



House of Lords
House of Commons
Joint Committee on
Human Rights

**Counter-Terrorism Policy
and Human Rights
(Eighth Report):
Counter-Terrorism Bill**

Ninth Report of Session 2007–08

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

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Joint Committee on Human Rights

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Summary

The Committee reports on the Government's Counter-Terrorism Bill before its Second Reading in the Commons and concentrates on five significant human rights issues needing thorough parliamentary scrutiny: pre-charge detention; post-charge questioning; control orders and special advocates; the threshold test for charging; and the admissibility of intercept. The Committee will report again on the detail of the Bill and is likely to comment on a number of other significant human rights issues raised by the Bill. Meanwhile it draws to the attention of both Houses a new measure about coroners' inquests involving material affecting national security. In the Committee's preliminary view it has the most serious implications for the UK's ability to comply with the obligation in Article 2 of the ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force (paragraphs 1-9).

In its Report of December 2007 on the Government's outline proposal to extend the period of pre-charge detention from 28 to 42 days, the Committee concluded that the Government had not made a compelling, evidence-based case for the change. This Bill's provisions on pre-charge detention are substantially the same as that proposal. The Committee welcomes provisions for limits on the scope of statements to Parliament about extended detention but still doubts that parliamentary safeguards would be meaningful. The Committee reaffirms the analysis in its previous Report and emphasises that, in its view, the Government's proposals for pre-charge detention are not compatible with the right to liberty in Article 5 ECHR. In particular, it considers that the proposals are in breach of the right of a detained person to be informed "promptly" of any charge against him; are an unnecessary and disproportionate means of achieving the aim of protecting the public; and fail to provide sufficient guarantees against arbitrariness. As such they are incompatible with Articles 5(1), 5(2), 5(3) and 5(4) ECHR. (paragraphs 10-21).

The Bill provides for a new power of post-charge questioning. The Committee and others have already expressed support for such a power, subject to safeguards, although concerns have also been voiced by some. The Committee recommends amendments on the face of the Bill to include important safeguards against the power being used oppressively (paragraphs 22-38).

The Bill contains detailed amendments to the control orders regime, some of which are in the Committee's view beneficial from a human rights perspective. But they do not address its most controversial aspects, including the fairness of control order proceedings. In the Committee's view it would have been more consistent with the democratic scheme of the Human Rights Act if in the *MB* case the House of Lords had made a declaration of incompatibility under the Human Rights Act. The Committee believes that Parliament should consider again what a "fair hearing" requires in this context and recommends amendments to the control order regime to make hearings fair (paragraphs 39-73).

The Committee continues to welcome the use of the “threshold test” for charging in terrorist cases but has concerns about the lack of parliamentary scrutiny of the introduction of the measure and the lack of independent safeguards. It recommends amendments including putting the threshold test on an express statutory footing and introducing some independent safeguards (paragraphs 74-85).

The Committee is disappointed by the limited scope of provisions to extend exceptions to the statutory prohibition on the admissibility of intercept evidence. In the Committee’s view it is essential that the Chilcot review should report in time to enable any proposal to relax the ban in terrorism prosecutions to be brought forward as part of this Bill. It calls on the Government to publish the product of its review of this question, including the “public interest immunity plus model” (paragraphs 86-89).

1 Introduction

1. The purpose of this report is to identify, in advance of the Second Reading in the Commons of the Government's Counter-Terrorism Bill,¹ some of the most significant human rights issues raised by the Government's proposals, and to indicate some of what we consider to be the most important debates which should take place in Parliament during the passage of the Bill.

2. In our view the five most significant human rights issues which are in need of thoroughgoing parliamentary scrutiny and debate are:

- (1) Pre-charge detention
- (2) Post-charge questioning
- (3) Control orders and special advocates
- (4) The threshold test for charging
- (5) The admissibility of intercept.

3. This Report concentrates on those five issues, with a view to framing the debate on the Bill. We will report again on the detailed provisions of the Bill when we have had an opportunity to carry out careful scrutiny of its clauses. We are grateful to the Government for affording us the opportunity to ask questions about draft clauses covering many (though not all) of the topics in the Bill. We have corresponded with the Home Office in relation to a number of subjects and anticipate that we will wish to comment on a number of those issues in any future scrutiny report, including:

- The disclosure and use of information by the intelligence services
- The retention and use of DNA samples
- Notification requirements
- The need for legal certainty in the definition of terrorism

4. The Bill also contains a number of measures which were not mentioned in the Government's consultation documents published in July 2007, for example:

- provisions concerning coroners' inquests involving material affecting national security
- provisions relating to the use of closed source material in terrorist asset freezing cases.²

5. These raise significant human rights issues, but, because of their late introduction, we have not yet had the opportunity to question the Government about them. We are particularly concerned about the insertion into the Bill at this late stage, without any prior consultation, of the measures concerning coroners' inquests. The Bill provides for the

¹ HC Bill 63, introduced in the House of Commons on 24 January 2008.

² Letter from the Home Secretary to the Rt Hon David Davis MP, 10 December 2007, Appendix 1.

Secretary of State herself to appoint a “specially appointed coroner” and to require the inquest to be conducted without a jury where, in her opinion, the inquest will involve the consideration of material that should not be made public in the interests of national security, in the interests of the relationship between the UK and another country, or otherwise in the public interest.³ We are disappointed to note that the Explanatory Notes to the Bill contain no analysis of the human rights implications of these provisions. A letter from the Home Secretary dated 21 January 2008, however, claims that “the proposed changes are necessary in order to ensure that we are able to comply with our Article 2 obligations while protecting the integrity of the material in question.”⁴

6. On first inspection we find this an astonishing provision with the most serious implications for the UK’s ability to comply with the positive obligation in Article 2 ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents.

7. It is well established in both ECHR and UK case law that Article 2 requires, for example, that the person carrying out the investigation must be independent from those implicated in the events, there must be a sufficient element of public scrutiny to secure accountability in practice as well as theory, and the investigation must involve the next of kin of the deceased to the extent necessary to protect their legitimate interests.⁵ We are alarmed at the prospect that under these provisions inquests into the death of Jean Charles de Menezes, or British servicemen killed by US forces in Iraq, could be held by a coroner appointed by the Secretary of State, sitting without a jury.

8. We will be writing to the Home Secretary about the compatibility of these provisions with the UK’s obligations to investigate deaths in Article 2 ECHR and will be reporting to Parliament in due course. **We think that the significance of the provision in the Bill concerning coroners’ inquests warrants it being drawn to the attention of both Houses at the earliest possible stage.**

9. In the meantime, we confine ourselves in this Report to the issues identified in paragraph 2 above. **As always, we ground our analysis in the human rights standards with which the Government’s counter-terrorism measures must be compatible, and we proceed from a full recognition that the Government has a duty to protect people from terrorism, a duty imposed by human rights law itself.**

³ Clauses 64 and 65 of the Bill, amending the Coroners Act 1988.

⁴ Letter from the Home Secretary to the Rt Hon David Davis MP, 21 January 2008, Appendix 2.

⁵ See e.g. *Jordan v UK* (2003) 37 EHRR 52; *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169.

2 Pre-charge detention

Background

10. We reported in December on the human rights compatibility of the Government's outline proposal to extend the period of pre-charge detention from 28 to 42 days.⁶ **We concluded that the Government had not made a compelling, evidence-based case for extending pre-charge detention beyond the current limit of 28 days** because:

- i) we could find no clear evidence of likely need in the near future, and considered the evidence of the Director of Public Prosecutions and the Head of the CPS's Counter Terrorism Division, that the CPS had managed comfortably so far with a 28 day limit, to be devastating to the Government's argument that there was a demonstrable risk that the present limit is inadequate;
- ii) alternatives to extension, such as the threshold test and broad offences like acts preparatory to terrorism, and possible future developments such as post-charge questioning and the admissibility of intercept, do enough, in combination, to protect the public and are much more proportionate;
- iii) there are no additional judicial safeguards accompanying the new power; and the existing judicial safeguards are inadequate because they do not provide a proper opportunity, at a truly judicial hearing at which the parties are on equal terms, to challenge the reasonableness of the suspicion on the basis of which they are detained;
- iv) the proposed parliamentary safeguards are virtually worthless because the risk of prejudicing the fair trial of suspects is likely to prevent Parliament from considering the justification for the exercise of the power in specific, ongoing cases, and because Parliament is only likely to consider the matter after the suspects have already been detained for the full 42 days.

11. To date, we have received no reply to our report from the Government.

12. The Bill gives effect to the Government's outline proposals by introducing a "reserve power" to extend further the maximum period of pre-charge detention.⁷ **The detailed provisions in the Bill are substantially the same as the proposals we considered in our report in December** and we therefore refer back to our analysis in that report rather than repeat it here.⁸ Most of the detail in the Schedule to the Bill concerns the parliamentary safeguards. The Bill acknowledges the danger of reports to and debates in Parliament prejudicing the future trial of individuals who are detained at the time of the extension, by expressly providing that the Home Secretary's statements to Parliament about the need for an extension of the limit and about actual extensions beyond 28 days must not include the

⁶ Second Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights: 42 days*, HL Paper 23/HC 156 (hereafter "Report on 42 days").

⁷ Clause 22 and Schedule 1.

⁸ JCHR Report on 42 days, above. The Government's outline proposals are summarised at paras 13-23 of that Report. Our assessment of the human rights compatibility of those proposals is set out at paras 24-101 of that Report.

name of any person currently detained or any material that might prejudice the prosecution of any person.⁹

13. These limits on the scope of the Home Secretary's statements are a welcome recognition of the danger of prejudicing future trials, but only serve to demonstrate the very limited extent to which Parliament will be able to provide any meaningful safeguard against the wrongful exercise of the power. It also remains the case that the order by which the Secretary of State can make the reserve power available is a wholly executive order which is not subject to any parliamentary procedure,¹⁰ and by the time Parliament expresses a view on whether the reserve power should be made available it is likely that the full 42 day period will have expired.

Compatibility with the right to liberty

14. The Explanatory Notes to the Bill state that the Secretary of State considers that the provisions in the Bill for extending pre-charge detention of terrorist suspects to 42 days are compatible with the right to liberty in Article 5 ECHR.¹¹ They point out that there is no specific European Court of Human Rights jurisprudence on the length of time that a person can be detained before he is charged, but accept that detention under Article 5 must not be arbitrary and must be proportionate to the attainment of its purpose.

15. The Notes state that detention for up to 42 days is not arbitrary in light of the following safeguards:

- i) the 42 day limit will only be available when the Home Secretary is satisfied that there is an operational need for it, a judgment which she can only make if she has received a report from both the DPP and the police that this is their view, and which she is required to report to Parliament;
- ii) the 42 day limit will only remain in force for 60 days, and then only if Parliament has positively approved its continuance in force within 30 days;
- iii) extensions of pre-charge detention must be authorised by a High Court judge at least every 7 days and applications for extensions beyond 28 days require the consent of the DPP;
- iv) extensions of detention up to 42 days can only be made if the existing grounds for extension¹² are made out, namely if the judge is satisfied that there are reasonable grounds for believing that further detention is necessary to obtain or preserve relevant evidence or pending the outcome of an examination or analysis of relevant evidence or that could lead to relevant evidence, and that the investigation is being conducted diligently and expeditiously;

⁹ Schedule, paras 41(5) and 44(5).

¹⁰ Schedule, para. 40(3).

¹¹ Bill 63-EN paras 269-273.

¹² In para 32(1) and (1A) of Schedule 8 to the Terrorism Act 2000.

- v) a suspect must be released immediately if at any point their detention no longer meets the test for detention;¹³
- vi) there is parliamentary oversight in the form of requirements that the Home Secretary must report to Parliament on each occasion pre-charge detention is extended beyond 28 days, and that the reviewer of terrorism legislation report annually to Parliament on the exercise of the power, a report which will be debated.

16. The Notes also state that pre-charge detention for up to 42 days is proportionate for three main reasons:

- i) the need to ensure public safety in the face of attacks designed to cause mass casualties means that arrests need to be made at an earlier stage in investigations, when less evidence has been gathered, so more time is needed to gather sufficient evidence to charge a suspect;
- ii) terrorist networks are often international, requiring enquiries to be made in many different countries and often requiring hard-to-find interpreters;
- iii) terrorist networks are increasingly using sophisticated technology and communications techniques, sometimes requiring searches of encrypted data on hundreds of computers and hard drives.

17. We have addressed all of these arguments in detail in our Report on 42 days. Here we simply summarise the main reasons why, in our view, both the legal framework which will be created by the Bill is not compatible with the right to liberty in Article 5 ECHR, and that framework will inevitably lead to breaches of the rights in Article 5 in individual cases.¹⁴

18. First, a person arrested on suspicion of terrorism has a right under Article 5(2) ECHR to be informed “promptly” not only of the reasons for his arrest but also “of any charge against him.” Although it is correct to say that there is no decision of the European Court of Human Rights establishing precisely how promptly a suspect must be informed of the charge against him, we consider that on any view a period of more than 28 days cannot be considered to be “prompt”. We are fortified in this view by the evidence we have heard that terrorism suspects are often provided with very little information about the reasons for their arrest other than that they are a suspected terrorist,¹⁵ and by the very limited opportunity to challenge the reasons for detention at the hearings to extend pre-charge detention.¹⁶ **We therefore think that charging suspects only after more than 28 days in detention is likely to be in breach of Article 5(2) ECHR.**

19. Second, we do not consider that pre-charge detention for up to 42 days is proportionate to the stated purpose of protecting the public from the risk posed by suspected terrorists being at large while an investigation proceeds. For the reasons we have given in our Report on 42 days, we consider the evidence of the Director of Public Prosecutions and the Head of the CPS’s Counter Terrorism Division, that the CPS has so far managed comfortably

¹³ Para 37 of Schedule 8 to the Terrorism Act 2000.

¹⁴ See Report on 42 days at para 74 for a summary of the specific rights under Article 5 ECHR which are relevant.

¹⁵ Ibid. at para. 85.

¹⁶ Ibid. at paras 90-96.

within the 28 day limit, to be fatal to the argument that there is any proven need to go beyond the current limit. We also consider that there are more proportionate alternatives which achieve the Government's aim, especially the combination of the threshold test for charging, broad offences such as acts preparatory to terrorism, post-charge questioning and allowing intercept to be used in evidence. We note that the Explanatory Notes to the Bill do not seek to justify the longer limit by reference to any increase in the level or seriousness of the threat since the increase to 28 days. **We therefore think that providing for pre-charge detention up to a maximum of 42 days is disproportionate.**

20. Third, we have given very careful consideration to all of the safeguards which would apply to extensions of pre-charge detention up to 42 days under the Bill, including the judicial safeguards which already exist, and we are firmly of the view that the legal framework as a whole does not provide sufficient guarantees against arbitrariness in the exercise of the power. Article 5(1) requires that deprivations of liberty must be "lawful", which means there must be sufficient guarantees against the detention being either arbitrary or disproportionate. Article 5(3) requires a person arrested on reasonable suspicion of having committed an offence to be brought promptly before a judge. Article 5(4) guarantees the right of an arrested or detained person to a judicial hearing to determine the lawfulness of their detention. In our view the legal framework which the Bill would put in place would be incompatible with each of these requirements, because, for the reasons we give in detail in our Report on 42 days, the suspect does not have a guaranteed right to a truly judicial hearing before the judge, on equal terms with the prosecution, and the test for further detention is set too low.¹⁷ The Government has not yet explained why our analysis of the inadequacy of the judicial safeguards is wrong. The Bill, however, contains no additional judicial safeguards. The parliamentary safeguards proposed do not make up for the inadequacy of the judicial safeguards for the reasons given above. **We therefore think that the legal framework does not provide sufficient guarantees against arbitrariness and is incompatible with Articles 5(1), 5(3) and 5(4) for that reason alone.**

21. As we indicated in our report on 42 days, we will be proposing amendments to the Bill to amend Schedule 8 of the Terrorism Act 2000 to ensure that the judicial safeguards which apply at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR that there is a truly "judicial" procedure, that is, one in which the suspect has an effective opportunity, at an open hearing and with access to the relevant material, to challenge the reasonableness of the suspicion on which the prosecution relies as the basis for the original arrest and continued detention.

¹⁷ As we reported in our Report on 42 days, at para. 92, Mr Bajwa's evidence was that the test is set so low that anyone with a computer and a mobile phone would struggle to resist an application for an extension of detention up to 28 days.

3 Post-charge Questioning

The provision in the Bill

22. The Bill includes a new power for a constable to question a person about a terrorism offence¹⁸ after they have been charged with the offence or been officially informed that they may be prosecuted for it.¹⁹ The Bill also provides for adverse inferences to be drawn from the accused's silence in the face of such post-charge questioning.²⁰

23. The Explanatory Notes to the Bill merely assert that since the European Court of Human Rights has held that the drawing of negative inferences from silence is not, of itself, a breach of the privilege against self-incrimination in Article 6(2) ECHR, it is therefore considered by the Secretary of State that these provisions are compatible with Article 6(2).²¹

The range of views about post-charge questioning

24. In our Report on *Prosecution and Pre-Charge Detention* in July 2006, we took the view that human rights law presents no obstacle in principle to the relaxation of the current restriction on post-charge questioning, nor to the drawing of adverse inferences from a defendant's refusal to answer questions at such post-charge interviews. We said that such a measure would not necessarily breach the privilege against self-incrimination, *provided* it is accompanied by adequate and effective safeguards (including some additional to those that exist for pre-charge questioning), such as 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.²²

25. We therefore recommended that the Government amend the PACE Codes to permit post-charge questioning and the drawing of adverse inferences, as a measure which would significantly reduce the need for a further extension of pre-charge detention, but we made clear that we expected an opportunity to scrutinise the adequacy of the safeguards proposed.²³ We repeated the recommendation in our more recent report on 28 days, intercept and post-charge questioning (July 2007), again emphasising the critical importance of the accompanying safeguards.²⁴ In the interests of introducing the change as soon as possible, we questioned whether it was necessary to make the change by legislation

¹⁸ A "terrorism offence" for this purpose is defined by clause 26 to include most of the offences under the Terrorism Act 2000 and the Terrorism Act 2006, as well as conspiracy, attempt and incitement to commit such offences.

¹⁹ Clause 23(2). Post-charge questioning is also allowed where a person has been sent for trial for a terrorism offence or a judge of the Crown Court has made an order for a preparatory hearing to be held in the case (under s. 29 of the Criminal Procedure and Investigations Act 1996) and did so on the basis that the offence has a terrorism connection: clause 23(3). Clauses 24 and 25 make equivalent provision for Scotland and Northern Ireland.

²⁰ Clause 23(6), amending s. 34(1) of the Criminal Justice and Public Order Act 1994.

²¹ EN para. 275.

²² Twenty-fourth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention*, HL Paper 240/HC 1576 (hereafter "Report on Prosecution and Pre-charge Detention"), at paras 132-135.

²³ *Ibid.* at para. 135.

²⁴ Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157/HC 394 (hereafter "Report on 28 days"), paras 163-172.

rather than amending the PACE Codes of Practice. We now accept that the important safeguards against oppressive use of the power should be spelt out in primary legislation.²⁵

26. The Home Affairs Committee, in its recent report on *The Government's Counter-Terrorism Proposals*, concluded on post-charge questioning:²⁶

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

27. Lord Carlile of Berriew QC, the reviewer of terrorism legislation, in his report on the Government's proposed measures for inclusion in a Counter Terrorism Bill, expressed some words of caution about post-charge questioning.²⁷

Whilst it is my view that it is sensible that provision should be made for suspects to be questioned further after charge in terrorism cases, it is right that I should utter a word of caution. Historically, the prohibition on post-charge questioning has existed to protect the rights of accused persons, by forcing the police to charge only where there is sufficient evidence to justify doing so, and in a timely fashion. If they are unable to do this then the suspect must be released. An unfettered ability to question after charge might give rise to at least two possible situations, each of which is wholly foreseeable and, equally, each of which is wholly unacceptable. First, a suspect could be charged with a minor offence (such as criminal damage). He or she could then be held pending trial, with virtually no judicial scrutiny or protection, whilst the police investigated the offences in which they were really interested, with the intention of adding more serious charges at a later stage. Alternatively, a suspect could be charged with a serious offence for which the police had strong suspicion but scant evidence, hoping that the pre-trial period would permit them to discover the evidence to justify the charge. As ever, I am concerned that the effort to protect the right to safety of the law-abiding public should not remove provisions designed to protect a wrongly-accused individual. I wish to make it plain that the ability to question after charge is not of itself a panacea for the ills of extended periods of pre-charge detention. However, with proper safeguards in place, it may be a practical and effective way of balancing the two competing principles referred to above.

