



House of Lords
House of Commons
Joint Committee on
Human Rights

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

Nineteenth Report of
Session 2006-07

*Report, together with formal minutes and
appendices*

*Ordered by The House of Commons
to be printed 16 July 2007
Ordered by The House of Lords
to be printed 16 July 2007*

HL Paper 157
HC 394
Published on 30 July 2007
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

Joint Committee on Human Rights

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

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

Current Membership

HOUSE OF LORDS

Lord Fraser of Carmyllie
Lord Judd
Lord Lester of Herne Hill
The Earl of Onslow
Lord Plant of Highfield
Baroness Stern

HOUSE OF COMMONS

Mr Douglas Carswell MP (Conservative, *Harwich*)
Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Nia Griffith MP (Labour, *Llanelli*)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)
Mark Tami MP (Labour, *Alyn and Deeside*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

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

Current Staff

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

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk.

Contents

Report	<i>Page</i>
Summary	3
1 Introduction	5
Our inquiry	5
The Government's change of approach	5
The Government's commitment to human rights law	6
The importance of prosecution	7
The importance of transparency	8
Our report	8
2 Length of pre-charge detention	9
The Government's current position	9
Developments since the increase to 28 days	9
Has the increase from 14 to 28 days been shown to be justified?	12
Is there evidence of a current need to go beyond 28 days?	15
Why does the UK need a longer period than other democracies?	18
Are the judicial safeguards adequate?	18
Are the current arrangements for parliamentary review adequate?	19
3 Conditions of pre-charge detention	21
Introduction	21
Facilities at Paddington Green	21
Use of video-conferencing when extending detention	24
Videoing of interviews	25
Healthcare	26
Adequacy of medical record keeping	26
Confidentiality of medical examinations	27
Right of female detainees to be examined by a female doctor	28
Doctors' independence of police	28
Delaying access to a lawyer	28
Response to the CPT report	29
Respect for family life and privacy	29
Conclusion	30
4 Using intercept as evidence	31
The Government's current position	31
Recent developments concerning the use of intercept as evidence	32
Our inquiry	33
The human rights issues	33
The value of intercept in prosecutions for terrorism	34
The practical obstacles to using intercept as evidence	37
(1) Protecting sensitive information and fair trial	38
(2) Avoiding onerous disclosure requirements	41
(3) Keeping up with changes in technology	43

(4) Overcoming objections of telecoms providers	43
Judicial authorisation	45
Conclusion	45
5 Post-charge questioning and other alternatives to extending pre-charge detention	46
Post-charge questioning	46
Bail for Terrorism Act offences	47
GPS tagging	48
The “threshold test” for charging	48
6 Special Advocates	49
Background	49
The function of Special Advocates	50
Concerns of the Special Advocates	50
(1) Disclosure	51
(2) Prohibition on communication with Special Advocate	52
(3) Standard of proof	54
Conclusion	55
7 Other matters	56
Control orders	56
Derogation	56
Formal Minutes	57
List of Witnesses	58
List of Written Evidence	59
Reports from the Joint Committee on Human Rights in this Parliament	60
Oral Evidence	Ev 1
Written Evidence	Ev 48

Summary

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

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

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

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

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

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

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

1 Introduction

Our inquiry

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

The Government's change of approach

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

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

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

¹ See e.g. Third Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I/ HC 561-I (hereafter "JCHR Report on the Terrorism Bill"); Twelfth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HL Paper 122/ HC 915 (hereafter "JCHR Report on First Control Order Renewal"); Twenty-fourth Report of Session 2005-06, *Counter Terrorism Policy and Human Rights: Prosecution and pre-charge detention*, HL Paper 240/ HC 1576 (hereafter "JCHR Report on Prosecution and Pre-charge Detention"); Eighth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL Paper 60/ HC 365 (hereafter "JCHR Report on Second Control Order Renewal").

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

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

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

The Government’s commitment to human rights law

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

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

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

⁴ HC Deb 24 May 2007, cols 1428-1429.

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

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

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

The importance of prosecution

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

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

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

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

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

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

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

⁷ Ev 68.

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

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

The importance of transparency

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

Our report

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

⁹ The Inaugural Colin Cramphorn Memorial Lecture 2007.

2 Length of pre-charge detention

The Government's current position

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

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

Developments since the increase to 28 days

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

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

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

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

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

¹³ *ibid*, p. 4.

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

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

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

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

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

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

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

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

¹⁴ Ev 48.

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

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

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

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

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

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

¹⁷ *ibid* at para. 95.

¹⁸ *ibid* at para. 101.

¹⁹ Terrorism Act 2006, s. 25.

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

²¹ HC Deb 10 July 2007 cols 1346-1368.

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

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

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

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

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

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

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

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

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

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

²⁴ *Ibid.*

²⁵ HC Deb 10 July 2007, col. 1348.

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

²⁷ Terrorism Act 2006, s. 25.

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

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

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

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

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

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

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

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

²⁸ Ev 48.

