



House of Lords
House of Commons
Joint Committee on
Human Rights

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

Twentieth Report of Session 2007-08



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*Report, together with formal minutes and
written evidence*

*Ordered by The House of Commons to be printed
12 May 2008*

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12 May 2008*

**HL Paper 108
HC 554**
Published on 14 May 2008
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.

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

Current Staff

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), James Clarke (Committee Assistant), and Karen Barrett (Committee Secretary).

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Summary

The Joint Committee on Human Rights scrutinises Government Bills for their human rights compatibility. The Committee draws the special attention of both Houses to the Counter-Terrorism Bill.

This is the Committee's second Report on this Bill. The Committee has also published four other Reports relevant to the Bill. This Report updates them in light of the Government's replies to two of the Committee's Reports and puts forward amendments to the Bill to give effect to the Committee's recommendations. The Committee's approach is based on the human rights standards with which the Government's counter-terrorism measures must be compatible and on the belief that such measures should as far as possible be part of the ordinary criminal law (paragraphs 1-5).

In the Committee's view the Government has not made out its case to extend pre-charge detention beyond 28 days. There is no clear evidence of any likely need for more than 28 days in the near future and there is an alternative, human rights-compliant package of measures available which means there is simply no need to extend the maximum period of pre-charge detention (paragraphs 6-8).

The Committee is very disappointed by the Government's failure to respond fully to its earlier substantial report on 42 days and looks forward to a response to its detailed recommendations in that Report (paragraphs 9-11).

The Committee considers the Government's argument that the Parliamentary safeguards surrounding pre-charge detention are substantial and meaningful but concludes that they confuse parliamentary and judicial functions by attempting to give Parliament the function of extending detention to deal with particular individuals. In view of what is now known about the former Attorney General's view of the previous 90 day proposal, the Committee is disappointed that the Law Officers were not even able to confirm that in their view the proposal to extend pre-charge detention to 42 days is compatible with and will not lead to breaches of the UK's international human rights obligations. The Committee concludes that as the case has not been made out the proposals for 42 days pre-charge detention should be deleted from the Bill. It suggests amendments to the Bill to strengthen the existing judicial safeguards in applications to extend pre-charge detention up to the current limit of 28 days to make them compatible with the right to a judicial hearing in Article 5(4) ECHR (paragraphs 12-36).

Charges for terrorism offences may be brought on the basis of reasonable suspicion that an offence has been committed rather than the normal, higher threshold of a realistic prospect of conviction. The lowering of the charging threshold in terrorism cases therefore significantly reduces the force of the case for extending the maximum period of pre-charge detention. Although the Committee considers this lower Threshold Test in terrorist cases beneficial, it remains of the view that it should be scrutinised by Parliament and placed on a statutory footing with a number of independent safeguards. It proposes an amendment to the Bill to provide an opportunity for parliamentary debate (paragraphs 37-49).

Under the Terrorism Act 2000 there is no provision for bail prior to charge. In the Committee's view the unavailability of bail has become anomalous as the range of terrorist

offences has grown. Bail with conditions would be an important alternative to longer pre-charge detention of those suspected of terrorism offences who do not pose a risk to public safety or a flight risk because it would enable the police to continue their investigations while still maintaining some control over the suspects. The Committee suggests an amendment to the Bill to make court-ordered pre-charge bail with conditions available in relation to terrorism offences (paragraphs 50-56).

The Committee has long recommended a change in the law to permit post-charge questioning, subject to safeguards. The Government has rejected its recommendations that there be specific safeguards on the face of the Bill. The Committee is not persuaded that existing safeguards are adequate and now proposes that the Bill should be amended to include seven safeguards (paragraphs 57-66).

Although the Bill contains some detailed amendments to the control orders regime in the Prevention of Terrorism Act (PTA) 2005, the Government has rejected the Committee's view that more far-reaching amendments are needed to make the regime human rights compatible and to underpin the Government's professed preference for prosecution as the way to deal with terrorists. The Committee now puts forward a series of amendments to the PTA to give effect to its earlier recommendations (paragraphs 67-114).

The Government dismissed as "misplaced" the Committee's concerns about the serious human rights implications of the Bill's provisions on coroners' inquests involving material affecting national security. In the Committee's view the Government's justification, that the changes are necessary in order to make the law compatible with Article 2, is highly questionable. The law of public interest immunity already provides for non-disclosure of certain documents or information which would damage national security and this has been found to be compatible with Article 2 by the European Court of Human Rights. Appointment of the coroner by the Secretary of State would be fatal to any appearance of independence in any inquests where the State is potentially implicated in the death which is being investigated. The Committee therefore recommends that the clauses concerning coroners' inquests should be deleted from the Bill and that the issue should be returned to in the context of the forthcoming Coroners Bill (paragraphs 115-120).

