



THE GOVERNMENT REPLY TO THE FOURTH
REPORT FROM THE HOME AFFAIRS COMMITTEE
SESSION 2005-06 HC 910

Terrorism Detention Powers

**Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
September 2006**

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Presentation of the Government Case

1. It will be clear from later parts of this report that we found the case for extending the maximum detention period to 28 days was convincing, but did not find the arguments for the 90 day period compelling. On such a major issue, with very significant human rights implications, we would have expected the case made by the police to have been better developed. The police should have been able to present an evidence-based analysis of the type we have endeavoured to undertake. It is clear that this was not done, despite their reliance on their ‘professional judgement’. We think it is reasonable for the Prime Minister and Home Secretary to rely on advice from the police on such issues, but we would also expect them to have challenged critically that advice in order to assure themselves of the case that was being made. We heard no evidence that this had happened: this is unsatisfactory. (Paragraph 29)

Given the rapidly changing nature of the terrorist threat and the complexities of terrorist investigations, any proposal to extend the maximum period of pre-charge detention is going to be based on professional judgement and experience rather than exact science. By definition, the changing nature of the threat is not something which can lead to definitive conclusions and much depends on the circumstances which arise in individual cases both now and in the future.

The strong advice we received (including from the country’s most senior anti-terrorist police officer) was that because terrorist investigations are now more complex the then current maximum period of detention – 14 days – was no longer considered adequate. Based on their operational experience, the police concluded that they might in a small number of cases need up to a maximum of 90 days in order to continue to obtain or preserve relevant evidence before charging suspects with a specific offence.

2. We recognise the value of seeking to achieve cross-party consensus on these issues. The immediate response to the July bombings was a strong cross-party approach to new counter-terrorism powers. By the time the Terrorism Bill was debated in the House, this consensual approach had broken down. (Paragraph 30)

We agree it is always desirable to achieve a cross party consensus on terrorism issues and there was co-operation between Government and the Opposition parties before and during the passage of the 2006 Act. Although we recognise there will inevitably be issues on which the parties disagree, we continue to believe it is important to have cross party consensus and will strive to achieve this in relation to future counter terrorism legislation.

3. The then Home Secretary argued to us that the break-down in the cross-party consensus on measures to tackle terrorism essentially arose from a lack of flexibility on the part of the Opposition parties over the period of 90 days. We did not take evidence from the Opposition and are therefore in no position to judge the points made by the then Home Secretary. But in our view the primary origin of the difficulties experienced by the Government lies in the lack of care with which the case for a maximum 90 day detention period was promoted. (Paragraph 31).

As mentioned in our response to the Committee's recommendation at paragraph 29 of the report, the case for the 90 day detention period is ultimately one of operational judgement and experience in light of the changing threat from terrorism.

4. We recognise that the public is less ready to take on trust assertions by those who have seen evidence not publicly available. However, in an area where much material cannot be published (mainly because it is *sub judice*), we considered it right to take some evidence in private. It is also obvious that those with responsibility for taking decisions on these issues will have access to material that is not and cannot be in the public domain: we therefore reject JUSTICE's argument that such material should not be taken into account. However, the nature of the issues under consideration mean that it is all the more important that the Government's presentation of its case be as open as possible. (Paragraph 35)

We recognise that the support and assistance of the public is crucial in the fight against terrorism. It would of course be beneficial for all the information which informs the legislative proposals to be made available, not least because it would strengthen the arguments in support of those proposals and increase confidence. Where possible, we will seek to make this information available. However, there are instances where specific information can not be made public because it is *sub judice* or it involves sensitive material or information that could damage or hinder terrorist investigations. In cases such as these, the information in the public domain will necessarily be more general.

Public Confidence & Community Relations

5. It is important to take into account the effect on the Muslim community of a longer period of detention. Muslims were amongst the casualties in the atrocities of 7 July, and the authorities cannot combat terrorism without the confidence and trust of Muslims. Extended pre-charge detention carries the danger, which should not be underestimated, of antagonising many who currently recognise the need for co-operating with the police, and hence the need to be very cautious before extending the period of detention beyond 28 days. (Paragraph 38)

We note the Committee's recommendation and we are committed to working with the Muslim community with the shared goal of combating terrorism. It is our intention that any future legislative proposals will be discussed with a full range of stakeholders including community representatives.

