



House of Lords
House of Commons
Joint Committee on
Human Rights

Counter–Terrorism Policy and Human Rights: 28 days, intercept and post– charge questioning

Nineteenth Report of
Session 2006-07

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

Current Staff

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Summary

The Committee has published several Reports dealing with human rights concerns raised by counter-terrorism policy. Although very critical in the past of aspects of Government policy, the Committee welcomes the recent significant change of approach and tone in Government pronouncements on counter-terrorism. This report focuses on the Government's main new proposals and a number of other issues (paragraphs 1- 13).

Recent Ministerial statements envisage an increase from 28 days in pre-trial detention limits. The Committee is not convinced of the need for this and recommends thorough scrutiny of the evidence, stronger judicial safeguards and improved parliamentary oversight. The Committee considers that there should be an upper limit on pre-charge detention and that Parliament, not the courts, should decide that limit after considering all the evidence (paragraphs 14 - 57).

The Committee recommends improved conditions of pre-charge detention, including a better-designed replacement for Paddington Green police station (paragraphs 58 - 98).

The Committee welcomes in principle the Government's review of the use of intercept as evidence. It remains convinced that the ability to use it would help bring more prosecutions against terrorists. It makes recommendations on implementation and considers that the law of public interest immunity would protect the public interest in non-disclosure (paragraphs 99 - 155).

The Committee makes recommendations on other alternatives to extending pre-charge detention, notably post-charge questioning (paragraphs 156 - 175).

The Committee believes that the Special Advocate system does not afford the individual a fair hearing and recommends changes (paragraphs 176 - 205).

The Committee may return to its concerns over control orders once the House of Lords gives judgment in cases pending. Following her predecessor's reference to the possibility of derogation from the right to liberty, the Committee awaits a response from the Home Secretary to its request for clarification of the Government's view of the level of threat from terrorism (paragraphs 206 - 210).

1 Introduction

Our inquiry

1. This is our third Report of this Session and our sixth report overall in our ongoing inquiry into counter-terrorism policy and human rights. Our purpose in keeping open our inquiry into this subject has been to enable us to continue to take evidence on specific aspects of counter-terrorism policy, with a view not merely to responding to measures brought forward by the Government but to putting forward positive policy suggestions for countering terrorism which are in our view compatible with the UK's human rights obligations.

The Government's change of approach

2. In previous reports in this inquiry, we have had cause to be very critical of the Government's general approach to counter-terrorism policy as well as aspects of its substance.¹ We have frequently complained about a lack of opportunity for proper parliamentary scrutiny of counter-terrorism measures, about the Government's apparent desire to be seen to do something about terrorism by rushing hastily prepared legislation through Parliament, and about the risk of counterproductivity which arises as a result of the alienation felt by certain communities who feel that they have not been properly involved in discussing and formulating an appropriate response to the threat from terrorism. We have also been critical of the Government's apparent willingness to call into question certain fundamental features of the human rights law framework with which the Government's response to terrorism must be compatible.

3. We therefore warmly welcome the announcement of a new approach to counter-terrorism policy set out in the statement of the former Home Secretary the Rt Hon Dr John Reid MP to the House of Commons on 7 June 2007.² The former Home Secretary announced that the Home Office had now completed a comprehensive review of counter-terrorism legislation and outlined both the Government's proposed approach to bringing forward new counter-terrorism measures and the specific areas of the law in which the Government is considering new legislation, probably in a bill to be brought forward in the autumn.

4. We welcome a number of aspects of this announcement. We welcome the Government's commitment to extensive consultation, both within and beyond Parliament, on the measures which are necessary, with a view to proceeding on the basis of national consensus, rather than partisan politics, on issues concerning national security. We welcome the commitment to work with relevant communities to isolate, prevent and

¹ See e.g. Third Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I/ HC 561-I (hereafter "JCHR Report on the Terrorism Bill"); Twelfth Report of Session 2005-06, *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 (hereafter "JCHR Report on First Control Order Renewal"); Twenty-fourth Report of Session 2005-06, *Counter Terrorism Policy and Human Rights: Prosecution and pre-charge detention*, HL Paper 240/ HC 1576 (hereafter "JCHR Report on Prosecution and Pre-charge Detention"); Eighth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL Paper 60/ HC 365 (hereafter "JCHR Report on Second Control Order Renewal").

² HC Deb 7 June 2007 cols 421-423 (hereafter "former Home Secretary's 7 June statement on counter-terrorism").

defeat violent extremism. We welcome the explicit recognition that as the powers to counter terrorism are increased, so there must be an increase in both parliamentary and judicial scrutiny of those powers to ensure a counter-balance against any arbitrary use of those powers. We welcome the commitment to give both us and the Home Affairs Select Committee an opportunity for pre-legislative scrutiny of draft clauses, before the introduction of any Bill. We also welcome the publication of a “Government Discussion Document” outlining some of the measures that might be included in a future bill, the commitment to publish a fuller “content paper” in the next few weeks, and the creation of a webpage on the Home Office website dedicated to the Bill. The Government has indeed committed itself to a more comprehensively consensual approach than it has ever used before and we look forward to playing our part in ensuring that this aspiration is fulfilled in practice.

5. We also welcome the measured tone of the Government’s reaction to the recent terrorist attacks in London and Glasgow. We are heartened that these attacks do not appear to have deflected the Government from the consensual approach set out in the former Home Secretary’s statement on 7 June. We welcome the indication by the Prime Minister and Home Secretary that there will be no “rush to legislate” in the wake of the attacks and that the Government remains committed to extensive consultation and debate about possible new measures to be brought forward in the autumn. We welcome the recognition in ministerial statements that countering the terrorist threat must be done not only by military, police, and intelligence means, but by “winning the hearts and minds” of members of the communities from which the violent extremists are recruited. Finally, we welcome the fact that the Government’s response has not suggested that human rights are a hindrance to protecting the public’s security, but rather has spoken of security in terms of the ability to live in accordance with “shared values” of individual dignity, life and liberty.³

The Government’s commitment to human rights law

6. Only two weeks before this change of approach, however, the former Home Secretary the Rt Hon Dr John Reid MP made a statement to Parliament in which he referred to what he considered to be the “inadequacy” of the international human rights law framework with which the Government’s counter-terrorism measures must be compatible.⁴ He referred to there being a disjuncture between the international human rights conventions we have inherited and the reality of the threat we face from terrorism today, resulting in there being “gaps” in the international legal framework. In the former Home Secretary’s view, these gaps and inadequacies cannot be addressed by courts and lawyers interpreting the legal conventions we have inherited, but must be addressed by politicians who should be working to modernise the law, including by “building on” the European Convention on Human Rights. The main change which he appeared to envisage was that the ECHR should be amended to make the right to security the basic right on which all other rights in the Convention are based.

7. In our report on the DCA and Home Office reviews of the Human Rights Act, we reported our concerns about the effect of repeated questioning of the domestic human

³ See e.g. the Home Secretary’s statement to the House of Commons on counter –terrorism on 2 July 2007, HC Deb 2 July 2007 cols 671-2; the Prime Minister’s interview on BBC Sunday AM, 1 July 2007.

⁴ HC Deb 24 May 2007, cols 1428-1429.

rights law framework by high-ranking members of the Government.⁵ The former Home Secretary's comments in Parliament on 24 May 2007 called into question the international human rights law framework which binds the UK. They were also directly at odds with the views of the then Lord Chancellor, Lord Falconer, given in evidence to us only three days earlier.⁶ The then Lord Chancellor disagreed that there are gaps in the international human rights law framework, saw no need to amend it and thought that the UK's commitment to it should be unequivocal.

8. We therefore wrote on 25 May 2007 to the then Home Secretary asking him to clarify whether or not it is the UK Government's position that the international human rights law framework requires amendment in order to be able to counter terrorism effectively, and if so how, and whether the UK had taken any active steps to build an international consensus to this effect.⁷

9. We did not receive a response to our questions before the former Home Secretary left office. We expect that the new Home Secretary will respond to our questions and hope that she will be unequivocal in her agreement with the former Lord Chancellor. **We recommend that the Government make an unequivocal public commitment to the existing international human rights law framework.**

The importance of prosecution

10. The Government's significant change of approach and tone in its counter-terrorism policy is in keeping with an emerging recognition that current counter-terrorism powers are, by now, broadly sufficient and that what is needed is not more legislative responses but a redoubling of efforts to use existing powers to prosecute those suspected of involvement in terrorism.

11. The Director of Public Prosecutions, Sir Ken Macdonald QC, in a recent public lecture, "Security and Rights", said,

"Acts of unlawful violence are proscribed by the criminal law. They are criminal offences. We should hold it as an article of faith that crimes of terrorism are dealt with by criminal justice. And we should start by acknowledging the view that a culture of legislative restraint in the area of terrorist crime is central to the existence of an efficient and human rights compatible process."⁸

12. The Head of the Metropolitan Police Counter Terrorism Command, Deputy Assistant Commissioner Peter Clarke, made a similar point in his recent public lecture, "Learning from experience: Counter-terrorism in the UK since 9/11":

"My personal view is that we now have a strong body of counter terrorist legislation that by and large meets our needs in investigating these crimes and bringing

⁵ Thirty-second report of Session 2005-06, *The Human Rights Act: The DCA and Home Office Reviews*, HL Paper 278/HC 1716 at para. 41.

⁶ Oral evidence, 21 May 2007, Qs 4, 15 and 46.

⁷ Ev 68.

⁸ *Security and Rights*, public lecture to the Criminal Law Bar Association by Sir Ken Macdonald Q.C., DPP (23 January 2007).

prosecutions. Prosecution through the courts, using judicial process that is recognised and understood by the public, is of course by far the preferred method of dealing with terrorism.”⁹

The importance of transparency

13. In our last Report, when we emphasised that it was a human rights responsibility of Government to protect those within its jurisdiction, we also emphasised that if by any legislation Government proved counter-productive (in the battle for hearts and minds) it would not be fulfilling that responsibility. **In our view, justice and its administration must be as transparent as it is in every way possible to make them and the case for any additional new legislation would convincingly have to be seen to be evidence-based. Justice has to be seen to be done.**

Our report

14. The main focus of this Report is consideration of what we consider to be the most significant of the proposals which the Government has announced it will be taking forward: the possible further extension of the 28 day limit on pre-charge detention, the possible use of intercept as evidence in criminal prosecutions, and other alternatives to extending pre-charge detention such as post-charge questioning of terrorism suspects. The Report also considers some other aspects of counter-terrorism policy, including the role of special advocates in control order proceedings, and the conditions of pre-charge detention at Paddington Green. We intend to inquire further into other matters, including the definition of terrorism and racial profiling, and to return to these in a later Report. We also intend to return in a future Report on torture to other aspects of the Government’s counter-terrorism policy, including towards extraordinary rendition.

⁹ The Inaugural Colin Cramphorn Memorial Lecture 2007.

2 Length of pre-charge detention

The Government's current position

15. The law on pre-charge detention was one of the specific areas which the former Home Secretary in his recent statement indicated the forthcoming counter-terrorism bill might seek to strengthen.¹⁰ He said that the decision to increase pre-charge detention limits from 14 to 28 days has been justified by subsequent events and has enabled prosecutions to be brought forward that “otherwise may not have been possible.” The Government believes it is right to extend the limit beyond 28 days in terrorist cases, but wants to build “broad agreement” on the way forward, and to this end has indicated that it wants to begin discussions now on how to do this. One possible way mentioned by the former Home Secretary would be to legislate now to extend the current 28 day limit but to make it clear that there would be further judicial and parliamentary oversight, such as a detailed annual report to Parliament with an accompanying debate.

16. The Prime Minister has also suggested, in a number of speeches and interviews, that the extension of the limit on pre-charge detention beyond the current limit of 28 days is one of the counter-terrorism measures the Government will be considering, and that any increase must be accompanied by “proper judicial scrutiny” and increased parliamentary accountability.

Developments since the increase to 28 days

17. In our report on Prosecution and Pre-Charge Detention in 2006, we gave detailed consideration to alternatives to lengthy pre-charge detention and concluded that “a combination of the flexibility introduced by the threshold test developed by the CPS, active judicial oversight of the application of the post-charge timetable, and the possibility of drawing adverse inferences from a refusal to answer questions at a post-charge interview should make it unnecessary to contemplate any further extensions to the maximum period of pre-charge detention of 28 days.”¹¹

18. In the Government's September 2006 response to the Committee's report, the Government said that the new maximum period of 28 days pre-charge detention had only been in place since the end of July 2006 and it would wish to see how it was working in practice, and it would be keeping the situation under review.¹² **We welcome the Government's confirmation that it has no plans to amend the Terrorism Act 2000 to include 'prevention' in the statutory grounds for detention, as the Home Affairs Committee had recommended, because the Government considers that this would not be permissible under Article 5(1) of the ECHR.**¹³

¹⁰ Former Home Secretary's 7 June Statement on Counter Terrorism, HC Deb 7 June, col. 422.

¹¹ JCHR Report on Prosecution and Pre-charge Detention, at para. 144.

¹² *The Government Reply to the Twenty-fourth Report of Session 2005-06*, HL Paper 240/HC 1576, Cm 6920 (29 September 2006), p. 11.

¹³ *ibid*, p. 4.

19. On 11 November 2006 the Metropolitan Police Commissioner, Sir Ian Blair, in a speech to the Urban Age Summit in Berlin, expressed the view that the question of a further extension beyond 28 days would soon have to be considered. He said:

“For other serious crimes, British police can but rarely do hold suspects for up to four days. After long and very heated parliamentary debates, that has currently been changed in Britain to 28 days in terrorist cases. Of course, whether it is 28, 4 or 1, suspects have access to full legal advice in custody. In the recent alleged airline plot, we needed all the 28 days in respect of some of the 24 suspects: if there had been more people, we would probably have run out of time. I believe that an extension to the 28 days time for detention will have to be examined again in the near future.”

20. On 20 November 2006 we wrote to the Commissioner indicating that we would be giving very careful scrutiny to whether there is any evidence that a further extension to the period of pre-charge detention is necessary.¹⁴ We asked for a detailed analysis of the way in which each of the 24 suspects arrested on 10 August 2006 had been dealt with, in order to be able to assess whether the experience of dealing with those suspects provides evidence for or against the need for a further extension of the 28 day period.

21. In the meantime, on 1 February 2007 the Prime Minister’s Official Spokesman (“PMOS”) briefed the press that the Home Secretary had told Cabinet that he would be trying to persuade the public and Parliament that 28 days’ pre-charge detention was not enough and that “going further would be a useful tool in the counter-terrorism effort.” The PMOS said that “the initiative to raise the subject for discussion again had come from the police, not the Government.”

22. On 2 February 2007 we received a response from the Commissioner to our letter written in November 2006.¹⁵ On pre-charge detention the Commissioner’s letter says:

“The MPS welcomed recent legislative changes that enabled suspects to be detained for up to 28 days without charge. The MPS is not requesting that this period be extended; this is a matter for Parliament. There is currently no direct evidence to support an increase in detention without charge beyond 28 days, however, the complexity and scale of the global terrorist challenge, sophisticated use of technology, protracted nature of forensic retrieval and potential for multiple operations may lead to circumstances in which 28 days could become insufficient.

The speed with which terrorist conspiracies have increased in number, in the gravity of their ambition and the number of conspirators suggests that a pragmatic inference can be drawn that 28 days may not be enough at some time in the near future.”

23. The letter from the Commissioner also included a detailed analysis of the way in which the 24 suspects arrested on 10 August 2006 in connection with the alleged airline bomb plot were dealt with. We return to this important subject in more detail below. In short, the analysis shows that a total of 9 suspects were detained without charge for more than 14 days under the new provisions, of whom 6 were charged with an offence and 3 released without charge.

¹⁴ Ev 48.

¹⁵ Letter from Sir Ian Blair to the Chair of the JCHR, undated but received on 2 February 2007, Ev 49.

24. In June 2007 the Home Secretary laid before Parliament Lord Carlile's annual report on the operation in 2006 of the Terrorism Act 2000 (including the operation of the extended pre-charge detention regime).¹⁶ Observing that the adequacy of the extended period remains the subject of heated and frequent debate, Lord Carlile reports that he expects in the course of time to see cases in which the current maximum of 28 days will be proved inadequate, but he has seen no such cases since the increase to 28 days.¹⁷ Commenting on the adequacy of the judicial safeguards, he notes that senior circuit judges supervise 14-28 day detentions and that "these responsibilities too have been tested extensively in the past year, and have proved fit for purpose."¹⁸

25. The 2006 Act provides for annual renewal of the provisions in the Terrorism Act 2006 which extend the period of pre-charge detention from 14 to 28 days.¹⁹ Under that section, the maximum period of pre-charge detention under the Terrorism Act would have been reduced from 28 to 14 days on 25 July 2007 (one year after the extended period was brought into force) unless a renewal order was passed by both Houses. On 11 June 2007, Tony McNulty MP laid the draft order to renew the extension of the maximum period.²⁰ On 10 July 2007 the draft Order was approved by the House of Commons.²¹ The draft Order is due to be debated in the House of Lords on Tuesday 24 July 2007.

26. Since the renewal of the extension to 28 days, there has been renewed pressure to extend the period even further. On 15 July 2007 the President of the Association of Chief Police Officers ("ACPO"), Ken Jones, was reported as having said "We are now arguing for judicially supervised detention for as long as it takes. We are up against the buffers on the 28 day limit. We understand people will be concerned and nervous, but we need to create a system with sufficient judicial checks and balances which holds people, but no long than a day [more than] necessary."²² He said that, with hindsight, the police should not have got involved in the debate about the precise number of days of pre-charge detention, but should have said that what is needed is an extraordinary mechanism to give the police the ability to investigate these complex cases under judicial supervision.

27. The call for a further extension was promptly supported by the statutory reviewer of the operation of the terrorism legislation and the Government's Security Minister, Lord West of Spithead. On 16 July 2007, Lord Carlile said that senior judges, not politicians, should set the limit. Rather than have a "completely sterile" debate about an arbitrary number of days, he said it would be better if senior judges, who have a great deal of experience in analysing evidence, should monitor individual detention periods, which would be subject to appeal.²³ Lord West also said that the scale and complexity of the threat meant police would need

¹⁶ *Report on the Operation in 2006 of the Terrorism Act 2000* by Lord Carlile of Berriew Q.C. (June 2007), presented to Parliament pursuant to s. 126 of the Terrorism Act 2000 (hereafter "Lord Carlile's Report on the operation of the Terrorism Act in 2006").

¹⁷ *ibid* at para. 95.

¹⁸ *ibid* at para. 101.

¹⁹ Terrorism Act 2006, s. 25.

²⁰ The draft Terrorism Act 2006 (Disapplication of section 25) Order 2007.

²¹ HC Deb 10 July 2007 cols 1346-1368.

²² *The Observer*, *Lock terror suspects up indefinitely say police*, 15 July 2007.

²³ BBC Radio 4, *the Today Programme*, 16 July 2007.

longer to question suspects, and that he could see “great attractions” in Lord Carlile’s proposal.²⁴

28. In our view the current debate about whether there should be a further extension of the period of pre-charge detention beyond 28 days raises five main questions:

- (1) Has the increase from 14 to 28 days been shown to be justified by subsequent events?
- (2) Is there evidence of a need to extend the limit beyond 28 days?
- (3) Why does the UK need a period longer than any comparable democracy?
- (4) Are the current judicial safeguards adequate?
- (5) Are the current arrangements for parliamentary review adequate?

Has the increase from 14 to 28 days been shown to be justified?

29. The Government’s view is that the increase from 14 to 28 days has been “justified by subsequent events” and has enabled prosecutions to be brought that “otherwise may not have been possible”. We take this to be a reference to the fact that 6 of the suspects charged with offences in connection with the alleged airline bomb plot uncovered in August 2006 were charged after having been detained for more than 14 days. In the recent debate on the renewal of the extension to 28 days, the Minister, Tony McNulty MP, said “the alleged plots since that time have substantiated the position on 28 days”.²⁵

30. The Commissioner of the Metropolitan Police is of the same view, commenting in his Berlin speech that “in the recent alleged airline plot, we needed all the 28 days in respect of some of the 24 suspects”.²⁶

31. We are not in a position to contradict either the Government or the Commissioner in their view that subsequent events have demonstrated the necessity for extending the maximum period of pre-charge detention from 14 to 28 days, and we do not seek to do so when we do not have the necessary information to make that assessment. We do, however, have some observations to make about the extent to which there has been rigorous independent scrutiny of the operation in practice of the extended pre-charge detention provisions since they were brought into force in July 2006.

32. The purpose of including in the Terrorism Act 2006 a requirement that there be annual renewal of the extension of pre-charge detention from 14 to 28 days²⁷ was to provide Parliament with the opportunity to consider the matter again after the power had been in operation for a year. For such parliamentary review to be meaningful, however, it must be informed by a thorough, detailed and independent review of how the power has been operating in practice. In our view, such rigorous independent scrutiny of the need for more than 14 days’ pre-charge detention requires detailed examination of the actual cases in

²⁴ *Ibid.*

²⁵ HC Deb 10 July 2007, col. 1348.

²⁶ Speech to the Urban Age Summit, 11 November 2006.

²⁷ Terrorism Act 2006, s. 25.

which the power of extended detention has been exercised. It requires a number of detailed questions to be asked and a careful analysis undertaken of whether the use of the new power in fact demonstrates its necessity.

33. In our Chair's letter to the Commissioner in November 2006²⁸ we asked to be provided with a thorough analysis of the way in which each of the 24 suspects arrested in connection with the alleged airline bomb plot were dealt with, including precisely when they were charged or released without charge, the reasons relied on at each application to a court for an extension of authorisation for detention, and the exact charges brought against those charged. We also asked to be supplied with detailed statistics showing for how long all suspects who have been arrested under terrorism powers have been held before being either released or charged since 25 July 2006, when the new 28 day period came into force.

34. We are grateful to the Commissioner for providing the detailed information showing the way in which the 24 suspects arrested in August 2006 in connection with the alleged airline bomb plot were dealt with.²⁹ The information provided details of the exact length of time each suspect was detained; whether a charge was brought in each case; the exact nature of any charge brought; and the current status of any subsequent court case.

35. The detailed information provided shows that 17 of the 24 suspects arrested on 9 and 10 August 2006 in connection with the alleged airline bomb plot were charged with offences:

- 11 within 12 days,
- 1 within 15 days,
- 3 within 19 days and
- 2 after 27 days 20 hours.

36. Of the 17 charged, therefore, 6 were charged only after their detention had been extended beyond 14 days, and 2 were charged just 4 hours before the end of the 28 day period.

37. The detailed figures also show that, of the 7 suspects released without charge:

- 1 was released within a day
- 1 after 11 days
- 2 after 13 days
- 1 after 23 days and 23 hours
- 1 after 27 days and 16 hours and
- 1 after 27 days and 20 hours.

²⁸ Ev 48.

²⁹ Ev 49.

38. Of the 7 not charged, therefore, 4 were released without charge within the old 14 day period, but 3 were released without charge well after that time, including 2 who were released without charge only at the very end of the 28 day period.

39. It is clear to us that this bare statistical information alone is not sufficient to answer the question “Does the airline bomb plot demonstrate the need for the extension to 28 days?” On the one hand, the fact that 6 suspects were detained for more than 14 days before being charged would appear on the face of it to show that the increase from 14 to 28 days was necessary. On the other hand, the fact that 3 of the 5 suspects who were authorized to be detained for the full 28 days were released without charge very close to the end of that period could be said, on the face of it, to raise concerns about whether the power to detain for up to 28 days is being used to detain those against whom there is least evidence.

40. There are clearly more detailed questions which need to be asked in order for Parliament to be fully informed about whether the experience of the alleged airline bomb plot shows the increase to 28 days to have been justified. For example:

- Was the evidence on which the individuals were charged after 14 days available before the expiry of the 14 day period?
- How precisely has the 28 day period enabled prosecutions to be brought forward that “otherwise may not have been possible”?
- How did the longer period affect the urgency with which the police pursued the investigation in relation to each of the suspects?
- How often were the suspects held for the longer period questioned by the police?
- Did the longer period available to the police have any noticeable effect on the amount of disclosure made by the police to the suspects?
- Are investigations being pursued in relation to any of the three suspects who were detained for almost the full 28 day period and then released without charge and have any of these three individuals been made subject to a control order?
- How would the availability of post-charge questioning have affected the way in which the police conducted their investigation into the alleged airline bomb plot? Would it have enabled any of the suspects to be charged with the same offence earlier than they were in fact charged?
- What was the psychological impact on those detained for nearly four weeks before being released without charge?

41. We are disappointed that the most recent report of the statutory reviewer of the Terrorism Act 2000³⁰ does not provide this level of detailed scrutiny of the cases in which the new power of extended pre-charge detention has been used.³¹

³⁰ Lord Carlile’s Report on the operation of the Terrorism Act in 2006.

³¹ The Report does not state in how many cases the power to authorise extended detention has been exercised.

42. During the recent debate on renewal of the extension to 28 days the Minister queried whether it is “useful” to look for “evidence” of the need to extend the period of pre-charge detention.³² He said that “the issue is as much about looking at where we are going over the next couple of years, in terms of the threat, as it is about assessing where we have come from”³³ and that the purpose of the proposed consultation is to arrive at “a view that is part evidence-based, part speculation and partly based on making some assumptions, to the extent that we can, about the nature of the threat that is to come.”³⁴ **We are concerned by any suggestion that the extension of the period of pre-charge detention does not need to be justified by reference to clear evidence that the period which already exists has proved to be inadequate in practice. We remain of the view any extension 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.**³⁵

43. **We recommend that for all future renewals of the power of extended pre-charge detention, there be made available to Parliament in good time an independent review of the circumstances in which the power to be renewed has been used in the previous year so as to enable Parliament to make an informed decision, on the basis of independent expert advice, about whether this extraordinary power of pre-charge detention is justified.**

44. **We also recommend that an appropriate independent body undertake an in-depth scrutiny of the operation in practice by the Metropolitan Police Service of the new power of pre-charge detention beyond 14 days. The Metropolitan Police Authority, the independent statutory body charged with scrutinising the work of the Metropolitan Police Service,³⁶ may be well placed to do this.³⁷ Although it is too late for such an independent review to inform this year’s parliamentary debate on renewal of the extension to 28 days, it is highly desirable that it be available to inform the forthcoming debate in Parliament as to whether there needs to be a further extension to the 28 day limit.**

Is there evidence of a current need to go beyond 28 days?

45. Although the Government’s aim is to build a broad consensus about the need to extend the maximum period of detention beyond 28 days, it has made it clear that it is already itself persuaded that such a need exists.

³² Tony McNulty, MP, HC Deb 10 July 2007, col. 1347.

³³ *ibid*, col. 1348.

³⁴ *ibid*, col. 1349.

³⁵ Third Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I/HC 561-I, at paras 89-90.

³⁶ The Metropolitan Police Authority was established by the Greater London Authority Act 1999.

³⁷ The MPA conducts “in-depth scrutinies” of specific aspects of the Metropolitan Police Service’s work: see e.g. its reports on the use by the MPS of stop and search powers under s. 44 Terrorism Act 2000.

46. As we said in our report on what became the Terrorism Act 2006, extending the period of pre-charge detention to 28 days, the interference with the right to liberty in extending pre-charge detention is so significant that there needs to be very clear evidence of the need for it. We regard it as an important part of our role to give very careful scrutiny to whether there is any evidence that a further extension to the period of pre-charge detention is really necessary. We regard two pieces of evidence as being of particular significance on this question.

47. First, in his response to our queries about the use that has so far been made of the power to detain for more than 14 days, the Commissioner of the Metropolitan Police, Sir Ian Blair, said

“There is currently no direct evidence to support an increase in detention without charge beyond 28 days, however the complexity and scale of the global terrorist challenge, sophisticated use of technology, protracted nature of forensic retrieval and potential for multiple operations may lead to circumstances in which 28 days could become insufficient. The speed with which terrorist conspiracies have increased in number, in the gravity of their ambition and the number of conspirators suggests that a pragmatic inference can be drawn that 28 days may not be enough at some time in the near future.”³⁸

48. Second, in his recent Report on the Operation in 2006 of the Terrorism Act 2000, Lord Carlile said:

“I expect in the course of time to see cases in which the current maximum of 28 days will be proved inadequate. I have seen no such cases since the increase to 28 days.”³⁹

49. We asked Tony McNulty MP, on what basis the Government would be seeking to persuade the public and Parliament that 28 days’ pre-charge detention is not sufficient when, in the view of the current Metropolitan Police Commissioner, there is currently no direct evidence to support an increase beyond 28 days.⁴⁰ The Minister agreed that it is very difficult to provide evidence, and thought that the Commissioner had been right to say that there was no substantial evidence other than what had happened in the summer following the alleged airline plot.⁴¹ He said “given the increasing complexities of some of these plots, it may well be that we need *in extremis* to go beyond that, so is there some sort of legislative device or portal that says *in extremis* it can go beyond 28 days but really, really for exceptional circumstances alone with absolutely appropriate parliamentary, judicial and other forms of scrutiny.”

50. During our visit to Paddington Green police station we were told that one of the main reasons why the police wanted to extend the period of pre-charge detention was the time taken to search the hard drives of computers seized from terrorism suspects. In an attempt to ascertain the scale of this problem, we asked if we could be provided with any figures, or a rough indication, of the number of times Terrorism Act suspects had been released without charge and then subsequently rearrested (or sought for arrest) in light of

³⁸ Ev 49.

³⁹ Lord Carlile’s Report on the operation of the Terrorism Act in 2006, at para. 95.

⁴⁰ Oral evidence, 18 April 2007, Q 97.

⁴¹ *ibid*, Q 98.

information that had subsequently come to light as a result of searching computer hard drives or related material. We were told in response that one officer could think of one such situation, but that “no data is kept to capture this set of circumstances.” **We recommend that, in order to help Parliament evaluate the strength of the case for further extending pre-charge detention, the police should in future keep data in relation to this and similar questions which are central to the adequacy of the current period.**

51. It would therefore appear that the case for extending the maximum period of detention beyond the current limit of 28 days is precautionary in nature: none of those advocating an extension of the period is claiming that there is evidence to demonstrate that the current limit has proved to be inadequate in any single case to date. Rather the case for extending the 28 day limit is based on an assessment that there “may well be” such a case in the future, given the increasing complexity of the plots and therefore of the investigations.

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

53. We note the recent proposals by ACPO and Lord Carlile for extending the current 28 day limit by removing an upper limit altogether and replacing it with enhanced judicial supervision of extensions of pre-charge detention. **We welcome any proposal to improve the current judicial safeguards, which we consider to be inadequate for reasons we explain below. We do not agree, however, that the law should authorise such judicially supervised pre-charge detention “for as long as it takes”: this risks becoming preventive detention, which, as the Government itself accepts, is not permissible under Article 5 ECHR. Nor do we agree that Parliament should leave it to the judges to decide on a case by case basis what the limit of pre-charge detention should be. In our view it is essential that there be an upper limit to the period of pre-charge detention, and that in a parliamentary democracy this limit should be clearly prescribed in a law passed by Parliament after carefully considering the evidence relied on to demonstrate the length of time which is needed.**

54. In addition to the lack of direct evidence demonstrating a current need to extend the 28 day period, we remain of the view that such an extension is unnecessary in light of a number of other alternatives which, in combination, should significantly reduce the need for longer pre-charge detention. In addition to those identified in our previous report (the flexibility introduced by the lower “threshold test” for charging developed by the CPS, active judicial oversight of the application of the post-charge timetable, and the drawing of adverse inferences from a refusal to answer questions at a post-charge interview), the availability of police bail for some of the less serious terrorism offences should also, in our view, make it less necessary to increase the maximum detention period. We consider these alternatives to extending pre-charge detention in Chapter 5 below.

Why does the UK need a longer period than other democracies?

55. In other comparable democracies, such as Canada, the maximum period of pre-charge detention is very much shorter than 28 days.⁴² We note that the suspects arrested in Toronto in 2006 in connection with an alleged plot to carry out various terrorist offences were charged very shortly after arrest. In light of this apparently significant difference, we asked the Commissioner what in his view is different about the UK situation that makes it necessary to have a period of pre-charge detention so much longer than in other comparable democracies?⁴³

56. The Commissioner replied that legislation and judicial process differ widely across different countries, and that the Canadian counter-terrorism operation in question was different from the operation in relation to the alleged airline bomb plot. The Canadian authorities had been monitoring the suspects for some time and had infiltrated the group, so they already had substantial quantities of evidence before arresting. In the case of the alleged airline bomb plot at Heathrow, the Commissioner said, the arrests were made in the interests of public safety on the basis of intelligence and the process of gathering evidence which could substantiate charges only really began after arrest.

57. Even assuming that there were in fact these differences between the particular UK and Canadian operations, we assume that the case for acting pre-emptively on the basis of intelligence must be just as applicable in other jurisdictions such as Canada. We therefore remain puzzled by the apparently large discrepancy between the 28 day period of pre-charge detention in the UK and the period in other comparable countries. **We recommend that the Government commission an independent comparative study of pre-charge detention periods in comparable democracies, together with an analysis of the possible reasons for any significant differences between the position in the UK and the position in such comparable countries.**

Are the judicial safeguards adequate?

58. We welcome the Government's acceptance that any extension of the current 28 day limit on pre-charge detention would have to be accompanied by "proper judicial oversight". We also welcome the Prime Minister's acknowledgment that such proper judicial scrutiny is essential in order to guarantee against arbitrariness in the exercise of powers which take away liberty. Although, for the reasons we have given above, we do not agree with Lord Carlile's recent suggestion that a statutory upper limit be replaced by improved judicial supervision, we are also encouraged by his suggestion that there is scope for improving the judicial safeguards that currently exist when pre-charge detention is extended.

59. We have consistently expressed our view in previous reports that the judicial oversight which already exists over pre-charge detention up to 28 days is inadequate.⁴⁴ In those earlier reports we have explained in detail why in our view the judicial scrutiny of extended

⁴² For the position in France and Spain, see JCHR Report on Prosecution and Pre-charge Detention (2006) at paras 118-121.

⁴³ Ev 48.

⁴⁴ JCHR Report on the Terrorism Bill at paras 93-99; JCHR Report on Prosecution and Pre-charge Detention at paras 136-138.

pre-charge detention is not proper judicial scrutiny: in summary, it falls well short of a full adversarial hearing because under the relevant provisions of the Terrorism Act 2000⁴⁵ detention can be extended in the absence of the detainee or on the basis of material not available to them.⁴⁶ We were of the view that any further increase in the period of pre-charge detention beyond 14 days would require the procedural deficiencies in the current statutory regime to be remedied in order to ensure that the detainee has access to a full adversarial hearing before a judge when deciding whether further detention is necessary. **We repeat our recommendation that, in order for there to be “proper judicial scrutiny”, there should be a full adversarial hearing before a judge when deciding whether further pre-charge detention is necessary, subject to the usual approach to public interest immunity at criminal trials, including when necessary the use of a special advocate procedure when determining whether a claim to public interest immunity is made out.**

60. We also have concerns about the adequacy of judicial oversight of decisions to extend pre-charge detention in light of the narrow scope of the questions which the court is required to answer. On an application by the police for extended detention, the court must ask two questions: first, are there reasonable grounds for believing that further detention is necessary to preserve relevant evidence, including pending the result of an examination or analysis of any relevant evidence; and, second, is the investigation being conducted diligently and expeditiously. Neither of these questions goes to the substantive question of whether there is material giving reasonable grounds to believe that the suspect has committed a terrorism related offence. There is no onus on the police to satisfy the court of this basic premise of the suspect’s detention. The adequacy of the judicial control is called into question by the fact that three of the suspects arrested in connection with the alleged airline bomb plot last August were judicially authorised to be detained for up to 28 days yet were eventually released without charge at the very end of that period. We intend to look more closely at the way in which judicial hearings to extend detention operate in practice and we may report further on this question in due course.

61. **We recommend that any independent inquiry into the operation of the 28 days provision in the alleged airline bomb plot case should scrutinise carefully the basis on which the court granted warrants of further detention to the police in relation to suspects who were eventually released without charge, and in particular the three suspects who were detained for nearly the entire 28 day period before being released without charge. We also recommend that consideration be given to introducing an additional requirement that a court authorising extension of the period of detention must be satisfied that there is a sufficient basis for arresting and questioning the suspect.**

Are the current arrangements for parliamentary review adequate?

62. We welcome the Government’s recognition that any further extension of the limit on pre-charge detention, beyond the current 28 days, would also require further

⁴⁵ Paras 33(3) and 34(1) and (2) of Schedule 8 to the Terrorism Act 2000.

⁴⁶ Our predecessor Committee made the same point about the deficiencies in the procedural safeguards for the detainee to guarantee against arbitrary or disproportionate detention when the maximum period of pre-charge detention was increased from 7 to 14 days in the Criminal Justice Act 2003: see Eleventh Report of Session 2002-03, *Criminal Justice Bill: Further Report*, HL Paper 118/HC 724.

parliamentary as well as judicial oversight. The Government suggests that this might, for example, include a detailed annual report to Parliament with an accompanying debate.

63. In our view, as we have commented above, there is already a need to enhance the current arrangements for parliamentary review to ensure that Parliament is fully and reliably informed, by an independent expert, prior to renewing the existing power to detain without charge for up to 28 days. **We recommend that, whether or not the current limit is extended, parliamentary oversight of this very significant and extraordinary power be improved by (i) the Home Secretary providing at least a month before any renewal debate a detailed annual report to Parliament on the use which has been made by the police of the power to detain without charge beyond 14 days; (ii) an independent reviewer reporting annually to Parliament at least a month before any renewal debate on the operation in practice of pre-charge detention more than 14 days, and on the necessity for the power; and (iii) an annual debate in both Houses on an affirmative resolution to renew the power. These improvements to the process of parliamentary review need not await legislation to be introduced by the Government. They could, however, be made the subject of statutory requirements in the forthcoming counter terrorism bill.**

3 Conditions of pre-charge detention

Introduction

64. In view of the significant extension of the period for which people suspected of terrorism offences can be detained before charge, we decided to look more closely at the conditions in which such suspects are detained and at the way in which they are treated during such detention.

65. Terrorism suspects are taken to a dedicated high-security facility at Paddington Green police station in London for questioning. We visited Paddington Green on 16 May 2007 and were able to look around the cells and other facilities and talk to the police officers responsible for both the custody and investigation of terrorism suspects, the station superintendent and one of the GPs responsible for assessing the health of detainees. We were impressed by the professionalism and positive attitude of the staff we met at Paddington Green, who work in less than ideal conditions but appeared to us to be committed to respecting the human rights of detainees. We are grateful to all those we met for the time they took to show us around and answer our questions, both during and after our visit.

66. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”), which is the monitoring body for the European Torture Convention, reported a number of significant concerns about Paddington Green following two visits it made to the UK in July and November 2005.⁴⁷ These concerns were reiterated by representatives of the CPT with whom we met during our visit to Strasbourg in December 2006. During our visit to Paddington Green we sought to follow up the Committee’s main concerns.

Facilities at Paddington Green

67. **The facilities available for dealing with terrorism suspects at Paddington Green are plainly inadequate.** They were designed when the station was built in the late 1960s in order to deal with terrorism suspects from Northern Ireland – a far different threat from that faced from international terrorism today, in terms of scale and complexity. The main deficiencies of Paddington Green are as follows:

- there are only 16 cells. Over 20 people at a time were arrested during individual terrorism investigations in both 2005 and 2006 and some had to be sent to Belgravia police station, which is not set up to deal with terrorism suspects. In addition, the normal day-to-day work of Paddington Green police station, which serves the local neighbourhood, was severely disrupted.

⁴⁷ Report to the UK Government on the visit to the UK carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 15 July 2005, CPT/Inf (2006) 26 (hereafter “CPT July 2005 Report”) at paras 10-24; Report to the UK Government on the visit to the UK carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 25 November 2005, CPT/Inf (2006) 28 (hereafter “CPT November 2005 Report”) at paras 27-39.

- there are no dedicated facilities for forensic examination of suspects on arrival. Cells have to be specially prepared for this purpose, which is time consuming and further exacerbates the lack of accommodation.
- there is no dedicated space for exercise. Part of the car park can be cleared to provide a small exercise yard but this takes time to arrange and the car park is overlooked. This is likely to reduce considerably opportunities for exercise.⁴⁸
- only one room is provided for suspects to discuss their cases in confidence with a solicitor.
- there are no facilities on site for the forensic examination of equipment such as computer hard drives.
- the videoconferencing room is too small to accommodate judicial hearings on the extension of the period of detention. Such hearings are usually now held in the entrance lobby, which is itself cramped, is a thoroughfare into the custody suite, and opens into the staff toilets at the back. It is clearly an inappropriate location for such a crucial part of the detention process.

68. We are not the first to comment on these problems. The CPT reported in 2005 that “the present conditions at Paddington Green High Security Police Station are not adequate for such prolonged periods of detention [as 28 days]”.⁴⁹ The Independent Police Complaints Commission concluded in 2006 that “in our view this facility needs to be improved if it is to be suitable for longer term detention” and recommended that the facilities should be upgraded or relocated.⁵⁰

69. The problem of the suitability of Paddington Green for prolonged periods of detention has been taken into account in the new Code of Practice on the detention, treatment and questioning by police officers of terrorist suspects.⁵¹ The Code provides that where detention beyond 14 days is authorised the detainee *must* be transferred from detention in a police station to a designated prison as soon as practicable.⁵² The Code explains that transfer to prison is intended to ensure that individuals who are detained for extended periods of time are held in a place designed for longer periods of detention than police stations.⁵³ Lord Carlile, in his recent report on the operation in 2006 of the Terrorism Act 2000, found the facilities at Paddington Green to be acceptable for up to 14 days’

⁴⁸ See CPT July 2005 Report at para 22 and CPT November 2005 Report at para 39.

⁴⁹ CPT July 2005 Report at para 24.

⁵⁰ IPCC Report into the Forest Gate counter-terrorism operation, 2 June 2006, published Feb 07, Recommendation 4.

⁵¹ Police and Criminal Evidence Act 1984 Code of Practice H: detention, treatment and questioning by police officers under section 41 of, and Schedule 8 to, the Terrorism Act 2000 (hereafter “Code H”).

⁵² Code H, para. 14.5. The detainee need not be transferred to a prison if he or she specifically requests to remain in detention at a police station, or if there are reasonable grounds to believe that transferring them to a prison would significantly hinder a terrorism investigation, delay charging the detainee or their release from custody, or otherwise prevent the investigation from being conducted diligently and expeditiously.

⁵³ Notes for Guidance, Note 14J.

detention,⁵⁴ although he also concluded that “it is plain that the Metropolitan Police need a new custody suite suitable for up to 30 terrorism suspects.”⁵⁵

70. We agree with the CPT that conditions at Paddington Green are not adequate for prolonged periods of detention. Bearing in mind that for all other offences the maximum period of police custody is four days, we consider 14 days to be a prolonged period of detention for which the facilities are not adequate. We are in no doubt that the facility for terrorism suspects at Paddington Green must be replaced as a matter of urgency.

71. Lord Carlile has suggested that a new facility for the Metropolitan Police would ideally be purpose built, very secure, and in a location causing as little disruption as possible to nearby residents and businesses.⁵⁶ A new custody suite for terrorism suspects could be situated in a remote location, where maximum security could easily be arranged. We heard strong arguments against this option from the police officers we spoke to at Paddington Green, however. Co-location with an ordinary police station lends a degree of transparency to the process of investigation and may give some reassurance that terrorism suspects are being dealt with fairly and in accordance with the law. There are also several benefits to staff in working inside, or close to, an everyday police station and the need to accommodate investigative staff who may work very long hours during investigations must be borne in mind.

72. We recommend that a new facility for dealing with terrorism suspects should be established as soon as possible. Such a facility should be located in London and should strike an appropriate balance between the need for high security and the desirability of appearing accessible to the local community. It should be part of a functioning police station rather than a facility exclusively for terrorism suspects in a remote location. Accommodation and social facilities for staff must be close at hand. The new terrorism facility must be significantly larger than Paddington Green and should take account of the detailed recommendations we make in this Report about the conditions of detention and the treatment of detainees.

73. Transferring suspects to prison after 14 days is on balance beneficial to suspects given the current unsuitability of Paddington Green for prolonged periods of pre-charge detention. It is not, however, without significant disadvantages. Prisons are not suitable locations for people who have not been charged with any offence. Although the social and leisure facilities available will be better, and there will be more opportunity for association, the prison environment may be unduly oppressive, particularly at a high security prison such as Belmarsh to which terrorism suspects are transferred. Suspects also have to be ferried backwards and forwards to the police station for interviewing, and there must be a risk that transfer to prison may encourage the police to pursue the investigation with rather less urgency once the suspect who is the subject of investigation is housed away from the police station. For all these reasons **we think it undesirable in principle that suspects be transferred out of police and into prison custody during the period of pre-charge detention. We recommend that the new purpose-built facility which replaces**

⁵⁴ Lord Carlile’s Report on the operation of the Terrorism Act in 2006, at para. 97.

⁵⁵ *Ibid.*, at para. 98.

⁵⁶ *Ibid.*

Paddington Green should be designed so as to be suitable for pre-charge detention of suspects for up to the maximum of 28 days.

Use of video-conferencing when extending detention

74. One of the most important safeguards accompanying the power to detain without charge is the requirement of judicial authorisation for extending the period of detention. The first such application must be made to a judge after 48 hours, and then subsequent applications for extensions must be made when the warrant of further detention expires, which is usually at the 7, 14 and 21 day mark, up to a maximum of 28 days. Applications to extend a period of detention are made by the police to a judge at Horseferry Road Magistrates Court. The CPT discovered in 2005 that these applications are usually made by video-link.⁵⁷ The Government's response was that this was done for security purposes.⁵⁸

75. During our visit, we were assured that suspects were free to choose to attend court in person, but most preferred to stay at Paddington Green. We heard that video-conferencing is used for about 80% of applications for extended detention. The police told us that they would also prefer hearings to extend detention to be done by video-link from Paddington Green, because it saved time and money compared to transferring suspects to Horseferry Road Magistrates Court. However, we were told that security considerations would not usually be the reason why the hearing takes place by video-link, because even when the hearing takes place by video link at Paddington Green the site still has to be secured. The reason the hearings are usually conducted by video-link, we were told, is that the suspect usually prefers to stay put at the police station.

76. We were also told that the superintendent from Counter Terrorism Command makes the application to the judge for extended detention in person, and that investigating officers prepare the application and will be present in the room if their help is required by the superintendent.

77. The CPT's concern was that video-conferencing was not suitable given that one of the main purposes of such a hearing is to monitor the manner in which the detained person is being treated:⁵⁹

From the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of the judge. Further, it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detainee is via a video-conferencing link.

78. The CPT therefore recommended that steps be taken to ensure that terrorist suspects in respect of whom an extension or further extension of police custody is sought are always physically brought before the judge responsible for deciding this question.

⁵⁷ CPT July 2005 Report at para 12.

⁵⁸ *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 11 to 15 July 2005*, CPT/Inf (2006) 27 at para. 11.

⁵⁹ CPT July 2005 Report at para 12 and CPT November 2005 Report at para 32.

79. **We share these concerns.** In our view, for the reasons given by the CPT, the routine use of videoconferencing does not meet with the highest standards of judicial oversight which would be expected for such a crucial part of the detention process. The judge does not have the same opportunity to witness the demeanour and body language of all the relevant people, and the suspect is likely to be more inhibited in a room in a police station, in the presence of their interrogators, talking only to the judge via a TV screen. **We recommend that suspects should be formally 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. Code H should be amended to make this explicit.**

80. **Even where a suspect waives their right to appear physically before the judge, it is unacceptable to hold judicial hearings into the extension of a period of detention by video-conference from the entrance hall at Paddington Green, the same room which provides access to the staff toilets. At the very least a dedicated room, sufficiently large for the purpose, is required, if needs be in the police station proper.**

Videoring of interviews

81. The anti-terrorism branch wish to record on video all interviews, to supplement the audio recording which is currently the definitive record in evidential terms. The main argument for this is that video would capture conduct, gestures, facial expressions and demeanour which cannot be recorded in audio.

82. The Home Secretary has power to make an order requiring the video recording of interviews with terrorism suspects in police stations, provided they are conducted in accordance with a code of practice about such video recording which the Home Secretary is required to introduce.⁶⁰ Video recording of terrorism interviews is currently permitted in Northern Ireland by virtue of the Terrorism Act 2000 (Code of Practice on Video Recording of Interviews) (Northern Ireland) Order 2003. No such provision has been made in respect of the rest of the United Kingdom. Although video recording of interviews is not illegal it can be objected to by suspects and their advisers.

83. In our view videoring all interviews with terrorism suspects is likely to be a human rights enhancing measure, providing a more reliable record of any abuse or ill-treatment during interrogation, as well as a means for police officers to rebut false allegations of such abuse or ill-treatment.

84. **We have written to the Home Secretary to ask for the reasons for not authorising the videoring of interviews with those suspected of terrorism in Great Britain. In the absence of a good reasons, we recommend that the Home Office consider the case for making an order under the Terrorism Act 2000 to require the video-recording of interviews of terrorism suspects, to supplement audio recording, and provide reasons for its decision.**

⁶⁰ Schedule 8 para. 3(2) of the Terrorism Act 2000.

Healthcare

85. A small team of local GPs are additionally employed by the police as forensic medical experts (FME). Their duties include conducting daily medical examinations of terrorism suspects and advising on fitness for detention and interview. Following the daily medical examination of a detainee, the doctor fills out Form 83 which is given to the police, countersigned by the custody officer and becomes part of the custody record, and orally debriefs police staff on the findings of their examination. The doctors also keep their own notes which are fuller than those on the police Form 83 and are subject to the usual rules of patient confidentiality.

Adequacy of medical record keeping

86. One of the main criticisms in the CPT reports was that doctors visiting the custody suites kept inadequate medical records on detainees.⁶¹ In the first of the CPT's reports in July 2005, it commented that the basic safeguard of a right of access to a doctor on the whole operated in a satisfactory manner, but that the recording of some of the forensic medical examinations was at times of such a rudimentary nature as to weaken the effectiveness of the safeguard. This observation was based on scrutiny of Form 83. In its second report in November 2005, the CPT was still concerned that doctors were not recording the findings from their medical examinations in full but said that, as a result of its most recent visit, it was now aware that many doctors are opposed on ethical grounds to making a fuller record of their findings available to the police, because of their concerns about patient confidentiality. It recommended that the UK authorities review the current system of recording medical examinations in police custody suites.

87. From information received from one of the FMEs at Paddington Green it appears that the CPT, at least in its first report in 2005, had not distinguished between the records kept by the police, which are relatively sparse, and fuller medical notes which the doctors make for their own purposes and which are covered by medical confidentiality. We received a template for the confidential notes kept by the doctors, which provided for far more information to be recorded than on the police forms, including any allegations of ill-treatment and any injuries or trauma to the detainee's body. These notes are not shared with the police but kept locked in the filing cabinet in the FME room accessible only by the FMEs. We did not ascertain, however, whether the specimen medical record forms we had been sent were standardised forms used by all FMEs at Paddington Green, or just those used by the particular FME concerned. We also note that the specimen forms do not contain all of the information that the CPT recommends should be included in such forms, such as an indication by the doctor of the extent to which any allegations of ill treatment are supported by the doctor's objective medical findings.

88. Although we formed the view that the current system for medical assessment of detainees generally seems to work well, we think there is scope for improvement in the system of recording medical examinations of detainees at Paddington Green by FMEs. In order to ensure that there is a full record of the information required to make medical examinations an effective safeguard against ill treatment, we recommend that, in addition to Form 83, a new standardised form be used which includes

⁶¹ CPT July 2005 Report at paras 15, 17-19 and CPT November 2005 Report at paras 35-36.

- a full account of statements made by the detainee which are relevant to the medical examination, including the detainee's description of his or her state of health and any allegations of mistreatment
- the doctor's assessment of the extent to which any allegations of ill-treatment are supported by objective medical findings.

The form should be made available to the detainee and his or her lawyer, but not to the police. We also recommend that section 9 of Code H should be amended to make clear that an FME is expected to report any signs and symptoms indicative of ill-treatment to an appropriate independent authority.

89. We also urge the Medical Ethics Committee of the British Medical Association and the General Medical Council to consider whether the medical examination of terrorism suspects in detention, and the keeping of records of those examinations, should be the subject of specific guidance to practitioners, in order to achieve greater consistency of practice.

Confidentiality of medical examinations

90. Another issue raised by the CPT was whether medical examinations are conducted in private.⁶² The standard operating procedures stated that the examination of a detainee by an FME without an officer present should be "exceptional rather than normal." The CPT found this unacceptable and recommended that appropriate measures be taken to ensure that all medical examinations are conducted out of the hearing of police officers so as to ensure confidentiality, and out of the sight of police officers unless the doctor requests otherwise.

91. We specifically asked about this and were assured that this was normally done, although doctors sometimes requested that a police officer be present for their own safety. We were not told whether, where a doctor requests the presence of a police officer, that officer can see but not hear the examination being conducted. We note that new Standard Operating Procedures for dealing with suspects detained in the secure unit at Paddington Green are in the course of being written following the lessons learnt from the first extended periods of detention beyond 14 days in August and September 2006. **We recommend that both the Standard Operating Procedures and section 9 of PACE Code H (concerning the care and treatment of detained persons) be amended to ensure that the medical examination of a suspect is always carried out in conditions which guarantee confidentiality, for example by requiring that medical examinations are always conducted out of the hearing of police officers and, unless the doctor concerned requests otherwise, out of the sight of such officers.**

92. There are two further points on which we feel improvements could be made in this area.

⁶² CPT November 2005 Report at para 37.

Right of female detainees to be examined by a female doctor

93. Firstly, the doctors serving Paddington Green are all male. We were told that, if a female detainee asked for a woman doctor one would be found from a neighbouring FME team. Such a request has apparently never been made, but we were told that if it were there would be no logistical obstacle to making the necessary arrangement. **We consider that female detainees should be offered the option of examination by a female doctor as a matter of routine, and we recommend that this should be done and both the Standard Operating Procedures and section 9 of PACE Code H amended to make this explicit.**

Doctors' independence of police

94. Second, the GP with whom we discussed healthcare at Paddington Green commented that he would prefer to be paid by the Home Office or the NHS, rather than the police, in order to demonstrate that he acted independently of the police service. **We agree with this suggestion and recommend that the Home Office consider alternative options for the payment of forensic medical experts in order to demonstrate more clearly that they are independent of the police service. In our view they should be paid by the NHS.**

Delaying access to a lawyer

95. Following its November 2005 visit, the CPT expressed its concern that under the Terrorism Act 2000⁶³ the right of access to a lawyer can be denied to a terrorism suspect for a period of up to 48 hours.⁶⁴ Access to any lawyer can be delayed if a superintendent has reasonable grounds to believe that the exercise of the right will have one of a number of consequences, such as physical injury to any person, the alerting of other suspects still at large, or the hindering of the recovery of property.

96. The CPT reiterated that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest, and the right to have access to a lawyer during that period is therefore a fundamental safeguard against ill-treatment. The CPT recognises that in order to protect the legitimate interests of the police investigation it may exceptionally be necessary to delay for a certain period the detainee's right of access to a lawyer of their choice, but this should not result in the right of access to any lawyer being totally denied during that period. Access to an independent lawyer should be arranged in such circumstances. The CPT recommended that the law be amended to ensure that all persons arrested have the right of access to a lawyer from the outset of their deprivation of liberty.

97. In light of the CPT's concern we asked at Paddington Green how often the power to delay access to legal advice for up to 48 hours is used and whether exact figures were available showing the number of times it had been used since July 2005. We were told that the power was only used very rarely and only on what were described as "safety grounds", such as where a suspect had been apprehended in close proximity to a live bomb and the police interview him or her to try to ascertain if there are other life-threatening devices. Detainees may be subject to what was described as a 'safety interview' after they have been

⁶³ Schedule 8, para. 8.

⁶⁴ CPT November 2005 Report at para 34.

arrested if it is thought that public safety may be at risk and once the agreement of the station superintendent has been obtained. We were told that although such “safety interviews” usually took place without a lawyer present, there was no reason not to have a duty solicitor present if one could be found in the time available. We were further told that it would be difficult to give even a rough indication of the number of times that terrorism suspects have been interviewed without a lawyer present because this would require examination of the interview records of each individual.

98. We share the concerns of the CPT about the width of the power to delay the right of access to a lawyer by a terrorism suspect. We note that the account of the circumstances in which a “safety interview” might be held with a suspect, such as where the matter may be one of life or death, is considerably narrower than the much broader statutory power.

99. **We recommend that in future detailed records be kept of the number of times that the power to delay access to legal advice is used and the precise grounds on which “safety interviews” are used so as to enable independent scrutiny of the use of this power to delay access to one of the most important safeguards against ill treatment. We also recommend that efforts are always made to secure the presence of a duty solicitor from the outset of a suspect’s deprivation of liberty, unless the need to interview the suspect is so urgent that one would be unable to get there in time.**

Response to the CPT report

100. We were surprised to learn that some of the police officers at Paddington Green, and the GP who we met at the station, were largely unaware of the CPT reports on Paddington Green and the Government’s response. We detected a willingness on the part of all the people we met to deal with any criticisms constructively, but they did not appear to have been provided with the necessary information to enable them to act on concerns which had been expressed by a significant human rights monitoring body. **We recommend that the Government draw the attention of relevant police officers, forensic medical experts and other staff to these Reports, and subsequent reports on the detention of terrorism suspects by parliamentary committees and other bodies, and ensure that their views are taken into account in formulating the Government’s reply to all such reports.**

Respect for family life and privacy

101. We learned during our visit that suspects detained at Paddington Green are not entitled to any family visits or any correspondence, and can only communicate with their family in English on a monitored telephone line.

102. We understand the need for stringent controls on detainees’ communications during an investigation, and the need to maintain a high security environment at Paddington Green. We are also aware, however, of the very wide range of terrorism offences, suspicion of which may lead to detention at Paddington Green, and the lengthier period of pre-charge detention, and we question whether a blanket prohibition on family visits and correspondence is likely in all circumstances to be a proportionate interference with the right to respect for family life. **We recommend that consideration be given to replacing the blanket prohibition on family visits and correspondence during detention at**

Paddington Green with a discretion to allow supervised family visits and monitored correspondence in circumstances where not to do so would be disproportionate.

103. All detainees at Paddington Green are subject to constant video surveillance in their cell. We noticed on the monitoring screens that the entire area of the cell is visible, including the area in which the toilet is situated, but that there is a small area of pixillation on the screen the purpose of which, we were told, is to obscure any view of the genital area when the detainee is using the toilet. We noticed that the area obscured was extremely small, so it would still be possible to see most of a detainee who is using the toilet, even if the precise area of the toilet seat is obscured from view.

