Counter Terrorism Proposals

House of Commons Home Affairs Committee

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Summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.

2. Further to our 11 July 2007 submission to the Committee concerning the government's June counter-terrorism proposals, we welcome the opportunity to comment on the additional details provided by the government's announcement of 26 July. Rather than rehearse at length points made in our earlier submission, we focus on the fresh material in two of the government's papers: (i) options for pre-charge detention in terrorism cases; and (ii) possible measures for inclusion in a future Counter-Terrorism Bill. However, mindful of the Committee's word limit of 2,500, we have not been able to address all of the proposed measure and welcome the opportunity to address these in oral evidence.

OPTIONS FOR PRE-CHARGE DETENTION IN TERRORISM CASES

The government's case for going further

3. In our earlier submission, we noted that no new evidence had come to light since the Terrorism Act 2006 was passed that would support extension of the maximum period of pre-charge detention in terrorism cases beyond 28 days.

4. A similar view was expressed by the Joint Committee on Human Rights in its July report, which noted a 'lack of direct evidence demonstrating a current need to extend the 28 day period'.[1] Instead, the Committee concluded that the case for extension is 'precautionary in nature' and that:[2]

> [N]one 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.

5. Indeed, the government's July options paper plainly concedes that:[3]

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[1] *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (30 July 2007: HL 157/HC 394), para 54. See also para 53: '[O]n the information currently available to us, the justification which is offered for further extending the 28 day period does not meet the test of strict necessity which must be satisfied where any new power would constitute an interference with personal liberty'.

[2] Ibid, para 52.

[3] *Options For Pre-Charge Detention In Terrorism Cases* (Home Office: 25 July 2007), p 8.

In the year since the 2006 legislation came into effect, there has been no case in which a suspect was released but a higher limit than 28 days would definitely have led to a charge.

6. The options paper instead seeks to justify extension beyond 28 days by reference to 'further clear, evidence that the threat [of terrorism] is increasing, and that cases are becoming more complex' and that, 'in the future, possibly quite soon' there will be cases requiring more than 28 days for charges to be brought.[4]

7. This attempt at justification involves at least two fallacies, however.

8. First, police will *never* be in a position to guarantee that charges will be brought in any case, unless and until they have the evidence to either support such charges or – in the absence of that evidence – satisfy the threshold test.

9. It is therefore logically impossible for the government to claim to know in advance that any particular case – or by extension any class of cases – will require more than 28 days for charges to be brought. On the contrary, the only way it could be shown is *ex post facto* – evidence of a specific case in which a suspect was held to the maximum period without being charged and then subsequently evidence came to light that would be capable of supporting charges.

10. Secondly, the argument assumes that the only relevant consideration is allowing the police sufficient time to gain admissible evidence to charge a suspect. Since there is no natural upper limit to investigations in terrorism cases, arguments for extending pre-charge detention could therefore run for as long as the police continue to show diligence in pursuing the investigation.

11. For example, in a hypothetical case, it could be argued that it would take 52 or 104 weeks or more in order for sufficient evidence to be obtained to charge a suspect. Since the possibility of such a case cannot be ruled out, this would presumably licence extending the maximum period of pre-charge detention to 1 year or 2 years or more. Of course, if there is in fact no admissible evidence to be found, an investigation may go on indefinitely.

12. This is supported by many of the arguments that the government raises against reliance on alternative measures: for instance, in respect of the threshold test, the options paper states that 'police will rarely have the necessary certainty that sufficient evidence will come to light to

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[4] Ibid.

sustain particular charges'.[5] However, the government patently fails to appreciate that this uncertainty cuts both ways. If police lack a reasonable expectation that further investigation is likely to yield admissible evidence, then – as a logical corollary – any justification for extending detention in order to gather such evidence is increasingly undercut.

13. In this context, it is also important to bear in mind that the so-called 'exceptional levels of complexity' of modern terrorism investigations have no bearing on whether a suspect is innocent or guilty. The fact that there are increasingly amounts of data available concerning suspects (e.g. the number of premises searched, phone records, videos, computers seized, etc) has itself no bearing whatsoever on the likelihood that admissible evidence will be located or even exists.