Legislation is not aimed at any particular section of the community – it is aimed at terrorists. And legislation and security measures alone will not defeat terrorism. We recognise that the assistance of the public is vital in combating the terrorist threat. The threat affects us all and it is essential that we work together to achieve the balance between maintaining security and upholding civil liberties.

The arrest of suspects for terrorism raises many community issues for the police service regardless of the background of those arrested. The Government recognises the potential for the extension of pre-charge detention time limits to 28 days to magnify these, especially in instances where charges may not subsequently be brought. Police are aware of the need to ensure that an individual's needs are catered for in detention, including any religious needs, a need for the detainee's family to be provided for and protected from possible media attention, and meeting any community concerns around the validity of arrests.

Welfare of the person(s) to be arrested and their family feature very highly throughout this process. In addition, the broader community issues are considered and planned for.

Provision is made for religious observance for all detainees. The specific provisions for religious observance for Muslims include a pack containing prayer mat, compass and Koran, which is offered to each prisoner. Arrangement of interviews and other investigative processes is made with the consideration of allowing for religious observance. This includes breaks for prayers and interviewing earlier in the day should investigations happen during fasting periods of Ramadan. The Code of Practice for detention of terrorist suspects envisages moving them to prison after 14 days, where there is better developed infrastructure to cope with long term human needs.

A community impact assessment is completed for every operation. Senior officers, at Chief Officer level and local to the area(s) in which an operation is to take place, are involved in community impact assessment and management planning at a very early stage. Depending on the impact – local, regional or national – a community impact management plan is designed using appropriate resources. For example, after the anti-terrorist raid in Forest Gate in June there was a very focused community reassurance plan for Forest Gate and surrounding areas. A broader, less intensive plan coordinated reassurance activity in the rest of London. The police National Community Tension Team coordinated the national response, keeping all forces informed of developments and suggesting policing responses to deal with any apparent community concerns.

Nature of the threat

6. We consider that the nature of the terrorist threat has changed: while there is no sharp break in the continuum between Irish republican terrorism and terrorism today, there are a number of significant developments. The first of these is that while Irish republican terrorism was brutal, and deliberately killed or injured large numbers of people, contemporary terrorism is distinguished by the centrality of the intention to cause mass casualties indiscriminately. Secondly, suicide bombers are a new phenomenon in this country. Thirdly, contemporary terrorism has an international basis which makes conspiracies more extensive and complex and increases the likelihood that recruitment to terrorism will continue to grow. Fourthly, the nature of the current threat appears less amenable to negotiated political resolution. (Paragraph 44)

We welcome the Committee's conclusion that the threat from terrorism has changed. We must continually review our capability to meet the evolving threat as the methodology, structure and goals of terrorism change.

Consequences for Police Work

7. It is of course the case that many non-terrorist crimes involve complex international elements over a number of countries, and that pre-charge detention is significantly shorter than in terrorism cases. But the unique feature of terrorism cases is the emphasis that has to be given to the protection of the public while the investigation proceeds. (Paragraph 51)

We welcome the Committee's conclusion that terrorism cases are different from other types of investigations. The police have a duty to protect the public and this is an overriding factor in any decision to make arrests as part of a terrorism investigation. However, once an arrest or arrests are made, the investigation must be focused on the collection of evidence in accordance with the relevant legislation.

8. Those investigating contemporary terrorism cases not only have to identify the individuals concerned, but also to understand the roles they played in complicated conspiracies. We therefore think that it is reasonable for the police to cite multiple identities as a complicating factor in their investigations. (Paragraph 54)

We welcome the Committee's conclusion that terrorist use of multiple identities is a factor in the length of investigation times. We are continuing to work with partners to introduce measures that will assist in ascertaining a detainee's identity, such as the introduction of the National Identity Scheme, and electronic fingerprinting. However, there will of course remain instances where further intensive investigation is required to confirm a person's identity.