For these reasons, this innovation would require careful amendment to the current Police and Criminal Evidence Act 1984 Codes of Practice, or an additional and specific Code. It would be necessary to provide clarity for the particular threshold for such questioning, limitations on its extent, and other provisions to ensure protection of the suspect from arbitrariness. The Government should consider judicial supervision of the exercise of the power, perhaps making provision for

²⁵ *Ibid.*, para. 169.

²⁶ First Report of Session 2007-08, *The Government's Counter-Terrorism Proposals*, Volume I, HC 43-I, at para. 92.

²⁷ *Report on Proposed Measures for Inclusion in a Counter Terrorism Bill*, Cm 7262, December 2007, at paras 22-24.

judicial examination at an early stage of the evidence said to be sufficient to justify charge. However, judicial supervision should not extend to judicial presence at the questioning itself.

My early reaction to this proposal included misgivings about the availability in court of an adverse inference against a defendant in the event of a failure to answer questions asked in post-charge police interviews. I have some doubts, founded on experience of court cases, of the efficacy of the adverse inference provisions. On reflection I have concluded that where post-charge questioning takes place on matters to which a defendant, properly advised by lawyers, could reasonably be expected to reply, an adverse inference should be available where there is a refusal. However, the new or amended Code must include protection against repetitive or oppressive questioning.

28. Considerable concern, however, has also been expressed about the emergence of an apparent consensus about the desirability of allowing post-charge questioning with adverse inferences. Lord Lloyd of Berwick, for example, in the debate on the Queen's Speech, said:²⁸

First, there is the issue of post-charge questioning. I knew that as soon as ever that idea was floated everyone would jump on the bandwagon and even claim that they had thought of it first. It seems to be such an easy and in a sense obvious solution to what everyone agrees is a difficult problem.

But it will not do. Why not? For the simple reason that if post-charge questioning is allowed, there is a very real risk that the suspect will not get a fair trial. That needs some explanation, along these lines. The courts have always made it their primary function to ensure that trials are fair. That applies not only to the conduct of the trial itself but to what happens before the trial starts. Let me give a recent example. Not long ago, a defendant was brought to stand trial in England by being forcibly placed on an aircraft in South Africa without any judicial process of any kind. The Court of Appeal, to its shame, held that he could still have a fair trial here, even though the manner in which he had been brought here was so obviously unjust. That decision was unanimously reversed by the House of Lords. I could give other examples.

So judges are very much concerned with not only what happens at the trial but what happens in the process by which suspects are brought to trial. It is for that reason that over the years they have formulated certain rules that have always been known as the "judges' rules". Two of the best known of those rules are that as soon as there is enough evidence to charge a suspect he must be charged forthwith. The second rule is like unto it and is obviously a corollary of it; that once he has been charged no further questioning is permissible in relation to that offence. The reason for both those fundamental rules is the need to protect a suspect from oppressive questioning. The rules have a long history and they have long had the force of statute. They are currently to be found in Code C of the codes made under PACE—the Police and Criminal Evidence Act 1984. The current code took effect as recently as July 2006. Paragraph 16.4 provides:

²⁸ HL Deb 12 November 2007 col. 263.

“A detainee may not be interviewed about an offence after they have been charged”.

It is not very good grammar, but the meaning is perfectly clear. There are some very limited exceptions, which only go to prove how important the rule is.

Those are just two of the rules that underpin our concept of a fair trial. Yet it is now proposed to abrogate the second of those rules in relation to terrorism. But a terrorist suspect is entitled to a fair trial, the same as any other suspect. Our notion of what constitutes a fair trial surely cannot depend on what the suspect is supposed to have done. Post-charge questioning is not the easy way out and we should resist it as vigorously as we should resist any extension beyond 28 days.

Even if it were to be allowed, where would it stop—at the door of the court? To allow a defendant to be questioned by the police up to the moment that he goes into the dock would be quite intolerable. No one would seek to defend that; but where else is the line to be drawn, once post-charge questioning is allowed? Of course the police can continue their investigation. Of course the suspect can be re-arrested and questioned in relation to some other offence. But once he has been charged and the case handed over to the Crown Prosecution Service, questioning in relation to that offence must stop.

The need for adequate and effective safeguards

29. When we were given sight of the draft clauses prior to the publication of the Counter-Terrorism Bill, we noted that no safeguards were included on the face of the draft clauses themselves. Instead, the draft clauses provide that the PACE Codes of Practice may make provision about post-charge questioning. Since, in our view, the crucial human rights issue in relation to post-charge questioning is the adequacy of the accompanying safeguards against the abuse of what is potentially an oppressive power, we wrote to the Home Secretary²⁹ asking her to provide more detail about precisely what safeguards are intended, and in particular whether any form of judicial control is envisaged, such as prior judicial authorisation of questioning or even judicial supervision of such questioning, as suggested by Professor Clive Walker.

30. The Home Secretary’s response contained, for the first time, a little detail about the safeguards being contemplated:³⁰

The proposed measures will only allow an individual to be questioned in relation to the offence for which they have been charged. ... An initial period of 24 hours to question a person after charge can be authorised by a senior police officer, thereafter any questioning after charge would be limited to a maximum period of 5 days and would have to be authorised by a Magistrate’s Court. If there is a need for any subsequent post charge questioning, the police must return to the Magistrate’s Court for further authorisation. The safeguards in the PACE codes will apply as they do pre charge as regards the conditions of custody, questioning, etc.

²⁹ Letter from the Chair to the Home Secretary, 12 November 2007, Appendix 3.

³⁰ Letter from the Home Secretary to the Chair, 5 December 2007, Appendix 4.

31. Professor Clive Walker and Professor Ed Cape both submitted evidence to us in which they expressed strong concern about the introduction of post-charge questioning, and suggest a number of detailed safeguards which they say should accompany any such measure if it were introduced.³¹

32. Like Lord Lloyd, we have been concerned about whether the apparent consensus about the desirability of post-charge questioning has led to a neglect of the question of the appropriate safeguards.³² We therefore took oral evidence on this subject from Professor Clive Walker.

33. Professor Walker told us that in his view human rights law does not impose any absolute prohibition on post-charge questioning, rather the issue is how to devise a process which is likely to be fair to the person who has been charged. However, he disagreed with the Home Affairs Committee that it was enough simply to apply pre-charge protections which mainly exist under PACE Code C. The situation is different after charge, because the accused is in a particularly vulnerable position, the police and the prosecution are building a case, and in our traditional adversarial process it is for the judge, acting as a sort of umpire, to ensure that what is being done is fair in all the circumstances.³³

34. In Professor Walker's view, many of the physical conditions of questioning post-charge could be dealt with in the PACE Codes, but it is important to establish in primary legislation many of the other parameters of post-charge questioning, such as the purposes of such questioning, and the limitation that it must be about new evidence rather than about the same issues that were the subject of questioning pre-charge. Careful judicial oversight is also needed to ensure that the police do not use post-charge questioning as a way round the process of disclosure of evidence pre-trial. Professor Walker also advocates judicial control of post-charge questioning after the event, to enable the court to supervise the purposes and length of time for which questioning has taken place, and taping of such interviews to facilitate such supervision.

35. Professor Walker said that, provided there is appropriate judicial umpiring of post-charge questioning, "it is difficult to argue that it is necessarily wrong to draw adverse inferences".³⁴ However, he would like to see a special warning to the jury to do with post-charge questioning, to remind them that, post-charge, the reliability of silences or statements might be questionable because of the particularly fraught stage of being a suspect.

36. We found Professor Walker's evidence compelling on the question of the detailed safeguards which should accompany post-charge questioning. **We support the introduction of post-charge questioning as a measure which reduces the pressure for an extension of pre-charge detention, but we agree that it should be accompanied by a number of detailed safeguards on the face of the Bill, to ensure that this potentially oppressive power is not used oppressively in practice.**

³¹ Appendices 5 and 6.

³² In our Report on 28 days, for example, at paras 171-172, we pointed to the need for post-charge questioning to be accompanied by certain minimum safeguards to ensure that its use is not oppressive.

³³ Oral evidence, 17 December 2007, Q2, Ev 1.

³⁴ Q6, Ev3.

37. We recommend that the Bill should be amended to include the following safeguards on the face of the legislation:

- (1) that there should be a requirement that post-charge questioning be judicially authorised;
- (2) that the purpose of post-charge questioning be confined to questioning about new evidence which has come to light since the accused person was charged;
- (3) that the total period of post-charge questioning last for no more than 5 days in aggregate;
- (4) that post-charge questioning always take place in the presence of the defendant's lawyer;
- (5) that post-charge questioning always be DVD- or video-recorded;
- (6) that the judge which authorised post-charge questioning review the transcript of the questioning after it has taken place, to ensure that it remained within the permitted scope of questioning and was completed within the time allowed; and
- (7) that there should be no post-charge questioning after the beginning of the trial.

38. The overriding requirement must be to ensure that a fair trial is possible and judicial oversight should be geared towards this end. For example, particular attention should be paid to the gap between the end of post-charge questioning and the beginning of the trial to ensure that the defendant's rights are respected.

4 Control Orders and Special Advocates

Introduction

39. The Bill contains some detailed amendments to the control order regime contained in the Prevention of Terrorism Act 2005 (“the PTA 2005”).³⁵ Some of these are broadly beneficial from a human rights perspective. For example, the Bill narrows the definition of “involvement in terrorism-related activity” so as to make clear that only support or assistance given directly to someone involved in terrorism-related activity is caught by the definition.³⁶ It makes clear that the time allowed for representations by controlled persons when a control order is made following permission from the court is seven days from the time that the order is served upon him, not seven days from the time the court gives permission.³⁷ It also enables the anonymity of individuals subject to control orders to be protected from the very beginning of the process when the Secretary of State is seeking the court’s permission to make the control order.³⁸

40. These amendments to the control orders regime, however, are largely in the nature of relatively minor “tidying up” amendments in the light of the first few years of the regime’s operation. They do not address at all the most controversial aspects of the control orders regime which have been the subject of intense parliamentary debate; frequent adverse comment by us; and now, important judgments of the House of Lords in the first cases concerning control orders to reach them.³⁹ In our view, for the reasons we explain below, the Bill provides an opportunity for Parliament to rectify some of the most significant defects in the control orders regime which have been identified in the course of the many legal challenges to that regime and to particular orders made under it.

Special advocates and the right to a fair hearing

The House of Lords judgment in MB

41. The House of Lords recently considered, in the case of *MB*, the compatibility of the control order special advocate regime with the right to a fair hearing, including under Article 6(1) ECHR.⁴⁰

42. The House of Lords held that control order proceedings do not amount to the determination of a criminal charge for the purposes of Article 6(1). The criminal trial guarantees in that Article therefore do not apply, but nevertheless the Lords held that the

³⁵ Clauses 71-74.

³⁶ Clause 72, amending s. 1(9) PTA 2005.

³⁷ Clause 73, amending s. 3 PTA 1005.

³⁸ Clause 74, amending para. 5 of the Schedule to the PTA 2005.

³⁹ *Secretary of State for the Home Department v JJ* [2007] UKHL 45; *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v E* [2007] UKHL 47 (31 October 2007).

⁴⁰ *Secretary of State for the Home Department v MB* [2007] UKHL 46 (31 October 2007).

procedural protections must be “commensurate with the gravity of the potential consequences” for the controlled person.⁴¹

43. The Lords also decided, by a majority of 4-1,⁴² that the procedures contained in s. 3 of the Prevention of Terrorism Act 2005 and the Rules of Court would not be compatible with the right to a fair hearing in Article 6(1) ECHR, if they permitted the essence of the case against a contolee to be entirely undisclosed to him. This accords with concerns we have repeatedly expressed about the fairness of control order proceedings.⁴³

44. However, the House of Lords held that the statutory regime must be interpreted under s. 3 of the Human Rights Act so as to guarantee the right to a fair hearing, and that it was capable of being so interpreted, instead of declaring the statutory scheme to be incompatible with Article 6(1) under s. 4 of the Human Rights Act,⁴⁴ which would have provided Parliament with an opportunity to consider the detail of the procedural framework again.

45. The House of Lords has therefore left it to the courts to work out, on a case by case basis, exactly what is required to ensure that the right to a fair hearing is properly respected in the practical application of the statutory framework. In the recent case of *Bullivant*,⁴⁵ the difficulties presented by this in practice were demonstrated. The High Court grappled with exactly what was required to give effect to the House of Lords judgment in *MB*, and found considerable difficulty in deciding exactly what it requires.

46. We welcome the decision of the House of Lords in *MB* that it would be a breach of an individual’s right to a fair hearing if a control order could be made where the essence of the case against him is entirely undisclosed to him. We have frequently made the same observation in our reports on the control order legislation. However, **we are surprised at the Lords’ interpretation of the scope of their power under s. 3 of the Human Rights Act to read words into a statute to avoid an incompatibility with a Convention right.** In 2005, in the Prevention of Terrorism Act, Parliament grappled with how to strike the right balance between the right to a fair hearing and keeping sensitive information secret. It decided (against our advice) to strike that balance by placing a duty on courts in control order proceedings to receive and act on material even the gist of which is not disclosed to the controlled person. It used mandatory language to make that intention clear.⁴⁶ To weaken Parliament’s clear mandatory language by “reading in” the words “except where to

⁴¹ Ibid., Lord Bingham at para. 24.

⁴² Ibid., Lord Hoffmann dissenting.

⁴³ See e.g. chapter 6 of our Report on 28 days, above, concerning special advocates, and our reports on the annual renewal of the control orders regime: 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; 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.

⁴⁴ A declaration of incompatibility would have been Lord Bingham’s preference: see *MB* para. 44.

⁴⁵ *Re Bullivant* [2007] EWHC 2938 (Admin) (11 December 2007).

⁴⁶ See e.g. para. 4(3)(d) of the Schedule to the PTA 2005: “Rules of court ... must secure ... that the relevant court is required to give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest.”

do so would be incompatible with the right of the controlled person to a fair trial⁴⁷ does, as Lord Bingham observed, “very clearly fly in the face of Parliament’s intention.”⁴⁸

47. The scheme of the Human Rights Act deliberately gives Parliament a central role in deciding how best to protect the rights protected in the ECHR. Striking the right balance between sections 3 and 4 of the Human Rights Act is crucial to that scheme of democratic human rights protection. In our view it would have been more consistent with the scheme of the Human Rights Act for the House of Lords to have given a declaration of incompatibility, requiring Parliament to think again about the balance it struck in the control order legislation between the various competing interests. In any event, we think it is now incumbent on Parliament to consider again, in detail, exactly what a “fair hearing” requires in this particular context, in light of the House of Lords judgment, and to amend the control order legislation accordingly.

The fairness of the special advocate regime

48. In our recent report in July 2007 in which we considered the fairness of the special advocate system, **we reached the firm conclusion that the system of special advocates, as currently conducted, fails to afford individuals a fair hearing, or even a substantial measure of procedural justice.**⁴⁹ We made a number of recommendations about the minimum changes which are required to improve the fairness of the process, principally:

- that the Secretary of State be placed under a statutory obligation always to provide a statement of the gist of the closed material;
- that the prohibition on any communication between the special advocate and the individual (or their legal representative) after the special advocate has seen the closed material be relaxed;
- that the low standard of proof in SIAC proceedings be raised.

49. The Government, in its Reply to our Report, rejected all of our recommendations concerning the special advocates regime:

The Government believes that the existing special advocate procedure provides individuals with a substantial measure of procedural justice, and that the recommendations of the Committee are not required to achieve this – indeed, that the recommendations of the Committee, if implemented, could potentially be damaging to the public interest, including to the extent of endangering the lives of members of the public.⁵⁰

50. That this was the Government’s position was not at all surprising at the time: it had recently sought to persuade the House of Lords that control order proceedings were fair and judgment was awaited. **That judgment, in the MB case, now requires the**

⁴⁷ *Secretary of State for the Home Department v MB* [2007] UKHL 46, at para. 72 (Baroness Hale).

⁴⁸ *Ibid.* at para. 44 (Lord Bingham).

⁴⁹ Report on 28 days, above, at paras 183-212.

⁵⁰ *The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights Session 2006-07: Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, CM 7215, September 2007 at pp. 15-16.

Government's earlier position to be revisited, because it rejects the Government's assertion that the statutory regime will always provide the individuals concerned with a substantial measure of procedural justice.

51. We were particularly disappointed, then, to learn from the Minister that when he finally met with some special advocates, they concentrated on “practical issues concerning the operation of the special advocate procedure and ensuring it worked as efficiently and effectively as possible, rather than the concerns of principle that you have previously raised with the Government, and on which we continue to differ.”⁵¹ The main outcome of the meeting was that the Government agreed to consider whether it would be possible to expand the training course already available to special advocates to cover concerns the special advocates had about remaining gaps in their knowledge. The Minister's meeting with the special advocates took place on 3 December 2007, more than a month after the decision of the House of Lords in *MB*. As we have explained, that judgment rejects the Government's assertion that the special advocate regime always provides individuals with a substantial measure of procedural justice, and agrees with a number of the concerns about the fairness of control order proceedings expressed in evidence to us by the special advocates. **We think it is a matter of great regret that the Minister did not see fit to discuss these issues of principle with the special advocates at their meeting with a view to the Government bringing forward amendments to the statutory regime in light of the judgment.**

52. We decided to seek further evidence from some special advocates, to explore with them the extent to which there is scope to make specific amendments to the legal framework which governs control order hearings in order to make them fairer in practice; and to ensure that we are fully informed of the possible practical consequences of possible amendments.

53. Although willing in principle to give evidence to a parliamentary committee on this subject, many of the special advocates felt that their involvement in ongoing control order cases considering the precise effect of the *MB* judgment gave rise to a potential conflict of interest which inhibited them from giving evidence. We understood and respected this concern. We took evidence from a special advocate, Mr Neil Garnham QC, who was not so constrained, because he is not involved in any control order cases, all of his work as a special advocate to date having been conducted in SIAC.⁵² Mr. Garnham thought it would be helpful for Parliament to clarify the statutory framework in the light of the recent House of Lords judgment,⁵³ and assisted us greatly in identifying some of the improvements to the procedure which would most enhance its fairness.

54. In our view the opportunity should be taken in this Bill to make a number of amendments to the control order regime in order to ensure that, in future, hearings are much more likely to be fair.

⁵¹ Letter from Tony McNulty MP to the Chair, 14 December 2007, Appendix 7.

⁵² Oral evidence, 17 December 2007.

⁵³ *Ibid.* Q31, Ev 7.

Amendments to the control orders regime to make hearings fair

(1) Express reference to the right to a fair hearing

55. According to the majority in *MB*, restrictions on disclosure may be justifiable, but not where the effect of such non-disclosure is to deprive a person of their liberty, or to impose other serious restrictions upon them, on the basis of material which is not disclosed to them even in summary form. However, on the face of the statutory framework, including the rules of court, a judge in control order proceedings is precluded from ordering disclosure, even where he considers that disclosure is essential in order to give the controlled person a fair hearing. To avoid that consequence, the House of Lords ruled that the following qualifying words had to be “read in” to the absolute and unqualified words of the statute: “except where to do so would be incompatible with the right of the controlled person to a fair trial.”⁵⁴

56. Mr. Garnham told us in evidence that he could “see good sense” in using the words “read in” to the statutory framework by the House of Lords and making them explicit in the statute, rather than leaving them in case-law.⁵⁵

57. We recommend two amendments to the control orders statute (the Prevention of Terrorism Act 2005) to achieve this.

58. **First, we recommend that the relevant provisions in the statutory framework, which expressly require non-disclosure, even where disclosure would be essential for a fair hearing, be amended by the insertion of qualifying words, such as “except where to do so would be incompatible with the right of the controlled person to a fair hearing”.**⁵⁶

59. **Second, we recommend that the relevant power for making rules of court in the control orders regime be amended to make explicit reference to the right to a fair hearing in Article 6 ECHR, in the same way as the Bill itself qualifies the power to make rules of court for asset freezing.**⁵⁷

60. This could be achieved by inserting a new paragraph⁵⁸ in the Schedule to the PTA 2005: “Nothing in this paragraph, or in rules of court made under it, is to be read as requiring the court to act in a manner inconsistent with the right to a fair hearing in Article 6 of the European Convention on Human Rights.”