14. Limits on pre-charge detention by police are a fundamental part of the right to liberty. They prevent, among other things, the unnecessary curtailment of a suspect's freedom for the sake of prolonged and speculative investigations by police. Nor is there anything in the government's options paper to show that the current 28 day limit has prevented the bringing of charges in even a single case. A sensible, evidence-based approach to counter-terrorism policy requires that the government's case for going further be rejected.[6]

Option (i) – legislate to extend pre-charge detention with additional safeguards

15. The government proposes several safeguards for any extension of pre-charge detention, including (i) approval of the Director of Public Prosecutions for any application to detain beyond 28 days; (ii) notification of Parliament of any extension beyond 28 days, including 'an option for the House to scrutinise and debate this'; (iii) a report on the operation of the powers by the Independent Reviewer of Terrorism Legislation; and (iv) an annual renewal debate in Parliament.

16. As we noted in our July evidence, while additional oversight is always welcome, we doubt that any such scrutiny – whether judicial or parliamentary – would be capable of preventing the injustice of an innocent person detained without charge for an extended period.

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[5] Ibid.

[6] See e.g. the JCHR's conclusion, n1 above, para 42: 'We remain of the view any extension [of pre-charge detention] 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'.

17. As some have already noted, there may be difficulties with Parliament debating any extension in particular cases due to the *sub judice* rule.[7] We also note that although the government's June paper referred to 'further judicial' oversight,[8] there is no reference to additional judicial measures in option (i). In this context, we note and endorse the recommendation of the Joint Committee on Human Rights that:[9]

> [I]n 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.

18. However, because the very premise of judicial scrutiny of pre-charge detention is the lack of sufficient evidence to support a charge or even meet the requirements of the threshold test,[10] we doubt that even 'proper judicial scrutiny' as described above would be a sufficient safeguard against injustice in cases of pre-charge detention exceeding 7 or 14 days.

Option (ii) – legislate to extend pre-charge detention subject to affirmative resolution

19. This is essentially the same as option (i) save that the extension would not come into effect until triggered by an affirmative resolution of both Houses of Parliament.

20. In our view, however, it would be wholly redundant for Parliament to legislate for some future emergency when it has already enacted the Civil Contingencies Act 2004 specifically for this purpose. Indeed, we note that the government's main argument against option (ii), i.e. 'the need for a Parliamentary debate in the middle of what could be a major operational emergency',[11] is an argument in favour of that Act to address any future escalation of the terrorist threat.

Option (iii) – declaration of an emergency under the Civil Contingencies Act 2004

21. We support Liberty's suggestion that the Civil Contingencies Act could be used to effect the extension of pre-charge detention beyond 28 days during an terrorist emergency by way of

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7 See House of Commons Library,*The Sub Judice Rule* (Standard Note: SN/PC/1141, 31 July 2007).
8 *Government Discussion Document Ahead of Proposed Counter Terror Bill 2007*, June 2007, para 6.

9 JCHR report, n1 above, para 59.

10 See Crown Prosecution Service*, Scrutiny of Pre-Charge Detention in Terrorist Cases*, July 2007, para 5.

11 Options paper, n3, p12.

regulations under sections 20 and 21 of the Act.[12] So long as the extension of pre-charge detention were strictly necessary in the circumstances, we believe this would be a proper and proportionate use of the Act's emergency powers framework. Indeed, it would have the benefit of requiring any extension to be strictly time-limited,[13] subject to parliamentary supervision,[14] and otherwise compatible with the requirements of the Human Rights Act and Article 15 of the European Convention on Human Rights.[15]

22. In its analysis of option (iii), the government incorrectly asserts that use of the Civil Contingencies Act would 'effectively require a debate in Parliament in the middle of what might be a national emergency'.[16] Section 20(2) allows emergency regulations to be made by a Minister without recourse to an Order in Council where various conditions are met, including where it is necessary to do so to avoid serious damage.[17] Section 27(1)(a) provides that the regulations shall be put before Parliament 'as soon as is reasonably practicable' and that, in such a case, they must be approved by Parliament within a week.[18]

23. The government's suggestion that the 2004 Act is somehow unsuited to address a terrorist emergency is completely at odds with the government's own statements in parliamentary debates. The Civil Contingencies Bill, as it was then, was introduced to provide '*modern and flexible* provision for the use of special legislative measures in times of serious emergency', including the threat of terrorism.[19] Another government minister referred to it as '*flexible, deployable and resilient*'.[20] Given that the Act was designed to address threats as varied as flooding, foot and mouth disease, asteroid strikes, and all-out nuclear war, the emergency extension of pre-charge detention during a terrorist attack would seem to be well within its scope.