9. Encryption of data does not appear, for the time being, to be the problem in practice that had been feared. However analysis of data on computers, both unencrypted and decrypted, is time-consuming and resource-intensive. This will be an increasing problem for all types of investigations. (Paragraph 63).

As the amount of data on computers expands, and the methods of encrypting, storing or transferring that data become more sophisticated, it is inevitable that the analysis of such data will present a challenge in all types of investigation.

10. Clearly, bringing Part III of RIPA into force would not solve the problem of encrypted data; it could nonetheless provide a useful instrument in some cases. We therefore welcome the Home Office's expressed intention, following consultation on a code of practice, to bring Part III into force. It should do so as soon as possible. (Paragraph 67)

In relation to the Committee's recommendation that Part III of the Regulation of Investigatory Powers Act 2000 (RIPA) be brought into force as soon as possible, the Home Office published a consultation paper on 7 June, which is available online at www.homeoffice.gov.uk/documents/cons-2006-ripa-part3/. We are seeking views on the contents of a draft statutory code of practice on investigation of protected electronic data, relating to the exercise and performance of the powers and duties that will arise from the implementation of Part III of RIPA (and on an amendment to Part III to increase the maximum penalty for failing to comply with a disclosure requirement in cases related to the possession of indecent images of children). The consultation period ended on 30 August. After considering representations made about the draft and incorporating any changes to it, the Home Office will lay the draft code of practice before Parliament. The code of practice will be brought into force upon affirmative resolution of both Houses of Parliament and concurrently with implementation of the provisions of Part III. Subject to the Parliamentary process and the Parliamentary timetable Part III and its code of practice may enter into force very early in 2007.

11. The police's argument that forensics are time-consuming is not disputed, and we also accept that this is not an area in which greater resources would have an effect because of the need for continuity of the investigation, which can only be ensured by using a team of skilled personnel. (Paragraph 69)

We note the Committee's acknowledgement of the need for the use of skilled forensic teams of limited size to ensure the safety and continuity in investigations.

Whilst the Committee's comment accurately reflects the issue of having a limited team, with full knowledge of individual case details relating to forensics, it cannot be underestimated that the investment in appropriately trained and experienced officers are a vital component.

Specialisation is required to ensure that there is appropriate resilience and capacity and this will inevitably have an effect on funding and training issues.

12. It is clear from the evidence we received that the analysis of data such as records of calls made from mobile phones can be an important part of an investigation, but that the process is also lengthy and complicated. We therefore think it is reasonable for the police to support their case by pointing to the difficulties caused by the analysis of mobile phones. (Paragraph 72)

As the Committee identified, investigation of mobile phones, embracing the forensic examination of handsets for fingerprints and DNA, the examination of the memory of handsets, and the acquisition and analysis of call data records, is an integral and time consuming part of terrorist investigations. Equipment encountered in investigations can include handsets and SIM cards which originate outside of the United Kingdom. Where handsets are seized the acquisition and analysis of call data records cannot begin until the forensic examination has been completed and the handset identity established.

The Government is working with communications service providers and with the police to ensure that the arrangements in place for the lawful retention, retrieval and disclosure of communications data, and its acquisition by investigators, are effective and efficient. This involves investment in training of accredited communications data investigators who work with service providers, and investment in technical facilities to enable service providers to respond to investigators lawful data requirements.

13. We received evidence that each of the above factors complicated the investigation of terrorism offences. We also received evidence that it was the combination of the issues in individual investigations that created the real problems. Opponents of extended detention tended not to address the complexity of the issues involved and to understate the challenge faced by the police. In our view, the important point about the above elements is that recent terrorist investigations have involved all of them. Their individual impact is often significant but it is their cumulative effect on investigations that is central to the case for an extension of maximum pre-charge detention. (Paragraph 73)

We agree that the issues highlighted by the Committee are some of the most significant issues in any case for further extensions to the maximum period of pre-charge detention and we appreciate the Committee's efforts in drawing attention to the cumulative effect that a number of these issues can have when they are encountered in the process of an investigation.

