so strong on these things.

**Mr McNulty:** As ever with these things, *Chahal* in terms of its application as case law has gone much, much wider than the very narrow focus of the utilisation of torture. It is said in terms, as the ex Home Secretary said over the weekend which I think I broadly agree with, that the balance of the individual and the public safety concerns about that individual should they be returned and tortured, as well as a whole range of other welfare issues, has gone much wider and far and away outweigh any concerns of national security or the wider welfare of communities and individuals living in the country. I think you are absolutely right, *Chahal* starts there but subsequent interpretation and application of *Chahal* has gone that wide. That is the concern and it is the gap in between. Being anti-*Chahal* is not pro torture, I think that is absolutely the case.

**Chairman:** We have gone off the issue.

**Lord Judd:** May I just say that I am sure you will understand if we return to this matter because speaking as a former chief executive myself there is a hell of a difference between having policy and its effective implementation, and its effective implementation is the thing that is really important. Can I now take us on to control orders.

**Q89 Chairman:** Can I just say, Tony, we were due to finish by now. We have got a couple of quite big issues to go through. Are we okay for time from your point of view?

**Mr McNulty:** Probably not actually, which is not me running away but I have a fairly significant appointment in Stanmore which is about 15 or 20 miles away and very important for my constituents. It sometimes takes an hour and sometimes takes two hours.

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**Q90 Chairman:** What time do you need to leave by?  
**Mr McNulty:** I should like to leave at four.

**Q91 Chairman:** It is four now.  
**Mr McNulty:** Five or ten minutes will be fine but then I need to go.

**Q92 Lord Judd:** You made a very interesting speech in July and I wonder whether I could just ask you a question about it. What did you have in mind when you spoke of “nipping around the edges of legitimacy of [British] values” in your speech?

**Mr McNulty:** You will have to tell me more about the speech, Lord Judd.

**Lord Judd:** It was reported in a *BBC News* report that you had said: “How can we in the fullest sense seek to get everyone signed up to the broadest values of the UK . . .” and you went on and developed your thinking about this.

**Q93 Dr Harris:** On 3 July apparently.  
**Mr McNulty:** I do not know how to answer that in any context at all.

**Q94 Lord Judd:** All right.  
**Mr McNulty:** Give me a little context. I am sure my speeches are wonderful but I cannot remember any of them!

**Q95 Lord Judd:** You said: “It may be that we haven’t thought in rigorous enough terms on how we capture these individuals under the law. It may well be that we can do with a degree more rigour within the law and control orders are inappropriate.”

**Mr McNulty:** Okay. I think what I meant—and I think I met Liberty shortly before that and discussed it with them—the more and more we can do in terms of the criminal law to prosecute the better, and that control orders should be, as they are, a matter of last resort. You will know that the House of Lords is due to report fairly soon on what could potentially be a fairly significant case in terms of control orders and we will have to take stock on where we go with control orders after that, but I am still trying to contextualise the quote.

**Q96 Lord Judd:** May I recommend that you reread your speech because it is a very interesting speech.  
**Mr McNulty:** I am sure it is but if you pull one line out, I am trying to put it into proper context.

**Q97 Lord Judd:** Minister, could I take you on and simply say is the Government or is it not considering derogation from the Convention in relation to control orders, because if it is I would find that difficult—I think we all would—to fit in with your own recent comments which you seem a bit vague about.

**Mr McNulty:** With respect, I am not vague about the comments; I am vague about drawing one line out and throwing that back at me three months later. We are not considering at the moment derogating but I think, fairly reasonably, we have not taken it off the table either. It needs to always be there as an option. It is almost a false dichotomy to say that because we

are not considering it why do we not eradicate the option at all. As I say, I think whatever decision the House of Lords makes on the two cases before them that they are due to report on, we will have to take very, very seriously and respond to them accordingly. The Government does not like the notion of control orders. We find them very unsatisfactory, as you are aware. I fear that in all that we do, even if post charge questioning gives us all that we want, even if acts preparatory and interceptors of evidence and all the other elements work in the direction that I know collectively we all want, there will still be a small handful of individuals in this twilight zone where there is more than sufficient information to be very, very concerned about them but not sufficient to prosecute or charge them, who would need to be looked at and dealt with in some way. I hope that is an absolute minimum but I think it will be absolutely irresponsible, given where we are, for the Government not to do something with those individuals. The notion that somehow we are rather sloppy and that we only go for control orders because we cannot be bothered to prosecute is not the case at all. Absolutely prosecution is the first recourse for the Government.

**Q98 Lord Judd:** One last question if the Chairman will permit me and that is if you are proposing wider police powers, for example to take, retain and use fingerprints and DNA and have homes entered and searched and property seized in connection with control orders, how can that really be reconciled with the purposes of Article 6 of the ECHR? Does it not really make it much more difficult to sustain the Government’s position that this is not in fact amounting to a determination of a criminal charge?

**Mr McNulty:** I would not accept that. I think it is ECHR-compliant and the minor elements that are in the Bill just go to tidying up things in terms of the control order process rather than pushing one way or t’other towards or away from concerns over contravention of Article 6, to be fair. They are probably elements that should have been there at the start of the process that do not go to the broad principle of the thing.

**Q99 Dr Harris:** On special advocates, which you address on pages 11, 12, 13, 14, 15 and 16 of your response, clearly you have put a lot of effort into addressing these and whoever was responsible for drafting your replies did not hold back and I think we welcome the fact that you go into detail. We have not got time to explore the selection of quotes from cases in here but the fundamental concern that we have—and I think it is fair to say you have rejected all our suggestions for how the special advocates system could be improved—is that special advocates have told us they are not happy, and they are part of the process that there is a fair crack of the whip for the person who never knows the evidence in many cases that they are faced with, and that although you have said that the procedure is as fair as it can be, one of the special advocates has said to us that “as fair as it can be” is not fair. Do you have anything you can add to your response that will give us any comfort



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that the Government recognises that there is any kind of a problem here along the lines that we set out and indeed the special advocates have set out in their evidence to us?

**Mr McNulty:** No, I think I would stand by “it is as fair as it can be” but with one caveat, I did say to the Committee in April that as and when I had a chance I would (because I was asked whether I had done and I had not) seek out and speak to some special advocates. I have not done that and I am mindful that I should do that and if there is anything following on that that I need to get back to the Committee on to look again at our position that it is as fair as can be, I am more than happy to do so. I remember I did say I would.

**Q100 Dr Harris:** I think that is quite helpful because we were quite impressed or influenced by what they said in a public session and a lot of what your reply is is not about what they actually said but, as is fair enough, about the case law as far as it has gone.

**Mr McNulty:** I did say that I would do that and I will do that and get back to the Committee after I have done so.

**Q101 Chairman:** I think that would be helpful because we were going to ask you about that.

**Mr McNulty:** Whether I had been to see them or not?

**Q102 Chairman:** You have forestalled one particular question so next time you come we hope you have an answer. One last question from me on the timetable issues. It was originally suggested by the former Home Secretary that we would get access to draft clauses for pre-leg scrutiny. Is that still going to happen?

**Mr McNulty:** We hope so. Clearly when we said there would be a Bill from June onwards, some instructions were made straightaway and some instructions will be influenced to an extent by the consultation process, so as and when we can that is certainly the intention.

**Q103 Chairman:** Have you any idea when?

**Mr Ford:** I think early October.

**Mr McNulty:** Early October he said out of the corner of his mouth. Hopefully by the time the House resumes, I think we can say, and that is October 8. I have no idea when their Lordships return but probably before that because they are more hard-working of course!

**Q104 Chairman:** Thank you very much and sorry we overran a bit.

**Mr McNulty:** Thank you.

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## Wednesday 5 December 2007

Members present:

Mr Andrew Dismore, in the Chair

Morris of Handsworth, L  
Onslow, E  
Stern, B

Dr Evan Harris  
Mr Virendra Sharma  
Mr Richard Shepherd

*Witnesses:* **Ms Sue Hemming**, Head of Counter-Terrorism Division, CPS, and **Mr Ali Bajwa**, Barrister, 25 Bedford Row, London, gave evidence.

**Chairman:** Good morning everybody. Thank you for coming to give evidence to us. We are joined by Ali Bajwa who is a barrister who has got some specialist knowledge in this area and by Sue Hemming from the Crown Prosecution Service. Before we start I have to remind Members of the *sub judice* rule. Members should be aware that criminal proceedings are active in relation to the airline bomb plot of August 2006. These matters are therefore *sub judice*. Members should therefore avoid referring in detail to the relevant events in questions or discussion. In particular, references to specific individuals even by anonymized references are not in order.

**Mr Shepherd:** And those released without charge?

**Q105 Chairman:** They are fair game! I asked that question myself yesterday when we were preparing the brief. This session is to look at counter-terrorism policy and human rights. I presume you are aware of our earlier report in the summer where we indicated that we saw no case at present for extending beyond 28 days because we had not seen any evidence of an increased terrorist threat. That is our Committee's position at the moment. What we would like to do to start off is to explore some of those issues around the discussion on pre-charge detention, if we may. Sue, in terrorism cases how easy is it to tell when there is enough evidence to charge someone? Does the evidence build up gradually or is there a point when it is obvious that the charge should be brought?

**Ms Hemming:** I think it depends on the case that you are dealing with. When you are dealing with a reactive case, such as the 21/07 bombings, it is much easier because you actually know what has happened and you are looking then at each of the individuals to see whether they are actually responsible for any part in it. When you are dealing with the more proactive cases, where you are looking more at conspiracies rather than incidents that have happened, then it is much more difficult. The cases tend to build up over a period of time until obviously you get to a stage where you get sufficient to charge particular individuals.

**Q106 Earl of Onslow:** Does that not apply to all conspiracy cases? What is the difference between terrorism and burglary, for example?

**Ms Hemming:** That clearly does apply to most or all conspiracies. It will depend on the nature of your evidence whether it becomes clearer more quickly.

Probably one of the big differences between terrorism cases and other cases will be the nature of the conspiracy and how quickly the police have to act and whether they can collect a lot of the evidence in advance of arrest or whether they have to arrest and then work towards collecting the evidence.

**Q107 Chairman:** How soon after the evidence became available in the airline plot, without going into the details, were the suspects actually charged?

**Ms Hemming:** The first suspects were charged after about 11 days and then other suspects got charged between the 14 and 21 and between the 21 and 28 days.

**Q108 Chairman:** Ali, do you think this longer period of detention has affected the urgency with which the police pursue their enquiries?

**Mr Bajwa:** All that is visible to us when we are acting for the suspect in a police station is how much disclosure is made and how much interviewing takes place. Plainly we are not privy to what is going on behind the scenes. So from what we can see, certainly in Operation Overt, the airline case where 28 days was brought into force and that was the first case to engage those powers, disclosure was virtually non-existent for the first week of custody and interviewing was rare. For the first four days sometimes there was less than three hours of interview. Three hours spread over four days is very little indeed. In those three hours some of it was taken up with the safety interview, which really was not meant to be an investigation of the case at all, and the rest of it is taken up with establishing the person's name, address and personal circumstances, the person's clothing or the contents of his pockets, something as trivial as that. That is the first four days of a person's detention. From where we are standing, that does not look to us as though the investigation is being progressed with diligence and expedition. Then for the last 15 days of detention we have noticed that sometimes there is only about, on average, ten minutes or so of interview per day. Many days pass where there is no interviewing at all. So again from our standpoint, whilst we do not know and cannot know what is going on behind the scenes, it certainly looks as though the police are taking full advantage of the time that they believe they will be granted and in some cases have already been granted.

**Q109 Chairman:** In an article you wrote for the NLJ you said, “. . . questioning of the suspects slowed down to snail’s pace”. Is that your position?

**Mr Bajwa:** Can I just add a little bit of flesh to that? Over the 28 days in some cases there was a total of 13 or 14 hours of interviewing, that is an average of half an hour per day. I have known more interviewing than that take place in a four-day non-terrorism investigation. So I think it is a fair statement to say that interviewing slowed down to snail’s pace.

**Q110 Chairman:** Have you done these cases before the extension to 28 days?

**Mr Bajwa:** Yes.

**Q111 Chairman:** Have you noticed a difference in the 14 days to the 28 days?

**Mr Bajwa:** Yes. In the 14-day cases there was at least that much interviewing taking place. Thirteen or 14 hours at least was taking place over the course of 14 days. Now it seems that that amount of interviewing is taking place over 28 days.

**Q112 Chairman:** After the 14 days I think the suspects are moved to Belmarsh.

**Mr Bajwa:** That is the position now under the 28 day powers.

**Q113 Chairman:** Do you think they are forgotten about once they are in the prison?

**Mr Bajwa:** I would not like to say forgotten about. There have been examples where on something like nine or ten days out of those 14 days no interviewing takes place. Again, we do not know what is going on behind the scenes and the police may very well be able to persuade this committee or another committee that they are working assiduously behind the scenes and are making best efforts to gather information for interviewing purposes. All I can tell the Committee is what we see, which is very, very little interviewing taking place in the first four days and very little interviewing, even less perhaps, happening in the last two weeks.

**Q114 Chairman:** Do you want to respond to any of those points, Sue?

**Ms Hemming:** Yes, if I could because I was actually the prosecutor who spent nearly 28 days in the police station during the period of time on this case and have made many of the charging decisions pre the 28 days in post. There is an awful lot of activity going on in the police station, in scientific laboratories and in the fingerprinting department. Of course, a lot of the investigation is not actually about interviewing, it is about pursuing lines of enquiry and about doing scientific tests. Whilst I am not present obviously in every place where this activity is going on, I have travelled round the different places where it has been and I personally have been working with police officers late into the night, early in the morning, on Saturdays and on Sundays. My experience is certainly that they do work diligently and that prosecutors are working diligently with them to charge at the earliest opportunity. In relation to the

interviewing, I think it is right to say that the interviewing certainly does slow down as the period goes on. The reason for that is that often you are waiting for scientific tests, for DNA analysis and for fingerprints on documents. A lot of those sorts of tests are coming a little bit later on. The police will interview once they have got the substantive results to be able to interview about.

**Q115 Chairman:** Are those scientific tests themselves being conducted expeditiously, and how long does it take to track a fingerprint?

**Ms Hemming:** They are. We are dealing with cases where you have got thousands and thousands of exhibits, computers, paper exhibits. Obviously the police are doing their best and using their best judgment to choose which of those exhibits need to be fingerprinted or looked at or analysed first. As far as I can see they are being conducted as diligently as they can be. We are actually focusing the investigations as well as prosecutors. So we specifically ask for particular items to be looked at for DNA, for fingerprints and try and focus the investigation as much as we can on those documents that would allow us to make a charging decision against any particular individual. We must remember that this is not about the overall operation, it is about each individual person. There will be an occasion when one particular exhibit could assist us in making a decision against one particular individual and decide whether to release or charge.

**Q116 Chairman:** Ali also says in his article that when the suspects are transferred to prison they are “. . . allowed unfettered association with other prisoners (including other suspects in the case), use of some of the prison facilities and very regular legal visits”. Because of the length of time involved obviously you cannot keep them in solitary confinement for a month, that would be inhumane. If they are allowed to associate with other suspects is that not going to prejudice your enquiries anyway?

**Ms Hemming:** I think it depends what you mean by prejudice in the enquiry because obviously the police can continue to make their enquiries and to do the scientific tests and all the rest of it. They can obviously speak to each other, which is something that does not happen in the police station. The reality is that most individuals who are actually under arrest for these sorts of charges actually say nothing at interview. I think if people were speaking in interview and giving explanations then maybe, but where you have people who are not speaking in interview then it has a limited effect.

**Q117 Lord Morris of Handsworth:** Let me pick up the description of “snail’s pace” in terms of interviews and the movements to Bellmarsh as well. Are these isolated cases or incidents that you are describing or is there a pattern to all those who are waiting to be charged?

**Mr Bajwa:** I can only base it on Operation Overt, which was the case that I was involved in and the first case to engage the powers to detain for 28 days.

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There have been other cases since. I do not know how many persons have been transferred to prison in operations since Overt. There were nine persons detained for more than 14 days in Operation Overt and I think all of them were transferred to prison. In those nine cases the interviewing in the last 14 days whilst they were in prison was next to nonexistent.

**Q118 Mr Shepherd:** The thing that puzzles me about all these enquiries as to why the Home Office and we are in difficulty is that when we look at common law equivalent jurisdictions, no one is approaching this in this incredibly important way we seem to attach. These are very fundamental liberties that we are touching into the area of. We are talking about a Government that wishes to extend possibly well beyond the 28 days and yet in the United States, for instance, which is still a real target for terrorism, it is still two days before you have to charge for detention purposes. Why are we in such difficulties? We are all governed by the Human Rights Act in Europe. Why is France not in such difficulties? The problem I am really asking about is that here we are doing these inquiries about the most fundamental and sensitive protections of the citizen for some reason that has never been quite explained. The police officers we have had say they can envisage circumstances where they might need more than 14 or 28 days. I can envisage lots of things. I therefore go back to the benchmark. This is a long-crafted protection of the citizen that we are talking about. What is it that is so special about the United Kingdom that we have to overthrow these original and important liberties? We are talking about across the world. You must have encountered this question a number of times, I am sure.

