



Reports from the Defence, Foreign Affairs,  
International Development and Trade and  
Industry Committees

Session 2006–07

**Strategic Export Controls: HMG's Annual Report for  
2005, Quarterly Reports for 2006, Licensing Policy and  
Parliamentary Scrutiny**

Response of the Secretaries of State  
for Defence, Foreign and  
Commonwealth Affairs, International  
Development and Business, Enterprise and  
Regulatory Reform

*Presented to Parliament by the Secretaries of State for Defence, Foreign and Commonwealth  
Affairs, International Development and Business, Enterprise and Regulatory Reform  
by Command of Her Majesty  
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# REPORTS FROM THE DEFENCE, FOREIGN AFFAIRS, INTERNATIONAL DEVELOPMENT AND TRADE AND INDUSTRY COMMITTEES

SESSION 2006–07

## ANNUAL REPORT ON STRATEGIC EXPORT CONTROLS

### RESPONSE OF THE SECRETARIES OF STATE FOR DEFENCE, FOREIGN AND COMMONWEALTH AFFAIRS, INTERNATIONAL DEVELOPMENT AND BUSINESS, ENTERPRISE AND REGULATORY REFORM<sup>1</sup>

This Command Paper sets out the Government's response to the Quadripartite Select Committee's report of 7 August 2007 on *Strategic Export Controls: Annual Report for 2005, Licensing Policy and Parliamentary Scrutiny*. The Government's response to the Committee's recommendations is set out in bold. Unless otherwise indicated, references are to paragraphs in the Committee's report.

#### **ECA Review General Statement**

**Under Recommendations 12, 14, 15, 16, 45, 46, 47, 48 and 50 of its most recent report, the Committee has put the case for change to the current export controls introduced under the Export Control Act 2002. The Government is grateful for the Committee's evidence, comments and recommendations.**

**The Committee is aware that the Export Control Organisation (ECO) of the Department for Business, Enterprise and Regulatory Reform (BERR) launched a review of the current control legislation on 18 June 2007. This includes a public consultation that seeks evidence and comments on the impact and effectiveness of the legislation, and whether there is a need to change or enhance the current controls further. The Committee will appreciate that in these circumstances the Government is unable to comment substantively in this response on the effectiveness of current export controls or the Committee's specific recommendations for further change, in order not to pre-determine the review's outcome. The Government has therefore restricted its replies under those recommendations to providing clarification, where necessary, of existing policy or procedures. However, we thank the Committee for its input into the review, and will consider its specific recommendations fully in the Government's post-consultation analysis.**

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<sup>1</sup> The Revenue and Customs Prosecutions Office (RCPO) has provided responses to the following conclusions/ Recommendations: 24, 25, 27 (third part), 29, 30, 31, 33, 34 and 52. RCPO is an independent prosecution authority. It is superintended by the Attorney General, who is answerable for it in Parliament.

## Conclusions and recommendations

1. We conclude that the Export Control Act 2002 has provided a sound legislative basis for controlling and regulating the UK's strategic exports but with gaps and shortcomings. The challenge of increased globalisation of the defence industry, the fast pace of technological development, changing proliferation patterns and procurement methods for weapons of mass destruction (WMD) programmes and the threat from terrorists suggest to us that the 2002 Act may not surpass the record of its predecessor, the Import, Export and Custom Powers (Defence) Act 1939, to remain on the statute book for over 60 years without extensive amendment. We expect the current legislation will need to be reviewed and possibly amended, regularly. (Paragraph 6)

**The Government notes the Committee's conclusions. The public consultation for the current review seeks comments on the impact and effectiveness of the legislation, and whether there is a need to change or enhance the controls. Any legislative amendments that result from the review will be subject to post-implementation review in accordance with better regulation principles. In addition, the Government will continue to keep under review the need for legislative or operational changes to reflect technological or other developments in this field. ECO regularly reviews its guidance to exporters and will continue to do so in the future.**

2. We recommend that the Government agree to reply fully – other than in exceptional circumstances – within six weeks to our letters on decisions to grant or withhold export licences. (Paragraph 9)

**The Government is committed to answering all requests for information in a timely manner. Where it is possible to do so, we shall meet the Committee's suggested deadlines. However, the Government cannot commit to responding within six weeks on the basis that it does not know in advance the number and nature of enquiries to be put to it by the Committee. The Committee will also appreciate that adequate time is needed to provide full responses to all enquiries it receives within its current resources. For this reason, deadlines may occasionally slip. We will endeavour to keep the Committee updated on any delays to correspondence.**

3. We recommend that the Government carry out a government-wide assessment of the effectiveness of the export control legislation since 2004 and that the assessment encompass all the agencies with responsibility for the monitoring and enforcement of export controls. (Paragraph 29)

**See answer to Recommendation 94.**

4. We recommend that the Government in responding to this report produce detailed evidence to demonstrate the effectiveness of export controls. (Paragraph 31)

**The Committee referred to breaches of export controls detected in 2004–05 as its starting point. The total number of breaches detected during that period was only 65, i.e. less than 1% of total licence applications. In addition, this sample of cases is not only small, it is also pre-selected and so cannot be viewed as representative. These were not cases stopped on a random basis by HM Revenue & Customs (HMRC) at the frontier – HMRC does not do that – they were cases selected by HMRC because it had prior suspicion, or cases where the Department of Trade and Industry (DTI) had asked HMRC to take action because of shortcomings identified on a compliance visit. It is therefore hardly surprising that 17% of these transactions would not have been granted a licence had one been applied for. In the**

**Government's view it is, therefore, highly risky to draw any broader implications from such a small sample, and the Government does not accept that these figures demonstrate any ineffectiveness in export controls.**

**However, we accept the Committee's view that the ECO's internal assessment of the controls included in the consultation document does not provide complete assurance that the system is working effectively. The Government will be in a better position to assess the effectiveness of the controls once it has the responses to the current consultation, and in the light of the ongoing inter-departmental discussions on the review, as well as the Government's research into comparisons with other EU Member States. The consultation document specifically calls on respondents to provide evidence on the effectiveness of the current export controls and the likely effectiveness of identified change options. The Government does not rule out commissioning independent research, as recommended by the Committee, but would need to be sure that this would add sufficient value to existing analysis. We are also grateful for the independent research carried out by Ms Kidd and Dr Bauer.**

5. We found no evidence to reach a conclusion that the balance between the requirements for the affirmative and the negative resolution procedures in the Export Control Act 2002 need to be re-examined or altered. (Paragraph 34)

**The Government notes the Committee's comments.**

6. We recommend that any secondary legislation to implement conclusions arising from the Government's review of export controls be shown in draft to our Committees. (Paragraph 35)

**The Government agrees that the Committee's input into any draft legislation resulting from the review of export controls would be very helpful and accepts the Committee's recommendation.**

**We also anticipate further consultation with manufacturers and non-governmental organisations as we work up any new draft legislation on strategic export controls.**

7. We recommend that the Government give an undertaking to consult interested parties – the defence manufacturers, the non-governmental organisations and our Committees – before deciding to make significant changes to the guidance on strategic export controls. (Paragraph 39)

**The Government notes the Committee's comments.**

**The term "guidance" covers a very broad range of material. Section 9 of the Export Control Act commits the Secretary of State to giving "guidance" about the general principles to be followed when exercising licensing powers. This type of guidance might perhaps be described as "policy guidance" in that it sets out the fundamental rules underpinning the Secretary of State's decisions on whether to grant or refuse export licence applications. The Consolidated EU and National Arms Export Licensing Criteria and the associated statement of incorporation made by the Foreign Secretary on 8 July 2002 are the only guidance that falls within the scope of section 9. In addition, there is a far broader range of guidance that is primarily of an administrative or operational nature, advising exporters of the practical impact of export controls. This is made available by ECO – often within very short deadlines – via its website, the Notice to Exporters and similar means.**

**It is the Government's role to decide policy. The Government will take account of all stakeholders' views in the development of policy. For operational and administrative guidance, ECO already consults its key stakeholders when proposing to make changes and will continue to do so. The Government cannot, however, commit to consult all interested parties on all potential changes to export control policy and associated section 9 guidance. For example, this often needs to be done at very short notice to assist external stakeholders and/or on the basis of information that will only be available to the Government.**

8. On the basis of the evidence supplied to us we conclude that the secondary legislation is intelligible to those to whom it applies. We recommend, however, that the Government clarify in guidance the distinction between applied and basic research scientific projects and that it defines the "public domain" in greater detail. (Paragraph 43)

**The Government thanks the Committee for its comment and accepts its recommendation.**

**The public consultation document specifically addresses the impact of the current export controls on the academic community, and calls for evidence as to where there are current gaps in understanding of how the controls apply. In light of the evidence it receives as a result of the consultation, ECO will review all its guidance material (including that applicable to academia) and will provide updated guidance to cover both the above areas, plus any others for which a guidance need has become apparent.**

9. The absence of successful challenges in the courts is not conclusive proof that the legislation is working satisfactorily but we conclude that it provides an indication that the legislation is accepted by exporters and interested parties. Once the case that is currently before the courts is concluded, we recommend that the Government supply us with a note describing the case and the lessons, if any, that it has for the operation of legislation. (Paragraph 44)

**The Government awaits the outcome of the case currently before the courts. Once the case is concluded the Government will provide the Committee with a note (in confidence if necessary).**

10. We recommend that the Government continue to provide notice and adequate explanation of any changes proposed to the secondary legislation. (Paragraph 45)

**The Government accepts the Committee's recommendation and will continue to provide this notification as recommended.**

11. We recommend that at the end of the review process the Government set out in its conclusions to the Review the reasons for the small number of applications for trade control licences from British citizens overseas. (Paragraph 59)

**The public consultation document specifically asks respondents to provide evidence on this point. Any evidence that is put forward will form part of the Government's analysis at the end of the public consultation period and will be reported as part of the Government's official response.**



12. Where a British citizen working overseas for a reputable and responsible organisation applies for a trade control licence we recommend that there be a presumption that a licence will be granted. We conclude that to do otherwise may penalise the responsible British citizen and may undermine the UK's extra-territorial controls on brokering and trafficking. (Paragraph 60)

**The Government is grateful for the Committee's recommendation, which it will consider as part of the review. Export licence assessments focus primarily on the end-user and recipient country rather than the exporter. The Government finds it difficult to envisage a system in which the reputation of the applicant becomes a prime or major consideration for determining whether a licence is granted, regardless of the risk assessment in relation to end-use.**

13. We recommend that the Government enquire whether the extra-territorial provisions in the legislation have placed British citizens overseas in unacceptable positions. (Paragraph 74)

**The Government is grateful for the Committee's recommendation.**

**The public consultation document specifically addresses the impact of the extra-territorial provisions set out in the current export controls, and in particular calls for evidence on the business impact of the trade controls on UK persons outside of the UK, relating to "restricted goods" or "controlled goods" to embargoed destinations. ECO will consider this question in light of the evidence it receives as a result of the consultation.**

14. We conclude that the Government should bring forward proposals to extend the extra-territorial provisions of the export control legislation to encompass trade in all items on the Military List. In our view the experience of the past three years has shown that the current arrangements have failed and that the extension of the extra-territorial provisions is overdue. We therefore recommend that the Government require all residents in the UK and British citizens overseas to obtain trade control licences, or be covered by a general licence, before engaging in any trade in the goods on the Military List. In order not to undermine the employment prospects of British citizens working for reputable organisations, we further recommend that the Government issue general licences covering British citizens working overseas and engaged in categories of trade between specified countries or in certain activities such as advertising. (Paragraph 76)

**As noted in the ECA Review General Statement above, the Government will consider this recommendation in the post-consultation analysis.**

15. We conclude that the EU Common Position on the control of arms brokering sets the best practice and we recommend that the Government follow best practice to establish a register of arms brokers. We conclude that a register will help to ensure that brokers meet defined standards, requirements and checks as well as deterring those—for example, with a relevant criminal conviction—for applying for registration. We also recommend that any brokering or trafficking in arms by a person in the UK or a British citizen abroad who is not registered be made a criminal offence. (Paragraph 82)

**The Government thanks the Committee for its recommendations, which it will consider in the review. As the Committee has noted in its report, Article 4 of Council Common Position 2003/468/CFSP of 23 June 2003 suggests that EU Member States "may" establish a register of arms brokers, but that "registration or authorisation to act as a broker would in any**