1 Introduction

1. We reported on this Bill before its Second Reading in the Commons, to identify some of the most significant human rights issues raised by the Government's proposals.¹ We have also recently published two other reports of relevance to this Bill:

(1) our Report on 42 Days, published on 14 December 2007²;

(2) our Report on the Annual Renewal of the Control Orders Legislation, published on 20 February 2008.³

2. Two of our earlier reports in our Counter Terrorism Policy and Human Rights series are also relevant: those on "28 days, intercept and post-charge questioning"⁴ and "Prosecution and Pre-charge Detention".⁵

3. We now report again on the Bill as it comes out of Committee. The purposes of this further report are twofold:

(1) to comment further on the issues already reported on in the light of the Government's replies to two of our recent reports; and

(2) to suggest amendments to the Bill to give effect to the Committee's recommendations in this and its previous reports.

4. We may report again in relation to other provisions in the Bill which raise human rights issues on which we have not so far focused.

5. As always, in this Report we ground our analysis in the human rights standards with which the Government's counter-terrorism measures must be compatible, and we proceed from a full recognition that the Government has a duty to protect people from terrorism, a duty imposed by human rights law itself. We also remind Parliament of one of the central and enduring insights of the Newton Committee of Privy Councillors which reported on the operation of the Anti-Terrorism, Crime and Security Act 2001: that counter-terrorism measures ought not to be extraordinary measures in a special category of their own, but, as far as possible, part of the ordinary criminal law of the land.

¹ Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL Paper 50/HC 199 (hereafter "First Report on Counter-Terrorism Bill").

² Second Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights: 42 days*, HL Paper 23/HC 156 (hereafter "Report on 42 days").

³ Tenth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, HL Paper 57, HC 356 (hereafter "Report on Control Orders renewal").

⁴ Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157/HC 394 (hereafter "Report on 28 days, intercept and post-charge questioning").

⁵ Twenty-fourth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention*, HL Paper 240/HC 1576 (hereafter "Report on Prosecution and Pre-charge Detention").

2 Pre-charge Detention

Background

6. We have set out our views on the human rights compatibility of the Government's proposal to extend the maximum period of pre-charge detention to 42 days at length in our 42 Days Report (published on 14 December 2007)⁶ and our first Report on the Counter-Terrorism Bill (published on 20 February 2008).⁷ Our view is that the Government has not made out its case for the need to extend pre-charge detention beyond the current limit of 28 days. Not only have we found no clear evidence of any likely need for more than 28 days in the near future, we have demonstrated, in a series of reports, that there is now an alternative, human rights compliant package of measures which does enough, in combination, to protect the public. Many of the elements of this package of measures are already in place; others are in train and still others are proposed in this Bill. There are also other measures which we propose in this report, which would serve the same purpose. In our view, when these alternative measures are taken in combination, and their interrelationship properly understood, there is simply no need to extend the maximum period of pre-charge detention.

7. The most important elements of the alternative package are:

- The lowering of the charging threshold for terrorism cases (the so-called "Threshold Test")
- The introduction of new offences, such as acts preparatory to terrorism
- The introduction of post-charge questioning with adverse inferences
- The availability of control orders and other forms of surveillance to limit and monitor risk
- The possible future availability of bail with conditions for terrorism offences
- The future admissibility of intercept evidence
- Greater specialisation within the CPS and more active prosecutorial involvement in investigations
- More active case management of terrorism cases by the judiciary, including a more robust approach to defence delaying tactics
- Incentives to those on the periphery of terrorism offences to give evidence, e.g. in the form of better witness protection and the possibility of plea bargaining.

8. As we have said in previous reports, in our view **the Government has failed to consider these alternatives to extending pre-charge detention as a coherent package. Taking these measures in combination, we do not think it can be said that there is really any**

⁶ Report on 42 Days, paras 1-101.

⁷ First Report on Counter-Terrorism Bill, paras 10-21.

gap in public protection which warrants taking the extraordinary step proposed by the Government to increase pre-charge detention up to a maximum of 42 days.

The Government's failure to respond to 42 Days Report

9. No reply to our 42 Days report was received by the end of the two month period by which Government responses are due. On 26 March 2008, however, the Government published its Reply to our later Report on the Counter-Terrorism Bill.⁸ The Government's Reply responds to the chapter on pre-charge detention in our report on the Bill, but not to our earlier and much more detailed 42 Days Report, in which we had subjected the Government's 42 days proposal to detailed scrutiny after taking a considerable amount of oral evidence on the subject. We therefore enquired as to when we could expect to receive a Government response to that Report.