104. This struck us as an unnecessary and disproportionate interference with the detainee's privacy and dignity. There may be a case for such intrusive surveillance of a detainee who has been assessed as at risk of suicide or self-harm, but such detainees will be in the minority and should be identified by the risk assessment process. In relation to detainees who have not been assessed as not posing a risk of suicide or self-harm, we doubt whether the interference with their privacy and dignity is proportionate to the security purpose which is served by the surveillance. **We recommend that the area within the cell which is obscured from view be extended so as to ensure that a detainee is not visible at all when using the toilet.**

Conclusion

105. Paddington Green was designed in an era when terrorism suspects could be held for no longer than 48 hours. Suspects can now be held before charge for up to 28 days, 14 of which may be at Paddington Green, and, given the longer period of detention which is now possible, it is likely that increasing numbers of suspects will spend 14 days in detention at Paddington Green. The cells at Paddington Green are, to say the least, spartan, containing nothing more than a bench with a mattress and pillow, and a toilet. Visitors are not allowed and, as we have noted, very limited provision is made for exercise. The GP we met with said that he had seen little evidence of deteriorating mental health in the suspects he had assessed. Nevertheless, the potential for terrorism suspects to suffer mental health problems because of lengthy detention at Paddington Green appears to us to be significant. We are concerned that holding terrorism suspects in such basic conditions for as long as 14 days may give rise in certain circumstances to breaches of the right not to be subjected to inhuman or degrading treatment in Article 3 of the ECHR. Furthermore, investigations would be jeopardised if suspects were rendered unfit for interview because of the conditions in which they are held, and there must also be a risk that in certain circumstances evidence obtained from questioning the suspect during such an extended period of detention in such basic conditions will be ruled inadmissible by a court, or a court may refuse to draw an adverse inference from any silence during questioning whilst detained in such conditions. **We recommend that the conditions in which suspects are detained at Paddington Green are improved immediately, beginning with more systematic arrangements for exercise and the provision of basic facilities for leisure. Any replacement for Paddington Green must have considerably improved facilities for detaining suspects for long periods.**

4 Using intercept as evidence

The Government's current position

106. In his recent statement to the House of Commons outlining the Government's approach to future counter-terrorism legislation, the former Home Secretary the Rt Hon John Reid MP announced that the Government will "commission a review of intercept as evidence on Privy Counsellor terms."⁶⁵ He said that the Government's position on intercept as evidence has consistently been that it would only change the law to permit intercept to be used as evidence if the necessary safeguards can be put in place to protect sensitive techniques and to ensure that the potential benefits outweigh the risks. Although he had not personally been persuaded that this was the case, he thought that the right approach was to address this carefully and fully before making a decision on whether to use intercept as evidence. He said that this was what the Government had been doing, but it was now necessary to reach a conclusion on the question. Hence the proposed review by Privy Counsellors.

107. **We welcome in principle the Government's announcement of a review of this important issue.** There has been growing frustration at the lack of progress on this issue in the face of steadily mounting evidence that the prohibition on the use of intercept as evidence is widely considered to be one of the principal obstacles to bringing more successful prosecutions of people suspected of involvement with terrorism. Internal Government reviews of the issue have been proceeding for years, but very little of the detail of those reviews has been made public other than their conclusions that there should be no change in the current position. In its response to our report on Prosecution and Pre-Charge Detention in September 2006, the Government said it was looking at a "Public Interest Immunity Plus" model and that this work was due to report to ministers in due course. In April this year we asked the minister at the Home Office, Tony McNulty M.P., whether that report had yet been received and if not when it was expected.⁶⁶ He said that it was going through an iterative process and had not yet been received in a definitive form that would enable the Government to make a statement to Parliament, but he hoped that it would be as soon as possible.

108. **We expect the newly announced review by Privy Counsellors to take place as expeditiously as possible and look forward to the Government announcing the proposed structure and timescale of the review at the earliest opportunity. We particularly welcome the fact that the review will be conducted on a cross-party basis. We also expect the composition of the panel of Privy Counsellors to reflect the importance of public confidence in its independence from Government. We understand that the nature of the subject matter of the review is such that it may be necessary for the Privy Counsellors to consider highly sensitive information which cannot be publicly disclosed. However, whilst recognising this reality, we recommend that the proposed review result in a published report containing the detailed reasoning of the Privy Counsellors conducting the review. In the meantime, we recommend that**

⁶⁵ Home Office Oral Statement on Counter Terrorism, 7 June 2007.

⁶⁶ Oral evidence, 18 April 2007, Q 156.

the Government publish its most recent report of its consideration of a “Public Interest Immunity Plus” model in order to inform public and parliamentary debate.

109. In this part of our Report, we report further on our consideration of the use of intercept as evidence. We expect that the evidence given in the course of our inquiry, and the conclusions and recommendations made in this part of our Report, will be taken into account in the forthcoming review.

Recent developments concerning the use of intercept as evidence

110. In our report on *Prosecution and Pre-Charge Detention* in July 2006 we concluded that the current statutory ban on the admissibility of intercept evidence⁶⁷ should now be removed and attention turned to ways of relaxing the ban.⁶⁸

111. In September 2006, the then Attorney General, Lord Goldsmith stated in an interview with the Guardian newspaper that he was “personally convinced that we have to find a way of avoiding the difficulties. I do believe there are ways we can do that. Otherwise we’re depriving ourselves of a key tool to prosecute serious and organised crime and terrorism.”⁶⁹ The Director of Public Prosecutions supported the Attorney General’s call for the removal of the ban the following day.⁷⁰ On 21 November 2006, in a radio broadcast, the DPP declared himself “completely satisfied” that providing for the admissibility of intercept would make it more likely that terrorist suspects could be prosecuted.⁷¹

112. On 23 November 2006, Lord Lloyd, the author of the 1996 Report on terrorism calling for the admissibility of intercept, introduced a short Private Member’s Bill in the House of Lords, the *Interception of Communications (Admissibility of Evidence) Bill*. The Bill would relax the absolute prohibition on the admissibility of intercept evidence by permitting the introduction of such evidence, on application by the prosecution, in proceedings in respect of serious crime or terrorism offences.⁷² Under the Bill, when deciding whether to admit such evidence, the court would be required to take account of all relevant considerations, including any application by the Secretary of State to withhold the evidence, or part of it, on the ground that its disclosure, or the disclosure of facts relating to the obtaining of the evidence, would be contrary to the public interest, and any submission that the evidence was obtained unlawfully.⁷³

113. On 25 April 2007 the House of Lords amended the Serious Crime Bill to provide for the admissibility of intercept evidence in cases involving serious crime.⁷⁴ The Government has indicated that it intends to recommend that the amendment be reversed in the Commons.

⁶⁷ Contained in s. 17 of the Regulation of Investigatory Powers Act 2000.

⁶⁸ JCHR Report on Prosecution and Pre-charge Detention (2006) at para. 101.

⁶⁹ The Guardian, 21 September 2006.

⁷⁰ The Guardian, 22 September 2006.

⁷¹ BBC Radio 4, File on 4, 21 November 2006.

⁷² Clause 1.

⁷³ Clause 2.

⁷⁴ Clause 4(2) and Schedule 13 of the Bill. HL Deb 25 April 2007, cols 687-697. The amendment was proposed by Lord Lloyd and carried by 182 votes to 121.

Our inquiry

114. In light of the mounting evidence that the prohibition on the use of intercept as evidence is a serious obstacle to bringing prosecutions for terrorism offences, we announced that we would be conducting a short inquiry into possible ways of relaxing the current statutory prohibition on the admissibility of intercept evidence.⁷⁵ We called for evidence, not on *whether* the ban on the admissibility of intercept evidence should be relaxed, but on *how* to do so. In particular we welcomed views on the following questions:

- What are the main practical considerations to be taken into account when devising a legal regime for the admissibility of intercept?
- What safeguards should apply?
- Would the ordinary disclosure rules need modification, and if so how?
- What would be the role played by the law of public interest immunity?
- What is the relevance of recent technological developments?
- Do private providers of telecommunications services have any particular views about how the prohibition should be relaxed?

We also welcomed detailed views on potential means of addressing the problem, including by reference to the approach of other countries, especially other common law jurisdictions.

115. We received written evidence from the Independent Police Complaints Commission, JUSTICE, Liberty, the London Innocence Project and the Northern Ireland Human Rights Commission.⁷⁶ JUSTICE appended to its submission a copy of its Report, *Intercept Evidence: Lifting the ban*, which we have found a very useful resource.⁷⁷ We also took oral evidence on the subject from the Director of Public Prosecutions, Sir Ken Macdonald QC; the Rt Hon Lord Lloyd of Berwick; John Murphy, Deputy Chief Constable of Merseyside Police and ACPO's lead on intercept; the Rt Hon Sir Swinton Thomas who was Interceptions Commissioner from 2000 to 2006; Tony McNulty MP, Minister of State at the Home Office; and the Attorney General Lord Goldsmith. We have also discussed the subject at various informal meetings, for example with Lord Carlile, the statutory reviewer of terrorism legislation, and the police at Paddington Green Police Station, and corresponded with others, such as the Metropolitan Police Commissioner. We are grateful to all those who have assisted us with this inquiry.

The human rights issues

116. The difficulty of obtaining sufficient admissible evidence to prosecute terrorist offences in the criminal courts has frequently been relied on in the past by the Government to justify exceptional counter-terrorism measures, including detention of foreign nationals without trial under Part IV ATCSA 2001, control orders and, most recently, pre-charge

⁷⁵ JCHR Press Notice No. 2 of 2006-07, 23 November 2006.

⁷⁶ Ev 72-95.

⁷⁷ A JUSTICE report (October 2006).

detention of up to 28 days. In each case, the Government has repeated its preference for criminal prosecution, but has cited evidential difficulties as one of the main justifications for its exceptional measures. The Government's failure, so far, to bring forward proposals for relaxing the ban on the admissibility of intercept therefore has important human rights implications, because it contributes to the need for exceptional measures which themselves risk being incompatible with the UK's human rights obligations. Permitting the use of intercept as evidence may be necessary in order to guarantee a fair trial for those accused of involvement in terrorism who are currently subjected to other forms of control which are not accompanied by the criminal due process guarantees which go with a fair criminal trial.

117. Using intercept as evidence in criminal trials raises two other human rights issues. First, there is the question of whether the use of intercept as evidence is compatible with the accused's right to a fair trial. We agree with Liberty and JUSTICE that there is no inherent human rights objection to the use of intercept as evidence in a criminal trial. However, whether the right to a fair trial is protected in practice will depend on how the law strikes the balance between protecting the public interest in not disclosing sensitive information and the right of the accused to the disclosure of material which might assist his or her defence. We consider this question in detail below.

118. Second, the interception of communications is clearly an interference with the right to respect for private life and correspondence which are protected by Article 8 ECHR, and the use of such intercepted material as evidence in a subsequent criminal trial would also amount to such an interference. To be justifiable, the legal framework governing such interferences must contain sufficient safeguards against arbitrariness and abuse. At present the legal framework does not contain any requirement that there be prior judicial authorisation of interception of communications. We consider below whether such a requirement should be introduced if the product of such interception is to be used as evidence in criminal trials.

The value of intercept in prosecutions for terrorism

119. There appears to be a wide range of views about the value of intercept evidence in enabling terrorists to be prosecuted. Sir Swinton Thomas, until 2006 the Interception of Communications Commissioner, thinks that it will make little if any difference, and in the long run will reduce prosecutions because it will hamper investigations as terrorists, now aware of previously secret techniques, successfully avoid having their communications intercepted.⁷⁸ He also told us that the experience from other jurisdictions is that intercept has been of little value in facilitating prosecutions for terrorist offences.⁷⁹ Lord Carlile thinks that it might make a difference in a handful of cases but that this will only be marginal at best.⁸⁰ Baroness Scotland, responding on behalf of the Government at the Second Reading of Lord Lloyd's Private Member's Bill, told the House of Lords "The evidential use of intercept would not even add significantly to the number of convictions that can be secured."⁸¹

⁷⁸ *Report of the Interception of Communications Commissioner for 2005-06*, HC 315 (19 Feb 2007) at paras 42-46.

⁷⁹ Oral evidence, 12 March 2007, Qs 7 and 8.

⁸⁰ First Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005 (2 February 2006), para. 37.

⁸¹ HL Deb 7 March 2007, cols 309-310.

120. We looked to the heads of the prosecution authorities for their view on this important question, assuming them to be in the best position to know the answer in fact. We asked the DPP how significant a difference it would make if the intercept ban was relaxed in terms of bringing more criminal prosecutions against suspect terrorists. His answer was unequivocal:

“We have spoken, as I think you probably know, a great deal to colleagues abroad, in the United States, Canada and Australia particularly, who have systems closest to ours. The message we have had from all of them is that it would make an enormous difference. Colleagues in the Department of Justice in the United States have told us that the majority of their major prosecutions now against terrorist figures and organised crime figures are based upon intercept evidence. I think it is well known that for the first time each of the five New York crime godfathers are in prison, each of them as a result of the use of intercept evidence. In Australia, I was told by the head of the New South Wales Crime Commission that prosecutors who did not rely on intercept evidence were not being “serious” in this area of work. When I was in the United States I spoke with the National Security Agency, the Drug Enforcement Administration, the counter-terrorism section of the Justice Department, the organised crime section of the Justice Department. In Australia I spoke to the Australian Security Intelligence Organisation, all of the crime commissions, the Commonwealth DPP, the New South Wales DPP, the Australian Federal Police. Everybody without exception told us that this material is of enormous use. It is cheap, it is effective; it drives up the number of guilty pleas and it leads to successful prosecutions. We are convinced, and have been for a number of years, that this material will be of enormous benefit to us in bringing prosecutions against serious criminals, including terrorists.”⁸²

121. We put to him specifically what the Minister, Baroness Scotland, had told the House of Lords a few days earlier, that the evidential use of intercept would not even add significantly to the number of convictions that can be secured. The DPP said:

“I disagree profoundly with that. Some investigations were undertaken, as you probably know, when this was being looked at some years ago to look at old cases and to try to determine whether intelligence intercept that had been used in those cases had driven up the number of successful prosecutions and convictions. It found that the difference would have been marginal. The problem with that approach is that you are not comparing like with like. If you look at material which is acquired for intelligence purposes, it is acquired on a different basis, with a different motive and with a different expected outcome than material which is targeted and acquired for evidential purposes. The whole point about intercept obtained for evidential purposes is that you target people who you think may be involved in crime and you look to intercept them talking about crimes which they are committing with prosecutions in mind. I cannot believe that all of our colleagues in jurisdictions so similar to ours abroad have formed such a strong view about the value of this material that somehow there is something different about our jurisdiction which would mean a different situation would apply here. That makes no sense to me.

⁸² Oral evidence, 12 March 2007, Q1.

Prosecutors, certainly in the Crown Prosecution Service, are strongly of the view that this material would be of assistance.”⁸³

“We had a major case of people trafficking which you may recall two or three months ago. This was people trafficking across Eastern Europe by organised gangs. A large number of these defendants pleaded guilty because we were able to play to them and their legal advisers intercept material which had been acquired abroad which, as you know, is admissible in this jurisdiction. I myself had many experiences at the Bar, when I was representing serious criminals, of them being convicted through their own mouths by the use of bugs and such like, including a case in which an IRA terrorist had a bug placed in the lorry in which he was transporting a bomb across London. There is no more powerful evidence for prosecutors than defendants convicting themselves out of their own mouths.”⁸⁴

122. On 16 March 2007, Lord Lloyd, moving the Second Reading of his Private Members Bill, the Interception of Communications (Admissibility of Evidence) Bill, relied heavily on the evidence given to the Committee by the DPP and described the case made by him for a change in the law as “overwhelming”.⁸⁵ The Government’s position, however, was unaffected by the evidence of the DPP: Baroness Scotland, responding to the debate for the Government, made exactly the same case as she had made the previous week when opposing Lord Lloyd’s proposed amendment to the Serious Crime Bill.⁸⁶ To our surprise, she made no reference to the fact that the DPP “profoundly disagreed” with her statement in the earlier debate that the evidential use of intercept would not even add significantly to the number of convictions that can be secured. Indeed, she ignored it, repeating her argument in the earlier debate:

“It is sometimes argued that if only we could produce intercept evidence against terrorists we would be able to lock more of them up and avoid measures such as control orders. That is simply untrue. The last review concluded that there would be, I emphasise, very limited utility against terrorists.”⁸⁷

123. We also asked the then Attorney General, Lord Goldsmith, for his view about how significant a difference relaxing the ban on using intercept would make in terms of bringing more prosecutions against suspected terrorists. He believed that, provided the genuine problems which exist can be overcome, “it would be very beneficial for prosecutors to be able to use intercepted materials”.⁸⁸ Indeed, he believed “it is capable of being one of the key tools in bringing some of the most dangerous and serious criminals to justice.”

124. The police, in their evidence to our inquiry, were of a similar view. The Commissioner, for example, told us that the Metropolitan Police Service supports, in principle, the use and legal admissibility of intercept material, arguing that it is “vital”, in

⁸³ *ibid*, Q2.

⁸⁴ *ibid*, Q5.

⁸⁵ HL Deb 16 March 2007 col. 966.

⁸⁶ HL Deb 9 March 2007.

⁸⁷ HL Deb 16 March 2007 cols. 991-2.

⁸⁸ Oral evidence, 26 June 2007, Q247.

the widest interests of public safety and security for best possible evidence to be available to place before the courts.⁸⁹ ACPO similarly believe that it may assist the police greatly in the prosecution of terrorists.⁹⁰

125. We have found particularly compelling the evidence from the DPP and the former Attorney General about the value of intercept evidence in prosecuting terrorism offences. In our view those who are responsible for the prosecuting authorities are in a unique position to make a judgment about how valuable intercept evidence would be in enabling prosecutions of terrorist suspects which cannot currently be brought because of lack of admissible evidence. It would require exceptionally good reasons and clear evidence to disagree with their judgment on a question so central to their experience and expertise. **We recommend that the Government addresses in its response to us the arguments in favour of the use of intercept provided by the former Attorney General, the DPP and the Commissioner.**

126. We have considered carefully the arguments made by those who claim that intercept would not make much difference to the ability to bring prosecutions for terrorism related offences but we are not persuaded that they contain such exceptional reasons or clear evidence. **We are satisfied that the evidence of the DPP and the former Attorney General puts the matter beyond doubt: that the ability to use intercept as evidence would be of enormous benefit in bringing prosecutions against terrorists in circumstances where prosecutions cannot currently be brought, and that the current prohibition is the single biggest obstacle to bringing more prosecutions for terrorism. We recommend that this be taken as the premise of the forthcoming review by the Privy Council. The difficult question is not whether the current ban on the evidential use of intercept should be relaxed, but how to overcome the practical obstacles to such a relaxation.**

The practical obstacles to using intercept as evidence

127. The evidence we have received in the course of our inquiry has identified four broad types of practical considerations which need to be taken into account when devising a legal regime for the admissibility of intercept evidence:

- (1) how to protect sensitive information about secret intercept methods, techniques and capability at the same time as achieving a fair trial (“protecting sensitive information and fair trial”);
- (2) how to avoid overburdening the police and the security agencies, by the need to transcribe and retain huge quantities of intercept in readiness for possible disclosure, and the prosecution and the court in the face of likely applications for disclosure from the defence in the course of a criminal trial (“avoiding onerous disclosure requirements”);
- (3) how to keep up with rapid technological developments in communications (“keeping up with changes in technology”); and

⁸⁹ Letter from Metropolitan Police Commissioner to Committee, received 2 February 2007, Ev 49.

⁹⁰ Oral evidence, 12 March 2007, Q3.

- (4) how to secure the co-operation of the telecommunications companies which are strongly opposed to intercept being used as evidence (“overcoming objections of telecoms providers”).

128. As we will explain below, having received considerable written and oral evidence concerning all of these practical objections to relaxing the ban, we consider that it is mainly the first and the second, the very practical problems of protecting sensitive information whilst ensuring a fair trial, and of the potentially onerous obligations imposed by the law on disclosure, that present genuinely difficult issues which will require the careful attention of the Privy Council when it conducts its review.

(1) Protecting sensitive information and fair trial

129. One of the principal practical objections most frequently made against relaxing the ban on using intercept as evidence is that it would inevitably lead to secret methods, techniques and capabilities of interception being revealed to terrorists, with the result that valuable intelligence material would be lost in the future because terrorists would find ways of avoiding their communications being intercepted.

130. The case has been most powerfully put by Sir Swinton Thomas, both in his last annual report as Interception of Communications Commissioner, in which he said that all the current advantages of intercept evidence would be “lost if all interception techniques are laid bare”,⁹¹ and in oral evidence to us, arguing that allowing intercept to be used as evidence will do “huge damage” to the capabilities of the intelligence agencies.⁹² The police expressed similar concerns, although they appeared more optimistic that these concerns could be overcome. ACPO was “greatly concerned about exposure of our methodologies, our capacity to intercept, which is significantly greater than some other jurisdictions”⁹³ and the Commissioner of the Metropolitan Police was also concerned about safeguarding methodology.⁹⁴ He said “careful thought and safeguarding measures would need to be put in place in relation to issues of security of methodology, the security and safety of those engaged with interception.”

131. The DPP agreed that it was “absolutely imperative” that we have a system that protects our agencies’ capabilities and methodologies.⁹⁵ However, both he and Lord Lloyd believed that the law on public interest immunity, as recently interpreted and applied by Lord Bingham in a case in the House of Lords,⁹⁶ already achieves this protection for capabilities, methodologies and techniques, at the same time as guaranteeing the defendant’s right to a fair trial.

⁹¹ Report of the Interception of Communications Commissioner at para. 46(i).

⁹² Oral evidence, 12 March 2003, Q7.

⁹³ *ibid.*, Q3 (John Murphy, ACPO lead on intercept evidence).

⁹⁴ Letter from Metropolitan Police Commissioner to Committee, received 2 February 2007, Ev 49.

⁹⁵ Oral evidence, *op. cit.*, at Q6.

⁹⁶ *R v H* [2004] UKHL 3, [2004] 2 AC 134. The central issue in the case was whether the procedures for dealing with claims for public interest immunity made on behalf of the prosecution in criminal proceedings are compliant with the right to a fair trial in Article 6(1) ECHR, and if not how any deficiencies might be remedied.

132. The DPP in his oral evidence to us explained succinctly exactly how the law on public interest immunity operates to strike this balance.⁹⁷ He described public interest immunity as “a very powerful tool to both protect the national interest and secure the right of a defendant to a fair trial.” The prosecution is under a statutory obligation to disclose to the accused any material “which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.”⁹⁸ In practice this means that in advance of a criminal trial the prosecution discloses its case to the defence and it also discloses any material which it possesses which, in the prosecution’s view, undermines its case or assists the defence. If the prosecution has material that is *prima facie* disclosable within those tests for disclosure, but which it does not wish to disclose because its disclosure would reveal sensitive information about, for example, secret methods or techniques of interception, the prosecution would have to apply to the trial judge for an order that the material need not be disclosed because its disclosure would be contrary to the public interest. An application by the prosecution for a public interest immunity order can be made to the judge without the accused or his lawyers being present, but where this is done it may be appropriate to appoint a special advocate to ensure that the contentions of the prosecution are tested and the interests of the defendant protected.⁹⁹ We asked whether there was any risk that providing for the admissibility of intercept might lead to trials which could proceed under the current law having to be abandoned if a claim for public interest immunity were refused. The DPP replied that this was unlikely to arise in practice because it was “difficult to imagine material that would emanate from an intercept that would come into that category.”¹⁰⁰

133. The DPP concluded quite unequivocally: “I do not have any doubt at all that we can protect the national interest and use this material and secure fair trials for defendants.” Moreover, as the DPP also pointed out in his evidence to us, if the prosecution’s application to withhold material on public interest grounds is not successful, it remains open to the prosecution to discontinue the case rather than proceed with the prosecution, so there is no risk of the Crown being forced to disclose material which in its view it would be contrary to the public interest to disclose.

134. Both Liberty and JUSTICE, in their written evidence to our inquiry,¹⁰¹ adopt a broadly similar position to the DPP, that existing principles of public interest immunity are sufficient to protect both sensitive information from being disclosed contrary to the public interest, and the right of the accused to a fair trial, because of the role of the judge in supervising non-disclosure on public interest grounds and the possibility of a special advocate being appointed to protect the interests of the accused at a hearing for a public interest immunity order at which the accused and his lawyer are not present.

135. Some of the evidence we received, however, raised concerns about whether the current law on public interest immunity contains sufficient safeguards for the accused to ensure that allowing intercept to be used as evidence will not undermine the right to a fair trial. The Northern Ireland Human Rights Commission (“NIHRC”), for example, is

⁹⁷ Oral evidence, 12 March 2007, Q11.

⁹⁸ Section 3(1)(a) of the Criminal Procedure and Investigations Act 1996.

⁹⁹ *R v H* [2004] UKHL 3 at para. 36.

¹⁰⁰ Oral evidence, 12 March 2007, Qs 12 and 13.

¹⁰¹ Ev 83 and 86.

concerned that it is the prosecution, rather than an independent court, which decides in the first place whether material in its possession may assist the accused's case.¹⁰² The NIHRC is concerned that this discretion in the prosecuting authorities means that the law on public interest immunity could be used to cover up malpractice and wrongdoing by the police and intelligence services, for example in relation to how evidence has been gathered. The Commission is in favour of allowing intercept material to be used as evidence at criminal trials, but advocates a formal procedure whereby a judge other than the trial judge deals with questions of admissibility of evidence, and in particular with the question of whether particular material might assist the defence, in which the interests of the defendant are properly represented by a special advocate.

136. The London Innocence Project ("the LIP"), a non-profit legal resource clinic and criminal justice centre which aims to ensure that the rule of law is maintained on the basis of equality before the law and procedural fairness, also has concerns that allowing intercept to be used as evidence will substantially increase resort to public interest immunity claims by the prosecution. In its view this is problematic because existing public interest immunity procedures do not contain sufficient safeguards to protect the defendant's right to a fair trial. Like the NIHRC, it is particularly concerned by the fact that it is the prosecution, not the court, which decides what evidence might assist the case of the accused and is therefore prima facie disclosable. The LIP argues that, if intercept is to be used as evidence in criminal trials, there needs to be fuller judicial supervision of the disclosure process, if necessary by specially trained members of the judiciary who are recruited specifically to perform that task. In the LIP's view, the prosecution should be required to hand over all their unused evidence to the security cleared special advocate who would assess its value to the defence.

137. We are broadly satisfied that the law of public interest immunity already provides a procedure for preventing the disclosure of sensitive information contrary to the public interest. We can see no reason why this well established procedure should not be capable in principle of protecting the public interest in non-disclosure of sensitive information about intercept, just as it already protects the public interest in not disclosing sensitive information about the methodologies and techniques of other forms of covert surveillance such as bugging or the use of informants.

138. We do, however, have some concerns about the extent to which the present law protects the right of the accused to a fair trial. We see the force of the criticism that a system of public interest immunity which depends on the prosecutor identifying the material in its possession which is potentially exculpatory and putting this before the judge to determine whether it needs to be disclosed does not contain sufficient independent safeguards for the accused's right to see the material against him or her, which is an important aspect of the right to a fair trial.

139. We can also see the attraction of separate disclosure judges, specially trained and experienced in the relevant law of disclosure and public interest immunity, deciding questions of what material should be considered exculpatory for the accused, as well as what should be immune from disclosure on public interest grounds, assisted by special advocates whose role is to protect the interests of the accused.

¹⁰² Ev 92.

140. We recommend that the Privy Counsellors who review the use of intercept as evidence give serious consideration to whether the current public interest immunity procedure contains sufficient independent safeguards for the accused in light of the prosecution's power to decide whether material in its possession is likely to assist the case of the accused.

(2) Avoiding onerous disclosure requirements

141. The second set of practical concerns about using intercept as evidence in criminal trials relates to the potentially adverse impact of disclosure requirements on the intelligence agencies in particular, but also on the police, prosecutors and courts.

142. The concern here is that the obligation on the prosecution to disclose material to the defence before trial will impose an enormous administrative burden on the intelligence and law enforcement agencies, who will have to transcribe, classify and retain enormous volumes of material in readiness for its possible use at trial. In the words of the DPP, "we have to discover a model which does not place undue administrative and bureaucratic burdens upon intelligence agencies. I think that is a bigger concern for some. That is to say, we have to have a disclosure regime that does not require them to put an unreasonable amount of resource into retaining and classifying material that might be relevant in some future trial."¹⁰³

143. The police expressed a similar concern about the impact on their capacity to respond to intercept material revealing a threat to public safety if they are having to spend a lot more time marshalling such material for possible use in evidence.¹⁰⁴ The Commissioner of the Metropolitan Police similarly told us of the need to build capacity and capability across the relevant agencies to handle such material, which would clearly have funding implications.¹⁰⁵

144. We accept that this concern about disclosure requirements is both a genuine concern and a difficult one. There have been some famous examples of judges ordering extremely onerous disclosure by the prosecution. Sir Swinton Thomas in his last Report as Interception of Communications Commissioner gives an example of a court ordering that 16,000 hours of eavesdropping material had to be transcribed at the request of the defence, at a cost of £1.9m. At the same time, the prosecution's disclosure obligations are a by-product of the accused's right to a fair trial. It is a fundamental right of the defence to have disclosed not only the material which is relied upon against him but also any material in the possession of the prosecution which tends to show that the accused is innocent.

145. Although we recognise that this is a genuine difficulty, we do not consider it to be an insurmountable problem when devising a legal regime for using intercept as evidence. We accept that it is likely that allowing intercept to be used as evidence will place an additional demand on the resources of the intelligence agencies, police and prosecutors, but we note the DPP's view that the experience abroad is that using intercept as evidence is in fact remarkably cost-effective, because it leads to various savings, for example on physical

¹⁰³ Oral evidence, 12 March 2007, Q6.

¹⁰⁴ Mr. Jon Murphy of ACPO, Oral evidence 12 March 2007, Q7.

¹⁰⁵ Letter from Metropolitan Police Commissioner to Committee, received 2 February 2007, Ev 49 at para. 4.2.

surveillance, which is much more resource intensive, and on the cost of lengthy and expensive trials where defendants plead guilty when confronted with the product of the intercept.

146. Nor do we agree with the view that it will be difficult to keep the disclosure obligation on the prosecution under control. It is already the case that the law on disclosure does not permit far reaching “fishing expeditions” by the defence. As Lord Bingham recently said in the House of Lords:¹⁰⁶

“The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.”

147. The then Attorney General, Lord Goldsmith, told us in oral evidence that, in order to deal with evidence which is exculpatory, there will need to be quite a detailed scheme in an Act which would set out what the obligations in relation to retention of material and in relation to disclosure of material were, in such a way that there could still be a fair trial, but the agencies would not be subjected to unconstrained fishing expeditions, requiring them to reveal material which might be prejudicial or hugely expensive to produce.¹⁰⁷ **In our view it ought to be possible to devise such a practically workable mechanism to prevent defence claims for disclosure becoming unmanageable. The question is how to circumscribe the prosecution’s disclosure obligation at the same time as upholding the right of the accused.**

148. We agree with the DPP that there ought not to be an obligation on the prosecution to disclose to the defence all the material obtained in a police investigation, including all the intercept product, for the defence to trawl through in the hope that it might contain something useful. We agree that such an extensive disclosure obligation would make trials unworkable. The disclosure obligation on the prosecution is already much more restrictive than that. The prosecution must disclose the material on which it relies and any other material in its possession which, in its judgment, undermines the prosecution case or might assist the accused. This is a much narrower category of material. The DPP told us that somebody had to do the job of going through all the material to decide what is disclosable, and he thought it should be the prosecution, with the assistance of the judge when the prosecution wants to withhold otherwise disclosable material on grounds of public interest immunity.

149. As we mentioned above, we have some concern about the appropriateness of the prosecution, as opposed to an independent court, deciding whether material in the possession of the prosecution is likely to assist the defence, and we have recommended that the Privy Council review give serious consideration to whether specialist disclosure judges, separate from the trial judge, should perform the function of deciding what material in the possession of the prosecution should, subject to any claim for public interest immunity, be

¹⁰⁶ *R v H* [2004] UKHL 3 at para. 35.

¹⁰⁷ Oral evidence, 26 June 2007, Q250.

disclosed to the defence because it meets the test for disclosure. We recognise that this would be likely to impose a greater burden on the prosecution than the present system, but we stress that it does not involve the prosecution automatically disclosing all the material in its possession to the defence. Rather it transfers to an independent judge the task currently entrusted to the prosecution of deciding which material meets the test for disclosure.

150. We recommend that any Bill providing for the use of intercept of evidence should clearly define the obligations on the prosecution to retain and disclose material on which it does not intend to rely and should restrict those obligations to material which might reasonably be considered capable of undermining the prosecution case or of assisting the accused, subject to a court ordering that disclosure of such material would be against the public interest. We also recommend that consideration be given by the Privy Council review to requiring that a disclosure judge, rather than the prosecution, decide whether the test for disclosure to the accused is met.

(3) Keeping up with changes in technology

151. The Government has frequently cited the pace of technological change in communications as a reason for not legislating now to relax the ban. Sir Swinton Thomas made the same point in his recent annual report and in his oral evidence to us.¹⁰⁸ He said that the switch to “Voice Over Internet” for example, was providing a very real challenge to interceptions technology, because at present there was no technical way of capturing it.

152. While we recognise the challenges that such technological development presents for our agencies’ capacity to intercept communications, we do not see why they present any obstacle to devising a legal regime for the evidential use of intercept. As JUSTICE points out in its written evidence,¹⁰⁹ there is nothing in the current legal framework governing interception of communications that stipulates the particular method of interception, and so long as a given communication falls within the terms of Part I of RIPA, the evidential use of intercept material would make no difference to the ability of police and intelligence services to use new means of interception.

153. In our view, although we do not underestimate the significance of technological developments, we do not consider them to present any obstacle to devising a scheme providing for the evidential use of intercept. We do not consider it to be beyond the ability of the parliamentary draftsman to accommodate future changes in technology.

(4) Overcoming objections of telecoms providers

154. In his annual report for 2006, Sir Swinton Thomas says that the “Communications Service Providers” (i.e. telecommunications companies), whose co-operation he regards as vital, are strongly opposed to intercept being admissible in court.¹¹⁰ During this year’s debate on the renewal of control orders in the Commons, Mark Oaten MP, who was party to discussions with the then Home Secretary on this issue at the time of the passage of the Prevention of Terrorism Act 2005, suggested that this was the principal obstacle to the

¹⁰⁸ Oral evidence, 12 March 2003, Q20.

¹⁰⁹ Ev 86 at para. 21.

¹¹⁰ Report of the Interception of Communications Commissioner 2006, at para. 46(vi).

relaxation of the ban.¹¹¹ Sir Swinton told us in evidence that the Chairman of BT had been invited to meet the then Prime Minister to tell him why the service providers were completely opposed to the relaxation of the ban and that this “was considered to be a very important piece of material for the Prime Minister to have in the decision that was made.”¹¹²

155. We were concerned to learn that this was a consideration which may have influenced the Government in its decision to maintain the statutory prohibition on the use of intercept as evidence. We asked Sir Swinton why the providers are so opposed to it being used as evidence. He gave two main reasons.¹¹³ First, there is the commercial consideration that the phone companies do not want to be seen by their customers intercepting their communications and providing them to Government agencies. Second, a lot of the technicians who do the intercepting work for the telephone companies are “deeply alarmed at the prospect that they are going to have to go to court to give evidence about what they do.” They are anxious about the consequences for them and their family.

156. The DPP, however, was clearly not persuaded by this as an objection to relaxing the ban. He understood the anxieties of the individuals concerned, but said that the experience abroad is that people involved in this sort of work are very rarely called to give evidence because there has to be a good reason for them to be called, and in most cases it is very difficult to imagine what that reason would be.¹¹⁴ In any event he was quite clear that the few who might find themselves in the position of having to give evidence would be completely protected¹¹⁵ by a variety of special measures, such as giving evidence without their name being given out, from behind a screen or by closed circuit television.

157. Lord Lloyd also referred to a letter from the service providers in which he said they had made clear that, provided their staff were protected, they had no objection in principle to intercept evidence being admitted.

158. Although we do not think that the agreement of the telephone companies should be a pre-condition to relaxing the ban on the use of intercept as evidence, we understand why, in practical terms, their co-operation is important. We were therefore pleased to learn that the service providers do not have an objection in principle to the use of intercept as evidence provided their staff will be protected. We were reassured on this score by the DPP’s complete confidence that, in the rare event that it would be necessary for any such member of staff to give evidence, they would be protected by various witness protection measures in the same way that informants receive protection when they have to give evidence. We therefore conclude that this should no longer be regarded as constituting an obstacle to relaxation of the ban on intercept.

¹¹¹ HC Deb 22 February 2007 col 447.

¹¹² Oral evidence, 12 March 2007, Q21.

¹¹³ *Ibid.*

¹¹⁴ *ibid* Q22.

¹¹⁵ *ibid* Q24.

Judicial authorisation

159. Both Liberty¹¹⁶ and JUSTICE¹¹⁷ argue that the interception of private communications under RIPA should require prior judicial approval. Under the present legal framework interception warrants are authorised by the Home Secretary.¹¹⁸

160. We heard a range of views on this question from those who gave evidence to us. Sir Swinton Thomas was in favour of keeping the power to grant warrants with the Home Secretary, mainly on the ground that this enabled warrants to be obtained much more swiftly in practice which was often operationally necessary.¹¹⁹ Lord Lloyd, by contrast, could not see why it was necessary for the Secretary of State to retain the power, and preferred to move in the direction of judicial warrants, which was the position in most other comparable countries. The DPP and the representative of ACPO could both see arguments on both sides and preferred not to express a view.

161. We would prefer warrants for the interception of communications to be judicially authorised where the product of the intercept is intended to be used as evidence. In our view this would provide an important independent safeguard against abuse or arbitrariness in the exercise of the power to intercept. The number of interception warrants being issued or modified certainly suggests that it must be difficult for the Home Secretary to give much scrutiny to each request to sign a warrant. In the 15 month period from 1 January 2005 to 31 March 2006, for example, the Home Secretary issued a total of 2,243 warrants, and modified 4,746.¹²⁰ The need to be able to issue a warrant swiftly can be accommodated by including an emergency procedure, such as authorisation by the Secretary of State followed by subsequent judicial authorisation. **We recommend that RIPA be amended to provide for judicial rather than ministerial authorisation of interceptions, or subsequent judicial authorisation in urgent cases.**

Conclusion

162. **In summary, we recommend that the forthcoming counter-terrorism bill provide for the admissibility of intercept evidence in terrorism cases; that the law of public interest immunity, complete with the use of special advocates, be relied upon to protect the public interest in non-disclosure; that the Bill clearly define the prosecution's disclosure obligations; that consideration be given to providing for a disclosure judge, rather than the prosecution, to decide whether material held by the prosecution meets the test for disclosure; and that judicial authorisation replace ministerial authorisation other than in cases of genuine urgency.**

¹¹⁶ Ev 89 at paras 15-17.

¹¹⁷ Ev 84-85 at paras 11-13.

¹¹⁸ Section 17 of the Regulation of Investigatory Powers Act.

¹¹⁹ Oral evidence, 12 March 2007, Q26.

¹²⁰ Annex to the Report of the Interception of Communications Commissioner for 2005-06.

5 Post-charge questioning and other alternatives to extending pre-charge detention

Post-charge questioning

163. In our report on Prosecution and Pre-Charge Detention we recommended the introduction of post-charge questioning and that it be possible to draw adverse inferences from a refusal to answer such post-charge questions, subject to appropriate safeguards.¹²¹ We considered that this would go some way towards reducing the need for any further extension of the period of pre-charge detention.

164. In its response to our report the Government indicated that it would shortly be publishing a public consultation document on a range of proposals about modernizing police powers, including proposals to provide for questioning after charge where considered necessary.¹²²

165. The Home Office Consultation Paper, *Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984* was published in March 2007 and asked for views on the questioning of the detainee/suspect from the decision to refer the case to the prosecutor for a charging decision up to the decision by the prosecutor to charge; and from following the decision to charge up to the trial hearing. It is envisaged that such post-charge questioning would take place in a police station and the person would remain entitled to the full range of safeguards under PACE. **We welcome the Government's positive response and the relative speed with which it has consulted on the introduction of this change.**

166. The Commissioner of the Metropolitan Police has described the ability to draw adverse inferences from a failure to answer post-charge questions as “a welcome amendment”, though he also stated that it is the Metropolitan Police's view that post-charge questioning alone would not be sufficient to replace extended pre-charge detention but would be a useful addition.¹²³ The Minister of State for Policing, Security and Community Safety, in oral evidence to us, described post-charge questioning as¹²⁴

“another useful device to obviate the need to go elsewhere ... in terms of departures from normality in terms of law and the rule of law. ... it will not obviate them entirely, but certainly, if it helps more and more people charged within the framework of the terrorism law going through due process rather than pre-charge detention ..., then I am all for it.”

¹²¹ JCHR Report on Prosecution and Pre-charge Detention (2006) at paras 132-135.

¹²² Government Response to JCHR Report on Prosecution and Pre-charge Detention at p. 9.

¹²³ Letter from Metropolitan Police Commissioner to the Committee, received 2 February 2007, Ev 49.

¹²⁴ Oral evidence, 18 April 2007, Q164.

167. We encountered a similar acceptance amongst the police at Paddington Green police station. **We welcome the Minister’s implicit acceptance that such a measure should in principle lessen the need for extending pre-charge detention.**

168. In the former Home Secretary’s oral statement to the House of Commons about the Government’s approach to counter-terrorism laws, on 7 June 2007, he said that the Government is planning to legislate so that in terrorist cases suspects can be questioned after charge “on any aspect of the offence for which they have been charged.” With regard to adverse inferences, he proposed to apply the same rules for post-charge questioning that currently apply to pre-charge questioning.

169. We welcome the Government’s announcement that it is planning to introduce post-charge questioning along with the possibility of adverse inferences from silence in the face of such questions. We question, however, whether it is necessary for this to be done by legislation rather than amending the relevant PACE Code of Practice, which would enable the change to take effect more quickly. Given the obvious relevance of post-charge questioning to the need for any further extension of the period of pre-charge detention, we regard it as important to introduce this change sooner rather than later.

170. We also question why the proposal appears to be restricted to post-charge questioning “on any aspect of the offence for which they have been charged”. This seems to us to be unnecessarily restrictive. It may be necessary to interview a person who has already been charged with one offence about fresh evidence which has come to light which may warrant slightly different or even additional charges.

171. We would point out that the introduction of this power would need to be accompanied by certain minimum safeguards to ensure that its use is not oppressive, including, for example, access to legal advice, a requirement that the prosecution have already established a prima facie case, and guidance as to how judges should direct juries about the inferences that could be properly drawn from silence in response to such questioning.

172. We recommend that post-charge questioning with adverse inferences be introduced by amending the relevant PACE Code, along with specific safeguards against its abuse, and without the restriction that questioning be confined to aspects of the offence with which the suspect has already been charged. We look forward to an opportunity to scrutinise the safeguards which the Government proposes should accompany this power in due course.

Bail for Terrorism Act offences

173. During our visit to Paddington Green the police indicated that they would often prefer to bail a person who is being detained in respect of a less serious terrorism offence rather than keep them in lengthy pre-charge detention. At present, however, this option is not available as police bail is not available in respect of any Terrorism Act offence.

174. Introducing the possibility of bail for the less serious terrorism offences would enable the police to continue their investigation of the person while at the same time maintaining some control over them through bail conditions.

175. We agree that this seems in principle a very sensible proposal and we recommend that the Government give it serious consideration.

GPS tagging

176. Also during our visit to Paddington Green, the suggestion was made that GPS technology might be used for tagging both individuals who are the subject of control orders and as a condition of Terrorism Act bail if this were to be made available.

177. Recent developments in tagging using the Global Positioning System (“GPS”) may make it possible to tag a suspect in such a way that their precise physical location would always be ascertainable. This may be less intrusive than many of the control orders currently in force and could potentially mean that suspects could not “disappear” in the way that a number of subjects of control orders have recently disappeared.

178. On the other hand, we are aware of the existence of studies which call into question the effectiveness of this technology and raise practical questions such as whether it is available in a form which cannot be physically removed by a person sufficiently determined.

179. We recommend that the Home Office make a formal assessment of the feasibility of GPS tagging for terrorism suspects and provide us with the results of its assessment.

The “threshold test” for charging

180. In our report on Prosecution and Pre-charge Detention we welcomed the introduction of the lower charging standard (“the threshold test”) by the CPS because it appeared to us to introduce greater flexibility in the investigation of terrorism cases¹²⁵.

181. The Government in its response,¹²⁶ however, said that this was not a relevant factor in considering the appropriate time limit for pre-charge detention. It also said that it could apply only in some terrorism cases, whereas the DPP told us at an informal meeting that it is used in most terrorism cases.

182. We remain of the view that the use of the threshold test should lessen the need for a further extension of the period of pre-charge detention. In our view, however, more information is required about the operation of the threshold test in practice. We recommend that an appropriate body, such as the CPS Inspectorate, conduct a review and report on the operation of the threshold test in terrorism cases.

¹²⁵ JCHR Report on Prosecution and pre-Charge Detention, at paras 132-135.

¹²⁶ Government Response to JCHR Report on Prosecution and Pre-charge Detention at p. 9.

6 Special Advocates

Background

183. In a number of reports both we and our predecessor Committee have expressed concern about whether the use of Special Advocates in control order proceedings satisfies the basic requirements of a fair hearing, whether under Article 6(1) ECHR or the equally stringent common law.¹²⁷

184. In our report on the first annual renewal of the control orders regime, in February 2006, for example, we reported that a procedure in which a person could be deprived of their liberty without having an opportunity to rebut the basis of the allegations against them was likely to be incompatible with a number of rights, including the right to a fair trial, the equality of arms, the presumption of innocence, the right to examine witnesses and the right of access to a court to challenge the lawfulness of detention.¹²⁸

185. In our recent report on the second annual renewal of the control orders legislation, we reported that we remained doubtful whether the procedures for judicial supervision of control orders in the Prevention of Terrorism Act 2005 satisfied the most basic requirements of due process.¹²⁹ The Government, in its response to this Report, denied that the control order regime violates the right of controlled individuals to a fair trial or a fair hearing.¹³⁰ The compatibility of the control order regime with basic standards of due process, including Article 6(1) ECHR, is one of the issues in one of the conjoined appeals currently before the House of Lords. We make no comment about the case itself.

186. The system of Special Advocates is designed to strike a balance between the need to protect public safety on the one hand and the right of the individual to procedural fairness on the other. Under Article 6(1) of the ECHR, a “substantial measure of procedural justice” must be accorded to the individual. The Government’s position is that the system of Special Advocates provides the substantial measure of procedural justice which is required by both human rights law and the common law of procedural fairness. The main concern about Special Advocates is whether they provide individuals with a sufficient opportunity to challenge information on the basis of which they are subjected to control orders. Special Advocates are not permitted to communicate with either the individual concerned or their lawyer about any matter connected with the proceedings once they have seen the closed material.

187. We decided to try to find out more from the Special Advocates themselves about exactly how closed proceedings work in practice, and in particular any concerns they have about that process, in order for us to be able to reach a more informed view as to whether special advocates provide “a substantial measure of procedural justice” and therefore

¹²⁷ See Ninth Report of Session 2004-05, *Prevention of Terrorism Bill: Preliminary Report*, HL Paper 61/HC 389 at para. 14.

¹²⁸ JCHR Report on First Control Order Renewal (2006), at paras 69-78.

¹²⁹ JCHR Report on Second Control Order Renewal (2007), at paras 30-38.

¹³⁰ Fourteenth Report of Session 2006-07, *Government Response to the Committee’s Eighth Report of this Session*, HL Paper 106/HC 539, at pp. 5-6.

whether proceedings before both SIAC and the High Court in control order proceedings are likely to be compatible with the minimum standards of due process.

188. We heard oral evidence from four special advocates, Nicholas Blake QC, Martin Chamberlain, Judith Farbey and Andy Nicol QC.¹³¹ Between them, these four have experience of acting as Special Advocates in all of the fora in which Special Advocates are now used: the Special Immigration Appeals Commission (“SIAC”), both in deportation proceedings and in proceedings challenging detention under the now repealed Part IV of the Anti-Terrorism, Crime and Security Act 2001; the High Court in control order proceedings under the Prevention of Terrorism Act 2005; the Proscribed Organisations Appeals Commission (“POAC”); and the Parole Board.

189. The four Special Advocates from whom we heard made clear that they were not speaking as formal representatives of all Special Advocates, of whom there are about 40-50. However, they made clear that they were familiar with the views of the other Special Advocates and thought that the views that they expressed would be in accordance with those of the other Special Advocates.¹³² We have no reason to believe that there is any significant difference of opinion amongst Special Advocates on these issues.

The function of Special Advocates

190. Special Advocates are appointed by the Law Officers to represent the interests of a party to certain proceedings in any of those proceedings from which that party and his legal representative are excluded.¹³³ Their functions are further defined by the relevant Procedure Rules of the Special Immigration Appeals Commission as being “to represent the interests of the appellant by (a) making submissions to the Commission at any hearing from which the appellant and any representative of his are excluded; (b) cross examining witnesses at any such hearings; and (c) making written representations to the Commission.”¹³⁴

191. Nick Blake QC explained that Special Advocates perform their function of promoting the interests of the appellant they represent in two ways. First, they seek to maximise disclosure to the individual concerned, by looking at the closed case to see whether there is anything which could be open material and also at what is not before SIAC or the court but which should be, such as exculpatory material, further investigations or other material which might tend to undermine the hypothesis against the individual concerned. Second, Special Advocates test the hypothesis against the person in the closed proceedings.

Concerns of the Special Advocates

192. We were concerned to find that the Special Advocates from whom we heard had a number of very serious reservations about the fairness of the system to the people whose interests they are appointed to represent. Indeed, we found their evidence most

¹³¹ Before giving evidence, the Special Advocates wrote to indicate certain areas of questioning which they would not be able to answer because of their ongoing professional obligations as active Special Advocates; see Ev 95.

¹³² Oral Evidence, 12 March 2007, Q 79.

¹³³ Special Immigration Appeals Commission Act 1997, s. 6; Prevention of Terrorism Act 2005, Schedule, para. 7.

¹³⁴ SIAC Procedure Rules 2003, r. 35; Civil Procedure Rules, Part 76, r. 76.24.

disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure. We were left in no doubt by their evidence that proceedings involving special advocates, as currently conducted, fail to afford a “substantial measure of procedural justice”.

193. The Special Advocates were concerned about a number of features of the procedure. In this Report we concentrate on the main three:

- (1) the very limited disclosure of information to the individual;
- (2) the prohibition on communication between the special advocate and the person whose interests they represent once the special advocate has seen the closed material; and
- (3) the low standard of proof.

194. We consider each of these concerns in turn.

(1) Disclosure

195. Individuals who are the subject of a control order are likely to have very little information disclosed to them and therefore have very limited opportunities to provide explanations which might rebut the allegations of their involvement in terrorism. We heard that there are cases where *all* the relevant material is “closed”, i.e. there is no open material at all for the subject of the control order to see, and others where virtually all of the relevant material is closed.¹³⁵ Where the individual is given an open statement, he has no way of knowing whether the open statement that he is given represents 1% or 99% of the case against him. There is no obligation on the Secretary of State to provide a statement of the gist of the closed material. The Special Advocates often try to formulate a “gist” from the closed material which would be acceptable to the Secretary of State, and although this sometimes succeeds it is often completely unsuccessful.¹³⁶ As one Special Advocate put it, “gisting” is itself prevented if by giving a gist you can damage national security the same way.¹³⁷

196. In addition to the lack of information disclosed to the individual concerned by the Secretary of State, we heard that there are various other obstacles to his finding out the precise nature of the allegations against him, even with the help of a Special Advocate. For example, when the court or the Commission is considering whether or not closed material should be open, there is no balancing of the interests of justice to the individual on the one hand against the public interest in non-disclosure on the other.¹³⁸ If there can be shown to be any public interest against disclosure, that is the end of the matter, because the court and the Commission are subject to an overriding duty, which is to ensure that information is not disclosed contrary to the public interest (which includes, but is not confined to, national security). In addition, the Special Advocates describe the Commission as being

¹³⁵ Oral evidence, 12 March 2007, Q46.

¹³⁶ *ibid*, Q47.

¹³⁷ *ibid*, Q63 (Nick Blake QC).

¹³⁸ *ibid*, Q34.

“zealous” in its compliance with this duty,¹³⁹ and the Secretary of State also takes a precautionary approach to treating material as being closed rather than open, even if there is only the slightest possibility that what is going to be disclosed will damage national security.¹⁴⁰

197. We also heard that it is not uncommon for it to transpire that material which has been served as closed material by the Secretary of State is in fact available on the internet, but the Special Advocates’ ability to track down such material is inevitably limited by their lack of support from Arabic speakers. Moreover, even the Special Advocates do not get to see everything they would like to see in order to be able to assess the reliability of the material which is relied on against the controlled person.¹⁴¹

198. We asked the Minister, Tony McNulty MP, whether the Government would consider imposing a new obligation on the Secretary of State always to provide a statement of the gist of the closed material, and although he agreed to look at the proposal he said that he remained sceptical about whether that would be an appropriate response because he thought the balance was about right now.¹⁴²

199. Our consideration of the way in which the Special Advocates system operates in practice has confirmed our concerns about the difficulty a controlled person may have contesting the allegations made against him. In the absence of any requirement to provide the individual with even the gist of the case against him in the closed material, he is at the enormous disadvantage of not knowing what is alleged against him and therefore not only unable to provide explanations himself in the open hearing, but unable to provide any explanations to the Special Advocate whose task it is to represent his interests in the closed proceedings. We recommend that there be a clear statutory obligation on the Secretary of State always to provide a statement of the gist of the closed material. We also recommend that consideration be given urgently to allowing the court or Commission to carry out a balancing between the interests of justice and the risk to the public interest when deciding whether closed material should be disclosed.

(2) Prohibition on communication with Special Advocate

200. The most serious limitation on what Special Advocates can in practical terms do for the person whose interests they represent is the prohibition contained in the Procedure Rules which prevents any communication between the Special Advocate and the person concerned or their legal representative about any matter connected with the proceedings as soon as the Special Advocate has seen the closed material.¹⁴³ The Rules provide for SIAC or the High Court to give directions authorising communication in a particular case at the

¹³⁹ *ibid*, Q60 (Andy Nicol QC).

¹⁴⁰ *ibid*, (Martin Chamberlain).

¹⁴¹ *ibid*, Qs 48, 51 and 54.

¹⁴² Oral evidence, 18 April 2007, Q119.

¹⁴³ CPR r. 76.25(2).

request of the Special Advocate,¹⁴⁴ but in practice this is very rarely used by the Special Advocates.

201. The Special Advocates told us that the prohibition of communication with the controlled person frequently limits the very essence of their function of protecting their interests, because the Special Advocate may have no idea what the real case is against the person until the start of the closed proceedings,¹⁴⁵ by which time it is too late to ask any questions of the controlled person to find out what explanations they might have. This was described as “extremely frustrating and counter-intuitive to the basic way that lawyers are used to doing their job”. It was explained that the facility in the Rules to seek the Court’s permission to consult with the controlled person was rarely used in practice, partly because such permission was unlikely to be forthcoming in practice if the purpose of the meeting was to discuss anything to do with the closed case, and partly because the Rules require any application for such permission to be served on the Secretary of State, which is not considered tactically desirable because of the risk that it might give away to the opposing party the parts of the closed evidence in relation to which the controlled person does not have an explanation.¹⁴⁶

202. The Special Senate Committee of the Canadian Parliament on the Canadian Anti-Terrorism Act recently considered this question and recommended that Special Advocates be able to communicate with the party affected by the proceedings and his or her counsel, after receiving closed material and attending closed hearings, and that the Government establish clear guidelines and policies to ensure the secrecy of the information in the interests of national security.¹⁴⁷ The Commons Constitutional Affairs Committee, in its 2005 Report, similarly recommended that the Government reconsider its position on the question of contact between the appellant in SIAC proceedings and Special Advocates following the disclosure of closed material, and thought it should not be impossible to construct appropriate safeguards to ensure national security in such circumstances.

203. The Special Advocates told us that they would be better able to perform their function if there were a more relaxed regime concerning their contact with the controlled person. Although they recognised that devising the appropriate safeguards would be difficult, and it would place enormous responsibilities on the shoulders of Special Advocates not to disclose inadvertently matters, it ought to be possible to devise a means for doing so. It was suggested that the safeguards could include, for example, the presence of someone from the Special Advocates Support Unit taking a full record, possibly even tape recording these meetings, and it would probably include certain topics which might be more capable of being discussed than others.¹⁴⁸ The Special Advocates made clear that although this would place them in a difficult position, they were prepared to accept that responsibility.

204. In light of the Special Advocates’ views on this important question, we asked the Minister why, if he was prepared to trust the Special Advocates to have access to the closed

¹⁴⁴ CPR, r. 76.25(4).

¹⁴⁵ Oral evidence, 12 March 2007, Q44 (Nick Blake QC).

¹⁴⁶ *ibid*, Qs 44 and 45 (Martin Chamberlain).

¹⁴⁷ *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act*, February 2007, at pp. 35-36 and 42.

¹⁴⁸ Oral evidence, 12 March 2007, Q44 (Nick Blake QC).

material, he was not prepared to trust their professional judgment and their expertise to decide what questions they can ask the controlled person, after having seen the closed material, without revealing anything which may be damaging to national security. He replied that it was not a question of trust, rather it was about placing undue burdens on the Special Advocates.¹⁴⁹ He pointed to the difficulties identified by the Special Advocates themselves in their evidence to us, to argue that there should be no change from the current position prohibiting any communication between the controlled person and the Special Advocate after the latter has seen the closed material.

205. In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person. We were impressed by the preparedness of the Special Advocates to take responsibility for using their professional judgment to decide what they could or could not safely ask the controlled person after seeing the closed material. With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material.

(3) Standard of proof

206. The Special Advocates have previously expressed concerns about the low standard of proof required in SIAC proceedings and also indicated that SIAC tends to defer very readily to national security assessments by the Security Services.

207. One of the Special Advocates told us that “the best way of describing sometimes what goes on in these closed sessions is not evidence proving a proposition, as you would do in a civil or criminal trial, by your best evidence or all the available evidence, but selected highlights of a plausible hypothesis, and responding to that is challenging.”¹⁵⁰ He thought that if the Secretary of State is permitted to rely on material which would not generally be admissible in evidence (e.g. because it is second or third or fourth hand), the system could afford to be a little more robust in requiring SIAC or the court to be satisfied to a standard of “more probable than not”. In other words, there should be a more robust test which requires a case to be put rather than “a plausible hypothesis”.

208. We again raised this possibility with the Minister, in light of the Special Advocates’ concerns, but he again disagreed, on the basis that he did not share the concerns of the Special Advocates about the fairness of the process.¹⁵¹

209. We recommend raising the standard of proof required in SIAC proceedings in light of the fundamental fairness concerns highlighted by the special advocates.

¹⁴⁹ Oral evidence, 18 April 2007, Qs 122 and 128.

¹⁵⁰ Oral evidence, 12 March 2007, Q75 (Nick Blake QC).

¹⁵¹ Oral evidence, 18 April 2007, Q123.

Conclusion

210. After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as “Kafkaesque” or like the Star Chamber. The Special Advocates agreed when it was put to them that, in light of the concerns they had raised, “the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.”¹⁵² Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against basic notions of fair play as the lay public would understand them.