**Ms Hemming:** Apart from the United States, I think I would say that the other countries are really not facing the numbers and the complexity of the sort of cases that we have been dealing with in this country.

**Q119 Mr Shepherd:** Canada?

**Ms Hemming:** Canada has had two cases that I can think of. With regard to Europe, I think it is difficult to compare the position in Europe to the position here because obviously what they call a charge is very different from what we call a charge. We have to apply the Code for Crown Prosecutors here, whereas across Europe, Italy, France and some of the other jurisdictions what they call a charge in the early stages is very different. Often the investigation and the case are not completed sometimes for months and years. It is quite difficult to compare us with those countries. I cannot say that I have a detailed knowledge of the United States and their working before they charge people or on the exact basis on which they carry out a charge. All I can speak about is my experience of taking the charging decisions on many of these cases over the last five years and the fact that they have got more complex. A lot of the type of evidence and the size of the cases have increased. The Crown Prosecution Service has made its position clear, that we think the 28 days has been sufficient in each case that we have had. We have not seen any evidence that we have needed beyond 28

days. Whilst there might be some arguments we have heard that obviously there will be cases in the future that might be more complex than the ones we have had, as I say, I can only speak from my experience of dealing with these cases. Certainly when I have made the charging decisions I have done so at the earliest opportunity on each individual.

**Q120 Chairman:** You have been dealing with these cases probably more than any other Crown Prosecutor hands-on and you have not found any case where the 28 days has been too restrictive for what you needed to do, have you?

**Ms Hemming:** That is right.

**Q121 Mr Shepherd:** Fourteen days is what I wanted to get from there. If that is over 28 days, following the questions to Mr Bajwa, where is the evidence that we outsiders can say it was necessary to go even beyond the 14 days?

**Ms Hemming:** Because we have used 14 to 28 days in three cases and in all three of those cases, which I think amount to charges against eight individuals—

**Q122 Chairman:** When you say three cases, do you mean three separate plots?

**Ms Hemming:** Yes. We have actually made 17 applications in all. We made 11 applications between 14 to 21 days and five of those people were charged and we went on to make applications against another six from 21 days to 28 days and three were charged between 21 and 28 days. Having been involved in the charging decisions against all of those individuals, we would not have been able to charge any of those people past the fourteenth day if we had not had the ability to ask for warrants of further detention beyond 14 days.

**Q123 Mr Shepherd:** And the outcome of the prosecutions?

**Ms Hemming:** None of them has come to trial as yet.

**Q124 Chairman:** Of the ones who were held 14 to 28 days, how many were released without charge?

**Ms Hemming:** Three were released without charge and eight were charged.

**Q125 Chairman:** Of those three who were released, are any subject to a Control Order?

**Ms Hemming:** I do not know because we are not involved in Control Orders. I probably should not say in any event because they might be identifiable.

**Q126 Chairman:** Are there any people who were released post 14, when 14 was the test, or post 28, when 28 was the test, who you felt that with more work you would have been able to bring charges against?

**Ms Hemming:** That is difficult to say. There is nobody who has been released who has been charged subsequently as far as we can see, although we do not have that data available to us. The focus of the investigation does change rather obviously once people are charged because the focus is getting that

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case together into a trial ready position. I am not aware of anybody that we have actually charged since as a result of ongoing investigations.

**Q127 Chairman:** I think that is a fair way of putting it. Are there any cases where you have had to bring the wrong charges because of the time pressures of the 14 or 28 day threshold?

**Ms Hemming:** It is difficult to say the wrong charges. There are cases in which we have changed—

**Q128 Chairman:** Inappropriate then.

**Ms Hemming:** Not inappropriate. There are cases in which we have decided to change some of the charges slightly because it has become apparent that other types of charges are more appropriate or we have added some charges because of material that has come to light since, but there has been nothing that we have charged and then changed to something completely and totally different.

**Mr Bajwa:** Can I come back on some of those points?

**Q129 Chairman:** Sure.

**Mr Bajwa:** Just dealing with the latter point, which is that in some cases a charge would not have been possible within 14 days and that in three investigations there have been eight individuals who have been charged between 14 and 28 days, this is the point made in reliance upon the need for more than 14 days detention, we do not know what the outcome of those cases will be. If a substantial number of those eight persons are found not guilty then it will blow a very large hole in the case for more than 14 days and an even bigger hole in the case for more than 28 days. The whole debate about extending the 28 days is wholly premature. I think the Government would be wise to allow some of these investigations to complete the prosecution and then to assess whether it was necessary to go beyond 14 or 28 days. The second assumption built into reliance on the fact that there were charges brought after 14 days is that those persons could not have been released and then subsequently the investigations continue and then be picked up and charged. I cannot see why that could not happen.

**Q130 Chairman:** What is important here is not so much the quantitative evidence but the qualitative evidence. We have to look in detail at the relatively small number of cases where this has happened and dig down into what happened both in terms of the ones who were released and ultimately, after trial, those who were charged to find out what was happening in those cases at the police station and in the Prosecution Service. Whether that can become public or not, I do not know. Would you agree with that?

**Mr Bajwa:** Yes, but we cannot say, of course, because these matters are *sub judice*. I cannot help the Committee with the state of the evidence at an early stage in the case of some of those eight persons who were charged after 14 days.

**Q131 Chairman:** Our previous recommendation was that we needed to dig down into the detail of what was going on to decide. I do not know what you would say to that, Sue.

**Ms Hemming:** We do not know what the results of the trials are going to be. All I can say is that at the time we charged them we felt there was sufficient to charge and sufficient to go to trial. As Mr Bajwa says, we cannot go into any detail because of *sub judice*.

**Q132 Chairman:** Our argument was, to put it simply, that until we can get into the detail of those cases, the qualitative assessment of them, we do not really have the evidence to go beyond 28 days. That is point number one. Point number two is that everything that we have heard on extending beyond 28 days has been on the basis of speculation. The police are saying they do not need it now but they might do in the future. How would you comment on that, Sue?

**Ms Hemming:** Clearly we can all envisage a situation where a case might become more complex. I have to stay with the position that the Director has already stated, which I agree with entirely, which is that we have no evidence to support beyond 28 days.

**Chairman:** That is what we have said.

**Q133 Earl of Onslow:** I want this in big bold neon letters! Am I right—and will you repeat after me—that the Crown Prosecution Service sees no need to extend the 28-day period at all?

**Ms Hemming:** We certainly have no evidence to support that position, no.

**Q134 Earl of Onslow:** It is the other way round, is it not?

**Ms Hemming:** Sorry. We have no evidence to support that we need beyond 28 days. We certainly have not needed it in any case up until now.

**Q135 Earl of Onslow:** That is a terribly, terribly important point.

**Mr Bajwa:** The second point I wanted to touch on was the issue of complexity. The suggestion is that there is a growing complexity in terrorism investigations. Terrorism investigations, for as long we have had computers and mobile phones, have boiled down to the same complex features, numbers, computers, mobile phones and items that need to be sent off for scientific examination. That was the case in 2004 when the Operation Vivace arrests were made concerning Dhiren Barot. That was the case in 2005 when the July 21 case was subject to investigation and a number of other investigations during the same period of time. The limit then was 14 days. The Government is saying that cases have become more complex. I do not know if they are suggesting there will be more numbers, more computers, more mobile phones or more scientific examination that needs to be done or possibly that some new technology that none of us know about which terrorists will be able to deploy is going to make investigations more complex. If they can cope with 14 days in 2004 and 2005, with no incorrect

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decisions made and nobody released without charge that should have been charged, then I fail to see why there is a case for 14 to 28 and beyond 28.

**Q136 Chairman:** Can I put that question back to you in a slightly different way? What makes terrorism cases so different, for example, to a major drugs conspiracy where we may end up with very similar evidence or a major City fraud, for example? What is the difference in terms of the investigation?

**Mr Bajwa:** I know the argument that has been mounted, which is that the police need to intervene at an earlier stage in order to guard against the risk to the public, but that is assuming that every single terrorism investigation is about bombs in public places. There are a vast number of terrorism offences with which a person can be charged, a fraction of which deal with bombs in public places. To say that there is a need for longer because cases are always more complex and because they always involve a greater risk to the public is to merge all terrorism offences under the same umbrella and it is not right.

**Q137 Chairman:** Can I put to you one point that was raised with us by the police when we visited Paddington Green and that was the lack of availability for bail for terrorist offences. What they said is that they often find people on the periphery who they have to detain because they are not allowed to bail them, but they could bail them on conditions, for example, similar to some of the more draconian Control Orders. Would that get over some of the arguments about holding people pending interview or whatever on the sort of cases you are talking about perhaps?

**Mr Bajwa:** At the moment, for reasons that I do not understand, bail is positively excluded as an option in terrorism investigations. I have not heard a sensible explanation as to why that is so. I think that bail should be extended to terrorism investigations. Police bail in non-terrorism cases is essentially to come back to the police station on a certain day. They cannot attach conditions to the bail in the same way as we see obligations in Control Orders. I would like to think some more as to whether there should be bail with conditions, but I certainly think there should be bail. With conditions, it would help at least to answer some of the arguments mounted to make a case for more than 28 days because then the persons that it is claimed are too dangerous to be released after 14 or 28 days whilst the investigation continued can be at least monitored and controlled to a certain extent if bail is granted.

**Q138 Chairman:** Sue, do you want to comment on that?

**Ms Hemming:** Mr Bajwa is of course right, there are many different types of terrorist investigations and many different types of terrorist offences, which is why we have only ever made applications in three different operations to go beyond 14 days, because clearly there is an obligation on the police and on the Crown Prosecution Service only to make these sort of applications when they are absolutely necessary and that is what we have done. Some of the offences

can be investigated well up until arrest. When some people are arrested a great deal of the evidence has already been collected and so you are able to charge relatively quickly. There is a big difference between something like the July 21 bombings as well because up until the point of arrest the police had already collected a great deal of the information that they needed and the evidence that they needed. I was also the prosecutor who made the decision in Operation Rhyme, the Dhiren Barot case and we were coming very, very close to the end of the 14 days when I had to make those decisions whether to charge or not. That is an example of a case where we really were very, very concerned that 14 days was not going to be enough. Fortunately it was. Yes, they are different and I think every case has to be treated differently. It would not be right in every case to be making applications up to 14 days never mind over 14 days.

**Q139 Chairman:** What about bail?

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

**Q140 Chairman:** So that would be an alternative to pre-charge detention?

**Ms Hemming:** I think it would be for some individuals.

**Q141 Chairman:** In the sort of cases that you have dealt with, how many of those held between seven and 14 and between 14 and 28 would that have been suitable for?

**Ms Hemming:** That is difficult to say.

**Q142 Chairman:** Give us a ballpark figure.

**Ms Hemming:** I would be surprised if the police would have been happy to bail any of the people past the 14 days because we were dealing with three major operations. We have to think about that in detail in every case. I would be surprised if in large operations where we are dealing with bombs or plots to cause explosions that would be appropriate. Certainly there might have been some cases, where we are dealing with some of the Section 57 or 58-type offences or terrorist financing, for example.

**Q143 Earl of Onslow:** Of those who were charged between 14 and 28 days, how many of those were at the weaker end of the charge sheet rather than the top end of the charge sheet? In other words, were they those who had been left behind in the general rush to get the first people really seriously charged? Did it end in a tail off? Do you follow what I am getting at?

**Ms Hemming:** Obviously because of the nature of the investigation and just the fact that you are making that application, at the stage of the

fourteenth day then obviously they are going to be the people against whom the evidence is the weakest at that stage.

**Q144 Earl of Onslow:** It is not the evidence; it is the actual nature of the charge. Were the people who were held longest charged with slightly lesser offences?

**Ms Hemming:** No.

**Q145 Earl of Onslow:** There was no difference in the level of charge between those who were charged first and those charged subsequently?

**Ms Hemming:** Certainly not the majority of them. The majority of them were charged with the main offence in each of the three operations.

**Mr Bajwa:** With Operation Overt, the two persons who were charged at the very end of the 28 day limit were not charged with the main offence. The main offence was conspiracy to murder. The two persons charged at the very end were charged with an offence contrary to Section 5 of the Terrorism Act 2006, which is conduct preparatory to the commission of terrorism, which is a lesser offence than conspiracy to murder.

**Q146 Earl of Onslow:** That is a catchall offence, is it not? It is the good old military discipline one.

**Ms Hemming:** It still carries life imprisonment. It still requires an intent to carry out a terrorist act or to assist others to do so. It is a very serious charge. The difference between them and the people that we charged early on is the test that we use to charge. We used the threshold test to charge the last two, whereas the first individuals who were charged with conspiracy to murder were charged on the full Code for Crown Prosecutors' test. I do not have the indictment that we have now. We were in a different position with the type of test that we used.

**Q147 Chairman:** The two who were charged with acts preparatory were charged with the threshold test?

**Ms Hemming:** They were, yes.

**Q148 Chairman:** And the ones who were charged with conspiracy to murder were charged with the traditional standard full code test?

**Ms Hemming:** Yes.

**Q149 Baroness Stern:** That brings us very neatly to some questions about the threshold test for charging. What is threshold charging? Could you give us a nice clear explanation?

**Ms Hemming:** I will, yes. I have actually got the Code for Crown Prosecutors in front of me so I will tell you what the threshold test is. The threshold test requires a Crown Prosecutor to decide whether there is at least a reasonable suspicion that a suspect has committed an offence and if there is, whether it is in the public interest to charge that suspect. In that particular test it has to be not appropriate to release a suspect on bail after charge, but obviously we are in a slightly different position with terrorism cases because we have no bail. In order for us to decide on

the reasonable suspicion we have to look at the following factors, which are the evidence available to us at the time we make the decision, the likelihood and nature of further evidence being obtained, the reasonableness for believing that that evidence will become available, the time it will take to gather that evidence and the steps being taken to do so, the impact the expected evidence will have on the case and the charges that the evidence will support.

**Q150 Chairman:** Can we just contrast that with the standard test?

**Ms Hemming:** There has to be a realistic prospect of a conviction.

**Q151 Baroness Stern:** Thank you. That is very helpful indeed. Could you tell us how often the threshold charge is used, and in what proportion of cases is it used where a suspect has been held for more than 14 days?

**Ms Hemming:** We do not hold data on that, but I did look at a number of cases that we have charged recently and we think it has probably been used in just under 50 per cent of the last 18 or 20 charges that we used the threshold test.

**Q152 Chairman:** Is that terrorism cases?

**Ms Hemming:** Yes. I am afraid I do not know for ordinary cases because we deal with mainly terrorism cases.

**Q153 Baroness Stern:** What proportion were being held for more than 14 days?

**Ms Hemming:** I do not have that data, I am afraid. I could find out for you.

**Q154 Baroness Stern:** You do not have an idea that you wish to venture at this stage?

**Ms Hemming:** I would probably say it is not a lot different, although it might be slightly more.

**Q155 Baroness Stern:** Slightly more than the 50?

**Ms Hemming:** I would say possibly slightly more, but I am just making an estimate.

**Q156 Baroness Stern:** Where the threshold test is used, is there a time limit by which the full test, as in the Code, must be passed?

**Ms Hemming:** There is not a set time limit, but obviously once somebody is charged in a terrorism case you have a hearing in front of a High Court judge within 14 days and the High Court judge will set a timetable for that case and for when pieces of evidence need to be served. Every time evidence is sent in to us by the police it will be reviewed before it is served on the defence. It will vary in each of the cases because we might have some of the evidence in very early where we have charged on the threshold test and we are expecting it on one individual or it might come in quite a bit later on another case. Certainly there is continuous review from the time of charge. As evidence is coming in our prosecutors are reviewing it and will apply the full code test at the



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earliest opportunity, but certainly by the stage that the case is served completely on the defence a full code test will have taken place.

**Q157 Baroness Stern:** Is there any independent supervision of the time it takes for the full code test to be satisfied?

**Ms Hemming:** The High Court judge is setting a timetable that he believes is reasonable in the particular case for service of the prosecution case. The full code test has to have taken place before service of the prosecution case.

**Q158 Baroness Stern:** Mr Bajwa, from the defence perspective, does the use of the threshold test cause any tangible prejudice to your clients?

**Mr Bajwa:** Yes. I have a few concerns. I have no difficulty in principle with the use of the threshold test. As has been said by this Committee before, it may assist in lessening the need for extended detention pre-charge in some cases. I give an example in my written evidence of a suspect who was described in custody by the letter “P” and he spent the best part of 12 hours after it was decided he should no longer be held in custody before the police eventually released him on charge, as I understand it, very close to the deadline. I do not know what was going on in those 12 hours or so. Was consideration being given to the threshold test? If that was the case, I have concerns about it taking that long to decide that this person should be released without charge. I have a strong belief that if that was the case, the threshold test should have been considered before. The second concern we have got on behalf of the defence is that we are not informed when the threshold test is the basis for charge. I do not know if Ms Hemming has got any thoughts as to whether there is any reason that the defence and the court should not be informed, but that has been the basis of the charge. I suggest that there should be some independent scrutiny by the courts as to the gathering of the evidence and the full test being applied. In major terrorism cases the judge can give, and has given, the prosecution six months to serve its case upon the defence. Ms Hemming has said that that is the date by which the prosecution will ask themselves whether the full test is met, but a person has been languishing in custody not just for some days, up to 28 days pre-charge and now up to six months post-charge in the serious terrorism cases. If the court and the defence were informed that the threshold test had been applied, I believe the court should then require the prosecution at a much earlier stage than six months to keep the court up-to-date with the status of its evidence gathering, when it would be able to make a decision and I hope it would be able to be made before six months. Without that independent scrutiny we rely, and I hope that we rely in good faith, on the prosecution to apply it expeditiously, but I would prefer if the rules ensured that it was applied expeditiously rather than relying upon trust.