10. We were astonished to be told that the Reply to the Committee's Report on the Counter-Terrorism Bill is intended by the Government to respond to both reports and the Home Office has no plans to respond further to the Report on 42 days. This had not been agreed with the Committee in advance. Moreover there is no mention of the 42 Days Report in the Government Reply. That Reply contains only four short paragraphs dealing with the compatibility of the 42 days proposal with Article 5 ECHR, and fails to respond to much of the detailed analysis and a number of relevant recommendations contained in the 42 Days Report. We set out below a list of the main recommendations in that Report which have not been responded to at all by the Government:

- That reasoned explanations, rather than mere "statements", be given by Ministers to Parliament concerning extensions of pre-charge detention (para. 15)
- That the Government bring forward the evidence relied on to demonstrate that the level of threat from terrorism has increased in the last year (para. 33)
- That the Government consider the inter-relationship between the various alternatives to pre-charge detention and bring forward a package of alternative measures in place of the 42 days proposal (para. 50)
- That the Government urgently consider introducing bail with conditions for Terrorism Act offences (para. 51)
- That the Home Secretary explain to Parliament why the Government has decided not to propose any additional judicial safeguards surrounding pre-charge detention, when this was one of the questions on which it consulted (para. 70)
- That a number of detailed amendments be made to the statutory regime governing hearings at which pre-charge detention is extended, to make them proper "judicial" hearings (para. 89)

⁸ Cm 7344, *The Government Reply to the Ninth Report from the Joint Committee on Human Rights, Session 2007-08 HL Paper 50, HC 199, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter Terrorism Bill (26 March 2008)* (hereafter, "the Government Reply.").

- That the test applied by the court when deciding whether to extend pre-charge detention be amended to require the court to be satisfied that there is a sufficient basis for arresting and continuing to question the suspect (para. 96)
- That legal aid be made available for representation by counsel at hearings to extend pre-charge detention (para. 98).

11. We are extremely disappointed by the Government's failure to provide a substantive response to a substantial report on the issue which has proved the most controversial in the context of the current Bill. We look forward to the Government at the very least responding to the recommendations we have identified above.

The Government's response

12. The Government's Response to our Counter Terrorism Bill Report is, for the most part, a restatement of the case it has already made in favour of the 42 days proposal, rather than a response to specific points made by us in our Reports. The Government argues that its proposal will ensure that the higher limit can only be made available when there is a clear and exceptional need to do so, that it will be temporary and subject to "strong oversight from Parliament" and "stringent judicial safeguards". The only new argument contained in the Government Response on this issue is in the form of a more detailed elaboration of the Government's reasons for arguing that the proposed parliamentary oversight of pre-charge detention would be meaningful.

Parliamentary safeguards

13. In our previous reports we pointed out that, because the power to extend the period of pre-charge detention will be exercised in relation to a specific, ongoing investigation, any parliamentary debate about the justification for exercising the power will necessarily be so circumscribed as to be virtually useless as a safeguard against the wrongful exercise of the power.⁹ We also pointed out that the order by which the Secretary of State can make the reserve power available is a wholly executive order which is not subject to any parliamentary procedure, and that by the time Parliament expresses a view on whether the reserve power should be made available it is likely that the full 42 day period will have expired.¹⁰ The Government argues that its proposal does contain "substantial and meaningful opportunities" for Parliament to consider whether a higher limit of pre-charge detention should be made available and to ensure that any such extension is accompanied by adequate safeguards. It argues that Parliament will have four opportunities to exercise such meaningful oversight:

- (1) when debating and scrutinising the proposal contained in the Bill itself;
- (2) when the Home Secretary makes a statement to Parliament as she would be required to do within 2 days of making the higher limit available;

⁹ *Report on 42 Days*, above, at para. 61.

¹⁰ *First Report on Counter-Terrorism Bill*, at para. 13.

(3) when Parliament is asked to approve the Home Secretary's decision to make the higher limit available, following a debate in both Houses, which must be within 30 days of that decision; and

(4) when it debates the report of the independent reviewer of terrorism legislation on the way in which individual suspects were detained and on the reasonableness of the Home Secretary's decision.

14. The Government argues that there would be meaningful debates on these occasions, which would not be mere "rubber-stamping" exercises. Although such debates could not discuss details relating to individual suspects, and the Government accepts that "the continued detention of individual suspects is a matter for the courts, not Parliament", the Government would nevertheless expect debates on the Home Secretary's decision to make the reserve power available to be "serious and detailed", and so provide a meaningful opportunity to hold the Home Secretary to account for her decision. It is envisaged by the Government that such debates would be able to cover such things as the exceptional nature of the investigation under way, information relating to the incident or plot involved and the complexities involved in the investigation. It also envisages that the debates following publication of the independent reviewer's report would provide an opportunity "to raise questions about whether individual suspects had been held in accordance with the correct procedures."