211. One of the Special Advocates described their role strikingly in the following way:¹⁵³

“I see it as mitigating the unfairness which is inherent in a system where the appellant, one party to the proceedings, does not know all the material that they are supposed to be meeting or answering. That is inherent. It is irreducible in the sense that, as long as the appellant does not know it, there is always going to be the fertile possibility that explanations or responses that could be given are not, because that material has not been disclosed to the only person who could provide them. The system of Special Advocates can never overcome that irreducible element of unfairness but, having accepted that, I think that the functions that we try to perform can at least mitigate it and is better than not having a system where there is a partisan representative.”

212. The Minister in evidence to us said that he thought that the procedure is “as fair as it can be” given the exceptional circumstances. As one of the Special Advocates told us, however, “as fair as can be is not fair”. **The evidence of the Special Advocates has confirmed us in our previously expressed view that the Special Advocate system, as currently conducted, does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law. In short, as we heard in evidence, the system frustrates those who have been through it who do not feel they have had anything like a fair crack of the whip because they still do not really know the essence of the case against them.**¹⁵⁴ In our view, the seriousness of the consequences of control order proceedings is such that the individuals concerned are entitled to a fair hearing according to objective and well established standards of due process. We regard the recommendations we have made above as the bare minimum that is required in order for the Special Advocate system to command the public confidence that is required.

¹⁵² Oral evidence, 12 March 2007, Q85.

¹⁵³ *ibid*, Q38 (Andy Nicol QC).

¹⁵⁴ *ibid*, Q84.

7 Other matters

Control orders

213. We reported on the annual renewal of control orders in February this year.¹⁵⁵ Judgment from the House of Lords is now pending in the cases referred to in that report, in which the lower courts have considered the compatibility of the control order regime with the right to a fair hearing in Article 6(1) ECHR and the compatibility of particular control orders with the right to liberty in Article 5(1) ECHR. We say nothing further about those issues in this report pending the decision of the House of Lords, but we may return to these issues in a future report in light of the judgment.

Derogation

214. In the then Home Secretary's statement to the House of Commons on 24 May 2007 he indicated that if the Government does not succeed in persuading the House of Lords to overturn the lower courts' interpretation of the requirements of the right to liberty in Article 5 ECHR, the Government will consider other options, including derogation. He also referred to "the fact that the threat to the life and liberties of the people of this country is higher than ever before, and is at the level of a national emergency."

215. It has been the Government's consistent position since introducing the Bill which became the Prevention of Terrorism Act 2005, establishing the control order regime, that the UK does not face a "public emergency threatening the life of the nation" within the meaning of Article 15 ECHR and that the UK Government is therefore not entitled to derogate from the right to liberty in Article 5 ECHR. This was the premise of the Prevention of Terrorism Act 2005, which contains what is essentially an enabling power allowing the Government to derogate swiftly if conditions change in future. At no time during the two annual renewals of the control orders regime, in March 2006 and March 2007, did the Government suggest that the level of the threat had changed so that the UK now faced a public emergency threatening the life of the nation.

216. We therefore wrote on 25 May 2007 to the then Home Secretary asking whether it is now the Government's position that the threat from terrorism is such that there is a public emergency threatening the life of the nation; if so, what precisely has changed since the Government renewed the control order regime in March of this year; and on what material the Government relies to demonstrate that the level of the threat has changed.¹⁵⁶

217. To date we have received no response.

¹⁵⁵ JCHR Report on Second Control Order renewal (2007).

¹⁵⁶ Ev 69.

Formal Minutes

Monday 16 July 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd

Nia Griffith MP

Lord Lester of Herne Hill

Dr Evan Harris MP

Lord Plant of Highfield

Baroness Stern

Draft Report [Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 217 read and agreed to.

Summary read and agreed to.

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

Several Papers were ordered to be appended to the Report.

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

[Adjourned till Monday 23 July at 3.30pm.]

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Sir Ken Macdonald QC, Director of Public Prosecutions, **Ev 1**
Jon Murphy, Deputy Chief Constable of Merseyside,
The Rt Hon Lord Lloyd of Berwick, former Law Lord,
The Rt Hon Sir Swinton Thomas, retired Lord Justice of Appeal,
Commander Richard Gargini, National Co-ordinator of Community Engagement

Special advocates: Mr Nick Blake QC, Mr Martin Chamberlain, Ms Judith Farbey, Ev 10
Mr Andy Nicol QC

Wednesday 18 April 2007

Mr Tony McNulty MP, Minister of State for Policing, Security and **Ev 22**
Community Safety,
Mr Jim Acton, Head of Intelligence and Security Liaison Unit,
Mr David Ford, Head of Counter-terrorism Legislation, Home Office

Tuesday 26 June 2007

Rt Hon Lord Goldsmith QC, Attorney General **Ev 38**

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Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2006–07

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

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Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN	HL Paper 276/HC 1714

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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

Taken before the Joint Committee on Human Rights

on Monday 12 March 2007

Members present:

Mr Andrew Dismore, in the Chair

Judd, L
Onslow, E
Plant of Highfield, L
Stern, B

Nia Griffith
Dr Evan Harris
Mark Tami

Witnesses: **Sir Ken Macdonald**, QC, Director of Public Prosecutions, **Mr Jon Murphy**, Deputy Chief Constable of Merseyside, **Rt Hon Lord Lloyd of Berwick**, a Member of the House of Lords, former Law Lord, **Rt Hon Sir Swinton Thomas**, retired Lord Justice of Appeal, and **Commander Richard Gargini**, National Co-ordinator of Community Engagement, examined.

Q1 Chairman: Good afternoon everybody. This is another evidence session in our ongoing inquiry into counter-terrorism policy and human rights. This afternoon we are joined by Sir Ken Macdonald, QC, Director of Public Prosecutions, Jon Murphy, the Deputy Chief Constable of Merseyside for ACPO, the Rt Hon Lord Lloyd of Berwick, a former Law Lord who has sponsored private Members' legislation on this, the Rt Hon Sir Swinton Thomas, a retired Lord Justice of Appeal and former Commissioner and Commander Richard Gargini, National Co-ordinator of Community Engagement for the police. The particular focus of this session is going to be primarily on intercept evidence. The Committee previously recommended that we should have the admissibility of intercept evidence in criminal trials so the evidence session is primarily going to focus on the how rather than the whether or the why. Perhaps I could start by asking the DPP how significant a difference you think it would make if the intercept ban was relaxed in terms of bringing more criminal prosecutions against suspect terrorists.

Sir Ken Macdonald: We have spoken, as I think you probably know, a great deal to colleagues abroad, in the United States, Canada and Australia particularly, who have systems closest to ours. The message we have had from all of them is that it would make an enormous difference. Colleagues in the Department of Justice in the United States have told us that the majority of their major prosecutions now against terrorist figures and organised crime figures are based upon intercept evidence. I think it is well known that for the first time each of the five New York crime godfathers are in prison, each of them as a result of the use of intercept evidence. In Australia, I was told by the head of the New South Wales Crime Commission that prosecutors who did not rely on intercept evidence were not being "serious" in this area of work. When I was in the United States I spoke with the National Security Agency, the Drug Enforcement Administration, the counter-terrorism section of the Justice Department, the

organised crime section of the Justice Department. In Australia I spoke to the Australian Security Intelligence Organisation, all of the crime commissions, the Commonwealth DPP, the New South Wales DPP, the Australian Federal Police. Everybody without exception told us that this material is of enormous use. It is cheap, it is effective; it drives up the number of guilty pleas and it leads to successful prosecutions. We are convinced, and have been for a number of years, that this material will be of enormous benefit to us in bringing prosecutions against serious criminals, including terrorists.

Q2 Chairman: Can I put to you what the Minister, Baroness Scotland, told the House of Lords on 7 March? "The evidential use of intercept would not even add significantly to the number of convictions that can be secured." You would disagree with that?

Sir Ken Macdonald: I disagree profoundly with that. Some investigations were undertaken, as you probably know, when this was being looked at some years ago to look at old cases and to try to determine whether intelligence intercept that had been used in those cases had driven up the number of successful prosecutions and convictions. It found that the difference would have been marginal. The problem with that approach is that you are not comparing like with like. If you look at material which is acquired for intelligence purposes, it is acquired on a different basis, with a different motive and with a different expected outcome than material which is targeted and acquired for evidential purposes. The whole point about intercept obtained for evidential purposes is that you target people who you think may be involved in crime and you look to intercept them talking about crimes which they are committing with prosecutions in mind. I cannot believe that all of our colleagues in jurisdictions so similar to ours abroad have formed such a strong view about the value of this material that somehow there is something different about our jurisdiction which would mean a different situation would apply here. That makes no sense to me. Prosecutors,

12 March 2007 Sir Ken Macdonald, Mr Jon Murphy, Rt Hon Lord Lloyd of Berwick, Rt Hon Sir Swinton Thomas and Commander Richard Gargini

certainly in the Crown Prosecution Service, are strongly of the view that this material would be of assistance.

Q3 Chairman: Perhaps I could ask Mr Murphy for his view on the police aspect of investigation?

Mr Murphy: The ACPO view is in accord with the DPP in so much as we believe it may assist us greatly in the prosecution of terrorists and in serious organised crime. However, we are greatly concerned about exposure of our methodologies, our capacity to intercept, which is significantly greater than some other jurisdictions and about managing the disclosure burden in terms of the inevitable reduction in capacity in order to service the evidence machine. Provided those two things can be overcome—and I know some work is being done on that—we would support the view of the DPP.

Q4 Chairman: Sir Ken, are you using intercept evidence that has been obtained overseas that is allowed to be used in the UK?

Sir Ken Macdonald: Yes.

Q5 Chairman: Do you regard it as evidence that is particularly valuable in bringing prosecutions?

Sir Ken Macdonald: We had a major case of people trafficking which you may recall two or three months ago. This was people trafficking across Eastern Europe by organised gangs. A large number of these defendants pleaded guilty because we were able to play to them and their legal advisers intercept material which had been acquired abroad which, as you know, is admissible in this jurisdiction. I myself had many experiences at the Bar, when I was representing serious criminals, of them being convicted through their own mouths by the use of bugs and such like, including a case in which an IRA terrorist had a bug placed in the lorry in which he was transporting a bomb across London. There is no more powerful evidence for prosecutors than defendants convicting themselves out of their own mouths.

Q6 Chairman: Is there any logic as to why we are allowed to use foreign intercept but not UK?

Sir Ken Macdonald: Yes. There are far greater implications for us in using domestic intercept. I do not mean by anything I say to underestimate the difficulties which have to be overcome in order to achieve this material as evidence. First of all, we have to have a system which protects our agencies as they go about their business, protects their capabilities and their methodology. That is absolutely imperative and I agree with everything that people on the other side of the discussion say about that. Secondly, we have to discover a model which does not place undue administrative and bureaucratic burdens upon intelligence agencies. I think that is a bigger concern for some. That is to say, we have to have a disclosure regime that does not require them to put an unreasonable amount of resource into retaining and classifying material that might be relevant in some future trial. Those sorts of

considerations and concerns do not apply when we are using foreign material because, if you like, that is their problem rather than ours. I feel strongly that, although there are significant concerns on the other side of the argument, we can overcome them.

Q7 Lord Plant of Highfield: I want to pick up the point which you just made and indeed the point made by Mr Murphy earlier. Just looking at the practical considerations that have to be addressed if we are going to use this evidence, I suppose there are broadly speaking four types of practical consideration, one that Sir Ken Macdonald has just mentioned about disclosure of intercept methods, methodologies, techniques, capabilities and so forth. Secondly, over-burdening the police and other agencies by the need particularly to transcribe huge quantities of intercept evidence. Thirdly, over-burdening prosecutors facing applications for disclosure of evidence from the defence. Finally, one which I do not think has been mentioned, namely keeping up with rapid technological developments and communications. Leaving aside the issue of principle, these are often thought to be fatal objections to intercept evidence being used as a matter of course in these sorts of offences. We have heard Mr Murphy and Sir Ken Macdonald on one or two of these points. I do not know whether any of the other people giving evidence would like to address these points and whether Mr Murphy and Sir Ken would like to come back on them?

Mr Murphy: Could I give one additional rider? There is a double benefit in overcoming the disclosure problem and the administrative burden in that the inevitable consequence of going to an evidential regime is a reduction in capacity in order to be able to manage the evidential burden. The other benefit of the current system that we would lose if we did not find a way of overcoming that is, as a consequence of the capacity we have, we have many instances where we have been able to disrupt terrorist and organised crime activity simply because of the scope of the coverage. If we reduce our capacity in order to serve the evidential regime, there is a possibility, if we do not overcome the problem, that we will lose that capability to disrupt some potentially catastrophic scenarios.

Lord Lloyd of Berwick: I would like to take up one point which you made, Chairman, which was: is there any logic in admitting foreign intercept but not English intercept? The answer is there is none. I can see no reason why we should admit intercept from Holland, France or wherever it may be but not from here. I agree with every word of what the Director of Public Prosecutions says. The only point he did not mention is the last report we had from a review committee which reported in February 2005. They went into the whole thing in great detail and they came down firmly of the view that there would be a modest increase in convictions in serious crime cases. That is now common ground.

Sir Swinton Thomas: The review found that there was some prospect of a minimal increase in convictions but that was far outweighed by the

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dangers we would face with the loss of intelligence which enables the intelligence and law enforcement agencies to disrupt and prevent terrorist outrages and serious crimes. The balance fell, they found, having looked at all the cases right across the board, all the agencies dealing with intelligence and law enforcement, very firmly in the opposite way. Until you made your opening remarks, Chairman, I had rather hoped and expected that I could say a little about the general principle as opposed to the detail but you indicate that you are not greatly interested today in the general principle, which I am bound to say, to me—as you will no doubt know if you have read my report—is absolutely fundamental. We will lose a huge amount and there are very great dangers in my judgment which are supported across the board by the intelligence and law enforcement agencies in taking the course proposed by the Director and Lord Lloyd. I do not want to be over dramatic about it but I have no doubt at all—and everybody in the police forces (I am not talking about directors of SOCA or chief executives or the Commissioner of the Metropolitan Police) and everybody who is engaged in the actual work of catching criminals and preventing terrorist bombs is wholeheartedly opposed to the whole concept of admitting intercept evidence. They think it will do huge damage to the capabilities which they have so successfully exercised in keeping us, since 2005, free of terrorist outrages. The intelligence that has been gathered has enabled them to frustrate a number of incidents. All of them believe that that would not have happened if those engaged in it knew that material that they supplied would be used evidentially against them. My experience so far as the use of intercept abroad differs from that of the Director and Lord Lloyd. I think you referred to the statistics that Baroness Scotland produced in the debate in the House of Lords, where she said that there had been reports of the unsuccessful use of intercept product in Spain and Italy. Australia's latest public figures on interception show that in 2003–04 there were no convictions in the five terrorism trials. The Canadian annual report shows there were 84 interception authorisations in that year but none ended in a conviction. In the United States, where it is only done by law enforcement and not by intelligence agencies—an important distinction—there was a comparatively low figure.

Q8 Chairman: I think the figure is 1,710 interceptions and 634 convictions.

Sir Swinton Thomas: May I ask you please to take on board that in the USA the intelligence agencies are not permitted to use intercept? It is law enforcement agencies only. Like the Director whose judgment I admire and for whom I have great respect, my experience in this regard is different. I gave a number of conferences in various countries dealing with this topic and a number of delegations have come to London to talk to me and to others about it. Over and over again I am told how much they envy our system and how they wish they had it in their own jurisdictions, and how they find that it produces very

little of value to them. What is said about the use of our intercept abroad and the use of intercept from abroad here is capable of being very misleading. No intercept material ever leaves this country if it is thought that there are such sensitivities attached to what is disclosed as to make it unwise to do so. So far as anything that goes abroad is concerned, it is totally protected. Equally, we do not use evidence from abroad here if, having looked at it, the intelligence agencies who receive it consider that our own sensitivities are endangered by its use. If that is the case, it does not come in. I do not think that aspect gives anything like the support to the arguments put forward by those who take a different view to mine as they would suggest perhaps it does.

Q9 Lord Plant of Highfield: Mr Murphy was concerned about the possibility that disclosure would also disclose methods, capabilities and so forth. I thought I detected a note of optimism when you said that there was work going on at the moment to see how this could be overcome. Obviously I cannot ask you about the detail of that work but are you optimistic or is that a misreading?

Mr Murphy: I have not had the benefit of being exposed to the outcome of that work. I know counsel have been working for some time and have worked previously in trying to overcome the disclosure difficulties. Various models have been put forward. It has thus far, as far as I am aware, failed to square our adversarial process along with our human rights obligations. Perhaps the Director would be in a better position to say where that work is up to.

Lord Lloyd of Berwick: I do not see any difficulty on disclosure. It has been dealt with very recently by the House of Lords in a case called *R v H* in 2004, in which Lord Bingham gave a magisterial judgment on this question, pointing out that there is no obligation to disclose material which would be deleterious to the national interest, either under the European Convention of Human Rights or under our own domestic law.

Q10 Chairman: Could I ask about public interest immunity and whether that provides sufficient safeguards of the public interest in relation to intercept? Would that provide a way forward?

Lord Lloyd of Berwick: That is what that case was all about. It is now set out in great detail in chapter 25 of the Criminal Procedure Rules, describing, paragraph by paragraph, the stages through which you have to go in order to protect sensitive material. We protect sensitive material every day in respect of informants and other sensitivities. There is no reason in my view why we should not protect the sensitive methods adopted by GCHQ and others.

Q11 Chairman: Sir Ken, do you think there need to be any changes or amendments to the public interest immunity law to safeguard the public interest when it comes to non-disclosure of intercept material?

Sir Ken Macdonald: I agree with Lord Lloyd that public interest immunity is a very powerful tool to both protect the national interest and secure the

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right of a defendant to a fair trial. One of the problems that arose in recent years was that the prosecution were not applying the laws relating to disclosure as well as they might have done. They were disclosing far too much irrelevant material to the defence. The trials were being swamped. Defendants were using that over-disclosure as a means to fight a war of attrition, making cases untriable. Over the last two or three years, we have insisted that prosecutors apply the Criminal and Procedure Investigations Act test which means we disclose our case. We also disclose anything we are in possession of which undermines our case or assists the defence. If we have material that is *prima facie* disclosable within those tests but we do not wish to disclose it for reasons, for example, of national security, then we have to obtain the leave of the trial judge to give an order under public interest immunity to the effect that that material need not be disclosed. This is a jurisdiction of last resort as Lord Bingham sets out in the judgment Lord Lloyd has just referred to, but it is a clear protection that we have against disclosing material that damages the public interest. The final protection is that, even if the prosecution are ordered to disclose a piece of material that they think would damage the public interest, they do not have to do so. Instead, they can abandon the case. That is something that we do from time to time, even in quite serious cases, if we are ordered to disclose something that we think would damage the public interest. We offer no further evidence in the case and walk away from it. Indeed, that is a procedure which is followed in other common law countries. I do not have any doubt at all that we can protect the national interest and use this material and secure fair trials for defendants.

Q12 Chairman: Can I put a scenario to you, comparing two cases? At the moment, the question of intercept does not arise because you cannot use it. Suppose you are prosecuting somebody under the existing regime. Take the same case a couple of years down the track where you are allowed to use intercept. Public interest immunity is refused by the judge. Would you then have to abandon the trial under that regime when you would not have to abandon it under the current regime?

Sir Ken Macdonald: I am not sure how public interest immunity would apply to the whole of the product. What would happen if we had intercept product available to us is exactly what happens now when we have bug material available to us. We look through it. We decide which of that material is going to form part of our case and we disclose that. We also disclose any material which we do not intend to rely upon but which supports the defence case or undermines ours. The bulk of material does neither and in our view does not need to be disclosed.

Q13 Chairman: If it is material where you have applied for public interest immunity from the trial judge and it is refused by the trial judge, what would the implications be for that trial which at the

moment could proceed on all the other evidence but perhaps could not proceed because of the refusal of the interest certificate?

Sir Ken Macdonald: I suppose there are two possibilities. One is that you would simply rely on no intercept material at all. The other, as in a bug case at the moment if that happens—and I am not aware of any bug case in which it has happened incidentally—is you would abandon the case. It is quite difficult to imagine material that would emanate from an intercept that would come into that category. The sort of evidence that one would want to protect under public interest immunity with intercept evidence is, for example, techniques used to conduct intercept, how it is done technically at the exchange or wherever. That is the sort of material that you would secure a public interest immunity certificate in respect of. People talking about going off to rob a bank or drop a bomb are unlikely to be saying things which would attract public interest immunity. They are saying things which would attract very long prison sentences.

Q14 Chairman: Sir Swinton, if the law on public interest immunity is sufficient in bugging cases, why is it not sufficient in telephone intercept?

Sir Swinton Thomas: Nobody has so far managed to put forward a model which would satisfy the protection of the sensitivity of the material and would satisfy the principles of quality of arms as between the prosecution and the defence. Having heard what Sir Ken has just said, PII is not at all necessarily and may well not be a protection of the intelligence sensitivities. The judge, if he is given the material, has to make a decision: is it or may it be material? If so, then it goes into the public arena and there is no protection for the sensitive material. Since I have been the Commissioner in 2000—I am not a technician; nor do I have any technical expertise—in my time alone the picture has changed dramatically. Before that we still had the bulldog clips and the land line. We are now moving into the era of the voice over internet product and the NGN materials, the New Generation Networks. As of today, it is doubtful whether we will be able to intercept any of that new material. A lot of work has been done on it. Query: can we intercept it? If so, how do we go about it? If you are going to take the line that the Director and Lord Lloyd are taking, it seems to me certainly and to all those who are working in the intelligence and law enforcement agencies that you must produce a model which will deal with those techniques. Nobody so far has done so. The PII plus, which was a concept I think of the Attorney General, Lord Goldsmith, has been examined with care. No decision has been made about it yet but the general thinking is that it almost certainly will not work. On one thing I am sure all five of us are agreed. It is probably the only thing we are agreed about and that is that, if you can produce a model which will allow intercept to be used evidentially and at the same time preserve the sensitivities of the intelligence of the intercept, we would all be in favour of it. The government has

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done a lot of work to see if it can be done. I think the PII plus proposals will meet the same fate. That is certainly the message that I am getting. So far, nobody has found a model which will do the trick. If the Committee can do so, we would all be very grateful.

Q15 Lord Judd: Whatever our position in the argument, there will presumably be personnel, material and cost consequences. I wonder whether the DPP can tell us just how these have been quantified if the ban were relaxed, so far as his own people's work is concerned; and secondly whether he thinks it will put an additional burden on the prosecution and whether that has been quantified. If these things have been quantified, exactly how is it intended that they will be dealt with? It seems to me this is not just an argument of principle; it is also an argument of resources.

Sir Ken Macdonald: I am sure that is right. One of the things we have to avoid for my agency as well as for the intelligence agencies is a system which becomes burdensome and too expensive to operate, particularly over the next few years when I do not think we are going to be getting much more money from the government. One of the things that was very interesting to me when I visited Australia in the autumn of 2004 was to talk to the various police forces as well as the prosecutors, who conduct most of this work. I spoke to the New South Wales police and to the Australian federal police at the most senior level. The message they gave was that the point about intercept is that it is surprisingly cost effective in terms of conducting big operations in complex crime. It is perfectly true that the New South Wales police and the Australian federal police operate a very sophisticated software system by which they conduct intercepts, which allowed key word searches, capturing sentences, key words and so on and so forth—although of course there is no reason why we should not have similar software. The message we had from them was that each warrant in effect cost from warrant through to prosecution about \$9,000 in terms of the amount of resource they had to put into the interception, which is about £3,500. They felt that one problem with intercept in organised crime cases was that it was so effective there was a danger it would become overused and more traditional forms of policing would fall away, which would not work because you need to combine intercept material with the more traditional evidence which is obtained by more traditional forms of policing. The reality is that, so long as we can control the disclosure obligations, this form of investigation is probably more cost effective than, for example, following someone around. It has been estimated that to follow one individual around London—I will not give the figure—it takes a surprisingly large number of individuals. These surveillance operations are hugely resource intensive. If you are following 14 men who you think are planning to blow up some airliners, that is an enormous operation. If you are tapping seven or eight phone lines, that is perhaps easier to do although you want

to combine elements of both. I do not get the impression from our foreign colleagues that cost is a problem here but they have found ways to restrain this appropriately so that it does not get out of hand and we would have to do the same.

Q16 Lord Judd: And for the prosecution?

Sir Ken Macdonald: The same thing. We have to satisfy ourselves whether material is disclosable or not. Therefore, there is a requirement upon us to consider all the material which is obtained as a result of the investigation, the fruits of the investigation. That is something which we have to do in all cases, whatever the sort of evidence, whether it is bug evidence, surveillance evidence or scientific evidence. We would need to find ourselves in a situation where courts were not routinely ordering us to disclose the totality of the product just in case the defence found some material. It is well known that a major professional criminal was sentenced to seven years in a London court last week and it is well known that in that case the judge ordered that the totality of the transcript should be supplied to the defendant at a cost of nearly £3 million. It is worth reading something Lord Bingham said in the case which Lord Lloyd referred you to a moment ago. This was part of his judgment: "The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far reaching disclosure in the hope that material may turn up to make them good." That would obviously apply to a situation where someone asked for disclosure of the totality of intercept product. Indeed, we appealed this judge's ruling. We had an interlocutory appeal in the Court of Appeal and the Court of Appeal laid down some guidelines as to when it would be appropriate to serve material and when it would not. I am quite confident that the CPIA regime does not require the prosecution to supply the totality of transcripts but only those parts of the transcripts which are disclosable under the law—that is, those which are our case and any other excerpts which undermine our case or assist the defence case. Financially, obviously there is a cost to this but the gain in terms of increased pleas of guilty, which is a very marked consequence of this abroad, and therefore the resulting saving of court time as we saw in the *Adams* case—no six, seven, eight or nine month trial because he was shown all the bug material and pleaded guilty eventually—would more than make up for the original cost in conducting these operations and assembling the material.

Q17 Lord Judd: I am not a lawyer and therefore I speak very much as a layman but in what you have just said, if we are very committed to the principle and presumption of innocence, is it quite as simple as this, about how much information is made available to the defence?

Sir Ken Macdonald: That is the law and that is the regime.

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Q18 Lord Judd: I am asking you.

Sir Ken Macdonald: I think it is. I think the law is completely appropriate. If we have a regime where everything that the police obtain during an investigation is served, trials become swamped with an enormous amount of material that has no relevance at all. The point of disclosure is to restrict the subject matter of the trial to material which is relevant to an issue in the case. Someone has to do that and I think it is appropriate that it should be the prosecution, assisted by the judge if we want to withhold material which is otherwise disclosable.

Q19 Lord Judd: I would now like to ask the police whether they anticipate significant additional burdens and whether they have been quantifying what these will be and how they will deal with them. For example, the very obvious task of transcribing intercept material and the costs attached to that. In looking at all that, have you had consultations with other countries and what have you learned from your consultations about how they tackle it?

Mr Murphy: Can I emphasise that if we can find a system that stops that burden we support it. If I can make two points on the burden, one is we currently use probe material, eavesdropping material in evidence. As in the case that the DPP referred to, sometimes there are significant volumes and hours and hours of material. An eavesdropping device is in one place that an individual has to be in at a particular time. A mobile phone is with somebody 24 hours a day so there is 24 hour coverage of what is on a mobile phone, but there is lots of collateral intrusion because the subject is not necessarily the person who is always using the phone. Potentially, there are massive volumes of material. There is also a difficulty in that the process and the technology we have are not designed to deliver evidence. We know that we miss calls. Whilst there are mechanisms to protect the disclosure of the volumes of material, we know there is potential for attack on the process and the integrity of the process in delivering the evidence. In relation to your question about other countries, I have had the opportunity to visit other jurisdictions and only last year I was in an intercept suite in Los Angeles. I have previously been in one in Canada. They have very good systems and they do achieve successful prosecutions but in both cases they were monitoring very small numbers of lines because of the requirement to service the evidential capacity. Unless we can find a way of reducing the volume of material that an evidential regime would create, the inevitable consequence for ourselves is that we will reduce our coverage and we may end up with longer operations, as opposed to shorter operations, because we do not have the same level of coverage.

Q20 Baroness Stern: I would like to probe a little further, if I may, this question of technological developments which is cited as a reason for not legislating now to allow intercept. Sir Swinton, you made this point in your report and you have just told us a little more about the methods. I wonder if you could tell us precisely why these new technologies

are an obstacle? Would it be very difficult for a parliamentary draftsman to devise a statutory framework that would be flexible enough to cover new technology as it is developed, in your view?

Sir Swinton Thomas: I am sure the parliamentary draftsman could do what was required of him. We are more concerned at the moment with the practicalities. If I may make so bold as to suggest it, you really want somebody here from an outfit called NTAC, the National Technical Assistance Committee, who deal with all the technical sides of this, or someone more relevantly from GCHQ, who have great expertise and who are in fact trying now to see whether they can devise a means of dealing with the new technology. So far, they have failed. They are hopeful that they will succeed but they are not confident. It is not easy for me, in a way, to give you a good answer to the question because of my absence of technical knowledge but, so far as the voice over internet protocol is concerned, as I understand it, that is going to replace the telephone altogether in the same way as our land lines have tended to go out of use and we all use mobile phones. Everybody is now going to use the internet. If you send a message on the internet, what you say gets broken up into little pieces and goes through all sorts of different airwaves. It arrives at the other end in pieces. It is not like a telephone call where you get the whole thing in one piece. As at the moment, nobody can see a way forward as to how you will successfully intercept that material and make it comprehensible to the receivers of it. If you are on the receiving end, you will have a fair idea what it is all about but if you are not you will not. It is a very technical topic and I would much rather it was answered by someone with much greater technical expertise than I have.

Q21 Nia Griffith: You mention in your annual report that communication service providers are strongly opposed to intercept being admissible in court. Can you tell us why that is and should their agreement be a precondition to relaxing the ban?

Sir Swinton Thomas: I visited all the major telephone companies and internet companies at least once a year and more often with some of them, as was necessary. There are two aspects. The companies themselves who are extremely co-operative in providing the material which is needed for the intercept are very concerned about their capacity and the way in which they go about dealing with these issues being made public. There is probably a commercial aspect to that which is difficult for me to deal with in public. I dare say that if you have a chairman of a company dealing in communications, he would say, "Quite frankly, we would prefer that our customers did not know that we were passing all your calls across to a government agency", which is a fairly natural response. A more important one is that they think—and I think they are right—that if there was a change in the law all the ways in which they go about providing material would be open to examination and cross-examination, which is something they do not want to happen. Members of the general public probably know very little about it.

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The second issue is this: whenever I go to the 10 or 12 major telephone companies that I do go to, I always go into the secure intercept room, where the highly trained technicians who deal with the warrant work and providing the intercept work in very secure conditions. They are always an impressive body of people. A lot of them are quite young. More than 50% nearly always are women. The first question they ask—indeed, the first question I am always asked by the companies themselves when I visit—is, “Sir Swinton, what is the latest news on intercept as evidence?” I have given differing answers as the years have gone by because the government’s approach has changed from time to time. They are super, very admirable people. These people who work in this are deeply alarmed at the prospect that they personally are going to have to go to court to give evidence about what they do. They say over and over again, “If that happens, we are going. I do not want a bomb under my house. I want to protect my family.” They are genuinely frightened of having to do it. I am bound to say, having seen them and talked to them, I do not blame them. Again if you want an expert, Sir Christopher Bland, who is the chairman of BT in one of the previous inquiries was asked by the Prime Minister to go and see him to inform him as to the view taken by the CSPs on this issue. He did and he told him why they were completely opposed to it. I am told that that was considered to be a very important piece of material for the Prime Minister to have in the decision that was made. I do not know. He may be quite happy to come and talk to this Committee as well. If you have the experience that I have had of visiting them regularly, they really mind that people like Lord Lloyd and the Director express views and they say, “They never come anywhere near us. They never come and talk to us. Why don’t they?” I cannot answer that but they do not. They feel it very deeply. There is that very strongly felt opposition in people who are enormously important to the whole process.

Q22 Nia Griffith: Has anybody else any comment to make about how those problems could be overcome?

Lord Lloyd of Berwick: Could I deal with an earlier point on finding a model whereby intercept could be used? It is said that it is still too difficult for us to do that. The question which then arises is: why is it that they have succeeded in finding a model in five other common law countries: Australia, the United States—they are all set out in the back of the Justice report. In all those countries they found that a combination of PII and in some cases statutory backup to the PII has protected the sensitive way in which this information is obtained. On the service providers, what Sir Swinton said is impressive but the letter which I received from them, which I referred to in my speech last week, made it quite clear that provided their staff were protected they had no objection in principle to intercept evidence being admitted. There is no doubt that their staff could be protected. That is indeed what happens day

in, day out in court when evidence is given by an informant. I do not really see any difficulty in meeting that.

Sir Ken Macdonald: The experience abroad is that people involved in this sort of work are very rarely called to give evidence because there has to be a good reason for them to be called. In most cases it is very difficult to imagine what that reason would be. Secondly, we are very accustomed to calling witnesses who are in a sensitive position. Witnesses can give evidence under a variety of what we call “special measures” without their name being given out, from behind screens, by closed circuit television and so on. Of course, at the stage where we are, people confronting any change of this sort would be uneasy about it and prefer it not to happen. That is human nature but we have to ask ourselves how it is that every other common law country manages to do this and manages to maintain relationships with the communications service providers without any great difficulty. People do resist change and people are uneasy about change but if we simply always submit to that there will never be any change in anything.

Q23 Chairman: Presumably you understand their reservations?

Sir Ken Macdonald: Of course.

Q24 Chairman: Do you accept those reservations?

Sir Ken Macdonald: Of course. Who wants to have to go to court and give evidence in a criminal trial unless it is absolutely necessary? I am quite clear that people who found themselves in that position—I think there would be very few of them—would be completely protected.

Mr Murphy: I agree with the views of the Director in relation to the individuals in the CSPs. I am concerned about the people who work in the intercept agencies. One issue we have not discussed is language. In a previous life I was head of operations for the National Crime Squad and I would estimate that as much as 50% of what we were listening to was not English. We had great difficulty in securing the services of interpreters in particular because there was a vetting process required for those individuals and some of them come from quite vulnerable minority communities. Whilst I understand what is being said in terms of special measures to protect witnesses, these people are far more likely to enter the evidence chain because of issues around interpretation of either what has been said in English or in terms of how that has been translated into another language. The issue with CSPs is true. There is far less likelihood that they will have to attend court. The same cannot be said for the people who are on the end of the telephone.

Q25 Chairman: Presumably the same protections can be worked through for translators and interpreters?

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Mr Murphy: There are two issues. One is the difficulty of securing people in the first place and the worry about losing them if we expose them to court. Secondly, the absolute need to have mechanisms in place to protect them should we go to such a system.

Q26 Lord Plant of Highfield: If we move towards the disclosure of intercept evidence, should interceptions of private communications require prior judicial approval or should that approval continue to be given by the Home Secretary?

Lord Lloyd of Berwick: That, if I may say so, is a subject which is very dear to the heart of Professor J R Spencer, a professor of law at Selwyn College, Cambridge. His view is that one of the difficulties has been that the Secretary of State wants to hang on to the ability to grant warrants; whereas in most, but not all, other countries law enforcement warrants are granted by judges. Certainly my view would be that we should move in that direction. I cannot see why it is necessary for the Secretary of State to retain these powers.

Sir Swinton Thomas: It is not just the Home Secretary. The Foreign Secretary does all the foreign ones and the Northern Ireland Secretary does all the Northern Ireland ones. This was much debated in 1985 with the first Act of Interception, IOCA. When RIPA came into force in 1990, Parliament came to the conclusion at the end of the debate that it the responsibility for issuing a warrant should stay with the Secretary of State. I think the basis was that it was practical and that the Secretary of State should take responsibility both politically and practically for what is a serious invasion of the privacy of the citizen. That was a thought out decision made by Parliament. From a practical point of view, which I suppose is what I am more concerned with, I think it is a very bad idea to put it in the hands of a judge. As things are at the moment, if you know that a bomb has gone on a train in Leeds and is on its way to King's Cross and you need information, in a matter of minutes you can get a warrant to intercept the communications of that suspected terrorist. Likewise with a serious crime, if a very large consignment of class A drugs has arrived at Dover and is on its way up to Manchester, the Secretary of State is always on duty, 24 hours a day. It is very often absolutely vital that you act with as much speed as you possibly can. That is what currently happens. You can get a warrant or a modification, which is equally important, straight away. Going to a judge would not permit that degree of elasticity. If it is done by a judge, the other side must have the right to be heard and you will not be able to acquire a judicial hearing at the sort of speed that papers can be put speedily in front of the Secretary of State. I would think we are much better maintaining what we have.

Q27 Chairman: Sir Ken looked a bit sceptical when you said that.

Sir Ken Macdonald: I did not mean to look sceptical. In fact, I was not sure that I was clear why the other side would have to be notified.

Q28 Chairman: That was the point I was going to put.

Sir Ken Macdonald: The other side is the person being tapped so it seems to me they would not be notified. I think there are arguments on both sides here. I have never disagreed with Professor Spencer before and I do not really want to do that now but I think there are arguments on both sides on this question. I do not have a set view, I am afraid.

Mr Murphy: I agree with that entirely. I think there are arguments on both sides. Sometimes there is an inevitable delay in the bureaucracy involved in getting to the Home Secretary but the department in the Home Office that deals with this and the interception agencies work very hard to overcome that. I think the system with the governance and oversight of Sir Swinton and his predecessor—I have been questioned quite closely by one of his predecessors previously when on an operation—works quite well. There are some advantages in having it before a judge but ACPO would not seek to influence the argument either way.

Lord Lloyd of Berwick: I agree that there are arguments both ways. My own preference would be that it is put to a judge. It would have to be a delegated judge. It would not be any old judge, if one might put it that way, and I do not believe there would be any great difficulty in getting that almost as quickly as with the Secretary of State.

Q29 Chairman: Presumably the argument is that if it can be done that quickly is the Secretary of State giving sufficient scrutiny to the request in the first place or is he acting as a cipher? Is the judge likely to look into this and be a little more satisfied as to the order?

Lord Lloyd of Berwick: I believe we are all right with the European Convention of Human Rights at the moment in having what we have. In America, for example, it has all moved towards judges and in most of the other Commonwealth countries it is judges. I can imagine circumstances in which it could be argued that it is not right for the Secretary of State to grant a warrant.

Q30 Nia Griffith: Mr Gargini, there have been concerns that sometimes counter-terrorism measures could have a disproportionate impact on minority communities and there is a danger that they could be alienated by such measures. Can you tell us what steps the police are taking to ensure that in the exercise of counter-terrorism measures there is not a disproportionate effect on particular communities and that there is not a counterproductive effect on those communities?

Commander Gargini: There are four things that we are currently focusing on but before I go into those four pieces of work I would like to say that we understand the interdependencies between the need to balance the security of all of our communities and the human rights of the individual and of particular groups. One of the first key points that we are trying to develop at the moment—this has been going since January of this year, 2007—is a co-ordinated

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communication strategy. What we find at the moment is that we are sending messages at the time of a specific event or a critical incident, but between those critical incidents there is very little communication between law enforcement, the agencies and the communities that we are trying to protect. What we are doing is developing a series of key messages. Those key messages are going to be along the lines of: why is it that we are using certain policies? Why is it that the threat level is at a particular point? Indeed, why is it that the police service has a particular response to that threat level? It certainly is not about discussing any of the intelligence or the intelligence sources; it is about explaining activity and that is the key point. The second point is about consultation and understanding. In order to maintain and build on trust and confidence, we need to know exactly what our communities and our vulnerable communities want us to do. Those are the things that we are trying to do, to seek views and develop them. The third thing is about guidance and advice. That guidance is encapsulated in a practice advice document published in July 2006 which gives authorising officers and those people exercising the powers under the Terrorism Act 2000 clear guidance about what they can do, the way it should be authorised, the need for tact and sensitivity when those powers are used. The fourth and I think the most important thing from the perspective of this Committee is about the community impact assessment. What we encourage at chief officer level is for all counter-terrorism operations to be assessed in terms of the impact they would have against vulnerable communities. We are encouraging all forces to do that. One of my teams, the national community tension team, co-ordinates all of that work and we add value to it by looking at it from a national perspective. If an operation takes place in Greater Manchester or Birmingham, we can look at the communities in London and globally because I think if we do something here it may well have an impact internationally into source countries. Those are the four key initiatives that we are undertaking at the moment.

Q31 Nia Griffith: Would we be right in assuming that it is ACPO policy not to use racial profiling?

Commander Gargini: You are absolutely right. The ACPO position is that we do not advocate racial profiling. We feel that this is counterproductive in the efforts to make our communities safer. We feel it is divisive. We feel it will alienate the communities

that we are trying to reach. We make it very clear in our practice advice that we would draw the attention of all officers to Police and Criminal Evidence Act, code A, to make sure that that was invoked. I would like to add something about intelligence here. The activity that we are implementing is based upon evaluating intelligence. It is not based upon a racial profile or a profile based on ethnicity. It might not always be that we know who the suspect is but what we try and do is look at the other factors involved. For instance, the location where the threat might be focused. That might well be a transport hub, a train station in the centre of London or an airport. We look at the ways that we can target that intelligence or narrow that intelligence down so that we can inform our staff and brief our staff effectively.

Q32 Nia Griffith: Do you feel then that that guidance is sufficient to make sure that officers are not involved in any sort of informal racial profiling?

Commander Gargini: I think there is always a danger of that, and we are very careful in the way that the practice advice is laid out. We deal with consultation in that practice advice, we deal with the community impact assessment, we deal with the application of section 44 under the Terrorism Act 2000, and we also deal with Schedule 7 stops and searches as well but most importantly, to answer your question, this is about briefing our staff effectively and appropriately. They are continuously reminded of the nature of the threat and the importance of not stereotyping people that may well be involved. So it is the view of ACPO, as I have said, that it is entirely dangerous to look at what has happened before. We must keep an open mind. People involved in this type of criminal activity will seek to change their methodology, and to actually fall back on what has happened and not keep an open mind for the future I think is extremely dangerous.

Lord Lloyd of Berwick: Could I just add something? I just have a correction, Mr Chairman, on this question of whether it should be a judge or the Secretary of State. It may be—I think I have said that increasingly countries are moving towards judges. The distinction is probably between evidential warrants, which are going to be used in court, and they are increasingly given by judges, but intelligence warrants, which I think are the ones which Sir Swinton was mostly concerned about, could and should be given still by the Secretary of State, and in that way one might get the best of both worlds.

Chairman: Thank you all for your evidence. It has been very helpful.

Witnesses: **Mr Nick Blake QC, Mr Martin Chamberlain, Ms Judith Farbey and Mr Andy Nicol, QC** gave evidence.

Q33 Chairman: We now move into the second session of the Committee's ongoing enquiry into counter terrorism policy and human rights. We are joined by four of the Special Advocates who are involved in terrorism cases. Welcome to you all. We know we cannot go into the specifics of individual cases and we accept that. Really, what this session is about is some of the general principles that are involved and some general understanding of proceedings work and concerns that you may have having to work within the system. Does anybody want to make an opening statement or shall we go straight on?

Ms Farbey: May I make one caveat on behalf of myself? I am a Special Advocate in the case of MB, which is going to the House of Lords on the issue of the role and function of the Special Advocate, therefore I will not be commenting on general issues of fairness of the procedure.

Q34 Chairman: Perhaps we could start off by asking Mr Blake first of all what do you consider your function to be as a Special Advocate?

Mr Blake: I think the function is to promote the interests of the appellant in his or her absence in those proceedings, so it very much depends from case to case what that entails. First of all, you must decide is it in the person's interests for you to participate in the proceedings at all? Sometimes you may take the view that you know so little as to how he or she would respond that any question you may ask may be deleterious to those interests, in which case that is one issue. Secondly, you look at the way in which, if you do have some information as to how this person wants to explain their situation, you are best going to be able to do that in closed proceedings. The rules suggest you do it in two parts. First of all, is there anything in the closed case which could be made open without endangering national security, so that person gets a little glimmer of more light as to what the real issues are in the case. The possibility of such disclosure is up against some iron laws with no balancing of the interest of justice. That is very important. If there is a public interest against disclosure, that is the end of the debate. It is not the beginning of the debate; it is the end of it. Secondly, if disclosure is out of the way, you then in those substantive proceedings may want to test propositions which are advanced against that person in closed. You may want to pursue the logic of a certain hypothesis which is being presented. You may want to demonstrate that there is other evidence, closed, exculpatory evidence, which might put a different picture upon the evidence but much of that, of course, is dependent upon you being given that material and then making a submission using it. I suspect that many of us would feel at the moment that our most important function is on the disclosure front of what, if anything, can go from closed to open, and also, what is not before the Commission as a whole which ought to be by way of further investigations, collateral investigations, exculpatory material and things which might tend to undermine the hypothesis of the case which is being presented

against the person whose interests you represent—that is a bit of a mouthful but we cannot use the word “client” for obvious reasons, we cannot receive instructions on the closed material. You seek to advance the appellant's interests by one means or another. Sometimes when doing that function you are met with the argument “That is not the function of a Special Advocate.”

Q35 Chairman: That was my next question: what are the differences between the Special Advocates and the Government as to what the role of the Special Advocates is or should be?

Mr Blake: A Special Advocate should do anything he or she thinks it is appropriate to do within the limits of their powers. You cannot do things which you are prevented from doing by statute or the rules but other than that, Special Advocates would take a broad view as to what they could do. Whether they should do it or not is a very different matter but that is a matter of individual judgment, rather than the existence of powers. I would not agree with many of the arguments that we have a very narrow function, which would, I think, diminish what could happen and what has happened in one or two cases which may have been of some benefit.

Q36 Chairman: So there is a difference between how you see you should operate and can operate and what the Government says you should and should not do?

Mr Blake: Certainly, that has been suggested in submissions. There has been no authoritative ruling of SIAC or indeed the High Court in the control order case. I think there might be some indication in a forthcoming judgement as to where the balance of the argument lies in the view of the judiciary but at the moment there is very little we can give back to you by way of decided authority on that question.

Q37 Earl of Onslow: You said two things which struck me. One, the public interest not to disclose meant that was the end of an argument. Is this in your view abused? In other words, do they say it is not in the public interest to disclose as a defence mechanism and I am just going to say it and secondly, you said your powers are limited by statute. Is there any way in which you feel your powers over-limited by statute?

Mr Blake: Can I give an example of the first, of an area which we have moved into which I think causes me concern and I know a number of my colleagues? Since the summer of 2006, with the cases going through SIAC of deportation with assurances, the Commission is no longer just looking at the national security case to deport. They are also looking at the safety on return to some of these countries that can be achieved without violation of our human rights obligations. That latter issue had historically always been a purely open issue. It is in asylum cases, where often the human rights record and what Her Majesty's Government thinks about the human rights record of various foreign governments is an open issue. There had also been cases, notably the

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Youssef case about the detention of Egyptian nationals who could not be deported to Egypt with assurances where a lot of relevant material about attempts made by the British Government to deport them with assurances was in the public domain before the trial judge. I think it is plain from open judgements that have been given since the summer that there have been debates in some of the cases that have arisen since then as to whether similar material, material of the sort that was in *Youssef*, is now a closed matter. Certainly, there are closed issues on safety on return and some concerns as to whether the public interest test—because this is not national security; this is about foreign relations and things which governments prefer not to have revealed about what is going on at that time, and whether those are really closed issues and whether there are no means by which the appellant’s team can understand the context in which these assurances are being negotiated and debated and issues of concern without being excluded from that discussion. I think that is a relevant concern and a live issue in certain cases. As to the function of statute, there were debates in cases last summer as to whether the words “public interest” could be read as involving some balance, ie a strong case in disclosing what the last exchange of diplomatic letters from government A and the Foreign Office about safety on return should not be trumped by a general principle that diplomats prefer to do things in secret rather than things which might go before a court. If one can read into the statute some element of balance where proportionate and necessary, I think that would be considered to be more helpful to the process rather than an iron block. If you have a ton of reasons why there should be disclosure and you have a feather against, the feather beats the ton because the statute says nothing which transgresses the line is permitted and that is the point.

Q38 Chairman: Does anybody want to add anything to the general questions we are asking about the role of Special Advocates?

Mr Nicol: I would add something on the role of Special Advocates. I see it as mitigating the unfairness which is inherent in a system where the appellant, one party to the proceedings, does not know all the material that they are supposed to be meeting or answering. That is inherent. It is irreducible in the sense that, as long as the appellant does not know it, there is always going to be the fertile possibility that explanations or responses that could be given are not, because that material has not been disclosed to the only person who could provide them. The system of Special Advocates can never overcome that irreducible element of unfairness but, having accepted that, I think that the functions that we try to perform can at least mitigate it and is better than not having a system where there is a partisan representative. We are not like friends of the court, *amici curiae*; we are partisan. We are partisan on the part of the person whose voice is otherwise not going to be heard in the proceedings and in relation to

material which is otherwise going to be put before the Commission with nobody saying anything contrary to the Government’s view.

Ms Farbey: I would elaborate on two points. The first is that I would regard it as always being in the controlled person’s or appellant’s interest to have matters put into open. I think openness is integral to fairness and it is not for me as a Special Advocate to judge what may or may not be of interest to an appellant or a controlled person when it is put in open. It is for me always to drive for openness. Secondly, I would also say that it is my function as a Special Advocate to ascertain from the conduct of the appellant and his lawyers what his interests are, and it is certainly not my function to step on his barrister’s toes and to take points which his barristers could take but may choose not to take.

Mr Chamberlain: I would agree with that last remark, subject to this: that there have been suggestions sometimes made in submissions to SIAC that there should be a very strict demarcation line observed between open and closed, so that any point which is in open or relates to open evidence is a matter for the open advocate only and the Special Advocate is restricted to dealing with points which arise solely out of the closed evidence. My position is that that would be too inflexible and impractical an approach to adopt because, in the nature of things, one quite often has cases where an open point arises but one does not know the significance of it except in the context of the closed material. So even though in principle the open advocate could deal with it—it might even be a point of law; the open advocate has access to the same law books as we do, there is nothing secret there, but he or she does not know the significance of the point and why it needs to be pressed home. Therefore I think I would strongly resist any suggestion that we as Special Advocates are somehow limited because of a formalistic interpretation of the procedure rules which define our function to points which are solely closed points.

Q39 Chairman: Could I ask a more general, philosophical question? You have all had your various criticisms of the system. Andy has given us an explanation that he thinks it is important that you do the work for the reasons that you have given. If you were to refuse to be Special Advocates, what would happen then? Would the system simply fall apart or would somebody else in the end always step into your shoes if you suddenly decided you had had enough of this unfair system and you were not going to do it any more?

Mr Blake: I am sure that I and each one of us has asked the question whether we are doing more harm than good by staying in the system, and I think the fact that each of us continues to perform this function feels that point has not yet arisen. It might have arisen and it might still arise for me or others, but it has not yet arisen. I cannot say what would happen if everyone resigned *en masse* or indeed if the Bar Council were to say no member of the bar will perform this function. That would be a professional rule, and I think it is unlikely that that would be the

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case. You have seen what happened recently in Canada, suggesting that it is filling a gap. Philosophically, on the very broadest level, it is important to recognize how the system came about, which was to provide something in the field of national security deportation where there was previously nothing. Where it is adding something against purely arbitrary executive decision-making or decision-making which may be arbitrary because no one knows what its qualities are, that is a safeguard. If it goes beyond that and therefore reduces standards of fairness which either the statute or common law or human rights or Article 6 or anything else says a minimum requirement is that you must know the case against you, where that has been established, a Special Advocate cannot be used to water down. I think the Special Advocate can add something where there was nothing previously. That of course is the proper use of Special Advocates in criminal procedure, which is the PII procedure. It is not determining guilt or innocence; it is determining what is material that the judge ought to make available to the defence or stop the trial if the Crown does not want to do it. In an asylum case, of course, you never stop the deportation. It still goes ahead. That is the problem.

Q40 Chairman: Is the very fact of your assistance mission creep, as more things around this area start to be put into your sphere of responsibility. If you were not there and did not exist in the first place, if you knew where it was going to end up compared to where you started, would you still have taken the job on?

Mr Blake: I am very concerned about the extension of this role into other areas which it is manifestly unsuitable for. Let me make plain that a Special Advocate does not ensure a fair trial. That is absolutely impossible. Proceedings with a Special Advocate are not a fair trial so suggestions at one stage in 2002 that we might have criminal trials conducted in secret with Special Advocates is completely impossible, contrary, in my view, to the fundamental norm of fair trial values. There are then cases where people might want to use the system to deprive people of assets or property, or possibly the hope of liberty in the Parole Board context. That is particularly controversial, a judicial decision about future liberty, and I think those are extensions outside the area in which it was originally evolved. I view those extensions with very considerable concern. But you are still left with the problem of the deportation of people who did not have rights granted by statute or human rights doctrines or anything else, and is this a check against arbitrary detention or expulsion? It may be and indeed, the cost and the delay and expense of the system may diminish governments' appetite to the number of people they want to put through the system.

Mr Nicol: Can I add something? I would entirely endorse what Nick has said about the danger of Special Advocates becoming used in areas where in the past the opposing the appellant, defendant or litigant has been told everything that is put before the court. I was involved in a case a little while ago

which concerned security vetting procedures for people who were doing certain kinds of jobs that required that vetting and who sometimes failed and, in the case of this particular litigant, was told very little at all about why he or she had failed to obtain that vetting. The employee then brought judicial review proceedings and the employee asked for a Special Advocate to be appointed in the course of those judicial review proceedings and to be told what the reasons were, and I happened to be the person who was asked to be that Special Advocate. The outcome of the litigation was the establishment of a whole new procedure for dealing with challenges to such refusals which incorporate something like a Special Advocate procedure and, just as Nick was saying that the use of Special Advocates in deportation procedure has added something to what was there before, so that is a procedure which has added something to the rights of employees who fail vetting processes that was not there before.

Mr Chamberlain: I would just add this, that the fact that a Special Advocate accepts an appointment in a particular case does not indicate that that Special Advocate considers at the time of accepting appointment that he can advance at all, even by a miniscule amount, the interests of the appellant and that is why in some cases Special Advocates, having accepted appointment, have taken a decision to make no submissions, and I have been involved in cases where I have taken that decision. Sometimes it has not attracted great judicial sympathy, it has to be said, but the decision has to be taken.

Q41 Chairman: Why would you decide to do that?

Mr Chamberlain: Without going into the details of the case, of course, because you have to take a judgement as a Special Advocate, once you have seen the material that you are given, whether your making submissions in the light of the particular stance that the appellant is taking will advance the interests of that appellant or not and, particularly where an appellant is taking a stance that they are not going to participate in proceedings, the Special Advocate has to form a view as to whether it is in the interests of that appellant for him to play a part in those proceedings. I see the question "Can we do more harm than good or do we do more good than harm?" as a question that falls to be decided on the facts of every individual case that we are instructed on and accepting appointment does not absolve you of the duty to consider very carefully on each occasion whether making submissions will advance the interests of the appellant or not.

Q42 Chairman: Or your client's wishes in that particular case are not to be represented, not to make the submission.

Mr Chamberlain: I cannot go into the details of that case but certainly, what you perceive the appellant would want is obviously a very important factor that a Special Advocate has to bear in mind.

Ms Farbey: Like Mr Blake, I would be very concerned about the creeping effect of the statutory framework in both control order cases and in SIAC cases. In particular, if one takes the Special

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Advocate system which has been set up in one case under the Parole Board rules, it is very difficult reading those rules, I would say, to find a space for special advocacy. In that framework there are no procedure rules, there is no statutory framework and it may be the case—I do not know—that the specially appointed advocates in that case have chosen to behave as if they were special appointments in SIAC but there is not the same parliamentary scrutiny of the system and it is a very different matter.

Q43 Baroness Stern: You will remember that you gave evidence to the Constitutional Affairs Committee in 2005 that was looking at Special Advocates, and three of you expressly disagreed with Lord Woolf's comment in *M v Home Secretary* that the case demonstrated that the use of Special Advocates "makes it possible to ensure those detained can achieve justice". It is now two years since that report. It appears there have been improvements to the operation of the Special Advocate system in the light of the report of the Constitutional Affairs Committee. Have there been improvements and does that remain your position? I suspect it does but perhaps you could put it on the record.

Mr Blake: I was Adviser to that Committee rather than giving evidence before it, so I do not think I am actually on the record on that particular quotation but it has to be said that two years on that is the only case of SIAC allowing an appeal, and it remains the only case. As you know, other proceedings have been taken in respect of that person. Certainly, there was some interest in adding support to the Special Advocates, who at the time of the CAC report had a very lonely job, ploughing an unsupported furrow, not really appreciated by appellants, who were concerned that this system was legitimising an unfair procedure and sometimes complaints from the Government side that it was taking too long and cost too much money and achieved too little. I think the Special Advocates Support Unit was a good idea to make some improvements but there is still a long way to go in terms of logistical support, in terms of the independent language experts, in terms of research expertise. I think I can give an example in a control order case which came up earlier this year of precisely how difficult it is to do this job without proper support. As you have already heard, one of our important jobs is to see what material that is relied upon in closed could be in open. There was a document that seemed to be highly sensitive, a document from a very senior Al Qaeda suspect to another very senior dangerous player, mentioning someone else's name—I will not mention the names but there it was. That was a closed document until a Security Service witness, who was giving evidence about it, explained that this document had been published by the Iraqi government on the internet a year previously and therefore it should never have been closed but of course, since it was published in Arabic and not many of us are Arabic linguists and able to do the research, none of us could make this point until we heard that. Once that point was made,

the document became open and it became quite an important opportunity for the appellant to deal with some observations in it. That was an example of not having their language skills and internet skills to research that job. Much of our work on disclosure is seeing whether there is an open source for materials and that is still a very time-consuming and difficult task and I do not think we have got a great deal further along the line with that. I am sure others have other things to say about that topic.

Ms Farbey: Can I just pick up on our function as unearthing open sources? I and other Special Advocates spend a lot of time on the internet to try to search for open sources. It would be helpful if, where there are two sources, a closed source and an open source, the Secretary of State would rely on the open source. Just to give an example from my own practice, I spent quite a few hours carrying out internet research and found an open source for a particular fact. I was most excited about it and thought perhaps it would assist. The next day I received papers in another case where that same document had been disclosed by the Secretary of State as part of the case. One wonders in that case whether the left arm quite knew what the right arm was doing. If open sources are not put into the Secretary of State's evidence at an early stage, we have to unearth them through the disclosure procedure, which causes delay in getting them to the appellant and thus may cause prejudice in preparing their case.

Mr Chamberlain: Just to pick up on your question about the case of *M* and Lord Woolf's remarks in that case, I was the junior Special Advocate in *M*, led by Angus McCulloch, and I did not agree with the inference that he drew from the fact that *M*'s case had succeeded then and I do not agree with it now, even under the new procedures. I do not think the fact that in one case under the 2001 Act it was possible for an appellant to succeed on the basis of submissions made by the Special Advocate shows anything at all about the efficacy of the system as a whole.

Mr Nicol: I did not give evidence to the Constitutional Affairs Committee that you referred to but I would join with what the other witnesses have had to say about our reaction to Lord Woolf's remarks.