14. We were not convinced by the evidence that provision of interpreters is a significant difficulty. (Paragraph 76)

As the Committee has noted, it is often the cumulative effect of such issues rather than instances in isolation that can cause delays to an investigation. While the provision of interpreters may not be a significant problem in every case, the increasing diversity of terrorists' backgrounds means that, in relation to some languages and dialects there will be a limited capability within the UK for suitably trained and vetted interpreters.

15. We recognise that the need to allow time for religious observance complicates the organisation of an investigation: we do not, however, accept that it justifies an extension of the maximum detention time. (Paragraph 78)

We welcome the Committee's conclusion that it is appropriate for time to be given over to allow for religious observance, and we note that the police accepted this was not a factor which on its own affects the amount of time available for interview. This is one of a number of issues that police need to take into account when considering the amount of time that an investigation might take.

16. We asked the police to provide us with an analysis of at least ten recent terrorist investigations showing how many suspects in each inquiry were represented by the same solicitor or the same firm. They provided this material in confidence, but it is clear that on more than one occasion a single firm with a small number of solicitors has represented more than double that number of suspects, who were the large majority of those arrested. We doubt therefore whether those suspects were represented to the highest legal standards: this of course raises questions of whether justice has been properly served. But the police are also concerned that such multiple representation may hinder effective investigation, for example by making it more difficult to schedule interviews of a number of suspects represented by the same solicitor. Be that as it may, it is not clear to us that the problem provides a strong case in itself for the extension of pre-charge detention. (Paragraph 81)

Again, although this may not be an overriding factor in the argument for extended detention, it is an issue which disproportionately affects terrorism investigations and is another contributing factor.

17. It is disgraceful that any lawyer should encourage the public not to co-operate with the police as a matter of course. It is for the Law Society to decide whether Arani & Co.'s conduct has breached professional standards, but given the obvious terrorist threat we find that conduct particularly reprehensible. (Paragraph 83)

It would not be appropriate for the Government to comment on this point.

18. The assertion by Gareth Peirce that in the large majority of cases the police do not conduct even preliminary interviews with suspects was rejected by the police. In the absence of any supporting evidence from Ms Peirce, we cannot give any weight to her claim. (Paragraph 88)

It would not be appropriate for the Government to comment on this point.

19. We accept that some of the aspects of the process of detaining and interviewing suspects pose practical difficulties for the police. They contribute to the case for extended detention but on their own are not sufficient to justify a change. (Paragraph 89).

In practice, interviewing is not something which is carried out in isolation from the rest of an investigation, rather it is inextricably linked to the gathering and analysis of evidence outside of interviews. There will therefore be factors such as the time taken to examine or analyse evidence, that can delay the construction of an interview strategy, and the interviews themselves may be more complex.

The Terrorism Act 2000 is quite clear that the questioning of suspects is only one of the grounds on which a person's detention may be extended. Section 24 of the Terrorism Act 2006 amends Schedule 8 to the Terrorism Act 2000 in relation to the grounds for extending detention of a terrorist suspect. Continued detention of a terrorist will be permitted if needed:

- To obtain relevant evidence whether by questioning him or otherwise
- To preserve relevant evidence
- Pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be, or is being carried out with a view to obtaining relevant evidence.

20. In general it cannot be expected that interviews of suspects during extended detention will lead to significant additional information that can be used in court. While we can understand that there may be cases in which confrontation of a suspect with new evidence might lead to admissions, it appears that the case for extended detention rests on two arguments: first, the need to seek and analyse evidence from a complex range of sources and, second, the need to ensure the protection of the public. This latter point has been referred to in our evidence and the Parliamentary debates. It does not, however, form any part of the legal basis for an application for extended detention. (Paragraph 90)

Terrorist suspects may exercise their right not to answer questions put to them in an interview. There are provisions whereby a person's failure to answer questions may adversely affect their defence should a prosecution take place. Regardless of whether a person intends to answer questions in interview, we would reiterate Assistant Commissioner Hayman's observation that we should not make an assumption that a suspect will not answer questions when presented with evidence and therefore deprive them of the opportunity to comment.