15. In our view, while it would clearly be possible for there to be a parliamentary debate of some kind on the Home Secretary's statement to Parliament about having made the 42 day limit available, it would not be possible for that debate to go into the details of the justification for extending the time limit for the purposes of the particular, ongoing investigation. The nature of that decision requires justification by reference to the particular circumstances of the investigation of the individual suspects. The Home Secretary would tell Parliament that she has been advised by the police and the CPS that more time is required in order to investigate the individual suspects who are already being detained. In order for Parliament meaningfully to debate the correctness of that assertion, it will be necessary to refer to the detailed factual circumstances of the individual suspects, but such reference will be impossible because, as the DPP made clear in his evidence to the Home Affairs Committee, it might prejudice subsequent prosecutions. In our view, **the fundamental flaw in the Government's proposal therefore remains: it confuses parliamentary and judicial functions by attempting to give to Parliament what is unavoidably a judicial function, namely the decision about whether it is justifiable to detain individual suspects for longer.**

16. The same problem arises with any parliamentary debate on the report of the Government's reviewer. The Government suggests that this will provide an opportunity "to raise questions about whether individual suspects had been held in accordance with the correct procedures." But that is precisely the sort of issue likely to arise in the course of subsequent prosecutions or other court proceedings, and the scope for parliamentary debate about that issue will therefore inevitably be severely circumscribed by the same concerns about prejudicing future trials.

17. We have also found nothing in the Government's Reply responding to the criticism that by the time Parliament expresses a view on whether the reserve power should be made

available it is likely that the full 42 day period will have expired. It has been suggested in the press that the Government might be prepared to agree to an amendment which would guarantee Parliament an opportunity to debate the justification for invoking the reserve power before the expiry of the 42 days. In our view, however, even if the Bill were amended in this way, it would not meet the objection above that any parliamentary debate will be so circumscribed by the need to avoid prejudicing fair trials as to be a virtually meaningless safeguard against wrongful exercise of the power.

18. The Government also states in its Response that the purpose of legislating now, away from the heat of any operation, is so that Parliament can ensure that the law contains the appropriate and meaningful safeguards against the wrongful exercise of the power, but “so far we have received no suggestions for how the safeguards contained in the Government’s proposal might be strengthened.” **In fact, we have made a number of very specific suggestions in our Reports about how to strengthen both the parliamentary and the judicial safeguards which accompany extended pre-charge detention.**

19. As far as parliamentary safeguards are concerned, we made detailed suggestions about how to strengthen the safeguards in July 2007 in our Report on 28 days, intercept and post-charge questioning.¹¹ We recommended that, whether or not the current limit of 28 days was further extended, parliamentary oversight be improved by:

- (i) requiring annual renewal of the power by affirmative resolution in both Houses;
- (ii) the Home Secretary providing, at least a month before the annual 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 for more than 14 days;
- (iii) an independent reviewer providing, at least a month before the annual renewal debate, an annual report on the operation in practice of pre-charge detention for more than 14 days and on the necessity for the power.

20. The Government’s Response to that report, in September 2007, did not respond at all to these recommendations.¹² To date, no response to them has been received. In our recent report on the renewal of the control orders legislation, we expressed our disappointment at the Government’s failure to respond to our constructive proposals for improved parliamentary review, especially in light of the Prime Minister’s renewed commitment to the importance of parliamentary oversight in relation to the unusual powers required to counter terrorism.¹³

Judicial safeguards

21. As for judicial safeguards, we made a number of detailed suggestions for improving the judicial safeguards which currently apply to extended pre-charge detention in our Report on 42 days.¹⁴ These included a number of suggested amendments to the statutory regime to ensure that hearings for warrants of further detention are truly adversarial in nature, e.g. by

¹¹ *Report on 28 days, intercept and post-charge questioning*, above, at para. 63.

¹² Cm 7215 (September 2007).

¹³ *Report on Renewal of Control Orders*, above, at para. 29.

¹⁴ *Report on 42 days*, above, at paras 89, 96 and 98.

providing for special advocates to represent the interests of the detained suspect at any closed part of the hearing, and by providing that any restrictions on disclosure to the suspect or on the suspect's participation in the hearing be subject to the overriding requirement that the hearing of the application be fair.¹⁵ The suggested improvements also included amending the test to be applied by the court when deciding whether or not to authorise further pre-charge detention, requiring that the court be satisfied that there exists a sufficient basis for arresting and continuing to question the suspect.¹⁶ These detailed recommendations were made after hearing evidence from both the Head of the Counter-Terrorism Division at the CPS and a defence barrister with experience of pre-charge detention hearings in terrorism cases. The Government has not responded at all to these recommendations.