**case not replace the requirement to obtain the necessary licence or written authorisation for each transaction.” As such, the Government’s view is that the EU Common Position does not establish best practice on the registration of brokers.**

16. We recommend that the Government obtain and publish in its reply to our Report definitive legal advice setting out whether primary legislation is required to publish a register of brokers and, if the conclusion is reached that primary legislation is required, that the Government bring forward an amendment to the Export Control Act 2002 to permit publication. (Paragraph 83)

**The Government has obtained definitive legal advice, and this has been incorporated into its earlier response to the Committee, a copy of which is reproduced at pages Ev 117 and Ev 118 of the Committee’s report (*Export Control Review: Potential Change Options Requiring Primary Legislation*). This advice is that primary legislation would be required to publish, but not to set up, a register. There could however be difficulties setting up a register under Articles 9 and 16 of the EU Services Directive, which would require a strong public interest case for a register to be made.**

**We note the weight given by the Committee to Article 4 of Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering. That says that Member States “may . . . establish a register of arms brokers”. It does not say anything about allowing general access to such a register. The Committee will have seen the Government’s views on this in the document reproduced at pages Ev 117 and Ev 118 about the EU Services Directive and the importance of justifying any new register. We have doubts about whether creating a public register would be proportionate given that the objective of doing so would be “to ensure that brokers meet defined standards, requirements and checks as well as deterring those – for example, with a relevant criminal conviction – from applying for registration” (paragraph 15 of the Committee’s report). None of this requires publication.**

17. We conclude that the imposition of a duty on exporters to enquire into the intended use of their goods and to withhold exports where they have a suspicion that goods could be used for WMD purposes is not yet justified. There are, however, a number of steps that the Government could take to improve the operation of the current system. First, we conclude and recommend that the Government regularly remind exporters of the provisions of WMD end-use and encourage exporters voluntarily to report any suspicions that they may have about WMD end-use. Second, for the system to work the Government has to gather intelligence from its own sources and exchange information with its EU partners and other services, as well as carrying out market surveillance in the same way as the Zollkriminalamt, the German Customs Criminological Office. In addition, it must use its powers under the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S.I. No. 2764/2003) to inform exporters where a WMD end-use is suspected and to bring the prospective exports within export control. We recommend that the Government in responding to our Report confirms that this is the approach it has adopted. Third, we are concerned that HMRC cannot seize goods destined for a WMD end-use without evidence that the exporter was aware of the intended use. We recommend that in its reply the Government explain whether this requirement has been an impediment preventing enforcement action against proliferators of WMD or whether other legislation provides HMRC with adequate alternative powers to seize goods. If the absence of a provision is an impediment to effective enforcement, we recommend that the regulations be changed to allow HMRC to seize goods where there is good intelligence that they are likely to be used for a WMD end-use, irrespective of the knowledge and intentions of the exporter. (Paragraph 89)

**The Government notes the Committee's recommendation, which reflects current best practice adopted within the export licensing community.**

**Exporters are already made aware of the requirements relating to WMD end-use and their responsibilities through a number of methods, including specific guidance on the ECO website and ECO exporter outreach programmes. In addition, every reply issued by ECO's Technical Assessment Unit in response to a request for advice on the licensability of goods or technology specifically reminds the enquirer about the operation of the WMD End-Use Control.**

**The export control community, particularly via the Restricted Enforcement Unit, gathers and exchanges information within its constituent departments and agencies (and where possible information is exchanged with counterparts in other countries) on WMD end-use and end-user concerns.**

**The Government also confirms that it informs exporters as a matter of course where it suspects that the export or transfer in question may be put to use in a WMD programme of concern. The Government's powers under S.I. No. 2764/2003 were invoked 173 times in 2006.**

**To address the third point, the Government considers that the absence of a specific power of seizure in cases such as those described by the Committee does not present an impediment to enforcement action. The Government also believes that there are two strong arguments why it is not necessary, at this stage, to widen the powers available under the WMD End-Use catch-all Control.**

**Firstly, there would be no practical advantage at the point of export. HMRC's powers are already sufficient to:**

- ensure that any suspect consignment is prevented from being shipped;**
- maintain the detention of the goods until the Government has decided whether or not an export licence is required; and**
- conduct enquiries of any person or company who is party to the export. HMRC's coercive powers, such as search and arrest, are not fettered in any way by the consignment's status being detained rather than seized.**

**Secondly, seizing goods in these cases, without any evidence that the exporter was aware of the potential end-use of the goods in question, would effectively amount to retrospective action and as such would be grossly unfair on the export community.<sup>2</sup> We consider that detaining the goods and providing the exporter with an opportunity to withdraw them from export (and potentially sell them elsewhere, in circumstances where there are no end-use concerns) is a balanced and proportionate response.**

18. We recommend that the Government in responding to this Report clarify whether each e-mail exchange within a group containing participants from within and outside the EU working on the collaborative development of IT source code requires a licence under the legislation and, if it does, whether an open or general licence or exemption could be provided. (Paragraph 91)

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<sup>2</sup> There is a distinction between the general customs powers of detention and seizure. Where goods are detained by HMRC, legal title remains with the exporter, although HMRC has control of the goods. Where goods are seized, they may ultimately be condemned as forfeit to the Crown. These powers are set out in section 139 of the Customs and Excise Management Act 1979.

To deal with this recommendation it is necessary to set out in some detail how the controls deal with transfers of technology and source code, and what Open General Export Licence (OGEL) coverage is available if transfers require licence cover.

The starting point here is that controls do not extend to source code simply because it is source code, and neither do they extend to material simply by virtue of it being encrypted to a specified standard. The controls on source code and encryption work in slightly different ways, but they are principally determined by the nature of what is being transferred.

### Source code

Academics will of course frequently transfer fragments of source code or similar material across the world in pursuance of collaborative projects. But that only creates a licensable event if the source code relates to military or dual-use equipment. Source code related to military equipment is controlled under category ML22 on the Military List, while source code related to dual-use equipment is controlled under the dual-use controls within the sub-category of “software” and therefore controlled in each category 0–9 in sub-category D. Hence, only when military or dual-use source code is transferred will an export licence be required.

Thus, for example, the transfer of source code necessary for the development of a software package to guide artillery shells to their destination would require an export licence, but the transfer of source code necessary for the development of software packages to test car engine performance, the safety of genetically modified food or a whole host of other scientific and academic studies, would in all probability not. We suspect that for the vast majority of e-mail exchanges between academics across national boundaries, the question of export licence cover never arises because what is being transferred does not relate to strategically controlled goods.

If the source code is controlled, then a variety of OGELs allow flexible licence cover in low-risk circumstances. The following OGELs cover category ML22 and therefore, subject to certain conditions, allow the export of military source code:

- **OGEL (Export After Repair/Replacement Under Warranty: Military Goods)**
- **OGEL (Export for Exhibition: Military Goods)**
- **OGEL (Export After Exhibition or Demonstration: Military Goods)**
- **OGEL (Government and NATO End-Use: Military Goods)**
- **OGEL (Export for Repair/Replacement Under Warranty: Military Goods)**
- **OGEL (Military Goods: For Demonstration)**
- **OGEL (Exports or Transfers in Support of UK Government Defence Contracts)**
- **OGEL (Access Overseas to Software and Technology for Military Goods: Individual Use Only)**
- **OGEL (Military and Dual-Use Goods: UK Forces Deployed in Non-Embargoed Destinations)**
- **OGEL (Military and Dual-Use Goods: UK Forces Deployed in Embargoed Destinations)**
- **OGEL (Software and Source Code for Military Goods).**

For dual-use source code, OGEL coverage is provided by the following open licences:

- OGEL (Export After Repair/Replacement Under Warranty: Dual-Use Items)
- OGEL (Export After Exhibition: Dual-Use Items)
- OGEL (X)
- OGEL (Export for Repair/Replacement Under Warranty: Dual-Use Items)
- OGEL (Turkey)
- OGEL (Dual-Use Items: Hong Kong Special Administrative Region)
- OGEL (Cryptographic Development)
- OGEL (Technology for Dual-Use Items)
- OGEL (Oil and Gas Exploration: Dual-Use Items)
- Community General Export Authorisation (CGEA).

## Cryptography

With cryptography, the circumstances may differ but the principle remains the same. Academics will routinely transfer encrypted material, but that does not create a licensable event unless the material that has been encrypted is strategically controlled under either the Military List (for example, the exchange of controlled technology relating to the design of an artillery piece would be controlled under category ML22 regardless of whether that exchange is in an encrypted form) or the Dual-Use List, under sub-category E (other than where WMD considerations apply as set out below).

It should also be noted that decontrols exist for some related equipment with specific applications, such as cryptographic equipment specially designed for and limited to banking use or money transactions and personalised smart cards. Products that are generally available to the public are also decontrolled, such as home computer wireless routers with cryptographic features. Consequently, the export of technology for the development, production or use of these decontrolled items will not be controlled, irrespective of the form in which it is exported.

The exception to this general rule is that where the ability to encrypt to a certain standard is being transferred, this will create a licensable event in its own right. Cryptographic software that provides this encryption or decryption capability is controlled in category 5, part 2, sub-category D of the Dual-Use List. The controls apply where, as a result of receiving the cryptographic software, the recipient would gain the tools necessary to encrypt or decrypt to a set of parameters that are considered to indicate an advanced standard. The objective here is to ensure that encrypted information is not used, for example, against UK Armed Forces or the UK's allies by not imparting an advanced ability to decrypt such information to those who have no legitimate need to have such knowledge.

This means that academics working on developing cryptographic software (as opposed to working on another project in such a way that requires their information exchanges to be encrypted) would create a licensable event if they transfer overseas either the technology to enable encrypting or decrypting of information above the control parameters in the Dual-Use List, or technology for cryptographic software designed for military use. But it would still remain the case that much of the e-mail traffic between such academics would not create a licensable event, because it would be routine or administrative in nature and would fall short of imparting that ability. So we suspect that the circumstances in which licence cover is necessary for encryption projects are very limited.

Dual-use cryptographic software and technology (with the exception of code-breaking software and technology) does not need a licence to EU Member States, and the CGEA can be used for the usual friendly non-EU countries. This facilitates the transfer of controlled software and technology by academics in a wide range of circumstances. For many other destinations the Cryptographic Development OGEL may be used (subject to conditions) for collaboration through established relationships on commercial cryptographic development. This OGEL may be used by the exporter, any subsidiary or parent organisation of the exporter, or by a business or academic collaborator of the exporter.

The international collaboration resulting in the development of the Serpent Encryption Algorithm has been referred to as an example of how controls in the area of cryptography might prohibit the essential exchange of information. In fact, that and similar projects are examples of how the various exemptions to licence coverage referred to above ensure that the necessary exchange of information can proceed, provided those involved consider export licensing issues in advance and seek guidance as necessary. The exchange of cryptographic code fragments under this project would have required licence coverage outside the EU, although for a number of other friendly countries they could be exchanged under the terms of the CGEA. Additionally, the Cryptographic Development OGEL could have been used to gain coverage for a wider range of countries, so that individual licence applications would only have been needed in respect of 23 countries of significant concern (for example Burma, Iraq, North Korea and Zimbabwe).

In addition to the Cryptographic Development OGEL, a number of other dual-use open licences provide further coverage, namely:

- OGEL (Export After Repair/Replacement Under Warranty: Dual-Use Items)
- OGEL (Export After Exhibition: Dual-Use Items)
- OGEL (Export for Repair/Replacement Under Warranty: Dual-Use Items)
- OGEL (Oil and Gas Exploration: Dual-Use Items).

Academics are fully entitled to use any of the OGELs (source code or encryption) referred to above and to discuss with ECO the possibility of using other flexible forms of licences, such as the Open Individual Export Licence (OIEL), if their circumstances are not covered.

### **WMD considerations**

The only exception to the above guidance is where software or technology, whether featuring on the Military or Dual-Use lists or more general in nature, is being transferred to a WMD programme outside the EU. The controls relating to WMDs contained in the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 made under the Export Control Act 2002 cover the transfer, by any means, of technology outside of the public domain which is used or may be intended for use outside the EU in connection with WMD or a related missile programme. The controls on these activities apply to anyone in the UK, or a UK national anywhere in the world, if they are communicating such technology or providing technical assistance to a person or place outside the EU.

