



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

**Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty
March 2008**



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**THE GOVERNMENT REPLY TO THE NINTH REPORT FROM
THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION
2007-08**

**COUNTER-TERRORISM POLICY AND HUMAN RIGHTS
(EIGHTH REPORT): COUNTER-TERRORISM BILL**

On first inspection we find the provision in the Bill concerning coroners' inquests an astonishing provision with the most serious implications for the UK's ability to comply with the positive obligation in Article 2 ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents. We think that the significance of this provision warrants it being drawn to the attention of both Houses at the earliest possible stage.

We note the concerns expressed by the JCHR but believe they are misplaced. In our view, these proposed changes will facilitate independent coroners' inquests and will ensure they can always be fully compliant with Article 2 of the ECHR by allowing the independent finder of fact to examine all material central to the inquest even if it cannot be disclosed publicly, including to a jury.

In cases held under these provisions, the finder of fact will be a coroner holding judicial office, and will be entirely independent of and separate from Government, as required under Article 2.

We have proposed these changes because we have become aware of the potential under existing arrangements for coroners' inquests to be incompatible with Article 2 where there is material that is, or could be, central to the inquest but that could not be disclosed publicly, including to members of a jury.

The detailed provisions in the Bill on pre-charge detention are substantially the same as the proposals we considered in our report in December. We concluded that the Government had not made a compelling, evidence-based case for extending pre-charge detention beyond the current limit of 28 days.

Given the scale and trend for increasingly complex cases, we believe there may be a need to go beyond 28 days in future. Information on the scale and complexity of recent terrorist cases was set out in a letter from the Home Secretary to the Rt Hon Keith Vaz MP on 6 December 2007. The Government's proposal will not extend the pre-charge detention limit beyond 28 days now but will enable the limit to be extended in future – and only then if there is a clear and exceptional need to do so.

We have listened to the concerns of community groups and others and have come up with a proposal which will ensure the higher limit can only be made available when there is an exceptional need (for example where there are multiple plots, or links with multiple countries, or exceptional levels of complexity) and that it will be temporary and subject to strong oversight from Parliament and stringent judicial safeguards.

It is right and proper to legislate now to ensure that we have the ability to activate the necessary powers when there is a clear operational need for them

The limits on the scope of the Home Secretary's statements [in relation to extending pre-charge detention] are a welcome recognition of the danger of prejudicing future

trials, but only serve to demonstrate the very limited extent to which Parliament will be able to provide any meaningful safeguard against the wrongful exercise of the power. It also remains the case 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 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.

Under the Government's proposal, Parliament will have four opportunities to consider the whether a higher limit of pre-charge detention should be made available.

First, there is the opportunity over the next eight months for Parliament to debate and scrutinise the proposal in detail. We believe it is right that any extension to the pre-charge detention limit should be set out in primary legislation and that Parliament has ample opportunity to consider and amend any such proposal. That is why we are legislating now – so that away from the heat of any operation, Parliament can carefully consider the proposal and ensure that it contains the appropriate and meaningful safeguards against wrongful exercise of the power. So far we have received no suggestions for how the safeguards contained in the Government's proposal might be strengthened.

If Parliament legislates to allow an extension to the pre-charge detention limit in future in the way that the Government proposes, then a further three Parliamentary safeguards would be invoked if the power was ever needed.

- 1) The Home Secretary would be required to make a statement to Parliament within 2 days of making the higher limit available.
- 2) Within 30 days of the Home Secretary making the higher limit available, Parliament will need to approve the decision following a debate in both Houses. If the Home Secretary's decision is not approved by Parliament then the higher limit will fall.
- 3) The independent reviewer of terrorism legislation is required to report on the way in which individual suspects were detained and on the reasonableness of the Home Secretary's decision. This report would be accompanied by a debate in both Houses of Parliament.