61. The effect of this amendment would also be to render *ultra vires* rule 76(2) of the Civil Procedure Rules (“CPR”), which expressly elevates non-disclosure over justice by requiring that in control order cases the overriding objective of the civil procedure rules (requiring courts to deal with cases justly) be read and given effect in a way which is compatible with the duty to ensure that information is not disclosed contrary to the public interest.

⁵⁴ *Secretary of State for the Home Department v MB* [2007] UKHL 46, at para. 72 (Baroness Hale).

⁵⁵ Oral evidence, 17 December 2007, Q32, Ev 8.

⁵⁶ E.g. in s. 3(13) PTA 2005 and paras 4(2)(a) and (3)(d) of the Schedule to the PTA 2005. Similar qualifying words would also have to be inserted into CPR r. 76.29(8), but this obviously is not a matter for the Bill.

⁵⁷ Clause 58(6).

⁵⁸ New para. 4(6).

Baroness Hale expressly disagreed with this provision in her judgment in *MB*,⁵⁹ as have we, in earlier reports.

(2) Obligation to give reasons for making control order

62. One of the ways mentioned by Baroness Hale in her judgment in *MB*,⁶⁰ to ensure that the principles of judicial inquiry are complied with to the fullest extent possible, is for the Secretary of State to give as full as possible an explanation of why she considers that the grounds for making a control order⁶¹ are made out.

63. In his evidence to us, Neil Garnham QC agreed that such an obligation on the Secretary of State would make control order proceedings fairer; but he anticipated the Security Service's objection that this would lead to disclosure which is potentially damaging to national security.⁶² We consider that an explicit obligation on the Home Secretary to give as full an explanation as possible of her reasons for making a control order would both provide the controlee with some material which he may be able to contest and would facilitate more open judicial scrutiny of the adequacy of the Home Secretary's reasons for making an order.

64. We recommend that an obligation on the Secretary of State to give reasons for the making of a control order be inserted into the statutory framework.⁶³

(3) Obligation to provide gist of closed material in some cases

65. According to the judgments of the majority in *MB*, the concept of fairness imports a core irreducible minimum of procedural protection.⁶⁴ In earlier reports, we have recommended that there should be an obligation on the Secretary of State to provide a statement of the gist of the closed material. Mr Garnham foresaw considerable objection to this proposal from both the Security Services and the Home Office, but did not see that as a reason for not going ahead, and considered it "an entirely sound proposal".⁶⁵

66. To give full effect to the judgment in *MB*, we recommend that the statutory framework be amended to provide that rules of court for control order proceedings "must require the Secretary of State to provide a summary of any material which fairness requires the controlled person have an opportunity to comment on."⁶⁶

⁵⁹ *Secretary of State for the Home Department v MB* [2007] UKHL 46, at para. 59 (Baroness Hale).

⁶⁰ *Ibid.* at para. 66.

⁶¹ In s. 2(1) PTA 2005.

⁶² Oral evidence, 17 December 2007, Qs 33, 34.

⁶³ E.g. by inserting (as new s. 2(4A) PTA 2005): "A non-derogating control order must contain as full as possible an explanation of why the Secretary of State considers that the grounds in s. 2(1) above are made out."

⁶⁴ See e.g. *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para. 43 (Lord Bingham).

⁶⁵ Oral evidence, 17 December 2007, Q23, Ev 6.

⁶⁶ In para 4(3)(e) of the Schedule to the PTA 2005. Para 4(3)(f) would also need amending to make it subject to para 4(3)(e) as amended.

(4) *Communication between special advocate and controlee*

67. Mr. Garnham told us in evidence that of all the matters raised by us about the fairness of control order proceedings, communication between the special advocate and the appellant is the “most critical”.⁶⁷ He described it as “a pretty essential step”, provided some mechanism can be devised for achieving it, because what exists at the moment is “pretty hopeless”, as it requires advance notice to the Secretary of State of the questions the special advocate wants to pose to the controlee.

68. Mr Garnham suggested that special advocates should have the power to apply *ex parte* (that is, without the Secretary of State being present or represented) to a High Court judge for permission to ask questions of the controlee, which would avoid having to disclose significant parts of their case to the Security Service. This would be a substantial change, because it would mean for the first time special advocates could find a way of putting questions to the person whose interests they are trying to represent without having to disclose those questions to the Secretary of State.⁶⁸

69. In our view the statutory framework requires amendment, to enable the controlled person to give meaningful instructions about the allegations against him, where it is possible to do so.⁶⁹ We recommend that special advocates be given the power to apply ex parte to a High Court judge for permission to ask the controlee questions, without being required to give notice to the Secretary of State.⁷⁰

(5) *Standard of proof*

70. Mr. Garnham told us that it has long been the view of all of the special advocates that changing the standard of proof to “balance of probabilities” rather than “mere suspicion” is “entirely justified.”⁷¹ He also thought it would make a real practical difference in some cases.⁷² The standard of proof was not expressly considered by the House of Lords in *MB*, but the judgments make clear that the standards of procedural protection (which must include the standard of proof) are to be commensurate with the seriousness of the consequences for the controlee. In our view this should be made clear in the legislation itself.

71. We recommend that the PTA 2005 be amended to provide that, in a hearing to determine whether the Secretary of State’s decision is flawed, the controlled person is entitled to such measure of procedural protection (including, for example, the appropriate standard of proof) as is commensurate with the gravity of the potential consequences of the order for the controlled person.⁷³

⁶⁷ Oral evidence, 17 December 2007, Q23, Ev 6.

⁶⁸ *Ibid.* Q36, Ev 8.

⁶⁹ See e.g. *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para. 35 (Lord Bingham).

⁷⁰ This is also likely to require amendment of CPR r. 76.25(2).

⁷¹ Oral evidence, 17 December 2007, Q23, Ev 7.

⁷² *Ibid.* Q24.

⁷³ New s. 3(11A) PTA 2005, using the formulation of Lord Bingham in *MB* at para. 24.

(6) Power for special advocates to call witnesses

72. One of the ways suggested by Baroness Hale in *MB* to make the hearing fairer was to permit special advocates to call witnesses to rebut closed material.⁷⁴ Although we heard that expert witnesses to assist special advocates are not readily available, because all those who are going to be any good are already working for the Security Service,⁷⁵ Mr. Garnham agreed that it might be useful to have it made absolutely clear that special advocates are empowered to call witnesses in control order proceedings.⁷⁶

73. We recommend that the PTA 2005 be amended to provide that, where permission is given by the relevant court not to disclose material, special advocates may call witnesses to rebut the closed material.⁷⁷

⁷⁴ *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para. 66.

⁷⁵ Oral evidence, 17 December 2007, Q37.

⁷⁶ *Ibid.* Q38, Ev 8.

⁷⁷ This would require a new sub-para in para 4(3) of the Schedule to the PTA 2005.

5 The Threshold Test for Charging

Introduction

74. In our earlier reports on counter-terrorism policy and human rights, we have drawn attention to the fact that the charging threshold has effectively been lowered for terrorism and other serious cases by the introduction of the “threshold test” for charging by the Crown Prosecution Service.⁷⁸ Instead of requiring prosecutors to be satisfied that there is a realistic prospect of conviction before charging a suspect, the threshold test enables Crown prosecutors to charge a suspect where there is only a reasonable suspicion that the suspect has committed an offence, provided there is a reasonable likelihood of relevant evidence becoming available within a reasonable time which will enable the higher charging threshold to be applied.

75. We have welcomed the threshold test for charging as a sensible practical response to the dilemma facing the law enforcement agencies in relation to pre-trial detention⁷⁹ and have consistently pointed out that lowering the charging threshold in this way reduces the force of the case for extending the period of pre-charge detention further beyond 28 days, especially when combined with other measures such as the broad offence of acts preparatory to terrorism and post-charge questioning.⁸⁰

Independent safeguards

76. Although we continue to welcome the threshold test and regard it as one of a number of important alternatives to extending the period of pre-charge detention in terrorism cases, we have become increasingly concerned to establish that its use is subject to appropriate independent safeguards. In an earlier report we expressed the view that more information is required about the operation of the threshold test in practice, and recommended that an appropriate body, such as the CPS Inspectorate, conduct a review and report on the operation of the threshold test in terrorism cases.⁸¹ **We are not aware of any such independent review having been carried out and we reiterate that such a review would be valuable.**

77. In the absence of such a review we have sought to find out more about the use that has been made of the threshold test for charging in terrorism cases. We are grateful in particular to Sue Hemming, Head of Counter Terrorism Division at the CPS, for the assistance she has given us in understanding the way in which the threshold test works in practice. From her oral evidence⁸² and her response to our letter,⁸³ we have established that of the eight individuals who have been charged after being held for more than 14 days, four

⁷⁸ See e.g. Report on Prosecution and Pre-charge Detention at paras 122-129; Report on 28 days at paras 180-182; Report on 42 days at paras 44-48.

⁷⁹ Report on Prosecution and Pre-Charge Detention at para. 127.

⁸⁰ Ibid at para. 128; Report on 28 days at para. 182.

⁸¹ Report on 28 days, at para. 182.

⁸² Oral evidence, 5 December 2007, Report on 42 days, Ev 24-26, Qs 149-169.

⁸³ Letter from the Chair to Sue Hemming, 20 December 2007, Appendix 8.

have been charged on the threshold test.⁸⁴ Of those four, one was charged after 20 days' detention, and the other three at the end of the maximum period, at 27/28 days. Two of the four charged on the threshold test were charged with acts preparatory to terrorism which suggests that this new offence, in conjunction with the threshold test, is indeed assisting with the task of enabling appropriate charges to be brought in terrorism cases, without the need for extending pre-charge detention beyond 28 days.

78. The further information we have received about the use made of the threshold test in terrorism cases suggests that the threshold test tends to be used towards the end of the maximum period of pre-charge detention. We do not suggest that there is necessarily anything wrong in principle about this (and we are reassured by the fact that there appear to be no cases in which charges brought on the threshold test have been dropped and the suspect subsequently released),⁸⁵ but it does raise questions as to what independent safeguards exist to ensure that terrorism suspects are not being detained for long periods on a low evidential threshold. We therefore asked Ms Hemming about what independent supervision there is of the time it takes for the full code test for charging to be satisfied.

79. Ms. Hemming pointed to two main safeguards. First, there is continuous monitoring and review by the prosecutor him or herself. Second, there is independent judicial scrutiny, because 14 days after charge there is a preliminary hearing before the judge when the judge sets the timetable which he or she believes to be reasonable for the particular case, and the defence is free to challenge the timetable and the sufficiency of the evidence relied on by the prosecution at that stage. The longstop, according to Ms Hemming, is that the full code test must have been applied before the prosecution's case is given to the defence.

80. However, we also heard evidence from Mr Ali Bajwa, a barrister specialising in defending terrorism suspects, who pointed out that the defence is not informed when the threshold test is the basis for the charge.⁸⁶ He pointed out that in major terrorism cases the judge can often give the prosecution six months to serve its case upon the defence, which gives it a very long period before it has to be satisfied that the full code test (realistic prospect of conviction) has been met, during which time the suspect will have been detained (bail not being available for terrorism offences)⁸⁷. As Mr Bajwa pointed out, if both the court and the defence were informed that the threshold test were the basis for the charge, the court might be more likely to require the prosecution to keep the court up to date with the progress of its evidence gathering, and less likely to allow a very lengthy period before the service of the prosecution case without the court having an opportunity to review the material in the meantime.

81. We asked the CPS whether it had any objection to there being an express requirement that both the suspect and the court be notified when a suspect has been charged on the threshold test. The response was that the CPS can see no benefit to the defence in such a requirement, because it becomes aware of the evidential basis of the Crown's case at the very first hearing before the judge, and it has the opportunity to have the case dismissed at

⁸⁴ Letter from Sue Hemming to the Chair, 18 January 2008, Appendix 9.

⁸⁵ Oral evidence, 5 December 2007, Q159.

⁸⁶ *Ibid.* Q158.

⁸⁷ We have previously recommended that the Government introduce bail with conditions for less serious terrorism offences: see e.g. Report on 42 days, at para. 51.

that early stage.⁸⁸ However, we can see the force of Mr Bajwa's point⁸⁹ that the judge responsible for case management is much less likely to set a long timetable for the service of the prosecution case if he or she is aware that the Crown is awaiting the availability of certain evidence before applying the full code test to determine whether there is a realistic prospect of conviction. **We recommend that the CPS be required to disclose to the suspect and the court when it has charged on the threshold test in order to provide the opportunity for the court to subject the prosecution's timetable to independent scrutiny and to ensure that the defence is in a better position to challenge the basis of the charge.**

Statutory authority for lowering charging threshold

82. We have also become increasingly conscious of the apparent anomaly that such an important change in the criminal justice system as a lowering of the charging threshold was brought about by an exercise of the DPP's discretion to give guidance to Crown Prosecutors, without any parliamentary consideration. **In our view, although we regard the advent of the threshold test in terrorism cases as a largely beneficial development, it would benefit from thorough parliamentary scrutiny.**

The threshold test for charging: conclusion

83. **The Bill provides an opportunity to put the threshold test in terrorism cases on a statutory footing and to specify some necessary basic safeguards, to ensure that the use of the lower charging threshold does not result in terrorism suspects being held for longer than necessary before being released without trial. We recognise that the threshold test for charging is not unique to the terrorism context, but we think there is a strong case for making special provision for this category of offence because of the extremely lengthy period of pre-charge detention which is available.**

84. We recommend that

- **the threshold test for charging in terrorism cases is put on an explicit statutory footing;**
- **there is an explicit requirement that the CPS inform both the suspect and the court when the suspect has been charged on the basis of the threshold test;**
- **the timetable for the receipt of the additional evidence is set by the court not the prosecutor.**

85. We hope to be proposing amendments to give effect to these recommendations in due course.

⁸⁸ Ibid. Q161, 165 and letter from Sue Hemming, 18 January 2008, Appendix 9.

⁸⁹ Oral evidence, 5 December 2007, Q165.

6 Intercept

86. The Bill contains provisions extending the exceptions to the statutory prohibition on the admissibility of intercept evidence, in asset freezing proceedings⁹⁰ and in certain inquiries and inquests.⁹¹

87. We are extremely disappointed that the Bill does not contain a wider relaxation of the prohibition on the admissibility of intercept evidence in criminal proceedings for terrorism offences. We had expected that, by now, the Chilcot Review would have been published and there would have been a widespread public debate about whether the obstacles to relaxing the ban can be overcome. **We remain of the view expressed in earlier reports, that providing for the admissibility of intercept evidence would remove one of the main obstacles to prosecuting terrorist crime, a view shared by the Director of Public Prosecutions. We believe it is essential that the Chilcot review reports as soon as possible and in time to enable any legislation to be brought forward as part of this Bill.**

88. In our earlier report on intercept we called on the Government to publish details of the “public interest immunity plus” model being worked on inside Government as the possible way forward, in order to inform and stimulate discussion about the possible practical ways in which the obstacles to the admissibility of intercept might be overcome.⁹² The Government in its reply to our report refused to do so.⁹³

89. When our Chair met with the Chilcot review team he heard that they welcomed as wide and well informed a debate as possible about the possible ways forward. **We therefore call on the Government to publish the product of the long running internal review of this question, including the work done to date on the “public interest immunity plus model”.**

⁹⁰ Clause 60, amending s. 18 of the Regulation of Investigatory Powers Act 2000.

⁹¹ Clauses 66 and 67, also amending s. 18 of RIPA to allow disclosure of intercept material for certain purposes.

⁹² Report on 28 days, chapter 4 (concerning intercept) at para. 108.

⁹³ *The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights Session 2006-07 HL Paper 157, HC 394, Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, Cm 7215 (September 2007) at p. 10.

Conclusions and recommendations

Introduction

1. As always, we ground our analysis in the human rights standards with which the Government's counter-terrorism measures must be compatible, and we proceed from a full recognition that the Government has a duty to protect people from terrorism, a duty imposed by human rights law itself. (Paragraph 9)

Coroners' inquests

2. On first inspection we find the provision in the bill concerning coroners' inquests an astonishing provision with the most serious implications for the UK's ability to comply with the positive obligation in Article 2 ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents. (Paragraph 6) We think that the significance of this provision warrants it being drawn to the attention of both Houses at the earliest possible stage. (Paragraph 8)

Pre-charge detention

3. The detailed provisions in the Bill on pre-charge detention are substantially the same as the proposals we considered in our report in December. (Paragraph 12) We concluded that the Government had not made a compelling, evidence-based case for extending pre-charge detention beyond the current limit of 28 days. (Paragraph 10)
4. The limits on the scope of the Home Secretary's statements [in relation to extending pre-charge detention] are a welcome recognition of the danger of prejudicing future trials, but only serve to demonstrate the very limited extent to which Parliament will be able to provide any meaningful safeguard against the wrongful exercise of the power. It also remains the case that the order by which the Secretary of State can make the reserve power available is a wholly executive order which is not subject to any parliamentary procedure, and by the time Parliament expresses a view on whether the reserve power should be made available it is likely that the full 42 day period will have expired. (Paragraph 13)
5. We think that charging suspects only after more than 28 days in detention is likely to be in breach of Article 5(2) ECHR. (Paragraph 18) We think that providing for pre-charge detention up to a maximum of 42 days is disproportionate. (Paragraph 19) Furthermore, we think that the legal framework does not provide sufficient guarantees against arbitrariness and is incompatible with Articles 5(1), 5(3) and 5(4) for that reason alone. (Paragraph 20)

Post-charge questioning

6. We support the introduction of post-charge questioning as a measure which reduces the pressure for an extension of pre-charge detention, but we agree that it should be accompanied by a number of detailed safeguards on the face of the Bill, to ensure

that this potentially oppressive power is not used oppressively in practice. (Paragraph 36)

7. We recommend that the Bill should be amended to include the following safeguards on the face of the legislation: (Paragraph 37)

(1) that there should be a requirement that post-charge questioning be judicially authorised;

(2) that the purpose of post-charge questioning be confined to questioning about new evidence which has come to light since the accused person was charged;

(3) that the total period of post-charge questioning last for no more than 5 days in aggregate;

(4) that post-charge questioning always take place in the presence of the defendant's lawyer;

(5) that post-charge questioning always be DVD- or video-recorded;

(6) that the judge which authorised post-charge questioning review the transcript of the questioning after it has taken place, to ensure that it remained within the permitted scope of questioning and was completed within the time allowed; and

(7) that there should be no post-charge questioning after the beginning of the trial.