The controls apply when the transfer is for “any relevant use”, a defined term within the legislation with the following meaning: “in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons”.

**“Technology” is also a defined term in the Order, meaning “information (including but not limited to information comprised in software and documents such as blueprints, manuals, diagrams and designs) that is capable of use in connection with the development, production or use of any goods”. “In the public domain” means “available without restriction upon further dissemination (no account being taken of restrictions arising solely from copyright)”. Source code, or any other software or technology, is not in the public domain until it has been placed there, which means that the public domain exemption cannot cover the exchange of parts of development code between private concerns simply because it will eventually be placed in the public domain.**

**However, while these controls are extensive, the impact upon academia will be very limited because the control only applies where the academic transferring the technology or software knows or has been made aware that it is to be used for a “relevant use” in WMD outside the EU. The legislation here does not contain a “suspicion clause”, so while exporters who are suspicious of enquiries that they may have received are encouraged to contact ECO for advice, the mere suspicion of relevant use does not render a transfer licensable.**

**For all the above reasons the Government considers that the concerns expressed by some in academia have been significantly exaggerated and that the current coverage of OGELs is adequate.**

19. We recommend that the Government request COARM to examine whether Member States are following a consistent interpretation of Criterion 8. (Paragraph 106)

**The Government welcomes the Committee’s recommendation. We are committed to ensuring that Criterion 8 is applied in a consistent way across the EU, and to this end we led the development of the Criterion 8 section of the EU Code of Conduct Best Practices Guide. We believe that this has helped to harmonise approaches within the EU. At the EU Co-ordinating Committee on Arms Controls (COARM) meeting on 7 September 2007, Member States discussed how they applied Criterion 8. From the discussions it was clear that one Member State was applying the Criterion in a different way, interpreting and refusing licences under Criterion 8, where most Member States were using Criterion 5 and 7 for similar licence applications.**

20. We conclude that there is no strong case for amending the primary legislation to require greater weight to be given to sustainable development. (Paragraph 107)

**We agree with the Committee’s recommendation.**

21. We accept that the list of countries eligible for IDA loans provides a foundation on which to build the first stage of the filtering arrangements for consideration of applications for export licences against Criterion 8. The Government itself has recognised that the IDA list needs to be supplemented with the addition of 14 countries. We conclude that the Government’s approach gives the correct degree of flexibility to the system. We recommend that the Government also consider adding countries such as Morocco to the list. (Paragraph 114)

**We agree with the committee’s recommendation, and will consider adding Morocco and other countries to the Criterion 8 list.**

22. From the information we obtained during the inquiry we conclude that the system for assessing applications against Criterion 8 appears sound and that it is underpinned by a robust methodology. We recommend that the Government publish the methodology in the Annual Report on Strategic Export Controls along with a list of the countries on the IDA list, as supplemented. (Paragraph 119)

**We are finalising an update to the Criterion 8 methodology and will consider publishing the final version once it is complete.**

23. We recommend that DFID consider including an assessment in the Criterion 8 methodology applied by Government to test whether the contract behind an application for an export licence is free from bribery and corruption. (Paragraph 122)

**Criterion 8 and the export licensing system more generally are not an effective way to deal with corruption. It is difficult at the licensing stage for the Government to determine whether a deal is corrupt, as evidence is only likely to come to light after the equipment has been exported.**

**The 2006 White Paper, *Eliminating world poverty: making governance work for the poor*, stated that the UK will “build on the experience of EITI [Extractive Industries Transparency Initiative] to help developing countries improve transparency and value for money in public procurement, and develop international proposals to increase scrutiny of public spending in the defence, construction and health sectors to help fight corruption.” We are currently examining the evidence on corruption in defence procurement and are developing proposals on how and whether to take this work forward.**

24. We recommend that, in any case where intent to evade export controls is suspected, the case should be investigated and where there is evidence of intent, irrespective of the sensitivity of the goods exported or of their destination, prosecution should always be initiated under section 68(2) of the Customs and Excise Management Act 1979. (Paragraph 126)

**The Government is committed to taking enforcement action against breaches of UK export control legislation. While HMRC will continue to give priority to cases involving sensitive goods and/or sensitive destinations, they will also investigate other cases subject to the tests applied to all investigation casework, such as the viability of the case, likelihood of securing sufficient evidence for prosecution and the likely public interest issues.**

**RCPO agrees with the general proposition that deliberate attempts to evade export controls are a serious matter. Nevertheless, as a matter of law all decisions to prosecute must be made in accordance with the Code for Crown Prosecutors, which makes plain that each case is unique and must be considered on its own facts and merits.**

**RCPO can only consider prosecution if cases are referred to it by HMRC.**

**There are then two stages in the decision-making process. First, the prosecutor has to decide if there is sufficient evidence, i.e. whether there is a realistic prospect of conviction against a person for a particular offence. Secondly, but only if there is sufficient evidence, the prosecutor must decide whether it is in the public interest to prosecute. This will involve consideration of the factors for and against prosecution. Usually a prosecution will take place unless there are public interest factors tending against prosecution that clearly outweigh those tending in favour. The more serious the offence, the more likely it is that a prosecution will be needed in**



**the public interest. In the context of breaches of export controls, the sensitivity of the goods or the destination will be taken into account, but they might not be determinative; other factors, such as the nature of the breach and the compliance history of the suspect exporter, could materially affect the decision whether to prosecute. RCPO does not have a policy not to prosecute in the absence of certain aggravating factors, such as the sensitivity of the goods or destination.**

**It would be wrong – and would be a matter susceptible to judicial review – for RCPO to have a policy to prosecute under section 68(2) of the Customs and Excise Management Act 1979 in all cases where there is evidence of intent to evade export controls.**

**RCPO can only consider prosecution if cases are referred to it by HMRC.**

25. We conclude that, because of the need to secure evidence or witnesses from abroad or to reveal evidence provided by the intelligence services in court, prosecutions under section 68(2) of the Customs and Excise Management Act 1979 against those posing most threat to the UK's strategic export controls are problematic. (Paragraph 131)

**Many of RCPO's cases involve evidence abroad, sensitive intelligence or fugitive offenders.**

**RCPO trains all its lawyers in international law issues, including obtaining/using evidence from abroad and extradition. Commencing prosecutions can be problematic, but every effort is made to obtain necessary evidence from abroad and secure the return of fugitives.**

**It should be noted that in many cases the evidence of an intention to breach export controls would be obtained from within the UK. The most problematic area is likely to be in relation to dual-use goods, with foreign states reluctant to provide evidence of the use to which the goods were to be used.**

26. To ensure that the process of levying compounding fines is as transparent as possible we recommend that HMRC continue to provide full disclosure of the details of all cases, but without names. In addition, we recommend that, when a suitable opportunity arises, the Government bring forward legislation to require HMRC to publish the names of those paying compounding penalties. (Paragraph 138)

**The Government will continue to disclose anonymised information in respect of compounding penalties issued in cases involving strategic export offences. HMRC will consider the issue of full disclosure in any future review of compounding policy.**

27. From the evidence we received about the enforcement of export controls in other Member States of the EU we concluded the following. First, the level and pattern of prosecutions in the UK is not significantly out of line with that in other EU States, but further examination is required for a comprehensive analysis of procedures, approaches and court rulings across the EU. Second, given the similarity of work and problems faced we are disappointed that the 2007 Consultation Document fails to draw in evidence from other EU Member States. Third, we recommend that the Revenue and Customs departments continue to develop arrangements to share information and experiences with enforcement authorities across the EU. (Paragraph 143)

**The Government already maintains strong operational links with enforcement partners across the EU. In addition, HMRC officials share information with other customs authorities on a regular basis, and take an active role at international regime meetings such as the Australia Group, Nuclear Suppliers Group, Missile Technology Control Regime (MTCR) and the Wassenaar Arrangement.**

**For the Committee's second point, please see the response to Recommendation 94.**

**RCPO has also increased its participation in international training and liaison events with major partners within and outside the EU. As well as involvement with the Eurojust seminar, RCPO attended the Proliferation Security Initiative (PSI) meeting in New Zealand in March 2007 and attended two international practical exercises with a number of partners in June 2007. It is participating in a strategic exports conference in Sweden in September 2007 and a PSI conference and outreach programme in Greece in October 2007. RCPO recognises the importance of sharing best practice and establishing strong working relationships with partners abroad.**

28. We conclude that in those cases where evidence is required from overseas HMRC is correct to concentrate on those cases involving sensitive goods and destinations where there is a likelihood of co-operation to obtain evidence. (Paragraph 144)

**We acknowledge the Committee's conclusion.**

29. We recommend that the Government increase resources for investigations and prosecutions under section 68(2) of the 1979 Act, particularly, to ensure the co-ordination and exchange of information with EU and other governments. (Paragraph 144)

**The Government considers that current resource allocations are sufficient to tackle investigation casework under section 68(2) and to co-ordinate and exchange information with overseas partners, where such activities add value. HMRC's criminal investigation resources are deployed in line with its strategic priorities with the flexibility to adapt to short-term pressures if required.**

**RCPO is adequately resourced at present to review and, where appropriate, prosecute cases involving breaches of export controls. This includes the obtaining of evidence from abroad and liaison with international partners.**

**David Green QC, RCPO Director, is determined that RCPO performs strongly in this area of work. More lawyers are being trained to ensure that the organisation is not vulnerable to the departure of one or more of the existing specialists.**

30. We recommend that as a matter of course HMRC consider all breaches of export control for prosecution under section 68(2) of the Customs and Excise Management Act 1979 and that where the evidential and other tests carried out by the Revenue and Customs Prosecutions Office are met prosecution should be initiated. (Paragraph 145)

**HMRC will continue to evaluate all breaches of export control for investigation under section 68(2) of the Customs and Excise Management Act subject to the requirements we set out in the answer to Recommendation 24.**

**Since 3 April 2007, all charging decisions have been made by RCPO. Every case is reviewed in accordance with the Code for Crown Prosecutors. The criteria for case adoption and subsequent referral for prosecution are a matter for HMRC. In practice there is close liaison about all cases and potential cases at an early stage, through the Strategic Goods Co-ordination Committee.**

31. We conclude that no change should be made in the operation of the reviews and tests carried out by the Revenue and Customs Prosecutions Office before a prosecution can be launched. (Paragraph 145)

**We acknowledge the Committee's conclusion.**

32. We conclude that it would be detrimental to industry if the Government were to increase the administrative burdens on exporters without convincing evidence that the existing measures were being fully enforced against those who with intent flout export controls. (Paragraph 147)

**The Government notes the Committee's comments, which it considers to be fully consistent with the approach that it has taken during its current review of export controls. Any case for extending or amending the current export controls will be judged in the light of evidence put forward during the current period of public consultation, and the two key factors of likely business impact and likely effectiveness will be carefully weighed up as part of the decision-making process.**

33. We recommend that in any case of breach of export control where prosecution under section 68(2) of the Customs and Excise Management Act 1979 is not possible, the Revenue and Customs Prosecutions Office as a matter of course consider, and take steps to maximise successful prosecution under section 68(1) of the 1979 Act and that the outcome of successful prosecutions be publicised by HM Revenue and Customs. (Paragraph 149)

**In accordance with the Code for Crown Prosecutors, RCPO prefers the charge that reflects the seriousness and extent of the offending. If there is sufficient evidence of intent to breach an export control, then a charge contrary to section 68(2) will most likely be preferred. If evidence of intent is lacking then section 68(1) will be considered.**

**HMRC will continue to publish the details of successful prosecutions via the ECO website and the Government News Network.**

34. We conclude that a warning letter should not be an alternative to a prosecution that meets the Revenue and Customs Prosecutions Office's tests for a viable prosecution and we recommend that, in those cases where a letter is issued, HMRC follow it up to ensure that all deficiencies have been rectified. We also recommend that HMRC examine the opportunities for greater publicity about warning letters subject to ensuring that the reputation and legitimate commercial interests of exporting companies are not unjustifiably damaged, and report its conclusions in the Government's response to this Report. (Paragraph 151)

**The decision to refer a case to RCPO for consideration rests with HMRC officers, who may determine that minor regulatory breaches can be dealt with more expediently by means of a warning letter. Should an officer determine that a case has features warranting a referral for prosecution, the case will be passed to RCPO, who will assess the evidence in accordance with the Code for Crown Prosecutors. Should there be sufficient evidence for there to be a realistic prospect of a conviction, RCPO will consider alternatives to prosecution in**

accordance with the Code. These could include inviting HMRC to issue a warning letter or recommending that an individual is formally cautioned. Such alternatives might be appropriate, for example, in respect of technical or unwitting breaches of the export controls by a generally compliant exporter.