In respect of the argument for extended detention we would refer the Committee to our response to paragraphs 93 and 94 of the report.

Disruption and Prevention

21. It is clear that the change in the nature of the terrorist threat has led to an increasing number of cases in which the arrest has come earlier than would be otherwise the case, because these arrests are primarily intended to protect the public by disrupting terrorist conspiracies. (Paragraph 93)

and

22. One of the key conclusions of our inquiry is that the preventative element of some arrests under the Terrorism Acts should be given clearer and more explicit recognition. Arrests whose main purpose is to disrupt terrorist conspiracies are a result of the changed nature of terrorism, and, as Assistant Commissioner Andy Hayman of the Metropolitan Police told us, there is now "a vast amount" of such cases. We believe that this form of detention could be used appropriately on occasions to disrupt conspiracies. Hence we agree with the decision to increase the period of detention. But preventive detention is a significant new development, and one that was not made explicit during the passage of the Bill, during which extended detention was primarily justified on the grounds of the time needed to collect and analyse evidence. Any legislation should recognise in terms this important new purpose of pre-charge detention. (Paragraph 94)

The power of arrest in section 41 of the Terrorism Act 2000 is one of the most important powers available to the police in the fight against terrorism. It allows for police to arrest a person upon reasonable suspicion of being a "terrorist", which is defined in section 40, as being a person who has committed any of a number of listed terrorist offences, or has been concerned in the "commission, preparation or instigation of acts of terrorism". The principal usefulness of the power comes from the latter ground, as it allows arrests to be made at an earlier stage than if there was a requirement for suspicion of a specific offence.

We accept the Committee's observation that there is no legal basis in making an arrest on the grounds of protecting the public, but it is evident that the police have a duty to act where it is necessary for them to do so.

We believe that the idea that arrest and detention of some terrorist suspects is carried out solely as a “preventative” measure, is misleading. While an arrest may have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests at any point during an investigation, the legislation does not allow continued detention on this basis. Once a person has been arrested, their continued detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence, or information with the aim of obtaining evidence. The purpose of the extended detention time is to secure sufficient admissible evidence for use in criminal proceedings.

There is an important distinction between the need for extended periods of pre-charge detention and the need for a separate power of arrest. The justification for an extended period of detention is related to changing methods and aims of terrorists and this was set out during the passage of the 2006 Act. The need for a separate power of arrest has been fundamental to our terrorism legislation for a long time. In 1998, before the introduction of the Terrorism Act 2000, the Government published a consultation paper entitled “Legislating Against Terrorism”, which set out the argument as follows:

“Whilst the ordinary powers of arrest are extensive, the Government believes they may not be sufficient to deal effectively with all the problems posed by terrorism. Terrorist groups are frequently highly organised with well practised procedures for thwarting police actions against them. Many of those who have operated in the UK (including non-Irish terrorist groups) have been trained to evade surveillance and their operations have been meticulously planned both to minimise the risk of arousing suspicion before the terrorist act is undertaken and to minimise the chance of leaving forensic evidence.”

Furthermore, during the passage of the 2000 Act, the then Home Secretary Jack Straw made clear the value of a preventative arrest power with reference to the gas attacks on the Japanese Underground:

“I hope nothing similar ever happens here, but, if it does, we need powers to deal with it. If the security forces were to obtain information that such an organisation was plotting such an outrage in this country, the security forces would need the powers provided in the Bill to prevent the outrage from occurring. That is the principal justification for introducing powers to arrest and detain on reasonable suspicion of involvement in acts of terrorism whose scope are wider than those covered in existing anti-terrorism legislation and in the normal criminal law, such as the Police and Criminal Evidence Act 1984”. (14 Dec 1999 : Column 159).

23. We repeat that preventive detention is a major step. At present, the police have to decide on both the action needed to protect the public and on the action required to pursue ultimately a successful criminal prosecution. We do not believe that this judgment should be left to the police alone. (Paragraph 95)

It is not the case that the police always act alone in either the arrest or evidence gathering phases of an investigation. Particularly in the case of surveillance operations which take place over a long period of time, the police will work closely with the Security Service in making the decision to execute arrests. Similarly, the Crown Prosecution Service work closely with police during the gathering and analysis of evidence in making decisions about any further action that should be taken.