²⁹ Ev 49.

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

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

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

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

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

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

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

42. During the recent debate on renewal of the extension to 28 days the Minister queried whether it is “useful” to look for “evidence” of the need to extend the period of pre-charge detention.³² He said that “the issue is as much about looking at where we are going over the next couple of years, in terms of the threat, as it is about assessing where we have come from”³³ and that the purpose of the proposed consultation is to arrive at “a view that is part evidence-based, part speculation and partly based on making some assumptions, to the extent that we can, about the nature of the threat that is to come.”³⁴ **We are concerned by any suggestion that the extension of the period of pre-charge detention does not need to be justified by reference to clear evidence that the period which already exists has proved to be inadequate in practice. We remain of the view any extension is an interference with liberty that requires a compelling, evidence-based demonstrable case, and that the most important evidence capable of justifying such an extension would be firm statistical evidence demonstrating the number of actual cases in which the current limit had either prevented charges from being brought at all, or required the police to bring the wrong or inappropriate charges.**³⁵

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

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

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

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

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

³³ *ibid*, col. 1348.

³⁴ *ibid*, col. 1349.

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

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

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

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

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

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

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

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

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

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

³⁸ Ev 49.

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

⁴⁰ Oral evidence, 18 April 2007, Q 97.

⁴¹ *ibid*, Q 98.

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

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

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

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

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

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

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

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

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

Are the judicial safeguards adequate?

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

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

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

⁴³ Ev 48.

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

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

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

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

Are the current arrangements for parliamentary review adequate?

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

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

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

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

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

3 Conditions of pre-charge detention

Introduction

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

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

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

Facilities at Paddington Green

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

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

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

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

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

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

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

⁴⁹ CPT July 2005 Report at para 24.

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

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

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

⁵³ Notes for Guidance, Note 14J.

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

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

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

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

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

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

⁵⁵ *Ibid*, at para. 98.

⁵⁶ *Ibid*.

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

Use of video-conferencing when extending detention

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

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

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

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

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

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

⁵⁷ CPT July 2005 Report at para 12.

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

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

79. **We share these concerns.** In our view, for the reasons given by the CPT, the routine use of videoconferencing does not meet with the highest standards of judicial oversight which would be expected for such a crucial part of the detention process. The judge does not have the same opportunity to witness the demeanour and body language of all the relevant people, and the suspect is likely to be more inhibited in a room in a police station, in the presence of their interrogators, talking only to the judge via a TV screen. **We recommend that suspects should be formally notified of their right to appear physically before the judge at the hearing of applications by the police for extended detention, and required formally, in writing, to waive their right to do so if they choose to have the hearing conducted by video-link. Code H should be amended to make this explicit.**

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

Videoring of interviews

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

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

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

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

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

Healthcare

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

Adequacy of medical record keeping

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

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

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

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

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

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

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

Confidentiality of medical examinations

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

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

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

⁶² CPT November 2005 Report at para 37.

Right of female detainees to be examined by a female doctor

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

Doctors' independence of police

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

Delaying access to a lawyer

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

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

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

⁶³ Schedule 8, para. 8.

⁶⁴ CPT November 2005 Report at para 34.

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

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

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

Response to the CPT report

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

Respect for family life and privacy

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

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

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

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

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

Conclusion

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

4 Using intercept as evidence

The Government's current position

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

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

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

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

⁶⁶ Oral evidence, 18 April 2007, Q 156.

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

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

Recent developments concerning the use of intercept as evidence

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

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

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

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

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

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

⁶⁹ The Guardian, 21 September 2006.

⁷⁰ The Guardian, 22 September 2006.

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

⁷² Clause 1.

⁷³ Clause 2.

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

Our inquiry

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

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

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

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

The human rights issues

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

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

⁷⁶ Ev 72-95.

⁷⁷ A JUSTICE report (October 2006).

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

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

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

The value of intercept in prosecutions for terrorism

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

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

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

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

⁸¹ HL Deb 7 March 2007, cols 309-310.

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

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

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

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

⁸² Oral evidence, 12 March 2007, Q1.

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

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

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

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

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

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

⁸³ *ibid*, Q2.

⁸⁴ *ibid*, Q5.

⁸⁵ HL Deb 16 March 2007 col. 966.

⁸⁶ HL Deb 9 March 2007.

⁸⁷ HL Deb 16 March 2007 cols. 991-2.

⁸⁸ Oral evidence, 26 June 2007, Q247.

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

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

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

The practical obstacles to using intercept as evidence

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

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

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

⁹⁰ Oral evidence, 12 March 2007, Q3.

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

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

(1) Protecting sensitive information and fair trial

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

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

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

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

⁹² Oral evidence, 12 March 2003, Q7.

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

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

⁹⁵ Oral evidence, *op. cit.*, at Q6.

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

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

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

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

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

⁹⁷ Oral evidence, 12 March 2007, Q11.

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

⁹⁹ *R v H* [2004] UKHL 3 at para. 36.