**HMRC will continue to forward warning letters to local compliance officers so that they can check that the exporter has rectified deficiencies identified in a previous warning letter. As their visits will take place over an extended period, HMRC will conduct a short review in the coming months to identify emerging findings. HMRC will also examine opportunities for greater publicity, such as including the number of warning letters issued in the HMRC Annual Report.**

35. We received no evidence that the power to disrupt had been abused and we accept that it is a legitimate and crucial weapon in HM Revenue and Customs' armoury. The exercise of the power by HMRC is not, however, usually subjected to review by the courts and it therefore needs careful supervision by ministers and Parliament. We recommend that HMRC as part of the review of export controls bring forward proposals to provide more information about the use of the power to disrupt exports of concern and to provide suitable safeguards, and provide information about how this is handled in partner countries. (Paragraph 155)

**The terms of reference for the 2007 review of export controls do not extend to disruption activities undertaken by HMRC, which are more accurately described as operational tactics than strictly a power, albeit that they rely on existing customs powers. The Government believes that strong safeguards on HMRC's use of powers already exist, through a number of rigorous internal control procedures to ensure compliance with legislation, departmental policy and guidance, as well as external oversight by HM Inspector of Constabulary and the Independent Police Complaints Commission. The Government does not therefore agree that HMRC's disruption efforts require any further oversight in the context of export controls.**

36. We recommend that the Government in replying to this Report provide an explanation for the reduction in the number of seizures since 2000–01. (Paragraph 157)

**The Government has previously stated that a number of factors have contributed to the decline in seizures since 2000–01, including:**

- **the cessation of a number of trade sanctions on Angola and Iraq;**
- **discontinuation in 2002 of controls on the export of off-road vehicles to the former Yugoslavia; and**
- **Government-wide efforts to improve industry awareness of the controls through national and regional seminars, including support for regional seminars run by the Defence Manufacturers Association prior to the introduction of the new Orders under the Export Control Act 2002.**

37. We reiterate our recommendation made last year that the Sentencing Guidelines Council conduct a review of the guidelines on sentences for breaches of export control and we press the Council as a matter of urgency to include the review in its programme for 2007–08. (Paragraph 165)

**The Sentencing Guidelines Council has considered the report and recommendations made at its meeting on 12 October 2007. The Council has recently agreed a demanding work programme through to 2009 and determined that the recommendations could not be introduced as an additional item to that programme. They would, however, be carried over for future consideration.**

38. We recommend that the Government examine the effect of the Export Control Act 2002 on academic institutions and on postgraduate research and consider whether the legislation is working as intended. We also recommend that the Government formulate and adopt a publicity strategy to inform academic institutions, research councils and similar bodies of their responsibilities under the Export Control Act 2002. (Paragraph 175)

**Prior to the launch of the public consultation document, the Government worked closely with academic institutions to gain an understanding of the impact on the academic community of the controls introduced under the Export Act 2002. We have carried this through into the public consultation where we are specifically seeking their views on this issue. The evidence provided in the Committee's report in this respect is extremely useful, and any further evidence received as a result of the current public consultation will be a key factor in enabling the Government to judge the effectiveness of the current legislation in this area.**

**The Government has already recognised that there is a need to raise awareness of export controls within the academic community. Responses provided by academia to the consultation document will shed further light on the extent to which awareness is lacking and provide a starting point for ECO to develop a strategy as the Committee suggests. ECO has therefore recently written to representatives of academia, suggesting a meeting in November to consider the awareness issue in the light of evidence submitted to the public consultation and to work up a more detailed plan to raise awareness and understanding.**

39. We recommend that HMRC produce and publish a report on the outcome of the exercise it is conducting on the operation of Open General Export Licences and that HMRC conduct a similar exercise on the operation of the Open General Transshipment Licences in time for the results to be taken into account by the Government before it reaches conclusions on its Review of Exports Controls. In our view it is of crucial importance that not only sensitive goods such as landmines, torture and paramilitary equipment and goods destined for use in a WMD programme or goods destined for embargoed destinations are denied transit and transshipment through the UK but also goods destined for terrorists. (Paragraph 183)

**HMRC intends to continue its exercise on OGELs for the foreseeable future. HMRC does not publish the findings of risk-testing exercises, but will provide the Committee with a confidential update in due course. Emerging findings from the exercise suggest that compliance with the customs requirements of OGELs is high. Transshipment consignments are not accompanied by a full export declaration and are not passed through HMRC's computerised CHIEF system. As a result, HMRC cannot conduct a similar profiling exercise to that conducted on the operation of OGELs.**

**The Committee will be aware that the Consultation Document offers an opportunity to comment on UK transshipment controls and the scope of legislation in this area.**

40. We recommend that those who fail to comply with open licences should be denied the privilege of open general licences for at least a year. We also conclude that for the public to have confidence in the system of open licences there needs to be a thorough system of regular compliance checking of those who use open general licences. We welcome the ECO's and HMRC's consideration of additional enforcement options and conclude that, when the Government has reached its conclusions, we should look at this matter again in our next report. At this stage we do not wish to pre-empt the ECO's and HMRC's consideration of additional enforcement options but we recommend that the Government also review whether resources dedicated to compliance visits and to outreach to industry are sufficient and ensure that the

ECO and HMRC produce a joint strategy which, for example, could include joint compliance visits. (Paragraph 190)

**As the Committee acknowledges, ECO and HMRC are currently working together to study the broad range of enforcement options, including both civil and administrative penalties. Withdrawal of registration for OGELs is certainly one of the options within this broader study.**

**HMRC and ECO liaise closely to ensure that their approach to enforcing the UK's export controls is both coherent and robust. Both departments have previously examined the possibility of conducting joint compliance visits, but have determined that they would present significant operational and logistical difficulties disproportionate to any benefits that could be derived. HMRC and BERR officers operate under differing legislative frameworks, and their respective compliance visits are designed to achieve different ends.**

**Additional resources have been allocated to the ECO's compliance and outreach activities, and recruitment for these posts is currently under way.**

41. We recommend that as part of its review of export controls the Government bring forward proposals for penalties such as fixed fines to be imposed in cases where the authorities discover dual-use goods exported in breach of export controls but which would normally be given an export licence had the exporter applied for one. (Paragraph 193)

**BERR and HMRC are already working together to explore the potential role of civil and administrative penalties in encouraging compliance with export controls. This is a longer-term project and final conclusions will not be reached during the review period. However, the Government will of course report back to the Committee when conclusions are reached.**

42. We conclude that the appeals procedures are working satisfactorily. (Paragraph 195)

**The Government notes the Committee's comments.**

43. We conclude that the secondary legislation has not impeded the provision of support to British armed forces. (Paragraph 197)

**The Government shares the Committee's conclusion. We are satisfied that the OGELs put in place in 2004 have served their intended purposes.**

44. We conclude that the Export Control Act 2002 does not impose an excessive burden on those organising arms fairs and exhibitions in the UK and that the current legislation provides a reasonable framework for regulating arms fairs provided that the legislation is actively enforced by the authorities and the organisers of arms fairs and similar exhibitions. We have, however, serious concerns about enforcement. We recommend that the Government in responding to this report set out the criteria for HMRC attending arms fairs and similar exhibitions. It would also assist us to have an account (a) from HMRC of the breach of export controls which arose at IFSEC 2007 and what information about the requirements of the Act had been conveyed to the defendant in the recent court case; and (b) from the Crown Prosecution Service about the charges brought and why no charges concerning breach of export controls were initiated. We further recommend that where HMRC attends a fair or exhibition its officers patrol during the opening hours, inspect the goods being displayed and put questions to those on stalls to ensure that export controls are not being breached. In addition, we recommend, where HMRC does

not assign officers to attend a fair or exhibition at which goods subject to export control are displayed, that HMRC send officers to carry out spot checks and provide expeditious access to officers to deal with matters raised by the organisers, exhibitors or those attending. (Paragraph 208)

**Taking each of the Committee's points in turn:**

#### **HMRC attendance at arms fairs and similar exhibitions: criteria and approach**

**In the context of its frontier responsibilities, HMRC will attend arms fairs and similar exhibitions according to the following criteria:**

- requirements for real-time advice and support to exhibitors and their potential customers in relation to imported and exported goods;
- compliance with customs procedures, for example on goods that have been temporarily imported for the exhibition;
- risk of the exhibition being a conduit or outlet for illegally imported goods, whether subject to duty and tax and/or any prohibition or restriction; and
- risk of breaches of the trade controls.

**This will be subject to an overall risk assessment, and HMRC will agree enforcement responsibilities with Police and others in an overall control programme that will also involve dialogue with the organisers well in advance of the event to ensure that they make exhibitors aware of their obligations under the Firearms Acts and Export Control Act and conduct checks on brochures and other publicity materials for breaches of the trade controls.**

**HMRC will determine levels of deployment according to the overall risk assessment and the approach that has been agreed with Police and others, with greater emphasis on high-risk events such as DSEI, Farnborough and military fairs.**

**Where HMRC officers attend an arms fair or exhibition, their first priority is to check exhibitors for compliance with customs procedures and controls on firearms, components and other controlled goods. Should any breach be detected, the case may be referred for investigation, or the officer may seize the goods and offer terms for restoration in the case of minor regulatory breaches. Officers may also refer cases to the Police where they involve a breach of domestic law, such as the unlicensed possession of a firearm or stun gun. They will also check for possible breaches of trade controls (including trafficking and brokering offences). Depending on the risk, officers may be supported by specialist investigation officers. HMRC officers will vary their deployment and tactics according to the exact circumstances at the event and the changing risk.**

#### **An account of the "breach" of export controls at IFSEC 2007 from HMRC**

**HMRC's firearms compliance officers did not attend this exhibition, as, from the information available, it would have been assessed as low risk. Although HMRC cannot comment on the specifics of the case, it can confirm that, under the normal arrangements agreed with Police, any stun guns detained by an HMRC officer at such an event would have been referred in the first instance to the Police. HMRC has seen the information relating to the trade controls issue and would emphasise that its officers cannot prevent such conversations from taking place, nor would such *prima facie* evidence that might appear to offer strong grounds for prosecution necessarily meet the rigorous tests performed by RCPO.**

**An account of the “breach” of export controls at IFSEC 2007 from the Crown Prosecution Service (CPS)**

**In paragraph 208 of its Report, the Quadripartite Committee has indicated that it would assist its deliberations if it could have an account in the case of R v Xia about “the charges brought and why no charges concerning breach of export controls were initiated”.**

**The CPS understands that the Committee generally has concerns about the extent to which prosecutions are brought relating to breach of export controls.**

**In preferring any criminal proceedings, the CPS must be satisfied not only that there is sufficient evidence to offer a realistic prospect of conviction on each of the charges but also that it is in the public interest to bring such proceedings. The way in which the CPS prosecutors take their decisions and the factors that they bear in mind in doing so are set out in the *Code for Crown Prosecutors*, a copy of which can be found at [www.cps.gov.uk/publications/docs/code2004english.pdf](http://www.cps.gov.uk/publications/docs/code2004english.pdf).**

**In this case, it was concluded that the most appropriate charges were under section 5(1)(b) of the Firearms Act 1968. Each offence carried a maximum of 10 years’ imprisonment. As the Committee will note, under section 7 of the *Code for Crown Prosecutors*, prosecutors should select charges that reflect the seriousness and extent of the offending; give the court adequate powers to sentence; and enable the case to be presented in a clear and simple way.**

**In this case, these considerations were borne in mind when deciding the most appropriate charges. The CPS assures the Committee that all possible offences were considered. However, it was decided that the case was best dealt with under the Firearms Act.**

**The Committee will undoubtedly be aware that breaches of the Export Controls Regulations are usually dealt with by RCPO. In this instance, our understanding is that liaison took place between the local CPS office and the HMRC nationally and that their advice was sought about how best to take this matter forward. Consequently, the decision to prefer charges under the Firearms Act was considered by both HMRC and the CPS to be correct, in this particular instance. In further discussions with RCPO in preparing this submission, our understanding is that, although not consulted in this instance, RCPO also agrees that charges under the Firearms Act were appropriate in this case.**