Alternatives to longer detention

24. There is no dispute that further increases in resources for counter-terrorism work by the police and security services would lead to quicker results in some cases. But we are satisfied that the nature of investigations is such that greater resources alone are not the answer. (Paragraph 100)

We recognise the Committee's observation that extra resources will not enable every obstacle in an investigation to be overcome, but we are committed to ensuring that the police have the resources they need to do their job. Since 2002/2003 the grant allocated to police specifically for counter terrorism has risen fourfold – from £59m to £249m in 2007/08.

25. The use of lesser charges was opposed by a wide range of witnesses, who raised serious practical and moral objections. We do not think it would be an appropriate response to the challenges of counter-terrorism investigations. (Paragraph 103)

Further to the written evidence of the Home Office and evidence given by a number of other organisations, we welcome the Committee's conclusion that it would not be appropriate to bring lesser charges purely to enable suspects to be held while more serious charges were investigated.

26. Post-charge questioning alone would not be sufficient to replace extended precharge detention, but it could be a useful addition. We therefore urge the Home Office not to allow its consultation to slip any further. (Paragraph 109)

The issue of post charge questioning will be included in the Government's review of policing powers and procedures. The consultation is planned to begin in September 2006.

27. The Threshold Test does not enable charges to be brought without the knowledge that further evidence will certainly become available. In the large majority of counter-terrorism investigations this will not be the case. Nonetheless, the Threshold Test should be used where possible. (Paragraph 112).

The Code for Crown Prosecutors sets out the key tests to be applied in each case and those tests, the evidential sufficiency test and the public interest test, apply equally to terrorism cases as well as any other. The threshold test appeared for the first time in the 5th (and current) edition of the Code in November 2004 to support the charging initiative. The CPS has been operating the Director's Guidance on Charging for some time and whilst the threshold test is generally not applicable in large terrorist operations, it could be met in certain circumstances provided that it is in line with the Director's Guidance.

In short, the threshold test is designed for use in cases where, at the very early stages of the investigation, there is a reasonable suspicion that the persons in custody have committed a crime and there is a reasonable expectation that the evidence to satisfy the formal Code tests will become available. Finally, it must be a case where the suspects present a threat to individuals or to the public at large if released pending the completion of the investigation.

There are scenarios where the police have to act early and make arrests based upon intelligence, where the nature and extent of the material found on arrest is such that there is insufficient time for the police to investigate or the CPS to properly analyse the evidence to make a proper charging decision. We agree with the conclusion of the Committee that whilst the threshold test could apply in some terrorism cases, it is not a solution to cases where the nature of the evidence and the possible charges are unclear; it requires more certainty than that and cannot operate simply on the 'reasonable suspicion' element of the test'.

28. Outside the Government there is universal support for the use of intercept evidence in the courts. The Home Office has not produced convincing evidence that the difficulties are insuperable: they have presumably been tackled in other jurisdictions. We therefore urge the Government to conclude its review of the issue, with the aim of reporting as soon as possible. In the absence of any new information, we assume that it will recommend the use of intercept evidence. (Paragraph 116)

Under current legislation Regulation of Investigatory Powers Act (RIPA) 2000, there is a statutory ban on the use of intercept as evidence. There is ongoing work to re-examine the case for, and the likely benefits of, using intercept as evidence to secure more convictions, primarily against organised criminals and terrorists.

The debate on intercept as evidence is not new – and has been considered on a number of occasions over the last 10 or so years. A comprehensive review of intercept as evidence was conducted in 2003/4 following a request from the Prime Minister in 2003. Following the review's completion in 2004, the Government concluded that was not the right time to change the law and that the impact of new technology needed to be properly considered and factored into the decision making process.

There is a clear commitment to this work but also recognition of the need to protect our intercept capability. We are committed to finding, if possible, a legal model that would provide the necessary safeguards to allow intercept to be used as evidence.