8. The overriding requirement must be to ensure that a fair trial is possible and judicial oversight should be geared towards this end. For example, particular attention should be paid to the gap between the end of post-charge questioning and the beginning of the trial to ensure that the defendant's rights are respected. (Paragraph 38)

Control orders

9. We are surprised at the Lords' interpretation of the scope of their power under s. 3 of the Human Rights Act to read words into a statute to avoid an incompatibility with a Convention right. (Paragraph 46) The scheme of the Human Rights Act deliberately gives Parliament a central role in deciding how best to protect the rights protected in the ECHR. Striking the right balance between sections 3 and 4 of the Human Rights Act are crucial to that scheme of democratic human rights protection. In our view it would have been more consistent with the scheme of the Human Rights Act for the House of Lords to have given a declaration of incompatibility, requiring Parliament to think again about the balance it struck in the control order legislation between the various competing interests. In any event, we think it is now incumbent on Parliament to consider again, in detail, exactly what a "fair hearing" requires in this particular context, in light of the House of Lords judgment, and to amend the control order legislation accordingly. (Paragraph 47)

10. We reached the firm conclusion that the system of special advocates, as currently conducted, fails to afford individuals a fair hearing, or even a substantial measure of procedural justice. (Paragraph 48)

11. That judgment, in the *MB* case, now requires the Government's earlier position to be revisited, because it rejects the Government's assertion that the statutory regime will always provide the individuals concerned with a substantial measure of procedural justice. (Paragraph 50)
12. We think it is a matter of great regret that the Minister did not see fit to discuss these issues of principle with the special advocates at their meeting with a view to the Government bringing forward amendments to the statutory regime in light of the judgment. (Paragraph 51)
13. In our view the opportunity should be taken in this Bill to make a number of amendments to the control order regime in order to ensure that, in future, hearings are much more likely to be fair. (Paragraph 54)
14. We recommend that the relevant provisions in the statutory framework, which expressly require non-disclosure, even where disclosure would be essential for a fair hearing, be amended by the insertion of qualifying words, such as "except where to do so would be incompatible with the right of the controlled person to a fair hearing". (Paragraph 58)
15. We recommend that the relevant power for making rules of court in the control orders regime be amended to make explicit reference to the right to a fair hearing in Article 6 ECHR, in the same way as the Bill itself qualifies the power to make rules of court for asset freezing. (Paragraph 59)
16. We recommend that an obligation on the Secretary of State to give reasons for the making of a control order be inserted into the statutory framework. (Paragraph 64)
17. To give full effect to the judgment in *MB*, we recommend that the statutory framework be amended to provide that rules of court for control order proceedings "must require the Secretary of State to provide a summary of any material which fairness requires the controlled person have an opportunity to comment on." (Paragraph 66)
18. In our view the statutory framework requires amendment, to enable the controlled person to give meaningful instructions about the allegations against him, where it is possible to do so. We recommend that special advocates be given the power to apply ex parte to a High Court judge for permission to ask the controlee questions, without being required to give notice to the Secretary of State. (Paragraph 69)
19. We recommend that the PTA 2005 be amended to provide that, in a hearing to determine whether the Secretary of State's decision is flawed, the controlled person is entitled to such measure of procedural protection (including, for example, the appropriate standard of proof) as is commensurate with the gravity of the potential consequences of the order for the controlled person. (Paragraph 71)
20. We recommend that the PTA 2005 be amended to provide that, where permission is given by the relevant court not to disclose material, special advocates may call witnesses to rebut the closed material. (Paragraph 73)

Threshold test

21. We are not aware of any such independent review [of the operation of the threshold test in practice] having been carried out and we reiterate that such a review would be valuable. (Paragraph 76)
22. We recommend that the CPS be required to disclose to the suspect and the court when it has charged on the threshold test in order to provide the opportunity for the court to subject the prosecution's timetable to independent scrutiny and to ensure that the defence is in a better position to challenge the basis of the charge. (Paragraph 81)
23. In our view, although we regard the advent of the threshold test in terrorism cases as a largely beneficial development, it would benefit from thorough parliamentary scrutiny. (Paragraph 82)
24. The Bill provides an opportunity to put the threshold test in terrorism cases on a statutory footing and to specify some necessary basic safeguards, to ensure that the use of the lower charging threshold does not result in terrorism suspects being held for longer than necessary before being released without trial. We recognise that the threshold test for charging is not unique to the terrorism context, but we think there is a strong case for making special provision for this category of offence because of the extremely lengthy period of pre-charge detention which is available. (Paragraph 83)
25. We recommend that: (Paragraph 84)
 - the threshold test for charging in terrorism cases is put on an explicit statutory footing;
 - there is an explicit requirement that the CPS inform both the suspect and the court when the suspect has been charged on the basis of the threshold test;
 - the timetable for the receipt of the additional evidence is set by the court not the prosecutor.

Intercept

26. We remain of the view expressed in earlier reports, that providing for the admissibility of intercept evidence would remove one of the main obstacles to prosecuting terrorist crime, a view shared by the Director of Public Prosecutions. We believe it is essential that the Chilcot review reports as soon as possible and in time to enable any legislation to be brought forward as part of this Bill. (Paragraph 87) We therefore call on the Government to publish the product of the long running internal review of this question, including the work done to date on the "public interest immunity plus model". (Paragraph 89)

Formal Minutes

Wednesday 30 January 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Dubs	John Austin MP
Lord Lester of Herne Hill	Dr Evan Harris MP
The Earl of Onslow	
Baroness Stern	

Draft Report [Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 89 read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

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

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

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

[Adjourned till Tuesday 19 February at 1.30pm.]

List of Witnesses

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Monday 17 December 2007

Professor Clive Walker, Professor of Criminal Justice Studies, University of Leeds
Mr Neil Garnham QC, Special Advocate, 1 Crown Office Row

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5 Memorandum from Professor Clive Walker, Centre for Criminal Justice Studies, School of Law, December 2007	Ev 15
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Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199

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
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/ HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights:	HL Paper 122/HC 915

	Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716

Oral evidence

Taken before the Joint Committee on Human Rights on Monday 17 December 2007

Members present:

Mr Andrew Dismore

John Austin
Dr Evan Harris
Mr Virendra Sharma

Dubs, L
Lester of Herne Hill, L
Morris of Handsworth, L
Onslow, E
Stern, B

Witness: **Professor Clive Walker**, Professor of Criminal Justice Studies, University of Leeds, gave evidence.

Q1 Chairman: We are joined for another of our sessions on counter terrorism policy by Professor Clive Walker of the law school at Leeds University, so welcome to you, and thank you for coming. We all have seen your paper on post-charge questions, which is what we particularly want to talk to you about today, and perhaps we can start off by asking you a general question whether there is anything in human rights law which prohibits in principle the allowing of post-charge questioning and ultimately drawing of adverse inferences.

Professor Walker: There are probably two provisions at least that are relevant to this matter. The first is the issue of the necessary detention that will be necessary to facilitate the post-charge questioning which would raise issues under Article 5 of the European Convention relating to the right to liberty. Secondly, under Article 6 there is a question of the generality of the treatment of the person and whether that has an on-going impact in terms of how fair the trial then becomes, how fair it is, for example, to take as admissible evidence which has been obtained by this process, and I suppose the argument would be that particularly after charge the person being questioned is in a rather, shall we say, precarious position, already knowing that charges are to be faced and a trial is pending. So I would say those are the considerations. That does not say that there is any absolute prohibition on questioning, and I think the general issue to be determined is what circumstances of fairness can we devise to ensure that any new process of post-charge questioning is fair under Article 5 and Article 6.

Q2 Chairman: So, taking you to the Home Affairs Committee recommendation, for example, that you should have the same safeguards post-charge as pre-charge, is that effectively the answer to the story, or should there be different safeguards?

Professor Walker: My own view would be that because of the fact that there has been a charge there is a changed circumstance which means that simply applying pre-charge protections which mainly exist under the Police and Criminal Evidence Act and Code C of the Code of Practice are not enough, in my view, and I put that forward for two reasons.

One is that, as I have already mentioned, there is the issue of what is fair in the circumstances, and fairness here includes not only the detention but also the fact that the police and the prosecution are building a case, and we are dealing with the circumstances of an adversarial process where normally we require a very careful umpire to ensure that what is being done is fair in all the circumstances. That umpire we normally call a judge, and we do not simply allow the police after charge to collect evidence without reference to the court. I think a second principle is, indeed, that the court should be seen as in charge. It is the law, that the court is in charge. The Criminal Procedure Rules of 2005 very much point in that direction, so there is again a major difference in principle between allowing the police to investigate a case up to charge, which is their duty, and what goes on after charge, which is the province, I would say, of the court. The court should keep a very close watch over what is happening after charge to ensure that what is being done is fair in those circumstances. So I would disagree with the Home Affairs Committee.

Q3 Earl of Onslow: What, in your view, should be the absolute minimum safeguards that are required? If we were to say yes, this is a good idea, basically how would you allow it to happen and under what circumstances? How would you ration the questioning? How would you umpire to ensure the questioning was still fair along those lines?

Professor Walker: Having criticised your colleagues in the Home Affairs Committee I would start with the proposition that many of the safeguards which apply pre-charge should, indeed, be applied post-charge, and they need explaining or explicating more fully in terms of the conditions of questioning: how long, in what circumstances, meal breaks and all the rest of it; access to solicitors. All of those apply pre-charge but under existing PACE codes there is basic silence on post-charge questioning. It is barely recognised at all, so the first thing is to specify really physical direct conditions of questioning. Secondly, I would like to see the purposes of questioning being carefully delineated, what are the reasons why the police, after charge, would question somebody?

Now, in the context of terrorism, which I think is your main interest, I guess the main reason would be that new evidence has now arisen post-charge, and fair enough, I would say, let's specify that therefore the questioning has to be about new evidence and we do not allow the police to continue to browbeat somebody post-charge on exactly the same issues they were questioning pre-charge. They have had their 28 days, or whatever period the Government might now wish to set. It would really be set at nought and it would make a nonsense of all the debates about what the period of pre-charge detention should be if they could continue on the same tack questioning about the same issue post-charge, bearing in mind that between charge and trial can be a considerable period of time— a year, even closer to two years in some cases, has been common in recent times. A third point is that I would like all of that to be policed. I said after charge the court should be in charge, and I therefore recommend that the wish to question further should be taken before a judge, and should be authorised or refused, as the case may be, by a judge, who should look very carefully at the purposes of questioning, and see that they do not conflict, either with the issues which have previously been questioned pre-charge, or, indeed, that they do not conflict with the very elaborate and precise rules about disclosure of evidence which apply post-charge, for I think there is again a danger of the police obtaining by post-charge questioning what they would not be allowed to obtain through the process of disclosure of evidence pre-trial. I would also like the judge, the questioning having taken place, to go back and check the records that the police have actually observed the limits that have been set on the rounds of questioning, the areas of permissible questioning. You would also need to think about periods of time. Should it be another 28 days? Should the police be able to question for what I described as potentially up to two years? Should they question somebody every day over two years? My own recommendation would be to think in terms of no more than a total period of questioning of seven days. So there are periods of time, there is judicial review, and conditions of questioning.

Q4 Earl of Onslow: Arising out of that, how do you cope with, unless you have a judge sitting in on the questioning, PC Bloggins being allowed to question within that sort of parameter? The accused has a solicitor present. The policeman, because he is getting more information, starts to stray outside those parameters. How do you police that if there is not somebody judicially there? Also, how long would you allow this to go on? Let's say new evidence arises ten minutes, and I am taking this as an exaggeration, before the trial is due to start? How would you stop it happening X days or X hours or X months or X years before the trial starts?

Professor Walker: On the first point, we have moved on in terms of police questioning and questioning is now, certainly for more serious cases like terrorist cases, almost certainly going to be tape recorded. So I think we do have a good record, and we would be

able to obtain a fairly clear transcript of what has gone on in the police station. As you say, combined with the fact that the suspect, the chargee's, lawyer is also likely to be present and is able to object at the time if the questioning, as you say, strays. But my idea was to bring back the transcript before the judge who granted the authorisation. Let the judge look at the transcript and make a judgment as to whether the police have strayed too far in a way which is unfair or underhand, if you like, designed to evade the rules on pre-charge questioning time limits or designed to evade the rules on disclosure. So that is my answer to your first point, the safeguards are there. In terms of when does the clock stop, or should the clock ever stop, I would certainly find it difficult to say that it is likely to be viewed as fair to question while the trial is going on. It would seem to me to be an extraordinary fate for an individual to spend his day in the Old Bailey and his night in Paddington Green, so I am fairly sure of that. I find much more difficult your question should the police interrogation stop a day before the trial, a week before the trial, a month or a year before the trial? I would come back to the idea that any questioning is to be authorised by a judge who is charged with the idea of ensuring fairness in the circumstances, and I can conceive that it is possible that if evidence suddenly arises a day before the trial and that the police have not exhausted their allotted time, which I argued should be seven days, then questioning might be viewed as fair. It might also be viewed as fair for that judge to postpone the trial so that the defence can properly consider the evidence which has been obtained. So I find your question a very difficult question to answer in terms of time limits, save that I would say that there cannot be questioning during the trial.

Q5 Baroness Stern: Some people might say that the role you are suggesting for the judge is inquisitorial and that is rather at odds with the traditional judicial function in an adversarial system like ours. How would you answer that objection?

Professor Walker: I am not asking the judge to directly ask the questions, and in the context of a hearing I would add as another safeguard that I would like any police questioning to be approved by the prosecution. I think it is probably obvious that that would have to be the case after charge, so on the one side we have the police making an application to question further, and I would also invite the defence to appear if they wished to object to the questioning. So I see the role of the judge as essentially an umpire as to whether the questioning should take place, and later, on review, an umpire as to whether the questioning which has taken place has taken place fairly and in the interests of justice. In that I would distinguish the role of the judge from an inquisitorial magistrate, who is actually directing the lines of inquiry and in some cases is conducting those inquiries directly herself or himself. The judge remains an umpire; the initiative is taken by others.

Q6 Lord Dubs: My question is about silence in the face of post-charge questioning. What do you think is the minimum that should be contained in the specimen direction by the trial judge to the jury about the inferences it might be permissible to draw?

Professor Walker: This, again, is a very difficult question. There are a number of provisions in past history which have allowed questioning post-charge but on the basis that the evidence is not allowed to be admitted at all, and so the first proposition is to question whether I think we allow this evidence to be admissible. As I say, there are a number of fairly recent statutory provisions—when I say “recent”, the past 20/25 years—dealing with serious frauds and corporate misdeeds which have allowed this form of questioning, but very much on the basis that the evidence would not be used. I think if we allow the evidence and then also we allow not only statements which have been made but silences by way of unforeseen¹ inferences, we have to be again sure, it strikes me, that it is fair to draw inferences in those circumstances, and I think that again points to active judicial umpiring of what is being questioned about and the circumstances of questioning. So I would say that provided we have had that form of umpiring, the circumstances which I have already described, it is difficult to argue that it is necessarily wrong to draw adverse inferences. A case called *John Murray* before the European Court of Human Rights did not exclude the possibility of adverse inferences being fair. In terms of the directions, then, to the jury I think I would like to add an extra statement to what is the current approved statement which has been devised through the Judicial Studies Board which would be to the effect of a reminder to the jury that, post-charge, the suspect is perhaps at a particularly fraught stage and is under particular pressure to respond and to try and, for example, do a deal or to please his or her imprisoners. Therefore the reliability of either silences or statements may be particularly questioned in those circumstances. So I start with the normal proposition, the normal inferences, the normal directions, but I think I would have a special warning to do with post-charge questioning.

Q7 Lord Dubs: You have mentioned a number of safeguards, both in answer to my question and earlier questions. Do you think some or all of these should be contained in primary legislation, and if not all, which ones do you think would be appropriate to leave to secondary legislation, for example amending the PACE codes, to which you have also referred?

Professor Walker: I start with the proposition that the Police and Criminal Evidence Act does not authorise in the terms of that Act post-charge questioning at all, so I would start with the proposition that if you are going to go down this road, whether it is to do with terrorism or, as the Government has also argued, police questioning in general, there does need to be primary legislation to set some parameters. The particular parameters I

would set in the primary legislation would, indeed, relate to the purposes of the questioning—for example, it relates to new matters not old matters: I would see it as relating to the time limits on the questioning—I suggested no more than seven days; and I think the idea I put forward of judicial umpiring of the process of questioning would also require primary legislation. Presence of a solicitor would also require primary legislation. So I think all of that should be primary. I think you could probably leave to an amended PACE code issues like the person shall get a meal every two hours or a meal break every two hours, and some of the details of that kind can be left to the details of the code.

Q8 Chairman: Can I put to you the more general question as to where this has all come from? We are trying to steer a very difficult course, I think, between, on the one hand, post-charge questioning and, on the other, 28 days, plus or minus. The question really, I suppose, is this. One of the key arguments that has been advanced by the police in the past, I am not sure to what extent it is still the case now but it will come back, is that the reason we need 28 days, or more than 28 days, is the complexity of the investigation and the fact that evidence comes to light much later, and with the fixed time limit they cannot put that evidence to the suspect, and the argument is we can have threshold charging, which works on the basis of anticipating what the evidence may be and within what timeframe and so forth, and the argument then comes back: Well, the answer to that is to require the charge and the threshold charging and all the rest of it to be at the 28 day limit, but the quid pro quo is that the police should then be able to put that to the suspect at a later date. So which is the lesser of two evils, having more than 28 days—42 days or whatever it is—and no post-charge questioning, or sticking to 28 days or even less, but the quid pro quo is you allow the suspect to be questioned on the evidence that comes forward as a result of those later inquiries? How would you answer that, which is the political question we all have to grapple with?

Professor Walker: I think I would prefer to treat the issues as independent to a large extent. In other words, I would like you to ask yourselves, as you no doubt have been, is the 28 days justified on its merits? What is the evidence in terms of the case files, for example, from 14-28 days?

Q9 Chairman: We have already concluded on that and we have said there are no grounds for fixing the limit beyond 28 days. But I put the argument hypothetically because there is no doubt this is an issue that will keep coming back as it gets more complex or more evidence is produced. At the moment we are not satisfied we need to go beyond 28 days, but there is no doubt this issue will be a running sore through politics for the foreseeable future, so take it as read that is going to be the argument we shall have to answer.

Professor Walker: Well, taking it as read that it is an independent issue, looking at the merits of the issue of post-charge questioning in itself, I accept in many

¹ *Witness correction:* adverse.

ways the preamble of what you have said, that it is claimed—and I think I accept—that a lot of the recent terrorist cases have been very complex. I go back to the question of independence: this does not necessarily mean you need more than 28 days because what you have there is a profusion of evidence within 28 days to charge to the person anyway, but I can see there is an argument you may wish to explore the evidence further. It is in the public interest to know what has gone on and to detect all the strands of the conspiracy which has taken place. So I think that the complexity is a good argument which I accept as a leg for post-charge questioning. The other argument you give I also accept—that the threshold test does again leave up in the air, if I can put it that way, more so than, shall we call it, the normal test, a number of strands of evidence which can be left where they are for the sake of bringing a viable charge, but it may again be in the public interest to explore those unexplored strands and see if there are better charges which might be made or, indeed, other charges which may be made against other people. So I accept the generality of the argument that post-charge questioning has come on the horizon, and makes some sense in the fact that there are changed circumstances which particularly apply in terrorist cases. What I did not accept was the argument that this can be done without a lot of thought and you can simply apply the pre-charge PACE rules to post-charge questioning.

Q10 Chairman: I think we would certainly agree with that. Can I look at the other side of perhaps the same coin? The police say: Well, it would be useful to have this. However, in practice they will not answer our questions anyway, which is what the position has been pre-charge questioning, generally speaking. The only utility, therefore, comes from the issue of being able to draw the adverse inferences. Is there anything you would like to add to that because in the end we are not arguing so much about the questioning, but about the inferences.

Professor Walker: Yes. The silences. I suppose two things come from my research. First, I agree with the proposition that in terms of post-charge questioning it happens very rarely, and I very much suspect the reason is what is the point, they will not answer any charges. What would be the effect of applying adverse inferences? I can tell you that there was some research done in Northern Ireland in relation to adverse inferences in terrorist cases—

Q11 Chairman: Is this in Diplock courts?

Professor Walker: In Diplock courts, indeed, yes. This goes back I think about seven or eight years, the research, so not exactly the heyday of Diplock courts but nevertheless Diplock courts. The effect of applying adverse inferences—and this again was pre-charge not post, because the rules in Northern Ireland are very much the same; there are no adverse inferences post-charge—was not to produce dramatic changes in terms of those adverse inferences, but to encourage the suspect to speak. I am trying to remember the precise figure, but I think it went up from round about 36% who answered

questions to 75% who answered questions, so the main effect was an encouragement to answer the questions. In terms of the adverse inferences they become rarer, and the change there was probably less dramatic. I have a colleague in Northern Ireland at Queen's University Belfast,² who does a lot of research on this and he described the adverse inferences as “copper-fastening” the already strong case. That was how he put it in his observations of the cases where he found an adverse inference had been used.

Q12 Chairman: And since adverse inferences came into England in ordinary criminal trials, has there been any research done on the impact that has had?

Professor Walker: There has. The impact has been rather more marginal but of a similar nature. In other words, the courts themselves have not, I would say, dramatically used adverse inferences to convict people; it adds to other evidence but it has encouraged more responses to police questioning or, indeed, issues raised at trial. That seems to be the impact. So we must assume it would have the same impact, if applied to terrorist cases in England post-charge.

Q13 Lord Lester of Herne Hill: I am sorry I was not here at the beginning of your evidence, Professor Walker. My question really is to ask you to state what I hope is the obvious. I take it that the basic safeguards built into the common law and the Human Rights Act are, first of all, the presumption of innocence: secondly, the privilege against self-incrimination, the right to silence: and, thirdly, the overriding obligation of the criminal court to ensure fairness at trial, and all of that is in common law but copper-fastened in the Human Rights Act and the European Convention, so that those safeguards would be in place if we moved towards post-charge questioning, leaving aside the merits of doing so. Is that right?