45. While we accept that little can now be done in respect of the proposed export of British-made maritime-patrol aircraft from India to Burma, we recommend that it should become a standard requirement of licensing that export contracts for goods on the Military List contain a clause preventing re-export to a destination subject to UN or EU embargo. In addition, the contracts should include a subrogation clause allowing the UK Government to stand in the place of the exporter to enforce the contract in British or foreign courts. We also recommend that the Government require as a condition of licensing that all export contracts make provision to allow for end-use inspections. (Paragraph 217)

**The Government considers all export licence applications rigorously, against our Consolidated EU and National Arms Export Licensing Criteria, taking full account of the prevailing circumstances at the time of application and other announced Government policies. Consideration includes the risk of diversion to undesirable destinations, which include the risk of diversion to countries subject to EU or UN embargoes, and also consideration of the recipient countries’ attitude towards international agreements/commitments.**



**End-use inspections (paragraph 217) are carried out by members of UK Diplomatic Missions overseas within the limits of available resources.**

**The Government will consider all the above recommendations in the post-consultation analysis of the ECA Review.**

46. We recommend that the Government bring forward proposals for an end-use control on equipment used for torture or to inflict inhuman or degrading treatment. We conclude that given the range of items that could potentially be caught it would be unreasonable to impose a requirement of due diligence on all exporters for all goods. There are, however, two less stringent obligations we recommend the Government impose on exporters. First, there be a requirement to withhold an export where an exporter has reason to believe that the goods are to be used for torture or degrading treatment. Second, there be an obligation on exporters to inform the Government if they know or have reason to believe that an export is to be used for torture or degrading treatment. Irrespective of the duty on the exporter, we recommend that there should be an obligation on the Government to investigate reports that exports from the UK are being used for torture or to inflict cruel, inhumane or degrading treatment. We recommend that, where the Government establishes a reasonable suspicion of abuse, it be under an obligation to inform exporters who would then be in breach of export control if they exported the goods to the destinations or end users notified by the Government. (Paragraph 225)

**As noted in the ECA Review General Statement above, the Government will consider this recommendation in the post-consultation analysis.**

47. On the basis of the evidence we have received this year and the work done by our predecessor Committees we conclude that the current controls over licensed production overseas are inadequate and need to be extended. We conclude that there are advantages in pursuing the third option put forward by the Government in the 2007 Consultation Document: the Government make export licences for supplies to licensed production facilities or subsidiaries subject to conditions relating to the relevant commercial contracts. (Paragraph 238)

**As noted in the ECA Review General Statement above, the Government will consider this recommendation in the post-consultation analysis.**

48. In addition, we recommend that where licences encompass overseas production the Government make it a condition of the licence that the contract underpinning the agreement prevent exports from the overseas facilities in breach of EU and UN embargoes and allow inspection. In addition, the contract should include a subrogation clause allowing the UK Government to stand in the place of the exporter to enforce the contract in British or foreign courts. (Paragraph 238)

**As noted in the ECA Review General Statement above, the Government will consider this recommendation in the post-consultation analysis.**

49. We recommend that the Government ensure that its database identifies licences, which encompass overseas production. (Paragraph 239)

**The licence application form requires an exporter to declare the “intended end-use” of a proposed export when applying for an export licence; this includes a question on whether “the proposed export is for use in relation to production overseas of other items”. If an export is intended for use in relation to overseas production, the exporter is required to give a full description of the items to be produced, and their intended end-use.**

50. We recommend that the Government extend export controls to encompass exports of goods and destinations subject to EU or UN embargo by overseas subsidiary companies, in which a majority shareholding is held by a UK parent or where UK beneficial ownership can be established. In such cases the parent company would be required to obtain a UK export licence or, in the absence of a licence, would be in breach of the Export Control Act 2002. (Paragraph 242)

**As noted in the ECA Review General Statement above, the Government will consider this recommendation in the post-consultation analysis.**

51. On the basis of the evidence we received we conclude that the feasibility and practicability of a Military End-Use Control “catch-all” provision has not yet been established. We recommend that the Government examine other countries’ experience with Military End-Use Control “catch-all” provisions before reaching its conclusions. (Paragraph 251)

**The Government thanks the Committee for its recommendation. As noted in the response to Recommendation 94, the Government has issued a questionnaire to members of COARM to enable them to develop a better understanding of their respective export control regimes. This questionnaire includes specific questions on their application of the Military End-Use Control.**

52. We recommend that the Government in responding to this Report explain how the existing WMD end-use controls work and why no prosecutions have been initiated. (Paragraph 258)

**The Committee has identified a complex area of work for both the Government and RCPO. The Government wants to give the Committee as full a response as possible, and with this in mind will respond separately to the Committee, as soon as possible.**

53. We recommend that the blanket exemption from controls of Government and its agencies as exporters of licensable goods and technology be ended and that details of the Government’s and its agencies’ exports be reported on the same basis as those of industry. There should, however, be one exception. In order to ensure that exports by the Government and its agencies to UK forces overseas are made expeditiously they should continue to be covered by Crown exemption. (Paragraph 268)

**Government-to-government contracts are covered in Table 4.2 of the Annual Report. In these cases the UK Government does not own the goods when the export takes place, and the export is made under an export licence. Where the export consists of equipment surplus to the requirements of Her Majesty’s Forces, the export licence application is made by the customer government, or, where one is involved in the sale, the UK contractor. Where the export takes place under government-to-government contracts, such as are currently in place with Kuwait and Saudi Arabia, the UK company whose goods are being exported makes the application.**

**There is no concept, therefore, of Crown exemption for either of these two categories; both require an export licence application, which will be assessed, as normal, against the Consolidated EU and National Arms Export Licensing Criteria. If the licence is subsequently issued, the details will be included in the aggregated information set out by destination in Section 3 of the Annual Report and corresponding Quarterly Report.**

**The Ministry of Defence uses Crown immunity only where its own equipment or technology is transferred overseas for its ultimate end-use, or where it gifts military equipment to another government. Gifts are subject to consideration against the Consolidated Criteria, in the context of the Department's Form 680 procedure. This accords with the Government's response to the Committee in September 2003 (CM 5943) on gifting practice. The Government considers that there would be no benefit from requiring the recipient of a gift to apply for an export licence.**

**The Government has been careful to explain in its outreach work with non-EU states that the gifting of equipment is subject to scrutiny against the Consolidated Criteria. We propose that in future, in the section of the Annual Report on Statistics on Exports of Military Equipment, we will make clear that gifted equipment has been assessed against the Consolidated Criteria. The Government believes that such an addition would be sufficient to make clear to other states that we apply at least the same scrutiny to equipment gifted as we do to exports. Otherwise, we consider that the present arrangements are satisfactory.**

54. We reiterate the conclusion we set out in our Report last year that a prior scrutiny model for certain sensitive (or precedent-setting) arms export decisions should be developed on a trial basis for transfers to countries under, or recently under, embargo. We recommend that the Government examine this proposal in detail as part of its review of export controls. (Paragraph 269)

**The Government notes the Committee's recommendation.**

**The case for prior scrutiny is not within the scope of the Government's current review of export controls, and the Government has previously stated that it will not introduce a system of prior parliamentary scrutiny of export licence applications, both on practical grounds and as a matter of principle; see [www.fco.gov.uk/Files/FAC\\_response030001,0.pdf](http://www.fco.gov.uk/Files/FAC_response030001,0.pdf) for the Government's last response on prior scrutiny.**

**Retrospective scrutiny has been enhanced by the introduction of provision of quarterly information on the Government's export licensing decisions, and also by the provision of quarterly confidential reports to the Committee.**

55. We recommend that the Government consider whether the development of e-mail to allow it to be used as a means to transfer entire software packages or detailed technical manuals between groups comes within export control and, if it does not, whether it should be brought within control. Given the pace of technological change and globalisation of industry we recommend that the Government carry out a further review of the legislation in five years. In the meantime we recommend that the Government set up an ongoing internal review which responds to technological and global developments and examines best practice and innovative ideas that enhance the effectiveness of export controls in other countries. (Paragraph 272)

**The Government's response to the Committee's first, specific question is that the controls now cover both physical exports and transfers by any electronic means. Whether or not a transfer is subject to control is therefore determined not by the means of transfer but by the nature of the goods or technology transferred. The transfer of software packages or detailed technical manuals within groups by e-mail will therefore come within export control if the software or manuals in question contain controlled software or technology and the recipient of the transfer is outside the UK. Furthermore, there are controls on the transfer, by any means, of technology outside the public domain that is or may be intended for use outside the EU in connection with WMD or a related missile programme.**

**On the Committee's more general point, the Government does of course accept that technological change is a fact of life and that its impact in the field of export controls needs to be carefully monitored. The proliferation risks attached to new or emerging technologies, or to new uses of existing technologies, are constantly monitored in the international non-proliferation regimes, which, as the Committee knows, form the basis for the national controls of the regime member states. The Government is a key player in these regimes, and as such is both at the forefront of international thinking in this area, and able to influence international policy to ensure that such developments are adequately covered by strategic controls. In addition, the Government will continue to keep under review the need for legislative or operational changes to reflect technological or other developments in this field. We think that this ongoing monitoring is preferable to waiting five years for a formal review.**

**The pace of technological change also reinforces the need to provide and maintain up-to-date and comprehensive guidance, indicating how exporters producing or using new and emerging technologies should ensure that they remain compliant with controls. The Government has always been committed to maintaining up-to-date and comprehensive guidance for exporters. We thank the Committee for this recommendation and agree that the current pace of change means that a more systematic approach may now be justified. ECO will therefore be instituting a bi-annual across-the-board review of technological developments, and will update its guidance to exporters as necessary, to ensure that it reflects the most recent developments.**

56. We note that the Government's predictions about the effect of the legislation overestimated the number of licences likely to be sought by exporters. We conclude this was in part a product of industry's apprehensive approach to the legislation and the greater than anticipated use of open licences. (Paragraph 274)

**The Government notes the Committee's comments.**

57. We conclude that the implementation of the Export Control Act 2002 has not undermined the competitiveness of the UK's defence industries. (Paragraph 277)

**We share the Committee's conclusion on this point.**

58. Taking the defence manufacturing sector as a whole we reach two conclusions about the implementation of the export control legislation. First, the co-operation and involvement of industry in drawing up guidance assisted the smooth implementation of the export control secondary legislation. Second, while we acknowledge the constructive approach taken by EGAD, we had concerns about the tone and inaccuracy of some of industry's representations about the implementation of the legislation. (Paragraph 282)

**The Government notes the Committee's comments.**

59. Whilst we accept that it is reasonable to assess the benefit in terms of counter-proliferation of any extension of export controls, we conclude that a detailed objective test may not be practicable and its absence should not preclude changes to the system of export controls consistent with a precautionary approach. (Paragraph 283)

**The Government thanks the Committee for its recommendation. This is fully in line with the Government's approach to assessing the case for change as part of its current review, which rests upon evaluating, on the basis of evidence submitted, both the business impact of change options and their relative effectiveness.**

60. We conclude that transitional arrangements lasting six months were adequate for the full introduction of the new export controls. (Paragraph 285)

**The Government thanks the Committee for its comments.**

61. We recommend that the Government work with industry to produce an Open General Export Licence as soon as possible to address the concerns of the chemical, biological, radiological and nuclear sector about the need to obtain export licences before submitting technical information to UK Armed Forces and blue light services prior to contract signature. (Paragraph 290)

**The Committee's recommendation refers to "the need to obtain export licences before submitting technical information". Controls apply to the transfer of "technology" and the provision of "technical assistance". This is an important distinction. Communications between CBRN manufacturers and the Ministry of Defence (MOD) or UK blue light services will not constitute the transfer of technology, where, for example, they are of a logistical or business nature rather than actually transferring equipment or knowledge. Communications necessary to help plan for, or respond to, an overseas emergency would therefore not necessarily need licence coverage at all.**