Compatibility with the right to liberty

22. The Government's Response to our detailed consideration of the compatibility of its proposal with the right to liberty in Article 5 ECHR comprises four short paragraphs.¹⁷ These largely comprise counter-assertions that, in the Government's view there is no incompatibility with Article 5(1), 5(2), 5(3) or 5(4). However, they also contain two inaccuracies.

23. First, the Government asserts that "no challenge has ever been made" on grounds of incompatibility with Article 5 where suspects have been held under the existing maximum period of 28 days "and if there was even an arguable case you would expect there to have been such a challenge." In other words, the Government is inviting Parliament to infer from the fact that there have not been any Article 5 challenges under the existing law that there is not even an arguable case that the regime of extended pre-charge detention is in breach of Article 5. **In fact, there has been such a challenge, by one of the first people to have their pre-charge detention extended beyond 14 days, a suspect arrested in connection with the alleged Heathrow bomb plot in August 2006.** In the case of Nabeel Hussain, referred to in the Committee's Report on 42 Days,¹⁸ the suspect applied for judicial review of the High Court Judge's decision to extend his pre-charge detention from 14 to 21 days.¹⁹ All applications to extend detention beyond 14 days are decided by a High Court Judge. However, there is no right of appeal against a judicial decision extending pre-charge detention. As the judgment records, in the case of Nabeel Hussain, the suspect sought to challenge the decision to extend his detention:

"on two grounds: namely, (1) that insufficient particulars were provided of the justification for continued detention; and (2) the judge failed to supply adequate reasons demonstrating that he had considered whether there was sufficient evidence to charge the applicant. Those submissions draw heavily upon the jurisprudence under Article 5(3) and (4) of the European Convention on Human Rights."²⁰

¹⁵ *Report on 42 Days*, para. 89.

¹⁶ *Report on 42 Days*, para. 96.

¹⁷ *Government Reply*, p. 3.

¹⁸ *Report on 42 Days*, para. 77.

¹⁹ *R on the application of Nabeel Hussain v The Hon. Mr. Justice Collins* [2006] EWHC 2467 (Admin).

²⁰ *Ibid* at para. 5.

24. The application for judicial review was rejected on the basis that the High Court does not have jurisdiction to review a decision of a High Court Judge acting in his capacity as a High Court Judge.

25. Second, the Government asserts that there is no incompatibility with the right to a judicial hearing under Article 5(4) ECHR because a detainee “may also issue habeas corpus proceedings if appropriate.” In our view, this is incorrect. **In fact, as we pointed out in our Report on 42 Days,²¹ the High Court in Nabeel Hussain’s case held that a warrant of further detention hearing is the “judicial hearing” to which a suspect is entitled under Article 5(4) ECHR.²²** There is no doubt, in light of this case law, that a detainee who applied for habeas corpus after a court had extended his detention would have his application struck out for abuse of process.

26. The Government has not addressed the Nabeel Hussain case because it has not replied to our Report on 42 Days. Until it does so, and explains why our interpretation of that case is wrong, there is a risk that these inaccuracies in the Government’s Reply may mislead Parliament.

The view of the Law Officers

27. On 21 November 2007 the former Attorney General, Lord Goldsmith, giving evidence to the Home Affairs Committee about the proposal for 90 days pre-charge detention in the 2006 Terrorism Bill, said:

“if the 90-day proposal had come from the Commons unamended, I would have not found it possible to vote for it in the Lords and that would have had an obvious consequence in terms of my position within government.”²³

28. Although Lord Goldsmith said that his view was not that the proposal for 90 days was illegal,²⁴ he explained that his reason for thinking that 28 days is the right limit was that, to keep somebody in detention without charging them, you need to continue to have reasonable suspicion that they have committed an offence, and that “this is probably required by our international obligations”.²⁵ He thought it unlikely that there could still be a reasonable suspicion if no evidence had been found of any offence after a period as long as 28 days. This was also the view expressed by the DPP in an interview with *The Times* newspaper.²⁶

29. It is also a matter of public record that the Law Officers will be called upon to advise Ministers about the human rights compatibility of measures in Bills in difficult or sensitive cases. As Lord Goldsmith explained in his public lecture, *Government and the Rule of Law in the Modern Age*, at the LSE on 24 February 2006:

²¹ *Report on 42 Days*, fn. 72.