**Q159 Chairman:** Do you want to comment on that? Perhaps you could also tell us how many threshold charge cases are dropped.

**Ms Hemming:** None.

**Q160 Chairman:** None?

**Ms Hemming:** None have been dropped, certainly, for several years, because the threshold test is fairly new, and I have certainly not discontinued any case where we have used the threshold test; we have always applied the full test and the cases have then gone to hearing.

**Q161 Chairman:** How many of those that have been tried have resulted in acquittals? This is probably getting a bit complicated.

**Ms Hemming:** We are, I am afraid. As I say, the threshold test is fairly new so there will be a number of cases where we have applied the full test and now we are waiting for trial. So those sorts of statistics are, again, quite early—a bit like the convictions on the 14-28 days. Certainly, we are applying the full code test as soon as we reasonably can. I am giving the date for service of the case as the outside date because, obviously, if we had a defendant who was charged on the threshold test and the only thing that we were expecting against him was one particular scientific test then we would hope that that scientific test would be done as early as possible, so we could apply the code test as early as possible. The defence do, of course, have the ability to ask for dismissal of a case once the case has been served, but there is no right to actually challenge before the dismissal stage. I am not quite sure what practical effect, saying that we applied on the threshold test rather than the full test, would actually have on the process.

**Q162 Chairman:** I suppose it might make the defence a little more active in trying to challenge the decision to pursue the prosecution in the first place. It might make the judge a little more suspicious or questioning about whether the evidence was, in fact, there to justify proceeding—me being speculative about it.

**Ms Hemming:** We provide a summary to the High Court judge for the 14<sup>th</sup> day. He sees a summary of the evidence—

**Q163 Chairman:** Post-charge is the question. Once you have charged on the threshold test, Mr Bajwa’s point, I think, is a fair one: why should the defence not know that the charge has been on the threshold basis rather than the full basis?

**Ms Hemming:** They know what the evidence is that we made the basis of the charge, because it will be on the summary that we serve on the High Court judge and, also, on the defence for the 14<sup>th</sup> day hearing.

**Q164 Chairman:** They will not know that you are not satisfied yourself that it is enough.

**Ms Hemming:** The full test.

**Q165 Chairman:** Yes. If he were to know that, that might give him a bit of an oomph to have another go at the earlier hearings on whether the case should

proceed and apply for a dismissal at the early stage. Equally, the presiding judge might think: "Well, if, in fact, this case is not as strong as it should be maybe I should look at this a bit more closely" than he would if he thought it was simply the normal test—me having a suspicious mind.

**Ms Hemming:** I would say that the defence are well aware of the evidence upon which we have charged, and if they want to challenge the timetable and they want to challenge when cases should be served then they already have that ability to do so. Obviously, I hear what Mr Bajwa says.

**Mr Bajwa:** My point is simply, if I may just amplify it, that the judge may not give the prosecution in those serious cases six months to serve their evidence on the basis that the Crown are saying: "We reasonably anticipate that within a matter of weeks or a month or, maybe, two months we will come into possession of the evidence that will satisfy the full test." The judge will say: "Fine, let's set a timetable for a few weeks or a month or two months" instead of six months.

**Chairman:** The judge will be a little more challenging.

**Q166 Earl of Onslow:** What is the statutory authority for introducing the threshold test?

**Ms Hemming:** The threshold test was introduced under the Director's guidance for charging, and it is now in the Code for Crown Prosecutors, which obviously comes from the Prosecution of Offences Act. I am not aware that there is a specific statutory authority, but let me just check. (After a short pause) The guidance came in in accordance with section 38 of the Police and Criminal Evidence Act, and the Code for Crown Prosecutors came from the Prosecution of Offences Act, and there is a right to change the Code for Crown Prosecutors. So that was what was changed in order to come across a threshold test. There was no particular statute that brought in the threshold test as sort of additional to what already existed.<sup>1</sup>

**Q167 Chairman:** One last point on the threshold test, which has just struck me: has the threshold test been used at a much earlier stage, or is it only used right against the wire?

**Ms Hemming:** It has been used at a quite early stage as well. It is not something that is left right until the very end. If the threshold test could be used in the early stages then we would use it in order to charge someone rather than applying to hold them.

**Q168 Chairman:** You would not hang about waiting for the evidence that would justify the full test?

**Ms Hemming:** No, if there was a legitimate reason to use the threshold test then we would.

**Q169 Chairman:** So, you have a suspect and you have held him for two days, if you are satisfied on the threshold test you charge him then?

**Ms Hemming:** Yes, if we thought it was appropriate, yes.

**Q170 Mr Sharma:** What are adversarial hearings? Can you define that to me?

**Ms Hemming:** I think it is a hearing which allows both sides that appear in front of the judge to put forward their argument properly and for the judge to make a reasoned decision.

**Q171 Mr Sharma:** How often, in practice, is the power to exclude the suspect and their representative from the hearing exercised?

**Ms Hemming:** I made some inquiries about this because the police, obviously, make most of the hearings up until the 14<sup>th</sup> day, and then we make them since. In the 17 applications that we have made from 14 to 28 days, there was one. I spoke to two very experienced senior investigating officers from the police and they have been making these applications since February 2001. I am told that each of them have made two applications for the judge to hear evidence with the suspect excluded. So I do not have statistics, but obviously those two pieces of information I have found out.

**Q172 Mr Sharma:** Mr Bajwa?

**Mr Bajwa:** I cannot recall a case—and I was involved in the three investigations, Rhyme, Vivace and Overt—in which there was not a closed hearing of some kind. Now, that does not tally with what I am hearing from Ms Hemming, but there has been a closed hearing of some kind. Plainly, I do not know what was discussed and how much evidence, if any, was called at the closed hearing, but we are told routinely, before we enter the room: "We have been to see the judge in private and we have had a private hearing". What was discussed we do not know.

**Q173 Earl of Onslow:** This evidence, from which you are excluded, does it then get produced in court?

**Mr Bajwa:** No, absolutely not.

**Q174 Mr Sharma:** How often is information provided to the judge which is not disclosed to the defendant or their lawyer?

**Ms Hemming:** As I have said, all I can say is that in only one of the 17 made by a Crown prosecutor did the Crown prosecutor ask for a hearing of that type. When I spoke to the senior investigating officers I asked them the type of material that formed those sorts of hearings, and having seen section 34 of Schedule 8 this is the type of material that allows those hearings to be made; where the police are carrying out investigations and they do not want to alert the suspect to that material because they want to be able to question him about it in due course. So it tends to be that sort of material. I do not have the data to tell you how many have been made in every case, but I can only deal with the qualitative information that I have been given by the senior investigating officers. In my view, the material that they told me they had made applications about has been section 34 material.

<sup>1</sup> *Note by Witness:* Reference to Section 38 of PACE should be Section 37A of PACE. The Code for Crown Prosecutors is issued in accordance with Section 10 of the Prosecution of Offences Act 1985.

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**Mr Bajwa:** Ms Hemming describes the paragraph 34 material as material that the police want to conceal from the suspect, which is material they want to question him about. However, the opinion of the House of Lords in *Ward v Police Service of Northern Ireland* is that that is not a permissible basis for exercising the paragraph 34 powers to present material to a judge in private. For the judge to hear that sort of material, the judge would have had to have asked the police or the prosecution, under paragraph 33, to hear material of that kind and, particularly, so that the judge can exercise that power for the benefit of the suspect. That is the basis of the opinion of the House of Lords in *Ward*. So if, as Ms Hemming says, the police have been exercising their paragraph 34 powers to explore with the judge issues that they want to question the suspect about, that is impermissible.

**Q175 Chairman:** There is no way we can know the answer.

**Mr Bajwa:** There is no way we can know.

**Ms Hemming:** I am sorry; I might have been looking at 34 instead of 33. Certainly, the material that I have been told about on the telephone sits firmly within the *Ward* judgment.

**Q176 Chairman:** I should say that you will have a chance to read the transcript. There is a lot of very technical stuff today, if you want to add to or supplement what you said.

**Ms Hemming:** Yes. I feel a bit uncomfortable talking about the technicalities of 33 and 34, but I certainly listened to what I was told by the officers, looked at the *Ward* case and was satisfied that what they told me complied with the *Ward* case. However, I obviously cannot give you any information about that material because of the type of material it is, but it is the sort of information that, generally, forms part and parcel of the investigation in the case as it develops.

**Q177 Mr Sharma:** Ms Hemming, you have answered partly the next question, but there be something else you want to add. What sort of information might be provided to the judge but withheld from the suspect and their lawyer?

**Ms Hemming:** I am not sure that I have sufficient experience of actually dealing with those sorts of hearings to be able to answer that question specifically for you. I am sorry; I am not trying to be unhelpful but I do not feel it is right to rely on a very small piece of information to give you a full answer.

**Q178 Mr Shepherd:** I wanted, if I may, to ask a supplementary question. Section 34(1)(2) of the Act, seems a very low test, does it not, for such an important concealed hearing? If we go through the conditions, it is not a high test at all.

**Ms Hemming:** One thing that has struck me about this is that we are, obviously, dealing with an investigation—we are not dealing with a trial process. So, obviously, the police are entitled to carry out an investigation and to be given the right to investigate properly rather than giving full

disclosure of absolutely everything to the suspect whilst they are investigating and while they are questioning. I would say that there is an independent scrutiny of this because the judge decides whether he will allow such a hearing and whether that material should be, ultimately, withheld from the suspect. All I can say is that I am told that these hearings that are in private are very, very different from the sort of hearings that we hear about in other types of procedures that are non-criminal, and that they do form a relatively small part of the application. It is not a situation where the police go to the judge and tell him all of the intelligence and hearsay information that they have on an individual and then proceed to make a short application in public; it is a very, very different process. That is what I am informed.

**Q179 Mr Sharma:** Does the power to withhold information in Schedule 8 extend to information derived from the intelligence sources which forms the basis for the reasonable suspicion that the suspect has committed a terrorism offence? Is the power ever exercised to withhold such information?  
**Ms Hemming:** Again, I am afraid I do not have sufficient experience of those sorts of hearings to answer that question for you. From the information that I was given by the officers I spoke to, it was not that type of information, but I obviously cannot answer that about every hearing.

**Q180 Mr Sharma:** The CPS Note on scrutiny of pre-charge detention in terrorist cases states that the defence is allowed to cross-examine the senior investigating officer at these hearings, but that this is “not a legal entitlement”, rather it is done “to assist the court and speed up the process”. Why do you say that there is no legal entitlement to cross-examine the person who is putting forward the case for further detention?

**Ms Hemming:** I believe that that would be because the senior investigating officer is entitled to make the application himself. In practice, in fact, the prosecutor makes it, as I say, in front of the High Court judge between 14 and 28 days. The senior investigating officer is actually taken to the hearing to assist in order to make sure that all of the information is available for the judge to make a proper decision. I do not think there is anything that specifically says that the investigating officer can be cross-examined. I do not think there is anything that is actually in statute to say that, but, obviously, we, as the Crown prosecutors, would want to make sure that the judge had everything he needed in order to assist in the hearing so that he can make a proper decision about whether he should allow a warrant of further detention or not. So we would do it because we think it is helpful.

**Q181 Mr Sharma:** Thank you. Mr Bajwa, in practice, have you always felt that you have access to all the material you require in order to challenge the lawfulness of your client’s detention at these hearings?

**Mr Bajwa:** We do not have access to very much material at all, in truth. I do not know if reference earlier was being made to the paragraph 32 test or the paragraph 34 test. If we are talking about the paragraph 32 test, which is the test for extending detention, that is such a low test and the material that we have is so little and so vague that we really do not have a chance in successfully objecting to detention being extended. In fact, I do not think that a single case can be cited where an application for a warrant of further detention or an extension to that warrant has been refused. I think it has been for shorter; I think what has been granted has been for an extension but shorter than that requested, but I do not think there is a single case in which it has been refused—I certainly have not known one. I know that as recently as late last year/early this year Andy Hayman gave evidence to the Home Affairs Select Committee in which he said that he did not know of a single application that was refused. If there are a few they are very rare indeed. The threshold is so low that, I dare say, if any of us in this room were arrested and we own a computer and a mobile ‘phone, we could be detained—any one of us—for 28 days on the tests as currently framed. “Pending further analysis or examination” can be satisfied for any one of us because it will take more than 28 days to examine a mobile ‘phone and a computer. The second part of it—that the police are acting diligently and expeditiously—a judge would hard-pressed to say that the police are not acting diligently and expeditiously. So it can be satisfied for any one of us. That is the greatest concern that I have about the tests as currently framed. It makes it next to impossible for us to successfully resist the application, and I think it makes it next to impossible for a judge to refuse the application.

**Q182 Chairman:** That is quite an interesting point, that any of us who has a mobile ‘phone and a computer—which, I suspect, is most of the people in this room—could be held for 28 days on suspicion.

**Ms Hemming:** Can I say, I am aware of an operation where some warrants were refused. They were police applications, not CPS applications. It is right to say that none of the CPS applications have been refused. There were a couple that we were given for a shorter period of time. We do scrutinise all of the applications before we even decide to make them; we would not make an application for a warrant of further detention unless we thought it was proper to do so and that the tests would be satisfied and that they would be satisfied properly. I think that the fact that very few of these are refused is, actually, because they are being made appropriately rather than because there are so many of them being made that are inappropriate and the judge is not refusing them.

**Chairman:** That begs the test that is applied by the judge, does it not?

**Q183 Earl of Onslow:** At a judicial hearing of an application for a warrant of further detention, is the CPS required to demonstrate that there is sufficient evidence to justify the decision to arrest and detain the suspect? This question arises out of an article in

the *New Law Journal* where Mr Bajwa says that the reason why warrants of further detention are granted by courts against individuals who are subsequently released without charge is that under the current statutory framework the court’s two-stage test is framed in too limited a way. I now quote: “There is at no stage in the whole process a requirement for the police to demonstrate to the suspect’s representative or the court that there is sufficient evidence to justify the decision to arrest and detain. All that the court is required to be satisfied of is that the police are awaiting the result of an examination or analysis . . .” This is what you are basically saying about the telephone evidence.

**Ms Hemming:** There is nothing specifically in the legislation, as far as I can see, that requires the judge to actually look at that evidence, but the reality of the situation is that when you are putting forward the case to actually extend, the applications change in nature, depending on the stage of the investigation. They change very much in nature. I am told by the police that in the very early stages, obviously, the hearings are much shorter because there is much less information given at that application. However, as you go on and, certainly, the ones that the CPS have been involved in, there is very much a discussion of the evidence that already exists as well as the evidence that we are waiting for, or the analysis or the parts of the investigation that we are waiting for. So at the stage, certainly, when the CPS is involved there are some quite detailed discussion of what already exists and what sort of evidence the person is being held on, but there is no actual requirement for the court to ask the police to justify on what basis they arrested, but I would say that a lot of that information comes out as the applications are being made during the investigation.

**Q184 Earl of Onslow:** Should there not actually be judicial oversight over why people have been arrested? Should people not say: “Look, you just have a vague suspicion; you cannot just lock him up on a vague suspicion that ‘We want to check his telephone numbers’”? That is, I suppose, oversimplifying it a bit—I concede that—but it seems to me there should be proper court rules on how and why you can lock people up or arrest them.

**Ms Hemming:** This is, obviously, not a matter for the CPS and we will apply whatever laws Parliament gives us. Of course, the police do have to apply for warrants in a number of cases, either to arrest or to search. There are certain powers and laws that already exist, and there will be judicial control over whether those warrants are granted. I do not think it is a matter, as a member of the CPS, that I can really comment on.<sup>2</sup>

<sup>2</sup> *Note by Witness:* Warrants are not required for an arrest under Section 41 of the Terrorism Act 2000, but search warrants are required in most terrorist related cases where the arrest is under TACT. These powers and requirements can be found in the Terrorism Act 2000 (as amended by the Terrorism Act 2006).

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**Q185 Earl of Onslow:** If the prosecution is already effectively required to demonstrate this, would you have any objection to the statutory framework being amended to add this to the two questions which the court must already ask itself under Schedule 8 of the Terrorism Act 2000?

**Ms Hemming:** Again, as a Crown prosecutor, we would obviously apply whatever law we were given.

**Q186 Earl of Onslow:** If there is any meaningful judicial scrutiny as to whether there exists reasonable suspicion that the suspect has committed a terrorist offence, how do you explain the fact that three people were held for almost 28 days, with judicial approval, before they were released without charge, and were not subsequently made the subject of control orders?

**Ms Hemming:** All I can say is that there was not sufficient for us to charge those three individuals. In a number of criminal investigations the same thing will be true; people will be arrested and will not be charged. So I am not sure I can really add anything.