These opportunities for Parliamentary oversight of pre-charge detention would not be merely 'rubber stamping' exercises as some have claimed. It is already the case that there are statements and debates in Parliament following major terrorist incidents (for example in relation to the alleged airline plot and following the incidents in London/Glasgow). Although these occasions do not deal with details that would be prejudicial to the ongoing investigations it would be wrong to say that they are not meaningful: they provide a very real and important opportunity for Parliament to question the Government about events and the response to them from law enforcement agencies and others. In a similar way, we would expect the debates on the Home Secretary's decision to make the reserve power available to be serious and detailed. Although these debates could not, quite rightly, discuss details relating to individual suspects, they would be opportunities to hold the Home Secretary to account for his/her decision. As such, the debates would be able to cover such things as the exceptional nature of the investigation underway, information relating to the incident or plot involved and the consequences if it had succeeded and the complexities involved in the investigation (for example, the number of computers seized and properties searched). The debates on the reserve power need be no more curtailed than those following terrorist incidents or held on matters such as proscription and the use of control orders. The debates will therefore provide a very real opportunity for Parliament to discuss the scale of the terrorist incident or foiled plot and the complexities involved

in the investigation which give rise to the exceptional operational need for the reserve power to be made available. The debates that would follow publication of the independent reviewers report would also provide a further opportunity for Parliament to debate the Home Secretary's decision and to raise questions about whether individual suspects had been held in accordance with the correct procedures.

The proposal contains, therefore, substantial and meaningful opportunities for Parliament to ensure that any extension to the pre-charge detention limit is supported by adequate safeguards, is made available only in accordance with the law and is properly implemented. However, it is worth reiterating that the continued detention of individual suspects is a matter for the courts, not Parliament. This is a very significant safeguard in relation to the power to detain individuals prior to charge.

We think that charging suspects only after more than 28 days in detention is likely to be in breach of Article 5(2) ECHR. We think that providing for pre-charge detention up to a maximum of 42 days is disproportionate. Furthermore, we think that the legal framework does not provide sufficient guarantees against arbitrariness and is incompatible with Articles 5(1), 5(3) and 5(4) for that reason alone.

We do not believe that an extension of the maximum period of pre-charge detention beyond 28 days would be incompatible with Article 5 of the ECHR. There has not been a case where the detention of a terrorist suspect being held under the existing maximum period of pre-charge detention has been found to be incompatible or unlawful; indeed no challenge has ever been made on these grounds and if there was even an arguable case you would expect there to have been such a challenge.

Pre-charge detention is subject to regular judicial oversight. Under Schedule 8 of the Terrorism Act 2000, a person is brought before a court after detention of 48 hours and continued detention is granted by the court for periods of up to 7 days at a time. In other words, after the first 48 hours, the detention is reviewed by the court at least every 7 days. This is within Article 5(1)(c) of the ECHR which allows for the deprivation of liberty in the case of "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence".

It is also in compliance with the requirement in Article 5(3) that such a person be "brought promptly before a judge or other officer authorised by law to exercise judicial power". Any extension of the maximum period of pre-charge detention would continue to have strong judicial safeguards in that the detention will continue to be subject to judicial approval at least every 7 days.

It is also compatible with Article 5(4). A detainee may challenge the lawfulness of his detention at the hearings for extending his detention and may also issue habeas corpus proceedings if appropriate.

We support the introduction of post-charge questioning as a measure which reduces the pressure for an extension of pre-charge detention, but we agree that it should be accompanied by a number of detailed safeguards on the face of the Bill, to ensure that this potentially oppressive power is not used oppressively in practice

We recommend that the Bill should be amended to include the following safeguards on the face of the legislation:

(1) that there should be a requirement that post-charge questioning be judicially authorised;

- (2) that the purpose of post-charge questioning be confined to questioning about new evidence which has come to light since the accused person was charged;
- (3) that the total period of post-charge questioning last for no more than 5 days in aggregate;
- (4) that post-charge questioning always take place in the presence of the defendant's lawyer;
- (5) that post-charge questioning always be DVD- or video-recorded;
- (6) that the judge which authorised post-charge questioning review the transcript of the questioning after it has taken place, to ensure that it remained within the permitted scope of questioning and was completed within the time allowed; and
- (7) that there should be no post-charge questioning after the beginning of the trial.

The overriding requirement must be to ensure that a fair trial is possible and judicial oversight should be geared towards this end. For example, particular attention should be paid to the gap between the end of post-charge questioning and the beginning of the trial to ensure that the defendant's rights are respected.

Judicial Authorisation and Time Limits

Post-charge questioning of a suspect is already permitted, for example for the purposes of intelligence interviews and the questioning of informants and people who wish other offences to be taken into consideration. Questioning for these purposes does not require judicial authorisation; instead it is the responsibility of the Prison Governor who has custody of the suspect to ensure their welfare. Any request by the police for production of a suspect for questioning is thoroughly scrutinised by the Prison Governor.