²² [2006] EWHC (Admin) 2467 at para. 26.

²³ House of Commons Home Affairs Committee, First Report of Session 2007-08, *The Government’s Counter-Terrorism Proposals*, Volume II, HC 43-II, Ev 78, Q492.

²⁴ *Ibid.* Q500.

²⁵ *Ibid.* Q496.

²⁶ *The Times*, 1 April 2008.

“the Minister giving the certificate needs to be satisfied that it is more likely than not that the courts will uphold the proposal as compliant. The Minister’s judgment is necessarily made on the basis of legal advice. That advice comes from departmental lawyers, sometimes supplemented by external advice or advice from the Law Officers. The Law Officers will normally only be called upon to advise in the most difficult or sensitive cases. But called upon, we are.”

30. In the light of the Government’s failure to respond to our detailed proposals in our 42 Days Report and Lord Goldsmith’s candid admission that extending the period beyond 28 days may fall foul of our international obligations, we wrote to the Law Officers to ask for their view, including whether they disagree with our analysis of the human rights compatibility of the 42 day proposal in our 42 Days Report.²⁷

31. The Attorney General refused to answer our questions, citing “the long-standing convention, set out in the Ministerial Code, that neither the fact that the Law Officers have advised (or have not advised), nor the content of any advice they may have given, is disclosed outside Government” and referring to the Home Secretary’s s. 19 certificate and the Explanatory Notes to the Bill as providing Parliament with the Government’s views on this issue.²⁸

32. We would not expect to have received the legal advice provided by the Law Officers to the Home Office, which we accept would be legally privileged. However, we are disappointed that the Law Officers were not even able to confirm that, in their view, the Bill is compatible with the UK’s human rights obligations and does not risk giving rise to breaches of human rights in individual cases. We see no reason why Parliament should not have received at the very least a summary of the reasons why the Law Officers regard the Government’s 42 days proposal as being compatible with the UK’s human rights obligations. In our view, on a matter as significant and sensitive as the proposal to increase the maximum period of pre-charge detention, it is important that Parliament is fully informed about the views of the Law Officers, especially in light of what has subsequently been learned about Lord Goldsmith’s view at the time of the 90 day proposal.

Strengthening the judicial safeguards

33. In the absence of any explanation from the Government as to why we are wrong in our analysis in our previous reports that the existing judicial safeguards are inadequate, we now recommend that the relevant part of the legal framework (Schedule 8 to the Terrorism Act 2000) be amended to ensure that the judicial safeguards which apply at hearings to extend pre-charge detention comply fully with the requirement in Article 5(4) ECHR that there be a truly “judicial” procedure. We suggest below some amendments to the Bill which are designed to ensure that the suspect has an effective opportunity, at an open hearing and with access to the relevant material, to challenge the reasonableness of the suspicion on which the prosecution relies as the basis for the original arrest and continued detention.

²⁷ Letter from the Chair to the Law Officers, 3 April 2008 (Appendix 4).

²⁸ Letter from the Attorney General to the Chair, 23 April 2008 (Appendix 5).

New clause

‘Extension of detention under section 41 Terrorism Act 2000

(1) The Terrorism Act 2000, Schedule 8, Part III (Extension of Detention under Section 41) is amended as follows.

(2) After sub-paragraph (6) of paragraph 29 (Warrants of further detention) there is inserted –

‘(7) Nothing in this Part is to be read as requiring the judicial authority to act in a manner inconsistent with the right of the specified person to a fully judicial procedure in Article 5(4) of the European Convention on Human Rights.’

(3) After sub-paragraph (d) of paragraph 31(Notice) there is inserted –

‘(e) a statement of the suspicion which forms the basis for the person’s original arrest and continued detention, and

(f) the gist of the material on which the suspicion is based.’

(4) Before sub-sub-paragraph (a) of sub-paragraph 32(1) (Grounds for extension) there is inserted –

‘(aa) there are reasonable grounds for believing that the person has been involved in the commission, preparation or instigation of a terrorist offence,’

(5) Sub-paragraph (1) of paragraph 33 (Representation) is deleted and there is inserted in its place –

‘(1) The person to whom an application relates shall be entitled –

(a) to appear in person before the judicial authority and make oral representations about the application,

(b) to be legally represented by counsel at the hearing,

(c) to legal aid for such representation,

(d) to be represented by a special advocate at any closed part of the hearing of the application, and

(e) through his representative, to cross examine the investigating officer.

(6) After sub-paragraph (3)(b) of paragraph 33 there is inserted –

‘if the judicial authority is satisfied that there are reasonable grounds for believing that the exclusion of the person and/or his representative is necessary in order to avoid any of the harms set out in sub-paragraphs (a)-(g) of paragraph 34(2) below.’’