**Earl of Onslow:** Were those three charged under the threshold rules or not?

**Chairman:** They were not charged at all.

**Q187 Earl of Onslow:** Arrested. I beg your pardon.

**Ms Hemming:** They were released without being charged.

**Q188 Chairman:** The inference is, on that answer, they would only be held for a couple of days?

**Ms Hemming:** Yes.

**Q189 Earl of Onslow:** Mr Bajwa, in your experience, how precisely are terrorism suspects told of the grounds for suspicion and the evidence against them when they are arrested under section 41 of the Terrorism Act?

**Mr Bajwa:** They are not.

**Q190 Earl of Onslow:** They are not?

**Mr Bajwa:** At the time of arrest they are told that they are suspected of being a terrorist or suspected of being involved in the commission, preparation or instigation of a terrorist offence. By the way, instigation is not even a criminal offence—instigation of a terrorist act is not even a crime, yet a person can be arrested under that limb of the test.

**Q191 Earl of Onslow:** I am sorry, can you say that again? Instigation is not—?

**Mr Bajwa:** Commission, preparation or instigation of a terrorist offence. Instigation of a terrorist offence is not a crime; it is not an offence, under either the 2000 or 2006 Terrorism Acts.

**Q192 Earl of Onslow:** However, people have been arrested under the instigation alone?

**Mr Bajwa:** Yes. The power has been there since 2000. Preparation, commission or instigation of a terrorism offence. In fact, until the 2006 Act came into force, preparation of a terrorism act was not an offence either, yet people were habitually arrested under that. It tells the person arrested nothing except

that: “I believe you are a terrorist”. Then they are taken to the police station and told nothing more for very many days as to the basis of why they are there. So during a warrant application, the application for more time, it is only at a very late stage that a suspect is given any idea as to the state of the evidence against that person. I have got before me the grounds for three applications for a warrant of further detention in the case of the same suspect: the first one between 7 and 14 days; the second application was for between 14 and 21 days and the third one 21 and 28 days. I hear Ms Hemming say that there is a change in the nature of the applications; the three applications I have got in front of me are identically worded—there is not a word that is different between the three applications for more time, between the period 7 to 14, 14 to 21 and 21 to 28 days. So it is a low test and the police, therefore, can, to some extent, take advantage of the fact that it is a low test, and that is to disclose next to nothing, and in the application suggest: “We have got lots of irons in the fire, plenty of things that are going on by way of the investigation; we are doing it” (they say to the judge) “trust us, expeditiously and diligently and if anything comes back that affects the suspect we would like to question that suspect about it, and we hope that the suspect will answer those questions”. That is all that needs to be satisfied. Ms Hemming says the reality of the situation is that the Crown does not ask for more time unless it is satisfied that there is some evidence, or that the Court tends to look into the sufficiency of the evidence. Again, these are matters taken on trust. I would much prefer that the law frames a test that requires these things to be built into extended periods of detention than to say: “We can trust the CPS and the courts to look into these matters in any event”.

**Q193 Earl of Onslow:** Ms Hemming, would you like to comment because that is a fairly whacking great charge against you?

**Ms Hemming:** It is because there is a difference between the written statutory notice and what actually happens at the hearing. The nature of the applications is different in that a lot more information is given to the judge in the hearing of the suspect and his solicitor at the oral hearing. The written notices that are required are exactly the same but the nature of the hearings is very different. I am told by the prosecutors who have conducted the hearings from 14 to 28 days that they have collected and given information in those hearings about the number of hours that the police have been working and the number of police officers that are working on cases, and we have ready the same sort of information if we are asked about prosecutors; information is given about the evidence we already have, about the type of evidence and the type of investigation that is ongoing. So whilst it is right that the statutory notices themselves do not say very much, the actual hearings have a lot more information given in them than is actually on the written notice.

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**Q194 Earl of Onslow:** But an awful lot of these hearings are without the defence counsel being present.

**Ms Hemming:** That is not what I am being told. I think they are more frequent in the very early stages but certainly, as I have said, in the 17 that were made by prosecutors there was only one where a small part of the hearing was done without the suspect being present. The rest of the hearings were done with the suspect and the solicitor present.

**Mr Bajwa:** Can I just come back on a point that has been made? The written notices are, we are told, identical and that more details are given in the course of the oral application. Can I direct your attention to *Ward* again, and the opinion of the House of Lords, which says, at paragraph 21: “As paragraph 33 provides that that person shall be given an opportunity to make oral or written representation about the application to the judicial authority and to be legally represented at the hearing, those details would have had to be set out in the notice that was given to Mr Ward.” The House of Lords is very clear in the opinion that for proceedings to be fair the full particulars of the grounds for the application should be set out in the written notice. It is no good those representatives of the suspect being taken by surprise at the oral hearing, where suddenly, for the first time, they are hearing information that now forms the basis for the grounds of the application, when we have not been given prior notice of it in writing and those are identical notices that we are given and equally vague. If amplification is given at the oral hearing, that is not in accordance with the opinion of the House of Lords in *Ward*, and it is unfair to those who represent the suspects.

**Q195 Lord Morris of Handsworth:** I have a couple of questions: one on compatibility—that is to you, Ms Hemming—and one on legal aid to Mr Bajwa. The first one is: has the European Court of Human Rights expressed any view about the compatibility with the Convention of the extension of pre-charge detention to 28 days?

**Ms Hemming:** I am not aware that they have but it is not something that I have actually done any research into.

**Q196 Chairman:** So when the DPP tells the Home Affairs Committee: “Strasbourg has had no difficulty at all with our 28 days, and nor should it”—

**Ms Hemming:** There have certainly been some hearings on pre-charge detention, but I do not know of any specific cases. I could obviously find that out for you.

**Q197 Chairman:** If you could, bearing in mind what the DPP told the Home Affairs Committee, because that might be just his opinion rather than actually a ruling from Strasbourg.

**Ms Hemming:** I will see if there is any specific case.<sup>3</sup>

**Q198 Lord Morris of Handsworth:** Mr Bajwa, when is legal aid available at applications to extend pre-charge detention? Or is it available?

**Mr Bajwa:** Pre-charge, legal aid is only available for a solicitor to attend the police station to represent the suspect. Yet these hearings for extended detention are adversarial hearings in which the suspect’s Article 5 rights are being decided. Being an adversarial hearing in which there is questioning to be conducted of the officer, submissions of law and, sometimes, of fact to be made to the judge, barristers (that is counsel) are much more experienced in that area as opposed to solicitors, and yet legal aid is not extended to counsel to attend those hearings of an application for further detention. One other important factor to bear in mind is that between 14 and 28 days the decisions of the High Court judge are not liable to legal challenge; they cannot be judicially reviewed. So I am of the view, and I have always attended those hearings on a *pro bono* basis as I am sure other counsel have—that there are very many suspects at those hearings who are not represented by counsel and are represented by solicitors who, with all respect to them, may not be as skilled in the art of questioning police officers and making submissions on human rights issues to the judge as they could be. They would like I am sure, to be able in some cases, to instruct counsel, and the suspect may also wish to instruct counsel, but legal aid is not available and, therefore, many of them are not given the services of counsel at these important hearings, and I think legal aid should be extended to those hearings.

**Q199 Lord Morris of Handsworth:** We are coming on to the *pro bono* principle, but are there any circumstances where suspects are not represented at all?

**Mr Bajwa:** No. I do not know of any circumstances in which they had no representation but they are represented by solicitors, and I think at very, very important hearings it is crucial that the suspect be given the entitlement to counsel that is commensurate with the importance of the hearing.

**Q200 Chairman:** Can I sum-up this batch of questions by going back to the question that Virenda posed at the beginning about what is an adversarial hearing? This is in the context of Article 5(4) and the context of *Garcia Alva v Germany*, which sets out the detail behind Article 5(4). Can I ask Mr Bajwa, do you think this is an adversarial hearing in accordance with the law?

<sup>3</sup> *Note by Witness:* There is no specific case on 28 day pre charge detention; the view expressed by the Director at the HAC was an opinion consistent with the cases that do exist on detention. He does not expect cases to be referred to Strasbourg and would expect the Crown to win them if they were.

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**Mr Bajwa:** I think that the hearings that take place where we are present (those who represent the suspect) are adversarial hearings that are in accordance with the law.

**Q201 Chairman:** It contravenes the human rights principles in Article 5(4) of the European Convention.

**Mr Bajwa:** Yes, I think that is right. I think there is authority to say that is right. However, the hearings that happen in closed session, I think, will also, of course, extend to the Article 5(4) rights, and I think that in order to make those fair there has to be, at the very minimum, a special advocate present to ensure that, where paragraph 34 is relied on, truly the material does fall within the public interest immunity categories, and that where section 33 is the paragraph under which the suspect and his representatives are excluded then the judge is acting in the interests of the suspect as opposed to giving the police an opportunity to make their case for extended detention.

**Q202 Chairman:** A couple of points. *Garcia* says that the suspect has to have the opportunity to challenge the reasonableness of the suspicion grounding the arrest, and if the Court are not entitled to ask the question in the first place, whether the arrest was right, has that actually created problems or do the Courts, effectively, do that anyway?

**Mr Bajwa:** I do not know if the Court would be able to do that. Certainly, when we get the reasoning of the court delivered, it amounts to very little more than to say that the police are carrying out more examination and analysis, and is quite satisfied they are acting diligently and expeditiously.

**Q203 Chairman:** Going back to your original hypothesis, supposing somebody came along and arrested Ms Hemming and took her mobile 'phone and computer away, and the police came along and said: "We want to examine this", even though the original arrest would be wholly improper because there would be no suspicion at all against Ms Hemming, she would be caught.

**Mr Bajwa:** I think *Garcia Alva* has particular application for periods between 14 and 28 days because in the early stages, in a way, terrorism investigations are given a great deal of latitude by the European Court. This is where I think the terrorism investigation may run into difficulties, and that is in the latter stages where it becomes disproportionate to withhold the basis of the suspicion from the suspect.

**Q204 Chairman:** The point about the evidence. What *Garcia* says is that information which is essential for the assessment of the lawfulness should be made available in an appropriate manner to the suspect's lawyer, not necessarily the suspect. That could be dealt with by a special advocate process.

**Mr Bajwa:** I think a special advocate process will help. That is all the special advocate process really can do, in most cases.

**Q205 Chairman:** Do you want to come in on that, Ms Hemming, before we move on?

**Ms Hemming:** All I can do is to reiterate that by the time we get to the 14 to 28 days a lot of detail is collected and given to satisfy these tests. That is why I say that the nature of the hearing changes. I think that is why you need to scrutinise very carefully where you make these applications and whether they are made at all, and that it is appropriate to do so to make sure that they are lawful, they are reasonable and they are made in accordance with the European Convention as well as in accordance with Schedule 8.

**Q206 Baroness Stern:** You will be aware that there has been some discussion about having Parliamentary safeguards. In your view, would a Parliamentary debate on the merits of extending the period of pre-charge detention beyond 28 days in a particular case risk prejudicing the eventual trial of the people so detained?

**Ms Hemming:** From my point of view I can really only repeat what the Director has already told the Home Affairs Committee.

**Q207 Baroness Stern:** Which is?

**Ms Hemming:** We have real concerns that if there is an open Parliamentary debate about particular individuals, what would be said in those open debates would become public before that individual went to trial, and there may be issues over fair trial.

**Q208 Earl of Onslow:** As you do not want an excess of 28 days it does not matter, does it?

**Ms Hemming:** I do not think it is a matter for us whether we have more than 28 days or not, but I do not actually feel that it is necessarily compatible with a fair trial, having an open debate.

**Q209 Baroness Stern:** Mr Bajwa?

**Mr Bajwa:** I share the view that has just been expressed about the risk of prejudice to the suspect. Moreover, I query its efficacy. The timing of it would be extraordinary, and we would have to have a special convening of Parliament to discuss a single suspect or a number of suspects' cases. I simply cannot see this is the practicable way to go about extending detention beyond 28 days.

**Q210 Earl of Onslow:** Now we come to the happy subject of post-charge questioning. I have in front of me a paper by Professor Clive Walker—we all have. I do not know whether you have got it. I only saw it, literally, as I came in and I have only had time to pick out, I think, the two paragraphs which seem to me apposite. First of all, how helpful would this be in practice, and in how many of the cases you have seen would the power to question post-charge, coupled with a power to draw adverse inferences, have been a useful tool?

**Ms Hemming:** From my experience of a number of cases, a lot of key pieces of evidence seem to be found after charge. Certainly, a lot of evidence becomes available after charge that would not have been available for questioning pre-charge. So we support a power to interview after charge. The police can

actually interview after charge now—there is nothing to prevent them from doing so—it is simply that they do not have particular powers to do so, there are no adverse inferences and it would have to be done with the consent of the defendant. He can consent to be spoken to after charge; there is nothing stopping that. We would support there being proper post-charge questioning with proper powers and, also, with safeguards, of course; as soon as you have legislation to cover questioning then you have proper the safeguards as well. We would certainly like to see that being with adverse inferences in the same way as it is pre-charge, but as long as there is a proper framework.

**Q211 Earl of Onslow:** So you could go on questioning right up to the gate of the court?

**Ms Hemming:** There has to be some sort of safeguard here. You cannot have a position where an individual can be constantly interviewed about the same thing for weeks and months; you have to have something to restrict what he can be questioned about and how he can be questioned. Certainly, I think, where there is something new that comes up after charge somebody can be interviewed about that because, of course, it gives him an opportunity to give his explanation as much as it gives the police the opportunity to actually interview somebody about it.

**Earl of Onslow:** If I read to you—have you been given this paper?

**Chairman:** This is a paper by Professor Clive Walker of the University of Leeds Law School. I do not know if you have had a chance to read it or not.

**Q212 Earl of Onslow:** He says: “The principled position is that, after charge, questioning should stop for two reasons. The first is that, after charge, the suspect becomes subject to the control of the court and further actions in pursuance of the case should be authorised by the court. It is the court which takes charge of the suspect and not the police, and the police should not intervene without permission. The second reason is to guard against oppressive treatment and questioning. Given that a person may spend a long time in custody after charge, there is a danger that prejudice to the case could be caused by forms of treatment which are later viewed as unfair by a jury. The police (and prosecution) represent one side of the adversarial process, and the court must umpire the way the accused is treated to ensure fairness.”

**Ms Hemming:** I do not necessarily disagree with either of those propositions—that he is in control of the court and that it would be wrong to continually question somebody after charge while he is in custody. Such a safeguard could, for example, involve the consent of the judge to be interviewed about certain aspects of the investigation.

**Q213 Earl of Onslow:** Once you charge somebody you should be reasonably sure that you are going to convict him. Or is that a novel idea?

**Ms Hemming:** Of course. We have made a decision that there is a realistic prospect of a conviction.

**Q214 Earl of Onslow:** Exactly.

**Ms Hemming:** It is now a matter for the Court, not for us, and not for anyone else; the judge and the jury are trying the case from there. I think we are simply saying that where something new comes up after charge we would support something to allow post-charge questioning for the police to be able to put that under proper safeguards to a defendant, and to give him an opportunity to give his explanation if he wishes to.

**Q215 Lord Morris of Handsworth:** Just a follow-up to your point, Ms Hemming, where you say that the CPS would support post-charge questioning, is there not a danger here that at that point the process could drift into, maybe, some sort of *de facto* plea-bargaining to the detriment of the person being questioned?

**Ms Hemming:** I do not think that would be right, as long as there are proper safeguards for this.

**Q216 Lord Morris of Handsworth:** I am not saying that it would be right; I am saying if you support post-charge questioning, is there not a danger of the process drifting into some sort of *de facto* plea-bargaining?

**Ms Hemming:** No, I do not think there would be. I think if you have a properly controlled post-charge questioning, I do not see that that would occur. We have obviously been asked for our view on this proposal. We have said we support it but we have made it clear that we have always supported it on the basis of proper safeguards, and not so that it can be used as something to continually question about the same thing.

**Q217 Chairman:** Can I put to you (I think the might short-circuit the debate a bit) the hypothesis of Professor Walker in his conclusions? His view is that you need clear statutory authority to do this in the first place, but he says that the need for post-charge questioning is understandable in the context of complex terrorism and the use of the threshold test but, he says, you should not go beyond the three situations which are in PACE Code C, which are “necessary for preventing or minimising harm or loss to the person or public, clearing up an ambiguity in a previous answer or to gather statements about information which has come to light since the charge was lodged”. He goes on to say: “The principles of fairness and court control after charge are best secured by a form of judicial examination of persons who have been charged . . .” The safeguards that he recommends are that there should be “. . . consent by the prosecutor and the prosecutor’s involvement in applications to the court for permission to question; close judicial supervision by way of initial authorisation and subsequent review; detailed rules as to treatment; a questioning clock which is limited to an overall limit of seven days; any use of adverse inferences should be considered by the managing judge who should address the admissibility of the statements obtained by post-charge questioning; a special warning to the jury about the reliability of post-charge statements.”



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5 December 2007 Ms Sue Hemming and Mr Ali Bajwa

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**Ms Hemming:** Certainly I agree entirely that it should be limited to those three items in the Code. I certainly see no difficulty at all with the prosecutor being involved or with there being any judicial supervision over it. Again, certainly no objection to the judge having some sort of control over the adverse inferences. What we are saying is simply that we support it in principle, and certainly those seem the sort of safeguards that would make sure that the defendant's rights are properly guarded.