Option (iv) – judge-managed investigations

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[12] See ss19 and 21 of the Act.

[13] Section 26.

[14] Sections 27 and 28.

[15] See e.g. section 20(5)(b)(iv) requiring the maker of emergency regulations to be satisfied that they are compatible with Convention rights; and section 30(2) of the 2004 Act, providing that emergency regulations cannot be used to amend the Human Rights Act in any event.

[16] Options paper, n3, p11.

[17] See section 20(2)(b) and (4)(a).

[18] Section 27(1)(b).

[19] Cabinet Office, *Draft Civil Contingencies Bill Consultation* (June 2003) p28. Emphasis added.

[20] Hazel Blears MP, 24 May 2004 : Column 1399, emphasis added.

24. The government itself acknowledges that the introduction of judge-managed investigations, similar to the system of examining magistrates in France and Spain, would ‘require a major shift in the way in which cases are investigated and in the adversarial system of prosecution used in this country’.

25. In our evidence to the Committee in December 2005,[21] we noted that the role of examining magistrates in such civil law jurisdictions as France is vastly different to that in common law countries such as the UK.[22] In particular, we noted, the role of the examining magistrate is not merely to provide an independent check upon criminal investigation by the police but to actively direct that investigation. This indicates a degree of judicial control over criminal investigations far in excess of that found in any common law jurisdiction based on an adversarial – rather than inquisitorial – system of justice. We concluded that the government should not seek to import features from other systems of law without first understanding the very different distribution of checks and balances in those systems. We are pleased to note that the Home Office’s own paper[23] bears out our conclusions on this matter.

POSSIBLE MEASURES FOR INCLUSION IN A FUTURE CT BILL

Measures in relation to DNA of terrorist suspects

26. We agree that the existence of a Counter-Terrorism DNA database separate from the NDNAD should be put on a statutory footing. However, we would strongly resist the retention of DNA samples on the same basis as the Police and Criminal Evidence Act. As we have argued in the past, and supported most recently by the report of the Nuffield Council on Bioethics,[24] the retention of DNA samples should be restricted to those convicted of a serious criminal offence (including terrorism offences). The DNA of those acquitted or not charged with a criminal offence (including those subject to control orders) should not be retained.

Collection of information likely to be of use to terrorists

27. Section 58 of the Terrorism Act already covers a person who ‘collects’ (without reasonable excuse) information of a kind likely to be useful to a person committing an act of terrorism. Under section 1(4) of the Criminal Attempts Act 1981, it would also be an offence to *attempt* to collect such information. In our view, the ‘gathering targeting information about key personnel’

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[21] *Terrorism Detention Powers* (3 July 2006: HC 910), Ev 84-85.

[22] While Scottish law is on civil law principles, the role of the judge in criminal proceedings in Scotland appears far closer to that in England, Wales and Northern Ireland than to other civil law jurisdictions.

[23] Home Office, *Terrorist investigations and the French examining magistrates system* (July 2007)

[24] *The forensic use of bioinformation: ethical issues* (September 2007).

would therefore already be covered by the existing law and see no basis for extending it further as the government proposes.

Post-charge questioning

28. Although we support this measure in principle, it is important to note that this must be regarded as an alternative to extended pre-charge detention not in addition to it. To do otherwise would be to fail to observe the importance of proportionality in counter-terrorism measures that interfere with fundamental rights. We also agree with the Joint Committee on Human Rights that:[25]

> 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 properly be drawn from silence in response to such questioning.

Terrorist travel overseas

29. In addition to the power of police to detain property at port under Schedule 7 of the Terrorism Act (referred to in the government's paper), there is also the specific power of immigration officers to detain travel documents produced or found for up to 7 days under paragraph 4(4) of Schedule 2 to the Immigration Act 1971.[26] Between this power and that under the Terrorism Act, we do not believe there is any case for granting the police additional powers in this area.

30. In our view, foreign travel orders could only be sustained against those persons convicted of terrorism offences, not suspects (as the paper notes, there is already power to prohibit travel by way of bail conditions). We note, moreover, that such orders could only apply in respect of UK passport holders and would not apply to those with dual or multiple nationalities.

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[25] JCHR report, n1, para 172.

[26] As amended by section 27 of the Immigration Asylum and Nationality Act 2006.