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

¹⁰¹ Ev 83 and 86.

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

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

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

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

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

¹⁰² Ev 92.

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

(2) Avoiding onerous disclosure requirements

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

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

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

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

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

¹⁰³ Oral evidence, 12 March 2007, Q6.

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

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

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

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

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

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

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

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

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

¹⁰⁷ Oral evidence, 26 June 2007, Q250.

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

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

(3) Keeping up with changes in technology

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

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

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

(4) Overcoming objections of telecoms providers

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

¹⁰⁸ Oral evidence, 12 March 2003, Q20.

¹⁰⁹ Ev 86 at para. 21.

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

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

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

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

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

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

¹¹¹ HC Deb 22 February 2007 col 447.

¹¹² Oral evidence, 12 March 2007, Q21.

¹¹³ *Ibid.*

¹¹⁴ *ibid* Q22.

¹¹⁵ *ibid* Q24.

Judicial authorisation

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

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

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

Conclusion

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

¹¹⁶ Ev 89 at paras 15-17.

¹¹⁷ Ev 84-85 at paras 11-13.

¹¹⁸ Section 17 of the Regulation of Investigatory Powers Act.

¹¹⁹ Oral evidence, 12 March 2007, Q26.

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

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

Post-charge questioning

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

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

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

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

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

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

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

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

¹²⁴ Oral evidence, 18 April 2007, Q164.

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

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

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

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

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

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

Bail for Terrorism Act offences

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

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

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

GPS tagging

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

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

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

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

The “threshold test” for charging

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

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

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

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

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

6 Special Advocates

Background

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

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

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

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

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

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

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

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

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

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

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

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

The function of Special Advocates

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

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

Concerns of the Special Advocates

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

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

¹³² Oral Evidence, 12 March 2007, Q 79.

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

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

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

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

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

194. We consider each of these concerns in turn.

(1) Disclosure

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

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

¹³⁵ Oral evidence, 12 March 2007, Q46.

¹³⁶ *ibid*, Q47.

¹³⁷ *ibid*, Q63 (Nick Blake QC).

¹³⁸ *ibid*, Q34.

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

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

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

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

(2) Prohibition on communication with Special Advocate

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

¹³⁹ *ibid*, Q60 (Andy Nicol QC).

¹⁴⁰ *ibid*, (Martin Chamberlain).

¹⁴¹ *ibid*, Qs 48, 51 and 54.

¹⁴² Oral evidence, 18 April 2007, Q119.

¹⁴³ CPR r. 76.25(2).

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

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

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

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

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

¹⁴⁴ CPR, r. 76.25(4).

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

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

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

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

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

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

(3) Standard of proof

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

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

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

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

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

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

¹⁵¹ Oral evidence, 18 April 2007, Q123.

Conclusion

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

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

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

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

¹⁵² Oral evidence, 12 March 2007, Q85.

¹⁵³ *ibid*, Q38 (Andy Nicol QC).

¹⁵⁴ *ibid*, Q84.

7 Other matters

Control orders

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

Derogation

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

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

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

217. To date we have received no response.

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

¹⁵⁶ Ev 69.

Formal Minutes

Monday 16 July 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd

Nia Griffith MP

Lord Lester of Herne Hill

Dr Evan Harris MP

Lord Plant of Highfield

Baroness Stern

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

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

Paragraphs 1 to 217 read and agreed to.

Summary read and agreed to.

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

Several Papers were ordered to be appended to the Report.

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

[Adjourned till Monday 23 July at 3.30pm.]

List of Witnesses

Page

Monday 12 March 2007

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

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

Wednesday 18 April 2007

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

Tuesday 26 June 2007

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

List of Written Evidence

	<i>Page</i>
1 Letter from the Chairman to Sir Ian Blair QPM, Commissioner of Police of the Metropolis	Ev 48
2 Letter from Sir Ian Blair, Commissioner of Police of the Metropolis	Ev 49
3 Letter from the Chairman to the Rt Hon Dr John Reid MP, Home Secretary	Ev 63
4 Letter from the Rt Hon Dr John Reid MP, Home Secretary	Ev 64
5 Letter from Tony McNulty MP, Minister of State, Home Office	Ev 65
6 Letter from the Chairman to the Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government	Ev 67
7 Letter from the Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government and Minister for Women	Ev 67
8 Letter from the Chairman to the Rt Hon Dr John Reid MP, Home Secretary	Ev 68
9 Letter from Alan Frazer, FME	
10 Letter from the Independent Police Complaints Commission	Ev 72
11 Memorandum from The London Innocence Project	Ev 73
12 Memorandum from Justice	Ev 83
13 Memorandum from Liberty	Ev 86
14 Memorandum from the Northern Ireland Human Rights Commission	Ev 92
15 Letter from the Attorney General's Office	Ev 95
16 Letter from Martin Chamberlain	Ev 95

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2006–07

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

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
--------------	---	--------------------

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

	Convention Against Torture (UNCAT)	
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716