29. We accept the police's argument that measures such as tagging and control orders cannot protect the public from the threat of terrorism to the same extent as do arrests and detention. But we believe that such measures can be used to disrupt terrorist conspiracies. We therefore reject as entirely wrong the arguments of those who oppose any use of control orders against terrorism suspects. It is clear to us that there are circumstances in which it is not possible to charge individuals yet an arrest or other preventative measures are necessary to protect the public and ensure the successful investigation of terrorism. We believe that the use of control orders, tagging and bail should be considered at each stage of the process of judicial oversight of arrest and detention. (Paragraph 119)

Control Orders are used in cases where there is no evidence available that could realistically be used for the prosecution of an individual for an offence relating to terrorism. The Secretary of State can make a control order against an individual if he

- (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
- (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

Before making, or applying for the making of a control order, the Secretary of State must consult the chief officer of the police force about whether there is evidence available that could realistically be used to prosecute the individual for a terrorism-related offence. After the order is made, the Chief Officer must ensure that the possibility of prosecution is kept under review throughout the period that the order has effect. A control order does not preclude prosecution for a criminal or terrorism-related offence if there is sufficient admissible evidence that the individual is engaging in these activities.

Extended detention under Schedule 8 of the Terrorism Act 2000 can only be granted if the judicial authority considers it necessary to obtain, preserve, analyse or examine relevant evidence (or other information with a view to obtaining evidence).

The focus of an investigation into the activities of an individual arrested under TACT, is towards obtaining evidence. We do not feel it would be appropriate to blur the lines between detention as part of a criminal investigation, and the separate powers relating to control orders.

30. We do not doubt that district judges perform their duties impartially and to a high standard and that the police have to take the utmost care in preparing applications for extensions to periods of pre-charge detention. However we share the wide-spread unease at the prospect of the existing system being used to provide judicial oversight of even longer pre-charge detention. (Paragraph 124)

and

31. Lord Carlile proposes a strengthened system of judicial oversight once a suspect has been arrested. We support the thrust of his proposals, but believe they should be extended. Firstly, we believe that supervision should provide for a continual reassessment of whether alternative methods, such as tagging and control orders, would be appropriate. Secondly, as we have argued in the section on disruption and prevention, we believe that there should be appropriate judicial oversight when arrests are made under the Terrorism Act. This would enable proper independent consideration to be given where an arrest is to be made for its disruptive and preventative value rather than primarily for its investigative purpose. It would also enable consideration from the outside of alternatives to arrest and detention. We recognise that this would bring some procedures more common in other jurisdictions into our criminal justice system. (Paragraph 129)

and

32. We acknowledge that we cannot simply import elements from abroad that would not work in the common law system. But there should be no bar to adapting such approaches to our needs. The principle of independent judicial oversight from the time that arrest is first considered should be adopted. This would also ensure that the police alone do not have to bear responsibility for arrests intended to protect the public. For judicial oversight to be effective, there must be adequate support for the judge, including through the provision of appropriate technical expertise. (Paragraph 131)

and

33. Current and recent investigations have gone sufficiently close to 14 days to show that an extension of the maximum period of pre-charge detention, as agreed by Parliament, is justified. We repeat, however, that effective judicial oversight of detention is essential. (Paragraph 139)

As mentioned in our response to the Committee's recommendations at Paragraphs 93 and 94 of their report, while an arrest may have a preventative effect, the legislation does not allow for continued detention on this basis. We are aware that a number of suggestions have been made concerning the role of the judiciary in issuing extension of detention warrants. At present, this process is thorough and detailed, and both the investigating team and the detainees legal representative are able to make representations to the judicial authority about any application for an extension of detention. We will consider carefully the proposals of Lord Carlile and others concerning further judicial oversight,

although as stated above, we do not feel it is appropriate for the current control order regime to be combined with the extension of detention process.