**Q218 Earl of Onslow:** For how many people—this is probably a very difficult question, but let us assume that some people have been acquitted—do you think the decision could have gone the other way had you had access to post-charge questioning?

**Ms Hemming:** I think that is a very difficult question to answer, I am afraid.

**Q219 Earl of Onslow:** You must say the need for post-charge questioning is to obviate that particular possibility. Is that not right?

**Ms Hemming:** Post-charge questioning would be for two reasons: it would be to put new evidence to people, new evidence that had come to light, or anything that was within those three items. I would imagine it would generally be about new evidence that had come to light. The two consequences of that would either be that the defendant could give his explanation and he may, in fact, have a proper explanation for whatever has come to light, or, secondly, that he makes no comment and adverse inferences can be drawn by a jury—with a judge's permission, if we are looking at safeguards. So it is difficult to speculate on what would have happened with each individual.

**Earl of Onslow:** I accept that.

**Q220 Chairman:** We are running out of time, so can I ask Mr Bajwa to comment briefly on this issue?

**Mr Bajwa:** I will try and be as brief as I can. Ms Hemming said that the suspect may wish to comment on fresh evidence. He can, because the defendant has to serve a defence statement in every case, and there is no limit on the number of defence case statements that he serves. So if the defendant wants to volunteer something he can and will. So post-charge questioning is not the answer to say that we are preventing the defendant from saying something he wants to.

**Q221 Chairman:** The only difference is the inferences, ultimately.

**Mr Bajwa:** Inferences, and inferences I have difficulty with. Pre-charge, the basis upon which adverse inferences are permissible is that pre-charge the suspect is being questioned by investigators, we hope, who are even-handed, have an open mind and are questioning him with a view to establishing whether an offence has been committed and, if so, by whom. In those circumstances it is fair and reasonable to say that questioning calls for an explanation from the suspect, and failure to do so may lead to the drawing of adverse inferences. The same is true at the other end of the spectrum, at trial, because by then the prosecution has presented all its evidence, the defendant is then called upon before a jury—again, open-minded and even-handed—to decide upon his guilt or innocence. It is reasonable to expect him to give an explanation. Post-charge, the police and the prosecution have made a decision that this person has committed an offence and there is a realistic prospect of a conviction. When the police go to see him post-charge for questioning, they are doing so to shore up a case. They are going to see him as an arm of the prosecution, as an agent for the prosecution.

**Q222 Chairman:** Even with those three restrictions I put to Ms Hemming?

**Mr Bajwa:** Yes, they may well still be able to fit it within the three restrictions, especially in terrorism cases, and say we need to question further in order to protect the public. They may well go to question. In fact I do not know if the Government's proposal to have post-charge questioning is limited to just the three restrictions, I think it will be. The Government would prefer this to be an open ended right to question about fresh evidence and the drawing of adverse inferences. The point I make in short is that after he has been charged, questioning will become a dry run for cross examination by the prosecution. They can go in and either attempt to shore up their case, gather more evidence against the suspect or, the fallback position, store up some more adverse inferences. I do not think it is fair for a suspect to be expected, when he has been charged and is preparing his case for trial, to allow himself to be further brow beaten by interrogators, this time who are not keeping an open mind but have decided that he is guilty and wish to question him more in order to help prove that he is guilty. That is not something the suspect has to do if he is charged.

**Chairman:** Thank you both very much. As usual we have allowed the defence to have the last word. It has been a very useful and helpful session.

# Written evidence

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## 1. Letter from the Chairman to The Rt Hon Tony McNulty MP, Minister of State for Policing, Security and Community Safety, Home Office

### COUNTER TERRORISM POLICY AND HUMAN RIGHTS

Thank you for giving evidence to the JCHR on 20 September in our ongoing inquiry into counter-terrorism policy and human rights. The Committee welcomes your commitment to having as much discourse as possible with us before the introduction of the Government's planned Counter-Terrorism Bill. In light of that commitment I am writing to follow up a number of issues on which you gave evidence to us and would be very grateful if you could answer the questions below.

#### DRAFT CLAUSES

In your evidence you indicated (Qs 102–3) that you hoped to be in a position to provide us with draft clauses for pre-legislative scrutiny by “early October”, or by the time the House resumes (8 October). As of the date of this letter we have not had sight of any draft clauses and we are obviously concerned that unless we receive them soon we will not have a proper opportunity to conduct meaningful scrutiny of them before the Bill's introduction.

*Q1. What is causing the delay in the publication of the draft clauses? When can we now expect to receive the draft clauses? Can you assure us that there will be a proper opportunity for detailed scrutiny of the draft clauses before introduction of the Bill itself?*

#### EVIDENCE OF NEED TO EXTEND PRE-CHARGE DETENTION

During our evidence session (Transcript, Q3) you very fairly accepted the import of what I was saying about the sort of information that ought to be available to Parliament in relation to the use which has so far been made of the power to detain pre-charge for more than 14 days, and said that you “will make sure . . . that information is forthcoming.”

*Q2. Please can you describe the steps you are taking to obtain that information and indicate approximately when you hope to be in a position to provide it*

Mr David Ford, head of the Counter Terrorism Bill team, said in evidence (Q20) that the Government is looking at how the pre-charge detention period has operated so far, and is discussing with the judiciary and the police whether there are any lessons to be learnt from that under the current limit.

*Q3. We would be grateful to be kept closely informed of precisely what lessons the judiciary and police say are to be learnt from their experience of operating the current 28 day limit.*

#### JUDICIAL SAFEGUARDS

You referred in several places in your evidence to strengthening the oversight and scrutiny if the power to detain pre-charge were to be extended beyond 28 days, including stronger judicial safeguards. The consultation documents, and the Prime Minister's statement to Parliament, also make a number of references to increased judicial safeguards. Mr. Ford, however, in his evidence (Q25), said that “in terms of judicial safeguards, they are not really extensions.” He said the only change in terms of judicial safeguards would be that an application for an extension beyond 28 days would require the consent of the DPP. Quite apart from the fact that requiring the consent of the DPP is not a “judicial safeguard”, it also does not appear to us to be an additional safeguard as we understand that it is already the case that applications for extended detention beyond 14 days are already made by Crown Prosecutors rather than the police. Elsewhere in his evidence, however (Q27), Mr. Ford said that there may also be an additional role for the judiciary in terms of oversight of the pre-charge detention period.

*Q4. What stronger judicial safeguards does the Government have in mind when it talks of strengthening those safeguards?*

In response to our recommendation in our last report that, for there to be proper judicial scrutiny of applications to extend pre-charge detention, there should be a full adversarial hearing before a judge, subject to the law of public interest immunity to protect sensitive information, the Government asserts in its response to our report (p.4) that there is “already a full adversarial hearing”, although it accepts that “on occasion, at the initial applications to extend detention that are made before the 14 day period has elapsed, the judge is given sensitive information to allow him to make an informed decision. Such information is unsafe to disclose to the suspect or cannot be disclosed at this early stage of an ongoing investigation.” Mr Ford in his evidence also said (Q26) that “the hearings that we have are already full adversarial hearings.” We are surprised to hear the Government describe extension hearings as “full adversarial hearings”: both

we and our predecessor Committee have consistently pointed out that such hearings fall well short of a full adversarial hearing because under the relevant provisions of the Terrorism Act 2000 detention can be extended in the absence of the detainee and on the basis of material not available to them.

Q5. *In what sense is there a “full adversarial hearing” at applications to extend pre-charge detention when, according to the Government, there is no right to a physical appearance before the judge, the judge may be given sensitive information which is not disclosed to the suspect, and the suspect may be excluded from all or part of the hearing?*

#### PARLIAMENTARY OVERSIGHT

As far as additional parliamentary oversight is concerned, Mr Ford told us in evidence (Q28) that what is envisaged is that Parliament would be “notified” every time an application for extension beyond 28 days had been approved or further extended and when those people were either released or charged. You told us (Q29) that it was really a case of keeping Parliament “informed” about the use of the provision. The Prime Minister in his statement to the House of Commons on 25 July, however, said (at cols 849 and 852) that in each case the independent reviewer would also prepare a report to Parliament so that “Parliament would then be in a position to debate the matter in full, if it chose to do so”.

Q6. *Is it envisaged by the Government that there will be a debate in Parliament about the circumstances in which the power to detain for more than 28 days has been exercised in individual cases?*

In your evidence, you were asked (Q48) whether you could give us an undertaking that there will be a satisfactory opportunity for Parliament to digest and reflect on critical reports such as those from Lord Carlile before being put to a vote. You said “I think I can” in the sense that, as far as you can, you would like to make available as early as you possibly can draft clauses, reports germane to the final content of the Bill, and other supporting documents not in the public domain now. We welcome this commitment.

Q7. *In view of your acceptance of the desirability of a proper opportunity for Parliament to consider and digest the reports of independent reviewers before debating measures such as annual renewals, are there any reasons for not implementing the Committee’s recommendations in its last report (para. 63) for improving parliamentary oversight of this extraordinary power?*

#### EXTENSION HEARINGS

In your evidence to us you agreed (Q41) to provide a note requested by Lord Lester on the test applied by the court when deciding whether to grant an application for extended detention and on the standard of evidence provided to the judge.

Q8. *Can you indicate when we can expect to receive this note?*

In his evidence Mr Ford said (Q42) that he would expect already to be built in to the procedure the requirement that the extension judge be satisfied that there are reasonable grounds to believe that the suspect has committed a terrorist offence in the first place.

Q9. *In light of this acceptance, does the Government have any objection to making explicit on the face of the Bill that this is one of the requirements that must be satisfied on any application for an extension of detention?*

In your evidence you said (Q43) that there is “no right to a physical appearance before the District Judge” at an extension hearing, and that it is “in the individual’s interest as well as everybody else’s to get that part of the process despatched in the most convenient and comfortable way possible for all concerned.”

Q10. *Can you explain your view that there is no right to a physical appearance before the extension judge in light of the right of everyone who is arrested or detained on reasonable suspicion of having committed an offence to be “brought promptly before a judge” in Article 5(3) ECHR?*

In your evidence you relied on “the safety and welfare of the individual defendant” as further justifications, in addition to traffic inconvenience, for not bringing defendants physically before a judge.

Q11. *Can you explain in more detail precisely how you consider the safety and welfare of the individual defendant to be affected by being brought to court for an extension hearing? Would these concerns be met by giving defendants the opportunity to waive their right physically to attend the hearing?*

#### VIDEOING OF INTERVIEWS OF TERRORISM SUSPECTS

You told the Committee in evidence (Q50) that the Government is minded to say that the use of video surveillance should be compulsory for interviews of terrorism suspects. This represents a change of position from that set out in an undated letter from the Home Secretary, responding to a letter from me dated 11 July, in which she indicated that the Government had decided to maintain the current position whereby the decision whether to video record suspects is left to the police as an operational matter.

Q12. *Can you explain the reasons for the Government's welcome change of mind?*

#### ACCESS TO FEMALE DOCTORS

You said in evidence that you “take the point” in our report about women detainees’ access to a female doctor and said that “MPS need to be advised on that”.

Q13. *Can you explain what you have done, or propose to do, to advise the MPS in relation to this? Does the Government accept the recommendation in our report or not?*

#### INSPECTION REGIME

You said that in your view (Qs 55 and 57) the inspection regime for places of extended pre-charge detention should be kept “under constant review” by the Government.

Q14. *Is the inspection regime for Paddington Green and equivalent places being actively reviewed by the Government at the moment? If so, how is that review being conducted and what options are being considered?*

#### INTERCEPT

You justified the Government’s refusal to publish the Home Office’s work on the “Public Interest Immunity Plus” model on the basis that at this stage the job of the Chilcott review is to address the issue of principle of whether the admissibility of intercept is “doable” (Q62). In your view, that is a prior question to the question of the appropriate legal framework. In our view, however, it is impossible to separate the “how” question in the way that you suggest: whether it is doable depends on whether it can be done within a legal framework that adequately protects the public interests in non-disclosure. From my meeting with the Privy Counsellor review team, my impression is that they welcome as wide a debate as possible about precisely how the ban on admissibility could be relaxed.

Q15. *Will you now reconsider publishing the Home Office’s work in progress on “public interest immunity plus” in the interests of informing the public debate?*

You referred in your evidence to “Sir John’s review with legal support” (Q65).

Q16. *Is the legal support for the Chilcott review being provided from within the Government Legal Service or from an external source?*

Q17. *Can you indicate approximately when the Chilcott review will be published?*

#### POST CHARGE QUESTIONING

You agreed (Qs 70–72) to look again at whether to introduce post-charge questioning by amending the PACE Codes of Conduct, rather than primary legislation, and to get back to the Committee.

Q18. *Please explain why it is not possible or desirable to introduce the change as a free-standing amendment to the PACE Codes, without having to wait for the completion of the comprehensive review of the Codes.*

#### BAIL FOR TERRORISM ACT OFFENCES

You agreed that the question of making bail available for those suspected of less serious terrorism offences is something “we need to look at and consult on”.

Q19. *Are you consulting on this issue yet and if not when do you plan to do so?*

#### DNA DATABASE

You indicated (Q74) that you would soon be meeting with the ACPO lead on the DNA database to discuss matters.

Q20. *We would be grateful to be kept informed of the outcome of your meeting with ACPO.*

You agreed to let the Committee have two notes on this subject, one concerning the publication of agreements with the UK’s international partners (Q76), and the other explaining the figures relied on by the Home Office responding to the Nuffield Report, including the number of convictions and the number of different individuals convicted (Qs 78–79).

Q21. *Can you tell us when we can expect to receive this further information?*

#### SPECIAL ADVOCATES

You will recall that in your evidence to us on 18 April you said (Q130) that you would speak to some special advocates about the fairness of the special advocate procedure and report back to the Committee after you had seen them. In September, however, you told us (Q99) that you still had not done so but indicated that you still intended to do so and would get back to us if anything arises from that meeting requiring you to look again at your position that the procedure is as fair as can be.

Q22. *We would be grateful if you could let us know when you intend to meet with the special advocates and inform us promptly and fully of the outcome of your meeting with them.*

#### SPEEDING UP TERRORIST TRIALS

The Bill Contents paper refers to “further work being undertaken between the Criminal Justice Departments to speed up terrorist trials”. There have previously been press reports of such proposals being considered in the Home Office, but no formal announcement of exactly what is being considered. One of the possible measures mooted in the press has been the introduction of a limit on cross-examination. Obviously such a measure, and other possible measures to speed up terrorist trials, will have implications for the right to a fair trial.

Q23. *What sorts of measures are under consideration for speeding up terrorist trials? Will these also be the subject of consultation?*

#### COMMITMENT TO THE INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

You objected in your evidence (Q86) to the clear implication in our last report that the Government are not unequivocal in their support for the international human rights framework, which you said is not true. The reference in the Committee’s report was to former Home Secretary John Reid’s call for the ECHR to be amended to ensure that public safety is properly protected, a call which he recently repeated in a newspaper article in the News of the World. You also said in your evidence (Q88) that you “broadly agree” with the former Home Secretary’s analysis that the balance between the individual and public safety is out of kilter. This is the sort of equivocation about the Government’s human rights commitments to which the Committee was referring in its last report and in its report last summer on the DCA Review of the Human Rights Act.

Q24. *Do you agree with the former Home Secretary that the international human rights law framework, including the ECHR, needs to be amended to make sure that public safety comes first?*

I would be grateful if you could reply by Tuesday 6 November.

24 October 2007

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## 2. Letter from the Rt Hon Jacqui Smith MP, Home Secretary, to the Rt Hon David Davis MP

### PRE-CHARGE DETENTION

Thank you for meeting me on 9 October to discuss proposals for the forthcoming Counter-Terrorism Bill.

It was clear from this and other discussions I have had, for example, with the Home Affairs Select Committee, that there are concerns that an extended period of pre-charge detention simply allows the police to take more time over the same tasks they would have done much quicker with a shorter period.

As you know the police refute this. However, following our meeting, I have asked for further information from the Metropolitan Police Service about the conduct of the investigation into the alleged airline plot.

The purpose of detention is to assist the investigators in maximising the opportunities in obtaining evidence. Nonetheless, it is subject to scrutiny both by senior police officers and the judiciary.

The police are satisfied that there were not unnecessary delays in interviewing, charging or releasing suspects. Individuals were only detained whilst enquiries providing realistic evidential opportunity were conducted.

The investigation into the alleged airline plot was a complex investigation. Twenty five people were arrested of which 17 were charged, two cases were not proceeded with at court, one case has been heard and 14 currently await trial. The case which has been heard produced a guilty finding and that person has been sentenced to six months' imprisonment.

The scale of the investigation was huge. For example, over 90 premises have been searched and there were nine searches of open space areas, yielding in excess of 25,000 exhibits.

### INTERVIEWING

In relation to the formal interviewing process the police adopted a strategy that was based on the principle that at any time during an application for extension the application may fail and so no further interview may be available once any period of detention, previously authorised, has expired.

However, they still prioritise who to interview and when and what to disclose to them, based on the evidence produced by searches and other interviews. That process has also to be co-ordinated across all those detained at anyone time and fitted to the availability of interviewing officers and rooms. It is simplistic therefore to assume that if someone is not being interviewed it somehow represents an unnecessary delay. In all, approximately 420 interviews have been undertaken.