Q44 Lord Plant of Highfield: I would like to ask a series of questions focusing on the issue of your relationship, or, in a sense, the lack of it, with the people whose interests you represent, because there is the prohibition contained in the procedure rules which prevents any communication between you, as Special Advocates, and the person concerned or their legal representatives about any matter connected with the proceedings as soon as the Special Advocate has seen the closed material. So, focusing on that point, perhaps I will ask all the questions together; it will probably be more efficient to do that and whoever feels moved to answer them can please go ahead. First of all, between you, could you provide one or two examples, which would obviously have to be hypothetical examples, of how

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the limitation on your communication with the person concerned or their legal representative after you have seen the closed material limits the effectiveness of your function? Can you explain to us why in practice Special Advocates do not make much use of the procedure rules, which do allow you to seek the High Court's permission to communicate with the person concerned or their legal representative? Our evidence suggests that there is little or no attempt to do that and it is an intriguing question for us as to why that is so. Thirdly, would you be better able to perform your function if you were able to communicate with the person whose interests you represent and their legal representative after you have seen the closed material? Finally, the Constitutional Affairs Committee and the Canadian Senate Committee have argued that if such communication were allowed, it would be possible to devise appropriate safeguards to ensure that sensitive national security information is kept secret. If you think that is possible, what do you think that would look like. I am sorry that is quite a lot but they are fairly integrated.

Mr Blake: Let me try to address those. The first question, the preclusion of communication frequently limits the essence of the function, because you may have no idea what the real case is until you have gone closed, and therefore there has been nothing provided to you by way of either prior statement, or prior meeting or conference with the person concerned, and it is only after you have gone closed that you want to talk about say country A in 2003 or what a person was doing in city B or something of that sort, which may at least be directing the mind to the kind of relevant material that you might need. That is extremely frustrating and it is counter-intuitive to the basic way that lawyers are used to doing their job. It used to be the basic rule, of course, of cross-examination that you should not ask a question you do not know the answer to but, of course, you never know what even the question is you would have wanted to ask until it is too late. As to why there is not much use made of the permission to consult, I think there is use of that for purely formal matters of communication about directions. Sometimes if a point of law has arisen which can be mentioned without damage to the public interest, you can get permission for that, and anything which we think the Committee or the Commission could give permission on is sometimes the subject of an application, but it is not used in any contentious issue for the very reason that it would not be approved if this meeting or this communication was to be anything to do with the substantive closed case, because the anxieties of those who are supplying the information and the nature of the information is that any form of communication after you go closed would inadvertently or otherwise—I think inadvertently is probably the principal cause of concern—alert the person whose interests you are representing to something about the case. In a very abstract way, one of the real problems that goes on in the system as a whole is that on one extreme the Security Services might be saying “Any information that the other

person knows about what our case is is of use to them because they can work out what our coverage is or is not and the way we go about our business, therefore we are very reluctant for anything to go in open court. We have to give them some information but not much.” It is in that context—and obviously, these are critical issues of importance—that Special Advocates have not made applications because they do not think there is the remotest prospect of success with the Committee granting permission to meet. Would we be better able to perform if we could meet under a more relaxed regime that would put, I think, enormous responsibilities upon the shoulders of Special Advocates not to inadvertently disclose matters? Yes, I think it would be an enormous advantage to be able to keep contact with people who wanted to communicate. Sometimes you know that the person whose interests you are representing probably has very little interest in communicating material that you can use, but that is not always the case, and indeed, there are cases where people are prepared to spend many hours talking and are very anxious to help you do your job on their behalf if they could be given some steer as to what it would be useful for them to do. Often it is difficult to know whether it is worthwhile for a person to get audits of bank accounts or businesses or whether that is a complete waste of time or money, or whether it would be a useful task, or to communicate, for example, yes, the Commission would be assisted if you explain about X business or X bank account—I am trying to talk very abstractly—would make the process a little bit more real. Would it be possible to do so with proper safeguards, as the Senate Committee in Canada suggest? I think in theory it would be. The difficult problem is how far you could engage in a conversation which directs someone's mind to a topic or an area without crossing the line that would give something away which might endanger the public interest or public security. That is a very difficult judgement for a Special Advocate to be called upon to be made, and clearly at the moment the Security Services say they should not be asked to make it at all and therefore there should be no communication, so a brick wall and a hard line is better than any doubt. I think the safeguards would include the presence of someone from the Special Advocates Support Unit taking a full record, possibly even tape-recording these meetings, and it probably would include certain topics which might be more capable of being subject of discussion than others, and there would be certain dangers which would make communication impossible. In other areas it might be possible. I think that it therefore depends upon experience, judgement and co-operation.

Mr Nicol: Can I pick up on something that Nick has said? It is a feature of this process that if you want to raise anything with the appellant, you have first to raise it with your litigation opponent, the Secretary of State's team. Sometimes we would feel inhibited about even drawing attention of our opponents to the fact that there are certain areas on which we would like to have assistance. That itself may be an inhibiting factor, quite apart from the gloomy view

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that we may form as to the prospects of the Commission granting the permission that we would seek.

Ms Farbey: Can I add a practical example on the limitations of our role? It goes back to finding open source evidence. We are then very often faced with the decision whether we serve the evidence on the Secretary of State and on SIAC, and whether we seek to have it put into the open case for the assistance of the appellant. That I find a very difficult position decision, one of the most difficult aspects of the job. I may well not fully understand the context of what I have found and I may not know whether it comes from a source which the appellant would find reliable and supportive for his case. I may have to take a precautionary approach. It may be better for me to keep the document to myself rather than to risk giving it to the Commission and to the Secretary of State and finding that it harms rather than helps the appellant's case, but then of course one must not be too precautionary. They are very fine judgements to make and they can be lonely and very difficult judgements.

Mr Chamberlain: Just on the question of why the procedure is not used more often, I agree strongly with Andrew Nicol's point and the main reason is the limitation placed on us that we cannot raise a point except by going through the very person who is going to be making submissions against us. So just to take a completely hypothetical example, you have a case where the appellant's open evidence is entirely silent about some activity which the appellant may know is vaguely implicated in the case but you know as Special Advocate that it is central to the case, so you want to ask appellant in private or you would want to ask the appellant in private if you could, "You need to give us a more details of activity that you were involved in." Let us suppose that in response to that question the answer is that there are no further details; it is a gift of a submission to your opponent, who can then say to the tribunal "There are no details given by the appellant about this important issue." It is exactly the sort of question which one would want to ask in private, precisely because one does not know the answer to the question, and the requirement to go not only to the Security Service or to some appropriate agency who can tell you whether what you are about to ask is going to endanger national security but to the actual person who is appearing against you in the case that you are in is really a very strong constraint on using this power.

Q45 Lord Plant of Highfield: Just to be absolutely unambiguous about this, you as Special Advocates have no direct access to the High Court; it has to be with the permission of the Home Secretary's legal team. Is that right?

Mr Chamberlain: The rules require that any application made to SIAC for disclosure—someone is looking at the rules at the moment and will hopefully give me the particular rule but I am pretty confident that the rules require that that application

which has to be made to SIAC is served on the Secretary of State and in practice that means served on the very legal team against you.

Q46 Chairman: Can I just explore one or two aspects of this "Alice in Wonderland" world or "Star Chamber" world in which you operate. How much of the case from the open part of the case is made available to the "client"? Is there any opportunity that they could work out from the open part of the case more or less the case they have to meet or is that just impossible?

Mr Chamberlain: It depends on the case. There are some cases where the majority of the evidence is in open and there are only a few supporting matters in closed, and there no doubt the appellant will be criticised if they have not explained some feature of the open evidence, and indeed, there are SIAC cases where they have been criticised, but then there are other cases where almost all, or indeed there are cases where all the material evidence is closed, there is nothing in open, and the difficulty is that when the appellant is given a short open statement, he has no idea whether this is 1% of the evidence against him or 99%. He simply has no way of knowing.

Q47 Chairman: He may not know the evidence, but does he know the gist of what is being said about him?

Mr Chamberlain: In some cases he does not know even the gist of what is being said in respect of 99% of the case. Part of our role in trying to secure as much disclosure as possible for the appellant involves trying to suggest to the Secretary of State's side, to the Security Service, gists that might be acceptable. We are constantly trying to formulate gists of closed material which we think might enable the Secretary of State to make something open, perhaps in a slightly different form, concealing the source but at least making the thrust of the point open, and sometimes we are successful in small degree and sometimes completely unsuccessful.

Q48 Chairman: What strikes me about what you are telling us, and this is probably a question for Nick, going back to what you were saying earlier—on the one hand you are trusted to see all this "secret squirrel" stuff and there is no question about your right to see all this stuff in private, yet you are not trusted to use your professional judgement, and obviously you are senior QCs, as to what you could or could not disclose safely to your appellant client. Does that strike you as odd, that you are trusted to do one thing but not the other?

Mr Blake: Yes. I do recognize that there are cases where it would be very difficult to make that judgement, to initiate a conversation with the person whose interests you are representing after you have been fully briefed on a wide area of allegation in a closed session where to even mention, for example, the name of one of our provincial cities which is relevant to the case against them; it may be said to mention the city may put the person on to a series of activities which might derive from a sensitive source

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and therefore, in this game of bluff and counter-bluff, the argument will go that person, just by knowing the city which is relevant, can work out what it is, how they came to know the case against them. That is very difficult. I am not, in a sense, surprised that there are these limits although I think we are talking about refining and fine-tuning a system which has now been running for some years, and I think there is in principle plenty of opportunity where that could be done and greater trust ought to result in greater ability to penetrate some of those questions. I do not for a moment pretend to ignore the real difficulties in going down that road but it also may be necessary to strike a note of caution for this Committee as to what it is that the Special Advocate will have seen. It is by no means everything.

Q49 Chairman: So you still even under this system do not get all the evidence anyway?

Mr Blake: To dignify it as “evidence” may itself be an enormous leap. Material, shall we say. No.

Chairman: I would have thought that most of us understood the way the system operates is that you get to see everything that there was so that you can make the best of it, but that is not the case.

Q50 Lord Plant of Highfield: Do you actually know that there is more that you are not getting or are you assuming that there is more that you are not getting?

Mr Blake: We discussed outside how to answer that question. I think it is very important to stress that what I am about to say is a very abstract answer based upon your assumptions rather than upon my experience, if I can preface it in that way.

Q51 Chairman: We can ask the question but you could not possibly comment?

Mr Blake: It would certainly be wrong for the Committee to assume that we are acting on all that we could plausibly know or believe to exist and in certain areas the barriers to what is even available for investigation come down earlier than in other areas. Obviously, you know the kinds of sensitive material from your background papers because that is an open question, the kind of sensitive sources which the Security Services rely on in these cases. Classes are of that are particularly sensitive and we do not get anywhere near certain topics.

Q52 Earl of Onslow: Why did you have to discuss outside how to answer that question? Were you frightened that somebody was going to finger your collar? I am quite disturbed that somebody should actually have to discuss their opinion when they are acting as servants of the state to a Parliamentary Committee.

Mr Blake: We are all here because we would like to assist your Committee, and we are all here to give as much assistance as we are able to, I do not feel restrained by pending cases or anything of that sort, though that is a factor, but we are, of course, having taken the role and seen the material, prevented from making any open comment on things that we have seen in closed, and sometimes to give an answer even

in the most general form might be construed by some as transgressing that line. We are therefore very careful not to be seen to be doing that.

Q53 Chairman: I should explain to the public at large that we did have an exchange of correspondence to circumscribe the basis on which we would question you to general terms.

Mr Nicol: Before we move on, can I just add to what Nick has said? We see everything that goes to the Commission and on which the Commission bases its decisions. Part of our role is to request of the Secretary of State information which we think would assist us in discharging our functions of advancing the interests of the appellant, and that will often produce responses, and often produce responses which, again, is of material that the public generally would never see, but not always.

Q54 Chairman: So your concern is that the exculpatory evidence is not being disclosed to you in all cases where it should be? This is perhaps going back to some of the discussions we had in the earlier session.

Mr Nicol: I am under the same inhibitions as my colleagues about expanding too much on what it is we do not get but there are materials that we would like to have seen but do not.

Q55 Earl of Onslow: That question the Chairman has asked is a general question, is it not, and you are even hesitant to answer that question? What I think we are trying to get out, and I am finding I am trying to catch up the whole time, I am finding that it is quite difficult to follow this very complicated procedure. I have an instinctive dislike of closed justice and people being locked up without contact with the outside world and their peers, without due process, and I feel that you feel that too.

Mr Nicol: Certainly.

Earl of Onslow: But I am also feeling that you are feeling inhibited in what you can say, even in a generalist way. Am I getting this wrong?

Baroness Stern: No, not at all.

Earl of Onslow: I am struggling.

Chairman: I think that is a comment rather than a question.

Q56 Earl of Onslow: It is a comment but one is trying to draw something out as well.

Mr Chamberlain: Can I add something on that which might help to explain the position that we feel, the limitations that we feel we are under even in giving evidence to this Committee and that is that we are under, as we have said, certain statutory obligations not to disclose closed matters and closed matter sometimes go a bit beyond the facts of individual cases. They may go to the types of process.

Earl of Onslow: About weapons of mass destruction in Iraq?

Q57 Chairman: He cannot possibly comment on that.

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Mr Chamberlain: I am certainly able to say I know nothing at all about that, and neither does anyone else apparently, but the matters about which we cannot comment do go a bit beyond the facts of individual cases, because they go to the way in which certain material is dealt with by, for example, the Security Service and other agencies, and that itself informs our approach to some of the general questions that you have been asking. I think that is why, certainly for my part, I would feel somewhat reticent about answering even some of the general questions in a wholly open way. It is not particularly because I feel my collar is being felt or that anyone is going to come after me; it is because we have taken on certain responsibilities of confidentiality and we want to make sure that we comply with them.

Chairman: That is in accordance with the agreement we have in writing with you so I think it is appropriate that we should not press you further on that issue.

Dr Harris: I just want to pick up on something you said earlier. Basically, what you said was that you only know what you do not know—without getting too Rumsfeldian in this, you only know or you only find out what you have not been told by asking around what might be missing. My question was, what evidence do you have that you are not being given some of the stuff that might be useful and could be more useful if procedures were different, and your answer is because you have asked in cases or you know that people have asked in cases and have been given something which was not given before. Is there any way of knowing what you are not being given?

Chairman: I think I have to step in here and protect the witnesses because I do not think they can go further down that road. We are getting into the unknowns and unknown unknowns. I think that is going beyond what we agreed.

Dr Harris: I am just asking am I right in assuming—I do not think this does tread on the issue in your letter—that if you do not ask, you would never know what was out there and it is only by asking that you may find something? My question is, can you ever be certain when you ask that it is handed over? How confident can you be?

Chairman: If the witnesses are happy with the question, fine but we will not press them if not.

Q58 Dr Harris: I think they are capable of determining.

Mr Blake: I am certainly confident that what we have said to you is correct. It is a correct proposition that it would be impossible to know whether all the material that we consider ought to be put before the Commission has been put before it. In terms of where you are generally seeking to know what the boundaries of available material may be, then asking and either getting an answer or not getting an answer, or being told one of a variety of reasons why the matter cannot progress, is one way that informs the experience which leads to the information that you have been given. There may be a number of ways for reaching such a conclusion.

Lord Judd: You are really conveying to this Committee that you think the executive sometimes pushes it too far.

Earl of Onslow: That is the impression I have got.

Chairman: Shall we leave that question hanging in the air?

Q59 Dr Harris: I am not sure if the transcript captures a nod from Mr Blake. I had just a small question on the answer you gave to Lord Plant earlier, which was helpful, which is this question of what is open and what is closed. The Secretary of State decides what is open and what is closed and there are, I guess, three potential judgements you can make on average. One is that the Secretary of State is very generous and errs on the side of making it open; is particularly picky and errs on the side of being highly precautionary, of not allowing it to be open; or they get it just right; or you do not know, you cannot make a judgement. That is four. I was wondering whether you can give an impression as to where you think the balance is or do you simply not know?

Ms Farbey: I think it has to be looked at on a case-by-case basis.

Mr Nicol: It is not as clear-cut as saying that we accept or reject. It is not a yes/no proposition when we are looking at the material that is supplied to us as the secret material. It can be shaded. You can argue for part of a document to be made open. Sometimes you can argue for a sentence, sometimes for a part of the sentence to be made open. Sometimes, as Martin was saying earlier, even if the raw material itself, all of it, has to remain closed, a gist of what the document says can be made open.

Q60 Dr Harris: I understand that. My question is are they helpful, unhelpful or do you not know?

Mr Nicol: The process that takes place is that initially it is done by discussion between us as Special Advocates and the representative of the Secretary of State, and that negotiation or discussion will be informed by both sides' knowledge of how the Commission will react if agreement cannot be reached and the matter is taken to the Commission for resolution, and as we all gather experience as to how the Commission behaves, then we can bring that greater knowledge to bear. The Commission has a task of seeing that nothing is disclosed that would harm national security or the public interest, and it is zealous in performing that function.

Mr Chamberlain: I would be happy to answer at least adopting one of your formulations. You had four categories. I think the first two categories were helpful and unhelpful but another way you put it—and I am not sure I would want to put it in those terms because I do not think those would be correct terms to use at all. If one is asking the question does the Secretary of State's side or the Security Service adopt a precautionary approach, I think the answer is in my experience, definitely, so that if there is even the slightest possibility that what is going to be disclosed will endanger national security, then that tends to be an objection taken.

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Q61 Lord Judd: Is there a dividing line between precautionary and zealous?

Mr Chamberlain: I am not sure I have enough information to say in any particular case whether the precautionary approach amounts to zealotry.

Q62 Dr Harris: Or is reasonable.

Mr Chamberlain: Certainly, if there is any erring to be done, it is on the side of caution, and that is my experience.

Q63 Chairman: Can we move on a bit? Is there any obligation on the Secretary of State to supply a statement setting out the gist of the closed material?

Mr Blake: No. If the closed material is considered to be properly closed because of the way it comes, then, although we have invented a new word, “gisting”, as part of our activity in the English language, gisting, which I think we went into with some hope that this might produce some clarity, itself is prevented if by giving a gist you can damage national security the same way. So if the case against X is that he does Y activity and if you just gist Y activity into one line but the case is if he knows what the case is he has to meet he may be able to work out how the Security Services know what the case he has to meet is, and that is going to damage national security anyway so a gist is out as well. So we do have sometimes great arguments, and I have certainly spent a day arguing about two words.

Q64 Chairman: It is a real Star Chamber sometimes.

Mr Blake: It is difficult.

Q65 Earl of Onslow: These procedures themselves are closed, are they not?

Mr Blake: Yes.

Q66 Earl of Onslow: Is somebody terrified that a judge in his full bottom wig is going to go tooting off to Tora Bora mountains and whisper into the ear of Mohammed El somebody or other that there is a security source which may or may not be accurate?

Mr Blake: There is a tension. It is sometimes worth looking at procedures before 9/11 and after 9/11. The Special Advocate system has been in operation from 1998 and the first case which case which came to the House of Lords, the *Rehman* case, was dealt with before the particular sensitivities of post-9/11 happened. A belated answer to an earlier question: the precautionary approach, and sometimes increasingly precautionary rather than decreasingly precautionary, may have happened by comparing before and after 2001 procedures. One of the things that could be done is precisely to have the appellant’s own legal team party to certain classes of information but not passing it on to the outside world and conceivably, if it related to, for example, safety on return issues, not passing it on with the appellant’s consent to the appellant, i.e. the appellant can agree his legal team can be party to the information that they would not pass on. We have seen that being used in Canada in the Supreme Court judgment. It is no secret to say that a submission was made to the Commission that a similar system could

be used in this country by interpreting the rules, and that submission was rejected in an open judgement, so this is not betraying any secret judgement. That may be going on to appeal—I do not know—but we seem to have moved into the black or white and all forms of shades of grey are considered to be inconsistent with the regime that Parliament has approved.

Q67 Chairman: Can I go back to something that Judith was saying earlier on about the Google search to dig up the evidence? How often is it that you can turn stuff up basically from an open source hat is available on the internet and it turns out that the Secretary of State is saying it is closed?

Mr Blake: There is quite a good example of that. I do not know whether the Committee have seen the recent judgement of Mr Justice Beatson in the case of *E*. He quashed the control order in *E*’s case for two reasons. One, because, like the other cases, it was thought to be deprivation rather than a limitation of liberty. The second is because he considered that there was a failure to make open material about the prosecution of someone else, which was available from the Special Advocates doing some Googling on an open source. It had been a closed issue and he thought that the failure to consider that material undermined the decision to continue a control order as opposed to using other techniques. That was a good example of something which was relevant, about events going on in another country, where a prosecution revealed information which the Special Advocates had been able to discover through, no doubt, a long and tortuous process.

Ms Farbey: In every case in which I have undertaken internet research as a Special Advocate I have found something on Google.

Q68 Chairman: I would make the assumption that you do not speak Arabic.

Ms Farbey: That is a very fair assumption; that is very inhibiting.

Q69 Chairman: Presumably your chambers could not help you, could they?

Ms Farbey: No. We do have access to the services of a Foreign Office translator sometimes.

Q70 Chairman: Sometimes, but presumably, they are not available to do hours and hours of internet searching, basically trawling on a fishing expedition?

Ms Farbey: No, it does not take much Googling to come across an Arabic source and then one is in effect at a dead end.

Q71 Chairman: Is there any way in which that could be resolved?

Ms Farbey: No.

Mr Nicol: We could in principle have a greater quantity of access to Arabic speakers. Because of the nature of the searching that we are doing, it would have to be somebody who is security cleared to the same level as we are, and no doubt you will be told that those are in heavy demand, but that could be

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done. It is important, because part of the reason that one is doing this Google searching is to demonstrate that the material that we are being shown as secret is available to those who matter, and those who matter frequently are those who are from Arabic speaking communities. So in many cases, in many ways, the fact that it is available on the internet in Arabic is more significant than the fact that it is available in English.

Q72 Baroness Stern: You will know that it recently emerged that the Government was relying on directly conflicting evidence in two separate cases because it was one of you that found it out and was acting in both cases. In response to this discovery, the Government I think said this was an isolated incident in which its quality control systems had broken down and that it could not happen again. Are you able to tell us whether you agree with that assessment or, in your view, is it possible that this is symptomatic of a more widespread problem?

Mr Nicol: I was the Special Advocate in those two cases. The short answer is we have no idea. We were able to demonstrate in that case that in one of the two cases the proposition was being put that X is true and in the second of the cases, which I happened to come across because of the coincidence that I was acting as Special Advocate in both cases, it was being said that X is not true. The Commission was very disturbed that conflicting propositions were being put into appeals and had only been stumbled upon by accident.

Q73 Chairman: That was both in closed material?

Mr Nicol: Yes. Whether that is more common or is isolated I simply cannot answer.

Q74 Chairman: I do not know if you can answer this question but were the same people involved in preparing the material? Is that going too far?

Mr Nicol: I think I would just have to refer you to the open judgement, which gives as much as I could say.

Earl of Onslow: Again, this is deeply deeply disturbing that you cannot tell a Committee of Parliament that something which is a cock-up of monumental proportions, if it is only a cock-up, or dishonesty of disgusting proportions, because it can only be one of those two things, and you cannot tell us any more than you can because you are bound by—

Chairman: And our agreement as well.

Earl of Onslow: Okay.

Q75 Mark Tami: Moving to access to independent expertise—and we have touched on a number of these areas—to what extent are you able to go behind the closed material which is used by the Secretary of State? Do you have enough assistance to enable you to assess how important that information is, or indeed how reliable?

Mr Blake: Once you are closed, you are only able to use what you have been given in closed to assess the reliability of what you have before you. I think from earlier answers that have been given, we are aware

that there may be more information available in certain cases than is being given to us as a tool to assess reliability, and that is a concern. The best way of describing sometimes what goes on in these closed sessions is not evidence proving a proposition, as you would do in a civil or criminal trial, by your best evidence or all the available evidence, but selected highlights of a plausible hypothesis, and responding to that is challenging. That perhaps is a better description of the nature of the process at certain times because of the combination of the standard of proof, the process of how the evidence is gathered, the test to be met, the restraints upon disclosure, and the issues which cause concern if one investigates matters of those sorts. In areas of pure judgement, opinion evidence, is group A linked to international terrorism or something of that sort, again, one necessarily cannot call independent evidence and the Special Advocate does not call evidence. One may or may not test it if it is there. Sometimes the basis for independent evaluation will appear to be lacking. Of course, one can make that point but the tribunal is not ultimately saying, “We prefer X over Y.” It is saying “Is there a reasonable case?” and that is quite a difficult task.

Q76 Mark Tami: So when the Security Services say that a particular disclosure would harm national security, are you in a position to challenge that?

Mr Blake: No. You can say it does not, because you can gist it in a certain way but we have made submissions and the Commission is likely and will defer to what view the Security Services take of the requirement for national security. It is fairly obvious that there are three or four main categories and if material might damage, for example, foreign relations or matters that sort, it falls into the category. It is not up to us to say, “That does not seem to us to affect national security.” It is simply a question of whether it does have the effect or not.

Q77 Mark Tami: Do you think there has been any progress towards enabling Special Advocates to call evidence from security cleared experts?

Mr Nicol: Yes, the point has been discussed and we have raised it as Special Advocates with the appropriate authorities. Nothing further has come forward in terms of response. There are real difficulties, which are not to be dismissed as just trying to brush us off. One is that, if it is to be of any use, it needs to have somebody who is of expertise, who has inside knowledge and which is recent. There is a very small pool of people who could come within that category, and the pool shrinks very much more when you look for some element of independence for the expert rather than simply somebody who is going to confirm the line which is being put forward on the Secretary of State’s side.

Q78 Mark Tami: So how would you see that working in practice?

Mr Nicol: I do not have an answer to offer to you to that question, so we struggle on as best we can without the assistance of some outside help. It is possible, I suppose, although I do not know the

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detail of the response that would be given to this, to try and find somebody who has been in the Security Service or one of the intelligence services but has recently, say, retired. At least for a limited period after their retirement they would have the characteristics that I have just described, although even in that case there might be an overhanging question as to whether their independence would be sufficient.

Q79 Lord Judd: I am very stuck at the number of occasions you have said, “We, as Special Advocates, have . . .” I want to be quite clear in my own mind how far we are listening to four Special Advocates who have a particular view of the task in hand or how far your view is representative of the whole body of Special Advocates.

Mr Nicol: I think we are appearing in front of you as four individuals. We do not have any mandate, as it were, to speak for all of our colleagues. That is the formal position. We are certainly not here in a formal sense as representatives of all the Special Advocates but one of the things that the Special Advocates Support Office within the Treasury Solicitor’s Department has been able to do is to bring us together, or at least provide the opportunity for us to get together from time to time. Speaking personally, I think that the views that we have expressed would be in accordance with what our other colleagues would think. I do not think in that sense that you are hearing four aberrant views and that there is out there a body of Special Advocate opinion that is vastly different.

Q80 Chairman: How many of you are there altogether, or is that a secret?

Mr Nicol: It is not a secret.

Mr Blake: It is growing because the system has become much more in demand than was contemplated at the time. I would think we must now be 40.

Ms Farbey: 40 to 50.

Mr Chamberlain: But the views that you are hearing, which are probably broadly in line with those of those who attend the meetings that we go to, are in line with the views of those who have already seen closed material, which is not by any means all of the 40. We have not had any contact with those who have never seen closed material yet.

Q81 Lord Judd: You have talked about the impossibility of the Special Advocates challenging rulings. Do you have any concerns about how far SIAC and the High Court in control order proceedings are themselves able to question an assertion by the Security Services that something would harm national security?

Mr Blake: I think there have been more submissions that something would not harm national security than there have been rulings in favour of Special Advocates. Sometimes one is over-optimistic in submissions; sometimes one does not necessarily feel that. It is equally difficult for a judge, not particularly trained in these areas until you have taken up this role—and High Court judges now have

to do control orders without any prior understanding of the particular system—to take a different view from the Security Service, with possibly significant results. It is quite a high burden to put on anyone. But you may have already had a flavour of some of our responses, perhaps mine personally, as an individual, that there seems to be sometimes . . .

Q82 Lord Judd: Too much deference?

Mr Blake: A surprise that we have not been able to sort out one or two issues in a better way than we have.

Q83 Lord Judd: That relates to the whole issue of the standard of proof that is required.

Mr Blake: Yes.

Q84 Lord Judd: Your anxieties, I would suspect, spill over into that area as well.

Mr Blake: Yes. This is the problem. The system frustrates those who have been through it, who do not feel they have had anything like a fair crack of the whip because they still do not really know the essence of the case against them. Some of them may not be able to make that complaint credibly, some may be. Often, in too many cases, important parts of the case, or indeed the whole case in a few, is really not disclosed in a gist at all. Those frustrations are the product of all the features of the system with which I am sure the Committee will be well briefed. I do not see why, if the system is designed to permit the Secretary of State’s team to put material which would not be admissible in evidence generally because it is second or third or fourth-hand, whatever it may be, and it may even be speculative or opinion evidence or matters that sort, but if you can put all that in, why the system cannot be a little more robust in asking the question of SIAC “Is it more probable than not that X either has done something which is a danger or will probably do something which is going to constitute a danger?” I think we tend to know ultimately what the dangers may be involved in this area, although even that is the subject of some debate in terms of foreign relations but, more probable than not would be a somewhat more robust test that would require a case to be put rather than a plausible hypothesis.

Q85 Lord Judd: All this means that the public should be left in absolutely no doubt that what is happening—and I think every member of this Committee will have been incredibly impressed by the sense of responsibility the four of you have in an impossible situation—has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.

Mr Blake: I think that is right.

Q86 Lord Judd: Then could I just ask you one more question, and that is, you have referred to the fact that you have seen the closed material. Having seen a great deal of closed material, relied on by the Secretary of State, is it possible—and we understand the rules of the game—for you to comment in a very

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general way on whether relaxing the ban on the admissibility of intercept would enable more prosecutions of terrorist suspects to be brought?

Mr Nicol: One of the stages that the Secretary of State goes through in these appeals is to provide the appellant with an open statement and open evidence, coupled with a statement, an open statement, of why the appellant cannot get more. That open statement will rehearse in general terms the type of material which is going to be in closed—not descending to the detail, not saying in your particular case it has got all of these categories but these are the types of material which cannot be disclosed to you and why. One of the categories is intercept material. If intercept material could be used in prosecutions, then that would allow the state authorities generally, to try and use an expression that encompasses both the Secretary of State and the prosecution authorities, to deal with cases by that route rather than through the SIAC route. Certainly, that would be true in terms of control orders. It is a little bit more complicated in terms of deportation, where, even if prosecution was available, the Secretary of State might say that the preferred option would be to deport. Certainly, in choosing a control order, the Secretary of State has formally to go through the process of deciding that a prosecution is not possible, and, at least in some cases, if intercept evidence could be adduced as part of the prosecution case, that test could not be satisfied and the matter could be dealt with much more satisfactorily in the ordinary adversarial way in a prosecution context in a criminal court.

Q87 Baroness Stern: We have already touched on this but let us just see if there is something more to be said about it. Special Advocates started, as I understand it, in the context of deportation on grounds of national security, and it is now being extended, I hear, as far as the Parole Board. There is also extension of the use of closed material—we have already discussed this—on the issue of safety on return. Do you have any concerns about these extensions or anything else you would like to say that you have not already said about the way this approach is spreading?

Mr Blake: I think it is probably quite instructive to look at Lord Woolf's comments in the case of *Roberts v Parole Board*, because he was the swing vote in a contested three-two decision. As I read his judgement in that case, he was saying we cannot say at this stage that a specially appointed advocate or something similar in the Parole Board might not benefit the interests of fairness, but he seemed to conclude that the interests of fairness was the bottom line and if it could not be met then you could not use the system. I am not too sure that that approach is the approach that is being used or contemplated in these extensions and it may well be that the test is, if there is a need to keep things closed, then as fair as possible is fair. I do not think as fair as possible does mean fair.

Chairman: Thank you all very much for your evidence this evening. It has been a fascinating session. We have gone quite a bit over time. Is there anything any of you want to add that we have not covered? Thank you all very much.

Wednesday 18 April 2007

Members present:

Mr Andrew Dismore, in the Chair

Lester of Herne Hill, L
Judd, L

Mr Douglas Carswell
Dr Evan Harris

Witnesses: **Mr Tony McNulty**, a Member of the House of Commons, Minister of State for Policing, Security and Community Safety, **Mr Jim Acton**, Head of Intelligence and Security Liaison Unit, and **Mr David Ford**, Head of Counter-Terrorism Legislation, Home Office, gave evidence.

Q88 Chairman: Good morning, everyone. This is an evidence session continuing our inquiry into counter-terrorism policy and human rights and we are very pleased to welcome Tony McNulty, Minister of State for Policing, Security and Community Safety and two officials from the Home Office, Mr Jim Acton, Head of Intelligence and Security Liaison Unit at the Home Office and Mr David Ford, Head of Counter-Terrorism Legislation. Thank you both for coming. Tony, do you want to make any opening remarks?

Mr McNulty: No, I am happy to go straight into the questions and answers if that is in order.

Q89 Chairman: Thank you very much. We would like to start off with some discussion about the definition of terrorism. When do you expect to respond to Lord Carlile's report on this?

Mr McNulty: I know it is a sort of last vestige of ministers but the word "imminently" springs to mind. I was rather hoping we would have responded by today, but it is imminent and so I should think very, very shortly.

Chairman: Thank you very much. I know this is Lord Judd's particular interest so I would like him to take up the questions.

Q90 Lord Judd: Obviously your response is coming out very soon and these questions are, in a sense, premature, but the UN does have a definition. I will not bore you by repeating it because I am sure you know it very well but I just wonder what the Government's position is on the UN definition.

Mr McNulty: We are very happy that Lord Carlile pretty much endorses where we are at in terms of terrorism. Without going through assorted protocols in terms of response, I will at least show my anchor in terms of some of the areas on which we might be responding more fully, if the Committee would like that. We are relatively comfortable too that the definition "as is now" does not run counter to anything implicit or otherwise in the UN definition and, certainly, during the course of arriving at where we are, the UN definition has been part of that process. I think we are broadly comfortable with how the definition "as is now" sits with the UN definition.

Q91 Lord Judd: Which leaves me slightly confused but obviously the official response will clarify this. You endorse the UN position but the Government's position is to come down with Lord Carlile in saying that it is very difficult to define.

Mr McNulty: I would not want to underplay the complexity of this. The UN's definition is worthy of its time and is an appropriate reference point but we think in terms of where we are today, in terms of our existing legislative framework and the nature of the threat, the definition as in our legislative framework is more appropriate. I do not think they are necessarily counter, contradictory, or anything else; I just think where we are at with Lord Carlile's agreement is a more appropriate and pertinent definition for today than the UN definition. But that is a reference point and does colour what we do and how we do it.

Q92 Lord Judd: How will you handle your relationships with the international community and the UN if the definition differs in any significant way at all? You referred just now, in your own words, to "an appropriate reference point" here.

Mr McNulty: Along with the word "imminent" from ministers, the phrase "We'll cross that bridge when we come to it" springs to mind. I do not think there is anything at the minute that is counterproductive or contradictory in the distinctions between our definition and the UN, or, indeed, a whole plethora of other definitions that are out there in the public domain. I cannot think of developments or progress in these areas over coming weeks and years where there will be a position where they are so startlingly different for it to be problematical.

Q93 Lord Judd: Minister, would you not agree that with all the provisions that have been introduced to deal with the terrorist threat, and there is nobody around this table I am aware of who does not agree that there is a major issue here of a threat, with all the measures that have been introduced to deal with that threat in the legal system, the judicial system, is it not terribly important, particularly in the sphere of hearts and minds, that there is not an argument about where the definition really lies; so that this is a clear-cut definition, as clear-cut as it is possible to be, so that everyone knows where they stand?

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Mr McNulty: I think it is relatively clear-cut. The wider implication of your question, beyond the definition, is: Are we very, very clear what all successive pieces of legislation now do in terms of an overall framework? That goes to the point about consolidation and perhaps taking things forward in that way, where there is going to be a subsequent Counter-Terrorism Bill and all those sorts of things, but I do not think there is much under law at least that divides the international community in terms of defining what terrorism is.

Q94 Lord Judd: We will obviously return to this when your reply is published. This will be very important. There is one question I would like to raise, if the Chairman will permit me. Lord Carlile in his report deals with what is sometimes called “the Mandela clause”. Some people, myself amongst them, do find difficulty in this area. When this Committee were taking evidence from a previous Home Secretary, he said what the Government has said on several occasions: that he could think of nowhere in the world where it was legitimate to take any kind of forcible action against the Government. I personally do not endorse force. I do not think it is a good idea and I think it usually ends up causing more problems than it solves, but I can think of places in the world, having spent much of my life in the real world out there, where people, in exasperation, under tyranny, feel they have no option. I think, of course, in my younger days when I was a member of your House, of the ANC and all that, but I can think of other places now—and I do not think it would be helpful to name them. Is it really impossible in legislation to recognise this dilemma that is faced by some people? Not to endorse the force in our legal system but to recognise that people have a real dilemma and that that must be taken into account in the judicial system. The Swiss, for example, have a political exception in their law. Why is it possible in Switzerland and not here?

Mr McNulty: I would say in the strongest possible terms—as predecessors have—that we must start from the premise that I fully endorse that there is no excusable legitimacy to using force or arms struggle in the war on terrorism in the current context. Whether you move away from that subsequently, given the particular context, is a moot point, but, as a starting point under law, I think you must start from that premise and it is appropriate to do so. I do not profess to be an expert in Swiss law canton by canton or otherwise but the ground surely must be between an absolutist position that says, “There can be no excuse for this sort of behaviour or strategy” full stop, and those who would say “There may be circumstances, currently unforeseen, in the future where things should be slightly less than absolute in those terms”. But I do not think you can start from anything other than a position of clarity that says “Terrorism is not an appropriate strategy” full stop.

Q95 Lord Judd: If you will forgive me, minister, for some of us who have spent a lot of our time in the real world out there in our professional working lives, there is a need to be very clear about the

difference between armed struggle and terrorism. I would have thought that in dealing with this terribly complex and dangerous situation it is very important to recognise that. Perhaps I could put an obvious question to you—it is an obvious question but I put it to you: So Mandela should not be a hero?

Mr McNulty: No, I would firmly disagree with that and I would simply say the law under discussion now is about where we go from here. There were some religious but some really quite obtuse examples given during the process of terrorism, I think getting to the position where if a Taoiseach from the Republic of Ireland set foot over here we would nick him, because of a perverse interpretation of something to do with terrorism law because he turns up for 1916 Easter Rising celebrations every year as part of the Irish State foundation. Looking from where we are now, I can see the dilemma facing people as you look backward to the struggles in which many people had a very productive role—if I may say so, yourself included—but we are about saying, “Here’s where we are now, here’s where we are going forward: the starting premise under law must be that terrorism is an illegitimate form of activity” full stop.

Q96 Lord Judd: If you lump together struggle for freedom—which may very specifically endeavour to exclude terrorism as we all understand it—with terrorism, is there not a danger that you play into the hands of the terrorist because you would lead more people to become still more disillusioned and embittered?

Mr McNulty: I see the point but I do not think I would agree necessarily, save for the provision, certainly under our law, for there to be case history established, things dealt with on a case-by-case basis and looking at each and every element within its own context. But I think you start from that universalist position that says “Terrorism is not an appropriate or legitimate form of activity” full stop, and then work to specific cases and move away from that. I think that does send the clearest message.

Q97 Lord Lester of Herne Hill: Minister, could I ask you some questions about pre-charge detention as at 28 days at present. As you know, this has a complicated history. This Committee reported upon it; Parliament debated it fully and decided on 28 days. On 1 February, the Prime Minister’s official spokesman indicated that the police were interested in extending the period beyond 28 days and that this did not come from the Government, it came from the police. The next day, 2 February, we received a letter from the Metropolitan Commissioner Sir Ian Blair in which he says “There is currently no direct evidence to support an increase in detention without charge beyond 28 days, however, the complexity and scale of the global terrorist challenge, sophisticated use of technology, protracted nature of forensic retrieval and potential for multiple operations may lead to circumstances in which 28 days could become insufficient.” Given those two statements, on what basis will the Government be seeking to persuade the

public and Parliament, if it is to, that 28 days' pre-charge detention is not sufficient, when, in the view of the Metropolitan Police Commissioner, there is currently no direct evidence to support the increased detention without charge beyond 28 days?

Mr McNulty: It is an enormously complex area, fraught with difficulties, as you suggest from the recent past. We want to consult as fully as possible on the whole issue. If there are to be changes to the existing position allied to that 28-day provision, if there is a Counter-Terrorism Bill in the future, then any changes will be included therein. However, when I say consult, I mean consult in full, certainly with all interested parties—and the posh word for that now, I suppose, is “stakeholders”, although I do not like that word—and certainly opposition parties and certainly this Committee, the Home Affairs Select Committee and others. I would very much like to get to a settled position where there is agreement that 28 days is more than sufficient; that there is something more than 28 days required, whatever it is, up to 90 days; or, indeed, that there is a sort of middle position that says 28 days would probably in most circumstances suffice. But, as Sir Ian Blair indicates, given the increasing complexities of some of these plots, it may well be that we need *in extremis* to go beyond that, so is there some sort of legislative device or portal that says *in extremis* it can go beyond 28 days but really, really for exceptional circumstances alone with absolutely appropriate parliamentary, judicial and other forms of scrutiny. I do not know the answer but sooner rather than later we want to embark on that consultation process.

Q98 Lord Lester of Herne Hill: We are dealing with the right to liberty and this Committee is interested in evidence-based decision taking as well as consultation. Thinking about evidence, I have mentioned already that there is no direct evidence. Of the five suspects in relation to the alleged Heathrow bomb plot who were authorised to be detained for the full 28-day period, three were released without charge: one after 23 days and 23 hours, one after 27 days and 16 hours, and one after 27 days and 20 hours. What steps is the Government taking to ensure that the period of 28 days' pre-charge detention is not in fact being used in relation to individuals against whom there is the least evidence?

Mr McNulty: I think that is a fair point. Part of any consultation on whether to go beyond 28 days must surely be how the limitations up to 28 days have been used for the short time they have been in existence. From the limited evidence we have—which, as you know, is not much beyond the airline plot, so called—there is certainly a case that could be made that says it is not, as you imply, that 28 days was really for some a fishing exercise, trying to keep them for the longest time and trying to get something on them. I think the process of going for the extensions beyond 14 days is as rigorous as it used to be in the past for extensions and, from the limited things we know on the oversight and scrutiny of those applications, I do not think it would be possible to

get to a stage where those about whom we had the least of evidence were kept in for the longest. On balance, without hearing absolutely all the ins and outs, I do not think that is a fair critique. In terms of your wider point about evidence, this is very, very difficult, in the sense that, as I suggest, the largest, substantial potential pool of evidence is the process of that airline plot. In terms of: “Where is the evidence? Where is the evidence?” it is very difficult to provide evidence. Sir Ian Blair is quite right to say there is no substantial evidence other than the practicalities of last summer, but I think he is intimating—and I think he would subscribe to this—that the only certainty is that the quantum of complexity, utilisation of technology, computers, mobile phones, surveillance, evasion techniques and all those elements are going up, and it may well be that 28 days is not sufficient to get to a stage where you can build the evidential base against individuals because of those very complexities. He is saying no more than that. I do not pray him in aid beyond that, but I do think we should have a substantial and reflective debate about whether 28 days is sufficing, whether, crudely put, we need to revisit the 90-day debate or whether there is some middle ground—which I think would probably be my personal preference—where there was scope, with absolutely appropriate judicial oversight and belt and braces—because it is a very, very serious issue, the deprivation of an individual's liberty—to allow, *in extremis*, going beyond 28 days for particular cases. When we say we want to consult, we want that to be a very serious consultation process, and we want, if possible, as with much of legislation in this area, to arrive at a consensual position rather than otherwise. It was enormous fun falling asleep in an armchair at five in the morning in March, or whenever it was in 2005 as these things went through, but not a process I would like to replicate.

Q99 Lord Lester of Herne Hill: I have to tell you that as one of the advisors on the original Prevention of Terrorism Act 1974 with Roy Jenkins, looking back on the period I have never known my old department to resist the temptation to ask for more and more powers and that is why I am concerned that excessive powers should not be sought. Do you think in your informed view that the experience of the 24 Heathrow suspects supports the case for a further extension or does not support the case for a further extension?

Mr McNulty: I think it at least opens the matter up for debate, not just in terms of the whole process on the airline plot but, equally—and this Peter Clarke at least tried to allude to—the level of complexity in the level of IT, computers and everything else that we use. I think it at least points to the need for a debate. It certainly obviates, I would say, in broad public policy terms, if people wanted to go here, a reduction back to 14 days. I think the case for 28 days has been well made, not least by the airline plot, and there is at least some discussion which should flow from that about whether 28 days is appropriate or otherwise.

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Q100 Lord Lester of Herne Hill: As you know, the Committee took evidence in Canada and in Spain. Spain, of course, has the most serious instance of terrorism in Europe by far with ETA as well as the other problems about the Madrid bombings. Canada has a much shorter period and when we were in Spain we asked what they thought about 28 days and they said quite unacceptable. We asked why and they said, “Because we believe in the rule of law in Spain.” What is it that is so exceptional about this country which would make us even think about going beyond 28 days when no other democracy, as far as I am aware, has ever done so?

Mr McNulty: In short, I think the nature and complexities of the threat. With the best will in the world, for all the complexities of the threat posed by Euskadi Ta Askatasuna in Spain, I would say that likening that to where we are now with the threat from assorted elements of al-Qaeda is rather like comparing the current threat to where we were *qua* the PTA in 1974 and everything else with the IRA. There is an immeasurable and substantial difference to the nature and complexities of the threat which do warrant the 28-day position. I think that is an important point, that the nature of the terrorist threat is so wildly different. PIRA and the threat they posed is nothing like the threat we face now but we do start from a premise of this being only a departure *in extremis* given the nature of that threat. We are still absolutely wedded—and maybe I should have said this at the start—not only to ECHR, not only to human rights, but to the value of legitimacy of the rule of law. Absolutely. These are exceptional departures from that for exceptional circumstances and an exceptional threat and used, I think, still very sparingly and rightly so.

Q101 Lord Lester of Herne Hill: Would you reflect on the message we received, for example, from Spain, which said that we do not need more and more laws; we need to make prosecutions work properly and get convictions and have the intelligence service working closely with the prosecution and judges who are well trained, and that it is a great mistake to use pre-charge detention as a substitute for these other much more important methods. It is a very easy thing to pass more and more laws but what matters is to take the very wide powers which you have and to use those effectively. Will you think about that when you reflect on the evidence you have given today?

Mr McNulty: Certainly. Without reflection, I would agree with much of that, apart from the bit at the end about the mistake. None of these elements, neither pre-charge detention nor control orders, is a substitute for an effective prosecution strategy and getting prosecutions and convictions where we absolutely can. That is absolutely central. I agree with that.

Q102 Chairman: We recently had the renewal order going through Parliament but the original idea, as I understand it, was that when we came to look at control orders again it would be in the context of a consolidation Bill so it would be amendable. Of

course, the order as it went through was not, so that was different from what was originally expected when the control order regime was first introduced. Are we going to get a consolidation Bill this session? If so, when?

Mr McNulty: Again, let me take a step back. On the premise that there will be a Counter-Terrorism Bill, which we have alluded to but not yet introduced or announced, then, given that may well change aspects of the law, it would be rather foolish to consolidate before that Bill. For all the substantial areas that we are talking about—control orders, pre-charge detention, some of the other areas that the Committee have waxed lyrical on that are not part of the legislative framework yet, like post-charge questioning or whatever—if there is sufficient discussion of all those issues in a Counter-Terrorism Bill, should there be one, then I think the consolidation that we promised that follows may well be of a more technical nature. Clearly, if there is not a Bill, then we need to talk about, I think quite rightly, the notion of consolidating all these laws into one place. I am a great believer in that. If there were the time and space to do it, I would like to get to a stage, as a Home Office minister, where, in all the areas we deal in, we took a year off from new legislation and simply consolidated what we have already because I think that might be useful. I was saying that last year on immigration and asylum. That is kind of complicated, so I cannot say definitively there will be a consolidation Bill this year because there may or may not be a Counter-Terrorism Bill. I would say, quite frankly, I hope there is one. That is what I am pushing for but it is not for me at this stage to report on internal government processes that are still ongoing. We have said—and I think inactivity has shown this—that we need to learn the lessons of the last great threat, the planes plot from last summer, but not in any hurry. Clearly, the original decision that it was absolutely right for the Government to look at and to take a view on was: Are there lessons to learn from the summer that would need and require urgent solutions in terms of legislation? The answer to that is palpably no because there has not been that sort of legislation. Then the Prime Minister asked the Home Secretary to look at not just our whole counter-terrorism effort but, specifically, in light of the summer, all the legislation to date and whether there were other elements that needed to be taken forward, reviewed, refined or whatever else. That process has finished, reported to the Prime Minister, and those deliberations are now going on in government to see whether there should be another Counter-Terrorism Bill in . . . I was going to say in a leisurely fashion, but in a non-urgent fashion through Parliament.

Q103 Chairman: So no decision on that has been taken as yet.

Mr McNulty: No, but about to be—and sooner rather than later. I have said to you, Chairman, privately, and to your equivalent on the Home Affairs Select Committee (if I may reference that committee whilst in this august presence), that as far

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as possible I will try to ensure there is sufficient time for scrutiny sessions with each committee on significant elements that may or may not be in that Bill. I think there will be the time to do that. I cannot commit to pre-legislative scrutiny because we do want to get the process under way, but for this new type of “post introduction of the Bill scrutiny” there should be sufficient for areas where there may be departures from where we are at the moment.

Q104 Chairman: That would be very helpful.

Mr McNulty: Including control orders.

Q105 Chairman: I was going to come back to the substantive point of control orders. Over the last few months, three people who were subject to control orders effectively have disappeared: two absconded and one disappeared before the control order could be renewed. Were they seeking to be threat to the public?

Mr McNulty: Clearly in one form or other they were. That is why they were subject to control orders. In one case, we are fairly certain that the individual is no longer in the United Kingdom and steps have been taken to ensure he will not be coming back to the United Kingdom. In that case, from memory, the immediate threat from that individual was precisely travelling abroad to commit acts of terror rather than being a domestic threat. The other two, as I understand it, remain at large and a matter of police operations.

Q106 Chairman: They are considered to be a threat to the public.

Mr McNulty: They are.

Q107 Chairman: In the UK.

Mr McNulty: They are.

Q108 Chairman: Does that not then raise the question about how effective control orders are in terms of trying to keep tabs on people who are dangerous and a threat to society?

Mr McNulty: It does and you would expect me to say that. Control orders were never offered as the United Kingdom Government’s response to dealing with such individuals, so there are difficulties with control orders. They have, again, been used, I would suggest sparingly. There are currently about 18 people under them. It is a serious departure from common law and the rule of law but for exceptional circumstances. The short answer is: the control order regime is not ideal. It has a legitimate use, we would say. Lord Carlile agrees with that. Certainly even recent judgments that have gone to a conclusion about the challenge of the limitations on the control order to the individual’s liberty not being conducive to the right to liberty, in most, if not all, of those cases there has still been an acceptance from the court that the control orders are an appropriate mechanism and instrument.

Q109 Chairman: The issue is whether they are derogating control orders or not, is it not?

Mr McNulty: Yes, and I think we say no and you say yes.

Q110 Chairman: I think the courts are saying yes at the moment as well.

Mr McNulty: No, they are not. I do not think they have gone that far. There has been no judgment, as I understand it, from the courts that has said explicitly these are non-derogating and the Government should be non-derogating. In fact, some have said the opposite. So I do not think there is a judicial point that agrees with the notion, as I know the Committee does, that these are, effectively, to all intents and purposes non-derogating.

Q111 Lord Lester of Herne Hill: There was a case reported in today’s *Times* of Mr Justice Ousley, from memory, on 30 March, in which he held in the particular circumstances of the case that the conditions imposed in the control orders were so strict and coercive that they did amount to a deprivation of liberty and he quashed it on that basis.

Mr McNulty: Yes, but that is a different point from saying the control order regime is, effectively, a non-derogating regime.

Q112 Lord Lester of Herne Hill: I agree. I have only said—

Mr McNulty: Yes, absolutely, in one or two cases they have used the notion of departure from ECHR as the force behind why the conditions should be changed. I think in most cases we are appealing those.

Q113 Chairman: Putting all that together, the question of effectiveness of control and keeping tabs on the individuals concerned, with the problems you are having in the courts in upholding more restrictive terms, are you planning to devise an exit strategy as part of the Counter-Terrorism Bill we are talking about?

Mr McNulty: I did say during the renewal debate that I thought that was not only an appropriate suggestion but also one we would look at in each and every case, as were some of the other elements suggested on far more explicit. There was certainly one case where, although the case for a control order was very, very clear in the interface between the police and the CPS about a decision on prosecution, there was not the paper trail there. That was unfortunate. The CPS and police explicitly meeting and reviewing regularly the notion of a substantial case for prosecution versus a control order, I have taken on board. That happens now. It did not in one or two cases in the past. The broad issue of an exit strategy for each and every individual where appropriate and an absolutely explicit review of each individual case, I think are appropriate changes to the regime that we will look into.

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Q114 Chairman: How many control orders at the moment were for detainees in Belmarsh, basically from the beginning? How long have they effectively been in this position of deprivation of liberty, in detention in Belmarsh?

Mr McNulty: Of the current 18, I do not have that absolutely in my head. There are certainly some, which is implied in what you suggest. I do not know off-hand. I could happily get back to the Committee on that.

Q115 Chairman: Presumably these people now have had their movements confined, in a more general sense, for quite a few years now. Is it not time we ought to be trying to find out evidence as to whether we can prosecute them or trying to find something else to do with them?

Mr McNulty: I am reliably informed by one of these magical bits of paper that arrive that we think it is two. I knew it was at least a couple and it is of that order: 1, 2 or 3, rather than the substantial portion of the 18. Clearly, if they remain under control orders we do not think there is sufficient to prosecute but we still think they are a sufficient enough danger to be under a control order regime. I would far rather do all we can in terms of developing deportation with assurances, memorandums of understanding—which is an area the Committee might want to get into—to pursue exit strategies, if you like, for those individuals. But you will know that our starting premise as government was that it was more than appropriate—nearly everybody else disagreed, clearly, which is why we are where we are—that foreign nationals who pose a threat in national security terms who could not be deported should remain in detention: the Belmarsh option.

Q116 Chairman: That is the next question. We have talked about those in Belmarsh on detention and control orders. How many of those in Belmarsh are now, effectively, on Immigration Act bail, subject to similar restrictions as under a control order?

Mr McNulty: Of the “original Belmarsh detainees”?

Q117 Chairman: Yes.

Mr McNulty: Again, I do not know directly but I will find out.

Q118 Chairman: Either by a magical piece of paper or a note afterwards would be sufficient.

Mr McNulty: I suspect a magic bit of paper might take longer to come on that one.

Q119 Lord Lester of Herne Hill: Special advocates. The Committee received some very important evidence, disquieting evidence, from the special advocates themselves. Special advocates: well-informed, experienced, independent members of the legal profession. Essentially, although they had to be careful not in any way to say or do anything which was incompatible with their duties, they did tell us that they were concerned as to whether the current procedure affords a substantial measure of procedural justice. They were concerned about a number of features. I will not go through them now,

but there were some specific proposals that they made to try to achieve a better balance and I want to ask you about those proposals. The first one is whether the Government would consider imposing a new obligation on the Secretary of State always to provide a statement on the gist of the disclosed material; that is to say, not the detail but the gist of it. That is one of the practical proposals that they put forward and we would like to know whether the Government might give favourable consideration to that, first of all.

Mr McNulty: It is an area we would certainly look at but I think with some degree of scepticism, in the sense that we think there is a distinction between where it is appropriate to view the material in closed session and then what is in the open session. I know people disagree but we think the balance is about right now. A sort of redacted version/summary for use in open session as well is something that we will look at but I would remain sceptical about whether that would be an appropriate response in this area.

Q120 Lord Lester of Herne Hill: You are the minister and the Home Office is the department but these are practitioners who are trying to achieve fairness in their day-to-day work without disclosing material that ought not to be. Can you think of any objection in principle or practice to give the gist of material without the detail?

Mr McNulty: I can in the sense that what then prevails in the open session will potentially come very, very close to revealing far more than just the gist and getting on to the substantive detail that more appropriately should be in the closed session. This is a civil procedure, quite rightly, and, in as far as it can be, in terms of due process concerns, we think it is as fair as it can be, given the exceptional circumstances. I take on board what some practitioners say and it is a matter of balance. For all the notion you suggest at the start, that I am a minister and we are a department, we have a bunch of lawyers and practitioners as well and their view differs from the practitioners that you pray in aid. In the end, it is a matter of judgment. The preservation of the substantial nature and details of the closed material is, quite rightly, where we should start from.

Q121 Lord Lester of Herne Hill: I have the advantage which you probably do not have of having done a case.

Mr McNulty: I am, very happily, not a lawyer.

Q122 Lord Lester of Herne Hill: I will not comment on my own experience, but the second suggestion which I make is whether the Government will relax the current prohibition on any communication between the special advocate and the person concerned or that person’s legal representative after the special advocate has seen the closed material as another way of trying to achieve a greater degree of procedural justice. Would that suggestion be one that the Government might favourably consider?

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Mr McNulty: I think the real way to get as much fairness as possible in the process is to be as clear as possible from the start as to the notion that as much of the material as possible for a specific case should be open and in the public domain. That is certainly the commitment that we start from. We would like to put as much as possible into the open session. Within that context, I think the split then between what is in closed session and the ability to converse with the individual after being exposed to all the closed information will put inordinate pressures on the special advocate and, again, is another way of lessening the integrity of the materials discussed in closed session—not because the special advocates are going to relay all that information that is clearly closed or fail to understand the distinction between open and closed material, but because of the hugely enormous pressure that does put on them. Getting the distinction right at the beginning, starting from a premise, as we do, that as much as possible, clearly, in our interest, should be in the open session rather than otherwise is the way to do it rather than tinkering thereafter.

Q123 Lord Lester of Herne Hill: Leaving aside the fact that it is for the judges to make sure the rules are not broken (in other words, that closed material is not unnecessarily disclosed in any way; and that is up to the court, the commission to do that) it is important, is it not, that the system should retain the confidence of those who are accused as a fair system and the confidence of the special advocates who are independent professionals? So far as I hear you, you are not minded to support the first two proposals, but what about the third proposal they put forward, which is to raise the standard of proof required in SIAC proceedings in the light of the fundamental fairness concerns which they have highlighted? That is the third proposal they make.

Mr McNulty: Given that we do not share the fundamental fairness concerns, we do not share the, I accept, logical conclusion that goes with the third element, which is that there should be different burden of proof. It is not fair, I think, to say that what you describe is the starting premise of all special advocates. You will know that a gentleman called Nick Baker was one of the special advocates who gave evidence who said to you clearly, as I have said, that he thought the change in the rules would put enormous responsibilities on special advocates not to disclose classified information inadvertently; that it was a difficult problem; and suggested “How far could you engage in a conversation which directs someone’s mind to a topic or an area without crossing the line which would give something away which might endanger the public interest or public security. That is a very difficult judgment for a special advocate to be called upon to make.” It is not simply the Government versus everybody else. There are real dilemmas there, if you make those changes, for the special advocates themselves, for what I would contend is not a whole lot of advantage in terms of people’s concerns about fairness and due process. That is a bit of a stonewall. I do apologise for that.