We agree that the role of the judiciary in agreeing extension of detention is an important one. The legislation concerning judicial oversight of extension of detention is applied strictly by the courts to ensure applications are scrutinised. It is in the interest of the investigation that the judicial authority has access to as much information as possible to enable the court to make a decision on applications for extension of detention. Given the sensitive nature of some cases, it is essential that some hearings for extended detention may be held *ex parte*, to ensure that as much information as possible can be presented to the judicial authority without compromising the integrity of the investigation.

34. The recent police raid in Forest Gate and subsequent release without charge of those arrested did not involve extended pre-charge detention, but it clearly would have been of benefit to police and public alike if there had been independent oversight of the decision to intervene. (Paragraph 132)

The decision to launch the operation in Forest Gate was not taken lightly. The Police believed that in light of the specific intelligence received they had no choice but to launch the operation. Public safety remains the top priority for the Government and the Police Service. The police continue to consider lessons learned with regard to intelligence, operational issues and community impact flowing from this operation. In doing so, they will continue to work closely with the community and their partners.

35. None of the evidence we have reviewed of current and recent investigations would have justified a maximum detention period longer than 28 days. But the growing number of cases and the increase in suspects monitored by the police and security services make it entirely possible, and perhaps increasingly likely, that there will be cases that do provide that justification. We believe, therefore, that the 28 day limit may well prove inadequate in the future. (Paragraph 143)

and

36. We have seen no evidence that a maximum of 90 days pre-charge detention is essential, rather than useful. The police did not press strongly for this maximum, while technical witnesses, generally in favour of as long a time as possible, did not seek to argue that 90 days was in itself a significant period. (Paragraph 145)

and

37. The process of the Terrorism Bill through Parliament was divisive and did not increase public trust in the police or the Government. If 28 days proves inadequate in due course, new primary legislation to extend the maximum pre-charge detention period is likely also to be very divisive. But it would be unacceptable for the Government to use secondary legislation. We suggest that a committee independent of Government be created to keep the maximum detention period under annual review and to recommend the introduction of new legislation as necessary. The committee might follow the model of the Newton Committee of Privy Counsellors, appointed in April 2002 to review the operation of the Anti-Terrorism, Crime and Security Act 2001. (Paragraph 148)

The Committee's recommendations are noted. The current period of extended detention pre-charge has only recently come into force and we will need to monitor over the coming months how it works in practice. Lord Carlile will report on the operation of the extended period of pre-charge detention in his report on the operation of the Terrorism Act 2000 next year. If experience shows

that 28 days is inadequate then Parliament will need to consider whether the legislation needs to be changed to provide for a longer period of pre-charge detention. In doing so it will need to take into account any advice received from the police arising from their operational experience. Given the role of the Independent Reviewer of Terrorism Legislation and the early stage we are at on the operation of the extended pre-charge detention period, we do not believe that an independent committee is required to review the detention period at this stage.

38. Many of the difficulties the Government experienced in the passage of the Terrorism Bill arose from the speed with which it was drafted and presented to Parliament: this inquiry did the job of examining the police arguments for extended detention which the Home Office should have done before introducing the Terrorism Bill. Any new legislation on terrorism should not in our view propose a longer period of detention than 28 days unless there is such compelling evidence as we have already referred to earlier. The new legislation on terrorism, including the promised consolidation of existing measures, should be extensively examined in draft, either by this Committee or by a joint committee of both Houses. The Government should ensure that it meets the commitment to build this into the timetable. (Paragraph 151)

The timetable for the Terrorism Act 2006 was accelerated with the agreement of the Opposition parties. This reflected the urgent need to put in place measures to tackle terrorism following the bombings of 7 July. Because of this the period for consultation on the bill was necessarily curtailed, however, the bill did receive extensive scrutiny during its passage through Parliament. In his statement to the House on 2 February this year, the previous Home Secretary indicated that it is our intention to introduce a bill consolidating the existing counter-terrorism legislation next year. He made clear that it is intended to publish the bill in draft for pre-legislative scrutiny. It is hoped that the bill can be taken forward, wherever possible, on the basis of cross party consensus. Any future proposals to extend the period of pre-charge detention beyond 28 days will only be put forward on the basis of evidence that such a change is needed for operational reasons.



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