If it is felt that detention is justified beyond 48 hours a police superintendent or the CPS can apply to the court for further detention. The application provides detailed representations showing enquiries are being carried out diligently and expeditiously. This is subject to intrusive scrutiny by the judge and subject to comment by each defendant's legal representative.

Where the judge hearing an application for an extension to detention is not satisfied that the investigation is being conducted expeditiously he must refuse the application.

### CHARGING

Under the legislation that governs pre-charge detention, a person can only continue to be detained in a limited number of circumstances. Where the officer in charge of the investigation believes that there is sufficient evidence to charge a suspect, the custody officer must be informed as soon as possible and consultation with the CPS on charging must take place as soon as reasonably practicable (PACE Code C paragraph 16).

In the alleged airline plot, the decision to charge was made by the CPS, which provided a team of dedicated senior prosecutors to review the evidence on a daily basis. They authorised charges based on their assessment of whether the case had reached the necessary evidential threshold.

It is often the case that those held the longest without charge are those against whom, in the early stages at least, there is less admissible evidence. That does not necessarily mean that the eventual case will be weak; further investigation could reveal strong evidence.

Finally, you asked me whether the police had used a shift system while running the investigation in to the alleged airline plot. The police have informed me that, during times of peak demand, including during this investigation, the Metropolitan Police does run a shift system to process the product/exhibits recovered during the course of the numerous searches. However, they do not forensically search premises and scenes on a shift pattern for a number of reasons including that, historically, best evidence has been achieved where one officer has control of a scene from start to finish.

I hope that the above information has been useful to you. I agree that it is important that we provide Parliament with as much of this information as possible, particularly for the purposes of the annual debates on the renewal of the maximum period of pre-charge detention.

In relation to the alleged airline plot the police and CPS worked very closely together and the latter was consulted at each step of the investigation and I am confident that those detained were charged or released as soon as all leads were exhausted or evidence crossed the charging threshold.

I will remain in close contact with the police and CPS so that we have up to date information on how existing investigations are proceeding and will endeavour to ensure that as much information as possible is provided to Parliament.

I am copying this letter to Nick Clegg, Andrew Dismore, Chairman of the Joint Committee of Human Rights, and Keith Vaz, Chairman of the Home Affairs Committee.

6 November 2007

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### 3. Letter from the Rt Hon Tony McNulty MP, Minister of State, Home Office, to Lord Lester of Herne Hill QC

#### PRE-CHARGE DETENTION

When I appeared before the Joint Committee on Human Rights on 20 September, you asked for a note on the grounds for extending pre-charge detention.

Schedule 8, paragraph 32 of the Terrorism Act 2000, as amended, sets out that:

- 1) A judicial authority may issue a warrant of further detention only if satisfied that:
  - a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary as mentioned in subparagraph (1A), and
  - b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.
- (1A) The further detention of a person is necessary as mentioned in this subparagraph if it is necessary:
  - a) to obtain relevant evidence whether by questioning him or otherwise;
  - b) to preserve relevant evidence; or
  - c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.

(2) In this paragraph “relevant evidence” means, in relation to the person to whom the application relates, evidence which:

- a) relates to his commission of an offence under any of the provisions mentioned in section 40(1)(a) or
- b) indicates that he is a person falling within section 40(1)(b).

You asked, in particular, about withholding information from the detainee. In relation to this, paragraph 34 of the Terrorism Act 2000 sets out that:

- (1) The person who has made an application for a warrant may apply to the judicial authority for an order that specified information upon which he intends to rely be withheld from:
  - a) the person to whom the application relates, and
  - b) anyone representing him.
- (2) Subject to sub-paragraph (3), a judicial authority may make an order under sub-paragraph (1) in relation to specified information only if satisfied that there are reasonable grounds for believing that if the information were disclosed:
  - a) evidence of an offence under any of the provisions mentioned in section 40(1)(a) would be interfered with or harmed,
  - b) the recovery of property obtained as a result of an offence under any of those provisions would be hindered,
  - c) the recovery of property in respect of which a forfeiture order could be made under section 23 would be hindered,
  - d) the apprehension, prosecution or conviction of a person who is suspected of falling within section 40(1)(a) or (b) would be made more difficult as a result of his being alerted,
  - e) the prevention of an act of terrorism would be made more difficult as a result of a person being alerted,
  - f) the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with, or
  - g) a person would be interfered with or physically injured.

(3) A judicial authority may also make an order under sub-paragraph (1) in relation to specified information if satisfied that there are reasonable grounds for believing that:

- a) the detained person has benefited from his criminal conduct, and
- b) the recovery of the value of the property constituting the benefit would be hindered if the information were disclosed.

(3A) For the purposes of sub-paragraph (3) the question whether a person has benefited from his criminal conduct is to be decided in accordance with Part 2 or 3 of the Proceeds of Crime Act 2002.

(4) The judicial authority shall direct that the following be excluded from the hearing of the application under this paragraph:

- a) the person to whom the application for a warrant relates, and
- b) anyone representing him.

I also attach a paper, produced by the CPS and published on 25 July, which deals with the scrutiny of applications for a warrant of further detention between 14 and 28 days.

I am copying this letter to Andrew Dismore, Lord Judd, Nia Griffith, Evan Harris, Lord Plant and Baroness Stern.

*Tony McNulty*

#### SCRUTINY OF PRE-CHARGE DETENTION I TERRORIST CASES

1. This paper deals with the scrutiny of applications for a warrant of further detention between 14 days and 28 days. These are made by CPS Counter Terrorism Division (CTD) who thoroughly scrutinise any request to make such an application and firstly decide whether it is necessary or appropriate before ever commencing the process.

2. Only if they consider that it is necessary and appropriate, and that the necessary criteria (see below) is met, will an application be made: To date, since the change in time limits to a maximum 28 days, applications beyond 14 days have only been made in three cases: the alleged airline plot, arrests arising out of an investigation in Manchester and the current investigation in relation to the London and Glasgow bombs.

3. The legal detail of this procedure is set out at Annex A.

4. The reality of this procedure in a case where there are multiple defendants is that, whilst a CPS lawyer will be advising on whether there is sufficient evidence to charge, a different CPS lawyer is likely to be appointed to present the warrant of further detention application.

5. The High Court Judge will need to be persuaded that:

- There are reasonable grounds to believe that the further detention is necessary to obtain relevant evidence, whether by questioning or otherwise or to preserve relevant evidence.
- The investigation in connection with which the person is detained is being conducted diligently and expeditiously.

6. This can be done with both open source material which is presented in the presence of the defence and sensitive material which is presented in the absence of the defence. The defendants, who are legally represented, are presented with a document setting out the state of the enquiry thus far and the future non-sensitive lines of enquiry, and can cross examine the senior investigating officer at length to test the strength of the application. (please note—this is not a legal entitlement, but is done to assist the court and speed up the process.) They are also allowed to make submissions arguing against the application.

7. Inevitably, to satisfy the Court that further detention is necessary (the first part of the test), the court must be informed in great detail of the lines of enquiry that are likely to bear results within the maximum period of detention available: speculative enquiries, or those that cannot achieve evidence within the next seven or 14 days (as appropriate), are not enough.

8. What is required by the court is:

- (a) precise detail of the enquiries being made;
- (b) when they will be completed;
- (c) what it is expected they will achieve; and
- (d) what difference that will make to the charging decision.

These questions are particularly stark for any application beyond 21 days as results beyond the next few days are of little relevance.

9. To prove due diligence and expedition the court must be satisfied that the investigation as a whole has been conducted as quickly as is reasonably possible (and continues to be so). This will include current events ie ongoing enquiries and the review of the evidence with a view to charging decisions. This test does not respect normal working hours or conditions; so lawyers and police are expected to work long evenings, weekends even nights before they can request more time.



10. Due to the detail and extent of the evidence required to persuade a court that the two tests are satisfied, the work that goes into the preparation of such applications is extensive. The CPS lawyer works with police officers to obtain the necessary information, prepare the necessary documentation in advance of a hearing and then present the application. This is extremely onerous, particularly where there are multiple defendants as the application for each defendant must stand or fall on its own merits, and is a huge resource burden on both the police and the CPS.

11. This document deals with CPS applications for extensions between 14–28 days before a Judge, the police generally carry out applications between 0–14 days before a District Judge.

12. These, equally, are subject to scrutiny and opposition by the defence and, whilst they may be more easily justified, occurring as they do at an earlier stage in proceedings, it should be noted that these are not always successful. For example, in the recent high profile Operation Gamble in Birmingham, police applications for warrants to detain nine men for a further seven days to 14 days were refused for two of the suspects who were subsequently released, and were not granted for full seven days for the remaining seven suspects who were subsequently charged.

30 October 2007

## Annex A

### NOTE ON APPLICATIONS FOR EXTENSION OF DETENTION OF TERRORIST SUSPECTS IN ACCORDANCE WITH TERRORISM ACT 2000 AND TERRORISM ACT 2006

This document seeks to set out the law relevant to an application to extend the detention of persons further than a period of fourteen days from time of arrest. This is a new power introduced by Section 2S (7) Terrorism Act 2006 which amends Schedule 8 of Terrorism Act 2000 to allow, subject to judicial authority, a maximum period of detention of twenty eight (28) days rather than fourteen (14) days.

#### *Who can make an application for a warrant of further detention?*

Schedule 8, Paragraph 36(1) of the Terrorism Act 2000 sets out who can apply for a warrant of further detention. Paragraph 36(1) Terrorism Act 2000 provided that warrants of further detention were to be made by a police officer of at least the rank of superintendent. This has been amended by Section 23(2) Terrorism Act 2006 to now include a Crown Prosecutor.

#### *To whom should such applications be made?*

If an application is to extend the period of detention more than fourteen (14) days after time of arrest, Section 25(6) (1A) Terrorism Act 2000 amends Paragraph 36 of the Terrorism Act 2006 and provides that such applications have to be made to a senior judge.

“Senior judge” is defined for this paragraph in Section 25(10) Terrorism Act 2006 as a judge of the High Court or of the High Court of Judiciary.

#### *For what period can detention be extended?*

Applications for further detention can only be made for a maximum period of seven days at a time. If more than a period of seven days is required, up to the maximum of 28 days, then further applications have to be made at the expiration of each period of seven days.

Section 25 (7) Terrorism Act 2006 amends Paragraph 36(3) Terrorism Act 2000 and substitutes Para 36(3) and inserts Paragraphs 36(3A) and 36(3AA). Para 36 (3) and (3A) now provide that the period by which the specified period of further detention can be further extended is the period which:

- Begins with the end of the period for which the period specified in the warrant was last extended.
- Ends with whichever is earlier of either the end of the period of seven days from that time or the end of the period of 28 days beginning with the time of the person’s arrest.

Para 36 (3AA) provides that the period need not be extended for the full period requested in Para 36(3) if the senior judge believes that it would be inappropriate for the period of extension to be as long as the period requested.

#### *Grounds for extension*

The grounds for issuing a warrant of further detention are found in Schedule 8 Terrorism Act 2000 paragraph 32. These are as follows:

- There are reasonable grounds to believe that the further detention is necessary to obtain relevant evidence whether by questioning or otherwise or to preserve relevant evidence.

- The investigation in connection with which the person is detained is being conducted diligently and expeditiously.

These have been amended by Terrorism Act 2006 to insert Para 32 (IA) as follows:

- (1A) The further detention of a person is necessary as mentioned in this subparagraph if it is necessary:
- (a) to obtain relevant evidence whether by questioning him or otherwise;
  - (b) to preserve relevant evidence; or
  - (c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.

*Procedure if there is to be an ex parte applications*

Paragraph 34 of Schedule 8 of the Terrorism Act 2000 is the legal framework for the applicant seeking an order from the High Court Judge to withhold information from the detained person and representative which is to be relied upon during any such application. This has been amended by 523(5) of Terrorism Act 2006 which substitutes the word “person” for “officer” in relation to who makes the application. This means that a Crown Prosecutor can now make such an application.

*Place of detention if detention extended for more than 14 days*  
*PACE Code of Practice H Para 14.5*

After 14 days detainee must be transferred to prison as soon as reasonably practicable, unless:

- (a) Detainee specifically requests to remain in police station and that request can be accommodated; or
- (b) There are reasonable grounds to believe that transferring detainee to prison would:
  - Significantly hinder a terrorism investigation,
  - Delay the charging of the detainee or his release from custody, or
  - Otherwise prevent the investigation from being conducted diligently or expeditiously.

If any of grounds in (b) are relied upon these must be presented to judicial authority as part of the application for WFD.

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**4. Letter from the Rt Hon Tony McNulty MP, Minister of State for Policing, Security and Community Safety, to the Chairman**

COUNTER-TERRORISM LEGISLATION

Thank you for your letter of 24 October asking a number of further questions about counter-terrorism policy. When I gave evidence to the Committee on 20 September, I also agreed to write with further information on a number of issues. I am sorry for the delay in replying.

DRAFT CLAUSES

Q1. *What is causing the delay in the publication of the draft clauses? When can we now expect to receive the draft clauses? Can you assure us that there will be a proper opportunity for detailed scrutiny of the draft clauses before introduction of the Bill itself?*

Draft clauses were sent to you on 6 November.

EVIDENCE OF THE NEED TO EXTEND PRE CHARGE DETENTION

Q2. *Please can you describe the steps you are taking to obtain that information and indicate approximately when you hope to be in a position to provide that*

The Home Secretary wrote to David Davis on 6 November, copied to you and others, to provide further information in relation to the operation of the current pre-charge detention limit.

Q3. *We would be grateful to be kept closely informed of precisely what lessons the judiciary and police say are to be learnt from their experience of operating the current 28 day limit.*

We have had a number of discussions with members of the judiciary, the Crown Prosecution Service (CPS) and the police as part of the consultation on the bill. This has included asking whether there are any changes needed to the legislation arising from experience of operating the current pre-charge detention limit. A number of minor points have been raised as part of these discussions in relation to the extension hearing procedure. We are considering these as part of taking forward the counter terrorism bill and will let you know if we decide that any changes to the legislation are needed.

#### JUDICIAL SAFEGUARDS

Q4. *What stronger judicial safeguards does the Government have in mind when it talks of strengthening those safeguards?*

The consultation document published on 25 July set out a number of options for taking forward extended pre-charge detention. These included increased judicial involvement in the pre-charge detention period. Following the completion of the consultation period, we are considering the nature of the judicial safeguards for any extended period of pre-charge detention. We will keep the Committee informed of developments. It is our intention however, that periods of extended detention will continue to be subject to judicial approval at least every seven days.

Q5. *In what sense is there a full adversarial hearing at applications to extend pre-charge detention when, according to the Government, there is no physical right to a physical appearance before the judge, the judge may be given sensitive information which is not disclosed to the suspect and the suspect may be excluded from all or part of the hearing?*

Extension hearings are fully adversarial. They involve the CPS making an application to a High Court Judge for all extensions beyond 14 days and the suspect and his or her legal representatives are able to question the case. The Committee asks how there can be a proper adversarial kind of hearing of an extension application without the physical presence of the alleged perpetrator of a plot. There is a power under Schedule 8 to the 2000 Act for the judicial authority hearing the application to exclude the detainee and his legal representative from any part of the hearing. This power is used to exclude those persons from any “closed” part of the application, where the applicant is relying on information which they reasonably believe would be harmful in one of a specified number of ways if disclosed to the detainee. These include hindering the gathering of evidence of terrorism offences, making the apprehension or prosecution of a terrorist suspect more difficult or making the prevention of an act of terrorism more difficult. However, the detainee and his legal representative are allowed to participate in the open part of the proceedings where the information presented to the court in support of the case for extension does not present such issues.

#### PARLIAMENTARY OVERSIGHT

Q6 and Q7. *Is it envisaged by the Government that there will be a debate in Parliament about the circumstances in which the power to detain for more than 28 days has been exercised in individual cases? In view of your acceptance of the desirability of a proper opportunity for Parliament to consider and digest the reports of independent reviewers before debating measures such as annual renewals, are there any reasons for not implementing the Committee’s recommendations in its last report for improving Parliamentary oversight of this extraordinary power.*

Any increase in the limit of pre-charge detention will be accompanied by strong judicial and parliamentary oversight. Following the completion of the consultation period, we are discussing how best to ensure that there is appropriate parliamentary oversight of the relevant provisions and will keep the Committee informed of developments. This consideration includes looking at how Parliament might be able to debate the issue. However, any information made available to Parliament, and any subsequent debate, in respect of ongoing cases will of course have to be limited so as not to prejudice or jeopardise those cases.

#### EXTENSION HEARINGS

Q8. *Can you indicate when we expect to receive this note [on the test applied by the court when deciding whether to grant an application for extended detention]?*

I wrote to Lord Lester on 30 October.

Q9. *In light of this acceptance, does the Government have any objection to making explicit on the face of the bill that this is one of the requirements that must be satisfied on any application for an extension of detention?*

We have no plans to do so. The court must be satisfied that there are reasonable grounds for believing detention is necessary to obtain/preserve/await analysis of “relevant evidence” and that “relevant evidence” relates to the person being a “terrorist”, reasonable suspicion of which forms the grounds for arrest under section 41.