Q124 Lord Lester of Herne Hill: Surely you must be very concerned about the need for public confidence in the system by those who work in the special advocates and by those against whom very serious allegations are made.

Mr McNulty: I am. I am. Do not doubt me.

Q125 Lord Lester of Herne Hill: I am sure you are.

Mr McNulty: But I am saying that there is not a universal view from the special advocates.

Q126 Lord Lester of Herne Hill: I am not suggesting any of this is simple but I am puzzled that you seem to be rejecting any change in the system to meet the kinds of points that they have made to us. I cannot understand why because it seems to me they are making extremely modest suggestions about the gist, about some form of communication to build confidence, and about the standard of proof. Surely there must be need to consider this very carefully indeed, because you must try to win public confidence, especially among minority communities, as to the fairness of the procedure which is being adopted.

Mr McNulty: In the context of control orders, I do not think public confidence is lacking or waning. I do not think it is terribly strange either—these are complex matters—that people who suggest there are flaws in the system—that I do not agree with: they go to fairness and due process—then offer solutions to what they see as flaws—that I do not agree with in the first place. I do not think it is unreasonable for me not to accept the solutions for their flaws, when I do not, on the balance of argument, accept the flaws they suggest in the first place.

Q127 Lord Lester of Herne Hill: Have you met with special advocates to discuss this?

Mr McNulty: No.

Q128 Chairman: When they gave evidence to us here, listening to them for a good hour, the picture they portrayed was of a very Kafkaesque system that, to mix metaphors, we have not seen since the days of Henry VIII’s Star Chamber. It is not just offensive to the basic principles of justice which we as lawyers are all trained up in; it is very much against the basic interests of fair play and actually the general understanding of justice issues. Ideally, you would know the case you have to meet but at least you should know in general terms, to make sure there are no really serious cock-ups about this. The particular instance we came across, purely by accident as far as the special advocate was concerned, was where the same special advocate was on two different cases where the Home Office closed material was saying entirely opposite things in those two cases. If there was a bit more openness about it, that would potentially be avoidable. But, more importantly, if we were prepared to trust special advocates to have access to this closed material in their professional judgment, why are we not prepared to trust the special advocates to use their

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professional knowledge and expertise and ability and trust them as to what they would or would not tell the—

Mr McNulty: I do not think it is about trust; I think it is about placing undue burdens on them in terms of the balance between their interests for their clients and serious slips that can go to, quite seriously, public security and national security threats and other considerations. We think not that these are minor matters at all—these are all serious matters—but getting the balance right, right at the start of the process, in terms of what should be in the closed material and what should be in the open material and doing that effectively and efficiently, is the way to deal with these matters rather than otherwise. I am not being overly sceptical. I would keep the thing constantly under review, Kafkaesque or otherwise, but I think there are clear reasons why there is a distinction between closed material and open material and I do not think, even if I accepted the flaws in the analysis, that this is necessarily the way to address them without fundamentally undermining the nature and substance of the closed material.

Q129 Chairman: They told us they were prepared to accept that responsibility. If they are prepared to accept the responsibility that entails, if we are prepared to trust them on one thing, why not that? You say it is important to make sure you get the closed and open material right, but one of the special advocates quite passionately told us of the hours she spent in front of the screen, looking on the Internet for material that turned out to be publicly available which was in the closed material. She also told of difficulties they have had in trying to trawl, particularly, through Arabic sites, where they have ended up in a dead-end because they could not translate it, when trying to contradict some of the closed material which is publicly available, if not in English. I think that is an important point. The difficulties they are experiencing seem to me to be reasonable complaints that perhaps you ought to be looking at.

Mr McNulty: The two you cite go exactly to making sure you get the balance right in the first place between what is open and closed material. I fully accept that point. For the integrity of the system, that is certainly what needs looking at and going through in more detail. I do accept that. I will happily look again at their suggestions but I do not think any of them get over the issue of the distinction between closed and open material.

Q130 Lord Lester of Herne Hill: The problem is the need for some effective safeguard against abuse or quality control which goes beyond your department. For example, they said that the closed procedure is now being used to prevent arguments taking place on things like safely returning someone to a particular place for immigration or for other civil proceedings which would normally be in the public domain. If you take the view: “You have to get it right and that is the safeguard,” it is not a safeguard. Of course it is vital you do get it right but surely the

special advocates do have a peculiarly important role in safeguarding and winning the public confidence. Should you not at least see them and hear what they say, as we have done, to see whether you can build trust which is at the moment not sufficiently deeply rooted.

Mr McNulty: I do take the point. I shall happily see them and report back to the Committee after I have met them. That is entirely fair.

Q131 Lord Judd: Deportations with assurances. I am sure you are well aware of the position of the Committee. What precise action has been taken by the British Embassy in Algiers to monitor the situation of the six returnees? Specifically, what has the embassy done to ascertain whether any of them have been detained, for how long and in what conditions, and how they have been treated?

Mr McNulty: You will know that the returns to Algeria were on the basis of deportations with assurances. There have been exchanges of letters signed by the Prime Minister and the President. The Algerian Government have agreed that any returning person, unless detained, may, if they wish so, establish or maintain contact with the officials in the embassy. Of the six that have been deported to Algeria so far . . . As I think I wrote to you, Chairman, with the details of the position that prevailed in the position of each and every case, in terms of how, if they choose to be, they can be in regular contact with the embassy through their representatives or directly.

Q132 Lord Judd: Minister, that is the general thesis, but I asked very specific questions. I wonder if you could answer them.

Mr McNulty: I do not have the absolute details on each and every case. As I say, it is a matter for each of the individuals to say directly how they want to deal with the embassy. I do not, I apologise, have chapter and verse on whatever contact directly there has been in each and every case, but, certainly, for all those who are returned, the extent to which there has been active engagement with them and the embassy I will provide for the Committee.

Q133 Lord Judd: Minister, if these special arrangements have been made—and it is rather like, if I may make the point, another argument concerning the extension of 28 days, let alone the 28 days themselves—in the battle for hearts and minds is it not terribly important to be able to demonstrate that what has been theoretically agreed is being followed through effectively in detail?

Mr McNulty: Absolutely. I agree. And I agree in the wider context in terms of 28 days and the broad general point that wherever we depart from, as I was suggesting earlier, the normal rule of law, what would normally pertain in terms of due process, because of our response to the terrorist threat, then, not only should those departures be seen to be used sparingly, but there should be chapter and verse on how they have been used sparingly, in what circumstances and why. Our starting premise is that as much as possible should be done within the

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framework of normality, if you like, and criminality rather than otherwise, so I do accept the point you make in terms of hearts and minds.

Q134 Lord Judd: On my three specific questions, will you give an undertaking to write to the Committee with specific answers?

Mr McNulty: Yes. Inasmuch as they can get chapter and verse detail on each individual and the contact there has been, I will, of course.

Q135 Lord Judd: I have one last question, and it would be good if you could answer it now but we may have to cover it in the same way. Has the British Embassy in Algiers had any direct contact with the returnees or has all their contact about the cases been with the Algerian Government officials?

Mr McNulty: Again, in absolute detail, I will find out for the Committee and write as quickly as I can.

Q136 Lord Judd: Could I just ask, minister, would you not agree that it is not really satisfactory that you as a responsible minister do not have this kind of information up front, because if you are pursuing a policy of this kind it is rather important not just to sign off the theory but to ensure the implementation.

Mr McNulty: Absolutely. But I do not have to hand in each and every case, with Algeria and elsewhere, every single interface or connection there has been with each individual and the embassy. Maybe that is a matter of regret and I do take the point but it is really not for me to go into the details of each and every case, but a broad sweep about these particular cases I do accept and I will make sure the Committee knows whatever details we have. I agree with that.

Q137 Chairman: Could I turn to questions on extraordinary renditions. In September last year, President Bush finally admitted that the United States had operated secret detention centres where they had interrogated so-called “high value detainees”. He said they got a lot of information out of them and that this had been passed to allies, including to the UK. On how many occasions did the UK receive intelligence from interrogations of the 14 “high value detainees” which the US Government admitted in September last year had been held in secret detention centres?

Mr McNulty: You will know that the Chief Constable of the Greater Manchester Police is looking into the broad issue of rendition. He has not reported in full yet, but, as I understand it, there are and have been no circumstances in which Britain has been party to anything to do with rendition extraordinary or otherwise.

Q138 Chairman: That is a separate question. I will come on to that shortly. That is the extent of British complicity in using our airports and whatever. The more fundamental question is after that. The Americans have admitted the rendition process was going on. They admitted the detention centres. They have said that information from the interrogations of 14 “high value detainees” is very helpful and they have said that some of this information was passed

on to allies, including the UK. Irrespective of the UK’s complicity or not in the process of rendition, which I will come back to in a minute, in how many cases did the UK receive intelligence in relation to those 14 “high value detainees”.

Mr McNulty: None that I know of. Even if there were and I had knowledge of them, I am not sure I could pass them on to you. But the straight answer is: None that I know of.

Q139 Chairman: I am not asking you for the detail of what they told you.

Mr McNulty: No. I am telling you that so far as my knowledge, the answer is none.

Q140 Chairman: So President Bush was not telling the truth—

Mr McNulty: No, I have no idea.

Q141 Chairman: — when he said he had passed it on to the UK.

Mr McNulty: No, I am telling you that I do not know.

Q142 Chairman: But you would know if you were the terrorism minister.

Mr McNulty: Not necessarily so, in terms of the details of the information passed on from each individual in this case, high value or otherwise. That does not absolutely follow. You have asked me a straight question. I have given you a straight answer.

Chairman: I appreciate the frankness of your answer but I do find it surprising as if the terrorism minister, in charge of the fight against terrorism, you do not know whether you have had information from these detainees.

Q143 Dr Harris: Could I ask a follow-up on that particular point. President Bush sought to justify the practice by saying that information from the so-called “high value detainees” had been passed to allies, including the UK. If it is the case—and perhaps you could clarify—that the UK Government opposes extraordinary rendition of this kind and does not want to receive intelligence that may have been provided under torture, for reasons that have been explored in the courts and I believe is UK Government policy, but please correct me if I am wrong, then would it not be essential for you to know whether that was the case and whether that justification given was valid in terms of what you as our Government know.

Mr McNulty: I agree absolutely with the starting premise, I am simply saying in the case of the 14 high value individuals I do not have any knowledge: “I accept your point about terrorism, Minister, that is an easy point to put”. It does not necessarily follow that there has not been that information, but your points about torture and the general position is absolutely right. The Government do not demur from that and have not done, and I think you will find that Mike Todd’s report on rendition will reflect that. For all the assertions, there has not been any complicity in extraordinary rendition.

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Q144 Chairman: We can come back to what you are saying.

Mr McNulty: I know, but it goes to the same point.

Q145 Chairman: It begs a different point, Tony, because you have got the process of people getting from A to B and then when they get to B, it is what happens to them when they are in B. The argument about whether or not we should be involved in extraordinary rendition is two-fold. Number one, all these people have been effectively kidnapped from somewhere around the world and, number two, what happens to them when they get there? Either of those would make the question of extraordinary rendition somewhat dubious legally. The key point here is, are we getting evidence that is being obtained by torture or is it a “hear no evil, see no evil” difference?

Mr McNulty: No, it is not, and I do press the point, and forgive me for repeating it. Simply because I am not in a position this morning to say to the Committee, “I have personal knowledge or otherwise”, does not follow (a) that is me being deficient in my duties or (b) that anyone else passing comment on these is right or wrong. The key elements are simply this, which is why the two are linked: Mr Harris’s initial point was about torture and I do reiterate that the British Government, including its intelligence and security agencies, so never mind the “hear no evil, see no evil”, never used torture for any purpose, including obtaining information, nor did we instigate action by any armies to do so. Again, as you infer, evidence obtained as a result of torture would not be admissible in criminal or civil proceedings in the UK and it does not matter whether they were extracted from here or abroad. That is, and remains, our starting premise. Because, in my deficiency or otherwise, I cannot tell you chapter and verse on what information or otherwise has been accrued from these 14 high value individuals does not obviate or lessen the points which I make.

Q146 Dr Harris: I accept what you have just said, but let me clarify one point. It is not just that this evidence is inadmissible under torture, some people think it is bad intelligence even if it is never sought to be used in evidence because people will say anything under torture and some of the other arguments which have been heard. Even without British complicity, I do not have to imply UK complicity, given that it is considered that some of the interrogations used in these secret detention centres which President Bush has admitted being used may well involve torture, first of all, would you agree that it is necessary for UK Government to know whether it is getting intelligence which may have been derived from that, which may not have been badged as such and it is essential to know that, particularly since the President to the US claims that such intelligence from those interrogations was passed on? Secondly, on the policy point, given that the US President has suggested that this information has been provided in these cases to the UK Government, it would be

useful for you now to seek to find out definitively whether it is the case or not in order to help engage in policy matters with the US Government.

Mr McNulty: Given that the starting point in both is that we unreservedly condemn the use of torture and will do what we can to eradicate it, then the other is a positive response to both the elements which follow. I know there are those who would assert otherwise, but the British Government unreservedly condemns torture and, as other government ministers have said before me, we will not in that context utilise information which results from such torture. I think that is clear. Simply because I cannot give you chapter and verse on the 14 high value individuals, it does not infer that somehow I am part of the “hear no evil, see no evil” conspiracy.

Q147 Dr Harris: I was not implying that.

Mr McNulty: I would answer personally positive to both your points, yes.

Q148 Dr Harris: I was not implying that in my question.

Mr McNulty: I know that, I just wanted to express that view.

Q149 Dr Harris: I just want to know whether as a result of this exchange you will let us know the answer to that question, whether there has been, not what it is obviously for reasons you have explained, in those 14 cases—as far as you can ascertain which they are for the two reasons I have given—intelligence passed on from those?

Mr McNulty: I will.

Q150 Dr Harris: Thank you.

Mr McNulty: I would say in passing that these are very, very complex matters but, like everything else we have deliberated on—I think it was the point about the battle of hearts and minds—clear lines need to be drawn in the sand, I accept that.

Q151 Chairman: We do not want to be privy to private and secret information, that is not what it is about, what we want to know basically is when President Bush says information from these high value detainees was passed to the UK, is that correct or not and, if so, preferably how many cases? If we could have that information that would be very helpful.

Mr McNulty: I take that broad point and certainly I will provide it but, in my own defence or otherwise, I do say it is not for me to carry those pieces of information or others across the whole piece around in my head.

Chairman: If you can let us have that information that would be helpful.

Q152 Lord Judd: Chairman, it would be helpful if we got that note if he could also say what specific arrangements the Government has in place for finding out whether or not torture has occurred.

Mr McNulty: Surely.

Q153 Chairman: Do you consider water boarding to be torture?

Mr McNulty: I do. I absolutely, and repeat, start from the premise that we unreservedly condemn the use of torture and central to our foreign policy is to try and eradicate it in all its forms. I know everyone has had a nice little field day making all sorts of assertions, not this Committee but in general, about British complicity or otherwise in the extraordinary rendition and everything else—we will see what Chief Constable Mike Todd’s report says—but we have constantly said, those assertions aside, unreservedly that we condemn the use of torture.

Q154 Chairman: The reason I put that question to you, and I am very grateful for the very positive answer, is that I think there may be a bit of a gap between what the UK considers not to be torture and what the US considers not to be torture.

Mr McNulty: I think there is a broad array of views internationally, some more obvious than others, on what some would consider torture compared with others. I think and hope that the Committee would find if we sat down and thrashed out a definition between us here this morning there would be a lot of accord between our collective views on what is torture.

Q155 Chairman: Could I come on to Mike Todd’s inquiry. The European Parliament ad hoc committee on extraordinary renditions, which goes by the acronym TDIP, which presumably is some foreign language acronym, I am not quite sure what it is, has reported to the European Parliament on UK complicity with renditions. Presumably these are the issues which Mike Todd was investigating. One of the concerns we have, and I think that has been highlighted by the questions today, is parliamentary accountability of the Government for what has been going on. When Mike Todd’s report is published, will it be made available to Parliament for us to scrutinise, either in this Committee or more generally in Parliament, because we have pressed for some time now for access to the evidence, if there is evidence, of UK complicity with rendition? One of the things which was quite clear when we looked at this before in producing our report on UNCAT was that there was a lot of rumour, innuendo and suggestion but very little hard evidence. This is why I think we were relatively cautious in what we said before, but as time has gone on the case seems to be a prima facie case, I would not put it any higher than that, that there may have been complicity. I think it would be very helpful if when Mike Todd’s report is produced it could be put before Parliament to try and clear the air one way or the other as to what has been going on.

Mr McNulty: I think Mike Todd’s report will show that there is no prima facie case or otherwise to show complicity by the UK Government. What I am not entirely sure about is the substance and detail his report goes into. You will know it is for the ISC whether it in full or an adapted version can be

published. For the reasons you suggest, Chairman, I would certainly hope that as much of it can be published and put in the public domain as possible. I think it is a very, very serious issue and that report will go to answer some of the charges, however flawed and rooted in, as you suggest, contention, assertion and anything but hard facts. Because I do not know the detail of it, I know he has had some early discussions in detail with the ISC, but I would have thought that hopefully in some form or other it can be published and move on the public debate on that, I agree.

Q156 Chairman: Could we go on to the question of intercept evidence, which is obviously something that has been on the agenda one way or the other for some time now, both on the Home Office agenda and more generally. In its response to our report on Prosecution and Pre-Charge Detention in September last year, the Government said it was looking at a “Public Interest Immunity Plus” model and that this work was due to report to ministers in due course. Have you received that report yet?

Mr McNulty: It is going through an iterative process. We have not received the final definitive report which will then allow us to say something to Parliament or otherwise and there are real difficulties around what would be an appropriate legal framework and model to allow intercept as evidence. We have not received the report in a definitive, concluded position and therefore ready to report to Parliament. The discussions are ongoing.

Q157 Chairman: When do you expect that to come to fruition?

Mr McNulty: I would hope as soon as possible because, again, this is a matter which is not only very, very serious but one where, shy of detailed evidence, assertion wins and I do not think it is helpful in the overall battle of, as Lord Judd suggested, hearts and minds because we did not raise it in the Control Orders debate but we are told and we were during the Control Order renewal, all you need is intercept as evidence, all you need is post-charge questioning and *ipso facto* there is no need for Control Orders or someone in departures anymore. Again, not by this Committee, I hasten to add, and I am not putting words in Lord Lester’s mouth, but in the wider political debate on these matters that is where we are at. The sooner we can come to a definitive position or otherwise on how useful or otherwise, limited or otherwise, intercept as evidence may be, what an appropriate legal framework may be to protect many of the fears some have about using it as evidence or whether it is appropriate or otherwise, the sooner there is a settled position, I think the better.

Q158 Chairman: As a Committee, I think we have proceeded relatively cautiously on this and looked at it on several different occasions, most recently our formal sessions with the DPP, Lord Lloyd, Sir Swinton Thomas and the police. The DPP was very firm in his view indeed and he expressed his profound disagreement with the Government’s

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position, as advanced by Baroness Scotland in the debate in the Lords about this, on the utility of intercept in trying to produce a stronger case against terror suspects. In the light of the DPP's very firm evidence to us on this, and also Lord Lloyd on this as well, given his vast experience on this issue, and also support from the police, including the Commissioner, is the Government going to reconsider its position in the light of those views?

Mr McNulty: No, these are matters which are being looked at, as I say, through trying to come up with an appropriate legal framework and otherwise. I would say that even many of those who would appear to be critical and want to go as fast as possible towards intercept as evidence still say, certainly Sir Ian Blair, Sir Swinton Thomas and others do, with a caveat of an appropriate legal framework, and that is partly where the struggle is. It is not absolutely going to intercept as evidence now regardless of what an appropriate legal framework would be. There are still complications even for those who start from the premise, they think that intercept as evidence will be an advance, not just in terrorism but in broader terms.

Q159 Chairman: We have got public interest immunity which is considered to be good enough for other types of covert surveillance, such as bugging, why is it different for telephone intercept?

Mr McNulty: In part because of disclosure rules, in part because of a whole range of other issues, in part because of how we do what we do in terms of intercept and exposing some of those techniques, in part because of diverting resources that can and should be used elsewhere, a whole host of different reasons. I think the nature and array of intercept which potentially could be used as evidence do make it slightly different from the position in terms of bugging which, for all its complexity, is relatively straightforward by comparison.

Q160 Lord Lester of Herne Hill: Mr McNulty, this issue has been around for years.

Mr McNulty: Surely.

Q161 Lord Lester of Herne Hill: It started, I think, with Lord Newton's Committee originally, looking at one of the earlier Terrorist Bills. We know that only we in Ireland have this prohibition. We know that in the common law world, including the United States and Canada, there is no such prohibition. We know that in the United States this is regarded as a particularly potent weapon. We know that the Director of Public Prosecutions in this country believes that it would help him in securing convictions of serious terrorists. What I do not understand is where is the energy or lack of it in your Department. This is now many years old, it is not an issue that requires great complexity in any legal drafting, so why is it taking you years to come to the sensible conclusion that this should be used simply because the intelligence and security service are unhappy about it themselves? Surely, as ministers, you should now give some leadership and get on with it?

Mr McNulty: No, I do not think it is a matter of a lack of leadership and I do not think it is a matter of stealth and inertia from the intelligence services or civil servants. There are very, very serious issues here that grow and increase with the increase in complexities and technologies involved with intercept. One example is that intercept is no longer putting a bulldog clip on one end of a telephone and the other end and knowing absolutely who is going to be making that phone call, to whom and intercepting it. Intercept in terms of email, there is no substantive legal base which says you know, or can assert, regardless of whose computer it is, who has sent what message to whom at the other end. The balance is between what very, very usefully can be done in terms of utilising intercept as a methodology to disrupt activity, to certainly point towards activity which subsequently evidential cases can be built up against and the value of that, which is enormous in serious crime and terrorism across a whole lot of areas, against the value, which even Lord Carlisle suggests in terrorism would be minimal at best, of intercept evidence. This is not, I would suggest, a silver bullet or panacea that some people suggest. Again when I say that, I am talking to the wider political backdrop and debate; I am not casting aspersions at this Committee because I know you have been very, very sensitive in trying to just push the debate forward rather than otherwise, but if I sound tetchy, it is because there are those who, given the perplexities of this, wave it around as a sort of absolute panacea which says, "Introduce this and everything's fine". It is the balance between all those elements that we can get out of intercept as a disruptive mechanism, which in this area goes to the life-threatening, the public protection and all the other issues, and the balance between utilising it on the other side in terms of evidence, and that is a fine balance and if it is to work, and the very real concerns of the agencies and others about protecting how they do what they do, not least with telecommunications providers and all those sorts of dimensions, within that you can get to a legal framework, PII-plus or whatever that works, then we will be the first to say, "Well, let's go down that line". Everyone is trying to sort of put this huge division between the Attorney General and the Home Secretary, this Home Secretary and the last Home Secretary, but again, to varying degrees of emphasis, everyone from the Government is saying that, even if it does potentially have real value, it must be within that appropriate legal framework to make those protections, and that is where the search still is, although I do take your rather exasperated point that this has been around for a long, long time and governments are still not coming down firmly one way or the other. The other point I make simply is that, given that there is about to be an even more complex quantum leap in terms of the utilisation of technology that effectively in some ways potentially at least makes telephony redundant, then how to intercept, let alone how to utilise that intercept within the legal framework for evidence, becomes even more problematic, Voice over Internet, and all those sorts of dimensions. Therefore, it is an

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important matter, it is a matter that we take very, very seriously and it is a matter which, if we can deal with the legal framework appropriately, as I suggested, we should move forward on. I would hope at the very least that during the course of this parliamentary session or fairly soon into the next one, there will be a definitive position from the Government one way or the other, if only to inform the broader debate. That is terribly lengthy, which I apologise for, but it is an important matter.

Q162 Lord Lester of Herne Hill: Could I then turn to the next proposal which we made, all in the context of trying to secure the conviction of the guilty effectively without sacrificing basic fairness. One of the recommendations we made was about post-charge questioning and we recommended the introduction of post-charge questioning and the possibility of drawing adverse inferences where there is a refusal to answer post-charge questions, subject to appropriate safeguards which are vital, and the Government indicated that it would include this possibility in consulting on the review of the PACE powers, and the Commissioner has described this proposal as a welcome amendment. Do you see any objections to introducing post-charge questioning, therefore, with adverse inferences?

Mr McNulty: Sorry, I missed the last bit.

Q163 Lord Lester of Herne Hill: Do you see any objections to our proposal which has been welcomed by the Metropolitan Police Commissioner? Do you see any objections to it?

Mr McNulty: I think it is more than appropriate that we do consider it. I think it does have some value and merit and, if there were to be a Counter-Terrorism Bill, then it might be one way that we can advance things. The sticking point, which is what I did ask you to repeat, is the value of it if you are not making any inference on the silent, and that is where I think there needs to be some thought and discussion, but the basic principle that says, as people have said many times before in debates about terrorism legislation, that it would be extremely useful if there were some framework we could come up with which looked to post-charge questioning, I think, has some real merit on a personal level and is something which I personally at least should like to see, if we can get the appropriate safeguards in in our array of options, and I know that I was very, very interested in the Committee's view on that and I think I would broadly concur with it.

Q164 Lord Lester of Herne Hill: I am sure you appreciate that one of the reasons we pursue this is because it is another way of tackling the problem that does not involve, for example, long periods of detention without a trial and other encroachments on basic liberty. Presumably, in devising a framework, you would have to ensure that questioning did not violate the right to a fair trial or the presumption of innocence?

Mr McNulty: No, those matters are as problematic, I think, as the value of it if you are not making a negative inference from the silence, and it is about

the balance between not having a subsequent field day, if you like, with the individual, trampling entirely over their rights, but it still being another useful device to obviate the need to go elsewhere, as you suggest, in terms of departures from normality in terms of the law and the rule of law. I say "obviate", it will not obviate them entirely, but certainly, if it helps more and more people charged within the framework of the terrorism law going through due process rather than pre-charge detention and other elements, then I am all for it.

Q165 Lord Lester of Herne Hill: Might you consider not waiting for some huge consolidating Terrorism Bill, but perhaps having something more targeted and narrow which deals with matters like intercept evidence and post-charge questioning so that we can actually make more rapid progress rather than waiting for a much more difficult, longer process where we consolidate and do all kinds of other things which will take a much longer time?

Mr McNulty: I think inadvertently perhaps I have confused the Committee. I have said that, were there to be a Counter-Terrorism Bill, which I would certainly support and I think it has some merits, to do precisely these sorts of issues, that would come about sooner rather than later and go through the regular process and that any consolidation, because we were making changes, would follow on from that, so if—

Q166 Lord Lester of Herne Hill: Sorry, it is my misunderstanding. I understand.

Mr McNulty: If there is to be post-charge questioning, if post-charge questioning is to be included in such a Bill, then that would go hopefully through its regular 12-month-ish-type process if introduced sooner rather than later, if indeed there is to be one, and you will appreciate why I have to keep saying "if there is to be one" and "if there is not to be one", so yes, it would be of that order, so sooner rather than later. In terms of post-charge questioning, you slipped in intercept as evidence there as well, but I meant the more general point.

Q167 Lord Lester of Herne Hill: I did not slip it in, but it is simply that they are both recommendations made with the same object.

Mr McNulty: Yes, I accept that.

Q168 Lord Lester of Herne Hill: They are means to a common aim. You share the aim of the Committee, I know.

Mr McNulty: I share the aim and I see a lot of merit in the notion of post-charge questioning assisting in that aim. All I was saying, as I have tried to indicate, is that I am not personally entirely convinced about intercept as evidence and its contribution to the aim that we share, so it would be wrong of me to suggest that, if there were a Terrorism Bill and soon, then necessarily the legal framework and all other elements of the vexed issue of intercept as evidence would be sufficient really one way or the other for inclusion, or otherwise, in that Bill. Now, I would hope, in the context of what I said earlier, that we

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move to sooner rather than later a resolution one way or the other of the whole issue of intercept as evidence, but I think it would be wrong if I left the Committee with the notion that all those elements of debate still would be determined by the time any Bill, if there were to be one, was introduced.

Q169 Lord Lester of Herne Hill: I am sure you will benefit if you go to the United States and have conversations about intercept evidence with our allies, but we will leave that to one side.

Mr McNulty: Well, interestingly, I have done fairly recently and at least some, though I am sure they would not say so publicly, rue the day they even introduced intercept as evidence.

Q170 Lord Lester of Herne Hill: Lord Carlile said in his recent report that you need an exit strategy to avoid having to rely indefinitely on control orders. Do you have plans for an exit strategy?

Mr McNulty: I have said during the renewal of the Control Order that that was something we would look at and want to put into place. It was part of, from my perspective, I think, the same criticism that said there was not clear evidence of sufficient and ongoing review of the potential to prosecute or otherwise, and I said in both cases that I thought we should do far more transparently the latter, ie, ensure that there was a considered view of the potential to prosecute or otherwise and, if there was not, to at least look seriously at the notion of an exit strategy, and I thought both points were well made by Lord Carlile.

Q171 Lord Lester of Herne Hill: So specifically, in the light of the High Court judgment in the case of *E v Home Office*, calling into question the seriousness of the Government's commitment to criminal prosecution as its first resort, what systems, as distinct from words, has the Home Office put in place to keep the prospect of prosecution under review?

Mr McNulty: I think we have subsequently streamlined the initial decision between CPS and the police about whether there should be a prosecution or otherwise, not least in the light of the case, and I do not think it was *E*, but a case where the police assumed there was so clear a case that there was not sufficient for prosecution and the concentration with the CPS was either derisory or absent and the court clearly commented on that, so we have made sure now that the initial decision to go for a control order rather than prosecution is very, very clearly a discussion with the police and the CPS, and I have sought to put in place regular reviews and very clear audit trails of those regular reviews of the decision whether there is sufficient to prosecute or not in a much clearer way than in the past, not least because of the court's views, which I think were fair points.

Q172 Lord Lester of Herne Hill: Could you give us a note summarising how the system is now meant to operate?

Mr McNulty: Yes, I can. If I may, I will make sure that the note includes all the outstanding areas that we are appealing against the courts which might have a bearing on how the whole system should operate, but I will happily do that certainly.

Q173 Lord Lester of Herne Hill: One of the things we would like to know, I think, is what happens when a control order is imposed as to whether there is a continuing investigation of the person with a view to prosecution, secondly, I think we would like to know, where again control has been imposed, how common it is for the individual concerned subsequently to be interviewed under caution and, thirdly, what steps the Government propose to take to facilitate criminal prosecutions in terrorism cases in the future. If you can cover those things now, that is fine, but if you would like to do it in a more considered way in a note so that we have it all in one piece, that would be convenient.

Mr McNulty: I will and, if I may, not just those points, but your broader points about how, given the previous judgments, given the critiques in the past, we think the process should work now in terms of the prosecution decision, in terms of the ongoing review and in terms of Lord Carlile's points about exit strategies for individuals who are on for any length of time, and, if I may, I will roll them all up into a short note for the Committee.

Q174 Chairman: I think it is an important issue because one of the criticisms of the Belmarsh regime, going back several years now, was that once people were in detention, then they were effectively forgotten about and the police inquiry ground to a halt and was not continually reviewed and reviewed. Then the control order regime came in, I suppose, as part of an answer to that, and the same criticism was then applied there, that people were just put under a control order and forgotten about. Bearing in mind now we are talking about quite a few years down the track, it is certainly not equivalent to Guantanamo Bay, but—

Mr McNulty: It is not even close, Chairman.

Q175 Chairman: That is the point I am making, that it is not like keeping people in detention indefinitely. Here we have got people in very different circumstances with access to a full range of rights which they do not have at Guantanamo, but nevertheless they are subject to a certain degree of deprivation of liberty through the control order regime.

Mr McNulty: I do agree and I agree with the Committee's general thrust which says that absolutely, where possible, where the evidential base is there in terrorism, as in all other forms of criminality, prosecution remains the optimum outcome, so I do take the point about forgetting people and just sidelining them because it is dealt with, even though you could not prosecute, and I do take that point very seriously.

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Q176 Chairman: Could we just end up with one or two questions about the Home Office reorganisation and its effect on the counter-terrorism policy. How do you think that the new reorganisation is going to enhance counter-terrorism?

Mr McNulty: I think it will afford officials and ministers in the Home Office much greater time to reflect and focus on counter-terrorism and how it relates to a whole array of both the national security and more general issues in a way that perhaps we have not been able to do thus far because of the broader span of interest brought before the Home Office because it goes alongside a complete reconfiguration of what we do and how we do it inside the Home Office on counter-terror, it goes alongside increased resource and focus on all that we do in terms of counter-terror, and I think it does allow us to grow and concentrate efforts far beyond what have been fairly limited foci because of the span of control in the Home Office. I think it will enhance overall our counter-terrorism efforts and clarify its relationship not just in terms of our rather clunky legislative agenda, but the broader issues implied earlier about the battle of hearts and minds propaganda and all other elements and a hugely important, co-ordinated role across government that we simply have not had the time or the space to grow and develop, but need to because of the nature of the threat that we face and its increasing complexity, so I think in the field of counter-terrorism, it is a hugely positive move.

Q177 Chairman: How will you evaluate the effectiveness of the changes?

Mr McNulty: I think in terms of keeping apace and getting beyond the counter-terrorism threat, in terms of winning the overall battle of hearts and minds which, by the bye, goes way, way beyond the simple notion that the Government's counter-terrorism legislation agenda is against, or focused on, simply one or two communities. It is the battle of hearts and minds in the very, very broadest sense and, I think, in the context of a very real quantum change in the interconnectivity across government and everybody realising far more than perhaps they have up to now, given the changing nature of the threat, that this is about all of us and not just something for the Home Office and the Foreign Office to think about. If you want the boring answer, there will probably be an internal PSA target of some sort that we will be held account to by the Prime Minister and the powers-that-be through that process and I think it would be interesting if, for obvious reasons, there could be, I think, far more dialogue and discussion of that success or otherwise with ISC and perhaps in a redacted way with the border-house authorities. I think getting far more oversight in that sense, albeit by definition by ISC, will be an important element.

Q178 Chairman: When will the new Office for Security and Counter-Terrorism's Research, Information and Communications Unit be set up?

Mr McNulty: It is being set up as we speak to become operative at least in outline form by May 9 when there is the formal establishment of the Ministry of Justice as well as the Home Office, but all the practicalities and elements going around the establishment of the Office, the Joint Information Unit and the corresponding new Cabinet and sub-committee structure to go alongside it are being developed as we speak to hopefully be in place and implementation plans unfolding by May 9, so it is all going to change by May 9, but certainly plans are afoot to have that implementation ongoing from now on.

Q179 Chairman: Have they got new money?

Mr McNulty: We are about to bid for CSR just the same as everybody else in terms of the quantum growth that we think we require in terms of the counter-terrorism effort. We think there are sufficient funds and more in terms of resources to recalibrate and refocus what we do in the Home Office in the light of the existence of the new Office and the new Joint Information Unit and the rest is a matter for at this stage the next CSR round, but there will be specifically CSR bids above and beyond the Home Office and I guess Ministry of Justice settlement for that CSR that has already been put in the public domain.

Q180 Dr Harris: On the question of research specifically, what is your judgment as to whether there is a real need for extra resources in this area to, for example and it is just an example, understand what is happening in some parts of the Muslim community and that we understand why it is that opinion polls show that still a significant minority appear prepared to see violence as a legitimate way of dealing with grievances against policy. How confident are you that there is research capacity in this country and, separately from that, how that is being used for government-acquired research into these questions to underpin policy?

Mr McNulty: There has been some research of that nature in the area already, not least by the Home Office and DCLG. I think there needs to be more, I think it needs to get smarter, I think it does need to get into the realms of the impact and efficacy of all that we do with, I think actually, all communities and then yes, specifically the Muslim community because of the nature of the threat we face at the moment, but I am as sanguine about much of the research as I think you imply. You will know that yesterday or today there was a report on Muslim communities in London which said overwhelmingly that the Muslim community in London has far greater faith and confidence, 80/85% or something, in the Metropolitan Police than probably other communities which runs initially counterintuitive to all the sort of public domain and media lines on some of the research, so I think there is a real value in that research and I think collectively, as government, we need to do more of it. Quite where elements of that should sit in terms of DCLG's charge on much of the preventing violent extremism agenda and the counter-terrorism agenda of the

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Home Office, I am not entirely sure, but I think collectively, across government, there should be, and is, value in that type of research, absolutely.

Q181 Chairman: That research is actually very interesting and I have actually tabled an EDM about it, so if you could sign it—

Mr McNulty: About the survey?

Q182 Chairman: About the survey, yes.

Mr McNulty: Well, as I say to my constituents, Chairman, whether I support EDMs or not, I am not at liberty to sign them.

Q183 Chairman: Exactly.

Mr McNulty: But I may write a letter to the Minister in support. I think that is roughly the gist of my EDM letter.

Q184 Chairman: Well, thank you very much. I think it has been a very useful session from our point of view. I hope that we will be producing our report before too long, to use a ministerial sort of phrase, on our recent evidence sessions and other material we have collected on counter-terrorism, so thank you very much.

Mr McNulty: And, as I say, at the risk of over-labouring it, I am serious that once we make a decision about whether there should be a Counter-Terrorism Bill or not, but, if there is, then I will do all I can to ensure that this Committee, as well as Home Affairs, do have some scope for a degree of scrutiny of elements in that Bill, but I fear it will be post-introduction rather than a regular pre-leg scrutiny dimension, but I will keep in touch with the Committee's authorities in terms of those developments and, I think, the response to Lord Carlile's definition of "terrorism" which is where we started.

Chairman: Thank you very much.

Tuesday 26 June 2007

Members present:

Mr Andrew Dismore, in the Chair

Judd, L
Lester of Herne Hill, L
Onslow, E
Stern, B

Dr Evan Harris
Nia Griffith

Witness: Rt Hon Lord Goldsmith QC, a Member of the House of Lords, Attorney General, examined.

Q185 Chairman: Good morning, Attorney General Lord Goldsmith. Thank you for coming at relatively short notice for our session on Iraq and other matters. We have to finish by half-past 10 as I understand it. We would like to start off with some questions about Iraq. Perhaps I could ask, first of all, whether it was always your personal view that the European Convention on Human Rights applied to those held in UK controlled detention facilities in Iraq.

Lord Goldsmith: First of all, thank you for the invitation. You have had the note that was sent on Friday.

Q186 Chairman: Yes.

Lord Goldsmith: The position is set out in that note that the substantive standards of treatment which are laid down particularly in Articles 2 and 3 of the European Convention in my view do—and that has always been my view—apply to those held in British-controlled and -run detention facilities in Iraq. The Government argued in the divisional court to a different effect. The court held that substantive standards of treatment in Articles 2 and 3 did apply and the Government therefore conceded that thereafter. I am saying that my personal view was always in line with the concession that the Government then made in the Court of Appeal. Is that clear enough?

Q187 Chairman: Yes. Basically, you are saying, as I understood it, that your personal view was that the European Convention rights applied to those in detention.

Lord Goldsmith: In relation to the substantive standards of treatment for detainees held in a UK-run detention facility.

Q188 Chairman: How does that square with the evidence that was given at the *Payne* Court Martial that there was a series of emails which say your view was that the Convention did not apply?

Lord Goldsmith: Let me be very clear about this. I first saw that exchange of emails about two or three weeks ago after an article appeared in a particular national newspaper, an article which in my view was unsubstantiated, uncorroborated and contained some ridiculous assertions which a national newspaper of that quality ought not to have been making. But I had never seen these emails. I have never met the gentlemen who was one half of those emails, nor did I ever know of any his concerns, but,

having looked at those emails and having looked at the transcript, it is quite plain that there is complete confusion, because the emails are not about the substantive standards of treatment for detainees but about procedures for review of detention. That is quite a separate issue, in which there is a different Court of Appeal decision in a case called *Al-Jedda*, in which the Court of Appeal have held that in relation to the holding of detainees in Iraq the higher law which applies is that laid down through the United Nations that people do need to be held for security purposes. That is a very important issue but that is to do with the fact of detention and the detention review procedures which the Court of Appeal, broadly speaking, accepted were acceptable. There was one issue in relation to them that they had a problem with but that, I understand, had been changed. But, in relation to the substantive standards of treatment, I do not read those emails at any stage as touching on that question; nor could they have done.

Q189 Chairman: Could I put the specifics to you. This is the questioning of Colonel Mercer and he was asked: “You were concerned, as appears from these e-mails, as to whether the ECHR . . . whether that applied” and he says, “That is correct”—not qualified in any way. Then it goes on with the question: “The Attorney General however seems to have taken a different view”—that is different from him, because he thought it did apply—and refers to the various individuals. Then there is an exchange of emails in the transcript, Ms Quick quoting Vivien’s letter dated 19 March, which “records the advice of the Attorney General (supported by Prof Greenwood and Jamie Eadie) makes the following points: ‘During Phase III(b) Phase III *lex specialis* operates to oust ECHR. At PJHQ we only intend to concentrate on the impact of GC III/GCIV”—I presume “GC” is Geneva Conventions—and the Hague Regs . . . I would refer to the AG’s advice.” Those seem to be referring to “substantive issues” as—

Lord Goldsmith: No.

Q190 Chairman: — the Convention as a whole, not just procedures.

Lord Goldsmith: No, they are absolutely not. They are referring to the procedures for review of detention. That was the issue that, as I understand it from the emails, was in question: whether or not, once people had been detained, the procedure for

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review of their detention should be having a High Court judge looking at it or whether it should be something else. That was the issue that was dealt with in the entirely different case, the *Al-Jedda* case, where the Court of Appeal has broadly upheld the procedures. The *lex specialis* in question is the United Nations Charter and the United Nations Security Council resolution which authorises and indeed requires a multinational force to hold people for security purposes, which of course is not an ECHR ground for detention. It has nothing at all to do with the standards of treatment. I want to be very clear about this because I am absolutely clear that at all times the obligations relating to the treatment of detainees in Iraq by British soldiers in British-run detention facilities has been not to apply any form of inhuman, degrading treatment, let alone of course torture. That is enforced by our criminal law which applies the Convention Against Torture, the Geneva Convention and this is of course why prosecutions have been brought against British soldiers who are alleged to have broken those rules.

Q191 Chairman: The last one I should put to you is, again, “I would refer to the Attorney General’s advice” and then “This concluded the better view was that the HRA was only intended to protect rights conferred by the Convention: . . . ‘the *lex specialis* to the exclusion of ECHR then those Articles could not confer a right which HRA would render enforceable. For your purposes”—and this is to Colonel Mercer, I think—I would suggest this means no requirement for you to provide guidance on the application of HRA/ECHR.’” Then there is the question to Colonel Mercer: “She is telling you, ‘Don’t worry your head about it.’”—that is the HRA—and the answer is “That is correct.” Question: “We have the Attorney General’s advice”? Answer; “Yes, but we disagreed with that.” That is Colonel Mercer.

Lord Goldsmith: So I understand. This is utterly confused. This exchange of correspondence—and of course I had nothing to do with the exchange of correspondence at the time: I did not see it, I was not authorising Ms Quick to express views on my behalf, I did not know she was doing so or purporting to do so—is not about the substantive standards treatment; it is about the detention review procedures. Do you have a High Court judge and magistrates deciding whether someone is still a security risk or do you have a military board or something of that sort determining it? That is the issue, as I say, which has been determined in *Al-Jedda*.

Q192 Chairman: When it says: “At the moment, as per the AG’s advice, ECHR has no application” you are saying that was not in this context.

Lord Goldsmith: It plainly was not in this context. That has plainly never been my view, as I have made it very clear. So far as the substantive standards of treatment are concerned, it has always been my view that Articles 2 and 3 apply overseas to the actions of British soldiers who are holding civilians in UK-run detention facilities.

Q193 Chairman: You have said that you would agree with the Court of Appeal decision. Why did the Government not concede that in the High Court, that the Convention rights applied?

Lord Goldsmith: There have been two perfectly respectable arguments. There has been an argument that the ECHR, as such, does not apply outside the European space, and that derives from one of the paragraphs in the *Bankovic* case. The *Bankovic* case was the first case in which the European Court was asked to consider whether the ECHR applied in some way to military operations and they held that it did not. That was the alleged bombing of the Belgrade television station. So there has been an argument that ECHR does not apply. I, personally, because of another case called *Ocalan*, did not think that was right and it did apply outside the European space. That was then conceded, rightly I think, in the course of this hearing. Then there is the question of whether the Human Rights Act applies. That is again a separate question. But I do want to come back to this because it is also very important to recognise that the obligations which nobody has been in any doubt apply (namely, the obligations under the Geneva Convention, the obligations under the Convention Against Torture) all applied, so did domestic criminal law. That is why any soldier who mistreated, treated inhumanely, let alone tortured, a detainee in the course of a UK detention would have been liable to Court Martial, and, indeed, that is precisely what happened. I do not believe, so far as the substantive standards of treatment are concerned, there is any difference between what the Geneva Convention, the Convention Against Torture require in relation to detention and the ECHR. I do not think there is any difference at all, so I do not think it matters, and I am not aware that anyone ever thought there was something that was permitted under the Geneva Conventions that is not permitted under the ECHR.

Q194 Chairman: Your argument is that you were never asked to advise specifically on the five techniques in the context of Iraq.

Lord Goldsmith: In relation to the techniques, if we may turn to that for the moment, I first discovered the techniques of hooding, stress positions and these other things had been applied after the death of Mr Baha Mousa when it came to my attention in the course of the Army Prosecuting Authority informing me of the results of the investigation that had been done into his death and into the detention of other prisoners.

Q195 Chairman: But you were never asked to advise on that prior to the invasion.

Lord Goldsmith: Absolutely not.

Q196 Chairman: Or when we were in occupation.

Lord Goldsmith: Absolutely not. I have said since, and publicly, that, given that these techniques appear to be the techniques that were outlawed on a cross-party basis in 1972, we need to understand why anybody thought, if they did—and somebody obviously did—that these were permissible

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techniques to be used. I think that is something which needs to be inquired into and I have said that publicly.

Q197 Chairman: Lieutenant General Brims, in answer to my questions when they were giving evidence to us in March last year: “I think if you went and asked most troops, ‘What are the five things that have been banned?’” they would know what they were and that you should not do them. However, he also told me at question 238 that a week into the operation, and he could not remember the exact date, he went to the prisoner of war handling organisation and saw an Iraqi soldier who was hooded, and he then goes on: “That evening I discussed it with my senior staff and took legal advice, and although I was told that we were permitted to do this under law I decided as a matter of policy to stop doing it.” He is saying that at that stage it was not connected to interrogation. He says it would be unacceptable in terms of how to treat somebody under interrogation. It does seem that the evidence from the *Payne* Court Martial was that the techniques were part of the Intelligence Corps training.

Lord Goldsmith: It is very troubling because the way the evidence was developed and then emerged in the course of the trial as it progressed was that, originally, the evidence appeared to be these techniques were not permitted but, then, in the course of the trial evidence was given that these techniques had been approved by Brigade. Evidence was given which I think the prosecution were not expecting that these techniques had been approved by Brigade. I think we need to understand, if that is right, how that came about. I think it is important for two reasons: first of all, because clear statements had been made in the House of Commons in 1972 about outlawing particular techniques, and because it is not clear why there seemed to be uncertainty about that so that different views came to be expressed, apparently, during the course of the trial as to what was there. I want to make this very clear, that all the experience I have had talking with senior military commanders is that they are very conscious of their obligations to act within the law, to act properly, not to mistreat detainees or anybody else. I therefore think it important to understand quite how this view emerged.

Q198 Chairman: The point I make here, Lord Goldsmith, is we are talking about it at Brigade level but here we have General Brims, who is in charge of the UK operation in Iraq, discussing it with his senior staff and taking legal advice at that level—not at the Brigade level, at the very top. He has advised them that they are not permitted to do it under law.
Lord Goldsmith: May I just ask, forgive me, is that in the context of hooding for security purposes or hooding for interrogation purposes?

Q199 Chairman: That is in connection of hooding for security purposes, I think. It goes on to say, “At this stage it was unconnected with any form of interrogation” and that it would be unacceptable.

Lord Goldsmith: There is a huge difference. To hood or to blindfold a prisoner for security purposes, for example whilst he is being taken by transport to a place where he is going to be held, is quite different from hooding somebody for the purpose of interrogation. I do not believe anyone has ever said that hooding or blindfolding for security purposes, so that someone does not know where he is being taken, is—

Q200 Chairman: Except that General Brims is saying it should not continue. He is the man in charge.

Lord Goldsmith: Yes.

Q201 Chairman: Not only did it continue in relation to security, which for the reasons you have outlined may be permitted, clearly it was continuing in relation to interrogation as well—which is far worse, as you have just said.

Lord Goldsmith: Absolutely. That is my concern about what took place and why I think it needs to be inquired into.

Q202 Chairman: Do you accept, I should say, that the European Convention imposes higher standards than UNCAT or domestic criminal law?

Lord Goldsmith: Not in relation to the substantive standards of treatment of detainees, no. I am not aware—and I say this in the note—of any view that there is a form of treatment which is permitted under the Geneva Conventions but is not permitted under Articles 2 or 3 of the Convention.

Q203 Chairman: Did you give any advice either on the application of the Convention or in relation to the five techniques, in relation to our occupation forces in Kosovo or Afghanistan?

Lord Goldsmith: You will understand I am very limited in what I say about advice I gave.

Q204 Chairman: I was actually asking you whether you advised, not what your advice was.

Lord Goldsmith: In relation to the five techniques, no. And the other part of the question, I am sorry?

Q205 Chairman: Were you asked to advise as to the applicability of the European Convention in relation to Kosovo or Afghanistan?

Lord Goldsmith: My view about the European Convention has always been this has been the same in relation to whether it is Iraq, Afghanistan or anywhere else, or, indeed, Kosovo. It is no different.

Q206 Chairman: That is a slightly different answer.

Lord Goldsmith: Is it?

Q207 Chairman: Were you asked to advise on its applicability?

Lord Goldsmith: Kosovo, I cannot recall. I cannot answer that question sitting here. What I can say is my view has always been the same as the one I have indicated to you.

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Q208 Chairman: Is it the Government's position that other obligations under UNCAT, such as to prevent acts of torture, or of cruel, inhuman or degrading treatment and investigating allegations of torture, do not apply to territory under the control of UK troops abroad?

Lord Goldsmith: There is no doubt at all that we have an obligation to criminalise torture, irrespective of where and by whom it is committed.

Q209 Chairman: Clearly things have gone very badly wrong in Iraq. You would accept that.

Lord Goldsmith: That is a very big question.

Q210 Chairman: I am talking in terms of this particular focus on the Convention, on the use of the five techniques in interrogation.

Lord Goldsmith: I am not sure I would necessarily accept the words "very badly wrong". I certainly agree with you that there is a matter of grave concern as to how these techniques came to be used, who authorised them and on what basis. That is a matter which ought to be inquired into, as I have said.

Q211 Chairman: Do you accept any responsibility as the Government's chief legal adviser for not ensuring that the necessary advice and guidance about the legal framework was in place to make clear to troops on the ground that techniques such as hooding, stress positions and sleep deprivation are unlawful?

Lord Goldsmith: I certainly do not. I have told you what my view is. I obviously am not asked, in any event—no Attorney General is ever asked—to advise on all aspects of any form of operation, let alone all military operations, and I cannot believe that anybody high up in the Army needed to be told, in any event, that our obligations under the Geneva Conventions, under the Convention against Torture, under our criminal law did not permit the treatment of detainees in a way which was degrading or inhuman, contrary to the substantive provisions of Articles 2 and 3 of the European Convention.

Q212 Chairman: You only found out all this was going on *ex post facto*.

Lord Goldsmith: I found out *ex post facto*, after Mr Baha Mousa had died, that techniques were being used in that particular place on that particular occasion, during the course of which worse took place as well, because beatings were administered to the detainees over a substantial period of time. Mr Baha Mousa suffered 92 or 93 separate injuries and died, and of course my reaction to that was to support the Army Prosecuting Authority in their endeavours to get to the bottom of what had taken place and where there was evidence then to bring a prosecution, to bring a Court Martial in relation to those few individuals who it appeared had been involved.

Q213 Lord Lester of Herne Hill: In the context of my questions I should say that I was with Sam Silkin, the Attorney General, in giving undertakings at the Strasbourg Court in the Irish state case that we

would never again use the five techniques, as I am sure is known. On the eve of the invasion of Iraq on 17 March 2003, in a speech in the Lords, I said that it was "essential for members of the Armed Forces and civil servants to have clear guidance about the legal obligations imposed on them as we face imminent war against Iraq." As you have fairly accepted, Mr Attorney, something seriously has gone wrong emerging from the *Payne* Court Martial, that hooding was used not only during transit but as part of conditioning for interrogation, that, in the case of 'high value intelligence' detainees, hooding was being used even during interrogation, that there were stress positions, deprivation of sleep and so on. All of those conditioning techniques, according to the evidence, appear to have had the approval of the legal adviser at Brigade Headquarters, from the evidence we have read. How would you explain such a spectacular failure to ensure compliance with what you of course accept are fundamental norms of humanitarian human rights law? How do you explain that?

Lord Goldsmith: That is why I have asked for an inquiry, because it seems to me to be inexplicable.

Q214 Lord Lester of Herne Hill: Surely, at the very least, as the chief legal adviser to the Government you do have responsibility for ensuring that proper advice and guidance about the legal framework is in place to make it clear to our Armed Forces in their difficult job that the techniques such as hooding, stress positions and sleep deprivation are unlawful. Surely that is something which the chief legal officer to the Crown has an obligation to ensure, particularly because all of this was raised in advance of the invasion.

Lord Goldsmith: I have no doubt at all that the advice which the Army had was that they had to comply with—and this was their view—the obligations under the Geneva Conventions, under the Convention Against Torture and, indeed—because they are no different, the substantive standards of treatment under Articles 2 and 3 of the Convention. I do not understand why, given the background in relation to hooding and so forth, there appears to have been this doubt, this confusion, whatever it was, about these techniques being used, and I have not got to the bottom of how that came about, which is why I think it does need to be inquired into. If I may respectfully say so, the time for asking questions about who is responsible for that would be after it has been looked into.

Q215 Lord Lester of Herne Hill: My question is rather different. It is not who was responsible but, under our constitutional arrangements, who in our system of government takes responsibility? You have said again and again in the past that as Attorney General you are accountable.

Lord Goldsmith: Yes.

Q216 Lord Lester of Herne Hill: If it is not yourself, who within government is the person of whom we should be asking these questions about formal accountability and legal responsibility?

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Lord Goldsmith: No, I think what you are asking about is how did a particular set of events occur. If somebody had said to me: “Is it all right for us to use hooding during interrogation?” they would have had a very clear answer.

Q217 Lord Lester of Herne Hill: I am simply seeking a clear answer to my question, which is: Who within our system of Government, if it is not the Attorney General, is the right person to whom we should be putting these questions?

Lord Goldsmith: With respect, I think you have a clear answer, which is that if you want to know—and, as I have said, I believe we ought to know and inquire into it—why certain techniques were used, notwithstanding what had taken place before, it is necessary to go to those people who appeared to have authorised them and ask how that came about. That, in this case, would be the Ministry of Defence and the Army. This is not shirking responsibility for this at all; this is saying I do not understand how this came about. I have said publicly I think it needs to be inquired into. It certainly did not come from my office and I have told you clearly what my view about that is.

Q218 Lord Lester of Herne Hill: Could I explain what the problem is for our Committee. Our problem is that during our UNCAT inquiry we received evidence from the Rt Hon Adam Ingram MP as the Minister of State for the Armed Forces at the Ministry of Defence, in the course of which he stated quite clearly that there had been clear guidance that the five techniques should not be used and that was the position. Our difficulty is that the evidence before the Court Martial suggests that the Intelligence Corps who did the interrogating had a written policy of using some of the techniques “to condition” before interrogating. We have not been able to see that written policy but we are determined to get to the bottom of this, as to, apart from anything else, who would take ministerial responsibility for that written policy. If it is not the Attorney General then which minister would it be?

Lord Goldsmith: With all respect, it sounds to me, from what you have put, exactly as I have been saying. Somebody, without guidance from above, without ministerial approval, has put in place or accepted a policy—if that indeed is what has happened—which is contrary to what I believe our obligations were. That is why—forgive me for sounding like a broken record—I have been saying, ever since the moment that it became public that some of the individuals in the *Payne* trial had been acquitted, or one of them in particular, on the grounds that it appeared (contrary to the prosecution case as it was presented originally—it appeared during the course of the evidence) that advice had been given by someone at Brigade level that this was permissible, this is a matter of grave concern as to how that happened. I believe we need to inquire into that issue and I still believe that needs to be done.

Q219 Lord Lester of Herne Hill: Thank you. Do you see a conflict of interest in your role as chief legal adviser to the Government about the human rights obligations of our Armed Forces and in your role in overseeing the Army Prosecuting Authority which has power to prosecute for breaches of those obligations?

Lord Goldsmith: You obviously do, so, if you would spell it out, I can consider it.

Q220 Lord Lester of Herne Hill: No, I was asking you whether you see any problem yourself.

Lord Goldsmith: No, I do not. And I do not for this reason: when it comes to the activities of the Army Prosecuting Authority, they have an obligation, like any other prosecutor, to bring prosecutions, however uncomfortable that might be for the Army or for the Government or for the country, in circumstances where there is credible evidence of wrongdoing, breaches of our criminal law, breaches of the treatment, that soldiers are required to comply with, and I entirely support them in that. Indeed—one of the things you might think was extraordinary about the suggestions in relation to what I might have said—I, above all people, have been more criticised for allowing these prosecutions to take place than anybody else in this country. I have allowed these prosecutions to take place precisely because my view is that the rule of law does need to be complied with. If there is credible evidence that soldiers—and I believe it is only a very small number out of a huge number of our soldiers who fought and acted in a very, very courageous and brave way—have broken the law then it is important that that should be brought to a court to be tested.

Lord Lester of Herne Hill: I agree.

Q221 Dr Harris: You have said there is confusion. Who, in your view, was confused? Are you saying Colonel Mercer was confused, Commander Brown was confused or Ms Quick was confused? Or that all three of them did not understand what they were saying?

Lord Goldsmith: When one reads the evidence that was given in the trial, the confusion—and the confusion is probably Lord Thomas’s confusion more than anybody else’s—is to treat emails which are talking about procedures as if they are talking about substantive treatment.

Q222 Dr Harris: I am with you. So you are saying that the three people involved knew that they were only talking about the procedures for review of detention but that the judge, despite the transcript interviewing one of the people, got the wrong end of the stick—

Lord Goldsmith: No, I am not saying—

Q223 Dr Harris: — and failed in his questioning to be clarified in his own mind.

Lord Goldsmith: Forgive me. To be clear, Lord Thomas was not the judge; Lord Thomas was counsel who was cross-examining.

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Q224 Dr Harris: I am sorry.