Professor Walker: I answered a previous question about what would be the difference of the regime pre-charge, and the various safeguards that exist pre-charge, and the regime that might exist post-charge and what I would like to see post-charge, and I did point out as one of the perhaps major differences what I would describe as “judge umpiring” the questioning post-charge. I would not be happy simply to leave this to the police to conduct as they see fit; I think it should require pre-authorisation by a judge. Let the police put their need to question to a judge and prove that it does not either repeat sessions of questioning already conducted, or does not trespass on the rules of disclosure, or process of disclosure. So there would be pre-authorisation. I also argued that the judge, after the process had taken place, should check the record to see that what has been done is fair, and that he or she makes a decision as to whether any evidence found, or silences inferred, should be raised at trial. So I think the differences are close scrutiny, a close umpiring, as I described it, by the judge.

² Note by Witness: Professor John Jackson.

Q14 Lord Lester of Herne Hill: I understand that entirely. What I was on about was, assuming that the earlier safeguards that you are recommending did not operate, there would still be the obligation at the actual trial for the judge to be extremely careful against the use of answers to post-charge information because of those three safeguards that I have mentioned about presumption of innocence, the privilege against self-incrimination and fairness of trial. So those would be in place. I am not disagreeing at all in my question, but that is right, is it not? There would be the final obligation of the trial itself?

Professor Walker: Oh, yes. We, of course, still have the operation of the provisions in Sections 76 and 78 of the Police and Criminal Evidence Act 1984 at the trial itself. What I am arguing is, if the judge has to review at a much earlier stage, pre-trial, then maybe the evidence would not even reach trial. If he or she believes that the questioning that has been conducted has strayed from the authorisation which was granted, we could put a stop to it at that point. But you are right, even if it goes to trial, I guess it would be true to say the defendant has a second bite at it through Sections 76 and 78, and let the jury decide ultimately of course.

Q15 Lord Lester of Herne Hill: And why would that not be sufficient? We know that in the United States the Fifth Amendment is interpreted in a very extreme way, one might say, to cover people being questioned even when it does not lead to trial, whereas in the UK and Australia we do not take quite such a robust view. Arguing against you, why would it not be sufficient to say any abuses or misuses on the way can be cured by making sure that the evidence is not improperly used at trial? What is wrong with that argument?

Professor Walker: Well, simply that I put forward the proposition that post-charge questioning is perhaps putting the suspect, the charged person, the accused, in an even more difficult position than pre-charge questioning, and our suspicions ought to be heightened in that circumstance. The earlier the check that the evidence that has been obtained or the adverse inferences which are to be applied is fair in the circumstances the better, in my view, and that relates again to the fact that there is perhaps greater pressure on the accused having been charged with offences. There is also the danger of conflict with the rules of disclosure- where does the boundary of post-charge questioning end and where does disclosure begin? We need again a judge to sit as an umpire to make sure that each procedure is being used for its appropriate purpose. Of course, particularly the issue of disclosure does not apply pre-charge.

Q16 Chairman: One recommendation that we previously made in relation to pre-charge questioning was that interviews should always be DVD recorded. Presumably you would consider that an appropriate safeguard here as well?

Professor Walker: If the technology is there, which it certainly is, I see no reason why not. My own experience is that these battles about what was being

recorded have been, largely won in the case of PACE suspects, and it is treated now as a matter of course. There is still an overhang in Northern Ireland of a reluctance to record, but I do detect from research and from talking to police officers in Northern Ireland that that is breaking down also because of the influences of PACE. So the better the record the happier I would be in terms of ensuring that justice and fairness is being observed.

Q17 Earl of Onslow: So may I sum up? What you would like is judge permitted to query interviewing on nothing other than new evidence and time-rationed, and videoing and post-questioning checking with the judge that Plod has not cheated?

Professor Walker: Yes.

Q18 Earl of Onslow: If that becomes acceptable and part of the law, would it not therefore be just as reasonable to use this for non terrorist trials as well as terrorist trials, if part of the politics of it should be to make terrorists as near criminal rather than terrorists? Is there any reason why it should not go on over into non terrorist trials?

Professor Walker: I do not see why not in principle. I think, as you rightly say, if the conditions of fairness apply they apply across the board. Of course, there is a Home Office paper modernising police powers which has made that very proposal but, again, it does so as a kind of afterthought without really any delineation as to what the rules should do. So I think there is a big "if and but" to set the conditions right.

Q19 Earl of Onslow: But it is proper conditions?

Professor Walker: Yes.

Q20 Lord Dubs: One of the safeguards you have mentioned was that the period of post-charge questioning should be limited to, say, seven days. In your view, given that the period after charge and before trial can be a long one, could that seven days be anywhere within that period, or is there some additional safeguard you would attach to it? In other words, could the police wait, say, three months and then have their seven days?

Professor Walker: I have raised the question before whether the police are allowed to wait until the day before the trial, and I think we have to judge in the circumstances whether they have done so as a kind of artifice to put pressure on the suspect, in other words on the accused, by waiting that long. But I am troubled by the idea and I started with the proposition: Well, why do we not allow them another 28 days, and then I had the question would it be 28 days per each piece of new evidence, or 28 days overall? It did seem to me we were getting into the realms of very oppressive-looking treatment. So my suggestion is that the period should be seven days, seven days in detention of the police for questioning, and that this should be treated as a clock that you could start and stop within that seven days. You start when you think it is a reasonable point to start it; you may stop after three days and save the other four days for later. I do mention seven days; you may think nowadays that is awfully short

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given that we have 28 days, but I think it is a fair period. Remember that 28 days was set with a view to dealing with things like forensic evidence and connecting with foreign police forces, reading computers, looking at CCTV; 28 days was not set to interrogate the suspect for 28 days. I can also tell you that if the seven days is purely for interrogating the suspect, that is an extraordinarily long period of interrogation. Maybe I have been too generous there. I did some research and when the period of detention used to be seven days—which it was, of course, until 2003—a study by the Home Office in 1992 found that out of seven days the maximum period of questioning of any suspect that it ever came across was 21 hours. So if one takes seven days as the questioning period, with maybe a little bit of time to get the person meals and so on in between, then that is an extraordinarily generous amount of time to allow to the police purely for questioning.

Q21 Chairman: And this would also, in your view, be subject to approval by a judge in the first place?

Professor Walker: Indeed, yes. The balance of questioning, as we have said, should be with a purpose which is explained to the judge, and I suppose equally the judge should check on where the clock has reached and make sure that the time is not being exceeded.

Chairman: That would fit in very well with one of our recommendations in an earlier report about much more judicial management of the timetable in relation to terrorist cases.

Earl of Onslow: One other matter arises out of that point—

Chairman: This is your post-interview questioning!

Q22 Earl of Onslow: —which is the police getting hold of evidence, holding it and saying: “We will wait before until a week before the trial”, even though this is new evidence, new evidence you have had for six months. Presumably this would have to be controlled by the judge as well?

Professor Walker: Yes. We are reliant on the judge, and your own previous reports have shown that perhaps the judges are not active enough in these cases and should be encouraged to be more active in questioning the police. So, yes, I would very much encourage a judge to question: When did this evidence become available to you? Why have you waited six months to ask for questioning at this point?

Chairman: Thank you very much, that is very helpful, and I hope has answered one or two questions in our minds about questioning witnesses in this area.

Witness: **Mr Neil Garnham QC**, Special Advocate, 1 Crown Office Row, gave evidence.

Q23 Chairman: We are now joined for our second session of the afternoon by Neil Garnham QC, who is Special Advocate. Our second session is about control orders and special advocates. Neil, presumably you are aware of our previous recommendations in our report in the summer of basically three themes: that there should be an obligation on the Secretary of State to provide a statement of the gist of the closed material; that the prohibition of any communication whatsoever between the special advocate and the “client” after closed material is seen to be relaxed; and the standard of proof in SIAC should be raised to balance of probabilities. From your experience do you see any particular practical problems arising from those specific recommendations?

Mr Garnham: I can see there is going to be considerable objection to the first of them. Although I think it is an entirely sound proposal from this Committee, the Security Services and the Home Office are going to be spitting tacks, I fear—not that that is a reason for not going ahead with it, but I anticipate that as a practical problem. The second matter you raise is the communication between the special advocate and the appellant. As you concluded on the basis of the previous Special Advocate’s evidence it seems to them, and I have to say I share the view, that it is a pretty essential step, provided some mechanism can be devised for achieving it, because what exists at the moment, as you know, is pretty hopeless. We can pose questions of the appellant after we have seen the closed

material but only with the permission of the Commission or the judge having given notice of the questions we want to pose to the Secretary of State, which is entirely counter-intuitive to any lawyer, that you disclose your case to the other side before you even get permission to ask the question. Of all the matters you raise that is the one that seems to us most critical. A thought I have had in the past, which I do not pretend is necessarily shared by others, is that I do wonder whether there might not be a means by which this could be achieved, sensibly and with reasonable efficiency. I do not see why special advocates should not have the power, were there rules to make provision for it, for us to apply *ex parte* to a High Court judge for permission to ask the question. The High Court judge would then act as the guardian to ensure we are not asking questions which we ought not to ask, but we would not have to disclose significant parts of our case to the other side, the Security Service, which would often render the whole idea pointless. If that was to find favour, it might even be made better by permitting that application to be made to a High Court judge with experience of these matters but not the one who is hearing the case. Because the downside of this procedure is that we ask a question of the appellant to which we get an entirely unhelpful answer that shoots ourselves in the foot, and since we are not meant to be there as *amici curiae*, friends of the court, we are meant to be looking after the interests of the appellant, I do not see why we should be exposing him to us accidentally shooting him in the

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foot. So it seems to me that it is possible, although it would take some thought. As to the third of your proposals, namely the change of the standard of proof to balance of probabilities rather than mere suspicion, it has long been the view of all of us who do this work that that is entirely justified.

Q24 Chairman: What sort of difference do you think it would make in the cases you have dealt with if we had that third provision? In practical terms do you think it would make any difference to the cases you have been involved in?

Mr Garnham: I should say straight away that although I have done quite a lot of special advocacy work it has been all in SIAC. I have not done a control order case, but I am not sure the difference is very material, to answer your question, Chairman. It is pretty difficult to answer, to be honest, the question as to whether I think that change of standard would make a difference. It might in one or two cases I can think of where I thought we had a decent shot at it, and if it was not for the fact we were met with such a low hurdle we might just have swung it, so yes.

Q25 Chairman: And on your previous answer on the gist of the closed material, is there any way that that could be operated in a similar sort of way to the point you made about the ex parte application in the High Court, in terms of how that could be cleared, or something like that?

Mr Garnham: Gisting is really quite a common technique that we have pushed hard because it has been the most fruitful way, often. The prospects of persuading the Commission or the court to put into open a closed document are vanishingly small, but sometimes we will get somewhere if we can suggest a gist that gets the burden across without disclosing where it comes from, so it has become a very popular device. But we have only succeeded in making it so useful because we have been able to negotiate it with the Secretary of State's counsel, and it is in that process of negotiation that you arrive at something that is just about acceptable to the Security Service and takes us a bit further forward, so I do not see room for that.

Q26 Chairman: For example, if they were to provide a gist they would have to justify that to this second judge?

Mr Garnham: If we, the special advocates—

Q27 Chairman: No. If you want it and they refuse to provide it, that refusal would have to be justified to a second judge?

Mr Garnham: Well, that is, in fact, what happens now but it is not a different judge, it is the same one and he is in the best position to judge that because he has been reading into the papers. So I am not sure that would improve it.

Q28 Earl of Onslow: On this closed material, are the Security Services overzealous in not allowing anybody to see anything? In other words, do they

tend to think that something which is published weekly in the *Daily Mail* should not be allowed to be shown?

Mr Garnham: I think that is their default position. My favourite example was where they were attempting to keep in closed the particular assertion we wanted in open, and we were able to point to the fact that it had been in the Buckingham Palace section of *The Times* not very long ago! The Court Circular had announced that whatever group of the Army it was had visited whatever country it was, and they did then give way and say that that could be made open. So they do tend, I think, to be very cautious but that is understandable because of the nature of the material they are dealing with, and the quantity is so vast. That is what is difficult to get across to those who do not do these cases; the material is enormous.

Q29 Chairman: What we were told last time was that a lot of material which turned out to be closed was available on the internet if you knew where to look, but often not in translation.

Mr Garnham: Yes. It is something we spend tedious hours doing, googling obscure names, but in fact we have to be careful about that because Security Service have made it clear they do not mind us making simple Google searches, a single name, but we cannot do any of the more complicated googling where you put in two names because the nature of the link, were it to be revealed, might disclose something they would be unhappy for us to reveal, so in those circumstances they require us to go to Thames House and do the googling on a protected computer.

Q30 Chairman: Does that stop you getting access to anything? There is the inconvenience of it; there is the risk of you being surveilled yourselves while you are doing that, I suppose; but, more importantly, does that restrict access to the wider internet?

Mr Garnham: It means if we want to make that sort of more complicated search we can only do it in their premises, and that is just inconvenient, and it is difficult to fix up times in the usual way.

Q31 Lord Morris of Handsworth: Mr Garnham, I note your earlier comment that you have not done a control order case, but from your experience of acting as a special advocate would it be helpful or unhelpful for Parliament to clarify the statutory framework in light of the recent House of Lords judgment, in particular concerning the procedure fairness of control orders?

Mr Garnham: I think it would be helpful. I suspect what will happen now is there will be a whole sheaf of cases that make their way up through the appellant courts testing the limits of what the House of Lords said in the recent case, and I suspect if that were overtaken by a Parliamentary amendment that set out clearly what it was it would help.

Q32 Lord Morris of Handsworth: Have you got any special procedural advice that you want to offer on that?

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Mr Garnham: Not beyond what I have said so far and beyond perhaps turning the qualification, the reading, into the statutory framework that was suggested by Baroness Hale. I can see good sense in making that statutory instead of case law.

Lord Morris of Handsworth: Thank you.

Q33 Baroness Stern: Are you saying it would make control order proceedings fairer if there were an obligation on the Secretary of State to give a fuller explanation of why she considers there are grounds for making the order at the time the order is made?

Mr Garnham: Yes, I do, but I can foresee the nature of the objection that there would be to that, because it is in giving that greater disclosure that the Security Service would fear damaging disclosure. This is not something I think easily solved by a piece of draftsmanship.

Q34 Baroness Stern: Because?

Mr Garnham: Because as soon as you start gisting the Secretary of State's case you start giving away that which is regarded by the Security Service as potentially damaging to national security, and that is the nub of the problem.

Baroness Stern: Thank you.

Q35 Earl of Onslow: Are there any other amendments to the statutory regime of control orders, would you say, that are necessary or desirable in the light of the House of Lords judgment?

Mr Garnham: I cannot think of any, I have to say, beyond what I have talked about already. The difficulty from a practitioner's point of view with the House of Lords judgment is that the three principal speeches, or at least the three that followed the single consistent line, Lord Brown, Baroness Hale and Lord Carswell, urge on the court and on the special advocates that they really must try harder to make this fairer, and that is easier said than done. I doubt, and I have not detected in the cases I have been in, there is any want of enthusiasm or hard work either on the part of the Court or the special advocates to try and make this work; it is just intrinsically difficult.

Q36 Chairman: So you have no bright ideas, going beyond MB, about what could be done to make them fairer?

Mr Garnham: Beyond the one I have suggested, which is provision for an ex parte application, and that would not be a tinkering. If it were acceptable that would be a substantial change because it would mean for the first time we could find a way of putting questions to the person whose interest we are trying to represent without being overlooked by the Secretary of State.

Q37 Chairman: But what about calling your own witnesses? Do people exist who are experts in the field that you could use as expert witnesses?

Mr Garnham: No, they all work for the Security Service. All those who are going to be any good at it are employed by the Security Service. Occasionally

one hears the name of a retired person with an independent mind, and we have raised this collectively as a possibility of obtaining the assistance of such a person, but it is not easy, and they are not ready available.

Q38 Chairman: Well, if they were readily available, could you or should you be able to call them?

Mr Garnham: Yes, we should, if Baroness Hale's reading of the rules is right, and yes, we can, but the latter point is not without its difficulties. I think it might be useful to have it made express that special advocates are empowered to call witnesses. It has been contemplated in various amendments to the rules and I confess I cannot recollect whether it is now in or not, but I think it would be a good addition.

Lord Lester of Herne Hill: My only experience, like yours, has been with SIAC and in relation to proscribed terrorist organisations in one case, and I must just remind myself about the sub judge rule, because the case I was in was the *People's Mojahedin Organisation of Iran* and I am not sure whether it is on appeal or not.

Chairman: I think you had better be careful on that.

Q39 Lord Lester of Herne Hill: That is why I am being careful but, anyhow, I think I can ask my question without breaching parliamentary privilege. I am interested by your proposal for the ex parte application. My difficulty with the current procedure on the basis of my experience is that suppose the allegation is that the organisation blew up a lorry at such-and-such a place and undesirable things were said at such-and-such a meeting, but not enough particularity is given to enable the advocate for the suspected body or whatever it is to be able to answer the allegation; it is simply too vague. My experience was that it was impossible to get particularity because immediately it was claimed that all this was very secure and therefore nothing should be disclosed to counsel for the applicant. Under your procedure, if you and I were doing a case of that character, whether it was control order or otherwise, could I then go to you and say: Would you make an ex parte application to get greater particulars of so-and-so, so-and-so and so-and-so?

Mr Garnham: Yes. That is how I foresee it operating.

Q40 Lord Lester of Herne Hill: Rather than my applying to the court on behalf of the individual—

Mr Garnham: I am not sure who "you" and "I" are in this example.

Q41 Lord Lester of Herne Hill: I am representing the suspected terrorist.

Mr Garnham: And I am the special advocate?

Q42 Lord Lester of Herne Hill: Yes, and the suspected terrorist is called Andrew Dismore, and I am trying to do the best for this suspected terrorist, and he says: "I have not the faintest idea of what is being alleged. It is far too vague; I do not recognise it". What would then happen under your scheme?

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Mr Garnham: My scheme envisages an application by me, the special advocate, based on what I know from the closed material trying to entitle me to ask you questions. For example, if the burden was that on 22 February Andrew Dismore was plotting with the rest of the organisation to blow up Parliament, although there is no way I think I can persuade a court to let me ask that question directly, I might be able to persuade somebody to give me permission to ask Mr Dismore where he was on 22 February.

Q43 Lord Lester of Herne Hill: I am suggesting asking the Security Service, not Mr Dismore.

Mr Garnham: On behalf of Mr Dismore I ask the court for permission to ask the Security Service, “Can I ask Mr Dismore where he was on the 22nd?”, because that is the way it would work. It is not me getting further information out of the Security Service on the model I am proposing.

Q44 Chairman: You have got the information; you want to be able to put it to the suspect?

Mr Garnham: Yes. I want to know what he was doing; I want to know whether he has an explanation for where he was on that date.

Q45 Chairman: Without saying what they say you think he has done?

Mr Garnham: Yes. At the moment I cannot do that, probably, because there would be objections from the Secretary of State to my even raising the question of 22 February.

Q46 Lord Lester of Herne Hill: Because it would tip him off—

Mr Garnham: That there was something significant about 22 February.

Q47 Lord Lester of Herne Hill: I understand. So it would make a real difference if you could do that?

Mr Garnham: Oh, yes.

Q48 Chairman: I think that is probably it, unless there are any questions or points that you would like to put to us that we have not covered?

Mr Garnham: No. Thank you very much for your time.

Written evidence

1. Letter from the Rt Hon Jacqui Smith, Home Secretary to the Rt Hon David Davis MP, dated 10 December 2007

I am writing to let you know that we intend to include two measures in the proposed counter terrorism bill that were not mentioned in the consultation documents the Government published on 25 July, but which I understand John Reid mentioned when he met you in May.

The two measures are:

Provisions relating to use of closed source material in terrorist asset freezing cases

Asset freezing is an important tool in the fight against terrorism. It is an executive action and is the responsibility of HM Treasury. When deciding whether to freeze the assets of a terrorist suspect, the Treasury may base its decision on all available information, including closed source material. Presently there is no mechanism in legislation to safeguard the use of closed source material in civil court proceedings relating to terrorist asset freezing cases (that is, where a decision to freeze assets is challenged in court), nor may intercept product be relied upon to support the asset freezing decision. We intend to amend the Regulation of Investigatory Powers Act 2000 so as to allow reliance on intercept in such cases (as already happens in control order, proscription and deportation cases), and to put in place a procedure to govern legal challenges to asset freezing decisions, which will afford the appropriate protection to sensitive material and capabilities. This will involve statutory provision for close hearings with special advocates.