Impact on affected communities

34. The Government in its Reply does not expressly address the argument that the power to extend pre-charge detention for up to 42 days is likely to have a disproportionate impact on Muslim communities. Elsewhere in its Reply, however, the Government implicitly appears to concede the point. Responding to our recommendation that the threshold test for charging be put on an explicit statutory footing for terrorism offences, the Government states:

“The problems highlighted in terrorism cases also occur in other serious offences. Communities most likely to be affected may react adversely if they perceive that terrorist cases are uniquely charged on a lower evidential threshold.”²⁹

35. This is precisely the argument that is made against the Government’s proposal to extend pre-charge detention to 42 days in terrorism cases.

Conclusion

36. For the reasons we have given above and in our previous reports, **we remain of the view that the Government has not made out its case for extending the period of pre-charge detention beyond the current limit of 28 days, In our view, there is a package of human rights compatible alternatives to extending pre-charge detention. We therefore recommend the deletion of the relevant provisions from the Bill** and suggest the following amendments:

Page 16, line 14, leave out clause 22.

Page 61, line 2, leave out schedule 1.

²⁹ Government Reply, p. 9.

3 Lowering the Charging Threshold

Background

37. In our previous reports on Counter Terrorism Policy and Human Rights we have sought to demonstrate the importance of the charging threshold in the debate about whether there needs to be a further extension of the period of pre-charge detention beyond 28 days.³⁰ Since 2004 the charging threshold for terrorism and other serious cases has been lowered by the introduction of the so-called “Threshold Test” for charging. Because of the importance of the Threshold Test for the debate about extending pre-charge detention, and because the meaning of the phrase itself is hardly self-evident, it is worth repeating the explanation of what the Threshold Test is and why it matters.

38. The normal test applied by a Crown prosecutor deciding whether or not to charge a suspect is that on the material available there is “a realistic prospect of conviction.” As the DPP explained in Public Bill Committee, “that means that there is a better than evens chance that the verdict will be guilty.”³¹ This charging standard is deliberately a high one: it is designed to protect potential defendants from being charged with weak cases where there is no prospect of a successful prosecution and to prevent the waste of public funds involved in bringing charges which are subsequently abandoned.

39. If the prosecutor is considering a case that is sufficiently serious that a remand in custody would be appropriate in the event of a charge, the prosecutor may charge on the “Threshold Test” which is a lower test: the prosecutor can charge on the basis of reasonable suspicion that the offence was committed. That reasonable suspicion must be based on material that either is or will be admissible at trial. The Threshold Test is therefore a higher test than is required to be satisfied to arrest a terrorism suspect (where the reasonable suspicion can be based on inadmissible material such as intelligence or intercept), but a significantly lower test than the “realistic prospect of conviction” test which is the normal charging standard.

40. The significance of the availability of the lower test for charging in terrorism cases is that it undermines the case for further extending the maximum period of pre-charge detention. As the DPP has explained, if, by the end of the period of 28 days, there is not even enough evidence to ground a reasonable suspicion that the suspect has committed a terrorism offence, it is extremely unlikely both that such material will in fact be found and that a judge can be persuaded that there is a reasonable likelihood that such material will be found. The lowering of the charging threshold in terrorism cases therefore significantly reduces the force of the case for extending the period of pre-charge detention, especially when combined with the recent advent of broader terrorism offences such as acts preparatory to terrorism and, in future, the availability of post-charge questioning.

41. As we pointed out in our first Report on this Bill, of the eight individuals who have so far been charged after being held for more than 14 days, four have been charged on the

³⁰ See e.g. *Report on Prosecution and Pre-charge Detention* at paras 122-129; *Report on 28 days* at paras 180-182; *Report on 42 days* at paras 44-48.

³¹ PBC 22 April 2008 col. 56.

threshold test.³² Of those four, one was charged after 20 days' detention, and the other three at the end of the maximum period, at 27/28 days. Two of the four charged on the threshold test were charged with acts preparatory to terrorism. In our view these statistics suggest that the threshold test, in combination with the new offence of acts preparatory to terrorism, is already assisting with the task of enabling appropriate charges to be brought in terrorism cases, without the need for extending pre-charge detention beyond 28 days.

Statutory authority and independent safeguards

42. We have therefore consistently welcomed the lowering of the charging threshold in terrorism cases as an important constituent element in the package of measures which make it unnecessary to extend the period of pre-charge detention. In our first report on the Counter Terrorism Bill, however, we considered in more detail the extent to which there had been parliamentary consideration of the lowering of the charging threshold and whether there exist satisfactory independent safeguards to ensure that the Threshold Test does not operate in practice in a way which impinges disproportionately on the liberty of the individual, for example by resulting in terrorism suspects being detained for longer than necessary before being released without trial.