Lord Goldsmith: He was cross-examining on the basis—and this is forensics—that the emails seemed to be about the substantive standards of treatment. The Chairman read before from one of the emails, Ms Quick saying something about “we applied the Geneva Conventions”. It is quite plain that this whole correspondence, for example, was taking place on the basis that the Geneva Conventions applied, yet, in his questioning, Lord Thomas suggested to Lieutenant Colonel Mercer that he was getting resistance on the proposition that the Geneva Conventions applied—which was a bad question and Lieutenant Colonel Mercer cannot have been listening to the question when he answered yes to that.

Q225 Dr Harris: That is fine. That is not what I was asking you about. It seems to me, just on reading these emails, that they are about the general question. There are a number of points. For example, it says that Colonel Mercer says, “My legal view, for what it is worth, is that the Convention did apply, particularly in occupation.” He does not say: does apply on this narrow point. Furthermore, they go on—and this is Commander Brown: “The fact that we are dealing with a Middle East Islamic country may make a difference as will the fact that much of this will be US led.” It is hard to see why that simply applies to procedures on review and the application. Then, again, it says here, “I have always been of the view that the ECHR would apply”—not “would apply in relation to this particular point”. They never used the term in the first half of these emails that you are saying they are directing it towards, which is this rather narrow point.

Lord Goldsmith: Dr Harris, I am not responsible for any of these emails. I did not see them until two or three weeks ago. The Ministry of Defence legal adviser is quite clear that, as far as Ms Quick is concerned, she was concerned about the procedures to be operated, not in relation to the substantive standards of treatment. I have read these emails. I think they are somewhat confused. I do not know what Lieutenant Colonel Mercer thought. I have never met him. I have never spoken to him. I did not know what his views were until they were reported in this trial or in a newspaper. I am saying, as far as Ms Quick was concerned the Ministry of Defence seems to be talking about the procedures. And, in relation to the procedures, there is an issue, where the view of the Ministry of Defence has been upheld by the Court of Appeal, that the procedures which apply are those which are applicable to the Geneva Conventions not those which would apply if you had a standard ECHR Article 5 issue arising—and I think at one stage it says, in Brighton or Brixton or Birmingham, or something like that.

Q226 Dr Harris: It is hard to see how a fair reading of these emails would suggest they were all about this specific issue. It is in paragraphs, and paragraph 2 states: “With regard to the detention of civilians . . .” You are saying it is not just paragraph 2 that is about that but the whole thing. It goes on to say, “we

raised this issue”—not the issue but this issue; that is the issue to do with the detention of civilians—so it does not seem to me unreasonable that people would assume there was a question about whether the ECHR applied.

Lord Goldsmith: I am not responsible for what people thought and I am not responsible for what people said in their emails which may have led them to that view. The point I am making—and I hope very clearly—is my view is and always has been that the substantive standards of treatment in Articles 2 and 3 of the European Convention apply to the operations of our soldiers when they are holding people in UK detention facilities. If anyone thought differently in relation to that, they are wrong. But it would not have mattered in any event, because the obligation under our criminal law, the Geneva Conventions and under the Convention Against Torture mean that you cannot subject anybody to inhumane and degrading treatment or torture. That is absolutely clear and should have been absolutely clear to everyone throughout.

Q227 Dr Harris: On a separate issue now, away from the emails, you said the Government argued to a different effect from your view in the divisional court in the case of *Al-Skeini* and you said they are entitled to do that. I do not disagree with you, I am sure they are, but I find it surprising because you give them legal advice. Who gave them legal advice to the different effect? What is the point of having you, if they say, “That’s what you say, but we’re going to go for this guy?”

Lord Goldsmith: I am not going to answer the question what is the point of having me!

Chairman: You are going.

Q228 Dr Harris: For the next three days.

Lord Goldsmith: Or anyone else holding this role.

Q229 Dr Harris: What is the point of the Attorney General giving advice if the Government can pick and choose someone else?

Lord Goldsmith: This is a broader question. There are certain occasions when the Attorney General’s advice is determinative of what Government does if you are clearing a particular action; for example, taking military action: the Government’s legal adviser’s view on that clears it and that is determinative. There are questions where the Government can bring forward legislation on whether it is compatible with ECHR. We take the view that there the legal advice may be determinative too. If the Attorney General says, “This is not compatible,” then it cannot be brought forward. That does happen from time to time. We do not know about it because it is kept behind the confidentiality blanket. There are occasions when the Government says, “We are involved in a legal dispute. We would like to argue *x*.” The Attorney General may say, “I don’t think *x* is right. I think the court will hold that *y* is right. But I do not think it is improper for you to argue that point because the court will then determine whether you are right or not.” Often, of course, there are perfectly

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respectable arguments which can be put. In the *Al-Skeini* case, for example, the Government argued that the Human Rights Act itself did not apply—and that is quite separate from the ECHR—and in the House of Lords the most senior Law Lord took the view with the Government that it did not apply and the four others took a different view. It is perfectly proper to make those arguments. An Attorney General should say—and I have in a number of cases said this—that the Government should not run arguments which are improper, and that means an argument which is so bad or so unlikely to succeed that it really is not appropriate for a responsible government to be arguing that at all. That was not the case in relation to whether or not the ECHR itself applied, because of this argument that the European Convention, as the European Court seemed to say in the *Bankovic* case, does not apply outside the European space, it is a convention for Europe not the Middle East.

Q230 Earl of Onslow: Attorney General, I find it very odd that this confusion arises about how Ms Quick was allowed to say that you said something when you did not. How did this confusion arise? Secondly, in reply to Lord Lester you seemed to say that it is not your fault that there were these confusions with the Army legal department, which appears to have given some advice with which you were obviously in disagreement. How have these confusions arisen? How is it still that nobody can say, “The buck stops with me that this legal advice was given”—either you as Attorney General or the Minister of Defence. “It’s not my fault, gov” seems to be whizzing around.

Lord Goldsmith: I think that is really unfair, Michael.

Q231 Earl of Onslow: Attorney General, you may think it is unfair; I think it is a perfectly respectable question to ask because there does seem to me, a non lawyer, that there has been something of a confusion. I think it is perfectly reasonable for me to ask you to answer it.

Lord Goldsmith: Yes, and I have done, and I am very happy to do that again. I believe it is important—and I have said this since the decision in the *Payne* case became public—to understand how it came about—because this is the real issue, that somebody at Brigade apparently thought that these techniques were appropriate, given what had been said in 1972, given the consistent view, given the consistent advice about the standards of treatment which should be applied to persons in detention. I am sorry for being slightly sharp about that. You said, “How did Ms Quick come to say this?” I do not know. Nobody asked me what she should respond in relation to it.

Q232 Earl of Onslow: But you do not seem to have shown a mild interest as to why. Why have you not discovered what happened?

Lord Goldsmith: I have.

Q233 Earl of Onslow: If it had been me, I would have been chewing up Ms Quick so that she looked like a hamburger by the time I had finished with her, if I had been you. You are very clever, we know that, much cleverer than I am, and you are a very good lawyer, so you should have been able to find out. That is all I am asking.

Lord Goldsmith: I have, and I will repeat—because I have said it, I think, four or five times—I am told and I read the emails this way and I understand that Ms Quick, whatever Lieutenant Colonel Mercer thought she was talking about, was talking about the procedures for detention review, where there is a distinct issue as to whether or not the European Convention applies or whether or not the higher obligation through the United Nations Charter and the United Nations Security Council resolution applies, which the Court of Appeal have held it does. That is what she was talking about. That is what I am told that she was talking about. From my own point of view, I very much wish that she had not invoked me in some way but, in relation to the question whether the United Nations obligations apply or the ECHR obligations in relation to procedures apply, she was right to say, in my view, as the Court of Appeal has said, that it is the United Nations obligations which trump . . . or not trump, but which operate in that specific area in relation to the procedures. But I do want to draw this distinction, because it is so critically important: that has nothing to do with the way you treat detainees. That is quite distinct. I think that is substantively a very important question. It is not a technical point; it is absolutely fundamental.

Q234 Lord Judd: Attorney General, you emphasised the unequivocal nature of the policy announced in 1972. I was present in Parliament when that policy was announced and I agree with you it was unequivocal and commendable. Would you not agree that for the record it is probably just as well to establish and remind people that it was made in the context of all the provocation of violence in Northern Ireland and all the anxiety and, indeed, emotion that was current at that time? Attorney General, would you not also agree that, quite apart from the issues of pinpointing responsibility, which is very important for what has happened and for how it has happened, this whole story raises very big issues about training and the quality of leadership in the Armed Services if something could happen now which should have been a central part of the culture of the Armed Services for 35 years.

Lord Goldsmith: I think I agree with everything or almost everything that you have put. It was unequivocal. It ought to have been very clear. I believe we do need to understand where the confusion arose, which is why I have consistently said this needs to be inquired into. I believe it is important for three reasons; first of all, because it is right in principle that we should comply with the law; secondly, because it is very important in practice—because I think that if we are going to win

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the struggle that is taking place at the moment, we are going to win it because we will demonstrate that we stand up for the rule of law, we believe in justice, even under extreme provocation. You will recall that the statement that was made in Parliament was following a very distinguished report, the Parker Report, in which two members of the Committee, very distinguished, took the view that, in the circumstances of provocation, expediency—if I dare put it that way—meant that it was justifiable to use those techniques and it was a minority view that they should not be used but it was the minority view which the House of Commons accepted and all parties accepted. The third reason I think it is very important, which is why I have been so concerned about it, is that I think it is incumbent on us to ensure that, in the interests of our soldiers, they know very clearly what it is that is expected of them. The bit of what you have said that I cannot really comment on is where the fault lies: is it training? I do not want to say anything against the leadership of the Armed Forces because I believe, having met the leadership of the Armed Forces, that they have been outstanding in so many ways. But something went wrong, apparently at Brigade level in relation to this particular issue, I believe it appears to be the case, and we should understand why it was, for the reasons I have given.

Q235 Chairman: One last question on this issue, and there is a bit more detail, is about the Red Cross report in February 2004. In our predecessor Committee's report 19.03.04 we referred to the allegations from the ICRC from February 2004 that there was a series of human rights abuses in the treatment of Iraqi nationals by coalition forces. We wrote to the MOD about this in June 2004. We got a pretty straight bat to the questions, but the Minister for the Armed Forces, Adam Ingram, said to us, "ICRC reports are confidential as between the ICRC and the UK Government. However, all senior personnel in theatre and in London, including UK Government Ministers, are provided with copies of the ICRC reports." As ministers were given copies of the ICRC reports, does that include you?

Lord Goldsmith: I would have to go back and see whether I was sent that particular report. I think I was. I am not sure.

Q236 Chairman: Obviously this is very significant, if you were given that report in or around February 2004, because it would have brought to your attention the suggestions that abuses were taking place.

Lord Goldsmith: I am just trying to remember at what stage I knew about the problems that had arisen in the detention of Mr Baha Mousa and the others because that already would have been an issue in my mind in relation to the Court Martials that needed to follow as a result of that.

Q237 Chairman: You are not quite sure when you knew about the Baha Mousa—

Lord Goldsmith: I know I was told about it. I cannot give you, sitting here, the precise date. I recall being told about it by the general in charge of the Army Prosecuting Authority who told me that they had received papers, it having been investigated, and told me some of the circumstances which I was extremely disturbed to learn.

Q238 Chairman: Could you let us have a note on when that happened.

Lord Goldsmith: Yes.

Q239 Chairman: And also when you saw the ICRC report.

Lord Goldsmith: Yes.

Q240 Chairman: When it was supplied to your department.

Lord Goldsmith: Yes.

Chairman: We now move on to a different subject.

Q241 Baroness Stern: Attorney General, I want to ask you some very, very simple questions about rendition. The first question is has Diego Garcia been used by the United States for processing 'high value detainees' as Dick Marty's most recent report alleges?

Lord Goldsmith: I am assured it has not.

Q242 Baroness Stern: Is it true that the UK Government has readily accepted assurances from the United States that Diego Garcia has not been used for processing 'high value' detainees without independently or transparently checking the facts?

Lord Goldsmith: I cannot say on what basis those assurances have been accepted. We do not operate ourselves in Diego Garcia, as you will know, but I am aware that the United Kingdom has been assured firmly by the United States that it does not use Diego Garcia for the holding of detainees, prisoners of war or anything of that sort. As to the circumstances, the nature of those assurances that were given, I think you would have to go to others, but I would like to believe that, even though there is friction from time to time over certain issues, the relationship between this country and the United States is that they would not give us assurances of such an equivocal nature which were not true.

Q243 Baroness Stern: Would this view, that they would not give assurances which were not true, also apply to any assurances that torture had not been used in any certain case; that if it was asserted then it would be accepted and we would never in any circumstances think that such assurances needed to be checked, verified, pursued?

Lord Goldsmith: These are not really questions for me. I think you put it in quite a leading way.

Q244 Baroness Stern: I am sorry.

Lord Goldsmith: Which is understandable. I was saying that my colleagues believed the assurances that they had been given that Diego Garcia was not used for holding 'high value' detainees or that sort of thing. All I was saying was that, from my experience

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of the relationship between the United States and the United Kingdom, even though there is friction from time to time, I would be very surprised if an assurance of that sort was given to us, given the nature of the operation in relation to Diego Garcia, that was not true. But I cannot go any further than that and I certainly cannot extend it to any other assurances that may have been given or any other statements that may have been given at any other time.

Q245 Baroness Stern: From where you sit, it is clear that Mr Dick Marty is wrong.

Lord Goldsmith: The Government does not accept some of the things that that report says. I would like to make it clear, though, that the fundamental thrust of the report that terrorism has to be combated by methods which are consistent with human rights and consistent with the rule of law is something that I would very strongly agree with and I believe the Government would strongly agree with as well. As to the detailed facts as to what has taken place, that is more difficult for me to comment on.

Q246 Lord Judd: In the light of what has happened, Attorney General, are you satisfied that effective measures are now in place to ensure that such things can never happen again, although you question whether they ever happened?

Lord Goldsmith: I am not questioning whether certain things happened. I was referring specifically to Diego Garcia. It concerns me that it was acknowledged in September 2006 that there had been a covert detention programme being operated by the CIA. It concerns me that, although it was said that that had been brought to an end, there was not an unequivocal assurance that it would never be started again.

Q247 Earl of Onslow: Attorney General, you know that the Government is making noises about accepting intercept evidence. In your view, how significant a difference would relaxing the intercept ban make in terms of bringing more criminal prosecutions against suspected terrorists?

Lord Goldsmith: I believe that if we can overcome the problems that exist—and there are genuine problems—that it would be very beneficial for prosecutors to be able to use intercepted material. I believe it is capable of being one of the key tools in bringing some of the most dangerous and serious criminals to justice.

Q248 Earl of Onslow: What are those objections?

Lord Goldsmith: I think they have been quite widely discussed, but the risk that the security agencies could be required to reveal secret methods and techniques which they have or their capabilities in such a way that would prejudice their ability to continue to operate to protect the people of this country; the risk that they would be subjected to unconstrained obligations to retain or disclose material in the course of a criminal trial that would put an unacceptable burden on them. I think those are two of the key issues which need to be dealt with.

Q249 Earl of Onslow: I understand that very clearly but does it not then follow that intercept evidence does not have to be used? The Crown can decide whether the risks of using it outweigh the benefits of using it. In other words, if the Crown feels there are dangers of using that in this particular case that particular piece of intercept evidence, it does not have to use it. It should not be mandatory.

Lord Goldsmith: I do agree with that. I think that would be a very important plank of any scheme if we introduced one, that it should be for the state to determine, in a given case, whether it wanted to use the material. But there is a very important qualification to that. That must be right in relation to what we would term inculpatory material (evidence which tends to show that the defendant is guilty) but there is an obligation on the state, on the prosecutors, to reveal information which is exculpatory (which tends to show he may not be guilty), and then, of course, that cannot be a question of decision by the state in the same way, if the failure to disclose that material would prevent there being a fair trial. That has to be dealt with in a different way.

Q250 Earl of Onslow: I understand that. You probably know—you almost certainly voted against me on this particular issue—we did vote recently in the Lords to include intercept evidence. Does that mean, with the Government thinking as it is, that it is going to accept that amendment?

Lord Goldsmith: I do not believe the Government is going to accept the amendment. Indeed, there has already been a statement about a review to take place and I welcome that. I think, if I may say so, the Lord Lloyd amendment does exactly what you say in terms of saying it is for the prosecution to decide whether it wants to use evidence if it is inculpatory. It does not deal with what happens in relation to evidence which is exculpatory. My view is that if we are going to overcome these problems—and I very much hope that we will—then you would need to have quite a detailed scheme in an Act which would set out what the obligations in relation to retention of material and in relation to disclosure of material were, in such a way that you could still have a fair trial but the agencies would not be subjected to, if you like, unconstrained fishing expeditions, a requirement to reveal material which might be prejudicial or huge expense in providing material. There are some examples where they have been put to very considerable expense, which I think we have to avoid. That is a real issue about the amendment as it stands.

Q251 Nia Griffith: Could I move on to the meaning of public authority. In the Law Lord's decision last week in the *YL* case on the meaning of public authority in relation to the Human Rights Act, and obviously with the increasing involvement of voluntary and private organisations in the delivery of public services, we obviously now have a situation where two individuals could be in very similar institutions and yet the law would be interpreted differently according to whether it was a private or

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local authority run home. What now is the Government's attitude to our Chairman's private Member's bill on the meaning of public authority?

Lord Goldsmith: The Ministry of Justice, the responsible department for this, did, as you well know, argue consistently with the undertaking it had given to this Committee that the decision of the Court of Appeal in the *YL* was wrong, and narrowly, by a 3:2 majority, that was rejected. The department is not considering carefully the implications of the judgment. If I may deal directly with the point about the Chairman's private Member's bill, I think there is a real, very important issue about the definition which would then be applied. What is a public authority requires very careful consideration. On the one hand—and the Government did take the view—those bodies that were caught by the *YL* judgment ought to be treated as public authorities. That is what it argued. On the other hand, there are bodies which would be brought in by the definition in Mr Dismore's bill, like bed and breakfast accommodation, which would be treated as public authorities. I must say I would have real reservations about that because there is a real risk that it would frighten off a lot of people who are providing simply bed and breakfast accommodation to homeless people, which is very important if decent and humanitarian standards are to be applied to them. I think it does need careful consideration but I am not responsible for reaching the final decision as to what it should say.

Q252 Lord Judd: Could I turn to the international legal framework. Attorney General, there does seem to be a difference of opinion between ministers. In Venice on 11 May the Home Secretary, addressing ministers from the six largest EU nations, said that there was a disjuncture between the international human rights conventions which we have inherited and the reality of the threat we face from terrorism. He went on to argue that there were gaps in the international legal framework. Lord Falconer to this Committee on 21 May had a rather different standpoint. He was asked whether he thought there were gaps and he replied, "I do not think there are gaps." He was asked whether it was common ground that we do not need to alter the international human rights conventions because of terrorism, and he replied, "I completely agree with that because I

strongly believe that these instruments provide the basis whereby you can alter what your operational response is within the context." He went on to say that he agreed that we should be "unequivocal in our commitment to international instruments" which set our basic standards. Where do you stand, Attorney General?

Lord Goldsmith: I stand in exactly the last place that you have identified. I believe it is very important that we should stand by our international commitments and standards. I believe that because I believe these set out the basic values upon which our societies are based. I believe that these are values which the terrorists would take away, and I believe it would be a huge mistake for us to give them away ourselves. I also think that it is very important that we stand by those standards so as to demonstrate that what we stand for is fairness, justice, the rule of law, rather than the seductive but hugely dangerous narrative of al-Qaeda that everything that is done by the West is an oppression of the Muslim minority. I think it is very important from that point of view. I also believe—and I have spoken publicly quite a lot about this—that the international standards to which we subscribe do not constrain us from taking the action that we need to take to protect ourselves. I do not think it is either national security or fundamental values. I think you can balance the two. Sometimes you need to adjust the balance to take account of particular circumstances, but I think you do that by respecting the rule of law; by standing by fundamental values, some of which are non negotiable; and by making changes only where they are proportionate (that is to say, they are necessary to meet the threat and proportionate to that threat).

Dr Harris: Do you think the Government shares your views, as a whole?

Earl of Onslow: Because the Home Secretary does not. Is the Home Secretary right or is Lord Falconer right?

Q253 Dr Harris: Two questions there.

Lord Goldsmith: I have to say that I think I am right.

Chairman: I think that is a good place to stop—particularly as you are only around for another couple of days. We will have to see if the next Attorney General thinks he is right and whether he agrees with you as well. Thank you very much for what has been a very helpful session.

Written evidence

1. Letter from the Chairman to Sir Ian Blair QPM, Commissioner of Police of the Metropolis

As you know, my Committee is conducting an ongoing inquiry into counter-terrorism policy and human rights, and recently produced a report on possible ways to facilitate prosecution of terrorist suspects and possible alternatives to lengthy pre-charge detention (our 24th Report of Session 2005–06). In the context of our work on this subject, I am writing to follow up some points you made in your speech to the Urban Age Summit in Berlin on 11 November.

PRE-CHARGE DETENTION

First, we note your belief that an extension to the 28 day period for detention before charge will have to be examined again in the near future. We will be giving very careful scrutiny to whether there is any evidence that a further extension to the period of pre-charge detention is necessary. In your speech you suggest that your experience of dealing with the 24 suspects arrested in connection with the alleged airline bomb plot provides such evidence. You said that you needed all the 28 days in respect of some of the 24 suspects and that, if there had been more people, you would probably have run out of time.

We are sure that you will understand that whether the experience of dealing with the 24 Heathrow suspects provides evidence in support of or against the need for a further extension of the 28 day period is a question which will require very careful independent scrutiny. We understand, for example, that of the five suspects who were authorised to be detained for the full 28 day period, three were released without charge, which might be said by opponents of further extension to raise concerns that the longest periods of pre-charge detention are being used in relation to individuals against whom there is the least evidence. It would assist us greatly in our scrutiny task if you could provide us with a thorough analysis of the way in which each of the 24 suspects arrested on 10 August 2006 were dealt with, including precisely when they were charged or released without charge, the reasons relied on at each application to a court for an extension of authorisation for detention, and the exact charges brought against those charged. We would also be grateful if you would supply us with detailed statistics showing for how long all suspects who have been arrested under terrorism powers have been held before being either released or charged since 25 July 2006, when the new 28 day period came into force.

Finally, we note with interest that in Canada the suspects arrested in Toronto earlier this year in connection with an alleged plot to carry out various terrorist offences were charged very shortly after their arrest. We would be grateful for your views as to what is different about the UK situation that makes it necessary to have a period of pre-charge detention so much longer than in Canada.

POST-CHARGE INTERVIEW

We note your support for introducing a procedure to question suspects after they have been charged with a terrorist offence when new evidence emerges about that offence. In our recent Report we made a similar recommendation and also recommended that it be possible to draw adverse inferences from a refusal to answer such post-charge questions. We would be grateful to know whether you agree with our view that any such procedure would need to include certain minimum safeguards, including access to legal advice, a requirement that the prosecution have already established a *prima facie* case, and limits to the inferences that would be proper.

RELAXATION OF THE INTERCEPT BAN

We welcome your view that the current ban on the admissibility of intercept evidence is not sustainable in the long term and that a way needs to be found to ensure that the best evidence becomes available. We expressed the same view in our recent Report and we are currently considering ways in which the prohibition could be relaxed whilst protecting the legitimate public interests at stake. We would be grateful for your views as to precisely what you consider to be the most important practical concerns about relaxing the current prohibition.

NEW LAWS ON PUBLIC PROTEST

We note your view that there is a need to consider anew some of our laws about some forms of public protest, including a ban on the burning of flags or effigies and the covering of faces in demonstrations. We know that you will be aware that such measures will amount to an interference with freedom of expression and possibly of religion and we would be grateful for your detailed analysis of the evidence which demonstrates the necessity for such measures.

We look forward to receiving your response to these questions, if possible by 15 December.

20 November 2006

2. Letter from Sir Ian Blair QPM, Commissioner of Police of the Metropolis

1. INTRODUCTION

1.1 It is important in the first instance to set out the MPS general position, by way of introduction. The MPS is acutely aware of the need to justify, and use responsibly, the powers with which it is provided. The balance between individual liberty, freedom, security and reassurance must be struck, and policing must be conducted with tolerance, fairness and respect for the traditions and faiths of others.

1.2 Furthermore, the MPS is committed to working with communities to reduce the risk of harm to London from terrorism. This will be achieved by further developing the relationship of trust and confidence between police, statutory partners and communities.

1.3 The current global terrorist threat is different to anything previously experienced and therefore requires new responses from all agencies and communities. It is the view of the MPS that, in the widest interests of security, public safety and reassurance, further changes to legislation are required and that these changes remain consistent with the principles outlined above.

1.4 The MPS proposes these changes on the clear understanding that sustaining our free society is an absolute prerequisite of defeating the terrorist threat. This report will now deal with each issue separately.

2. PRE-CHARGE DETENTION

2.1 The MPS welcomed recent legislative changes that enabled suspects to be detained for up to 28 days without charge. The MPS is not requesting that this period be extended; this is a matter for Parliament. There is currently no direct evidence to support an increase in detention without charge beyond 28 days, however, the complexity and scale of the global terrorist challenge, sophisticated use of technology, protracted nature of forensic retrieval and potential for multiple operations may lead to circumstances in which 28 days could become insufficient.

2.2 The speed with which terrorist conspiracies have increased in number, in the gravity of their ambition and the number of conspirators suggests that a pragmatic inference can be drawn that 28 days may not be enough at some time in the near future.

2.3 In the interests of wider public security and confidence, it is both responsible and legitimate to explore options that could address this potential. The MPS would ask that consideration is given to the identification of a mechanism—with the appropriate level of judicial oversight and scrutiny—in which time constraints that restrict essential activity, can be properly anticipated and addressed, and that the question of the appropriate detention time is subject to regular review, for example by the Home Affairs Select Committee.

2.4 In response to your request for a thorough analysis of the way in which the 24 suspects arrested on 10 August 2006 under Operation Overt were dealt with, a spreadsheet is attached at Appendix “A”. This details the exact length of time each suspect was detained, and whether a charge was brought in each case. The exact nature of that charge is also recorded, along with the current status of any ensuing court case.

2.5 In response to the concern that a 28 day period of extension may be being used in relation to individuals against whom there is the least evidence, it is important to note that of the seven released without charge, four were released within 14 days, one in fact within one day, of being detained. This tends to counter-balance the concern, and demonstrates an approach which takes each case on its own merits.

2.6 Unfortunately this report is unable to include details of the reasons relied on at each application to the court for an extension of authorisation for detention. At the time, these applications were dealt with in camera, and therefore were not placed in the public domain. Additionally that which was relied on now forms part of the case, which is sub judice.

2.7 Also included at Appendix “B” is a similar spreadsheet which is extended to include all suspects arrested under the Terrorism Act 2000 since 25 July 2006. This includes suspects arrested by police forces other than the Metropolitan Police for completeness.

2.8 In relation to your request for an MPS view in comparing the UK situation to that of the Canadian experience last year, it is important to note that legislation and judicial process differ widely across many different countries. The Canadian operation of which you make mention differs greatly to Operation Overt. As we understand the situation, the Canadian authorities had been monitoring the suspects in this case since 2004. The group had also been infiltrated, and the plot to take delivery of ammonium nitrate fertilizer (believed for use in explosive devices) was turned into a police “sting” operation. Without having discussed the details of the case with the Canadian authorities, it would appear that such an operation is one where the authorities would be in control of an evidential package in advance of any arrests being effected. The Canadian situation does not in essence differ therefore to the UK situation in that charges could be brought in a more timely fashion in the UK should we effect arrests of suspects in relation to whom we are already in possession of substantial quantities of evidence. An analogy can be provided of a sliding scale, whereby the more evidence the police are in possession of prior to arrest, the shorter a detention time would be

required to prefer a charge. In the case of Operation Overt, the police were in a position where arrests were effected in the interests of public safety due to existing intelligence. Only after arrest could the process of accumulating evidence to secure legal charges really begin.

3. POST-CHARGE INTERVIEW

3.1 In essence, the MPS is in agreement with the position you outline. Although provisions do exist to allow a post-charge interview, it is currently not normal for the police to make use of the facility in its existing form. Largely this is due to the fact that the suspect retains the right to exercise their right of silence, and in a post-charge scenario, no adverse inference can be drawn from their failure to answer questions about an offence for which they have been charged. Thus the ability to draw such an inference would be a welcome amendment.

3.2 The MPS fully supports the rights of any individual to have access to legal advice at all stages of the judicial process.

3.3 The MPS are not supportive of the suggestion that lesser charges should be preferred in order to hold terrorism suspects in custody whilst a fuller investigation takes place. Rather the correct and appropriate charge should be laid at the earliest opportunity. This would safeguard against the following dangers: the diversion of resources to deal with the lesser charges; the possibility that the lesser charge would not justify a remand in custody; the possibility that the accused would plead guilty and therefore be released before the fuller investigation could take place; the possibility of abuse of process arguments being made. All in all the suggestion is not an appropriate response to the challenges of counter-terrorism investigations.

3.4 With agreement that an appropriate charge must first be preferred, there is a natural return to the discussion regarding pre-charge detention. The challenge still exists of securing the necessary evidence in a complex terrorism investigation where arrests have been made in the interests of public safety and a very limited evidential package therefore is available. With this in mind, it is the MPS view that post-charge questioning alone would not be sufficient to replace extended pre-charge detention but it would be a useful addition.

4. RELAXATION OF THE INTERCEPT BAN

4.1 In principle, the MPS supports the use and legal admissibility of intercept material. When adopting a “best evidence” baseline, there is a strong argument to make intercept material available, where appropriate, for potential use by the CPS and the Courts. In cases where the most serious offences are being considered, the MPS would argue that it is vital, in the widest interests of public safety and security, for best possible evidence to be available to place before the Courts.

4.2 It is however recognised that significant practical hurdles lie in the way of achieving this position. Careful thought and safeguarding measures would need to be put in place in relation to issues of security of methodology, the security and safety of those engaged within interception and the need to build capacity and capability across the relevant agencies to handle such material. There will clearly be funding implications as a result.

4.3 Disclosure would be a very challenging arena in the courts, which could potentially jeopardise trials rather than assist them. Disclosure is already a fiercely contested area of criminal trials, and it is fair to say that judges verge on the more liberal interpretation of the law when ruling on whether material should be disclosed or otherwise. Should intercept evidence become evidential, the boundaries of disclosure will without doubt be tested to the full by defence teams, and serious consideration needs to be given to where this might lead in relation to safeguarding methodology and third parties.

4.4 The MPS is also aware that the current debate will need to evolve to incorporate the same considerations in relation to the growing use of voice over internet.

5. NEW LAWS ON PUBLIC PROTEST

5.1 Progress on this area of debate is considerable. The MPS felt that legislative change might be considered appropriate following recent events, most notably the high profile Westminster Cathedral demonstration and protests in response to the Danish cartoonist. These demonstrations and protests drew some adverse reactions from a cross-section of the public, and there appeared to be a growing national and international perception that the policing of such demonstrations was unduly lenient. The MPS have a well-earned reputation for facilitating lawful protest whilst ensuring public safety, and remain equally committed to our duty of preventing and detecting crime. However, there is a grey area where it is extremely difficult to readily gain evidence of offences, but where the public perception is that extremists have a platform to transgress an acceptable line and say what they want without fear of whom they offend. This perceived imbalance is manifesting itself in passionate responses from elements of the community not traditionally given to publicly protesting. In effect we are seeing a rise in the politicisation of middle England and the emergence of a significant challenge for policing.

5.2 As a result the MPS submitted an initial paper through AC Ghaffur to the Attorney General's office in October 2006, which dealt with four main areas where legislative change might be considered appropriate. The Attorney General then sought the views of both the Home Office and the CPS, which the MPS have had an opportunity to consider. The current position of the MPS is summarised below on each of the four points initially raised, which we believe is a measured position.

5.3 *Power to require removal of face coverings*

5.3.1 The MPS accept the Home Office and CPS interpretation of Section 60AA of the Criminal Justice and Public Order Act 1994 (as updated by the Anti-terrorism, Crime and Security Act 2001) as current legislation providing the power to require the removal of face coverings.

5.3.2 Under Section 60AA, a police officer of Inspector rank or above can authorise police officers within a given area for a period of up to 24 hours to require the removal of face coverings worn for the purpose of concealing identity and to seize any such items. Before authorising an area, an Inspector must reasonably believe that activities likely to involve the commission of offences will take place in that area and that it is expedient, in order to prevent or control the activities, to give an authorisation.

5.3.3 This latter point may lead to difficulties however. The power relies on the "likely . . . commission of offences" and taking the example of the recent demonstration outside Westminster Cathedral, there was only one identified offence committed and therefore the grounds for the authorisation may not have been met, despite the fact that in that context the facial covering caused public disquiet.

5.4 *No current offence of symbolic burning of a flag or religious text*

5.4.1 The MPS accept points raised by the CPS in relation to this proposal, namely that such behaviour may amount to an offence under the Public Order Act, most likely causing harassment, alarm or distress, and therefore any further legislation would appear to be superfluous. However the CPS also recognise that such a charge would not be straightforward. They raise the case of *Percy v DPP* whereby Lindis Percy successfully appealed such a conviction in 2001 after defacing the stars and stripes in front of a US serviceman at an airbase. The Divisional Court said that whilst the Public Order Act recognises freedom of expression, the trial court had given this insufficient weight. In consideration of specific legislation to cover such acts, the only real offence that we would wish to tackle is that of intended insult (assuming the flag or text is the person's to burn and that we could not realistically say that there was any risk of injury or damage to other property). It is difficult to see how any specific offence would differ significantly from causing harassment, alarm or distress under the Public Order Act, and how it would avoid the same limitations that the decision in *Percy* illustrates.

5.4.2 The MPS would therefore argue that, notwithstanding the legal position, there should be greater provision for the imposition of conditions in these circumstances rather than the pursuance of specific legislation.

5.5 *Legal gap in relation to current powers of arrest under section 24 PACE*

5.5.1 It is the view of the MPS that police powers in public order situations need strengthening in order to prevent offences continuing.

5.5.2 The power of arrest for offences in certain circumstances is insufficient in that it does not provide police with any power to prevent a continuation of the offence. This situation has only arisen since the amendment of section 24 PACE by section 110 of the Serious Organised Crime and Police Act 2005. For example, prior to the amendment of section 24 PACE in January 2006, there was a specific power under section 4A Public Order Act to arrest a person who a constable "reasonably suspects is committing" a section 4A offence. From the wording it can be seen that the power was only in relation to ongoing offending behaviour and where this behaviour had ceased, the power of arrest ceased also. Thus the legislation was focused on providing police with a power to prevent criminal behaviour in public.

5.5.3 Now the power of arrest is only available where the necessary criteria under section 24 PACE are fulfilled. Thus if the person concerned provides their name and address and there is no need for any further investigation or there is no obstruction of the highway, it is hard to see a circumstance where arrest might be justified. A person who commits an offence may be reported by police for the offence but is then free to continue committing the offence. The continuation of the offence makes the police appear powerless or worse, this may be misrepresented as police condoning the offending behaviour giving rise to the perception that some elements of the community are allowed to get away with unlawful behaviour.

5.5.4 The complexities of the common law offence of breach of the peace mean that it is only in cases where there is a "real and imminent threat" that an arrest can be justified on that basis. With the numbers of officers regularly deployed by the MPS to police demonstrations it can rarely be demonstrated that this is the case.

5.5.5 The MPS would welcome consideration to be given to amending section 24(5) of PACE to permit arrests where a constable has reasonable grounds for believing that it is necessary to arrest the person in question in order to prevent the ongoing commission of the offence. There is no reason why such an amendment should be limited to certain public order offences, other safeguards would have to be introduced to prevent arrests being justified for minor ongoing offences.

5.6 *Conditions on Processions and Assemblies*

5.6.1 Sections 12 and 14 Public Order Act allow police to impose conditions on public processions and assemblies in order “to prevent serious public disorder, serious criminal damage or serious disruption to the life of the community”, but the conditions are limited to the specifying of the number of people who may take part, the location of the assembly, and its maximum duration. Unlike section 4 and section 5 Public Order Act, which are designed to criminalise behaviour that causes alarm, harassment or distress, the purpose of these sections are to prevent processions or assemblies from resulting in unacceptable and serious consequences.

5.6.2 Recognising the difficulties in creating specific offences as discussed above, an alternative is proposed in which consideration is given to granting wider powers to impose conditions under sections 12 and 14 Public Order Act 1986 governing processions and assemblies. There are two aspects to this.

5.6.2.1 Extending the scope for imposing conditions on assemblies under s14 to include aspects other than the duration, location and numbers. Section 14 could be brought into line with s12, which allows the senior police officer to impose “such conditions as appear . . . necessary to prevent such disorder, damage, disruption or intimidation..”

5.6.2.2 Lowering of the threshold to allow imposition of conditions on assemblies and processions in order to “prevent harassment, alarm or distress.” Freedom of expression under Article 10 is a qualified right, which can be subject to such conditions as are prescribed by law and are necessary in a democratic society, inter alia, “. . . for the prevention of disorder or crime . . . for the protection of the . . . rights of others.” It is believed that such an amendment to s12 and 14 could be effected consistently with Article 10. It would then enable police to control events such as the BNP march in Bermondsey, where communities were demanding protection from protest at this lower threshold.

5.6.3 If these two changes were effected to sections 12 and 14 Public Order Act, conditions could then be imposed in appropriate circumstances to prevent the burning of flags or religious artefacts, or to prevent the wearing of face coverings or offensive articles of clothing.

February 2007

APPENDIX "A"

OPERATION OVERT

NJU ref No	Date arrested	Force Area Dealing	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case	
			Released w/o charge	Cautioned	Charged	Detained by Immigration	MHA		Bailed		Other Specify
A086/06	9-Aug-06	Metropolitan			Y				Sec 38B (1) (a) and (2) of the Terrorism Act 2000, On diverse days between the 1 January 2005 and 10 August 2006 within the jurisdiction of the Central Criminal Court had information which she knew or believed might be of material assistance in preventing the commission of another person namely, Ahmed Abdullah Ali aka Abdullah Ali Ahmed Khan, of an act of terrorism and failed to disclose it as soon as reasonably practicable. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	14:19:53	Case Dismissed at Court. No case to answer
A087/06	9-Aug-06	Metropolitan			Y				Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	27:20:49	Awaits Trial
A088/06	9-Aug-06	Metropolitan			Y				Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	11:18:36	Awaits Trial
A089/06	9-Aug-06	Metropolitan			Y				Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 1. See 1(1) Criminal Law Act 1977, On diverse days between 01/01/2006 & 10/08/2006 within the jurisdiction of the CCC conspired with other persons to murder other persons. 2. Section 5(1) TA 2006, On diverse days between 01/01/2006 & 10/08/2006 within the jurisdiction of the CCC with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	11:17:40	Awaits Trial
A090/06	9-Aug-06	Metropolitan			Y				1. See 1(1) Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	11:18:05	Awaits Trial
A091/06	9-Aug-06	Metropolitan			Y				Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. Section 58 (1) (b) of the Terrorism Act 2000, On a day between 1 October 2005 and 10 August 2006 within the jurisdiction of the Central Criminal Court had in his possession a document or record, namely a book on improvised explosives devices, some suicide notes and wills with the identities of persons prepared to commit acts of terrorism and a map of Afghanistan containing information likely to be useful to a person committing or preparing an act of terrorism.	11:18:21	Awaits Trial
A092/06	9-Aug-06	Metropolitan			Y				Section 58 (1) (b) of the Terrorism Act 2000, On a day between 1 October 2005 and 10 August 2006 within the jurisdiction of the Central Criminal Court had in his possession a document or record, namely a book on improvised explosives devices, some suicide notes and wills with the identities of persons prepared to commit acts of terrorism and a map of Afghanistan containing information likely to be useful to a person committing or preparing an act of terrorism.	11:16:40	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case	
			Released w/o charge	Cautioned	Charged	Detained by Immigration	MHA				Bailed
A093/06	9-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 1. Sec 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 2. Sec 5 (1) (abc) of the Firearms Act 1968 as amended, Possession a prohibited firearm namely a Baikal 8mm pistol which had a barrel less than 30 centimeters in length. 3. Sec 1 (1) (b) of the Firearms Act 1968 as amended, Possession of a magazine clip with 10 rounds of ammunition without holding a firearms certificate. 4. Sec 1 (1) (b) of the Firearms Act 1968, Possession a black gun silencer without holding a firearms certificate.	19:16:48	Awaits Trial
A094/06	9-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. Section 38B (1) (a) and (2) of the Terrorism Act 2000, On diverse days between the 1 January 2005 and 10 August 2006 within the jurisdiction of the Central Criminal Court had information which she knew or believed might be of material assistance in preventing the commission of another person namely, Ahmed Abdullah Ali aka Abdullah Ali Ahmed Khan, of an act of terrorism and failed to disclose it as soon as reasonably practicable.	27:21:44	Awaits Trial
A095/06	9-Aug-06	Metropolitan	Y					23:23:04			
A096/06	9-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. Section 38B (1) (a) and (2) of the Terrorism Act 2000, On diverse days between the 1 January 2005 and 10 August 2006 within the jurisdiction of the Central Criminal Court had information which she knew or believed might be of material assistance in preventing the commission of another person namely, Ahmed Abdullah Ali aka Abdullah Ali Ahmed Khan, of an act of terrorism and failed to disclose it as soon as reasonably practicable.	11:16:22	Awaits Trial
A097/06	10-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	11:14:40	Awaits Trial
A098/06	10-Aug-06	Metropolitan			Y				1. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 2. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons.	11:15:53	Awaits Trial
A099/06	9-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons.	19:17:51	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
			Released w/o charge	Cautioned	Charged	Detained by Immigration	MHA			
A100/06	10-Aug-06	Metropolitan			Y				11:14:17	Awaits Trial
A101/06	10-Aug-06	Metropolitan	Y						13:15:47	
A102/06	10-Aug-06	Metropolitan	Y						11:07:35	
A103/06	10-Aug-06	Metropolitan	Y						13:17:35	
A104/06	9-Aug-06	Metropolitan			Y				11:18:45	Case Dismissed at Court. No case to answer
A105/06	10-Aug-06	Metropolitan	Y						0:22:05	
A106/06	10-Aug-06	Metropolitan			Y				11:16:25	Awaits Trial
A107/06	10-Aug-06	Metropolitan	Y						27:20:03	
A108/06	10-Aug-06	Metropolitan			Y				19:20:09	Awaits Trial
A109/06	10-Aug-06	Metropolitan	Y						27:16:15	

APPENDIX "B"

INFORMATION RELATING TO PERSONS ARRESTED UNDR TERRORISM ACT 2000

NJU ref No	Date arrested	Force Area Dealing	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
			Released w/o charge	Cautioned	Charged	Detained by Immigration	MHA			
A084/06	27-Jul-06	Metropolitan	Y						6:10:35	
A085/06	31-Jul-06	Metropolitan	Y						3:08:10	
A086/06	9-Aug-06	Metropolitan			Y				14:19:53	Case Dismissed at Court. No case to answer
A087/06	9-Aug-06	Metropolitan			Y				27:20:49	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
A088/06	9-Aug-06	Metropolitan		Y						11:18:36	Awaits Trial
A089/06	9-Aug-06	Metropolitan		Y						11:17:40	Awaits Trial
A090/06	9-Aug-06	Metropolitan		Y						11:18:05	Awaits Trial
A091/06	9-Aug-06	Metropolitan		Y						11:18:21	Awaits Trial
A092/06	9-Aug-06	Metropolitan		Y						11:16:40	Awaits Trial
A093/06	9-Aug-06	Metropolitan		Y						19:16:48	Awaits Trial
A094/06	9-Aug-06	Metropolitan		Y						27:21:44	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
A095/06	9-Aug-06	Metropolitan	Y							23:23:04	
A096/06	9-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. Section 38B (1) (a) and (2) of the Terrorism Act 2000, On diverse days between the 1 January 2005 and 10 August 2006 within the jurisdiction of the Central Criminal Court had information which she knew or believed might be of material assistance in preventing the commission of another person namely, Ahmed Abdullah Ali aka Abdullah Ali Ahmed Khan, of an act of terrorism and failed to disclose it as soon as reasonably practicable.	11:16:22	Awaits Trial
A097/06	10-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	11:14:40	Awaits Trial
A098/06	10-Aug-06	Metropolitan			Y				1. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	11:15:53	Awaits Trial
A099/06	9-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	19:17:51	Awaits Trial
A100/06	10-Aug-06	Metropolitan			Y				Section 38B (1) (a) and (2) of the Terrorism Act 2000, On diverse days between the 23 September 2005 and 10 August 2006 within the jurisdiction of the Central Criminal Court had information which she knew or believed might be of material assistance in preventing the commission of another person namely, Ahmed Abdullah Ali aka Abdullah Ali Ahmed Khan, of an act of terrorism and failed to disclose it as soon as reasonably practicable.	11:14:17	Awaits Trial
A101/06	10-Aug-06	Metropolitan	Y							13:15:47	
A102/06	10-Aug-06	Metropolitan	Y							11:07:35	
A103/06	10-Aug-06	Metropolitan	Y							13:17:35	
A104/06	9-Aug-06	Metropolitan			Y					11:18:45	Case Dismissed at Court. No case to answer
A105/06	10-Aug-06	Metropolitan	Y							0:22:05	
A106/06	10-Aug-06	Metropolitan			Y				1. Section 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons. 2. Section 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board.	11:16:25	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
A107/06	10-Aug-06	Metropolitan	Y							27:20:03	
									1. Sec 5 (1) of the Terrorism Act 2006, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court with the intention of committing acts of terrorism engaged in conduct to give effect to their intention to smuggle the component parts of improvised explosive devices onto aircraft and assemble and detonate them on board. 2. Sec 1 (1) of the Criminal Law Act 1977, On diverse days between 1 January 2006 and 10 August 2006 within the jurisdiction of the Central Criminal Court conspired with other persons to murder other persons.		
A108/06	10-Aug-06	Metropolitan			Y					19:20:09	Awaits Trial
A109/06	10-Aug-06	Metropolitan	Y							27:16:15	
A110/06	11-Aug-06	North Wales	Y							11:00:10	
A111/06	11-Aug-06	North Wales	Y							10:21:50	
		British Transport Police									
A112/06	15-Aug-06	Police	Y							0:07:40	
A113/06	15-Aug-06	Metropolitan	Y							1:10:42	
									1. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 28th April 2006 and 1st May 2006 he attended at a woodland area near Matley WoodCaravan and camping Site, Beaulieu Road, Lyndhurst, Hampshire and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism, or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences.		
A114/06	23-Aug-06	Greater Manchester			Y					27:20:24	Awaits Trial
									2. Sec 58 (1) (b) TACT Making a record of information likely to be of use to a person committing or preparing an act of terrorism.		
A115/06	28-Aug-06	Dorset	Y							0:11:10	
									1. Sec 6(1) TACT 2000, Between 28/04/2006 and 01/05/2006 he provided instruction or training in the use of any method or technique for doing anything that is capable of being done for the purposes of terrorism, in connection with the commission, preparation of an act of terrorism or Convention offence or in connection with assisting the commission or preparation of such an act or offence and at the time he provided the instruction or training he knew that a person receiving it intends to use the skills in which he is being instructed or trained for or in connection with the commission or preparation of acts of terrorism or convention offences, or for assisting the commission or preparation by others of such acts or offences.		
A116/06	2-Sep-06	Metropolitan			Y					12:17:10	Awaits Trial
									2. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 02/06/2006 and 04/06/2006 he attended at a woodland area near Matley WoodCaravan and camping Site, Beaulieu Road, Lyndhurst, Hampshire and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism, or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences.		
									3. Sec 8(1) and (2)(a) Terrorism Act 2006, On 18th June 2006 he attended at near Pondwood Farm, Snewince Rd, White Waltham, Berkshire, and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the for the purposes connected with the commission or preparation of acts of terrorism or convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or convention offences.		
									S 58 (1) (b) TACT 2000, On 01/09/2006, without reasonable excuse, he possessed a record containing information likely to be of use to a person committing or preparing an act of terrorism.		
A117/06	1-Sep-06	Metropolitan			Y					9:22:30	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
A118/06	1-Sep-06	Metropolitan		Y					1. Sec 58 (1) (b) TACT 2000, On 01/09/2006, without reasonable excuse, he possessed a record containing information likely to be of use to a person committing or preparing an act of terrorism. 2. Sec 1(1)(a) and schedule 6 Firearms Act 1968, On 01/09/2006 had in his possession, a firearm, namely a 16mm flare launcher which is a firearm to which this section applies without holding a certificate in force at the time. 1. Sect 4 Offences Against the Person Act 1861, Between 31st March and 1st April 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who do not "implement Allah's law" 2. Sect 4 Offences Against the Person Act 1861, Between 21st and 22nd April 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who do not believe in the Islamic faith. 3. Sect 1(2) of Terrorism Act 2006, Between 21st and 22nd April 2006 published a statement intending members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences. 4. Sect 4 Offences Against the Person Act 1861, On 3rd June 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely British or US citizens.	9:23:14	Awaits Trial
A119/06	1-Sep-06	Metropolitan		Y					5. Sect 1(2) of Terrorism Act 2006, On 3rd June 2006 published a statement intending members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences. 6. Sect 4 Offences Against the Person Act 1861, On 15th June 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who do not believe in the Islamic faith. 7. Sect 1(2) of Terrorism Act 2006, On 15th June 2006 published a statement intending members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences. 8. Sect 4 Offences Against the Person Act 1861, On 14th July 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who do not implement Sharia law. 9. Sect 1(2) of Terrorism Act 2006, On 14th July 2006 published a statement intending members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences. 10. Sect 4 Offences Against the Person Act 1861. On 22nd July 2006 did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who are not of the Islamic faith. 11. Section 54(1) Terrorism Act 2000. Between 1/5/04 and 19/3/06 he provided instruction or training in the making or use of firearms. 12. Sec 6(1) Terrorism Act 2006. Between 13/4/06 and 19/6/06 he provided instruction or training in the use of any method or technique for doing anything that is capable of being done for the purposes of terrorism, in connection with the commission, preparation of an act of terrorism or Convention offence or in connection with assisting the commission or preparation of such an act or offence and at the time he provided the instruction or training he knew that a person receiving it intends to use the skills in which he is being instructed or trained for or in connection with the commission or preparation of acts of terrorism or convention offences, or for assisting the commission or preparation by others of such acts or offences. 1. Sec 4 Offences Against the Person Act 1861, On 24th March 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who do not believe in the Islamic faith. 2. Sec 4 Offences Against the Person Act 1861, Between 31st March and 1st April 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who do not "implement Allah's law" 3. Sec 4 Offences Against the Person Act 1861, Between 21st and 22nd April 2006 at a meeting did solicit or encourage persons at that meeting to murder	12:20:07	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
A120/06	1-Sep-06	Metropolitan			Y				another person or persons, namely person or persons who do not believe in the Islamic faith. 4. Sec 1(2) of Terrorism Act 2006, Between 21st and 22nd April 2006 published a statement intending members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences. 5. Sec 4 Offences Against the Person Act 1861, On 9th June 2006 at a meeting did solicit or encourage persons at that meeting to murder another person or persons, namely person or persons who do not believe in the Islamic faith. 6. Section 1(2) of Terrorism Act 2006 On 9th June 2006 published a statement intending members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences. 7. Section 58(1)(b) Terrorism Act 2000 On 1st September 2006, at Flat 5 47-55 Knowles Hill Crescent, Lewisham, SE13 6DT, without reasonable excuse, he possessed a record containing information of a kind likely to be useful to a person committing an act of terrorism. 8. Section 58(1)(b) Terrorism Act 2000 On 1st September 2006, at 90 Rangefield Road, Bromley, Kent, without reasonable excuse, he possessed a record containing information of a kind likely to be useful to a person committing an act of terrorism. Sec 15(1) TACT 2000, Invited another to provide money and intended that it should be used or had reasonable cause to believe that it would be used, for the purpose of terrorism.	11:21:55	Awaits Trial
A121/06	2-Sep-06	Metropolitan			Y					8:16:16	Awaits Trial
A122/06	1-Sep-06	Metropolitan	Y							3:22:48	
A123/06	2-Sep-06	Metropolitan	Y							3:23:52	
A123/06	2-Sep-06	Metropolitan	Y							3:22:52	
A124/06	1-Sep-06	Metropolitan			Y				1. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 28th April 2006 and 1st May 2006 he attended at a woodland area near Matley Wood Caravan and Camping site, Beaulieu Rd, Lyndhust, Hampshire and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences 2. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 2nd June 2006 and 4th June 2006 he attended at a woodland area near Matley Wood Caravan and Camping site, Beaulieu Rd, Lyndhust, Hampshire, and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences 3. Sec 8(1) and (2)(a) Terrorism Act 2006, On 18th June 2006 he attended at near Pondwood Farm, and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or convention offences. 4. Sec 58(1)(b) Terrorism Act 2000 On 1st September 2006, at Hanworth House John Ruskin Street, SE5, without reasonable excuse, he possessed a record containing information of a kind likely to be useful to a person committing an act of terrorism. 1. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 28th April 2006 and 1st May 2006 he attended at a woodland area near Matley Wood Caravan and Camping site, Beaulieu Rd, Lyndhust, Hampshire and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and	11:21:33	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
A125/06	1-Sep-06	Metropolitan			Y				he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences 2. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 2nd June 2006 and 4th June 2006 he attended at a woodland area near Matley Wood Caravan and Camping site, Beaulieu Rd, Lyndhust, Hampshire, and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences . 3. Sec 8(1) and (2)(a) Terrorism Act 2006, On 18th June 2006 he attended at near Pondwood Farm, Smewince Road, White Waltham, Berkshire, and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences . 1. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 28th April 2006 and 1st May 2006 he attended at a woodland area near Matley Wood Caravan and Camping site, Beaulieu Rd, Lyndhust, Hampshire and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences	11:21:33	Awaits Trial
A126/06	1-Sep-06	Metropolitan			Y				he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences 2. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 2nd June 2006 and 4th June 2006 he attended at a woodland area near Matley Wood Caravan and Camping site, Beaulieu Rd, Lyndhust, Hampshire, and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences 3. Sec 8(1) and (2)(a) Terrorism Act 2006, On 18th June 2006 he attended at near Pondwood Farm, Slewince Road White Waltham Berkshire and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences . 1. Sec 8(1) and (2)(a) Terrorism Act 2006, Between 2nd June 2006 and 4th June 2006 he attended at a woodland area near Matley Wood Caravan and Camping site, Beaulieu Rd, Lyndhust, Hampshire, and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences	9:16:11	Awaits Trial
A127/06	1-Sep-06	Metropolitan			Y				he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences	11:22:27	Awaits Trial

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
									2. Sec 8(1) and (2)(a) Terrorism Act 2006. On 18th June 2006 he attended at near Pondwood Farm, Slewince Road White Waltham Berkshire and whilst there instruction or training of the type mentioned in Section 6(1) of this Act or Section 54(1) of the Terrorism Act 2000 (weapons training) was provided wholly or partly for the purposes connected with the commission or preparation of acts of terrorism or Convention offences and he knew or believed that the instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences 3. Sec 58 (1) (b) TACT On 1st September 2006 at 17b Gladsmore Rd N15, without reasonable excuse he possessed a record containing information likely to be of use to a person committing or preparing an act of terrorism .		
A128/06	2-Sep-06	Metropolitan			Y				1. Sec 54(1) Terrorism Act 2000, between the 01/05/2004 and 19/03/2006 provided instruction or training in the making or use of firearms. 2. Sec 54(2) Terrorism Act 2000, between the 01/05/2004 and 19/03/2006 received instruction or training in the making or use of firearms. Sec 5(1)(abc) Firearms Act 1968, as amended, On 01/09/2006 within the jurisdiction of the Central Criminal Court without the authority of the Secretary of State had in his possession a prohibited firearm namely a point 410 shotgun which has a barrel less than 30 centimeters in length.	11:17:55	Awaits Trial
A129/06	2-Sep-06	Metropolitan Greater			Y					11:18:43	Awaits Trial
A130/06	2-Sep-06	Manchester Greater	Y							13:05:50	
A131/06	2-Sep-06	Manchester	Y							13:06:39	
A132/06	4-Sep-06	Sussex	Y							0:19:54	
									Sec 38B(1)(b) and 2 TACT 2000, Person has information which he knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.		
A133/06	7-Sep-06	Metropolitan			Y					0:10:07	Awaits Trial
A134/06	8-Sep-06	Metropolitan	Y							0:20:35	
									1. Sec 58 (1) (b) TACT collecting possessing or recording information of possible use to a terrorist organisation. x2 2. Sec 57(1) TACT 2000, possession of articles giving rise to suspicion that possession is for terrorist purposes x 2.		
A135/06	14-Sep-06	Metropolitan			Y					0:07:14	Awaits Trial
A136/06	16-Sep-06	Metropolitan	Y							0:04:02	
									Sec 17 TACT 2000, Arranging for money or other property to be made available for the purpose of terrorism x 2.		
A137/06	19-Sep-06	Greater Manchester			Y					5:20:20	Awaits Trial
A138/06	20-Sep-06	Metropolitan	Y							1:07:07	
A139/06	21-Sep-06	Metropolitan					Y			0:11:06	
									1. Sec 38B(1)(b) and (2) TACT 2000, between 20/07/2005 and 28/07/2005 person had information which she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism and she failed to disclose it as soon as reasonably practicable. 2. Sec 4(1) Criminal Law Act 1967, between 20/07/2005 and 28/07/2005 knowing or believing that Yassin OMAR had committed offences of attempted murder conspiracy to murder and offences contrary to the explosives substances act 1883 in relation to the transport for London system on the 21/07/2005 without lawful authority or reasonable excuse she assisted him in evading arrest.		
A140/06	27-Sep-06	Metropolitan			Y					6:10:15	Awaits Trial
A141/06	27-Sep-06	Metropolitan	Y							6:09:54	
A142/06	27-Sep-06	Metropolitan	Y							6:09:54	
A143/06	28-Sep-06	British Transport Police	Y							0:05:40	
A144/06	28-Sep-06	British Transport Police	Y							0:05:38	
A145/06	9-Oct-06	Metropolitan	Y							0:01:40	
A146/06	10-Oct-06	Metropolitan			Y					3:06:40	

NJU ref No	Date arrested	Force Area Dealing	Released w/o charge	Means of case disposal ("y" applies)					If Charged or Cautioned Act and Section Applicable	Total TACT Detention time D.H.M	Result of Court Case
				Cautioned	Charged	Detained by Immigration	MHA	Bailed			
A147/06	10-Oct-06	Metropolitan	Y							0:22:15	
									1. Sec 5(1) TACT 2006, on the 18/10/2006 at Heathrow airport with the intent of committing acts of terrorism or assisting another to commit such acts engaged in conduct in preparation for ns giving effect to his intention namely by preparing to take to Islamabad articles including £9,000 in cash a night vision scope 2 metal batons 2 sleeping bags 2 rucksacks and a disk and an external hard drive containing data including manuals detailing combat techniques and a copy of the Mujahideen poison handbook. 2. Sec 57(1) TACT 2000 possession of articles giving rise to suspicion that possession is for terrorist purposes. 3. Sec 58 (1) (b) TACT Collecting possessing or recording informatio for possible use to a terrorist organisation or a person committing or preparing an act of terrorism .		
A148/06	18-Oct-06	Metropolitan			Y					13:20:35	Awaits Trial
A149/06	19-Oct-06	Metropolitan	Y							0:11:33	
A150/06	24-Oct-06	Hampshire	Y							0:25:55	
A151/06	25-Oct-06	Essex	Y							0:07:55	
									1. Sec 57(1) TACT 2000, Possessed a computer hard drive containing the Al Qaeda Manual, the terrorists hand book, The Mujahideen Poisons handbook, a manual for a Dragunov Sniper rifle, The firearms and RPG handbook, Operators manual for a 9mm pistol, a document on Obstacles, mines and demolitions, Operators manual for a light anti tank weapon, a document entitled 'How to win Hand to Hand Fighting' and a folder and contents entitled 'Samina'z Stuff', likely to be of use to a person committing or preparing an act of Terrorism. 2. Sec 57(1) TACT 2000, Possession of miscellaneous jottings which gave rise to a reasonable suspicion that possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism. 3. Sec 58(1) TACT 2000, Collected information namely (as shown in 1 above) Likely to be useful to a person committing or preparing an act of terrorism. 4. Sec 58(1) TACT 2000, Possession of miscellaneous jottings likely to be useful to a person committing or preparing an act of terrorism.		
A152/06	27-Oct-06	Metropolitan			Y					13:11:03	Awaits Trial
A153/06	28-Oct-06	Metropolitan	Y							0:04:40	
A154/06	30-Nov-06	Metropolitan	Y							0:04:55	
A155/06	30-Nov-06	Metropolitan	Y							0:05:20	
A156/06	6-Dec-06	Metropolitan	Y							6:08:25	
A001/07	2-Jan-07	Metropolitan	Y							0:15:25	
A002/07	2-Jan-07	Metropolitan	Y							0:15:25	

3. Letter from the Chairman to the Rt Hon Dr John Reid MP, Home Secretary

Last Wednesday, my Committee took oral evidence from Tony McNulty MP, Minister of State for Policing, Terrorism and Community Safety, as part of our inquiry into counter-terrorism policy and human rights. We took the opportunity to ask him about the implications for the Government's anti-terrorism strategy of the forthcoming changes to the Home Office. In particular, we discussed the new Office for Security and Counter-Terrorism and the proposed research, information and communications unit. I would be grateful if you could send my Committee a memorandum dealing with these issues in more detail, including the formal aims and objectives of the new counter-terrorism bodies, their staffing, budgets, and ministerial oversight arrangements.