Attorney General's approval for all UK prosecutions of terrorist offences committed overseas

We are proposing to legislate so that the Attorney General should approve all UK prosecutions of terrorist offences committed overseas. It was recommended by Lord Carlile, in his report on the Definition of Terrorism (paragraphs 75–82) in order to strengthen confidence that the discretion for or against the use of counter terrorist legislation in extra-territorial cases is exercised correctly. At present the Attorney must give her consent to prosecutions for terrorism offences that are connected to the affairs of a foreign country. Therefore this is a small extension of the Attorney's powers.

I am copying this letter to Nick Clegg MP, Peter Wishart MP, Elfyn Llwyd MP, Rt Hon Keith Vaz MP, Andrew Dismore MP and Lord Carlile of Berriew QC.

Jacqui Smith MP

10 December 2007

2. Letter from the Rt Hon Jacqui Smith, Home Secretary to the Rt Hon David Davis MP, dated 21 January 2008

I am writing to inform you that I intend to include two further measures in the proposed counter terrorism bill. The measures relate to coroners' inquests that will involve material that could not be disclosed publicly without harming the public interest and measures to establish a universal UK jurisdiction for terrorist offences.

Coroner's inquests

The Coroners Act 1988 requires or creates a power for coroners to hold inquests with a jury when they have reason to suspect that an individual has died a violent, unnatural or unexplained death in prison or while in police custody, as well as in certain other circumstances. In such circumstances, an inquest may provide the means by which the UK complies with its obligation to investigate deaths under Article 2 of the European Convention on Human Rights (ECHR). It may therefore be necessary in some cases for coroners' inquests to consider material that could not be disclosed publicly without harming the public interest (for example, for reasons of national security or international relations). But material that cannot be disclosed publicly could not be shown to the jury, as the finders of fact. This creates the potential for coroners' inquests to be incompatible with Article 2 of the ECHR where the sensitive material is central to the inquest. In order to remove this potential, we have developed two legislative proposals which will ensure that coroners' inquests in England and Wales can always comply with Article 2 of the ECHR.

First, it is proposed that coroners should be required to hold inquests without juries in all cases which the Secretary of State has certified will involve consideration of material that could not be disclosed publicly without damaging the public interest for reasons of national security, international relations or for other public interest reasons. Sitting without a jury, suitably trained and cleared coroners, as the finders of fact in these inquests, will be able to see the material in question. It will be possible for coroners in certified cases to invite suitably trained and cleared counsel to assist the inquest. Counsel to the inquest, one of whose functions will be to represent the interests of bereaved families, will also be able to see the material in question.

Second, we also propose to add coroners presiding over such inquests, and counsel appointed for the purpose of assisting them, to the tightly drawn list of exceptions in section 18 of the Regulation of Investigatory Powers Act 2000 which would allow material derived from intercept to be disclosed to them where the exceptional circumstances of the case make the disclosure essential.

We propose to make a corresponding amendment to section 18 of the Regulation of Investigatory Powers Act 2000 to permit intercept material to be disclosed, in exceptional circumstances, to counsel to an inquiry held under the Inquiries Act 2005. The panel to an inquiry can already seek disclosure of intercept in exceptional circumstances. The Government is firmly of the view that the proposed changes are necessary in order to ensure that we are able to comply with our Article 2 obligations while protecting the integrity of the material in question. We are working with colleagues to consider whether equivalent provisions should be made for Northern Ireland and Scotland.

Measure to establish a universal UK jurisdiction

I would like to legislate in the Counter-Terrorism Bill to provide UK universal jurisdiction for terrorist specific offences. This would enable an offence under the Terrorism Acts 2000 and 2006 committed in any part of the UK to be tried in any other part of the UK.

The events in Glasgow earlier this year have highlighted a potential issue in relation to jurisdiction over terrorism cases. Although terrorism offences under the Terrorism Act 2000 and the Terrorism Act 2006 are UK wide there must be a link with England for the offences to be tried here (and the same is true in relation to Scotland and Northern Ireland respectively) and such a link may not be apparent until the investigation is well advanced.

Lack of clarity on these issues threatened to cause problems in the Glasgow case. This was resolved because the suspects could be prosecuted for both the incidents in London and Glasgow under the Explosive Substances Act 1883. This facilitated the transfer of the investigation to the Metropolitan police because the 1883 Act allows for prosecution in any part of the UK for explosions that are carried out anywhere in the UK. This issue has been highlighted by Lord Carlile in his report on the Bill which was published on 6 December.

There may, however, be circumstances where we are unable to transfer investigations under current legislation. Therefore we propose to legislate in the forthcoming Counter-Terrorism Bill to make it clear that a terrorist offence committed in any part of the UK can be prosecuted in any other part of the UK. This would enable prosecutions to take place in the most appropriate jurisdiction, whether that is in England and Wales or Scotland or Northern Ireland.

The proposal would be supported by the development of protocols between the police in England and Wales, Northern Ireland and Scotland on how cross border police issues should be handled in terrorism cases.

I am copying this letter to Chris Huhne MP, Peter Wishart MP, Elfyn Llwyd MP, Rt Hon Keith Vaz MP, Andrew Dismore MP, Rt Hon Alan Beith MP and Lord Carlile of Berriew QC.

Jacqui Smith MP

21 January 2008

3. Letter to Rt Hon Jacqui Smith MP, Home Secretary. dated 12 November 2007

COUNTER TERRORISM BILL DRAFT CLAUSES

Thank you for sending my Committee a copy of draft clauses on some of the proposals in the forthcoming Counter Terrorism Bill. As you know, we welcomed your predecessor's commitment, in his statement to the House of Commons on 7 June 2007, to share draft clauses with us and the Home Affairs Committee. In our most recent report in our ongoing inquiry into counter-terrorism and human rights, we welcomed this as an important indicator of a change to a more consultative and consensual approach to counter-terrorism policy.¹

While we are grateful to have received the draft clauses, we are disappointed not to have received them in time to give us an opportunity to subject them to detailed scrutiny and to point out any human rights compatibility concerns at as early a stage as possible and before the Bill is finalised. In Mr. McNulty's evidence to us on 20 September he hoped to be in a position to provide us with draft clauses by "early October", or by the time the House resumes (ie 8 October). We received the draft clauses on 6 November. With the Bill itself expected to be published shortly, this has provided us with very little time to conduct anything but a very cursory pre-legislative scrutiny of the draft clauses. We understand the pressures under which you and your staff work, but we hope that in future you will be able to keep your commitment to affording an opportunity for meaningful pre-legislative scrutiny by making draft clauses available at least four weeks before a Bill is due to be published. Otherwise the exercise risks looking like token consultation.

¹ *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, 19th Report of 2006–07, para. 4.

We are also disappointed not to have received draft clauses concerning the Government's proposed extension to the period of pre-charge detention, which is likely to be the most controversial of the measures in the Bill and therefore most in need of careful pre-legislative scrutiny. We seek your reassurance that it is still the Government's intention to afford an opportunity for pre-legislative scrutiny of the draft clauses giving effect to this proposal.

In the meantime we would be grateful for your responses to the following questions concerning four of the areas covered by the draft clauses.

1. *Post-charge questioning*

The draft clauses include a new power for a constable to question a person about terrorism-related offences after they have been charged with the offence, or been officially informed that they may be prosecuted for it, or where they have been sent for trial for the offence. They also provide for adverse inferences to be drawn from the accused's silence in the face of such post-charge questioning.² No safeguards are included on the face of the draft clauses themselves. Instead, the draft clauses provide that the PACE Codes of Practice may make provision about post-charge questioning.

As we have pointed out in our recent reports, while we welcome the introduction of post-charge questioning as an important alternative to even longer pre-charge detention, the crucial human rights issue in relation to post-charge questioning will be the adequacy of the accompanying safeguards against the abuse of what is potentially an oppressive power. We note that the draft clauses provide no assistance on this, leaving all the safeguards to be provided in the PACE Code of Practice.

We would be grateful if you could provide more detail about precisely what safeguards are intended.

2. *Disclosure and use of information by the intelligence services*

Two of the most significant human rights issues concerning the use and disclosure of information by the intelligence services are the arrangements for independent oversight of the powers to use and disclose information, and the safeguards provided to make sure that information has not been obtained from, and will not be used in, acts which amount to human rights violations.

In the Committee's report on Torture, for example, we said that in future "the UK intelligence and security agencies must take all feasible steps to ensure that information exchanged with foreign intelligence services has not been obtained from, and will not be used in, acts which would be regarded as human rights violations."³ Otherwise there is a serious risk of UK complicity in acts of torture and inhuman and degrading treatment. The draft clauses are silent on both of these matters.

In light of these concerns, will independent oversight of these powers be exercised by the Information Commissioner?

Will the forthcoming Bill include express safeguards designed to ensure that information has not been obtained as a result of, and will not be used in, acts amounting to torture or other human rights violations?

3. *Retention and use of DNA samples*

We note that the draft clauses provide for the retention of DNA samples taken under the Terrorism Act on the National DNA Database, and for their use for the purposes of national security. There is no requirement that the person from whom the sample has been taken has been convicted of or even charged with a terrorism or terrorism-related offence and no limit on the period for which the samples can be retained.

In September, the Nuffield Council on Bioethics recommended that the police should only be allowed to store permanently bioinformation from people who are convicted of a crime, with the exception of people charged with serious violent or serious sexual offences.⁴ Indefinite retention of DNA samples from persons suspected of terrorism potentially raises even more acute concerns about proportionality, because the threshold for arresting a person on suspicion of terrorism is so much lower, and the proportion of those arrested who are subsequently released without charge is correspondingly higher.

² Amending the relevant sections of the Criminal Justice and Public Order Act 1994.

³ *The UN Convention Against Torture*, 19th Report of 2005–06 at para. 60.

⁴ *The Forensic Use of Bioinformation: Ethical Issues*.

What are the Government's reasons for not limiting the retention and use of DNA samples to those who have been convicted of or charged with a terrorism or terrorism-related offence?

On what evidence does the Government rely to demonstrate the necessity for a wider power to retain and use the samples taken from anyone arrested on suspicion of terrorism?

4. Notification requirements

The notification requirements contained in the draft clauses apply automatically to anyone convicted of a terrorist-related offence and sentenced to a term of imprisonment for 12 months or more in respect of the offence.

Has the Government considered a less restrictive notification regime for those convicted of terrorism-related offences in which the sentencing judge is given a discretion to decide, in all the circumstances, which notification requirements are required for the protection of the public? What are the Government's reasons for not favouring such a regime?

The proposed notification requirements would apply indefinitely to a person sentenced to more than five years' imprisonment, and for 10 years to people sentenced to less than five years.

Has the Government considered a more graduated regime in which the period for which notification is required is linked more proportionately to the length of the sentence received?

What is the justification for imposing indefinite notification requirements, without any mechanism for the requirements to lapse on certain conditions being satisfied?

There is a procedure for the police to apply to a court for a notification order in respect of a person convicted of and sentenced to more than 12 months' imprisonment for a foreign terrorism offence, where the offence would also have constituted a terrorism offence if done in the UK.

Given the breadth of the definition of "terrorism" in the Terrorism Act 2000, will the application of notification requirements to those convicted of terrorism offences outside of the UK catch the political opponents of oppressive regimes who have been convicted in their absence of offences which would qualify as "terrorism-related offences"?

I would be grateful for your response to these questions by 26 November 2007.

4. Letter from Jacqui Smith, Home Secretary, dated 5 December 2007

COUNTER TERRORISM LEGISLATION AND DRAFT CLAUSES

Thank you for your letter of 12 November 2007 asking a number of further questions about counter terrorism policy after considering the draft clauses of the Counter Terrorism Bill.

I am sorry we could not share draft clauses with you earlier and that we have been unable to share clauses on all the measures being considered for the bill. Unfortunately, I am unable to give you the assurance that you seek that you will have the opportunity to see all the clauses in draft before the bill is introduced but it is my intention that the Committee will, at least, see those relating to the most significant issues, including pre-charge detention.

I attach answers to the questions you raised.

Jacqui Smith MP

5 December 2007

Post-charge questioning

Q1. *We would be grateful if you could provide more detail about precisely what safeguards are intended*

The proposed measures will only allow an individual to be questioned in relation to the offence for which they have been charged. We believe this is an important safeguard against a person being charged for a minor offence unrelated to terrorism with the intention of questioning them about more serious offences after charge. In such circumstances, we believe the proper course of action would be to re-arrest the person for the more serious offence if further evidence came to light and to charge them appropriately. An initial period of 24 hours to question a person after charge can be authorised by a senior police officer, thereafter any questioning after charge would be limited to a maximum period of five days and would have to be authorised

by a Magistrate's Court. If there is a need to any subsequent post charge questioning, the police must return to the Magistrate's Court for further authorisation. The safeguards in the PACE codes will apply post charge as they do pre charge as regards the conditions of custody, questioning etc.

Disclosure and use of information by the intelligence services

Q2. *In light of our concerns, will independent oversight of these powers be exercised by the Information Commissioner?*

The Information Commissioner will exercise his existing powers of independent oversight in relation to this measure.

Q3. *Will the forthcoming Bill include express safeguards designed to ensure that information has not been obtained as a result of, and will not be used in, acts amounting to torture or other human rights violations?*

The Government shares the concern that everything practical should be done to ensure that information from foreign sources is not gained from human rights violations and that information shared with foreign governments is not used in such violations. However, the Government is satisfied that the existing oversight and safeguard arrangements for the intelligence and security agencies are working well and that no express safeguards are required. You will be aware that under Governance of Britain ways to develop the Parliamentary accountability and public transparency of the Intelligence and Security Committee are being considered.

Retention and use of DNA samples

Q4 and Q5. *What are the Government's reasons for not limiting the retention and use of DNA samples to those who have been convicted of or charged with a terrorism or terrorism-related offence?*

On what evidence does the Government rely to demonstrate the necessity for a wider power to retain and use the samples taken from anyone arrested on suspicion of terrorism?

We believe it is important to be able to retain and use samples in relation to terrorism and national security from persons who have not been convicted or charged with a terrorist or terrorist related offence. As Tony McNulty said during his evidence session to the Joint Committee on Human Rights on 20 September, samples obtained from individuals who are not subsequently charged or convicted of an offence are already stored on the National DNA Database. These samples have proved to be extremely useful in police investigations. The figures supplied by Tony in his evidence session and clarified in his letter to you of 16 November 2007, support this. We consider that any intrusion on personal privacy is both necessary and proportionate to the benefits for victims of terrorism and society generally in terms of detecting terrorist activity and protecting the public against terrorism.

Notification requirements

Q6. *Has the Government considered a less restrictive notification regime for those convicted of terrorism-related offences in which the sentencing judge is given a discretion to decide, in all the circumstances, which notification requirements are required for the protection of the public? What are the Government's reasons for not favouring such a regime?*

The proposed notification regime mirrors that currently available for sex offenders. An important element of such regimes is that notification is an administrative requirement that flows automatically from a conviction for a particular offence. Notification is not intended to be a penalty—its purpose is the protection of the public rather than the punishment of the offender. Strasbourg jurisprudence (*Ibbotson v UK and Adamson v UK*) is that the sex offender notification requirements are not a penalty for the purposes of ECHR Article 7.1. Giving judges discretion over who and how they apply the notification requirements would risk undermining the administrative nature of such schemes. The effectiveness of the requirements could be undermined if they were not mandatory—and this position was recognised and upheld as being in accordance with Article 8 by the Court of Appeal in the case of *Forbes v the Home Secretary*.

Q7. *Has the Government considered a more graduated regime in which the period for which notification is required is linked more proportionately to the length of the sentence received?*

The proposed notification requirements are based on those for sex offender notification. Under our proposal a person would be subject to notification indefinitely if they were sentenced to imprisonment of five years or more (under sex offender notification the threshold is 30 months imprisonment) and for 10 years if they are sentenced to imprisonment between 12 months and five years (for sex offender notification a sentence of 6 months imprisonment would lead to a 10 year notification period). The sentence thresholds for notification periods for terrorists are therefore already higher than those that apply to sex offenders.

Q8. *What is the justification for imposing indefinite notification requirements, without any mechanism for the requirements to lapse on certain conditions being satisfied?*

The measures we are proposing mirror those for sex offenders. The period of notification is related to the seriousness of the offence for which the person has been convicted as reflected in the sentence that they have received. Under the sex offender notification scheme a person is subject to the requirements indefinitely when they are sentenced to imprisonment for 30 months or more. We are proposing that indefinite notification should only be triggered where someone has been convicted of a terrorist related offence and sentenced to five years imprisonment or more.

Q9. *Given the breadth of the definition of “terrorism” in the Terrorism Act 2000, will the application of notification requirements to those convicted of terrorism offences outside of the UK catch the political opponents of oppressive regimes who have been convicted in their absence of offences which would qualify as “terrorism-related offences”?*

It would be a matter for the police to decide whether to apply for a notification order against any particular individual. They would only be able to do so where the conviction for a terrorism offence overseas is equivalent to one that would trigger the notification if committed in the UK. I would be very interested to hear the Committee’s view on how we might be able to define political opposition to oppressive regimes as this is a topic on which there has been much debate in the context of the definition of terrorism.

5. Memorandum from Professor Clive Walker, Centre for Criminal Justice Studies, School of Law

INTRODUCTION

1. This paper responds principally to proposals in the document, Possible Measures For Inclusion In A Future Counter Terrorism Bill (Home Office, 25 July 2007) (referred to as the “Possible Measures Paper”). However, other related documents regarding policing powers have also been consulted and are touched upon.

2. The sole issue dealt with in this paper is post-charge questioning. My previous submission has dealt with many other aspects raised in the discussion documents concerning counter-terrorism laws.

BACKGROUND PRINCIPLES

3. The impression is afoot amongst policy-makers and academic commentators that post-charge questioning is unproblematic either in principle or practice. This position is evident in the foregoing paper and is also present in the more general proposals in the further Home Office paper, Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984 (2007, para.3.49). It has therefore captured far less public attention than the debates about proposals for 90 day pre-charge detention and questioning. This impression is wrong in both principle and practice. In principle, there should be substantial concerns about any move towards post-charge questioning. In practice, there are many details to be considered and specified.

4. In legal principle, it should be realised that the purpose of police arrest and detention at common law was historically confined to the needs of bringing identified suspects before the courts. The court, and not the police station, was the place for the examination of suspects and witnesses, both at committal and at trial. Thus, arrest was for the purpose of charging with an offence and then conveyance to the courts. This legal position was subject to some practical derogation in respect of pre-charge detention and questioning during the 20th Century. Thus, in response to a request from the Home Secretary to the judges of the King’s Bench, the Judges’ Rules were issued in 1912 to guide English police forces about the detention and questioning of suspects in a way which would avoid the inadmissibility of any evidence so gathered. The Rules allowed the police, subject to a caution, to question before charge any person with a view to finding out whether, or by whom, an offence had been committed. The Rules required a further caution when a person was charged and prohibited questioning afterwards charging save in exceptional circumstances (rule III(b)). At the same time, the Rules did not amount to a formal legal recognition of powers to detain or question pre-charge and confirmed very firmly that questioning should cease on charge. The Rules created some clarity, certainly in comparison to earlier less authoritative guidance, such as Sir Howard Vincent’s *Police Code and Manual of Criminal Law* (originally published as Cassell & Co., London, 1881). But since the law did not explicitly recognise the practice of police detention for questioning, the legal position of police questioning remained uncertain and always subject to the overriding exercise of judicial discretion on grounds of voluntariness and fairness. As explained by Lawrence J. in *R. v. Voisin* [1918] 1 KB 531 at pp.539–540:

“In 1912 the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to

the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.”

The 1912 Rules were revised in 1918 and were later reissued as a Home Office Circular 536053/23 (1924) and as the Practice Note (Judge’s Rules) [1964] 1 WLR 152. They were eventually wholly replaced in 1986 by PACE Code C made under the Police and Criminal Evidence Act 1984 (PACE). However, until PACE, Parliament did not grant explicit powers to detain or question. That position was confirmed, for example by the Royal Commission in *Police Powers* (Cmd.3297, 1929) para 158 recommended against the grant of any general legal powers to hold in police custody and delay charges pending investigation. There were just a few exceptions to this position, including the Prevention of Terrorism (Temporary Provisions) Act 1974, which allowed pre-trial detention and questioning following arrest on suspicion of terrorism.