**It is nevertheless the case that CBRN exporters may need licence coverage to transfer technology to UK Armed Forces and blue light services within the UK prior to contract signature in certain circumstances. A licence is required where the NBC supplier has been informed by BERR that a licence is required or where the equipment in question is intended for a "relevant use" as defined in the legislation, for example it may be used for the detection of chemical, biological or nuclear weapons and that there is a transfer to the Armed Forces or blue light services of "technology" or the provision of "technical assistance", as defined in the legislation. If these conditions were satisfied then there would be a licensable transfer under Articles 8 or 9 if, in addition, the NBC supplier "has reason to believe" that the software or technology transferred to the recipient emergency service may be intended for use outside the EC.**

**The Government has been working with exporters in the CBRN-related sector to ensure that they have appropriate licence coverage to transfer technology or provide technical assistance to UK Armed Forces, blue light services or other entities within the UK prior to contract signature. Exporters in the NBC field have been granted OIEL coverage, which is tailored to their particular needs and circumstances, and can therefore most adequately reflect the need to transfer technology prior to a contract being signed. This is then supplemented by a range of OGELs, some of which cover pre-contract exchanges of technology. The UK Defence Contracts OGEL will cover many of the limited number of licensable communications from companies to MOD after a contract has been agreed. The UK Forces in Embargoed Destinations OGEL provides broader coverage for supplies in support of UK Forces in embargoed destinations, and the newly expanded Government and NATO End-Use OGEL allows coverage for supplies of CBRN equipment and technology to both UK and NATO Armed Forces where they are for the handling, detection and identification of WMD. This expanded OGEL coverage has been agreed after extensive negotiations with industry, and represents a reasonable compromise between the need to react quickly and the need to guard against unacceptable risk.**

**Supplies to blue light services cannot benefit from some of the above OGELs (although supplies to blue light services of any country listed in the Government and NATO End-Use OGEL where they are centrally, rather than regionally, constituted would be covered). The Government does not consider the transfer of WMD-related technology to blue light services as analogous with transfers to UK MOD, because overseas deployment is an integral feature of UK MOD requirements, whereas it is not with the blue light services. We do not think the “reason to believe” test as set out in the legislation is satisfied, because of a hypothetical possibility of use outside the EU and, as such, we consider that the number of instances in which licence coverage will be necessary for supplies to blue light services will be small in comparison with supplies to MOD. The Government therefore doubts that OGELs are the solution to whatever problems remain in the field of supplies to blue light services. We do not want transfers to be covered on a blanket OGEL basis when they are not in fact licensable, thus imposing burdens on exporters, in the form of record-keeping, which may be unnecessary. Furthermore, extension of the OGELs is not attractive, because it would involve varying the existing conditions on them, which are specific to MOD requirements and operations, and so would make the licences more complicated to operate. In theory, we could create a new OGEL, but we have to date had no licence applications of any kind from any company for Article 8 or 10 activities in respect of UK emergency services; we only create new OGELs where we consider there is sufficient demand and that this demand can be met without exposing export controls to unjustifiable risk.**

62. We recommend that the ECO review and modify its website to make it easier to use. (Paragraph 295)

**ECO has already started making improvements to the website. Earlier this year, it began to make the site “wider” and “shallower”: in simple terms, this means you need fewer clicks to get to the page required. The website now includes a comprehensive search facility, making it significantly easier to navigate: for example, users can access OGELs from any part of the BERR site simply by searching on “OGEL”. At the same time, in order to improve accessibility for users, a number of the most frequently used pages and documents were placed on the front page of the ECO website, for example the beginners’ page, the guidance on the export of firearms and a link to the rating enquiry service details. ECO keeps the website under ongoing review and further improvements are planned for later this year. Specific suggestions for improvements are always welcome.**

63. We conclude that the Export Control Organisation has a key role to play in preventing inadvertent transfer of goods and technologies, which can be used in weapons of mass destruction. We recommend that the ECO publish and regularly update Guidance on the Operation of the WMD End-Use Control, including lists of suspected front companies. (Paragraph 297)

**The Government thanks the Committee for the work it has undertaken in this area and, in particular, notes the findings (Ev 130) of the research undertaken by Miss Kidd and Dr Hobbs.**

**ECO is committed to regularly updating all its guidance material, including that on the operation of the WMD End-Use Control, and expects to review much of it in light of the evidence received as part of the current review.**

**As the Committee has noted, in addition to general guidance on the operation of the WMD End-Use Control, ECO's guidance emphasises the particular concerns with Iran and its nuclear programmes by publishing a list of Iranian (and one other in United Arab Emirates) entities of concern. This list is a combination of entities for which the UK has refused export licences in the last three to four years; entities where there is published information about their connections with the Iranian WMD programmes; and entities listed in UNSCRs 1737 and 1747, which have together imposed measures against Iran, including embargoes on Iran's nuclear and missile programmes, an asset freeze on named entities and individuals involved in these programmes, and a travel ban on those individuals.**

**However, the Committee will appreciate that there are inherent difficulties in extending this across the full range of countries of potential concern. This is, in part, due to bilateral sensitivities, but is, in addition, complicated by the fact that many proliferation entities will be front companies, which can, by definition, set up and shut down quickly. Thus, they will always be a moving target and, in that sense, any attempt to create a fully comprehensive list would be limited in its usefulness. It is, therefore, more helpful to exporters to provide as much information as possible about general concerns and issues they should watch out for, rather than on specific entities. In this respect, we agree with the findings of the Memorandum (Ev 130) that it would be useful to enhance the information that we provide about the ways in which front companies operate, and we will include this in future guidance.**

64. We recommend, as we did last year, that the outreach programme to industry be expanded significantly. (Paragraph 300)

**ECO has continued to run a number of very successful events around the UK, on occasion with the assistance of external bodies such as the Defence Manufacturers Association, raising the awareness of current exporters and also informing those new to export control and licensing. These events have been well attended and received. These programmes have covered all aspects of export controls, including dual-use goods, and over the past year ECO has also introduced a number of new programmes to reflect developments in export controls. The Committee may be interested to note that ECO will be running a seminar specifically on "dual-use" items in the autumn, and is always willing to tailor its programmes to meet the exporters' requirements. In addition, ECO's compliance officers routinely assess companies' levels of awareness of the controls when they carry out compliance monitoring visits. Where appropriate, they provide information and advice on the controls to improve the companies' knowledge, as well as recommending that they attend specific training events. We are also pleased to inform the Committee that we are increasing the level of resources to both our compliance and industry outreach activities.**

65. To ensure that the export control system maintains its integrity we conclude that the holders of OIELs with terms of five years or longer must be subject to regular compliance checks and we recommend that in its reply the Government explain the extent to which the holders of such licences are subject to compliance visits and checks. (Paragraph 302)

**All holders of open export and trade licences and those registered to use OGELs and trade licences are already regularly visited by ECO compliance officers. In addition, all holders of Individual Trade Control Licences receive compliance visits. The frequency of the visits is based on risk and is dependent on a number of risk factors. The average frequency of visits is between 18 and 24 months, with the longest interval between visits where there are no concerns being 36 months. There will be an increase in the number of compliance officers towards the end of 2007, and consequently an increase in the number of visits undertaken from the first half of 2008.**

66. On the basis of the evidence put before our inquiry we conclude that there is no overwhelming case in favour of setting up an export enforcement agency. (Paragraph 304)

**The Government notes the Committee's comments.**

67. We recommend that the Government improve the arrangements for monitoring and controlling large volumes of weapons that enter the UK for destruction or re-export. In addition, we recommend that the Government provide a full account of the 200,000 assault rifles that were imported into the UK from the former Yugoslavia between 2003 and 2005, explaining how many were made unusable and how many were re-exported. (Paragraph 310)

**The Government shares the Committee's concerns about the proliferation and use of firearms both within and outside the UK.**

**Firearms import, monitoring and export are within the competence of a number of government departments. Therefore, to respond to the recommendation adequately, the Government is providing the following overview of the UK system for the import, internal monitoring and export of firearms.**

**The Home Office is responsible for determining whether a person can legitimately import firearms. The legislation governing this is section 5 of the Firearms Act 1968, as amended. The Home Office requires all section 5 applicants to produce documentary evidence that they have a genuine business need to possess firearms, which would otherwise be prohibited. They will grant an authority to possess prohibited firearms only if the local police are satisfied that adequate secure storage is available.**

**The licensing of firearms imports is the responsibility of BERR's Import Licensing Branch. The basis of the current import system is that registered firearms dealers, or others authorised to possess the firearms being imported into the UK, can only make imports that are calculated not to exceed the importer's domestic authority to possess, as determined by the Home Office. In this way, the Import Licensing Branch ensures that imports can only take place according to eligibility rules that have been established by the Home Office. Import licences are then issued subject to the agreed maximum limits.**

**A reminder is issued with all import licences that the authority given under section 5 of the Firearms Act 1968, as amended, limits the number of prohibited firearms, ammunition and component parts that the importer may hold at any one time. This includes a warning**



**that it is an offence to be in breach of a condition of the authority. However, when a trader is applying for a licence to import, they are not asked why they need to import as part of the application process. The system does not work on the basis of an importer needing to specifically demonstrate what they intend to do with each batch of imported weapons (which may not be known at the time of import).**

**Arrangements for controlling and monitoring weapons when they have entered the UK, including monitoring and inspection of storage facilities and deactivation procedures, are primarily the responsibility of the Home Office. The legal basis is the domestic Firearms Act, and this is enforced by the respective police authority, which may inspect local dealer registers and conduct periodic checks on dealer activities.**

**Any proposed arms export, regardless of whether the arms have been imported to the UK or manufactured here, is subject to the grant of an export licence. All such applications will be rigorously assessed against the Consolidated EU and National Arms Export Licensing Criteria to determine whether the export may proceed. The factors determining the decision on export relates primarily to the overseas destination, the particular overseas end-user, and any risks the export of small arms to them would generate. The question of where arms originated from before entering the UK is not a consideration when determining whether they should be exported from the UK. Therefore, information about the country of origin of weapons intended for export is not sought as part of the export licensing process.**

**As described above, the first part of the Committee's Recommendation 67 is connected not with arms export controls but with domestic controls on firearms, for which the Home Office is responsible. The Government considers that it would therefore not be appropriate to address these issues as part of this response, which focuses on arms export controls. But the Government acknowledges that the Committee has a legitimate reason to request this information. Therefore, a separate response on these issues will be provided by the Home Office, who will also be able to provide any further information the Committee may request on the tests applied before granting section 5 status.**

**In respect of the second part of the Committee's recommendation, there is no consolidated list recording the subsequent storage, movement, deactivation (where relevant) and subsequent disposal of weapons imported into the UK. It is therefore not possible to provide an answer to this part of the Committee's recommendation. The Home Office would be able to provide further information relating to monitoring of weapons within the UK, or deactivation procedures.**

68. We recommend that the Government do not cut defence attaché posts in countries where the export of goods and technology from the UK requires careful consideration to ensure that they meet the EU Code of Conduct on Arms Exports and the National Export Licensing Criteria, and in countries where the UK and other members of the international community are assisting in the destruction of surplus conventional weapons and WMD materials, or where there are concerns about the exporting of such surplus weapons and materials. (Paragraph 312)

**Careful consideration is given in all cases where staff cuts in overseas Posts are envisaged, to ensure that priority tasks can continue to be met. The Government remains of the opinion that it is a priority to promote the high standards required by the EU Code of Conduct and, so far as resources allow, to ensure that third-party countries apply these high standards, particularly in respect of UK exports.**

69. We recommend that in responding to this Report the Government set out the progress that has been made in carrying out the recommendations arising from the 2004 review of the implementation of EU Council Regulation 1334/2000 on the control of dual-use items in an enlarged EU. We further recommend that the Government consider whether the EU review's conclusions have implications for its own 2007 Review of Export Control Legislation. (Paragraph 314)

**The recommendations arising from the 2004 review of the implementation of EU Council Regulation 1334/2000 fell into three broad categories: (i) action that Member States should take themselves to ensure that the Regulation is applied in a more uniform way; (ii) production of guidance material and workshops on best practice and practical application; and (iii) revisions to the Regulation itself to ensure a more uniform application. To date, the emphasis has been on actions that individual Member States should take and on examining the Commission's proposals for revision of the Regulation.**

**We will look carefully at the review's conclusions to see whether there are any implications for the review of our own domestic legislation.**