In addition, mindful of the Government's clear commitment in its Counter Terrorism Strategy that "human rights standards must be an integral part of its efforts to counter terrorism", it would be helpful if you could describe the arrangements in place in the reformed Home Office to ensure that the department meets its human rights obligations, including its positive obligations to take steps to protect human rights as well as the avoidance of non-compliance.

I would be grateful if you could reply by Wednesday 9 May.

23 April 2007

4. Letter from the Rt Hon Dr John Reid MP, Home Secretary

Further to Tony's McNulty's evidence to the Joint Committee on Human Rights and your letter of April 23, I have set out below some more detailed information on the points you raise.

AIMS, OBJECTIVES AND MINISTERIAL OVERSIGHT ARRANGEMENTS

You wished to know the formal Aims and Objectives of the new counter-terrorism bodies. These are (i) The new office for Security and Counter-terrorism (OSCT), and (ii) the Research and Information Communications Unit (RICU).

With regard to (i), the OSCT has two key aims: to bring a new drive, more cohesion and greater strategic capacity to our fight against terrorism; and secondly to deliver a system that is inclusive and integrated with real political accountability. A new Ministerial Committee on Security and Counter Terrorism (chaired by the Prime Minister) has been created and meets monthly. In support of this, the Home Secretary chairs a weekly security briefing which ensures that key departments and agencies have the latest available threat and intelligence information. This gives Ministers constant oversight together with the ability to engage regularly and directly on Counter-terrorism and provide the necessary leadership.

With regard to (ii), the cross-Government Research, Information and Communications Unit will be established within the Home Office to lead on the struggle for ideas and values. The RICU's aim is to lead a seamless international and domestic approach to counter the ideological and other factors which drive groups and individuals into violent extremism. The Unit will report to the Home Office, Foreign and Commonwealth Office and Department for Communities and Local Government, with a joint Ministerial Supervisory Board.

STAFFING AND BUDGETS

The exact budgets for OSCT and RICU have not yet been finalised, and therefore it is not possible for me to give you accurate figures. However, I can say that we are looking to recruit around 100 new staff to meet the requirements of the expansion, who will be recruited from a range of backgrounds and disciplines.

HUMAN RIGHTS OBLIGATIONS

The Home Office takes its human rights obligations very seriously and conducts its business in close consultation with our legal advisors, who provide advice on compatibility with the European Convention on Human Rights. Moreover, a Home Office Board member is responsible for overseeing the department's human rights obligations.

With regard to our counter-terrorism strategy, it will continue to be the case that all of our anti-terrorism measures have to be set in the context of our general commitment to human rights and the protection of individual freedoms. As you know, the UK has been subject to a sustained campaign of terrorism for more than 30 years—initially emanating from Northern Ireland but now more international in character—and this experience has shown how the balance between necessary legislation and protecting human rights can be struck.

We strive to maintain this balance ie that of the measures necessary to deal with the very real threat posed by terrorism; and the need to avoid diminishing the civil and human rights of the population. One of the earliest achievements of the current Government was the enactment of the Human Rights Act 1998, which made the rights enshrined in the European Convention on Human Rights enforceable in domestic courts. This is an example of our approach of continually seeking to enhance human rights, which we do not believe is in any way incompatible with the requirement to protect the population from the threat of terrorism. Indeed, the most fundamental right of all is the right to life—it is the duty of all Governments to ensure that every appropriate measure is in place to minimise the danger to life from terrorist attacks.

I hope that this provides a satisfactory answer to the Committee's questions, but please do not hesitate to contact me if you require further information.

10 May 2007

5. Letter from Tony McNulty MP, Minister of State, Home Office

At the JCHR evidence session on 18 April, I agreed to respond to you or a number of points.

Q105-107: *Clarification of danger to UK public posed by control order absconders*

In relation to my responses to questions 105 to 107, for clarity about the nature of the threat posed by individuals subject to control orders, I refer the Committee to the Government's response to the JCHR's March 2007 report on renewal of the Prevention of Terrorism Act 2005, and in particular the response to paragraph 61.

“...Control orders are used for the purpose outlined in Parliament and indeed on the face of the legislation—protecting the public, whether in the UK or abroad, from a risk of terrorism. It is a matter of public record that some control orders are in place to reduce the risk of an individual going abroad to engage in terrorism-related activities rather than because the individual poses a direct and current threat to the public in the UK itself. As Lord Carlile notes in his second report: “in some cases control orders against British citizens have been founded on scud intelligence of their intention to join insurgents in Iraq or Afghanistan, with resulting risks to British and other allied troops”.”

Q114-7: *Number of Individuals subject to a control order or immigration Act bail who worn previously detained at Belmarsh*

Former detainees held under Part 4 of the Anti-terrorism, Crime and Security Act 2001 are sometimes referred to as the Belmarsh detainees, although some of them were held in other Category A prison establishments and high security hospitals. Two of them are currently subject to a control order, as I stated in my April evidence session. Three such former detainees are currently under Special Immigration Appeals Commission imposed strict bail conditions whilst the Home Secretary pursues their deportation from the United Kingdom on national security grounds. A further individual previously held under Part 4 of the Anti-terrorism, Crime and Security Act 2001 is currently detained pending deportation.

Q132, 134-6: *Circumstances of individuals deported to Algeria*

In respect of the questions you raised on Algeria, you asked specifically about the assurances we have received in relation to the six returnees. I wrote to the Committee on 26 March 2007 providing information regarding the particular assurances we have received from Algeria in relation to the six men that were deported to that country. We have continued to monitor the situation through regular contact between Algerian Government officials and staff at the British Embassy in Algiers.

You also asked whether the British Embassy in Algiers has had direct contact with any of the returnees or whether all contact regarding their cases has been with the Algerian Government officials. We have agreed with the Algerian Government that any returning person, or his next of kin if he is in detention, may, if they wish to do so, establish and maintain contact with the officials of the British Embassy in Algiers. Prior to removal all the men were provided with the contact details of the British Embassy. Two individuals, Mr Reda Dendani, and “H”, decided to establish regular contact with the Embassy. They provided contact details of their next of kin in Algeria and the British Embassy arranged a weekly time for the named contact to call. The family members are also welcome to call outside of the arranged hours if they have information they wish to pass on to the British authorities. The British Embassy has also been in touch with lawyers acting on behalf of the two men. The British authorities do not have direct contact with Mr Dendani and H as they are in Algerian detention. The other four individuals (I, V, K and P) did not offer any contact details but remain free to get in touch with the Embassy at anytime. The four individuals were detained on arrival in Algeria and subsequently released after a period of detention from judicial custody. Amnesty International reporting confirms that I, V and K returned directly to their families.

In addition to the contact described above, the Algerian authorities have answered queries on details of the detention of the two men and prison conditions. Reda Dendani returned to Algeria on 20 January 2007 and was detained under Article 51 of the Criminal Procedure Code on 25 January. He was subsequently brought before a judge and detained pending trial after being charged by an investigating judge. ‘H’ was returned to Algeria on 26 January and detained on 30 January. On 10 January ‘H’ was brought before a court, charged and remanded in custody. Both Reda Dendani and ‘H’ are being detained in Serkadji Prison, Algiers; they have regular access to their lawyers and are allowed weekly visits from their families.

Furthermore, I would like to take this opportunity whilst writing to inform you that on Monday 14 May the Special Immigration Appeals Commission (SIAC) handed down four judgments concerning Algerian nationals. In the case of “U”, “W” and “Z” SIAC dismissed the appeals against deportation. In the case of Sihali (AA), SIAC concluded that the appellant could be deported to Algeria without risk of ill treatment but found insufficient proof of terrorist activity in the United Kingdom to order removal. The judgment in U discusses in detail the contact that the British Embassy has had with H and Mr Dendani's lawyers and families since their return. SIAC confirmed that the “British Government has fulfilled its implied promise to take sufficient active steps to ensure that assurances of the Algerian Government are fulfilled”. (U

judgment para 37 (iv)). In addition to the four judgments there is one addendum judgment which considers alleged H and Q torture allegations. These allegations were investigated, including with the Algerian authorities, and SIAC concluded that they were inconsistent with other evidence. Copies of the four judgments and the one addendum are enclosed for your information.

In addition to the judgments concerning the recent four Algerian cases, since my evidence session we have also received the judgments in the first two Libyan cases where the MoU was being tested for the first time. As I am sure you are already aware the Government won on national security grounds but lost on safety of return. We believe that the assurances given to us by the Libyans do provide effective safeguards for proper treatment of individuals being returned and are very disappointed with SIAC's decision. We are therefore seeking to appeal this judgment.

Q149, 151-2: Information from detainees

I also said I would look into whether there has been intelligence passed to the UK that originated from the 14 Thigh value detainees we discussed. I am afraid I am unable to discuss specific intelligence matters. However, as the Intelligence and Security Committee noted in its report of March 2005 entitled "The handling of detainees by UK intelligence personnel in Afghanistan, Guantanamo Bay and Iraq the Security Service and Secret Intelligence Service have explained that they have received intelligence of the highest value from detainees, to whom they have not had access and whose location was unknown to them, some of which has led to the frustration of terrorist attacks in the UK or against UK interests.

The Government, including the intelligence and security agencies, never uses torture for any purpose, including to obtain information, nor would it instigate others to do so. Our rejection of the use of torture is well known by our liaison partners. Where we are helping other countries to develop their own counter-terrorism capability, we ensure our training or other assistance promotes human rights compliance.

The provenance of intelligence received from foreign services is often obscured, as intelligence and security services, even where they share intelligence, rarely share details of their sources. Similarly, foreign intelligence and security services do not welcome close monitoring by other countries or international bodies of how they gather intelligence. All intelligence received from foreign services is carefully evaluated. Where it is clear that intelligence is being obtained from individuals in detention, the UK agencies make clear to foreign services the standards with which they expect them to comply. As the Committee has acknowledged, the prime purpose for which we need intelligence on counter-terrorism targets is to avert threats to British citizens' lives. Where there is reliable intelligence bearing on such threats, it would be irresponsible to reject it out of hand.

Q 155: Chief Constable Mike Todd's report on allegations of rendition

During my evidence session, I referred to the report Mike Todd, the Chief Constable of Greater Manchester Police, has conducted in relation to allegations of rendition.

In November 2005, Liberty wrote to ten chief constables and asked them to investigate allegations of rendition operations at particular airports within their jurisdiction. In his capacity as lead on Aviation Security for ACPO, Mike Todd undertook to examine the allegations on behalf of ACPO.

He conducted an examination of evidence to see whether domestic law had been breached by the alleged use of UK airports in unlawful rendition. He has concluded that no such evidential basis exists on which a criminal inquiry could be launched. Mr Todd has reiterated his findings in a private letter to Liberty and has also given evidence to the Intelligence and Security Committee as part of their inquiry into rendition.

Q172-3: Prospects of prosecution of and exit strategies for individuals on control orders

During my evidence session I agreed to set out the current position in relation to keeping the prospect of prosecution of Individuals subject to a control order under review, and also offered to explain the Governments thinking in relation to exit strategies for such individuals.

As you know, Lord Carlile raised both issues in his report on the operation in 2006 of the Prevention of Terrorism Act 2005. The Government will shortly be responding formally to Lord Carlile's report. Rather than pre-empting elements of the response in this letter, we intend to set out the Government's full position on these issues in that response. I will of course ensure that the Committee is sent a copy of the Government's response.

12 June 2007

6. Letter from the Chairman to the Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government and Minister for Women

“PREVENTING VIOLENT EXTREMISM—WINNING HEARTS AND MINDS”

In the course of our ongoing inquiry on Counter-terrorism Policy, the Joint Committee on Human Rights has stressed our deep concern about the danger of certain counter-terrorism measures being counterproductive in the sense that they risk alienating the very sections of the community whose close co-operation and consent is required if terrorism is to be defeated.¹ Against this background, I note the launch of your Action Plan “*Preventing violent extremism—winning hearts and minds*”.

I welcome your recognition that a new approach is needed and that “a security response is not enough”.² It is timely to assess whether the Government’s approach to date has struck the right balance between national security and community cohesion. I hope that in the course of your work, local authorities will be supported and encouraged to avoid the risk that ethnic minority communities are portrayed as a risk to public order or national security. Such discrimination, through racial profiling or otherwise, could seriously risk alienating the very communities at the heart of your campaign.

I welcome the announcement by the Prime Minister that work on counter-terrorism will be co-ordinated at Cabinet level by a new cross-government committee and that work on “counter-radicalisation” will be led by a cabinet sub-committee under your leadership. It is important that this work is taken forward on a coherent basis. Work on community cohesion, diversity and shared values will be undermined if counter-terrorism measures and compulsory powers are used in a way which discriminates against members of minority groups, and in particular, members of the Muslim community.

My Committee may wish to scrutinise the Action Plan and its individual elements, including the national strategy for the prosecution of “extremist radicalisers” announced by the Attorney General, for compliance with the United Kingdom’s human rights obligations.

In the meantime, I would be grateful if you could describe the arrangements, other than the establishment of the new cabinet sub-committee, being made to ensure that your new approach, sensitive to the impact which counter-terrorism measures may have on community cohesion and the human rights of individuals in ethnic minorities, is embedded in all Government counter-terrorism policies or proposals.

I would be grateful for your response by 4 June 2007.

April 2007

7. Letter from the Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government and Minister for Women

RE: “PREVENTING VIOLENT EXTREMISM—WINNING HEARTS AND MINDS.”

Thank you for your letter of 23 April 2007 regarding counter-terrorism policy. You ask for a description of the arrangements, apart from the new cabinet sub-committee, being made to ensure that the new approach announced in the launch of the Action Plan “*Preventing violent extremism—Winning hearts and minds*”, is sensitive to the impact which counter-terrorism measures may have on community cohesion and the human rights of individuals in ethnic minorities. You also asked how consideration of these issues is embedded in Government counter-terrorism policies or proposals. I apologise for the long delay in replying.

We remain committed to our objectives of promoting community cohesion and working with local communities to challenge the violent extremist message, underneath my Department’s overarching goal to build strong, prosperous communities. These two policy aims complement each other—cohesive communities are more likely to be resilient to violent extremism, and work to build shared values across society will in turn promote better cohesion. As part of this we will be responding to the Commission for Integration and Cohesion later in the autumn. Its wide-ranging proposals aim to develop practical approaches that build communities’ own capacity to prevent problems, including those caused by segregation and the dissemination of extremist ideologies.

My Department is in regular contact and consultation with individuals and groups representing local communities, including ethnic minority groups this has proved to be important in getting a better understanding of the impact on a wide range of Government policies (including national security priorities) on local communities. Our action plan sets out the steps we are taking to broaden this contact with these groups through coming months.

¹ See for example, Third Report of Session 2005-06, para 9

² “Winning hearts and minds: working together to defeat extremism”, Speech by Ruth Kelly at the Muslim Cultural Centre, London, 5 April 2007

The management arrangements for my Department reflect our sensitivity to the need to balance delivery of the community cohesion and preventing violent extremism agenda. The Preventing Extremism Unit and Cohesion and Faiths Unit are part of the same Directorate and Group within Communities and Local Government sharing a single line of accountability and management. This enables these teams to maintain a close working relationship, particularly in managing stakeholders and co-ordinating forward plans, and in gauging and reacting to the impact of our policies in both areas.

You will of course be aware that under the Human Rights Act 1998 policy makers and public authorities are required to take into account the Convention rights when developing and assessing the impact of policies, and this clearly includes counter terrorism policies. The Review of the Implementation of the Human Rights Act conducted by the Department for Constitutional Affairs in July 2006 concluded that the Human Rights Act has led “to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals.” For example policy makers must ensure, under Article 14, that their policies do not lead to discrimination which cannot be objectively justified in the protection of the other rights guaranteed under the Convention, on grounds including, amongst others, race, colour, religion and association with a national minority. The Human Rights Act therefore ensures that the needs of all members of the UK’s increasingly diverse population are appropriately considered.

I hope you and your committee members find this reply helpful.

27 June 2007

8. Letter from the Chairman to the Rt Hon Dr John Reid MP, Home Secretary

COUNTER TERRORISM POLICY AND HUMAN RIGHTS

The Joint Committee on Human Rights is preparing a further report to Parliament in its ongoing inquiry into counter terrorism policy and human rights.

As you know from our previous reports on this subject, the Committee accepts that the UK faces a serious threat from terrorism and that human rights law positively requires the Government to take effective steps to protect the lives of everyone in the UK against the risk of terrorist attack.

To assist the Committee in its preparation of its next report, I would be grateful for your response to the following questions in light of your recent speech to the G6 conference in Venice, and your statement to Parliament yesterday about the three individuals under control orders who have this week absconded.

THE ADEQUACY OF THE INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

In both your speech to the G6 conference in Venice and your statement to Parliament yesterday you referred to what you consider to be the inadequacy of the international human rights law framework with which the Government’s counter-terrorism measures must be compatible. You referred to there being a disjuncture between the international human rights conventions we have inherited and the reality of the threat we face from terrorism today, resulting in there being gaps in the international legal framework. In your view, these gaps and inadequacies cannot be addressed by courts and lawyers interpreting the legal conventions we have inherited, but must be addressed by politicians who should be working to modernise the law, including by “building on” the European Convention on Human Rights. The main change which you appear to envisage is that the ECHR should be amended to make the right to security the basic right on which all other rights in the Convention are based.

Lord Falconer gave evidence to the Committee on 21 May. The Committee asked him about some of the things you had said in your speech to the G6. He made a number of statements which directly contradict your own views as expressed in Venice and yesterday to the House of Commons. For example:

- Asked if he thought there are gaps in international human rights law in relation to some of the issues relating to terrorism, he said (Q4)³ “I do not think there are gaps. One of the things that the Human Rights Convention does is seek overall to balance the rights of the individual against the needs of a community in the context of a variety of threats.”
- Asked if it was common ground that we do not need to alter the international human rights conventions because of terrorism, he said (Q15) “I completely agree with that and I completely agree with that because I strongly believe that these instruments provide the basis whereby you can alter what your operational response is within the context. . . . The particular threat which is causing all the debate at the moment is the threat of terrorism of the sort we have seen over the last few years, and you need to change your operational response, but that can all be done and judged and adjudicated upon within the context of the existing instruments.”

³ References are to the uncorrected transcript.

- Asked if he believed that to complain about the restrictions and difficulties raised by international human rights obligations is actually to put oneself in danger of playing into the hands of the extremists (Q46), he said “Yes. I did not quite put it that well but, yes, I do agree. I think we should be unequivocal in our commitment to these international instruments which set out our basic values. In many cases we were instrumental in promoting them or writing them; not all of them but some of them. They represent, in a way which I think very, very, very few people in our country would find objectionable, what our basic values are. I think we have to be absolutely unremitting in our commitment to those values.

It therefore seems that Lord Falconer, the Secretary of State with responsibility for the Government’s human rights policy, disagrees with your analysis of the need to amend the European Convention on Human Rights, or other international human rights conventions, in order to be able to counter the threat from terrorism effectively. We are sure you would agree that in a matter of such importance it is essential that Parliament knows which represents the position of the Government. We would therefore be grateful if you could answer the following questions.

1. *Is it the UK Government’s policy that the European Convention on Human Rights requires amendment in order to enable the Government to counter the threat from terrorism?*
2. *Is the UK Government actively seeking to build an international consensus to amend the ECHR?*
3. *If so, what steps has the UK Government so far taken in pursuit of this policy?*
4. *What precise change to the text of the ECHR does the Government consider to be required in order to make the right to security the basic right on which all other rights are based?*
5. *In the Government’s view are any other changes to the text of the Convention required in order to address what you describe as the disjuncture between it and the reality of the current threat from terrorism?*
6. *Does the Government envisage that any other international human rights treaties also require amendment? If so, which, and in which precise respects?*

DEROGATION FROM THE RIGHT TO LIBERTY IN THE ECHR

In your statement to the House of Commons yesterday you indicated that if the Government does not succeed in persuading the House of Lords to overturn the lower courts’ interpretation of the requirements of the right to liberty in Article 5 ECHR, the Government will consider other options, including derogation. You also referred to “the fact that the threat to the life and liberties of the people of this country is higher than ever before, and is at the level of a national emergency.”

It has been the Government’s consistent position since introducing the Bill which became the Prevention of Terrorism Act 2005, establishing the control order regime, that the UK does not face a “public emergency threatening the life of the nation” within the meaning of Article 15 ECHR and that the UK Government is therefore not entitled to derogate from the right to liberty in Article 5 ECHR. This was the premise of the Prevention of Terrorism Act 2005, which contains what is essentially an enabling power allowing the Government to derogate swiftly if conditions change in future. At no time during the two annual renewals of the control orders regime, in March 2006 and March 2007, did the Government suggest that the level of the threat had changed so that the UK now faced a public emergency threatening the life of the nation.

7. *Is it now the Government’s position that the threat from terrorism is such that there is a public emergency threatening the life of the nation?*
8. *If so, what precisely has changed since the Government renewed the control order regime in March of this year?*
9. *On what material does the Government rely to demonstrate that the level of the threat has changed?*

I would be grateful for your response to these questions by 8 June 2007.

Because of their obvious interest in the subject matter I am copying this letter to the Prime Minister, the Chancellor, the Lord Chancellor, the Secretary General of the Council of Europe and the Chairman of the Home Affairs Select Committee.

25 May 2007

9. Letter from Alan Frazer, FME

CPT AT PADDINGTON GREEN

I was unhappy at the visit of the CPT to Paddington Green and their conclusions. I am only too aware that criticisms can be made about the suite but felt that they missed these completely in attempting to respond to a malicious allegation by a detainee that was clearly nonsense.

I have attached a document about some of the medical aspects of the suite, and included the latest update of the style of medical notes we are trying.

I am sorry that I have written such long documents but it matters to me that we try to achieve the best possible standards.

The CPT visited Paddington Green in Autumn 2006. I was asked to speak to them by the Chief Inspector Harrington. I was not given further details and agreed to do so. I thought that this was as a result of the then new 28 day legislation. I had sent a number of letters expressing my concerns about the suitability of Paddington Green being used to house Detainees for long periods. My particular anxiety was that persons detained in this environment might become in time “unfit to be interviewed” (FTBI—fit to be interviewed) as defined by the Police and Criminal Evidence Act and that, although some aspects of PACE might be overridden by counterterrorism legislation, that the standards we use to assess FTBI would still be applied to the mental well being of prisoners held under TACT.

I wrote—at great length—to Lord Carlile, the Westminster Borough Commander, the BMA Ethics department, and to the Commander of the Anti-terrorist squad, Peter Clarke. If any number of detainees became “unfit to interview” extending the duration that police could question detainees in the suite would be pointless. In effect this extension would become unworkable. To my knowledge this had not been raised as an issue by the police, no-one had sought advice or raised this as a possible problem and that this needed to be addressed urgently.

I had replies from Lord Carlile (“it was never the intention that Paddington would be used for 28 days”), and had a meeting with Mr Clarke at New Scotland Yard and some ongoing discussions with the BMA Ethical department.

When the CPT—a Maltese lawyer and a Finnish psychiatrist—spoke to me it transpired they did not want to discuss these matters. As you are aware they wanted to focus on an allegation made by a Islamic detainee of ill treatment. As part of their investigation they had been handed the Book 83 by an officer earlier in the week and had been told this was the “medical notes”. Unsurprisingly they were appalled.

By the time I met them they already appeared to have made up their minds that the Book 83 was symptomatic of poor medical practice. The Book 83 is a very unsatisfactory document that fills a number of functions, a simple record that a consultation has occurred, a claim form, a record of a decision and any advice to police about fitness to be detained and fitness for interview, a record of some medical findings that can help continuity of care between doctors etc.

I told them that different doctors used the Book 83 differently- relying on a combination of the Book 83 and private notes to fulfil their various tasks. There are a number of issues a doctor has to consider here including confidentiality, a need to hand over to the custody staff so that they can look after the detainee, and a need for information to be available for any other doctor visiting the patient subsequently. “He had a blood pressure of 130/80 it has now fallen dramatically to 80/50, could he have bled internally/had a heart attack?”

The actual level of confidentiality that can be achieved is made more complex by the existence of the medical questionnaire (the form 57M) that the custody sergeant asks each detainee as part of a risk assessment for medical and mental problems. The detainee divulges directly to the police most of the information that the FME will eventually cover so much of this concern is redundant.

The role of the FME is a mixed one—treating his patient and recording information for the court. Unfortunately we are paid by claiming through the Police (rather than say the Home Office or, even better, the NHS) but this does not reflect the independent nature of our role.

The 83 is held by the police. Any confidential matters not divulged to the police should not be recorded on this document. This essentially highlights the muddle that the CPT found themselves in—they assume that the 83 handed to them by the police forms the medical notes—and it does form the notes as held by the police—but unsurprisingly does not comprise the complete notes as held by the doctors.

Detainees are examined on arrival, daily and before release. Any detainee requesting a doctor at any time will have access to one of the team on call within one to two hours at most. The initial visit involves a full assessment including an examination to note any injuries to the detainee’s body. Subsequent examinations are led more by the patient in response to open questions about their health and wellbeing, the Final examination offers the possibility of a complete examination.

(see specimen notes attached with this. These are filled in and a patient’s notes will be kept locked in the filing cabinet in the FME room accessible only by the FMEs) (not published).

The CPT were also unhappy about my response to a question about total body examination. In my experience of 20 odd years in general practice I had become accustomed to a reluctance of many Islamic men (some who had known me for many years) to remove their clothing to show their upper thighs, buttocks or genitalia. The CPT contradicted this, saying that the detainee when visited in Long Lartin had immediately stripped to show them his injury on his upper thigh. I can only offer an examination to my patient, and to insist on examining a reluctant patient is unethical.

The CPT asked if a police officer is present during examinations. I replied that this was up to the doctor concerned. There are clear reasons for a consultation to be one to one but with high risk detainees—eg Kamal Bourgass who stabbed DC Oake in Manchester and came to Paddington it would have been foolish to consider a consultation without an officer being present. I told the CPT that my ultimate loyalty was to my wife and eight year old daughter and expected each FME to make his or her own decision taking into some sort of risk assessment from the custody staff. (I have had to sign a disclaimer when I refused to have an officer present with some detainees)

Reporting of injuries/ ill treatment would be made to outside medical authority—we have a full network of specialists who have visited detainees in Paddington (dentists, radiologists, orthopaedic surgeons, cardiologists, general physicians, general surgeons, psychiatrists.) Solicitors who specialise in this work are aware of their right to ask for outside doctors to visit their client, and we have held joint consultations with a variety of doctors called at their behest. Interestingly these joint consultations tend to be harmonious—maybe surprising considering the adversarial nature of so much expert work.

We have instigated referrals ourselves to specialists for purely clinical reasons acting as the GP for detainees- not being concerned just with the duration of the detention in Paddington but also taking responsibility for the long term care of detainees. For instance a 19 year old man who in the months prior to his arrest had become increasingly withdrawn from his family, spending large amounts of time in his room on his computer whilst his school performance deteriorated. We set up a visit from a psychiatrist despite his retaining in the suite a good cognitive performance being still able to function quite impressively in an interview. We were concerned that his clinical picture was consistent with the pre-clinical phase of a schizophrenia. If he were to be remanded in custody his rather subtle clinical signs would not be obvious: it might mean his presenting some months later with a full blown psychotic illness that might have been preventable. The psychiatrist who saw him confirmed that he was well.

The environment of Paddington is a complicated one. As doctors we are not involved in gathering evidence and have no idea of the merits of the case against anyone. We attempt to establish clinical relationships with our patients. They are not a simple group—some may be completely innocent, others less so. On occasions I realised that part of the training that some of our patients receive involves knowing about us as individuals and our procedures (in general chatter some detainees steer conversation in a way that suggest they know a little bit more about me than they might have picked up in Paddington) Solicitors can have complex input in a detainee's description of their sense of well being one young man held in custody for five days had been effusive in his thanks to all the doctors who looked after him, but, after changing solicitor, grumbled all the time. Occasionally solicitors try to present their client as not fit for interview- and we have to make an impartial professional assessment and be able to justify this some months later in court. As a matter of adversarial practice well rehearsed, well paid lawyers will cast aspersions on our competence, independence, parentage etc that will be undoubtedly reported in the press (but not the rebuttals which are never so interesting to the journalists).

I have been an FME since 1980 and have seen a variety of “terrorist” groups come and go—some now are welcomed into the establishment so it would be folly to let any politics cloud the medical aspects of what we do. The behaviour of some doctors in cases 20–30 years ago eg Guildford is still criticised heavily within the profession. We have developed very good working relationships with many of the young men who have been in custody for prolonged spells. Clearly many are bright, well educated and courteous. It is sad to hear that they are charged, sad to hear that they may stay in custody and sad to hear that they may be sentenced to wasting the best part of their lives in prison. Just as there is the “Stockholm syndrome” where a kidnap victim develops a positive transference to his captors, maybe we should talk about a “Paddington Syndrome” where the doctors are charmed by the patients who he has been appointed to look after. No matter how evil the actions that brought them there.

I have worked hard to develop the way we look after detainees and to pre-empt medical or legal problems. We have built a good close team of doctors to work in this environment and ensured that there are a variety of routes that can be taken in the event of any allegation made by any detainee (MPs, senior members of the judiciary, senior medical authorities etc) I have read extensively about torture and ill treatment, attending an international conference in Berlin on looking after victims and the ease with which medical complicity in torture arises. I've looked into relevant law especially the ECHR. I have completed an internet based course run by the World health Organisation into the Ethics of the care of people in detention and studied at Bristol and the Institute of Psychiatry additional aspects of this doing some modules of relevant masters programmes. I intend to write an MA standard thesis about the care of vulnerable detainees and to continue to explore ways we can assess the on going intellectual performance of detainees held in prolonged custody. I have initiated meetings with retired Det Supt John Pearse (an ex- Ch Supt in SO13 who has a doctorate

in psychology) and a Chief inspector of the Anti-Terrorist Branch in trying to develop a regime that would follow on some of the work done at Orpington and Peckham by Dr Pearse and Professor Gudjonsson in the 1980s that led to PACE).

I asked the CPT how long they thought it was reasonable a detainee could be kept in Paddington. They said three days. In 1985 years ago the NCCL published a report (ed Hewitt P) saying that after 24 hours most detainees would crumble at the intensity of the conditions and the severity of the regime as then practised in Northern Ireland The Supermax prisons in the USA hold prisoners in more restrictive conditions for years. So far, although the conditions at Paddington are not ideal, we have seen surprisingly little evidence on a patient by patient basis of deteriorating mental health.

10. Letter from the Independent Police Complaints Commission

INQUIRY INTO RELAXING THE BAN ON THE ADMISSIBILITY OF INTERCEPT EVIDENCE

We recently made representations to the Home Office regarding the difficulties caused by the Regulation of Investigatory Powers Act 2000 in relation to disclosure of sensitive material to coroners. This issue would appear to be of relevance to the Inquiry into Relaxing the Ban on the Admissibility of Intercept Evidence.

I set out below the representations made and should be grateful if you would draw this letter to the Joint Committee's attention. We would be happy to provide any more information or further submission in relation to this issue that the Joint Committee may need.

REPRESENTATIONS

I should perhaps first explain why this concerns the IPCC and not just the police.

As you are no doubt aware, the IPCC was established under Part 2 of the Police Reform Act 2002 with a broad remit in relation to police misconduct and complaints about the police. Its functions include investigating serious allegations of police misconduct. Any death following some form of direct or indirect contact with the police where there is reason to believe that the contact may have caused or contributed to the death must be referred to the IPCC, regardless of whether there has been a complaint or any indication of police misconduct.

The IPCC must then determine how the death is to be investigated. An investigation may be independent (conducted by the IPCC itself), managed (conducted by the same or a different police force but managed by the IPCC), supervised (conducted by the same or a different police force but supervised by the IPCC) or conducted by the police force itself (local). In both an independent and managed investigation, the IPCC is in control of, and determines the outcome, of the investigation; this is not the case with a supervised or local investigation.

Where the investigation is carded out by the IPCC independently, or conducted by the police but managed by the IPCC, the IPCC in effect replaces the police as the body charged with investigating the death for the benefit of the coroner. Consequently, at the inquest it performs the function which would otherwise be undertaken by the police.

The IPCC is therefore responsible, when inquests involve such independent or managed investigations, for deciding which documents to disclose to the coroner. In the interests of justice, it is the IPCC's practice to pass to the coroner all documents touching the cause of or circumstances surrounding the death in question. There may, however, be occasions where sensitive material such as telephone and other intercepts are relevant to an investigation conducted or managed by the IPCC. It would appear that, in those circumstances, under the Regulation of Investigatory Powers Act 2000 the IPCC would not be able to disclose the intercept material to the coroner or even do or say anything that would suggest the intercept had occurred.

Under the Regulation of Investigatory Powers Act 2000, a relevant judge can order disclosure of such material to himself/herself if satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice. "Relevant judge" includes a High Court, Crown Court and Circuit judge. There is no comparable right for a coroner to order disclosure (to him or herself).

There are likely to be circumstances where the inability to disclose intercept material prevents the coroner from carrying out his or her duty or leads to injustice.

Moreover, in the absence of full criminal proceedings the inquest will normally be the means by which the state discharges its obligation under Article 2 of the European Convention on Human Rights to initiate an effective and independent public investigation into a death involving agents of the state. If such investigation is flawed because the coroner is not in possession of all the relevant evidence, this may place the state in breach of Article 2.

It is submitted that the potential for injustice where intercept material is concerned would be mitigated if the same exceptions that apply to relevant judges were also available to coroners and we have suggested in response to consultation on the proposed Coroners Bill that provision is included in the Bill accordingly. However, we realise that this is only a partial solution and there will be issues about the coroner sharing this material with a jury. We are conscious that the safeguards that apply in criminal proceedings (admission or discontinuance of proceedings by the prosecution) would not be available in inquests.

John Wadham
Deputy Chair

3 January 2007

11. Memorandum from the London Innocence Project

THE LONDON INNOCENCE PROJECT

The London Innocence Project is an organisation founded by 1 Pump Court Chambers and a team of law students. It is a non-profit legal resource clinic and criminal justice centre that works to examine and prevent potential miscarriages of justice. We work to exonerate the wrongfully convicted by examining their cases and subjecting both the evidence and the trial process itself to close scrutiny. We distribute research reports on criminal justice and strive to ensure that the rule of law is maintained on the basis of equality before the law and procedural fairness. The London Innocence Project has a dedicated team of barristers committed to providing high-quality legal representation to those who maintain their innocence.

THE AUTHORS OF THIS REPORT

This paper has been authored by members of the 1 Pump Court Chambers and Inns of Court School of Law Innocence Project:

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1. INTRODUCTION

1.1 This report has been written by members of the London Innocence Project (LIP) in response to the Joint Committee on Human Rights (JCHR) call for evidence into relaxing the current statutory prohibition on the admissibility of intercept evidence.

1.2 The prohibition has been on the statute books since 1985. However, over the last 10 years the call for its reform has gathered force with no less than five government reports commissioned and increasing support from opposition political parties and the DPP Ken Macdonald and Attorney General Lord Goldsmith, to name a few.

1.3 Increased terrorist activity and the growing preponderance of intelligence are significant factors in favour of calls for reform. A view has formed which suggests the use of intercept evidence in court would lead to more convictions of terrorists; however, some intelligence studies do not come to the same conclusion. In addition there are fears that a hasty change made by the government in response to terrorist activity might open the door to many other problems, especially in relation to human rights issues.

Current use of intercept evidence

1.4 This procedure is currently regulated by statute, the Regulation of Investigatory Powers Act (RIPA) 2000 following the Interception of Communications Act (IOCA) 1985. RIPA has been criticised for lack of clarity⁴ and inadequate authorisation requirements.

1.5 At present, the Home Secretary must authorise each phone tap by issuing a warrant under s.5 RIPA, of which there are approximately 2,000 annually. These intercepts are thus wholly lawful but are still excluded from being used as evidence just as unlawful ones are. The only circumstance under which intercept

⁴ (2004) Ormerod and McKay pg 18.

evidence is currently admissible in court is when a prisoner is in custody and relevant remarks are made by him on a public phone. However, the interception of these calls have their own set of unique circumstances: firstly, the person is in custody and secondly, the inmate is notified that his telephone conversations will be recorded.

Our position

1.6 The LIP welcomes the opportunity to contribute to this enquiry and has drafted the following report in terms of legitimate concerns that may have to be addressed if intercept evidence is to become admissible in the United Kingdom.

1.7 The LIP strongly believes in the need to ensure that equal attention is paid to a defendant's right to fair trial, guaranteed under Article 6 of the ECHR (entrenched common law principles) and the need to protect national security, by disclosing information on sensitive intelligence methods. We are concerned that there has been a shift towards the latter of these two principles with a greater reliance on the use of Public Interest Immunity.

1.8 A number of bodies support relaxing the ban primarily because using intercept evidence is preferable to control orders. Effectively lifting the ban is the lesser of two evils in terms of human rights violations. The LIP believes there are other concerns which need to be fully considered and these are set out in the following submission.

1.9 We have four major concerns which are summarised below and explained in full in the body of this submission:

1. The LIP submits that the current UK Law and European jurisprudence is incompatible with the admissibility of intercept evidence.
2. The inclusion of intercept evidence in criminal trials would substantially increase the use of Public Interest Immunity. The LIP submits that the current system of PII is inherently prejudicial, and any increase would have a substantial impact on the defendant's right to a fair trial.
3. It is highly likely that the use of intercept evidence will require the instruction of special advocates. The LIP is concerned that there are innate flaws in the special advocate system which, if the system were expanded, could completely undermine many principles of due process.
4. The debate still continues regarding the approach of other jurisdictions to the use of intercept evidence. The LIP is concerned that many of the safeguards present in other jurisdictions are not present in the UK.

2. INTERCEPT EVIDENCE: LEGISLATIVE PROBLEMS

Introduction

2.1 This paper briefly makes the following submissions regarding the proposal to introduce intercept evidence:

- (i) In the light of section 76(2) and 82(1) of the Police and Criminal Evidence Act there are serious legislative problems with introducing intercept evidence under RIPA 2000.
- (ii) Without stringent safeguards the introduction of intercept evidence could violate fundamental rights.

Background

2.2 In order to understand the legal and legislative problems with introducing intercept evidence it is necessary to briefly consider the rules of disclosure, which concern the duty of the prosecution to disclose material to the defence.

2.3 The prosecution's duty is two-fold. There is a duty of primary disclosure, which concerns material that may undermine the case for the prosecution. This duty is automatic. There is also the duty of secondary disclosure, which concerns material which might assist the accused's defence. This is not automatic, and is in fact dependent upon the disclosure of a defence case statement by the defendant.⁵

⁵ These provisions are contained within the Criminal Procedure and Investigations Act 1996 (CIPA) which significantly restricted the prosecution duty of disclosure. Prior to 1996, the duty of disclosure was governed only by the common law where the duty was broad and instead merely depended on the relevant item of evidence being in any way "material"—that is, having some bearing—on the offences for which the defendant stands accused.

Public Interest Immunity

2.4 This situation becomes more complex in cases where public interest immunity applications are made. These are applications made by the prosecution to the judge in order for particular items of evidence to be withheld from the defence on the grounds on the public interest. This typically occurs in what is called an *ex parte* hearing where the prosecution has applied to the court without giving notice to the defence and the hearing is conducted without the defence being allowed to participate.

2.5 Those who argue that intercept evidence should be admitted heavily rely upon the existence of these PII procedures in order to prevent details of methods of covert interception and the identity or even the existence of informants, from being disclosed to defendants. So, the hearing to assess the evidence can be held in secret and without notice being given to the defence. Two questions follow from this which must be considered:

- (i) What is the law governing the circumstances when the intercept evidence will be disclosed to the defence?
- (ii) Are these provisions adequate to protect the defendant's right to a fair trial?

Section 18 of RIPA

2.6 Section 18 of RIPA effectively allows intercept evidence to be surreptitiously admitted in criminal proceedings. There are no circumstances in which prohibited material may be disclosed to the defence. However, section 18(7)(a) allows the material to be disclosed to the prosecutor "for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution".

2.7 Section 18 gives the judge the authorisation to disclose material to the court (in what will be the course of a public interest immunity hearing) where the "exceptional circumstances of the case make the disclosure essential in the interests of justice".

2.8 Peter Mirfield has pointed out that there is a triangle of problems with this process⁶:

"A first problem emerges: how can the judge be so satisfied without already having seen the content of the intercept? Though thoroughly hackneyed, the phrase 'Catch 22' seems wholly apposite here. Perhaps we are to suppose that the prosecutor will be able to satisfy the judge, more as a matter of assertion than of argument.

Yet, if so, the reality would seem to be that the accused is at the mercy of this opponent [ie prosecution counsel] throughout.

Moreover, there is a third problem, for the steps which the judge may take, having gone through this rigmarole, are limited, by section 18(9), to a direction to the prosecution 'to make for the purposes of the proceedings any such admission of fact as that judge thinks essential in the interests of justice' . . .

There must be a very real prospect of this peculiar procedure falling foul of Article 6."

2.9 The crucial point here is that while the judge's direction to the prosecution to make any admission that the judge thinks is essential in the interests of justice, such as admitting material which demonstrates the defendant's innocence, this does not cover material which is equivocal and merely assists the defence.

- The test under section 9(b) of "exceptional circumstances" only relates to material which conclusively demonstrates the defendant's innocence.
- Yet there is no provision for material that may be suggestive of innocence on one interpretation, and suggestive of guilt on another.
- This effectively gives the prosecution the right to exclude that which, if presented in open court, may assist the defence.

2.10 What are the ramifications of this process of public interest immunity hearings and severely restricted disclosure? First, it is submitted that rather than extending the use of PII hearings, the jurisprudence of the ECtHR suggests that there is a real danger that PII procedures may violate Article 6:

"[T]he principle of public interest immunity . . . in English law allows the prosecution, in the public interest, not to disclose or communicate to the defence all the evidence in its possession and to reserve certain evidence . . . The Court made no express statement of its views on this point and its silence might be understood as approval of this principle, which is not the case . . . [O]nce there are criminal proceedings and an indictment, the whole of the evidence, favourable or unfavourable to the defendant, must be communicated to the defence in order to be the subject of adversarial argument in accordance with Article 6 of the Convention . . . Under the European Convention an old doctrine, such as that of 'public interest' must be revised in accordance with Article 6"⁷

⁶ Peter Mirfield, Zeitlyn Fellow of Law, Jesus College, Oxford: "Regulation of Investigatory Powers Act 2000" [2001] Criminal Law Review, p.97.

⁷ *Edwards v. United Kingdom*, judgment of Judge Pettiti (1993) 15 E.H.R.R. 433-435.

Section 76 of the Police and Criminal Evidence Act 1984

2.11 Section 76 of the Police and Criminal Evidence Act 1984 concerns challenges as to the admissibility of confession evidence in criminal proceedings so as to prevent the confession being adduced against its maker by the prosecution as evidence to show guilt.

2.12 Section 76(2) of PACE directs the court to exclude confession evidence obtained by:

- oppression
- or in circumstances which were likely to make the confession unreliable.

2.13 Section 82(1) of PACE sets out what constitutes a confession. It defines a confession as including:

- Any statement wholly or partly adverse to the person who made it.
- Whether made to a person in authority or not.
- Whether made in words or otherwise.

2.14 Section 76(2) and 82(1) of PACE have important consequences in the context of the proposal to introduce intercept evidence.

- If the use of covert surveillance in criminal proceedings is to increase, so will the reliance upon statements that are alleged to be admissions of guilt by the accused.
- In the recent case of *R v Mushtaq*, their Lordships unanimously agreed that, as a matter of principle, under section 76(2) of PACE where the admissibility of a confession is challenged, the judge cannot allow it to be given in evidence. *Mushtaq* concerned a defendant who confessed to a crime during an interview with police officers.
- The judge can only allow it to be given in evidence if he is satisfied, beyond a reasonable doubt, that it was not obtained by oppression or any other improper means.

2.15 Their Lordships did not merely leave the matter to rest in terms of the burden of proof upon the prosecution. The House ruled that there is a *prima facie* breach of a defendant's right against self-incrimination where a jury is directed to take into account a confession which they considered was, or might have been, obtained by improper means. Lord Rodger of Earlsferry ruled that the test under section 76(2) is so strict that⁸:

“The judge can admit confession evidence only where he is satisfied beyond a reasonable doubt that it was not obtained by oppression or any other improper means. If there is anything in the evidence that gives rise to a reasonable doubt, he must exclude the confession. So the proposed direction [that the jury should disregard the evidence] would bite only where, despite the judge's view that, beyond a reasonable doubt, the confession was not obtained by oppression or any other improper means, the jury decided that it was, or might have been obtained in that way”.

2.16 The importance of this judgment in the context of the current proposal can hardly be overstated.

- (i) First, it entails that the burden of proof that the prosecution must discharge under section 76(2) is beyond a reasonable doubt. This implies that the evidence must be put under proper scrutiny if this burden is to be discharged. This means that the old prosecution privilege of being able to avoid disclosing equivocal evidence to the defence—evidence that may or may not suggest guilt or innocence—does not stand up to scrutiny in the light of *Mushtaq*. The judgment clearly has the consequence that it must be open to the defence to challenge such evidence (initially during the *voir dire*).
- (ii) Second, the judgment has the consequence that the jury must be able to make up its own mind as to whether or not the evidence is reliable. This naturally entails that the defence should have the right to put its case to the jury, otherwise how are the jury to come to their own view during the course of proceedings? If the jury agrees with the defence's submissions that the evidence was, or may have been, obtained under compulsion then the judge must direct them to disregard it.
- (iii) Third, and most importantly, for these reasons it would therefore appear that *Mushtaq* has the weighty implication that if intercept evidence was subject to a PII procedure in the absence of a jury, Article 6 and section 76(2) of PACE would be automatically contravened. This is because there would be no jury to make up its own mind on the evidence—and under the current procedures—the prosecution would only be bound to disclose that material to the defence which the judge under section 18(7)(b), (8) and (9) of RIPA where the “exceptional circumstances of the case make the disclosure essential in the interests of justice”. Yet this makes no provision for the possibility of the prosecution having evidence that may not be clear confession evidence, but could still satisfy the definition of “confession” in 82(1) of PACE.

⁸ (2005) 18 BHRC 474 at [41].

2.17 The point of Mushtaq is that such an “exceptional circumstances” test with respect to the disclosure of evidence immediately falls foul of the proviso that the prosecution must prove beyond a reasonable doubt that the confession evidence was not obtained by oppression or any other improper means. How can the prosecution be said to have fulfilled this obligation if equivocal intercept evidence is withheld from the defence as can be currently sanctioned by section 18 of RIPA Section 82(1) of PACE defines “confession” in terms that are wide enough to be contravened by the current practices of disclosure under section 18 of RIPA in the context of PII hearings.

- It appears that the solution to this problem is for the prosecution to disclose all evidence—whether used or unused—to the defence. It will then be for the defence to assess whether the intercept evidence in question could satisfy the definition of confession under section 82(1) of PACE.
- It is submitted that sections 76(2) and 82(1) of PACE, in the light of the House of Lords ruling in Mushtaq, entail that this is the only method by which the introduction of intercept evidence could be admitted into courts in the United Kingdom.

2.18 It is submitted that the tension between RIPA and the current proposals to introduce more material which is likely to be of a self-incriminatory nature present the possibility of a fracture within the criminal legal system.

- According to section 18 of RIPA, evidence can be withheld from the defence even if it is equivocal—if it could be interpreted “either way”.
- Yet the jurisprudence of the Strasbourg court and the House of Lords ruling in Mushtaq entails that section 76(2) of PACE must be interpreted in terms of evidence that could suggest that it was obtained by compulsion or any other improper means only being admissible on the basis of a beyond reasonable doubt test being satisfied.

2.19 Yet this is the crucial point:

- This still allows the prosecution to evade disclosing any evidence to the defence that does not meet the “exceptional circumstances” test in section 18(7)(b), (8) and (9) of RIPA.
- This is to give the prosecution a “keep in jail free” card: for if there exists any evidence that may suggest that the content of the intercept was obtained by compulsion or any other improper means, but it is equivocal, it is open to the prosecution under current PII procedures to refrain from disclosing it to the defence.
- This presents a clear risk of the prosecution failing to disclose more equivocal evidence to the defence, evidence that may in fact still satisfy the definition of “confession” under 82(1) of PACE.

2.20 We further consider that if intercept evidence is introduced under the current legal framework there would be an inconsistency between the section 76(2) and section 82(1) of PACE and those under section 18 of RIPA as that section is invoked during PII hearings. In the light of the House of Lords strict test approach to section 76(2) of PACE in Mushtaq the current proposals will run contrary to the current human rights principles protecting the individual’s article 6 right to a fair trial applicable in the United Kingdom.

Recommendations

2.21 We recommend that if intercept evidence is to be introduced into domestic law both the PACE and the RIPA must be reviewed.

2.22 We consider that Section 17 and Section 18 of RIPA will have to be significantly amended if the use of intercept evidence is to adhere to current domestic and Strasbourg human rights guidelines.

2.23 We suggest that the reviewing body will be compelled to consider the fact that if more incriminating material is put before the courts it will have to subject to full defence scrutiny in equal and fair adversarial proceedings.

2.24 We have concerns that there will be a real danger that the security services will be forced to sacrifice aspects of their methods and procedures. Therefore, we consider that in the context of the existing law the worry that the use of intercept evidence will jeopardise the security services is a genuine one.

3. PUBLIC INTEREST IMMUNITY

General Introduction to Public Interest Immunity

3.1 It is widely expected that if intercept evidence becomes admissible, the Crown will rely heavily on Public Interest Immunity (PII) to protect national security. It has been suggested by a wide variety of commentators that any fears of compromising security services’ sources in terrorism trials can be allayed by using PII to prevent the disclosure of evidence, which may reveal sensitive intelligence sources or methods, such as the use of undercover agents.

3.2 PII is a principle of English common law under which the English courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. This is an exception to the usual rule that all parties in litigation must disclose any evidence that is relevant to the proceedings. In making a PII order, the court has to balance the public interest in the administration of justice (which demands that relevant material is available to the parties to litigation) and the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging.

3.3 The inevitably secretive nature of PII may have a negative effect on the fairness of the trial process and historically has been shown to lend itself to abuses of state power as conceded by the Scott Report.⁹ Protection of national security has sometimes been used by the Government to justify new powers and legislation. The LIP is concerned that the use of PII to protect intelligence sources should not become a blanket under which all scrutiny of state action and fairness of trial procedure are denied.

3.4 The LIP is also concerned that allowing the introduction of intercept evidence under the guise of facilitating terrorism trials will lead to it being used in an increasingly wide variety of trials. This will lead to an increased use of PII in many types of trials including those for non-terrorism criminal offences.

3.5 The use of PII in criminal trials has long been subject to much special concern, since the fundamental issue of the defendant's liberty means an abuse of PII will lead to great injustice.

Procedural Requirement of PII

3.6 The Court is limited by what the Crown and the intelligence services disclose, thereby granting investigatory bodies the power to pick and choose which documents are put before the Court. The LIP would submit that fuller judicial supervision is needed to ensure that evidence already weighted in the prosecution's interest is not further compromised by abuse of disclosure.

3.7 The responsibility for balancing the public interest issues in disclosing the evidence should be removed from the decision-maker and lie with either the trial judge or specially trained members of the judiciary who are recruited to perform that task in this area. The LIP would submit that assessing the requirements of justice is better performed by the courts rather than the Crown.

3.8 Currently the reason for the attachment of PII to documents and the suspected damage disclosure would bring are unclear. The common term used on the PII certificate is "Harm to National Security". The LIP submit that this term is too broad a banner to justify non-disclosure and as far as the limits on security dictate sources and reasons for non-disclosure must be revealed to allow the defence to evaluate the claims.

3.9 The issue of editing and redactions of evidence as an alternative to complete non-disclosure should be approached with much caution. It is particular to the nature of intercept evidence that any transcripts and telephone records must be carefully considered in their full context if they are not to be open to non-interpretation or misrepresentation.

Defence Rights

3.10 All unused intercept evidence should be made discloseable to the defence except for that explicitly barred under PII. It should be the role of the judge to determine why certain evidence that strengthens the defence case cannot be disclosed.

3.11 Where possible pre-trial meetings should be held between the defence barrister and the judge, and between the crown, judge and defence barrister, to discuss any applications for the use of PII and to raise any concerns about their suitability in the context.

Inclusion of Evidence

3.12 It has been suggested that if there is any failure to attach PII to sensitive intercept evidence, or perceived lack or probability of PII being successfully attached, there would be no obligation to introduce that evidence. This would lead to too great latitude lying with the Government and prosecution about which evidence can be introduced in trials.

Recommendations

3.13 The introduction of intercept evidence explicitly to facilitate terrorism trials should not be used as a backdoor to allow it to be introduced in other trials.

3.14 All potential evidence that may become subject to an attempt to attach PII should be available for judicial overview before the duty to disclose stage.

⁹ Attorney-General Statement to the Commons, 18 December 1996.

3.15 The reasons given by the Judge for non disclosure should be full and not limited to National Security.

3.16 Pretrial meetings should take place between counsel, Judge and defence in order to discuss disclosure and possible PII applications. Where possible the defence should know the intentions of the Crown and the extent of material they intend not to disclose.

4. SPECIAL ADVOCATES

4.1 It has been argued that one way of overcoming the problem of Intercept Evidence would be to appoint independent counsel (Special Advocates)¹⁰ to review the material. The LIP has strong views concerning this suggested use of Special Advocates.

4.2 Special Advocates are experienced, security-cleared lawyers with complete disclosure of both closed and open material. They are appointed to represent the interests of defendants in lieu of regular counsel where closed (classified) material is involved.

4.3 This section turns to consider the usefulness of special advocates, specifically in criminal trials. It is foreseeable that special advocates might be used in two ways following the advent of intercept evidence: first, in independently determining issues of disclosure upon the examination of sensitive intercept evidence; second, in closed hearings, to decide substantive issues on the basis of secret evidence.

The Nature of the Special Advocate System

4.4 The special advocate system in the UK, until now, has been developed outside of the criminal context. The special advocate system was introduced into the UK by the Special Immigration Appeals Tribunals Act 1997 in response to the case of *Chahal v United Kingdom* (1997) 23 EHRR 413, to add a degree of procedural fairness to certain proceedings in the context of immigration.

4.5 The clear distinction between the immigration context in which the special advocate system was developed, and the criminal context, which the system might be applied to, is illustrated by the differing application of article 6(1) of the ECHR. This treaty provision, which has regard to ensuring fair trials, does apply in criminal trials, but not in SIAC trials, where the special advocate system was first used in the UK.

4.6 Much controversy has already been caused by the use of special advocates in the quasi-criminal context of a Parole Board hearing in *Roberts v Parole Board* [2005] UKHL 45.

4.7 The LIP is concerned that the use of special advocates in relation to intercept evidence in criminal trials threatens the rights of the defendant. The UK system of Special Advocates has not been developed with respect to the criminal justice system. Consequently this could prove fundamentally inconsistent with the following principles of due process:

- (i) Disclosure
- (ii) Appointment of counsel
- (iii) Resources of counsel
- (iv) Accountability and communication

Disclosure

4.8 We believe that if a defendant has been the subject of intercept they should be entitled to see the resulting evidence. Therefore, ideally, the prosecution would discharge their disclosure duty by handing over all of their unused evidence to the security cleared special advocate employed to assess its value to the defence. In complex cases requiring considerable factual research this may prove to be an insurmountable task, if concerns regarding the support and resources available to special advocates are not addressed (this is discussed in paragraphs 9 and 10).

4.9 In the alternative that only extracted evidence identified by the prosecution as potentially exculpatory is supplied, we are concerned that evidence out of context may not be as useful as it might otherwise have been in context; and that the approach of prosecution minded assessors, who might neither be trained nor experienced in the construction of a legal defence, for example where they are intelligence officers, would not be as effective as that of a standard legal team.

Appointment of Special Advocates

4.10 At present, special advocates are not appointed by the person they represent, but by a Law Officer of the Government. The same Law Officers are also active in bringing the case against the defendant. While it has been claimed that fears of any conflicts of interest are wholly unfounded, we believe that it is not in the interests of justice, or conducive to ensuring fairness that such a situation should be allowed to continue.

¹⁰ Law Society Gazette, 12 October 2006.

4.11 If the appointment of special advocates remains a matter for the discretion of the Law Officers and not the defendant, we believe that the special advocate system will be unsuited to criminal trials, because of the violation of the basic right of a defendant's liberty to choose their own counsel.