5. The position in regard to pre-charge detention and questioning was radically altered by PACE Part IV, which explicitly granted police powers and made police questioning of arrestees a routine part of investigations. Some twenty years on from PACE, it now sounds strange that there could ever be any legal doubt about police powers to question suspects in custody. However, evidence for that position can be confirmed in two ways:

- (i) First, it is reflected in the terms of Article 5 of the European Convention on Human Rights and Fundamental Freedoms of 1950, which states that:

“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . . (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so . . .”

It will be noted that there is no mention of the purpose of interim interrogation by the police, though it has been recognised that questioning for the purpose of building a case to be put before the court (but not mere intelligence gathering) is lawful, subject to adequate judicial supervision under article 5.3, in *Brogan v. United Kingdom*, App. nos. 11209, 11234, 11266/84, 11386/85, Ser. A 145-B, (1989) 11 E.H.R.R. 539 para.53.

- (ii) Second, it was only in *Holgate-Mohammed v Duke* [1984] A.C. 437 that police powers to question before charge was conclusively established in common law by the House of Lords. In that case, a detective constable, exercising his powers under section 2(4) of the Criminal Law Act 1967, arrested the plaintiff on suspicion that she had stolen jewellery and took her to a police station where she was questioned. She was not charged with an offence and was released from detention within six hours of her arrest. The plaintiff brought a civil action against the chief constable for damages for wrongful arrest. The judge found that the detective constable had had reasonable grounds to suspect the plaintiff of having committed an arrestable offence and that the period of detention was not excessive but, because the constable had decided not to interview her under caution but to subject her to the greater pressure of arrest and detention so as to induce a confession, there had been a wrongful exercise of the power of arrest. The plaintiff was awarded £1,000 damages. The Court of Appeal allowed an appeal by the chief constable, and the House of Lords dismissed the plaintiff’s appeal. The House of Lords applied administrative law standards to the exercise of discretion pursuant to arrest powers by a constable. In this way, the discretion must be exercised in good faith and not be affected by irrelevant considerations. The interrogation of a suspect in order to dispel or confirm a reasonable suspicion was a legitimate cause for arrest, so that the fact that the constable, when exercising his discretion to arrest the plaintiff, took into consideration that she might be more likely to confess her guilt if arrested and questioned at the police station was a relevant matter and therefore did not render the exercise of his discretion *ultra vires*. Lord Diplock stated the position as follows at p.445:

“That arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance was said by the Royal Commission on Criminal Procedure in England and Wales (1981) (Cmnd. 8092) at paragraph 3.66 ‘to be well established as one of the primary purposes of detention upon arrest.’ That is a fact that will be within the knowledge of those of your Lordships with judicial experience of trying criminal cases; even as long ago as I last did so, more than 20 years before the Royal Commission’s Report. It is a practice which has been given implicit recognition in rule 1 of successive editions of the Judges’ Rules, since they were first issued in 1912. Furthermore, parliamentary recognition that making inquiries of a suspect in order to dispel or confirm the reasonable suspicion is a legitimate cause for arrest and detention at a police station was implicit in section 38(2) of the Magistrates’ Courts Act 1952 which is now reproduced in section 43(3) of the Magistrates’ Courts Act 1980, with immaterial amendments consequent on the passing of the Bail Act 1976.”

However, it will be noted that there is no specific statutory authorisation or common law precedent quoted in the foregoing extract. It may also be noted that the legal position of “arrest on charge” and that an arrested person was placed “in the protection of the law” prevailed in Scotland until recent times (compare: *Chalmers v Lord Advocate* 1954 SLT 177; *Johnston (Derek) v HM Advocate* 1993 J.C. 187).

6. Much of the foregoing discussion has related to the development of police powers to question before charge. There is even less historic legal basis for powers to question after charge, including no clear precedent equivalent to *Holgate-Mohammed*. Exceptional circumstances when post-charge questioning might be allowed were outlined in rule III(b) of the Judges' Rules. They were confined to (i) where necessary for the purpose of preventing or minimizing harm or loss to some other person or the public or (ii) clearing up an ambiguity in a previous answer or statement. PACE Code C has added the possibility of questioning (iii) "in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted". If anyone is interviewed in these circumstances, inferences cannot be drawn under sections 34 to 37 of the Criminal Justice and Public Order Act 1994, and the accused must be given a modified "old-style" caution. More extensive powers of post-charge questioning exist exceptionally in respect of a variety of corporate and financial services crimes and serious frauds whereby questioning is allowed. The exceptional nature of such powers is noted in *R v. Director of Serious Fraud Office, ex parte Smith* [1993] A.C. 1. Any evidence gathered pursuant to such powers will not be admissible at trial. A substantial list exists under Schedule 3 of the Youth Justice and Criminal Evidence Act 1999 as follows: Insurance Companies Act 1982; sections 43A and 44; Companies Act 1985, section 434; Insolvency Act 1986, section 433; Company Directors Disqualification Act 1986, section 20; Building Societies Act 1986, section 57; Financial Services Act 1986 sections 105 and 177; Companies (Northern Ireland) Order 1986 (NI 6), Articles 427 and 440; Banking Act 1987 sections 39, 41 and 42; Criminal Justice Act 1987 section 2(8); Companies Act 1989, section 83; Companies (Northern Ireland) Order 1989, Article 23; Insolvency (Northern Ireland) Order 1989 (NI 19), Article 375; Friendly Societies Act 1992, section 67; Criminal Law (Consolidation) (Scotland) Act 1995, section 28; Proceeds of Crime (Northern Ireland) Order 1996 (NI 9), Schedule 2 paragraph 6.

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

8. The first reason, the transfer of authority to the courts, can be evidenced by two sources. The first is the Criminal Procedure Rules 2005 SI no.384. These set out the overriding objective, that criminal cases be dealt with justly (rule 1.1) and specify further that the court must advance the overriding objective by actively managing the case (rule 3.2). This transfer of authority away from the police is also underlined by the institution of the charging scheme under the Criminal Justice Act 2003, by which charging decisions and the gathering of evidence in connection with charges becomes a matter for the Crown Prosecution Service. The second source which underlines this transfer of authority after charge is a series of Scottish cases. In *Stark and Smith v H.M. Advocate* 1938 J.C. 170 at p.173, Lord Justice-General Normand stated:

"As a matter of law the police are not entitled to question an accused person about a particular charge once the investigation relating to that charge has been completed at the stage of his having been taken into custody and cautioned and charged. Statements made by an accused person after that stage, made in such circumstances, are inadmissible as evidence. The police may not question him or act in such a way as to give a plain invitation or otherwise to induce him to answer questions . . ."

In *Miller v HM Advocate* 1997 SCCR 748 at p.751, it was stated that, "The formality of the making of a charge provides a certain and clear-cut point marking the change in the relationship between the police and the suspect." This rather stark position has been moderated to some extent. In *Aiton v H.M. Advocate* 1987 S.C.C.R. 252, the High Court of Justiciary allowed a statement where there was no question of the police inviting or inducing the appellant to make a statement. In *Fraser and Freer v H.M. Advocate* 1989 S.C.C.R. 82, the police invited statements after charge but did not question the charged persons. Questioning about other matters unrelated to the crime charged was allowed in *Carmichael v Boyd and Kinnie* 1993 S.C.C.R. 751.

9. As regards the second reason for limiting post-charge questioning, possible unfairness to the accused, all questioning, whether pre-charge or post-charge, should be voluntary and fair, as required by PACE, sections 76 and 78. The English legal system remains in the business of running an adversarial process and must secure fairness in that context. One consequence is that if the police are afforded new powers to examine their chief suspect at any time up to trial and on pain of adverse inferences, then the defendant's barrister should be likewise enabled to examine the police and their witnesses on the same terms under the principle of equality of arms, as required by article 6 of the European Convention on Human Rights. Second, how can we disentangle what might be said to be legitimate questioning which is akin to documentary disclosure by the defence, a principle first controversially enshrined in the Criminal Procedure and Investigations Act 1996, and the questioning of an accused with a view to uncovering the defence's legal tactics? Surely, the pursuit of the latter is not fair in the light of the principles of legal privilege and the right to counsel? But who will police the police questioning in these sensitive circumstances? Compulsion through police questioning may contravene article 6 of the European Convention where other criminal proceedings are pending as in *Shannon v United Kingdom* App. no.6563/03, 4 October 2005. For both these reasons, it

would be troubling to put the police in effective charge of a post-charge process which might impinge upon pre-trial processes which are normally the province of the presiding judge. At very least extra safeguards are required. This hostile approach to post-charge questioning was adopted by the Court of Appeal in *R v. Walters* [1989] *Crim. L.R.* 62. The defendant was accused of throwing petrol bombs. He was charged on evidence of eye witnesses and also because of burns on his leg. While on remand, he asked to see a specified police officer. The police officer asked, after caution, whether he was admitting the offence, which he did. No contemporaneous record was made of the conversation. The Court was of the view that there should have been no questioning after charge and therefore excluded the statement.

10. Moving from history and established principle to the future use of post-charge questioning in counter-terrorism, in terms of the substantive case for post-charge questioning, one can appreciate that the weight of evidence in complex terrorist cases, combined with the use of the Threshold Test by Crown Prosecutors (albeit that the Test does not apply in many terrorist cases: House of Commons Home Affairs Committee, *Terrorism Detention Powers* (2005–06 HC 910 para.112)), do conduce towards the resumption of questioning after charge. It is said by the Home Office paper to have become more likely that new facts will emerge in terrorist cases than in many other serious crimes (with, perhaps, the exception of serious frauds). At the same time, if the justice route is to be followed, as opposed to the pursuit of preventive administrative measures such as control orders, then the standards of justice must be observed. It is no use securing a conviction, if the convict, his community and even the general public regard it as lacking legitimacy. It is most unlikely to be viewed as legitimate or just if the post-charge questioning is applied in circumstances beyond those already identified in Code C, in other words, (i) where necessary for the purpose of preventing or minimizing harm or loss to some other person or the public or (ii) clearing up an ambiguity in a previous answer or statement or (iii) to gather statements about information concerning the offence which has come to light since the charge was lodged. The justice of the resumption of questioning can be readily understood in those three circumstances. By contrast, the resumption of questioning post-charge about matters which were known and investigated pre-charge does not appear legitimate. Rather, it appears to set at nought the carefully constructed restraints on questioning and detention pre-charge which exist for the sake of fairness and liberty.

11. Conclusion: There exist strong statements of practice, backed by sound principle, that questioning after charge is generally not allowed. There are good reasons to support that stance in terms of the overriding roles of the court and prosecution after charge and also because of the need to ensure fairness. For these reasons, if it is decided that post-charge questioning is to be allowed, the rule of law demands that there should be a clear grant of statutory authority. Changes to PACE Codes, whether Code C or Code H, will not be sufficient to achieve these purposes since they may affect issues of admissibility but cannot grant new legal authority. In short, clear statutory powers will be required if post-charge questioning is the chosen policy.

12. Conclusion: The need for greater use of post-charge questioning is understandable in the circumstances of complex terrorist cases and the use of the Threshold Test for charging. But the application of post-charge questioning in circumstances beyond the three situations already identified in PACE Code C is not legitimate if the principles of adversarial process and fairness are to be maintained.

THE PREFERRED APPROACH: JUDICIAL EXAMINATION

13. Assuming that post-charge questioning is to be allowed, then the preferred approach should be to explore an enhanced role for the presiding trial judge rather than the police. The intervention of the judge will answer the demand for equality of questioning opportunities and will reduce concerns about voluntariness and fairness. This mechanism also ensures, in line with principle, that the court is in charge of process.

14. There is much to be said for the precedent of the Explosive Substances Act 1883, section 6, by which, in exceptional cases arising from terrorism, there may be questioning after charge, but it must be conducted by a judge. Section 6 states as follows:

“6 Inquiry by Attorney-General, and apprehension of absconding witnesses:

- (1) Where the Attorney-General has reasonable ground to believe that any crime under this Act has been committed, he may order an inquiry under this section, and thereupon any justice for the county, borough, or place in which the crime was committed or is suspected to have been committed, who is authorised in that behalf by the Attorney-General may, although no person may be charged before him with the commission of such crime, sit at a . . . petty sessional or occasional court-house, or police station in the said county, borough, or place, and examine on oath concerning such crime any witness appearing before him, and may take the deposition of such witness, and, if he see cause, may bind such witness by recognizance to appear and give evidence at the next petty sessions, or [a magistrates' court] when called upon within three months from the date of such recognizance; and the law relating to the compelling of the attendance of a witness before a justice, and to a witness attending before a justice and required

to give evidence concerning the matter of an information or complaint, shall apply to compelling the attendance of a witness for examination and to a witness attending under this section.

- (2) A witness examined under this section shall not be excused from answering any question on the ground that the answer thereto may criminate, or tend to criminate, [that witness or the [spouse or civil partner] of that witness]; but any statement made by any person in answer to any question put to him [or her] on any examination under this section shall not, except in the case of an indictment or other criminal proceeding for perjury, be admissible in evidence [against that person or the [spouse or civil partner] of that person] in any proceeding, civil or criminal.
- (3) A justice who conducts the examination under this section of a person concerning any crime shall not take part in the committing for trial of such person for such crime.
- (4) Whenever any person is bound by recognizance to give evidence before justices, or any criminal court, in respect of any crime under this Act, any justice, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person, and if such person is arrested any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties: Provided that any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued.”

This role would fit with the Protocol on the Management of Terrorist Cases. Section 6 is now outdated and would need revision as follows:

- It should be applied not only to explosives offences but also to other terrorist offences and even (as argued above) to persons subject to control orders.
- It should be triggered by a request from either prosecution or defence on the basis of compelling new evidence which has arisen after the pre-charge process and where the judge is satisfied that it is in the interest of justice to investigate further. The possibility of defence requests might seem unlikely, but evidence might arise which can lead to a dismissal of charges at an early stage.
- An amendment is required to section 6(2). The purpose of the amendment would be to make the answer admissible, but in circumstances of judicial control which might be distinguished from the *Shannon* case.
- The power should be exercised by a judge qualified to sit in the Crown Court. Given that seniority, it is not clear why the disqualification under section 6(3) should apply.
- Further consideration could be given to whether the adverse inferences of the kind allowed in sections 34 to 37 of the Criminal Justice and Public Order Act 1994 should be allowed. The changes in Schedule 3 of the Youth Justice and Criminal Evidence Act 1999, which disallow any testimony, were made in the light of powers of compulsion (it being an offence not to respond to the questions). That legal position had been condemned under article 6: *Saunders v United Kingdom*, App.no.19187/91, (1997) 23 EHRR 213. Adverse inferences might be viewed as less drastic than a criminal offence, and a judicial examination might be less partisan than interrogation by an investigator. Nevertheless, the fact that the person is under charge and is increasingly close to the point of trial when such matters can be drawn out in better controlled circumstances, might be telling. The idea that adverse inferences can simply be applied to the context of post-charge questioning (Home Office paper, Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984 (2007, para.3.53) therefore fails to understand the legal difficulties. These difficulties are compounded if it is the police or prosecution who are put in charge of the questioning post-charge.

15. It should be emphasised that a judicial examination of this kind is not the same as appointing a judge as investigator. Under the proposal, the judge can retain the role of umpire, with a prosecutor or defence counsel putting the questions which have been screened by the judge. It is submitted that this is far preferable to the confusion of roles which would be represented by a judge-investigator. Judges have no training in police investigation. Furthermore, they would have to rely on police sources of intelligence and evidence, assuming they were forthcoming from the police which may not always be true where an “outsider” is involved, and so could not really act independently. To be viable, a judge-investigator would therefore need independent resources as well as training.

16. A number of substantial advantages would flow from judicially-managed examinations. Existing time-limits regarding detention could be respected. At that point, the person would be charged or be subject to a control order or be set free. If further evidence arose from later investigations, further questioning would be possible by reference to judicial examination, which would have the major benefit of ensuring that the responses would be admissible evidence and ensuring respect for the independence of the judiciary. It would also ensure clearer circumstances of fairness and humanity for the suspect.

17. Conclusion: The principles of fairness and court control after charge are best secured by a form of judicial examination of persons who have been charged with criminal offences. The necessary powers and processes should be adapted from section 6 of the Explosive Substances Act 1883.

Police examination by way of post-charge questioning

18. If post-charge questioning powers are to be granted to the police, there should be clearer rules about the circumstances of questioning than currently arise under PACE Code C paragraph 16 (the more specialist Code H para 15 adds nothing to the regulations). The rules should operate *pari passu* with the rules about pre-charge detention, including: limits on any interview session and an overall limit on questioning; the specification of conditions of treatment, dealing with meals, heating, sleep and so on; access to outsiders; and the recording of interviews.

19. These points are in the main straightforward, but the call for an overall time limit is problematic. Should this limit apply to questioning on all matters together or about each specific issue? One can imagine that the latter would be a more attractive rule to the police, who might say that information on X was not available until, say 10 days after charge, while information on Y was only discovered at 37 days after charge. If one assumes just one extra period of questioning of, say, 28 days (as specified by the Terrorism Act 2006, section 23), then there is just one day to question about Y. But if each specific matter triggers a potential 28 days, not only does the questioning clock become complex, with overlapping periods, but it also begins to appear to allow a process of wearing away the will of the suspect who is being exhausted into a state of complicity.

20. It is submitted that the resolution of these difficulties can be tackled in the following way. First, there should be a total parameter on police questioning. The prospect of a potentially large number of successive periods of questioning until trial is surely akin to the kind of practices widely condemned as applying in Guantánamo Bay. Second, given that the evidence will already have emerged to trigger the need for further police questioning, a second grant of 28 days would be excessive. One should instead invoke the extraordinary period of detention for questioning which prevailed during most of the life of British anti-terrorism laws, namely seven days (from the Prevention of Terrorism (Temporary Provisions) Act 1974 until the Criminal Justice Act 2003, section 306). It should be emphasised that seven days was the period specified in its original version by the Terrorism Act 2000, Schedule 8 paragraph 29. A limited period of this kind would apply discipline to police questioning, forcing investigators to think carefully about their strategies of investigation and limiting the questioning process until they were good and ready. For example, they would know that if information X has arisen but they are still investigating issue Y, it might be wise to wait until a fuller picture emerges before starting the seven day clock. The only variation on the PACE rules for pre-charge questioning might be that the clock could be stopped within seven days at the behest of the police. For example, if inquiries are satisfied on X and Y within two days, the investigators could save up a further five days for questioning about a later unexpected matter.

21. Oversight of police practices and the running of the questioning clock is vital. The judge who is managing the case to trial should have oversight over these processes. Any application to question should no longer take place under the terms of PACE Code C para 16. Instead, the regulation of these matters should be clearly set out in statute (and be reflected in PACE Code H para 15). The process should flow as follows. First, the police should seek the consent of the prosecutor assigned to the case for further questioning. If the prosecutor consents, both police and prosecutor should apply to the managing judge who should be able to grant a period of questioning up to seven days. The judge should consider and specify the following matters:

- that there is clarity as to the subject-matter which will be the basis of questioning. Police investigators should be warned to stick to the approved issues and that questioning beyond these parameters may lead to the exclusion of evidence under PACE sections 76 and 78. They should also warn that questioning which is designed to achieve objectives which fall within the process of disclosure or which infringe upon legal privilege will be treated as an abuse of process;
- that the police are applying appropriate resources to achieve a speedy resolution of the investigative process, including sufficient personnel, translators, data analysts, and forensic technicians;
- that the conditions of questioning are satisfactory—that arrangements are in place to oversee the welfare of the accused and to provide legal advice.

Once the process of questioning is over or whenever the questioning clock is stopped, the police should be required to return to the court to report their findings and should produce custody and interview records so that checks can be made on detention periods expended to date and the nature and subject-matter of questioning.

21. There will be substantial concerns about unfair process in terms of any evidence arising from post-charge questioning being put before a trial court. These concerns could be averted by adopting the simple rule under Schedule 3 of the Youth Justice and Criminal Evidence Act 1999 that information gathered is

not admissible. However, such a rule would doubtless be said to defeat any criminal justice purpose of questioning, though not the intelligence-gathering purposes or possible executive purposes such as control orders.