Q10. *Can you explain your view that there is no right to a physical appearance before an extension judge in light of the right of everyone who is arrested or detained on reasonable suspicion of having committed an offence to be brought promptly before a judge in Article 5(3) ECHR?*

The existing legislation provides for frequent and regular judicial oversight of pre-charge detention in accordance with Article 5(3) and any extension to 28 days will also be subject to such oversight. A person is “brought” before a judge even if this is by way of video link. Their further detention is determined by a judge and the detainee is able to make oral representations etc. at the hearing.

Q11. *Can you explain in more detail how the safety and welfare of the individual defendant to be affected by being brought to court for an extension hearing? Would these concerns be met by giving defendants the opportunity to waive their right physically to attend the hearing?*

As I have said previously, the decision as to whether to undertake a hearing by way of video-link is made by the judicial authority hearing the application, who has the right to have the detained person appear physically before him (in which case he must state his reasons for doing so). Additionally, the judicial authority may only direct that the hearing be held in this way after hearing representations from the detainee, or those acting on his behalf. The expectation is that these hearings are conducted by way of video link for reasons of security and resources. If these hearings were routinely held in the physical presence of the parties, this would create an unwarranted security risk. It would involve transporting, sometimes numerous suspected terrorists, where a large number have been arrested in connection with one operation, across London. Measures would have to be put in place to protect the public and prevent their escape. This would take a large amount of planning and involve large numbers of police officers in the operation, at public expense and diverting resources from more pressing anti-terrorism work. In addition to this, there are, of course, security implications for suspected terrorists themselves when traveling.

#### VIDEOING OF INTERVIEWS OF TERRORISM SUSPECTS

Q12. *Can you explain the reasons for the Government’s welcome change of mind?*

We have discussed this issue with the police and others. As a result we are minded to make the video-recording of the interviews of terrorist suspects compulsory. This will be done through secondary legislation.

#### ACCESS TO FEMALE DOCTORS

Q13. *Can you explain what you have done, or propose to do, to advise the MPS in relation to this? Does the Government accept the recommendation in our report or not?*

The Forensic Medical Experts already have a system whereby female doctors can be called upon. However, we have informed the Metropolitan Police Service of the point the Committee made.

#### INSPECTION REGIME

Q14. *Is the inspection regime for Paddington Green and equivalent places being actively reviewed by the Government at the moment? If so, how is that review being conducted and what options are being considered?*

We are considering this issue following the completion of the consultation period, but there is already independent scrutiny of pre-charge detention cases. Independent custody visitors can visit suspects; suspects held beyond 14 days are generally held in prison and are subject to oversight by Her Majesty’s Inspectorate of Prisons and Lord Carlile reports annually on the operation of counter-terrorism legislation.

## INTERCEPT

Q15. *Will you now reconsider publishing the Home Office's work in progress on "public interest immunity plus" in the interests of informing the public debate?*

The Home Office work on intercept as evidence has been overtaken by the Privy Counsellor review on intercept evidence. The Review Team has had access to all previous work, including that on the work on "PII Plus". It will report its conclusions and recommendations to the Home Secretary and the Prime Minister producing, if necessary, both an unclassified report that can be put into the public domain and a separate report containing sensitive material. We believe this independent review is the best way to inform public debate.

Q16. *Is the legal support for the Chilcott review being provided from within the Government Legal Service or from an external source?*

The Privy Counsellor Review has had access to all legal advice produced in previous reviews of the subject. The Government Legal Service has had input into the Review, but arrangements have been made for the Review to receive formal legal support from independent Counsel.

Q17. *Can you indicate approximately when the Chilcott Review will be published?*

Sir John Chilcott, Chair of the Privy Counsellor Review Committee, has written to the Prime Minister and Home Secretary seeking an extension to January. As the Prime Minister made clear in his statement on 14 November, this is a serious issue and he is determined to ensure that it is given very real and careful consideration. On this basis he has agreed to Sir John's request for an extension of time until mid January.

## POST CHARGE QUESTIONING

Q18. *Please explain why it is not possible or desirable to introduce the change as a free-standing amendment to the PACE codes, without having to wait for the comprehensive review of the Codes.*

While I very much welcome the Committee's support for the changes we propose to enable questioning after charge and for adverse inferences to be drawn from such questioning in terrorist cases, it may be helpful if I clarify why changes are required both to primary legislation and the PACE Codes.

The ability to draw adverse inferences from post charge questioning would require a new caution to be introduced and could only be achieved through primary legislation as drawing adverse inferences are governed by Part 3 of the Criminal Justice and Public Order Act 1994. In addition, allowing post charge questioning is an important and novel step which should therefore be subject to detailed scrutiny by Parliament, in particular to ensure that appropriate safeguards are put in place.

Any changes to the PACE Codes are also subject to Parliamentary scrutiny in the form of an affirmative resolution order; however given need to introduce the ability to draw adverse inferences in these new circumstances through primary legislation, and the importance of post-charge questioning, we believe this measure should be introduced in the proposed Counter Terrorism Bill.

## BAIL FOR TERRORISM ACT OFFENCES

Q19. *Are you consulting on this issue yet and if not when do you plan to do so?*

We have sought views on any changes needed to legislation as apart of the consultation on the proposed counter-terrorism bill. This includes whether police bail should be available in terrorism cases. The consultation period has now closed and we will be publishing a summary of the responses received in due course. We did not receive any formal responses on this issue.

## DNA DATABASE

Q20. *We would be grateful to be kept informed of the outcome of your meeting with ACPO*

I met Tony Lake, the ACPO lead on DNA, on 9 October. It was agreed that Tony Lake would meet with officials regularly.

Q21. *Is it possible to let the committee have copies of agreements with international partners with whom we share DNA and could you please explain the figures relied on by the Home Office in response to the Nuffield Report?*

Memoranda of Understanding form part of Government to Government discussions. These can sometimes be confidential. We consider on a case by case basis whether or not to make these public. Depending on the outcome of consultations in the area of DNA we may consider doing so for this case.

The Committee sought further information regarding the number of convictions secured as a result of matches with samples from crime scenes to samples held on the National DNA Database which would have been removed prior to the introduction of the Criminal Justice and Police Act 2001. Whilst we can identify the number of matches against these samples, we do not hold the statistics on the number of convictions secured as a result of these matches. DNA evidence alone is not enough to secure a conviction it does greatly assist the police in their investigations.

#### SPECIAL ADVOCATES

Q22. *We would be grateful if you could let us know when you intend to meet with the special advocates and inform us promptly and fully of the outcome of your meeting with them.*

I am meeting three of the special advocates who gave evidence to the Committee on 3 December. They are Andrew Nicol QC, Martin Chamberlain and Judith Farbey. I will write to the Committee separately on the outcome of this meeting.

#### SPEEDING UP TERRORIST TRIALS

Q23. *What sorts of measures are under consideration for speeding up terrorist trials? Will these also be the subject of consultation?*

Work is already under way across the Criminal Justice System (CJS) to improve the management of terrorism trials through the criminal justice system, and thereby reduce delay. The Office for Criminal Justice Reform (OCJR), working with the criminal justice agencies and the defence will continue to carefully explore and review ideas and options for further improvement. If ministers determine that further initiatives should be pursued, OCJR will consult key stakeholders as required.

#### Defence trial preparation

- Revised arrangements for defendants in custody awaiting trial in terrorism cases at the high security unit at Belmarsh prison have been drafted by the Office for Criminal Justice Reform in consultation with the Bar Society, Law Society and the Prison Service. The document recommends fast tracking some aspects of the current security clearance regime for defence solicitors, extending the duration of prison legal visits and sets out the Prison Service and defence solicitor responsibilities to prevent inappropriate material which does not form part of the prosecution case being brought into the prison.
- Defence case statements. Concern that inadequate and late defence statements are causing difficulties with the management of terrorist trials, creating delays and unnecessarily adding to the trial length, is being explored in consultation with the CJS agencies and the senior judiciary.

#### The courts

Her Majesty's Court Service (HMCS) has already put processes in place to assist the progression of terrorism trials through the courts:

- The Judicial Protocol on the Management of Terrorism Trials issued by the Lord Chief Justice in January 2006 sets out the pre-trial management process for the management of terrorism trials. All terrorism cases are managed by the Presiding Judges of the South Eastern Circuit, or other High Court Judges nominated by the President of the Queen's Bench Division (PQBD), so that a nominated case management judge manages all terrorism cases. The nominated case management judge sets a clear timetable with deadlines for when actions undertaken by the parties should be completed and proactively manages the case to ensure the timetable is met.
- HMCS has strengthened the South East (SE) Circuit Listing Co-ordinator's team to enable effective support to be provided to the Presiding Judges. Liaison arrangements have been established with City of Westminster Magistrates Court to provide early warning of new charges. The SE Circuit Listing Co-ordinator's team actively monitoring progress against all cases within the terrorist list and provides dedicated case progression support. The SE Circuit Presiding Judges, Senior Presiding Judge (SPJ) and PQBD are alerted to any obstacles to timely progress. HMCS ensures that any inter-agency issues are escalated appropriately. HMCS is addressing current court capacity requirements by increasing the security of the court estate to provide sufficient capacity

for terrorist trials. Work is in train to increase the security of the court estate with 14 high security courtrooms suitable for hearing terrorist trials due to become operational by the end of March 2008 at key locations across the country.

- HMCS will be working closely with the Senior Judiciary to ensure that there are sufficient judges to hear terrorist cases.

#### The CPS

- The CPS is exploring the viability of establishing a Northern regional office in 2009.
- The Counter Terrorism Division based in London has expanded from a team of eight lawyers to a team of 16 specialist lawyers to prosecute terrorism matters. A buddy system has been established to ensure that a CPS lawyer is always contactable in every case to prevent the delay of key case management decisions.
- The Protocol for the Management of Terrorism Trials clearly sets out the responsibilities of the prosecution including the provision of a summary and timetable for the service of the prosecution case.

#### Live links

Defendants who are in custody can already appear by video live link at a preliminary hearing. Following the Police and Justice Act 2006 (PJA) it will now be possible for them to be sentenced over a live link—with their consent—either at a live-link hearing at which they have pleaded guilty, or (where they have been convicted in person in the usual way) at a later live-link hearing called specifically for the purpose of sentencing. Attendance via live link will avoid the need to convey a prisoner to court simply for a sentencing hearing. Use of live links is also extended to allow defendants at a police station to make a live-link appearance at a magistrates' court; this will apply both to detained defendants and those who are bailed by the police to appear by live link. In both cases the defendant's consent is required. At present a defendant might be detained overnight, taken to court next morning and from there (if he is remanded in custody) taken to prison—two journeys. Under the new provisions, he could appear by link from the station, and taken (if remanded) straight from there to prison, saving one journey. The Criminal Appeal Act 1968 is amended by the PJA to allow appellants to appear at the Court of Appeal Criminal Division over a live link from custody; the appellant's consent is not required. This provision should avoid many journeys between prisons and the Royal Courts of Justice.

#### Forecasting and modelling

OCJR is working with the cjs agencies to model the displacement of normal Criminal Justice System business as a result of the projected additional counter-terrorism work to assist with agencies' contingency planning.

#### COMMITMENT TO THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

*Q24. Do you agree with the former Home Secretary that the international human rights law framework, including the ECHR, needs to be amended to make sure that public safety comes first?*

There appears to be a continuing misunderstanding about the former Home Secretary's position in relation to international human rights' law and our ensuing obligations. As the current Home Secretary explained in her letter of 2 August to the Committee, there is not any intention on the part of the Government to amend the text of the international human rights' instruments, including the ECHR. I am happy to echo the Home Secretary's assurance that this remains the Government's position.

Where the misunderstanding might have arisen is in relation to the challenges we have made to the interpretation of Article 3 of the ECHR in three cases currently before the European Court of Human Rights. These are not challenges to the text of Article 3 as we fully support both the wording and the underlying principles. We have, as you know, continually made clear that we do not support torture and that we would not remove an individual if we knew that he would be tortured. We are, however, challenging the interpretation of Article 3 that the European Court handed down in *Chahal*. We hope to persuade the Court that the rights of the public at large need to be taken into account and balanced against the rights of the individual. *Chahal*, as you know, precludes us from considering any factors other than the risks to the individual.

The Government has a duty to protect public safety. In its interpretation of Article 3 we consider that the *Chahal* judgment disregards this. It is possible that the European Court will decide the three cases on their particular facts without having regard to our interventions. It is equally possible that our arguments will be considered and rejected—we should know in the next few months. I can assure you, however, that we will continue both to abide by our human rights commitments and to take whatever steps are necessary to protect the public.

### 5. Letter from the Chairman to Jonathan Evans, Director General, MI5

The Joint Committee on Human Rights, which I chair, is currently engaged in a long-running inquiry into counter-terrorism policy and human rights. Our most recent report on the issue, focusing on pre-charge detention, the use of intercept evidence in court and post-charge questioning, was published in July and we intend to report to Parliament on the Government's proposed counter-terrorism Bill, once it has been published.

A central concern of our inquiry is whether the Government's counter-terrorism proposals are proportionate to the level of threat faced by the UK. In oral evidence on 20 September, we asked Home Office Minister Tony McNulty MP about his assessment of the threat level. The key exchange was as follows:

Q8 Chairman: The threat, basically, is pretty well the same as it was this time last year?

Mr McNulty: Yes, very high.

My Committee noted with interest that, on 5 November, you gave a speech to the Society of Editors in Manchester, which was widely reported in the press, during which you were reported as saying that there were 400 more people in the UK who pose a national security threat because of their links to terrorism than one year earlier. If the threat to UK national security has increased significantly, in contrast to what we were told by the Minister in September, this has considerable implications for the proportionality of the Government's response, in human rights terms. I am sure you will understand the importance, for us, therefore, of assessing the level of threat from terrorism in our work in scrutinising counter-terrorism policy.

Given that you have now spoken publicly about the level of threat from terrorism in the UK, my Committee has asked me to contact you to see if you would be willing to meet with us to discuss this matter. Without wishing to engage you in discussion of Government policy, we feel that recommendations which we make would be better informed if we were at least aware of any Security Service views or concerns, even if we were unable to refer to them explicitly.

I would therefore like to offer you the opportunity to give evidence to the Committee, in private if you prefer, in the near future. A possible date would be the morning of Wednesday 5 December, but we could consider alternatives.

I would be grateful if you would let me know if you would be willing to give evidence to my Committee on those terms.

16 November 2007

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### 6. Memorandum from Ali Naseem Bajwa

#### RE TERRORISM DETENTION

1. I was called to the Bar in 1993 and I specialise in criminal law. In recent years, I have acted for the defence in a number of terrorism cases and for three controlees in control order proceedings.

2. I have acted for suspects at Paddington Green Police Station and Bow Street Magistrates Court in respect of a number of applications to extend pre-charge terrorism detention, including Operation Rhyme (Dhiren Barot & Ors), Vivace (the July 21 case) and Overt (the airline case). In October 2006, I co-wrote an article for the New Law Journal ("the NLJ article") with Bernie Duke, a solicitor at EBR Attridge Solicitors, on the application of the powers of pre-charge detention in Operation Overt, the first case to engage the 28-day limit.

#### INTRODUCTION

3. I have a number of concerns relating to pre-charge detention in terrorism cases. These concerns are particularly acute for the following reasons:

- a. An extraordinarily high proportion of all persons arrested under the Terrorism Act 2000 (TA) are released without charge. For obvious reasons, any failings in the treatment of suspects in terrorism detention are going to be felt most, but not exclusively, by this category of person.
- b. Being detained on suspicion of involvement in terrorism, has a particularly grave impact on suspects and their families.
- c. The maximum period of detention is of course a very long one; 28 days.

4. My particular concerns about terrorism detention can conveniently summarised under four headings, each of which I shall develop below:

- a. Conditions of detention.
- b. The intensity of the investigation.
- c. The test for an extension of detention.
- d. The procedure for an extension of detention.



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CONDITIONS OF DETENTION

5. I respectfully agree with the committee's conclusion at § 67 of its report published in July this year on "Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning" ("the July 07 report") that, "The facilities available for dealing with terrorism suspects at Paddington Green are plainly inadequate."

6. Putting aside the particular conditions of detention at Paddington Green for a moment, a person held in terrorism detention is already under an extraordinary strain. Firstly, apart from the somewhat vague basis for arrest (see s. 41 TA 00—suspicion of being concerned in the commission, preparation or instigation of an act of terrorism) he is usually told nothing for a number of days as to the facts and evidence which form the basis of the decision to detain him. Secondly, the suspect's solicitor will at a very early stage break the news that he may be detained for up to 28 days, the last 14 of which could be in prison (In fact, I have been told by some of my clients that they have been privately warned by the police that if they did not co-operate, they could be held for up to 14/28 days) Thirdly, at the police station, he is permitted contact with no-one but his solicitor. Most of his time is spent alone in his windowless cell. Fourthly, the suspect is in a state of heightened suspense, sometimes for a long time, about whether he is going to be charged or released; I have been told by suspects that the anxiety engendered by their pre-charge detention was worse than any period of post-charge custody.

7. In fact, it is not unknown for suspects, with no previous mental health problems, following extended periods of pre-charge detention, to start to develop significant psychiatric symptoms such as insomnia, hallucination, mood disturbance and thoughts of self-harm.