43. We considered that, although the lowering of the charging threshold in terrorism cases had been a beneficial development, and there was no evidence that it had operated unsatisfactorily in practice, there had been no parliamentary consideration of the lowering of the charging threshold and there was room to introduce some independent safeguards to ensure that it is not operated in a way which has a disproportionate impact on liberty. We therefore recommended that the Threshold Test for charging in terrorism cases be put on an explicit statutory footing and that certain independent safeguards be introduced. The present Bill provides an opportunity to do this and we indicated that we hoped to propose amendments to give effect to our recommendations. The purpose of this part of this report is to consider the Government's response to our recommendations, to explain why we find them unpersuasive, and to explain the amendments we now propose to give effect to our earlier recommendations.

44. Since the publication of our first Report on this Bill we have also received a response from the DPP to our letter in which we enquired about the genesis and application of the Threshold Test and asked to be provided with a copy of the DPP's Explanatory Guidance on the Application of the Threshold Test issued in September 2005 but which had not found its way into the public domain.³³ We are grateful for the DPP's detailed response³⁴ and for providing us with a copy of the Explanatory Guidance.³⁵ We found the DPP's explanation of the background to the introduction of the Threshold Test extremely helpful and it confirms our previously expressed view that the lowering of the charging standard in terrorism and other serious cases has been a beneficial development which is to be welcomed from a human rights perspective. We note with interest the explicit acknowledgment in the DPP's own Explanatory Guidance that "the Threshold Test is

³² *First Report on Counter-Terrorism Bill*, para. 77.

³³ Letter from the Chair to Sir Ken Macdonald QC, 17 January 2008 (Appendix 1).

³⁴ Letter from Sir Ken Macdonald QC to the Chair, 8 February 2008 (Appendix 2).

³⁵ *Explanatory Guidance on the Threshold Test* (Appendix 3).

potentially a grave infringement on the liberty of the individual.”³⁶ It is for precisely that reason that we have recommended that it should have a statutory basis, rather than depend on the exercise of the DPP’s discretion, and be subject to certain independent safeguards to ensure that the proportionality of the infringement on individual liberty is scrutinised by someone other than the DPP himself.

The Government’s response

45. In its Reply to our first Report on the Counter-Terrorism Bill, the Government rejected all of our recommendations in relation to the threshold test for charging. It sees no benefit for the defence in being informed that the Threshold Test rather than the Full Code Test has been applied when a suspect is charged. It claims that there has already been an opportunity for parliamentary scrutiny of the Threshold Test because the Code for Crown Prosecutors (which contains the Threshold Test) is required to be laid before Parliament annually, when there is an opportunity to hold a debate on its contents. It says that Parliament has “already considered the point” and given the DPP powers to issue guidance under the Prosecution of Offences Act 1985 and the Police and Criminal Evidence Act 1984.³⁷

46. We do not accept that there has already been meaningful parliamentary scrutiny of the Threshold Test. The Government’s assertion that the Code for Crown Prosecutors is laid before Parliament annually, when its contents can be debated, is simply wrong. The DPP’s annual report to the Attorney General is laid before Parliament annually, but the Code itself is only set out in the DPP’s report in the year in which the Code is issued which, in the case of the current Code, was 2004.³⁸ **We remain of the view that the Threshold Test would benefit from proper parliamentary scrutiny and debate, which to date it has never received.**

47. The Government is also opposed to putting the threshold test in terrorism cases on a statutory footing, and to specify some independent safeguards. They state that enshrining the Threshold Test in statute would necessitate similar treatment for the Full Code Test, and the standard required to be met to bring a prosecution has never been specified in primary legislation before. To do so, the Government argues, “would restrict the ability of the DPP to react to legal situations which may demand a change in the Code. ... The fact that Parliament would effectively determine the test for bringing a prosecution in such sensitive cases may be seen as unwarranted political interference in the prosecution process.”

48. We do not accept that putting the Threshold Test on a statutory footing would amount to an unwarranted political interference with the independence of the prosecution process. On the contrary, we are concerned by the amount of discretion to interfere with liberty that is currently delegated to the DPP, without any independent safeguards. **Given the importance of where the threshold for prosecution is set, and in particular the implications for an individual’s liberty, in our view the Government’s approach fails**

³⁶ Ibid at para. 3.

³⁷ As amended by the Criminal Justice Act 2003, giving the DPP a guidance making power in relation to charging: see s. 37A.

³⁸ Prosecution of Offences Act 1985, s. 10(3).