Support and Resources of Special Advocates

4.12 We are concerned that the special advocate system is prejudiced in favour of the prosecution as a consequence of the imbalance in resources available to prosecution and to special advocates. Special advocates must familiarise themselves with a case and conduct extensive legal and factual research, without the assistance of a solicitor. A standard counsel will have a solicitor fully conversant with the case at hand to assist in such tasks, but special counsel have, until now, been denied such benefits. This is much to the disadvantage of the case for the defence, since the prosecution suffers no similar limitations and prosecution lawyers work uninterrupted, well supported and undivided.

4.13 The prosecution may call on expert support and specialist knowledge, such as translators and technical experts. We believe that in order to conduct their defence the special advocate must also have such specialist support at their disposal.

Accountability

4.14 We are concerned, in principle, at the lack of accountability owed by special advocates to the people they represent and to the public. While there is as yet no evidence of negligence, oversight, or incompetence having occurred at the hands of a special advocate, adequate measures are not in place to detect such events if they should occur, or to regulate and uphold the standards of special advocates. In ordinary open cases advocates are subject to wide scrutiny from a range of sources: their peers, the public, their instructing solicitors, regulating bodies. However, in closed cases involving secret evidence special advocates have only the judge and the opposition, each of whom are occupied in the exercise of their own particular functions.

Communication

4.15 We are concerned by the restrictions imposed upon counsel to solicit communications, and thereby receive proper instructions, from the people they represent. If counsel is not permitted to receive informed instructions from the person they represent and the defendant cannot hear the evidence, and consequentially the case against them, then they will have no opportunity to defend themselves. In criminal trials so conducted, we believe that justice has not been done.

Recommendations

4.16 If intercept evidence were to become admissible in court, it seems inevitable that Special Advocates would be required to review the material protected by PII. However, there are innate flaws in the Special Advocate system which, if the system were expanded, could completely undermine many principles of due process. Therefore, we would make the following recommendations:

- (i) Full disclosure of evidence to the Special Advocate.
- (ii) The selection and appointment of special advocates to be presided over by an independent body.
- (iii) Equal access to resources for Special Advocates and the Crown, to balance out the prosecution bias.
- (iv) Improved accountability of the Special Advocates.
- (v) Reform to allow more useful communication between the Special Advocate and defendant.

5. OTHER JURISDICTIONS

5.1 We consider that it is at least reasonable to take the view that in the light of current domestic law including recent House of Lord's decisions and jurisprudence from the European Court of Human Rights, the use of intercept evidence in adversarial proceedings in the United Kingdom faces serious difficulties, both legal, legislative, practical, and ethical.

5.2 We consider that these difficulties flow from the fact that our legal system is dependent upon criminal proceedings being adversarial in nature. The defence must have access to all relevant material and be able to challenge its admission and content if justice is to be done and is seen to be done.

Canada

5.3 Under section 187(4) of the Canadian Criminal Code¹¹:

“[T]he judge shall not allow disclosure until the prosecutor has deleted any part of the document that the prosecutor believes ‘would be prejudicial to the public interest’. This includes any material that would:

- (a) Compromise the identity of any confidential informant;
- (b) Compromise the nature of ongoing investigations;
- (c) Endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
- (d) Prejudice the interests of innocent persons”.

5.4 However policy makers should not conclude that this implies that the only safeguard of the defendant’s rights within the Canadian system in relation to intercept evidence is that laid down under section 187(4)(d) of the Canadian Criminal Code which concerns “prejudice to the interests of innocent persons”.

5.5 Since in fact, in Canada the exclusion of evidence obtained in breach of the Canadian Charter of Rights and Freedoms 1982 is regulated by express provisions. Section 24(1) allows that a person whose rights or freedoms have been infringed may apply to a court for a remedy. Section 24(2) expressly states that:

“Where, in proceedings under subsection (1) a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

5.6 As Emmerson and Ashworth rightly point out:

“This creates an exclusionary rule, rather than discretion, but the operation of the rule depends on a finding that admission of the evidence would ‘bring the administration of justice into disrepute’”¹²

5.7 In the case of what the Canadian courts have termed “non-conscriptive” evidence The learned authors make the important point that in Canada the concept of “bringing the administration of justice into disrepute” has been defined in terms of three identifying factors:

- (i) The court must address the issue of whether there has been any breach of the Charter of Rights and Freedoms 1982. In examining this issue the court may consider:
 - The deliberate or non-deliberate nature of the violation by the authorities
 - Circumstances of urgency and necessity
 - Other aggravating or mitigating factors
- (ii) Whether other investigatory techniques, compatible with the Charter, could have been used.
- (iii) The nature of the breach. This application of this test is similar in some respects to the test of proportionality employed by the UK courts in examining alleged breaches of human rights. Under this third test, if the violation of the defendant’s right was relatively minor compared with the seriousness of the offence, then its admission would be less likely to bring the administration of justice into disrepute.
 - An important aspect of the third criterion is that the bad faith of the police can be taken into consideration when the defendant applies to have items of evidence excluded
 - It is important to note that while the Canadian system allows the bad faith of the police to be taken into account:

“The fact that the police thought they were acting reasonably is cold comfort to an accused if their actions resulted in a violation of his or her right to fair criminal process” (Judgment of Iacobucci J Elswaw [1991] 3 S.C.R. 24)
 - The good faith of the police is irrelevant in assessing whether an item of intercept evidence should be admitted against the accused.

The United States

5.8 The United States’s Constitution provides a series of important and absolute principles which are designed to protect individuals’ rights against encroachment by the state.

5.9 The U.S constitution provides for an absolute exclusionary rule in relation to unlawfully obtained evidence—this is the so-called “fruit of the poisoned tree doctrine”.

¹¹ JUSTICE: *Intercept evidence—lifting the ban*, para 126, page 51.

¹² Emmerson QC and Ashworth QC, *Human Rights and Criminal Justice*, p.424, 15-17.

5.10 The Supreme Court's landmark decision in *Mapp v Ohio* was that evidence obtained in breach of the Fourth Amendment Right not to be subjected to unlawful search of seizure should be automatically excluded from the trial¹³.

5.11 The Fifth Amendment protects the privilege against self-incrimination. This is a right that has been recognised in the United Kingdom since at least the 17th century. If an increased amount of secret intercept evidence is to be made admissible in court then the privilege against self-incrimination will come under threat.

- (i) Again, following the ruling in *Mushtaq*, the prosecution must prove beyond a reasonable doubt that any evidence of a confession was not obtained by oppression or any other improper means if section 76(2) of PACE is to be satisfied.
- (ii) This will be impossible if all material—whether used or unused—is not disclosed to the defence.

Ireland

5.12 The Supreme Court of Ireland has adopted an exclusionary approach to evidence that has been obtained by the intentional breach of a constitutional right, there is a strong presumption that the evidence should be excluded.

5.13 The Irish courts have a duty to “defend and vindicate” constitutional rights. In *The People (AG) v O'Brien* the Supreme Court held that evidence obtained in “deliberate and conscious” breach of a constitutional right was inadmissible except in “extraordinary excusing circumstances”¹⁴.

Recommendations

5.14 We consider that care must be exercised when comparing different legal systems.

5.15 We recommend that the methodology of such a study be considered and described before policy makers rely on comparative studies.

5.16 We consider that other jurisdictions have established mechanisms to avoid breaches of fundamental rights, and that should intercept evidence be introduced in the United Kingdom existing mechanisms must be strengthened and revised.

6. CONCLUSION

6.1 The use of intercept evidence has been a matter of concern for many years and requires careful consideration before it is enacted into UK law. The usefulness of intercept evidence in future cases is still a matter of debate. The LIP is concerned that due to provisions in related legislation and case law there is a real danger that the security services will be forced to sacrifice aspects of their methods and procedures. In the context of the existing law the worry that the use of intercept evidence will jeopardise the security services is a genuine one.

6.2 We are concerned that the introduction of intercept evidence could infringe the privilege against self-incrimination, this has been a fundamental right in the UK since the 18th century. Equally, its compatibility with European human rights law is uncertain.

6.3 Further, we would submit that the need to choose between Control Orders and intercept evidence does not provide a healthy arena to have such a debate.

6.4 The London Innocence Project has made a number of recommendations and expressed areas of concern that need to be carefully and fully addressed before intercept evidence can become admissible in the United Kingdom. This is to ensure that if intercept evidence is used that all possible safeguards are put in place to ensure that the defendant's absolute right to a fair trial guaranteed by Article 6 of the ECHR is protected, thereby limiting the potential for miscarriages of justice.

6.5 The London Innocence Project offers the following concerns and recommendations:

- i. If intercept evidence is to be introduced into domestic law both the Police and Criminal Evidence Act and the RIPA must be reviewed.
- ii. We consider that Section 17 and Section 18 of RIPA will need to be significantly amended if the use of intercept evidence is to adhere to current domestic and European human rights guidelines.
- iii. All potential evidence that may become subject to an attempt to attach PII should be available for judicial overview before the duty to disclose stage.
- iv. The reasons given by the Judge for non-disclosure should be full and not limited to national security.

¹³ 367 U.S. 643 (1961).

¹⁴ [1965] I.R. 142.

- v. Pre-trial meetings should take place between Judge and prosecuting and defence counsel in order to discuss disclosure and possible PII applications. Where possible the defence should know the intentions of the Crown and the extent of the material they intend not to disclose.
- vi. If intercept evidence were to become admissible in court, it seems inevitable that Special Advocates would be required to review the material protected by PII. Therefore, we would make the following recommendations:
 - a. Full disclosure of evidence to the Special Advocate.
 - b. The selection and appointment of Special Advocates to be presided over by an independent body.
 - c. Equal access to resources for Special Advocates and the Crown, to balance out the prosecution bias.
 - d. Improved accountability of the Special Advocates.
 - e. Reform to allow more useful communication between the Special Advocate and defendant.

February 2007

12. Memorandum from Justice

INTRODUCTION

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE welcomes the Committee's inquiry into this issue. We recommended that the ban on intercept evidence should be lifted in our 1998 report on covert policing.¹⁵ In October 2006, we released a further report, *Intercept evidence: lifting the ban*, that examined in detail the arguments for and against using intercept material in court and which included a comparative study of its use in other common law jurisdictions. A copy of that report has been annexed to this submission.

How should the ban on the admissibility of intercept evidence be relaxed?

3. There are a number of options for relaxing the ban on intercept evidence. The first, and narrowest, approach is simply to create an exception to section 17 of the Regulation of Investigatory Powers Act 2000 ("RIPA"), such as that proposed by the Interception of Communications (Admissibility of Evidence) Bill, the Private Members Bill put forward by Lord Lloyd of Berwick. Under the Bill, it would be open to the prosecution to apply to use intercept material in proceedings relating to serious crime and terrorism. The statutory ban in section 17 would otherwise remain.

4. A slightly broader approach would be to simply repeal section 17 RIPA altogether. This would require some consequential amendments within Part I RIPA (eg the repeal of section 18), as well as diluting the distinction between interceptions with a warrant and those without elsewhere in Part I (see eg section 3).

5. In our view, however, the relaxation of the ban on intercept evidence should be attended by wholesale reform of the way in which interceptions are authorised. In particular, we note that the UK is one of the few common law jurisdictions in which law enforcement interceptions are authorised by a politician rather than a judge.¹⁶ We consider that any proposed state interception of private communications requires prior judicial scrutiny in order to ensure that the interference with privacy is justified and strictly proportionate. More generally, we think that the law governing interceptions should be as clear and accessible as possible: something which cannot be said of Part I RIPA as it currently stands.

What are the main practical considerations to be taken into account when devising a legal regime for the admissibility of intercept?

6. In our view, the main practical considerations are:
- preventing the disclosure of interception methods to suspects;
 - minimising the likely impact of increased pre-trial disclosure on courts and prosecutors;
 - avoiding any undue logistical burden on police and intelligence services; and
 - ensuring that interception warrants are authorised in a manner that is both operationally effective and affords sufficient independent scrutiny of their merits.

¹⁵ *Under Surveillance: Covert policing and human rights standards* (JUSTICE, 1998).

¹⁶ See *Intercept evidence: lifting the ban* (JUSTICE, October 2006), p75.

7. These are in addition to what we consider to be the main considerations of principle: the importance of safeguarding the right to a fair trial (including equality of arms and the disclosure of relevant evidence), the right to respect for private and family life (including ensuring that any interception of private communications is governed by a clear and coherent legal framework), and maintaining the public interest in the effective investigation and prosecution of crime (by avoiding disclosure of sensitive material contrary to the public interest).¹⁷

Preventing disclosure of interception methods to suspects

8. There is no evidence that the use of intercept evidence in other common law jurisdictions has led to the disclosure of interception methods to suspects. Given the obvious public interest in the police and intelligence services maintaining an effective interception capability, however, we think it is sensible to have regard to this as a practical consideration when redrafting the law governing the admissibility of intercept evidence.

Minimising impact of increased pre-trial disclosure on courts and prosecutors

9. Section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 provides that the prosecution must disclose to the accused any material “which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused”. Since allowing intercept evidence would increase the pool of material that is potentially disclosable to defendants in criminal proceedings, it seems reasonable to have regard to this increase when devising a fresh legal regime for its admissibility. At the same time, we doubt that allowing intercept evidence will have a significant impact on the pre-trial disclosure process. Any difficulties that do arise are likely to be best addressed by greater diligence from prosecutors and better case management by judges. As Lord Bingham noted in *R v H*:¹⁸

The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.

Avoiding undue logistical burden on police and intelligence services

10. For the reasons set out in our October report,¹⁹ we think concerns that allowing intercept evidence would lead to a significant drain on the resources of police and intelligence services have been greatly exaggerated. However, we also conceded that it was likely that allowing intercept evidence would result in some increase in the requirement on police and/or intelligence services to transcribe and retain intercept material with a view to future criminal proceedings. Accordingly, we agree with the view expressed in the government’s 1999 consultation paper that “any arrangements which make intercept material available to one or both parties would have to be both practical and affordable”.²⁰

Effective procedure for authorising interceptions

11. Strictly speaking, the procedure for authorising interceptions is a separate issue from the practical considerations governing their admissibility in subsequent proceedings. The experience of other common law jurisdictions, however, shows that the way in which interceptions are authorised can have an important effect on the way that evidence is subsequently gathered and used. In particular, the accused in criminal proceedings may seek to prevent intercept material being admitted on the basis that the warrant authorising the interception was invalid. We think it is sensible, therefore, to have regard to both the principled and practical considerations governing authorisation when devising a legal regime for the admissibility of intercept evidence.

¹⁷ See *R v H* [2004] UKHL 3 per Lord Bingham at para 18: “The public interest most regularly engaged [in public interest immunity claims in criminal cases] is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations”.

¹⁸ *Ibid*, para 35.

¹⁹ *Lifting the ban*, n2 above, pp 32-34.

²⁰ *Interception of Communications in the United Kingdom: a Consultation Paper* (Home Office: June 1999, Cmnd 4368), para 8.8.

12. On the one hand, it seems plain that the authorisation process should have regard to the operational considerations of those wishing to carry out interceptions. In particular, there will be cases where police or intelligence services need to obtain a warrant at short notice. Both the Canadian and US legal regimes allow for interception without warrant in cases of emergency, for instance, with US federal law requiring subsequent judicial authorisation within 48 hours.²¹

13. On the other hand, we think it is important that applications for interception of private communications be subject to prior judicial scrutiny—something which is wholly lacking from the current arrangements under Part I RIPA. In particular, we think it important that any proposed state intrusion into private communications by way of covert surveillance should be carefully scrutinised to ensure that the intrusion is necessary and proportionate.

What safeguards should apply? Would the ordinary disclosure rules need modification, and if so how? What would be the role played by the law of public interest immunity?

14. In general, we think that the existing principles of public interest immunity—and the disclosure provisions of the Criminal Procedure and Investigation Act 1996 in particular—are sufficient to protect sensitive information, including details of interception methods, from being disclosed contrary to the public interest.

15. At the same time, however, we would support the adoption of a specific provision designed to prevent interception applications (which typically contain a great deal of sensitive material concerning police investigations) from being the subject of fishing expeditions in the course of pre-trial disclosure.

16. One example of such a safeguard is section 48 of the South African Regulation of Interception and Provision of Communication-Related Information Act 2002, which provides that a certificate issued by a judge authorising an interception shall be taken as prima facie proof that the authorisation is valid for the purposes of any subsequent proceedings, civil or criminal. This would impose an evidential burden on the accused to adduce evidence sufficient to raise the validity of the authorisation as an issue.

17. Alternatively, Part 6 of the Canadian Criminal Code provides that details of any intercept authorisation are to remain sealed unless ordered by a judge for the purposes of disclosure at trial. Section 187(4) of the Code provides that a judge shall not order disclosure until the prosecutor has deleted any part of the authorisation that the prosecutor believes “would be prejudicial to the public interest”, including any material that would “compromise the identity of any confidential informant” or “endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used”. Section 187(7) allows the trial judge, on application, to make available any deleted material.

18. It is also worth noting that allowing for the admissibility of intercept material would not prevent it from being excluded from criminal proceedings on other grounds, eg because the communication was privileged,²² because its prejudicial effect outweighs its probative value,²³ or otherwise to prevent unfairness to an accused.²⁴ We note, however, that neither UK law nor the European Court on Human Rights requires the automatic exclusion of evidence obtained unlawfully.²⁵

19. In addition to the various judicial mechanisms that may be used or adopted to prevent sensitive material being disclosed contrary to the public interest, it is important to highlight a further safeguard against disclosure of sensitive material—the discretion of the Crown to discontinue proceedings against a defendant. The prospect of withdrawing charges against an accused in order to safeguard intercept capabilities may seem unsatisfactory, but it is better for prosecutors to occasionally face that dilemma than for an entire species of evidence to be barred altogether from the courtroom.

What is the relevance of recent technological developments?

20. In our October report, we noted that “communications technology is currently undergoing a period of rapid change” and that “these changes pose a serious challenge to police and intelligence services carrying out lawful interceptions”.²⁶ In our view, however, the rapid pace of change has no bearing on the admissibility of intercept evidence. As we noted in our report:²⁷

Interception itself requires legislation in order to remain lawful. Any change in communications technology that fell outside the current framework would need to be legislated for in any case.

²¹ *Lifting the ban*, n2 above, p65.

²² See eg AW Mewett and S Nakatsuru, *An Introduction to the Criminal Process in Canada* (4th edn Carswell, Toronto 2000) at 54.

²³ *R v Sang* [1980] AC 402.

²⁴ Section 78 of the Police and Criminal Evidence Act 1984.

²⁵ See eg *Chinoy v United Kingdom* [1997] 24 EHRR 523, para 51.

²⁶ *Lifting the ban*, n2 above, p30.

²⁷ *Ibid*, para 31.

21. By the same token, we noted, there is nothing in the current legal framework that stipulates the particular method of interception: so long as a given communication falls within the terms of Part I RIPA, therefore, the evidential use of intercept material would make no difference to the ability of police and intelligence services to utilise new and increasingly sophisticated means of interception.

22. Plainly, the further changes we recommend to the law governing intercepts (eg judicial interception warrants) will require drafters to have regard to the rapid pace of technological change. However, there is no shortage of successful statutory models from other common law jurisdictions.²⁸ We doubt, therefore, that the challenge of flexible drafting in this area will prove to be as great as has sometimes been claimed.

JUSTICE wishes to acknowledge the research assistance of Freshfields Bruckhaus Deringer, Bell Gully and Oxford Pro Bono Publico on the comparative use of intercept evidence in other common law jurisdictions.

Eric Metcalfe
Director of Human Rights Policy

February 2007

13. Memorandum from Liberty

INTRODUCTION

1. The Joint Committee on Human Rights (“JCHR”) recently concluded in its report, Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention that the ban on the use of intercept evidence in criminal proceedings should be removed.²⁹ The JCHR is not alone in reaching this conclusion. The Commissioner of the Metropolitan Police has stated “I have long been in favour of intercept evidence being used in court”³⁰ and Dame Stella Rimington, former director of MI5, has described the bar as “ridiculous”.³¹ The Attorney General and the Director of Public Prosecutions have also supported the lifting of the bar.³² Liberty is fully in agreement with these diverse and influential voices. We have for many years urged the Government to remove the bar on intercept evidence in order to facilitate criminal prosecutions in terrorism cases.³³ There are no fundamental human rights objections to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings.

2. It is nearly 10 years since lifting the bar on intercept evidence was first proposed by Lord Lloyd.³⁴ Last February, the Home Secretary stated that the Government was working “to find, if possible, a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence”³⁵ and promised a report on this matter later in 2006.³⁶ No such report has, to our knowledge, been published. Later last year, in response to the JCHR’s most recent recommendation on this subject, the Government explained again that it is “committed to find, if possible, a legal model that would provide the necessary safeguards to allow intercept to be used as evidence.”³⁷ It is disappointing that in all this time there have been no legislative proposals from Government to achieve the removal of the bar.³⁸

3. The JCHR has now called for evidence on ways of relaxing the current statutory prohibition on the admissibility of intercept evidence in UK courts. In particular, views are being sought on: the main practical considerations to be taken into account when devising a legal regime for the admissibility of intercept evidence; what safeguards should apply; whether and how the ordinary disclosure rules need modification; and what would be the role played by the law of public interest immunity. We hope that this inquiry will persuade the Government to make some long-overdue moves on this issue and help to identify the underlying principles that should underlie any change in law that removes the bar.

4. JUSTICE has recently published an excellent report considering this issue in detail.³⁹ In this response we do not attempt to repeat the detailed legal analysis and comparative law research undertaken by JUSTICE. Nor do we reiterate our arguments in favour of lifting the bar, which are now well-known and which we have been repeating for many years.⁴⁰ Instead, we provide an overview of the main issues which

²⁸ See eg *Lifting the ban*, n2 above, pp 49-67.

²⁹ Twenty-fourth Report 2005-06, HL 240/HC 1576.

³⁰ *Telegraph*, “Lift phone tap ban in terror trials, says new Met chief”, 6 February 2005.

³¹ *Guardian*, “Courts set to admit wiretap evidence”, 21 September 2006.

³² *Ibid* and *Guardian*, “DPP backs attorney’s call to admit phone-tap evidence in court”, 22d September 2006.

³³ Cf. *Reconciling Security and Liberty in an Open Society*, August 2004.

³⁴ Lord Lloyd, *Inquiry into Legislation against Terrorism*, 1996, Cm 3420.

³⁵ HC Deb, 2 Feb 2006, col 479.

³⁶ HC Deb, 2 Feb 2006, col 482.

³⁷ The Government Reply to the Twenty-Fourth Report from the Joint Committee on Human Rights’, September 2006.

³⁸ We do, however, note Lord Lloyd’s current private members Bill on this issue.

³⁹ *Intercept Evidence: Lifting the Ban*, October 2006.

⁴⁰ Cf *Reconciling Security and Liberty in an Open Society*, August 2004 and Submission to the JCHR, “Counter-Terrorism and Human Rights: Supplementary Call for Evidence”, February 2006.

we consider would be raised by the removal of the bar on intercept evidence and the extent to which these may be adequately addressed by existing legal protections. We are not convinced that it would be necessary to make any major overhauls to existing legal protections in, for example, the Police and Criminal Evidence Act 1984 and under the principle of Public Interest Immunity.

5. Before considering the issues that would be raised by the removal of the bar it is useful to provide a brief overview of the current legal regime. The interception of communications is permitted under the terms of the Regulation of Investigatory Powers Act 2000 (“RIPA”) in a restricted range of circumstances. In particular, the Secretary of State may issue a warrant authorising or requiring interception if this is necessary, *inter alia*: (a) in the interests of national security; or (b) for the purpose of preventing or detecting serious crime, provided that the interference is proportionate.⁴¹ Despite the fact that RIPA permits interception, Section 17 prohibits evidence, questions, assertions or disclosures for the purposes of, or in connection with, any legal proceedings that might suggest that unlawful interception of post or telecommunications has occurred or that an interception warrant has been issued.⁴² It is the removal or amendment of Section 17 which is currently in issue.

EXAGGERATED CONCERNS

6. We do not deny that the removal of the bar on intercept evidence would raise some significant issues (considered below). There are, however, a number of concerns which have been expressed in this context which are, in Liberty’s view, either incorrect or, at least, over-played. It is important to get some of these out of the way at the outset.

7. The Government has sought to argue that relaxing the bar on the admissibility of intercept would be too difficult to achieve in practice given how quickly the relevant technology changes:⁴³

“It does not make sense to change our intercept regime before we know what these changes mean for the way interception is carried out. The changeover to computer technology and the effects this will have on interception is not confined to the UK; it is something every country that uses interception will need to address. It might be possible in the future to create a legal framework that has all the checks and balances needed to ensure that material that is intercepted can be put forward as evidence in a way that is not going to damage our crime fighting capabilities and satisfy all our legal obligations. But not yet.”⁴⁴

Liberty is not convinced by this argument. It appears to look forward to an unspecified future point in time when technological advancement will have halted. This is not realistic. In any case complex and rapidly developing technology has not hampered the Government’s desire or ability to legislate in other fields, for example, legislation governing the matters such as internet gambling,⁴⁵ data protection⁴⁶ and even RIPA itself. Legislation in almost any field must be drafted in such a way as to take account of relevant developments in technology. This should not, however, prevent the bar being removed. This concern could be dealt with by ensuring that any relevant legislation is drafted in such a way as to provide flexibility for future technological changes including, if necessary, delegated powers subject to appropriate parliamentary scrutiny.

8. It has also been argued that lifting the bar on intercept evidence would damage the relationship between different organs of the state, namely intelligence agencies, the police and the CPS.⁴⁷ In a time when the importance of “joined-up Government” is so frequently stressed this argument is surprising. It may, of course, be necessary for these different bodies to agree protocols or codes of practice to ensure that they work effectively together following the lifting of the bar. One could, in fact, argue that removing the bar would remove some of the inter-agency tensions that have been created by the current legal position which must frequently frustrate the desires of the police and CPS to prosecute suspected terrorists and criminals.⁴⁸

9. A further argument against the admission of intercept evidence is that it would increase administrative burdens on the police and intelligence services which would have to spend time and resources transcribing material in case this is required to be disclosed or used at trial by the prosecution. In addition, it is argued, extra pressure would be put on prosecutors and courts dealing with requests for disclosure from defendants. We do not deny that there would be an increased burden on police, the CPS and intelligence services. Resource issues should not, however, in themselves be used as a reason

⁴¹ Section 5. There are a number of other situations in which communications may be intercepted. For example, where one party to the communication consents to the interception, the interception does not require a warrant but only a directed surveillance authorisation which may be issued by a superintendent (Section 3).

⁴² There are exceptions for proceedings for offences under RIPA 2000 and other communications legislation, and for control order, Special Immigration Appeals Commission and Proscribed Organisations Appeal Commission proceedings (ie closed proceedings).

⁴³ Cf HL Deb, 13 December 2005, col 1236 (Baroness Scotland).

⁴⁴ <http://security.homeoffice.gov.uk/ripa/interception/use-interception/use-interception-review/?version=1>

⁴⁵ Gambling Act 2006.

⁴⁶ Data Protection Act 1998.

⁴⁷ *Ibid.*

⁴⁸ Cf *Telegraph*, “Lift phone tap ban in terror trials, says new Met chief”, 6 February 2005.

for rejecting a change in the law that would allow people, currently subject to oppressive measures like control orders, to be given a fair trial and, if found guilty, to be legitimately subjected to effective punishments.

10. The concerns about additional administrative burdens have also, in Liberty's views, been overplayed. It is clearly not the case that every piece of intercept material taken would have to be transcribed.⁴⁹ Moreover, as discussed below, lifting the bar on intercept evidence may well have the effect of reducing the number of intercept warrants that are granted in the first place. If this is the case, there would be a reduction in the amount of time and resources spent on intercepting communications. The amount of material that is obtained, and through which the prosecution might be required to trawl, would also be reduced. Finally, these additional administrative challenges to the police and intelligence services are ones which have been met and overcome in virtually every other common law jurisdiction. It should not be beyond the capabilities of the UK.

PRIVACY ISSUES

11. The interception of communications clearly affects our personal privacy, protected by Article 8 of the European Convention on Human Rights (the "ECHR"). The subsequent use of intercept material would also engage Article 8. This does not, of course, mean that communications cannot be intercepted or that material obtained should not be used; the right to privacy is not absolute. Interception and the use of material obtained would not raise human rights problems provided that: (A) the interception and use of the material obtained is for a legitimate purpose; (B) is in accordance with the law; and (C) the aim could not be achieved by less intrusive means.

12. In this context a legitimate purpose would be relatively easy to establish—usually the interests of national security or the prevention or detection of crime. Indeed, RIPA already contains a limited range of circumstances in which RIPA permits the interception of communications, which broadly correspond with the legitimate reasons in Article 8. Proving guilt of a criminal offence, or disclosure to allow a defendant to receive a fair trial, would also be legitimate reasons for the interference with privacy represented by the use of material obtained from the interception of communications. Indeed, given that the primary privacy interference (the interception of communications) would already have occurred, it is very surprising that the secondary privacy interference (the use of intercept evidence in court) is not permitted. As David Ormerod points out "there is something inherently incoherent and illogical in a scheme which seeks to authorise an activity (ss.1–9), recognises that that activity must lead to material which will be relevant at trial (s.18), and yet seeks to suppress that material and even the fact of its existence (s.17)."⁵⁰

13. In this context the requirement that the interception must be carried out in accordance with the law has provided more difficulties. Two adverse judgments from the ECHR criticised the UK's lack of statutory framework regulating the interception of communications and, effectively, forced the UK Government to put in place domestic legislation, including RIPA.⁵¹ The reasons for this requirement include: protecting the rule of law by creating a legal framework to regulate the exercise of state power and to provide accountability when those laws are breached; providing objective criteria to limit the uses for which interception can occur and to ensure; and providing clear and discernable domestic legal framework to give individuals certainty about the state's powers to interfere with their privacy.⁵² As the interception of communications is a form of targeted surveillance which has serious consequences for the privacy of individuals, the law in this area must be particularly precise.⁵³ This would also apply to any law that makes intercept evidence admissible.

⁴⁹ Clearly material that is to be adduced by the prosecution would need to be transcribed. As we explain below, evidence that weakens the prosecution case or strengthens the defendant's would also need to be transcribed so that it can be disclosed to the defence. (cf *R v H* UKHL 3, para 35 per Lord Bingham).

⁵⁰ Ormerod D, "Telephone Intercepts and their Admissibility", *Crim. L. R* 2004, Jan, 15-38, 31.

⁵¹ The judgment in *Malone v UK* (1984) 7 EHRR led to the enforcement of the Communication Act 1985; the judgment in *Halford v UK* (1997) 24 EHRR 523 resulted in RIPA.

⁵² *Malone v UK*, *Ibid* : "[T]he requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which the [police] are empowered to resort to this secret and potentially dangerous [measure]."

⁵³ *Kopp v Switzerland* (1998) 27 EHRR 91. The requirement for the UK to have in place a clear and specific set of laws and regulations governing interception renders the Government's argument regarding the difficulties of legislating for the complex technology involved particularly weak; regardless of whether or not intercept evidence is to be admitted in the courts, in order not to fall short of the very minimum requirements of European law, the Government is already bound to adapt the current legal framework, ie RIPA, in the face of technological advancement.

14. The interception of communications and use of material obtained must also be “be necessary in a democratic society” if it is to comply with Article 8. In other words, any interference must be proportionate to the aim pursued. This will, in each case, involve careful consideration of a number of different factors. A central consideration is that the system has in place proper guarantees against abuse. In *Klass v Germany*, the ECHR stated:

“the Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by national law”.⁵⁴

The Court in *Malone v UK* also pointed out that interception “could only be regarded as necessary in a democratic society if the particular system of secret surveillance adopted contains adequate guarantees against abuse”.⁵⁵

15. The current legal framework does not, in our opinion, offer sufficient protection against such abuse.⁵⁶ Our main area of concern is that interception does not require prior judicial authorisation. Under RIPA interception only requires a warrant authorised by the Secretary of State. As the ECHR has stated “in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.”⁵⁷ Judicial authorisation in this context would guarantee a more detailed consideration of each request for interception warrants.⁵⁸ The potential for ill-informed, irrational and arbitrary decision-making under the current scheme for obtaining warrants would seem to be supported by comments made by the former Home Secretary Rt. Hon. David Blunkett MP:

“My whole world was collapsing around me. I was under the most horrendous pressure. I was barely sleeping, and yet I was being asked to sign government warrants in the middle of the night. My physical and emotional health had cracked”.⁵⁹

16. The requirement for judicial authorisation would also militate against an over-readiness to grant warrants which is, perhaps, inevitable when a democratically elected politician is given this responsibility. The Home Secretary would understandably be afraid of the public response were it to emerge, after a terrorist attack or serious crime, that s/he had refused to grant an interception warrant. This may well mean that intercept warrants are issued when, in fact, they represent a disproportionate interference with privacy. This would seem to be supported by the most recent published figures. According to the Interception of Communications Commissioner, in 2004 the Home Secretary issued 1,849 warrants and a further 674 warrants continued in force from previous years. The report published by JUSTICE explains that this is higher than the number of judicial intercept warrants issued for the whole of the United States.⁶⁰

17. We fear that the Government’s reluctance to allow the use of intercept material in criminal prosecutions may, to some extent, result from concerns about the additional judicial and public scrutiny this would facilitate. The extent of communications interception in the United Kingdom would be likely to come to the public’s attention if intercept material were used in high-profile criminal cases. While those who are involved in terrorism or serious organised crime are themselves likely to be aware of this fact, the general public may not. The Government might legitimately fear a major public reaction about the extent to which invasive interception techniques are being used. This is not, however, a legitimate reason to prevent the use of intercept material in criminal courts. It would be no bad thing if greater caution were exercised in the granting of intercept warrants. Lifting the bar on intercept evidence could indirectly have a positive impact on personal privacy.

FAIR TRIAL IMPLICATIONS

18. There is no doubt that removing the bar on intercept evidence would raise fair trial issues. Foremost among these is the fact that this could make a fair trial possible in a number of cases where, at present, people are instead subject to draconian executive measures like control orders. Liberty’s views on such measures are well known. We believe they undermine fundamental democratic values: the rule of law, the presumption of innocence and the right to a fair trial. We have also expressed our fears about the dangerous counter-productivity of repression and injustice, the unintended consequences of over-broad and repressive measures such as the Belmarsh detention regime. The Government has itself stated its preference for prosecuting international terrorists—criminal prosecutions are undoubtedly both fairer and more effective

⁵⁴ [1978] ECHR 4, para 50.

⁵⁵ *Malone v UK* (1984) 7 EHRR, para 81.

⁵⁶ For example, *Klass v Germany*[1978] ECHR 4; *Kopp v Switzerland* (1998) 27 EHRR 91.

⁵⁷ *Klass v Germany*[1978] ECHR 4, para 56. See also *Rotaru v Romania*, App. No. 28341/95, Judgement of 4 May 2000, GC.

⁵⁸ The Government argued that authorising interception involves particularly sensitive decisions that are properly a matter for the executive, and that judges cannot reasonably be expected to make decisions on what is or is not in the interests of national security. Liberty rejects this argument.

⁵⁹ <http://politics.guardian.co.uk/blunkett/story/0,,1889881,00.html>

⁶⁰ JUSTICE, *Intercept Evidence: Lifting the Ban*, October 2006, para 3.

than control orders. Nevertheless, the Government has argued that continued recourse to executive restrictions on freedom is necessary because it is not always possible to prosecute those suspected of involvement in terrorism.

19. Back in 2003, the Newton Committee concluded that lifting the blanket ban on the use of intercepted communications in court would be “one way of making it possible to prosecute in more cases”.⁶¹ It proposed the removal of the bar as a “more acceptable and sustainable” approach to the threat from terrorism than executive powers to restrict liberty which evade the criminal justice process.⁶² Since then a number of other influential bodies have identified the removal of the bar on intercept evidence as a change to the criminal justice system that could facilitate criminal prosecution in the terrorism context instead of continued recourse to measures like control orders.⁶³ The Government has itself argued that one of the reasons why it may not be possible to prosecute those suspected of involvement in international terrorism is the fact that the evidence on which the suspicion is based would be inadmissible in court.⁶⁴ All of this points to the fact that removal of the bar on intercept evidence would overcome one of the primary obstacles to bringing proper criminal proceedings against terrorist suspects.

20. Article 6 of the ECHR, as protected in UK law by the HRA, would, of course, apply in respect of a criminal prosecution in which intercept evidence is adduced. It is, however, important to clarify that the admission of intercept evidence in a criminal trial would not, in itself, have any negative bearing on the fairness of a trial. Indeed, as the House of Lords pointed out in *R v. P* the more relevant evidence which is presented before the court the more fair the trial is likely to be and the more likely it will be that the jury reaches the right decision. It is the Government’s desire to maintain secrecy, not fair trial principles, that are the reason for the bar on intercept evidence in legal proceedings:

“In this country it is, in the judgment of the Government, the necessity to have a fully effective interception system which creates the necessity for secrecy and consequently the need to keep the evidence of it out of the public domain. But where secrecy is not required, the necessity is that all relevant and probative evidence be available to assist in the apprehension and conviction of criminals and to ensure that their trial is fair. The latter necessity exists in both cases but in the former case it is trumped by the greater necessity for secrecy.”⁶⁵

While some evidence should never be used in legal proceedings, ie evidence obtained by torture, there are no fundamental human rights objection to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings.

21. The European Court of Human Rights has considered the Article 6 (Fair Trial) implications of the use of intercept evidence in a small number of cases.⁶⁶ These have, however, generally involved the use of intercept evidence that was unlawfully obtained. This would not, of course, be the case in the UK if the bar were lifted.⁶⁷ In the most important of those cases, *Schenk v. Switzerland* the Court relied on the following factors when reaching its decision that the use of intercept evidence in a criminal prosecution did not violate Article 6: the fact that the intercept evidence was not the only evidence relied on; and that fact that the other party to the intercepted communication had given evidence at the trial. As pointed out above, the Court also noted that, provided that the overall trial was fair, decisions about the admissibility of evidence was within the margin of appreciation of the state.⁶⁸

22. Even in the unlikely event that the admission of a certain piece of intercept evidence could prejudice a defendant’s right to a fair trial we consider that this would be addressed by the existing rules of criminal evidence. In particular, section 78 of the Police and Criminal Evidence Act (“PACE”) gives the court the discretion to exclude evidence if “having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission . . . would have such an adverse effect on the fairness of proceedings that the court ought not to admit it”.⁶⁹ The exercise of the courts’ discretion under section 78 requires the court to have regard to the circumstances in which the evidence was obtained.⁷⁰

23. It is, however, defendants’ fair trial rights which indirectly give rise to the Government’s concerns that lifting the bar on intercept would make it difficult or impossible to maintain secrecy (see below). The elements of a fair criminal trial that are most relevant from this perspective include:

⁶¹ Privy Counsellor Review Committee: “Anti-terrorism, Crime and Security Act Review: Report”, 18 December 2003, para 208.

⁶² *Ibid*, paras 208-215. See also Lord Lloyd, *Inquiry into Legislation against Terrorism*, 1996, Cm 3420; Lord Carlile’s evidence to the Home Affairs Select Committee (Minutes of Evidence 11 March 2003).

⁶³ Cf “First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 2 February 2006, para 37.

⁶⁴ Newton Committee Report, para 207.

⁶⁵ *R v. P and Others*, [2000] All ER (D) 2260.

⁶⁶ Cf *Schenk v Switzerland* (App. No. 10862/84) and *Chinoy v. United Kingdom* (App. No. 15199/89).

⁶⁷ To some extent the use of unlawful intercept evidence considered by the Strasbourg institutions raises more difficult fair trial issues given that some legal systems conflate the two questions of the lawfulness of evidence-gathering and the fairness of a trial (cf. *Mapp v. Ohio* 367 U.S. 643 (1961)).

⁶⁸ *Schenk v Switzerland* (App. No. 10862/84), paras 45 to 48.

⁶⁹ There is a further common law power to exclude though this is rarely used.

⁷⁰ *R v. P and Others*, [2000] All ER (D) 2260.

- The requirement to disclose prosecution evidence to the defendant so that s/he is able to plan his/her defence and to challenge the prosecution evidence by, for example, providing an alternative explanation or alibi. The European Court on Human Rights has stated that “the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.”⁷¹
- The disclosure requirement also covers evidence “which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.”⁷² This recognizes the greater information-gathering capacity of the state vis-à-vis the individual. It also derives from the important principle that the prosecutor plays a “minister of justice”, with some responsibility for the interests of the defendant, and is the trustee of all evidence in its possession, including exculpatory evidence.⁷³ This would mean that, if the bar were lifted, the state may be required to disclose intercept material to the defence even if it were not itself planning on adducing such evidence.
- The requirement that the defence can test the reliability of the evidence, including by questioning the reliability of any technology used and cross-examining those involved in gathering intercept material.⁷⁴ In *Schenk* the European Court of Human Rights explained that the following factors were important in reaching its decision that Schenk’s trial had not been rendered unfair by the admission of unlawfully obtained intercept material: the fact that the defendant “had the opportunity—which he took—of challenging [the intercept evidence’s] authenticity and opposing its use”;⁷⁵ the fact that the defendant was able to examine the other party to the intercepted communication; and the fact that the defence “did not summon Inspector Messerli to appear, although he was in charge of the investigation” suggesting that this would have been possible.⁷⁶

24. There may be cases where it would be impossible to maintain the secrecy that the public interest requires while also meeting these requirements of a fair trial. In some of these cases it may be possible to ensure, by other special means, that the defendant’s interests are protected and that s/he receives a fair trial. This would not, however, require a change in the law. It is already being done by the UK courts in cases involving other types of sensitive or secret evidence. In *R v. H*, for example, the House of Lords described one of the questions a court should ask when considering whether disclosure of sensitive or secret evidence is necessary to guarantee the defence a fair trial:

“[C]an the defendant’s interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?”

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge . . .⁷⁷

There will be cases where the public interest in maintaining secrecy cannot be reconciled with a defendant’s fair trial rights. In such cases, the prosecution would be required to choose between disclosing the relevant evidence or, more likely, discontinuing the proceedings.

SECURITY CONCERNS

25. The most substantial argument advanced by the Government against lifting the bar on intercept evidence is the concern that this would jeopardise security services sources and methods. It has argued that this would, accordingly, jeopardise the ability of the state to protect national security, to detect and investigate future criminal activity.

“There is also a real risk that if the sensitive capabilities and techniques used to gather the information are revealed: criminals will be able to avoid interception by changing how they communicate; we would lose the close intelligence co-operation between agencies that has delivered impressive results in the UK; this would undermine UK agencies’ ability to fight crime as effectively as they might”⁷⁸

As Peter Mirfield has pointed out the goal of RIPA is apparently to “shroud in secrecy many of the workings of the process of investigation”.⁷⁹

⁷¹ *Edwards v. UK*, (1992) 15 E.H.R.R. 417.

⁷² Section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003.

⁷³ Cf *H and C* [2004] 2 W.L.R. 335, para 13.

⁷⁴ Cf Article 6(3)(d) of the ECHR.

⁷⁵ *Schenk v Switzerland* (App. No. 10862/84), paras 47.

⁷⁶ *Ibid.*

⁷⁷ [2003] EWCA Crim 2847, para 36, per Lord Bingham.

⁷⁸ <http://security.homeoffice.gov.uk/ripa/interception/use-interception/use-interception-review/>

⁷⁹ P Mirfield, “Regulation of Investigatory Powers Act 2000: Part 2: Evidential Aspects” (2001) *Criminal Law Review* 91.

26. In our opinion, the significance of even this argument has been exaggerated:

- The Government’s position is inconsistent. Foreign intercepts can be used if obtained in accordance with foreign laws.⁸⁰ Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping may also be admissible even if they were not authorised and if they interfere with privacy rights. It is difficult to see how this already admissible covert intelligence raises different secrecy concerns to intercept evidence which is not currently admissible.
- The Government’s claim that those involved in serious crime or terrorism are not already well aware of the interception methods employed is naïve, to say the least. The international nature of much serious crime and terrorism and the use of intercept evidence in other jurisdictions mean that criminals and terrorist are highly likely to be fully aware of the tools of their adversaries; relying on disclosure of methods in the UK courts would be a most inefficient method for to learn the latest tricks of the Government. There is no reason to suppose that criminals in the UK are so cut off from the rest of the world so as to render this their only source of intelligence.
- Even if the bar were lifted, the prosecution would have the choice about whether or not to adduce intercept material. Therefore, where there was a significant concern about compromising secrecy the prosecution could choose not to rely on intercept material.
- It must, however, be possible to overcome these legitimate concerns. Indeed, as far as we are aware, the approach taken by the UK is an anomaly.⁸¹ The JUSTICE report explains that, worldwide, only the UK and Hong Kong maintain a ban on the use of such evidence.⁸² The comparative law research undertaken for the report clearly demonstrates that “the UK is the only country in the common law world that prohibits completely the use of intercepted communications as evidence in criminal proceedings”.⁸³ Problems raised by the admissibility of intercept evidence cannot, therefore, be insurmountable—if these other countries can manage it there is no reason why it should be beyond the UK criminal justice system.

27. We do accept that there will be some cases where the admission of intercept material in criminal trials could compromise the Government’s legitimate desire to maintain secrecy. We are not, however, convinced that such concerns could not be met by existing laws. If there are concerns over protecting a state’s sources then clearly established rules of public interest immunity allow disclosure to be withheld from the defence and the public. The court is prohibited from disclosing any material that it concludes is not in the public interest under section 3(6) of the Criminal Procedure and Investigations Act 1996. In addition, there is detailed guidance on the procedures by which the prosecution may apply to the court to prevent the disclosure of sensitive material.⁸⁴ Security sensitive legal proceedings are nothing new in the UK. The existing laws, designed to guarantee secrecy are regularly used in, for example, “supergrass trials” and other criminal trials where disclosure of the details of an under-cover operation would compromise continuing operations or individual officers who were involved.

Jago Russell
Barbara Davidson

February 2007

14. Memorandum from the Northern Ireland Human Rights Commission

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,⁸⁵ advising on legislative and other measures which ought to be taken to protect human rights,⁸⁶ advising on whether a Bill is compatible with human rights⁸⁷ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁸⁸ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding “soft law” standards developed by the human rights bodies.

⁸⁰ Cf *R v. P and Others*, [2000] All ER (D) 2260.

⁸¹ Cf JUSTICE, *Intercept Evidence: Lifting the Ban*, October 2006.

⁸² Newton Committee Report, para 211.

⁸³ *Ibid.*, Executive Summary.

⁸⁴ Cf Code of Practice under Part 2 of the Criminal Procedure and Investigations Act 1996; the Attorney General’s guidelines on the disclosure of information in criminal proceedings, and the Joint Operational Instructions for the Disclosure of Unused Material.

⁸⁵ Northern Ireland Act 1998, s.69(1).

⁸⁶ *Ibid.*, s.69(3).

⁸⁷ *Ibid.*, s.69(4).

⁸⁸ *Ibid.*, s.69(6).

2. The Commission welcomes this opportunity to submit evidence to the Inquiry of the Joint Committee on Human Rights (JCHR) on “Relaxing the Ban on the Admissibility of Intercept Evidence”. The JCHR may be aware that the Commission has commented extensively on the provision of anti-terrorist legislation in the UK and therefore the use of intercept evidence in cases involving suspected terrorists is of particular interest to this Commission.

3. The Commission has stated elsewhere⁸⁹ that it would be appropriate for the UK government to relax the present ban on the admissibility of intercept evidence in proceedings relating specifically to cases involving suspected terrorists. What follows then is the Commission’s view in relation to terrorist cases and not serious crimes, which the Commission believes are more suitably dealt with as a separate issue.

4. This is because while the Commission recognises that relaxing this ban engages the right to a fair trial and the right to privacy enshrined in Articles 6 and 8 of the ECHR it has supported the relaxation on the basis that one of the justifications for the unacceptably lengthy periods (currently 28 days) that terrorist suspects can be held without charge, has been the difficulty of obtaining sufficient admissible evidence to prosecute in the criminal courts.

5. The Commission is therefore of the view that a relaxation of the ban should be followed immediately by a revision of current exceptional counter-terrorism measures that impact seriously on individuals’ rights to liberty under Article 5 of the ECHR.

6. The Commission is aware that Government has to date resisted the call to relax the ban on the admissibility of intercept evidence and has done so on a number of grounds ranging from, for example, the sheer administrative burden that would be placed on the police and intelligence services in transcribing and retaining intercept material that will be used at trial, to concerns about intercept evidence harming relationships between the police and intelligence services.

7. For this Commission however, the safeguards to be put in place when devising a legal regime for relaxing the ban ought to be primarily concerned with the possible impact on Government’s duties under Articles 6 and 8 of the ECHR.

8. In making evidence obtained by intercept admissible, full regard must be made to the requirement under Article 6 of the ECHR to ensure a fair trial for the defendant and equality of arms between the prosecution and the defence. Indeed, the nature of intercept evidence is such that the way in which it has been obtained may amount to constituting procedural irregularities in the trial process. The requirements of Article 6 also involve the right of the defence to challenge prosecution evidence and therefore, potentially, the right of access to all the evidence that is to be put before the court.

9. Currently, Section 78 of the Police and Criminal Evidence Act (PACE) gives the court the discretion to exclude evidence if “having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission . . . would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

10. The Commission believes that the experience in Northern Ireland, where the system of non-jury trials for scheduled offences has meant that judges have been essentially combining the roles of both judge and jury, may also be of interest. In Northern Ireland procedures have been developed to protect judges from becoming aware of prejudicial material that would not have been admissible in a jury trial. This has involved a different judge dealing with the admissibility of evidence to ensure that the trial judge does not see material of this kind. A similar approach could be used and would be appropriate in executing Section 78 of PACE even in jury trials. This would act as an additional safeguard in terms of ensuring the fairness of the proceedings.

11. PACE potentially protects the defendant from intercept evidence being presented that could harm his/her case. It does not however, give the defence the right of access to all the material that is to be presented in court proceedings.

12. The use of intercept material as evidence and the requirements of Article 6 raise the very precarious issue about how a sufficient level of access can be achieved without revealing sensitive material, without exposing too much about the methods of intercept used by the relevant agencies and their sources and without interfering unduly in surveillance or undercover operations that are considered necessary for the effective prevention of terrorist activity. One of the concerns around relaxing the ban on the use of intercept evidence is that if it were to be admissible in court proceedings it would alert terrorists to the types of methods used by the relevant agencies and equip them better to elude such surveillance.⁹⁰

13. The law of public interest immunity could be one way of resolving the competing needs expressed above. Public interest immunity has the potential to play two roles in cases involving intercept material being presented as evidence in court proceedings. First, public interest immunity, along with its current use in relation to sensitive material, could also be used where there is a risk that the disclosure of certain evidence would reveal too much about interception methods and capabilities.

⁸⁹ The Commission made this point in its Parliamentary briefing on the Anti-Terrorism, Crime and Security Act 2001 and then again in its report “Countering Terrorism and Protecting Human Rights”.

⁹⁰ Newton Committee Report, para 211.

14. However, the second and potentially harmful role that the law on public interest immunity could play is that it could be used to cover up mal-practice and wrong doing by the police and intelligence services particularly in relation to how evidence has been gathered in the first place.

15. The use of the law of public interest immunity to protect surveillance methods then must come with appropriate safeguards for the defendant.

16. The Commission has also referred elsewhere to relevant case-law of the European Court of Human Rights undertaken by the House of Lords in *R v H*.⁹¹ That particular case has made clear that limits, within reason, on the disclosure of sensitive evidence in the interests of national security are acceptable. The same case also confirms that disclosure is required only in relation to material that will be helpful to the defendants and therefore that the full range of evidence relating to their guilt does not need to be disclosed.

17. The very real concern of course is how and by whom the decision is made on the nature of the evidence and its actual risk to national security and/or potential benefits to the defence.

18. In Northern Ireland, a similar approach to that involving prejudicial material cited above, has also been taken for reviews of decisions by the prosecution not to disclose sensitive or irrelevant material to the defence and for requests by the defence for disclosure of what may be relevant. In the case of *R v Harper*⁹² in the Court of Appeal in Northern Ireland in which the defence sought the disclosure of an intelligence file it was suggested that “another judge should rule on issue of materiality or of public interest immunity and, if necessary, the trial judge will have to adjourn the hearing until the other judge has given his ruling”.⁹³

19. Taking from the Northern Ireland experience, provisions could be made in any legislation relaxing the ban on the admissibility of intercept evidence for a review by an independent judge of the security file in order to establish what material is relevant to the defence. It would appear that such approaches could be a solution to both meeting the requirement of Article 6 of the ECHR and to the concern of the security authorities over the disclosure of evidence to the defence in a terrorist case of the full extent of their intercept information and methods. A separate judge dealing with issues of admissibility would ensure that the trial judge is not aware of any material that would compromise the defendant’s right to a fair trial.

20. The Commission therefore repeats a previous recommendation that provision “should be made to permit the admission in evidence on telephone taps and other intercept evidence, subject to formal procedure by which the relevant intelligence material of this kind to the conduct of the defence in terrorist cases can be decided at a separate judicial hearing at which the defence would be represented by special counsel”. The Commission however, stresses the importance of making such a system of special advocates as transparent and accountable as possible in which the interests of the defendant are truly represented by special counsel.

21. In addition to the need to safeguard an individual’s right to a fair trial any relaxation of the current ban must have due regard for Article 8 of the ECHR. Article 8 (2) states that: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. Article 8 then requires a statutory framework for regulating the use of intercept as a means for gathering evidence and presenting in criminal proceedings and one that is open to challenge in the courts.

22. The Council of Europe Guidelines on Human rights and the Fight against Terrorism state: “measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and the use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court”.⁹⁴

23. On this requirement, Government has expressed concern that given the rapidly changing nature of technology, any legal framework permitting its use would be relatively redundant within a short space of time. The legal framework, it has been claimed, would also limit the ability then of the police and intelligence services to intercept new types of communication. Baroness Scotland has previously said in Parliament: “It does not make sense to change our system just as technology is changing and before we know what that means for how intelligence is regulated and deployed in future . . . Terms such as ‘wiretrap evidence’ will soon be as redundant as talk of telephone operators and switchboards is today”.⁹⁵

24. While, as already stated Article 8 does require a legal framework for dealing with intercept, that framework to some extent already exists under Part 1 of the Regulation of Investigatory Powers Act 2000 (RIPA). Although Part 1 of RIPA does not allow for evidence resulting from interception to be admitted in criminal proceedings it does permit the interception of communications. The Government then will have to confront the changing nature of communication technology in any case. The Commission’s view is that any developments in communications technology that fall outside the legal framework existing at the time can be legislated for through amendment. The UK and the Republic of Ireland are the only countries worldwide that currently maintain the ban on the admissibility of intercept evidence and moreover the UK

⁹¹ [2004] 2 WLR 335.

⁹² *R v Harper* [1994] NI 199.

⁹³ *R v Harper* [1994] NI 199.

⁹⁴ Guideline V1 (1).

⁹⁵ Hansard, HL, Debates, 13 December 2005, col 1239.

allows for foreign intercepts to be used provided they are obtained in accordance with foreign laws. The UK therefore will not be alone in having to confront, through legislation, the changing nature of communications technologies. If the alternative is depriving people of their liberty without due process, Government should certainly be willing to rise to the legislative challenge posed by rapidly changing methods of communication.

25. The Commission's endorsement of relaxing the ban on the admissibility of evidence obtained through intercept must be read with the provisos stipulated above. It of course recognises the duty of the UK Government to protect those within its jurisdiction from terrorist activity and is of course acutely aware of the damage to all areas of life that terrorist activities bring. However, while the primary concern of Government must be to protect the very fundamental right to life it cannot and does not need to pursue this aim on the basis that the ends justify the means.

26. The Commission refers to the Preamble of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism: "Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law".

February 2007

15. Letter from the Attorney General's Office

At the evidence session on Counter-terrorism policy and human rights on 26 June 2007 the then Attorney General, the Rt Hon Lord Goldsmith QC, agreed to let the Joint Committee on Human Rights have a note setting out when he came to know about the problems that had arisen in the detention of Mr Baha Mousa and the others and whether he had seen a report of the International Committee of the Red Cross (ICRC) dated February 2004, and if so when. I am writing, with the consent of Lord Goldsmith, to provide that information.

Lord Goldsmith first became aware of allegations of mistreatment of detainees and the death of Mr Mousa from a newspaper report on 4 January 2004. Having seen the report he requested a report from the Army Prosecuting Authority which was provided to him on 13 January 2004. This was all before the ICRC report, which was dated February 2004 and which Lord Goldsmith saw on 13 May 2004. So his first knowledge of problems in relation to the detention was, as he recalled, from the APA and not the ICRC report.

17 July 2007

16. Letter from Martin Chamberlain

THE USE OF SPECIAL ADVOCATES IN CLOSED PROCEEDINGS

Judith Farbey, Nicholas Blake QC, Andrew Nicol QC, and I have agreed to appear as witnesses at a public session of the Joint Committee on Human Rights to answer questions on the use of Special Advocates in closed proceedings. Between the four of us, we have experience of having acted as Special Advocates before the Special Immigration Appeals Commission ("SIAC") (both in deportation proceedings and in proceedings challenging detention under the Anti-Terrorism, Crime and Security Act 2001), the Administrative Court (in control order proceedings under the Prevention of Terrorism Act 2005), the Proscribed Organisations Appeals Commission ("POAC") and the Parole Board.

I am writing on behalf of all the Special Advocates who have agreed to give evidence to outline some concerns about the scope of the questions that we might be asked. I have discussed this at some length with the Committee's Legal Advisor, Murray Hunt. He suggested that I record our concerns in writing.

Because we continue to act as Special Advocates, we remain subject to relevant professional obligations. Those obligations are:

1. As barristers, we are required to comply with the Bar Code of Conduct §709.1 of which provides:

"A barrister must not in relation to any anticipated or current proceedings in which he is briefed or expects to appear to have appeared as an advocate express a personal opinion to the press or other media or in any other public statement upon the facts or issues arising in the proceedings".
2. As Special Advocates, we are under an additional obligation (including in relation to cases which are no longer current and subject only to immaterial exceptions) not to "communicate with any person about any matter connected with the proceedings": see r.36 of the SIAC (Procedure) Rules 2003 ("the Rules").
3. Having been appointed under s.6 of the SIAC Act to "represent the interests of the appellant", we should not do or say anything which could prejudice those interests.

We do not think that any of these provisions was intended to, or does, prevent us from answering questions of a general nature based on our experience of the way in which closed proceedings work. Similarly, we do not consider ourselves precluded from answering general questions about the way in which the role of the special advocate differs from that of advocates in other proceedings, or about the limitations on what a special advocate can, in practice, achieve for the person whose interests he represents.

However, we would not be able, consistently with the obligations set out above, to answer questions about:

- (a) the facts and issues in the individual cases in which we were involved or the decisions we took in those cases;
- (b) certain aspects of the closed procedure where disclosure would be contrary to the public interest within the meaning of r.4(1) of the Rules; or
- (c) any legal issues the subject of litigation in which we are currently instructed or on which our expressing views could tend to injure the interests of those whose interests we represent.

I would be grateful for an indication that these concerns will be communicated to the Committee.

2 March 2007

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