8. When one adds all of the above to the conditions of detention that are so comprehensively documented in the two CPT reports in July and November 2005 and the committee's July 07 report, the situation of the suspect is made considerably worse. It was in that context that I wrote in the NLJ article:

It must be recognised that transfer to prison during the 14 to 28-day detention period provided some benefits to suspects. Most of them indicated that prison provided a welcome respite from 14 days of solitary confinement at the police station; they were allowed unfettered association with other prisoners (including other suspects in the case), use of some of the prison facilities and very regular legal visits.

9. In my view, it is a very grave indictment on the current system that a person not charged with a criminal offence can spend up to 14 days in prison and that that state of affairs is, as things currently stand, preferable to being detained in a police station.

THE INTENSITY OF THE INVESTIGATION

10. Code H, the code of practice in connection with terrorism detention, paragraph 1.5 states:

All persons in custody must be dealt with expeditiously, and released as soon as the need for detention no longer applies.

11. I am concerned that the 28 days pre-charge detention limit is not conducive to an expeditious investigation and to the speedy release of those to whom the need for detention no longer applies.

12. In my NLJ article I wrote:

A number of matters were noticeable in the police's conduct during the pre-charge stage of the aircraft bomb plot case. Firstly, the police have never been very forthcoming with disclosure in terrorism cases but now, given the weeks that stretched out before them, disclosure of any value was particularly rare.

Secondly, questioning of the suspects slowed down to snail's pace. In the first 14 days, a single interview per day was the norm and in the period between 14 and 28 days, many days passed with no interviewing at all.

(i) *Disclosure*

13. In the first four or five days of custody, the practice seems to have become that nothing relating to the facts and the evidence which formed the basis of the decision to arrest and detain the suspect is disclosed.

14. No doubt the police will, in part, defend the lack of disclosure as "interviewing strategy". In Operation Vivace, the officer in charge of the investigation accepted that, after a number of days in custody, nothing incriminating any of the suspects had been disclosed or put to them in interview; yet he also accepted that there was a significant amount of manageable surveillance evidence in the police's possession relating to some of the suspects had thus far not been deployed because of an "interviewing strategy."

15. I am doubtful whether withholding for up to a week the facts and evidence that formed the basis of the decision to arrest and detain a suspect to be a fair or expeditious way to progress and investigation.

16. There must also be a question mark over whether this practice complies with Article 5(2) of ECHR: Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(ii) *Interviewing*

17. The practice also seems to have grown up to interview very little in the first four or five days in custody, sometimes no more than a total of just one or two hours; and even that is mostly about the suspect's personal circumstances and his arrest.

18. Over the course of detention total period of close to 28 days of detention, the interviewing still may not exceed a total of 13 or 14 hours. I have known there to be more interviewing than this over the course of four days in a non-terrorism investigation. During the period of 14–28 days, there have been cases where less than a total of three hours of interviewing has been conducted and, on the vast majority of days, there is no interviewing at all.

(iii) *The Charging Decision*

19. In the NLJ article, I wrote about P's experience during Operation Overt:

In the early hours of the morning on the 10 August 2006, police officers burst into the home P shared with his wife and new-born baby, arrested him on suspicion of involvement in terrorism and transported him to Paddington Green Police Station. When P's assets were frozen, his name, like most of the other suspects, was released by the Treasury and widely reported. He was kept in virtual solitary confinement at one of highest security police stations in the UK for 14 days during which time not a shred of evidence implicating him in the aircraft bomb plot or any other terrorism was disclosed to him. At the end of all this, he was released with no explanation, apology or promise that it would not happen to him again.

20. I did not describe P's treatment on the last day of his detention, 23 August 2006.

21. From memory, P's extended detention limit was due to expire at around midnight on 23 August. On that day, the police applied to extend detention for 9 suspects but they announced at about midday that they would not be seeking an extension in P's case.

22. Therefore, at around midday on 23 August the position was this: Had there been any evidence incriminating P in the alleged airline bomb plot, we can be quite sure that it would have been put to him in interview at some point during his 14 days of detention. None had been put and it was clear that there would be no further interviewing. A decision had now been taken not to apply to extend P's detention. There could be only conclusion: P was going to be released without charge.

23. In fact, P was left to sit in his cell for about 12 hours from midday to close to midnight, when the deadline for his detention was imminent. His solicitor sat with him for as long as we could but after a number of hours waiting, he had to leave. All requests of the police to find out what was going on were met with the response that they were dealing with it as soon as they could. P went through a terrible ordeal for those hours, many of them alone, not knowing if he would be spend that night charged and in custody or with his family. At close to midnight, P was called into the custody suite and told that he was going to be released without charge, at which point he broke down.

24. Only the police and/or the CPS can explain why it took them so many hours on 23 August to release P without charge but I find it hard to accept that this amounts to release "as soon as the need for detention no longer applies".

25. If this was P's experience, it begs the question: how many other suspects in terrorism cases have to spend this long, or perhaps longer, in detention before being released without charge?

THE TEST FOR AN EXTENSION OF DETENTION

26. In Operation Overt, a total of 24 people were arrested. They were dealt with in the following way:

<i>Detention Period</i>	<i>Persons In Custody at Start of Period</i>	<i>Charged During Period</i>	<i>Released Without Charge During Period</i>
0–2 days	24	0	1
2–7 days	23	0	0
7–14 days	23	11	3
14–21 days	9	4	0
21–28 days	5	2	3
<b>Totals</b>	<b>24</b>	<b>17</b>	<b>7</b>

27. Eight of the alleged “main players” in the conspiracy were charged fairly quickly—within 11 days of their arrest; well within the timeframe of the old 14-day limit. At the other end of the spectrum, it is significant that three of the five suspects authorised to be detained for the maximum 28-day period were released without charge. Moreover, on 1 November 2006, a judge at the City of London Magistrates’ Court dismissed the case against one of the men authorised to be detained for the 14–21 day period.

28. In my view, Operation Overt highlights the danger that the longest periods of pre-charge detention will be used in respect of those suspects against whom there is less evidence; in other words, those most likely to be innocent. Accordingly, in my view, it is imperative that there be proper protections in place to safeguard against this danger.

29. The current test for judicial authorisation of further detention is as follows (para. 32, schedule 8, TA 00):

- (1) A judicial authority may issue a warrant of further detention only if satisfied that:
  - (a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary as mentioned in sub-paragraph (1A), and
  - (b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.
- (1A) The further detention of a person is necessary as mentioned in this sub-paragraph if it is necessary:
  - (a) to obtain relevant evidence whether by questioning him or otherwise;
  - (b) to preserve relevant evidence; or
  - (c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.
- (2) In this paragraph “relevant evidence” means, in relation to the person to whom the application relates, evidence which:
  - (a) relates to his commission of an offence under any of the provisions mentioned in section 40(1)(a), or
  - (b) indicates that he is a person falling within section 40(1)(b).

30. In my view, the para. 32 test is all too easily satisfied, even where there is no evidence against a suspect and/or where there are many valid criticisms that can be made of the manner in which the investigation is being conducted.

31. I would respectfully suggest that the para. 32 should be supplemented or amended so that so that at every application for an extension to detention, the judge should have to be satisfied that:

- a. There is sufficient evidence to justify the decision to arrest and/or detain the suspect.
- b. The investigation in connection with which the person is detained is being conducted with all due diligence and expedition (this is the test for an extension to a post-charge custody time limit), including, but not limited to, full disclosure of the non-sensitive facts and evidence which formed the basis of the decision to arrest and detain him and the efficient questioning of the suspect about the disclosed facts and evidence.
- c. In any case where the police rely on the ground that they wish to obtain relevant evidence by questioning, there is material which the police have not had a reasonable opportunity to put to the suspect in interview.
- d. In any case where the police rely on the ground that they are awaiting the examination or analysis of relevant evidence, the suspect cannot be released on bail (see below) pending that examination or analysis.

32. Currently, there is no provision for suspects to be bailed by the police. This is not the case in non-terrorism investigations in which a person can—and routinely is—released on police bail. Failure to answer police bail is an arrestable offence. I am yet to hear a valid explanation for the anomaly between terrorism and non-terrorism investigations. I venture to suggest that the introduction of bail (possibly with conditions) for terrorism investigations will help to ensure that those most likely to be innocent of a terrorism offence are detained for no longer than strictly necessary.

33. I also consider that the judge should be required specifically to consider the suspect’s physical and psychological wellbeing if further detention is authorised.

#### THE PROCEDURE FOR AN EXTENSION OF DETENTION

34. I respectfully agree with the views expressed by the committee at § 80 of the July report regarding the suitability of holding judicial hearings by video link from the entrance hall of Paddington Green. The police are doing their best in very difficult circumstances but, to perhaps illustrate one of the problems, I have had to question an officer in charge of a major terrorism investigation whilst sitting next to him (so close that our shoulders were touching), each of us trying our best to hide his notes from the other.

35. I consider that the procedure for applying for an extension of terrorism detention should be supplemented and/or modified in the following minimum respects:

- a. Legal aid should be extended so that counsel (it is currently only available for solicitors) may be instructed to represent suspects at all applications to extend terrorism detention (I currently represent suspects at such hearings on a pro bono basis). In my view, all suspects should be entitled, if they so choose, to free representation by counsel at any hearings where their right to liberty is being determined, particularly as the case of *R, on the application of Nabeel Hussain v The Hon. Mr. Justice Collins* [2006] EWHC 2467 (Admin) has held that decisions of the High Court judge in respect of the 14–21 and 21-day detention periods are not subject to legal challenge.
- b. In respect of any hearing from which the suspect and his representatives are excluded, a special advocate (ie a security-cleared lawyer who, once he or she has seen the closed material, is barred from communicating with the suspect and his representatives) must be instructed to protect the rights and interests of the suspect.

36. Presently, I have a strong suspicion that the police and judges are not necessarily applying the entitlement to withhold information from suspects in strict accordance with the rules set out in paras. 33 and 34 of schedule 8, TA 00 and in accordance with the report of the House of Lords in *Ward (AP) v Police Service of Northern Ireland* [2007] UKHL 50.

37. Let me give the committee an example from Operation Overt: After seven days in detention, the police applied to extend P's detention. I knew that no evidence to incriminate P in any terrorism offence had been put to him in interview in those seven days. At the hearing of the application for further detention, I asked the officer whether there was any evidence which pre-dated P's arrest that had so far not been put to him in interview (if the answer was "no", the officer would have admitted that my client was arrested and was being detained on no evidence; if "yes", the police would find it difficult to persuade the judge that, having withheld material evidence for seven days, the investigation was being conducted diligently and expeditiously). In the event, the officer said that could not answer the question in the presence of the suspect and his representative. I pressed the officer to answer the question simply with a "yes" or a "no" but he would not. The judge decided that it was necessary to detain P for a further seven days and the investigation was being conducted diligently and expeditiously.

#### POST-CHARGE QUESTIONING

38. Currently, post-charge questioning is only conducted with the consent of the suspect and, when it happens, the defendant (as he now is) is told that he has the old-fashioned right to silence, ie his silence will not be held against him.

39. I do not have any difficulty with the government's proposal that the police be entitled to conduct post-charge questioning of terrorism suspects. Indeed I would welcome it if it helped to see off the proposal to extend the 28-day limit.

40. However, I am firmly of the view that adverse inferences should not apply to post-charge questioning. I consider that it would be unfair to a defendant who is awaiting trial and is in the process of preparing his defence to be put under any pressure to permit the Crown to have a dry-run at cross-examining him on further evidence as and when it comes into their possession.

41. If the government case is that the police require the post-charge questioning power to be able to judge whether they have brought the right charges, the answer to that is simple: the penalty for a defendant who chooses not to answer questions post-charge can hardly complain if his silence contributed to him being charged with more serious or additional terrorism offences.

42. If post-charge questioning and adverse inferences are introduced, the power should be subject to the following safeguards:

- a. A judge must give his permission to conduct the interview and he should only give that permission if he is satisfied that there is a realistic prospect that the new evidence is likely to affect the charges that the defendant currently faces.
- b. The police should only be permitted to ask questions about the new evidence.
- c. The police must, before the interview, have made full disclosure of the new evidence to the defendant and his representatives and the defendant must have an adequate opportunity to consult his representatives.
- d. There must be a cut-off point, after which further interviewing is not permitted.

#### THE PROPOSAL TO EXTEND 28-DAY DETENTION

43. As the committee might have gathered, I am wholly opposed to any extension to the 28-day limit on pre-charge detention in terrorism cases.

44. I take the view that all legislative and judicial decision making must be evidence-based and thus far, no evidence has been provided to suggest that there is a need for more than the present 28-day limit. I must confess that I have been surprised, to say the least, that Operation Overt is relied on as by proponents of an increase to the current 28-day limit as somehow supportive of their case.

45. The following matters are particularly significant:

- a. The police are required to make a decision only on whether to charge or release a suspect within the pre-charge detention limit. There is no requirement to disclose or present any evidence, to complete the investigation or to finalise any charges within that timeframe.
- b. The maximum period of pre-charge detention in all non-terrorism cases, including many grave and highly complex investigations, is only 4 days. There is no proposal to extend this limit.
- c. It is accepted by the police that there has not been a single terrorism case where an investigation has been hampered or erroneous charging decision made because of an insufficient period of pre-charge detention or where more than 28 days detention was required.
- d. A terrorist attack that threatens the UK's security or threatens serious damage to human welfare or the environment in the UK can, if necessary, be dealt with by the Civil Contingency Act 2004, which allows the government power temporarily to implement emergency measures, including extended periods of detention without charge.
- e. The UK's limit of 28 days already far exceeds the pre-charge detention limit in comparable democracies, all of which face the same or similar terrorism threat and investigative challenges.

46. Two recent and very substantial terrorism investigations that I have been acted in, Operations Rhyme and Vivace (in 2004 and 2005) involved all of the complexities that are cited by those seeking to extend the 28-day limit. In some respects there presented the greatest challenges to the investigators:

- a. Operation Rhyme in August 2004 was a massive international investigation in which there were at one time 13 suspects in police custody. Some of the key computer material was encrypted. DAC Peter Clarke has said on more than one occasion that, at the time of the arrests, there was not one shred of admissible evidence against the suspects.
- b. Operation Vivace concerned the 21 July 2005 London attacks and it is hard to imagine a more difficult time for the police and security services who were at the same time investigating the 7 July attacks.

47. Yet the police managed in both cases to make decisions on charge within the 14-day pre-charge detention limit applicable at that time.

48. My view on the matter can be simply stated: If, after 28 days in custody and following a thorough and efficient police investigation, there is insufficient evidence to charge a person with any terrorism offence, it is only fair to give that person the benefit of the doubt and to release him or her from detention. The investigation can of course continue after release and, if it is thought absolutely necessary, a close eye can be kept of that person's movements. The authorities can rest secure in the knowledge that the released person can hardly present a grave danger to the public if 28 days in custody has not revealed a case to answer on a single terrorism offence.

*Ali Naseem Bajwa*  
 25 Bedford Row  
 3 November 2007

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## 7. Letter from Jonathan Evans, Director General, MI5, to the Chairman

1. Thank you for your letter of 16 November.

2. I would be happy to provide a private background briefing to your committee on the current terrorist threat to the UK. I recently provided similar, off the record, briefing to the Home Affairs Select Committee. As you will understand, however, it would be inappropriate for me to be asked to comment on Government policy.

3. The Service's parliamentary accountability is to the Intelligence and Security Committee (ISC) and as a matter of course I inform Paul Murphy MP of any briefing of Select Committees.

4. You mentioned 5 December as a possible date. I would be available if required from 1000–1045.

*Jonathan Evans*  
 27 November 2007

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### **8. Letter from the Chairman to Jonathan Evans, Director General, MI5**

Thank you for your letter of 27 November which responded to my request for you to appear before the Joint Committee on Human Rights, which I chair. I am sorry not to have been able to respond to your offer to provide a private, background briefing to the Committee sooner, but I wished to discuss your offer with the other Members of the Committee.

Your letter does not directly address my request for you to give evidence on the record to the Committee so I am writing to seek clarification on this point and about whether there has been any recent increase in the terrorist threat level in light of the evidence given to the Home Affairs Committee by the former Attorney General Lord Goldsmith on 21 November.

Lord Goldsmith's evidence to the Home Affairs Committee was that he did not see any evidence during his time as Attorney General to indicate that longer than 28 days' pre-charge detention was necessary (Q491). He acknowledged that he had been out of government for several months and that things might have changed since then, and that if things had changed since then he would expect to see the material on which any new proposals were formulated (Q518).

Lord Goldsmith stepped down as Attorney General on 27 June 2007. Has the level of threat from international terrorism increased since that date? If so, to what extent has it increased and can you please provide us publicly with as much information about the basis of your assessment of the increase in the threat level as it is possible for you to provide consistently with the obvious public interest in not disclosing information which would harm national security? I would be grateful if you could reply dealing with these points, if possible by Monday 17 December.

I am sure you will appreciate that up to date, accurate and publicly accessible information about the nature and level of the threat posed by terrorism is central to my Committee's function of advising Parliament about the proportionality of the Government's counter-terrorism measures. For this reason I remain hopeful that you will agree to give public evidence to my Committee to assist it with its scrutiny of the human rights compatibility of the measures which the Government is proposing in its forthcoming counter-terrorism bill.

*5 December 2007*

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