70. In our view the Government needs to formulate a policy to respond to any proposals emerging from the European Commission to remove the barriers to the free movement of military goods and technology that currently exist within the EU. The Government's policy needs to address the effect that any changes would have on export controls and to ensure that UK and EU export controls are not weakened. We recommend that the Government set out its policy in responding to our Report. (Paragraph 320)

**The Commission has yet to issue formal proposals on intra-Community transfers of defence products. In essence, the Commission is seeking ways to make intra-Community transfers less cumbersome and to remove unnecessary barriers, rather than removing all control over such transfers. For our part we are seeking to ensure that any proposals would not impact on our ability to use OGELs, nor result in any weakening of the control regime; and the recommendations would offer some tangible benefits for British industry with minimal changes to existing regimes. Commission officials have held a number of discussions with Member States and with representatives from industry on various ideas and continue to refine their thinking. The Government will develop its policy when the extent of the formal proposals is known.**

71. We share EGAD's concerns about the European Commission's proposals for changes to the dual-use regulations and recommend that the Government in its response to this Report explain its policy to the changes proposed by the Commission to the regulations. (Paragraph 323)

**Discussion on the Commission's proposals for a revision of the Council Regulation on the control of exports of dual-use items takes place at official level in the Presidency-chaired Dual-Use Working Party. The UK has contributed positively to these discussions and seeks to disseminate UK best practice and experience where this is appropriate. Member States have yet to agree formally on any of the proposals, and discussions are likely to continue until at least the end of 2007. The notion of "intermediation" has been dropped in favour of the term "brokering services" which will be clearly defined. Individual Member States and the Commission have already made a number of proposals for drafting changes, or suggested other refinements to the original draft. This process is being taken forward at the initiative of the Presidency. The UK will develop any new policy that is required once the Presidency has drawn up draft conclusions.**

72. We recommend that the Government provide firm and explicit answers to questions about its decisions to grant, or withhold, export licences for goods or technology, which could be used for internal repression in countries where human rights are abused. (Paragraph 330)

**The Government assesses the possibility of an export being used for internal repression under Criterion 2 of the Consolidated EU and National Arms Export Licensing Criteria. This criterion sets out in detail how each case is assessed. The main factors are an assessment of the nature of the equipment, the prevailing circumstances, and the expected end-use and end-user of the equipment for each case to establish if there is a clear risk that the equipment might be used for internal repression. Where the Foreign and Commonwealth Office (FCO) has concerns over human rights in a country, the licence is forwarded to its Human Rights and Good Governance Department for an individual assessment.**

**The Quarterly and Annual Strategic Export Controls Reports present our strategic export control policies as openly as possible. But certain information on individual cases is commercially confidential for licence decisions, and as such is exempt from disclosure under the Freedom of Information Act. Assessments may also include sensitive information, which is classified and may also be exempt from disclosure under the Freedom of Information Act. This limits the information that can be provided in answers to individual cases.**

**Every year, the Government reviews the way in which information is presented in these reports so that as much information as possible is presented as clearly as possible to the extent that resources allow.**

73. We conclude that it is entirely reasonable for a government to have a policy of refusing to license exports to a particular country for a stated reason or a foreign policy objective. (Paragraph 333)

**The Government notes the Committee's comment.**

74. We conclude that on the basis of the statistics there is evidence that the licensing policy to Israel may have been tightened up. We conclude that the Government's "case by case" response in explaining decisions to grant or refuse licences is unclear. While the "case by case" approach gives the Government flexibility this appears to allow latitude to adjust policy without the need for public explanation, which is neither transparent nor accountable. (Paragraph 339)

**Our policy remains that we judge each licence application against the Consolidated EU and National Arms Licensing Criteria. The case-by-case approach does not lead to any adjustments to this policy. The variable is the particular circumstances of each case.**

**The Government adopts a case-by-case approach so that the precise circumstances of each case can be assessed against the high standards of the Consolidated EU and National Arms Licensing Criteria. The Government is of the opinion that, while such assessment will always contain some degree of interpretation, the process of objectively measuring variable circumstances against these fixed criteria does not constitute, or provide latitude for, changes in export control policy.**

**As much detail as possible about the Government's export controls is published in its Annual Strategic Export Controls Report. The Government would be willing to share with the Committee on a confidential basis more details of individual assessments, where requested, but cannot publish a high level of detail about individual assessments because certain information used in such assessments is sensitive and confidential.**

75. We recommend again this year that the Government explain its policy on licensing exports to Israel, Jordan or other countries in the Middle East and that it explain whether it has adjusted its policy since 1997 as events in the Occupied Territories and Middle East have unfolded. We further recommend that Government explain how it assesses whether there is a "clear risk" that a proposed export to Israel might be used for internal repression (for the purposes of Criterion 2). (Paragraph 340)

**The Government's policy on licensing exports to Israel, Jordan and other countries in the Middle East has not changed. All export licence applications are judged on a case-by-case basis against the Consolidated EU and National Arms Export Licensing Criteria.**

**The case-by-case approach allows flexibility when taking into account prevailing circumstances. The Criteria clearly state the Government's commitment to assess the risk that exports might:**

- i) be used for internal repression;**
- ii) provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination; or**
- iii) be used aggressively against another country.**

**In assessing licence applications for exports to Israel, Jordan and other countries in the Middle East against the Consolidated Criteria, we take into account events in the Occupied Palestinian Territories and in the Middle East region.**

**When making an assessment as to whether there is a clear risk that a proposed export to Israel might be used for internal repression, the Government considers the nature of equipment, the stated end-use of the equipment and the end-user. The British Embassy in Tel Aviv offers advice on what the export will be used for and whether the end-user has used this or similar equipment in a manner inconsistent with Criterion 2 in the past. Similarly, the FCO's designated Human Rights and Good Governance Department (the same department that published the *Human Rights Annual Report for 2006* referred to in paragraph 337) provides advice on all export licences where the Government considers human rights concerns might apply.**

76. We recommend that in responding to this Report the Government explain what was the purpose of the Foreign and Commonwealth Office's recent visit to China to discuss export controls and what was the outcome. (Paragraph 346)

The FCO's visit to China was part of an ongoing EU Pilot Project that aims to assist China in improving its export controls. The UK has played a significant role in the three EU Pilot Project seminars held with China to date. Two of these took place in China, with the third recently taking place in the UK. Representatives from the FCO, BERR, HMRC and the MOD actively participated, and the Chinese indicated that they had gained significant experience from the UK's involvement, attaching great value to the level of expertise we provide. Following recent trilateral discussions, the Chinese have agreed to take part in future projects. We are now in the process of agreeing a forward programme with the EU and China, and look forward to building on the impressive foundation that has been laid as a result of previous events.<sup>3</sup>

77. We reaffirm the recommendation we made in our last Report that the Government work within the EU to maintain the arms embargo on the People's Republic of China. (Paragraph 348)

**The Government notes the Committee's recommendation that the Government should work within the EU to maintain the arms embargo on the People's Republic of China. The Government believes that the embargo should stay in place until the conditions are right for it to be lifted.**

78. We recommend that the Government press for the inclusion of provisions in the arms trade treaty to regulate the trade in small arms and light weapons. We recommend that the Government provide a report on progress on the treaty in responding to this Report. (Paragraph 356)

**The Government welcomes the Committee's endorsement and support for the Government's submission to the UN of March 2006 on the initiative for an Arms Trade Treaty (ATT). We made clear in that submission that we envisage a treaty covering the trade in all conventional weapons, including Small Arms and Light Weapons (SALW). The UK was the first country to submit views to the UN. Subsequently, we worked with other supportive States, non-governmental organisations and UK industry, to encourage all States to feed in their views. A record number, over 90, have done so, compared with an average response to such exercises of around 10 or 20 replies. This is an encouraging indication of the level of global interest in the initiative. The Government is pleased to note that the vast majority of the papers fed into the UN clearly recognise the importance of including SALW within the scope of a future treaty. National views fed into the UN are available at <http://disarmament.un.org/cab/att>. The next stage in the UN process will be the establishment of a UN Group of Governmental Experts (GGE) to examine the feasibility, scope and draft parameters of a treaty. The GGE will begin work in February 2008 and is mandated to report back in time for the UN First Committee meeting in October 2008. Following this, and depending on the result of the GGE's work, we will need to secure a further UN Resolution to begin negotiation of a formal treaty text.**

79. We recommend that the Government press for the inclusion of provisions in the arms trade treaty to promote good governance and combat bribery and corruption in arms transfers. (Paragraph 358)

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<sup>3</sup> [The Committee may wish to note that] In the transcript of the evidence session with the Quadripartite Committee on Strategic Export Controls, on 15 March 2007, there is an error in the recording of Mr Arkwright's response to question 282 from Linda Gilroy. The first line of Mr Arkwright's response is recorded as "... aimed at consulting with the Chinese and improving our own exports [sic] controls". The response should read "aimed at consulting with the Chinese and improving *their* export controls".

**The Government agrees with the Committee’s suggestion. In its submission to the UN on ATT the Government made clear its view that one of the key goals in taking forward this initiative should be to ensure that “In the conduct of the arms trade, States subscribe to the highest standards of good governance, including the need to tackle bribery and corruption.”**

80. We conclude that, if a comprehensive treaty is secured, its full benefit will only be realised if countries across the world put into operation export control systems capable of implementing the provisions of the treaty as well as with non-proliferation requirements under UN Security Council Resolution 1540 of 2004 and other treaties and that countries with fully developed systems will have to assist those without. In the UK this will include providing licensing, technical and enforcement staff to participate in outreach missions. (Paragraph 360)

**The Government agrees the importance of ensuring that countries have the capacity to implement properly the provisions of an ATT and to meet their other commitments. In its submission to the UN on ATT, the Government made clear that:**

**“Ongoing work now, whether it is carried out bilaterally or as part of co-ordinated international interventions, will continue to help ensure States have the capacity to implement an eventual instrument. While an instrument may take some years to become a reality, it is vital that this capacity-building work continues, whether it is focusing on putting in place national legislation and administrative regulations, or on improving national enforcement, such as through more rigorous customs procedures. This work will enable States to improve their controls now, but will only be fully effective when they can be confident that other States are following the same high standards as they have adopted, which will only be assured when a global instrument is agreed and implemented.”**

**And suggested that:**

**“an instrument will also need to include provisions on transitional implementation periods, and on the need for those able to, to offer assistance to other States to help them meet and successfully implement the commitments an instrument will entail.”**

**The Government remains committed to supporting bilateral and international efforts to improve practical implementation of effective export controls, including through participation in outreach activities.**

81. While we consider that the Government ought to give top priority to the international arms trade treaty, there is a risk that it may distract support for the non-proliferation regimes. We recommend that the Government bring forward proposals to extend the non-proliferation regimes. (Paragraph 362)

**The Government notes the Committee’s concern that there is a risk of work towards an ATT distracting support from the other non-proliferation regimes. We do not believe this will be the case, as these regimes do not cover the conventional arms trade in the way the envisaged ATT would. However, we remain committed to the effective functioning of all non-proliferation regimes, and to their extension where appropriate.**

82. We congratulate the Government on its support for a ban on “dumb” cluster bombs and on its commitment to withdraw the UK’s stocks of “dumb” cluster munitions with immediate effect. (Paragraph 368)

**The Government's response to Recommendation 82 is covered in the response to Recommendation 83 below.**

83. We recommend that the Government also withdraws "smart" cluster bombs, provided that an operational alternative is available for military use to counter massing troops in formation on the battlefield. (Paragraph 368)

**The Government fully recognises and shares the legitimate humanitarian concerns that have been raised over cluster munitions. We strive always to reduce civilian casualties to the minimum, for overriding moral reasons, and because of the direct link to the values our Armed Forces both support and embody in campaigns.**

**Having carefully considered the military and humanitarian factors regarding cluster munitions, and that cluster munitions are legal weapons, we have decided to retain certain types of cluster munitions (often referred to as "smart") that have a valid role in modern warfare. A ban on the use of all types of sub-munitions would adversely impact on the UK's operational effectiveness, impose serious capability gaps on our Armed Forces, and take away one element of force protection; we cannot therefore exclude their use either in current or future operations.**

**The UK's current stock of cluster munitions has undergone, and will continue to be subjected to, rigorous and comprehensive testing. The UK is also committed to improving the reliability of all munitions, including cluster munitions, with the aim of achieving lower failure rates and leaving less unexploded ordnance.**