22. A more modest limitation would be to leave in place the existing “old-style” caution (PACE Code C para 16.4) and not to apply the adverse inferences in sections 34 to 37 of the Criminal Justice and Public Order Act 1994. The argument may again be made that questioning in the absence of the threat of adverse inferences is likely to be a fruitless pursuit. In response, it may be pointed out that skilled investigators with considerable detention periods in which to interrogate should have the skills to make headway, as they managed to do in many cases before 1994. A further response is to repeat the point made earlier that police questioning at this late stage of the process raises greater concerns about unfairness under Article 6 than questioning pre-charge because of the greater circumstances of pressure on the accused. At the same time, the European Court of Human Rights in *Murray v United Kingdom*, App.no.1873/91, 1996-I, (1996) 22 EHRR 29 at para 47 has held that the privilege against self incrimination under Article 6 is not absolute. Provided there is a strong element of judicial supervision of the questioning, combined with strong warnings at trial to the jury as to the stressful circumstances in which any testimony was obtained post-charge, then it might pass the article 6 standard of fairness, though there will often be considerable challenges in the circumstances of extraordinary terrorist detentions. It would therefore be worthwhile to place any evidence before the managing judge for an early decision as to admissibility and the fairness of a direction about adverse inferences. Any statements obtained through post-charge questioning should also be subject at trial to a special warning by the judge to the jury concerning the highly stressful and potentially oppressive circumstances in which they have been obtained.

23. Conclusion: After charge, police examinations raise greater dangers of unfair treatment and excluded evidence than judicial examinations. They are a second best solution. If they are adopted, then the conditions in which they operate should be clear and detailed and specified by statute. The conditions should include: consent by the prosecutor and the prosecutor’s involvement in applications to the court for permission to question; close judicial supervision by way of initial authorisation and subsequent review; detailed rules as to treatment; a questioning clock which is limited to an overall limit of seven days; any use of adverse inferences should be considered by the managing judge who should address the admissibility of the statements obtained by post-charge questioning; a special warning to the jury about the reliability of post-charge statements.

December 2007

6. Memorandum by Professor Ed Cape, Professor of Criminal Law and Practice, University of the West of England, Bristol⁽¹⁾

The Government’s proposals to permit post-charge questioning and to lift the restriction on drawing inferences from “silence”

The current position

Persons arrested and detained under the Terrorism Act (TA) 2000 s41 (on suspicion of terrorism) are detained under that section, and the TA 2000 Sch 8. The relevant Code of Practice governing their detention until the time that they are charged with a criminal offence is PACE Code of Practice H. If and when they are charged, their continued detention is governed by PACE Code of Practice C.

The decision to charge, and questioning of the suspect, are not dealt with by the Police and Criminal Evidence Act (PACE) 1984 nor the TA 2000, but by the Codes of Practice.

With regard to the point at which questioning must cease, Code H para 11.7 provides:

“11.7 The interview or further interview of a person about an offence with which that person has not been charged or for which they have not been informed they may be prosecuted, must cease when:

- (a) the officer in charge of the investigation is satisfied all the questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect, this includes allowing the suspect an opportunity to give an innocent explanation and asking questions to test if the explanation is accurate and reliable, eg to clear up ambiguities or clarify what the suspect said;
- (b) the officer in charge of the investigation has taken account of any other available evidence; and
- (c) the officer in charge of the investigation, or in the case of a detained suspect, the custody officer, see *PACE Code C paragraph 16.1*, reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence. See *Note 11B*”

Questioning is, of course, limited by the restrictions on the maximum length of pre-charge detention, a matter which, of course, is currently the subject of further government proposals.

Any charge decision must be made in accordance with PACE 1984 s37(7) which provides that if the custody officer determines that they have before them sufficient evidence to charge the person arrested with the offence for which they were arrested⁽²⁾, the person must be, inter alia, detained or released on bail for the purpose of the DPP making a charge decision (in practice, a Crown Prosecutor), released on bail, or charged. If a suspect is released on bail without charge, bail conditions may be imposed.

The restriction on questioning after charge is governed by Code C para 16.5, which provides that:

“16.5 A detainee may not be interviewed about an offence after they have been charged with, or informed they may be prosecuted for it, unless the interview is necessary:

- to prevent or minimise harm or loss to some other person, or the public;
- to clear up an ambiguity in a previous answer or statement; and
- in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted.

Before any such interview, the interviewer shall:

- (a) caution the detainee, ‘You do not have to say anything, but anything you do say may be given in evidence.’;
- (b) remind the detainee about their right to legal advice.”

Inferences from silence under the Criminal Justice and Public Order Act 1994 s. 34 are limited to “silence” during questioning prior to charge or “on being charged”⁽³⁾.

Three things are worthy of note regarding the current position.

- (a) As currently phrased Code H para 11.7 gives power to the police to continue questioning beyond the point where the officer in charge of the investigation concludes that there is sufficient evidence to provide a realistic prospect of conviction. In fact, in this respect, it would appear to conflict with the custody officer’s duties under PACE 1984 s37(7) since they should make a decision under that sub-section as soon as they have before them sufficient evidence to charge. That conflict has not been authoritatively determined by the courts, but it would appear that if the officer in charge of the investigation can authorise continued interviewing even if they are satisfied that there is sufficient evidence to provide a realistic prospect of conviction if, for example, they wish to have put to the suspect further questions regarding the suspected offence.
- (b) In taking a charge decision, the custody officer must have regard to the DPPs Guidance on Charging, issued under PACE 1984 s37A. This currently provides that where a case has been referred to a Crown Prosecutor for a charge decision, the normal test to be applied is whether there is a realistic prospect of conviction and whether the public interest test is satisfied. However, in circumstances where there is insufficient evidence to satisfy this test and it would not be appropriate to bail the person, the charge decision may be made on what is known as the Threshold Test, which is essentially whether there are reasonable grounds for suspecting that the person has committed an offence⁽⁴⁾. Taking the provisions together, the police and the CPS are given maximum discretion regarding when to charge—subject to maximum time limits governing detention without charge, they may continue to detain, and to question, until all of the conditions in Code H para 11.7 are met or they may charge on the basis of the Threshold Test.
- (c) Code C para 16.5 permits questioning after charge in certain circumstances, including in relation to information concerning the offence which has come to light since the person was charged. I know of no statistical or other research evidence on post-charge questioning, but the government has stated that the CPS reports that suspects normally decline to be interviewed. It would seem that this cannot be correct since, at least if they continue to be in custody, the police have the power under para 16.5 to interview although, of course, the suspect may decline to answer questions put to them.

The rationale for limiting questioning after charge

PACE 1984 and the Codes of Practice were, to a large extent, based on the recommendations of the Royal Commission on Criminal Procedure which reported in 1981. The Commission does not appear to have considered questioning after charge. This is almost certainly because it was accepted as a basic feature of our criminal justice process that questioning after charge should not normally be permitted. The Commission was acutely aware that arrest and detention represent a significant limitation on a person’s freedom. When the police question a person arrested and detained at a police station they are, of course, interviewing under coercive conditions. It has traditionally been regarded as proper that such questioning should be limited both in time and extent. The point at which a person is charged has been regarded as the point at which, having determined that there is sufficient evidence to charge, questioning should cease (although, of course, other forms of investigation can continue).

In an adversarial system, in which (unlike some inquisitorial jurisdictions) investigation is neither conducted nor supervised by the judiciary, the coercive powers of the police to interview under detention, should be subject to significant limitations. Otherwise, the principle of equality of arms, which provides a

foundation for adversarialism, is severely compromised. To enable the police to interview a suspected person after the decision has been made that there is sufficient evidence to instigate criminal proceedings puts that person at a severe disadvantage, particularly if inferences may be drawn if they do not co-operate with the process. A defendant who is cross-examined at trial not only has the benefit of legal representation, but will also have received prior disclosure of both the evidence on which the prosecution intends to rely and “unused material”. This is in recognition of the fact, incorporated into the European Convention on Human Rights article 6, that they are entitled to know the case against them. Permitting questioning after charge, especially if it goes beyond putting to the accused information that has come to light since they were charged, would seem to be a way of circumventing that right.

The Government’s proposals

It should be noted that whilst the proposals are currently limited to terrorist suspects, the Home Office is considering extending them to all suspects.⁽⁵⁾

I am not aware of any evidence that the current limitations on questioning after charge are causing difficulty to the police and prosecution. As noted above, the police may already question after charge in certain circumstances. If the police are to have to power to continue to question without such limitations, it would seem that the only purpose must be to enable them to strengthen the case for the prosecution. This is particularly so if the restrictions on inferences are removed. As argued above, this would amount to a severe infringement of the principle of equality of arms and, in turn, would undermine the right to a fair trial.

If the government is to persist with its proposals, I suggest that a number of matters should be considered:

1. The creation of the position of an “investigating judge” who would determine whether post-charge questioning is necessary, and who would conduct the questioning. This would ensure that the procedure is a judicial process conducted by a person who is independent of the investigation. Whilst it is the case that in some inquisitorial jurisdiction such questioning is conducted by a prosecutor, prosecutors in such jurisdictions are generally considered to be an arm of the judiciary and in some jurisdictions are subject to a common training.
2. Prior disclosure to the accused of relevant material in the hands of the police/prosecution. This would go some way to dealing with the objections to post-charge questioning outlined above.
3. An absolute right to legal representation, with sufficient time given to the accused and their lawyer to prepare for such questioning.
4. The mechanism by which the accused is to be available for further questioning, and the location where questioning is to be conducted. In terrorism cases it is likely that the accused will be remanded in custody, although if the proposal is extended to all accused, this will not necessarily be the case. If the person is on bail, are the police to be given powers of arrest for the purposes of questioning? Given the adverse effects of lengthy detention and interview in a police station, consideration should be given to requiring that post-charge questioning be conducted away from a police station, for example, in a court room.
5. Given the coercive nature of post-charge questioning of a person who is detained, and the risk that continued questioning would either amount to oppression or circumstances likely to render any confession unreliable,⁽⁶⁾ and particularly in the absence of any of the protective measures outlined above, it would be inappropriate for the law on inferences from “silence” to be changed.

REFERENCES

(1) Author of *Defending Suspects at Police Stations* (5th ed., LAG, 2006), and the Police Powers section of *Blackstone’s Criminal Practice 2008* (Oxford University Press, 2007).

(2) It should be noted that s37(7) is deficient in a number of ways, including the fact that where a person was arrested under TA 200 s41 they are not arrested for an offence.

(3) Strictly it is not “silence” that may lead to inferences, but failure to tell the police facts which are relied upon in the person’s defence, and only provided the court is satisfied that, in the circumstances existing at the time, the person could reasonably be expected to have mentioned those facts.

(4) The Threshold Test has been disapproved of by the Divisional Court in *G v Chief Constable of West Yorkshire Police* [2006] EWHC 3485 (Admin). A decision on an appeal to the Court of Appeal from this decision is currently awaited. For further analysis of this point see E. Cape, (2007) “Police Bail and the Decision to Charge: Recent Developments and the Human Rights Deficit”, August *Archbold News*, 6–9.

(5) See the Home Office Consultation Paper *Modernising Police Powers*, March 2007.

(6) Which result in exclusion of a confession under PACE 1984 s76.

7. Letter from the Rt Hon Tony McNulty MP, Minister of State, Home Office, dated 14 December 2007

Meeting with Special Advocates, 3 December 2007

In my letter of 16 November I undertook to inform you of the outcome of my 3 December meeting with three special advocates (Andrew Nicol QC, Judith Farbey and Martin Chamberlain). All three special advocates gave evidence to the JCHR in March 2007.

The meeting was constructive, and I found it useful in further informing my appreciation of the work and issues involved in control order and SIAC proceedings. The special advocates concentrated on practical issues concerning the operation of the special advocate procedure and ensuring it worked as efficiently and effectively as possible, rather than the concerns of principle that you have previously raised with the Government, and on which we continue to differ. I reiterated the Government's commitment to providing special advocates with the equipment and training they need to do their job. The main outcome of the meeting was that I agreed that the Government would consider whether it would be possible to expand the training course already available to special advocates to cover concerns the special advocates had about remaining gaps in their knowledge.

8. Letter to Sue Hemming, Deputy Director Counter Terrorism Division, Crown Prosecution Service, dated 20 December 2007

Threshold test

Thank you for giving evidence to my Committee on 5 December. We found your evidence very useful. I am writing to ask if you can help us with a few more detailed questions about the use made of the "threshold test" for charging.

During your evidence, Baroness Stern asked you (Qs 151 and 153) how often the threshold test is used in terrorism cases and in what proportion of cases it is used where a suspect has been held for more than 14 days. You said that you do not hold data on that, but that it had probably been used in just under 50% of the last 18 or 20 terrorism cases in which charges have been brought and you estimated that it might be slightly more than 50% in cases where people have been held for more than 14 days. You very kindly offered to find out for us the number of cases in which it has been used where the suspect has been detained beyond 14 days (Q153).

We may return to the use made of the threshold test in our next report on counter terrorism and human rights and would be very grateful if you could tell us:

1. *In approximately how many cases has the threshold test been used in terrorism cases since it was introduced?*
2. *In how many cases have suspects been charged with the offence of acts preparatory to terrorism on the threshold test?*
3. *In how many of the cases in which a suspect has been charged after being held for more than 14 days has the threshold test been used?*
4. *In each of the cases in which the threshold test has been used to charge a suspect who has been held for more than 14 days:*
 - *how long had they been detained when they were charged on the threshold test;*
 - *what was the offence with which they were charged on the threshold test; and*
 - *how long after being charged on the threshold test was it decided that the full code test was satisfied?*
5. *What arrangements has the CPS made to monitor the use made of the threshold test in terrorism cases and does it propose to keep it under review?*
6. *Can you explain to us the background to the introduction of the threshold test in the Code for Crown Prosecutors, including whether any public consultation was carried out prior to the change being introduced?*

During the evidence session on 5 December, it was suggested by Mr. Bajwa (Q158) that both the court and the defence should be informed that the threshold test, rather than the full code test, is the basis for the charge. You said in response (Q161) that you were not sure what practical effect this would have. However we are conscious that you did not have much time to think about your response to this suggestion and we would therefore like to give you an opportunity to provide a more detailed response if you wish to do so.

7. *Would the CPS have any objection to an express requirement that both the suspect and the court be told whether the suspect has been charged on the threshold test or the full code test?*

I would be very grateful for your response to these questions, if possible, by Monday 14 January 2008.

9. Letter from Sue Hemming, Deputy Director Counter Terrorism Division, Crown Prosecution Service, dated 18 January 2008

Thank you for your letter dated 20 December 2007.

I regret that not all of the information you have sought is readily available however I am able to provide most of the information you have requested and to answer your substantive questions at 5, 6, and 7.

We do not keep specific data about which test was applied in every case since the test was introduced, but I am able to give you that information in relation to those who were held for more than 14 days.

Eight individuals have been charged after being held for more than 14 days. The threshold test was used to charge four defendants. The full test was used to charge the other four.

In three cases where the threshold test was used the defendants had been held for 27/28 days and in the other the defendant was held for 20 days before charge. Of the four charged on the full test, three were held for 19/20 days and one for 15 days. The reason for the day not being exact is that I do not have the precise time of each defendant's arrest.

Of those charged on the threshold test, two were charged with offences contrary to Section 5 Terrorism Act 2006, one with conspiracy to cause explosions and one with offences under Section 58 Terrorism Act 2000 and Section 8 Terrorism Act 2006. Three charged on the full test were charged with conspiracy to murder and one with an offence under Section 38B Terrorism Act 2000. I should emphasise at this point that Section 5 Terrorism Act 2006 is a very serious offence that requires intent and carries a maximum sentence of life imprisonment. I have felt it necessary to emphasise this because the seriousness of that offence was questioned by others during the evidence session.

There is considerable monitoring in all terrorism cases after charge and particularly where the threshold test has been used. This takes the form of continuous review by the prosecutor and judicial scrutiny of the case in accordance with the Terrorism Case Management Protocol (TCMP). The TCMP is a public document which sets out how all terrorism cases should be managed through the court.

CPS guidance requires prosecutors to set review dates in all threshold test cases. The date for the first review is set at the time of charge and the main pieces of evidence required will be set out in an advice for the police. Thereafter there will be further regular reviews as and when necessary in each individual case. In terrorism cases the prosecutor allocated to a case will be working on it consistently until the point that the case papers are served on the defence and the court, whether that is within 42 days (the time for most ordinary criminal cases) or a longer period set by the judge. Each prosecutor on the Counter Terrorism Division has only a few cases which will be at different stages of the investigative and prosecution process and it is not unusual in the very large cases for a prosecutor to be devoted almost exclusively to that case from the date of charge to the date of trial.

In the first 11 days the prosecutor looks at the available evidence, advises the police, and produces a preliminary summary and proposed timetable for service of evidence. These are both quite detailed documents which serve to inform the managing judge and the defence at an early stage about what evidence is then currently available and what additional evidence will be available for service and when it will be available. On the fourteenth day there is a preliminary hearing where the judge sets the timetable for the case having been informed by the information provided by the prosecutor. This will inevitably involve staged service of distinct sections of the evidence and before each section is served the prosecutor will review it against the evidence so far. The evidential case inevitably continues to develop up until the date that the full case is served but often beyond that as terrorism investigations are frequently very large and wide ranging.

There are also regular conferences to discuss and review the progress of the case and the gathering of evidence throughout that pre-service period. This continuous and dynamic process means that the whole of the prosecution's case against each defendant in every case is looked at very regularly. If the evidence is not developing as anticipated or if something is received that appears to be exculpatory, the prosecutor will reconsider the case against each defendant and either discontinue if it is clear that there is no longer a realistic prospect of conviction or if felt more appropriate because further information is expected, in exceptional circumstances we might inform the court that bail is no longer opposed. This could occur at any stage even before the formal review date or receipt of all the papers from the police.

In addition to the continuous review by the prosecutor, the regular conferences with the prosecution team to review progress, and the monitoring of the timetable by the court, all cases are closely supervised by me or my deputy throughout their lifetime. This includes regular updates on progress and monthly formal reporting.

I trust you will understand from my brief explanation, that there are procedures in place to ensure very close monitoring and supervision of all terrorism cases and especially those where the threshold test has been used. We do of course keep all our systems and procedures under review and develop and improve our practices where it is thought appropriate.

I know you will appreciate that I was not personally involved in the introduction of the threshold test but I have consulted colleagues about the background to it. The threshold test was developed following the transfer of responsibility for charging from the police to the CPS.

Prior to the changes in 2004 charging was generally agreed by the police custody officer after discussion with the investigating officer about the nature of the evidence. At this stage of the investigation in most serious or complex cases, it was generally impossible for the police to have produced a full file of admissible evidence. The threshold test was designed to ensure that in serious cases where it is not appropriate to release a suspect on bail, but where the evidence to apply the Full Code Test is not yet available, it was possible to charge. I explained the nature of that test during my evidence. The Director of Public Prosecutions' Guidance on Charging issued under Section 37 PACE, sought to remove any difference between the standards applied by the police and the CPS and to require a custody officer to apply the Code for Crown Prosecutors when the guidance was first published for statutory charging in 2004. The test also sought to embrace the requirements of Article 5 of the European Convention on Human Rights by using the same test of reasonable suspicion and also by referring to the evidence.

When the threshold test was first included in the most recent edition of the Code for Crown Prosecutors published in June 2004, there was full cross Government consultation. This consultation included members of the senior judiciary who put forward no objection.

I have also consulted others on the issue of whether there should be an express requirement to inform the defence and the court which test was used to charge.

The CPS can see no benefit (or advantage to the defendant) in an express requirement that the court and defence must be informed that the initial decision to charge is based on either the "Threshold Test" or the "Full Code Test". The court dealing with bail issues is not the court of trial but is solely concerned with whether the defendant should be retained in custody or remanded on bail. The safeguard is that the defendant will have been charged on the authority of an experienced independent prosecutor after a careful examination of the available evidence on the basis of a test contained within the most widely published document of the CPS: namely the Code for Crown Prosecutors. The criminal process already enables the defence to be informed of the evidential basis of the Crown's case at the first hearing and permits applications to be made for the case to be dismissed at an early stage in proceedings. Moreover, the defence can bring any perceived dilatoriness on behalf of the prosecution to the attention of the court, who then can impose judicial scrutiny on the process and even prescribe a timetable for service of material. The Bail Act and Custody Time Limit regime further ensures that courts must consider the strength of the evidence against a defendant and the conduct of the prosecution when making a decision whether to remand in custody or not.

In relation to cases under the TCMP, there is of course very early disclosure of the evidence available in a served summary and rigorous case management by a High Court Judge.

I hope that you find this information helpful.