**At international meetings, we have consistently called on all States to comply fully with International Humanitarian Law when using cluster munitions, and to follow the UK's example announced in March this year, and phase out so-called "dumb" cluster munitions. At the most recent Certain Conventional Weapons (CCW) Conference in Geneva last June, the UK was at the forefront of States urging all key users and producers of cluster munitions to agree to a negotiating mandate to address the problems caused by certain types of cluster munitions. The Government is also supporting the Oslo Initiative on cluster munitions, which is working towards a legally binding agreement to prohibit certain types of cluster munitions – those that cause unacceptable harm to civilians.**

84. We recommend that the Government publish future Annual Reports on Strategic Export Controls by the end of April each year. (Paragraph 370)

**The Government is committed to publishing the Annual Report on Strategic Export Controls as soon after the end of the year as possible. We will look very carefully at whether the publication date can be brought forward as the Committee suggests.**

85. We recommend that future Annual Reports on Strategic Export Controls set out in a consistent and systematic manner the resources made available by the Government to implement and enforce strategic export controls with details of enforcement actions. (Paragraph 372)

**The Government continues to improve the information available in Annual Reports on Strategic Export Controls. In the 2006 Annual Report, we included on page 10 information about resources on enforcement and outreach. For future Annual Reports, we will endeavour to provide new material that will add value to interested parties.**

86. We recommend that section 1 (Policy Issues Relating to Strategic Export Controls) of future Annual Reports be widened to include a detailed report on UK export control policy as a whole along the lines of that provided in the Swedish Annual Report. We welcome the Government's offer of a "Restricted" report on outreach and recommend that the Government provide such a report at the same time that it publishes its Annual Reports on Strategic Export Controls. (Paragraph 376)

**The Government will continue to seek to improve the information available in the Annual Report, and hopes the Committee will welcome the changes in the 2006 Report. As we look at how to further enhance the usefulness of the Report, we will of course look at the format used in other national annual reports, including the Swedish report.**

**The Government also notes the Committee's recommendation about the timing of a "Restricted" report on outreach activities.**

87. We recommend that the "country by destination" section of future Annual Reports provide, for each country, a statement on the general arms transfer control approach or policy, along with any policy changes that have occurred over the year. We also recommend that the Government bring forward proposals to allow the data in the Quarterly Reports to be easily extracted in order to be summarised and analysed. (Paragraph 379)

**The Government continues to improve the information available in Annual Reports on Strategic Export Controls. In the 2006 Annual Report, we included more detail on consideration of applications to certain embargoed destinations. For future Annual Reports, we will include new material that will add value to interested parties. For many destinations similar considerations come into play, so adding a statement on general approach for each country may add little real value, but we will consider this suggestion further.**

88. We recommend that the Government make the following changes to its Quarterly Reports.

- Divide up information on financial values and descriptions between Military List items and "Other".
- Combine the information on financial values, number of licences issued and descriptions to give a better indication of the volume of each type of goods licensed for export.
- Provide more systematic information on the type of end-user.
- Provide information on the final destination of goods covered by "incorporation licences".
- Provide separate information on each licence denial with a description of the goods covered the reasons for the denial. (Paragraph 382)

**The Government is always looking at whether it can improve the way in which it presents data in its Quarterly and Annual Reports, and continually reviews the extent to which it can publicly release information. However, the Government also needs to protect commercially sensitive information that has been provided to it on a confidential basis as part of the export licence application process. This means that information cannot be made available in such a way as could identify individual licence applications, but can be presented in an aggregated format.**



The Government has reviewed the specific points raised by the Committee in the context of the need to balance these two competing needs. Its responses are as follows:

1. The Government accepts the Committee's recommendations at points 1 and 2 above. We will introduce a split, by destination, between military and other licences issued, and also introduce a table under each destination where it will split the number of military licences issued by the category ("rating" of equipment, at the top level, e.g. ML1, ML2, the number of licences issued under the heading, and the value of the licences issued, much the same as is produced in the EU's Annual Report on the EU Code of Conduct on Arms Export). This will provide the value of licences issued and not the actual value of exports.
2. The Government will consider further the practices followed in annual reports issued by other EU Member States and elsewhere, and consider whether it will be able to provide the same, or similar, level of information in future reports. It will report back to the Committee once it has completed its review.
3. The Government is not able to do this because exporters are not asked, as part of the licensing process, to describe the end-user according to centrally defined categories. It would require a very significant amount of work by the Government to retrospectively categorise end-users into broad groupings for the 10,000 Single Individual Export Licences that it processes each year. This would divert resources away from core export control tasks, including processing licence applications. The Government is, however, willing to consider the practices followed by other EU Member States in preparing their annual reports, including the level of detail of end-user information they provide, and investigate whether they can be adopted by the UK in the future.
4. The Government accepts this recommendation and will provide this information in an aggregated form. Currently, information is presented in the Annual Report on the basis of destination country, with a separate table providing aggregated details of exports to that country which were then incorporated for onward supply to another country. This table will now be expanded to list the countries to which those exports were supplied following incorporation, although this will of necessity be based on the understanding of the exporter at the time of export, which may not always be complete.
5. The Government already provides the "rating" category (i.e. the relevant entry on the UK export control lists) of items that have been refused by destination, and this enables the reader to identify the types of item that have been refused. It has recently also included aggregated information by destination on which of the Criteria have been used for all refusals, to make it clearer why items have been refused.

The provision of information on individual licence denials would breach the confidentiality of applicants, and could in some cases be sensitive for other reasons. However, we will consider the possibility of replacing the "rating" with the case summary description (as used for issued licences) in the refusals tables so that the reader has a clearer idea of what has been refused. We would welcome the Committee's comments on this approach.

89. We recommend that the Government produce data on the value of exports broken down by Military List category and data on the value of dual-use exports, which is published in future Annual Reports. In addition, as the EU Code of Conduct on Arms Exports applies to dual-use goods we recommend that the UK press the EU to produce an EU reporting standard for data on conventional dual-use exports and for the data on dual-use goods to be included in the EU's own Annual Reports. (Paragraph 383)

**See answer to Recommendation 88 for the response to the first part of Recommendation 89.**

**With regard to the second part of Recommendation 89, the Government will continue to engage the EU on how to improve the way in which data is presented in its Annual Reports including reporting on dual-use exports.**

90. We recommend that the Government consider amending customs codes either to include a sub-category of controlled items in each relevant category or to add a digit that indicated that a good was listed. (Paragraph 385)

**The Committee has noted that commodity codes are subject to international agreement and, as a result, the Government is not in a position to unilaterally amend codes for domestic purposes. A previous effort on behalf of the UK to establish greater details for military products was met with unanimous opposition from the Customs Code Committee. It is unlikely that a further attempt to revise commodity codes in this area would meet with greater success.**

91. We recommend that the Government bring forward a proposal for a fully searchable and regularly updated database of all licensing decisions. If the Government propose that the database replace the Quarterly Reports it must demonstrate that there will be no loss of functionality or data. In addition, the Government will need to make a proposal for supplying the classified information that it provides to us each quarter. (Paragraph 386)

**The Government is pleased to accept this proposal. Following the Committee's recommendation in its 2006 report, ECO has investigated the feasibility of a fully searchable online database and can now confirm that this database will be introduced during 2008, updated at monthly intervals and will replace the Quarterly Reports. We confirm that there will be no loss of functionality or data: the searchable database will provide licensing data to the same degree of detail as currently provided in the Quarterly Reports, and in a similar format, but will allow users to specify their own search criteria so as to produce bespoke reports to meet their needs. This will enable users, by way of example, to produce reports of aggregated details of licensing activity for non-standard time periods, or to sort data by categories of equipment to see destinations to which that category had been licensed. Where enhancements to the provision of data have been agreed in response to other Committee recommendations, these will of course be transferred to the searchable database during the course of its development, or thereafter as appropriate.**

**The Government is confident that this will be a significant step forward in improving the flexibility of its provision of licensing information and can confirm that the existing quarterly provision of confidential information to the Committee will not be affected. The Government will also be pleased (closer to the date of launch) to demonstrate the searchable database and explain to Committee staff and members how best to utilise its capabilities.**

92. We conclude that the Government's explanation about the breaches of export control in respect of UK-manufactured imaging equipment found in South Lebanon was satisfactory. (Paragraph 387)

**The Government notes the Committee's comment.**

93. The DTI's (now the Department for Business, Enterprise and Regulatory Reform's) 2007 Review of Export Control Legislation is an opportunity to stand back and look at the changes in strategic export controls since the 1990s. As a result of the Export Control Act 2002, and the secondary legislation made under it, the UK now has generally efficient and reliable export controls. The volume and quality of information that the Government provides about strategic export controls has improved considerably in the past ten years and we hope will continue to improve. (Paragraph 390)

**The Government thanks the Committee for its comments.**

94. We conclude that the DTI's 2007 Review is a constructive process that addresses many of the issues which we and other interested parties have raised over several years. Much careful thought and work has gone into the Consultation Document and it shows that the Government has been listening. The options for changes it sets out in important areas such as extra-territoriality are welcome and we conclude provide the basis for change. The Review has two shortcomings. First, it ignores the fact that strategic export controls rely on Government-wide co-operation and communication. The Consultation Document does not mention HMRC, which enforces strategic export controls. Second, it ignores the EU dimension. The States of the EU face exactly the same problems as the UK in administering an export control regime, a significant part of which is derived from EU legislation. (Paragraph 391)

**The Government is grateful for the Committee's positive comments. The Government can see why the Committee has identified two apparent shortcomings in the process so far but believes that, by explaining in more detail some of the actions it has been taking to complement the public consultation, it can reassure the Committee on these issues.**

**Section 1 of the consultation document provided a statistically based evaluation of the business impact of the controls introduced under the Export Control Act 2002 and their effectiveness. As the document makes clear, section 1 draws on evidence held by ECO only, and is simply a contribution to the broader debate rather than an authoritative statement. Since ECO, as the licensing authority, holds the central statistics on volume of applications, processing times, and rates of refusal, we judged that it would be helpful to place these in the public domain. But a more extensive assessment, involving all government departments, would not have been useful, as it could have been perceived to be closing down the debate or prejudging the outcome of the public consultation.**

**The absence of an authoritative, Government-wide statement in section 1 does not, however, highlight a lack of co-ordination or liaison across government. Prior to the issue of the consultation document, BERR has been working closely with all other government departments, including HMRC and the intelligence services, and will continue to do so throughout the entire review process. Liaison with HMRC is particularly close, since the review's terms of reference specifically highlight the need to consider potential enforcement difficulties when evaluating the case for further change. HMRC has contributed material to section 2 of the consultation document to highlight enforcement issues, and will contribute fully to the evaluation of options, which will begin in earnest in October.**

**Neither should the absence from the consultation document of a direct and detailed comparison with export control regimes in other EU Member States be interpreted as the Government ignoring the EU dimension. ECO has devised a questionnaire for EU Member States, focusing upon the main areas for change that have been identified in section 2 of the consultation document. The aim of this is to establish both what legislation is in place in other countries and, where a country appears to do things differently from the UK, whether any practical, legal or enforcement issues have resulted from the approach they have adopted. The questionnaire was distributed via COARM channels in May 2007 and so far 11 responses have been received. All responses will be analysed at the end of the public consultation period so that they fully influence the broader examination of change options.**

95. We look forward to reviewing the Government's conclusions arising from the 2007 Review in our next Report. (Paragraph 392)

**The Government notes the Committee's comments and thanks it for its contributions to the review.**

96. The past year has seen the start of the UN process to secure an International Arms Trade Treaty. The groundswell of support for the treaty has been greater than could have been anticipated and we are pleased to report significant progress. We conclude that the Government has continued to show skill in promoting the treaty and, significantly, to press for a comprehensive treaty including both military and dual-use goods and technology. The next year will be crucial for the treaty when the governmental experts start on the details. We hope that in our next report we shall be able to report further significant progress. (Paragraph 393)

**The Government welcomes the Committee's comments and agrees good progress has been made; 2008 will be an important year, particularly for the work of the GGE. It should be noted that the GGE is expected to report back in time for the UN First Committee in autumn 2008, so its report may be issued after the Committee's next report is produced. However, the Government will look for opportunities to update the Committee on progress throughout the course of the GGE.**

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