Our proposal extends post-charge questioning so that the suspect can be questioned about the offence for which they have been charged; we believe that the same authorisation process will be sufficient to ensure the welfare of the suspect. A Governor making the suspect available for questioning would need to be satisfied that the questioning was necessary and efficient; they would also be guided by the time limit for post-charge questioning set out in a prison service order. Therefore, it is not necessary for judicial authorisation and time limits for questioning to be set out in primary legislation.

Judicial safeguards for suspects will exist in the case of extended post-charge questioning; a trial judge could deem police questioning to be oppressive and so rule evidence obtained in these circumstances as inadmissible. As such we do not believe it is necessary for a judge to authorise post-charge questioning as protection for the suspect would already be in place.

Limiting of Post-charge Questioning to New Evidence

Terrorism cases are often complex involving large amounts of encrypted evidence and evidence from overseas; the police may not have opportunity to analyse and then question the suspect on evidence such as this before a charge is made. Any requirement that post-charge questioning was limited to new evidence would prevent the police from being able to question the suspect about, for example, computer material which raises further questions as a result of analysis undertaken after charge. The Government does not believe that such material should be excluded from post-charge questioning.

Access to Legal Representation

The defendant will be able, if they wish, to have access to legal representation during post-charge questioning. This will be made clear in the PACE Codes of Practice which would cover post-charge questioning.

Video Recording

We agree that post-charge questioning should be recorded in a visual format. Paragraph 3 of Schedule 8 the Terrorism Act 2000 sets out that the Secretary of State may make an order requiring the video recording of interviews; we are considering whether this is sufficient to enable the compulsory recording of any post-charge questioning. If it is not, then we will consider introducing a Government amendment to enable the Secretary of State to make an order requiring video recording of post-charge interviews.

Post-charge Questioning Following the Commencement of a Trial

We also agree that there should be no post-charge questioning once a trial has commenced; however a trial judge would be very likely to rule any evidence arising from a police interview of a suspect following the commencement of a trial as inadmissible as it could infringe the right to a fair trial. We therefore do not believe it is necessary to set a bar on questioning following the commencement of a trial in legislation.

We are surprised at the Lords' interpretation of the scope of their power under s. 3 of the Human Rights Act to read words into a statute to avoid an incompatibility with a Convention right. The scheme of the Human Rights Act deliberately gives Parliament a central role in deciding how best to protect the rights protected in the ECHR. Striking the right balance between sections 3 and 4 of the Human Rights Act are crucial to that scheme of democratic human rights protection. In our view it would have been more consistent with the scheme of the Human Rights Act for the House of Lords to have given a declaration of incompatibility, requiring Parliament to think again about the balance it struck in the control order legislation between the various competing interests. In any event, we think it is now incumbent on Parliament to consider again, in detail, exactly what a "fair hearing" requires in this particular context, in light of the House of Lords judgment, and to amend the control order legislation accordingly.

We note the JCHR's comments about the approach taken by the Law Lords in *MB* to section 3 of the Human Rights Act, but do not propose to comment on them given the ruling on this issue by the Law Lords.

It is not necessary for Parliament to reconsider what constitutes substantial measure of procedural justice. Parliament set out what it believed was necessary to deliver this in the Prevention of Terrorism Act 2005; the Law Lords applied section 3 of the Human Rights Act in the *MB* judgment to the extent they believed necessary to ensure compatibility with Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR).

We reached the firm conclusion that the system of special advocates, as currently conducted, fails to afford individuals a fair hearing, or even a substantial measure of procedural justice

We continue to disagree with the July 2007 conclusion of the JCHR. The special advocate procedure, as supplemented by the decision in *MB*, satisfies the requirements of Article 6.

That judgment, in the *MB* case, now requires the Government's earlier position to be revisited, because it rejects the Government's assertion that the statutory regime will always provide the individuals concerned with a substantial measure of procedural justice.

In *MB*, the Law Lords did not say that any control order case before them had breached the right to a fair trial. The majority view was that in rare cases, the provisions in the 2005 Act might breach Article 6. The Law Lords therefore applied section 3 of the Human Rights Act to make the 2005 Act compatible with Article 6 in all cases, and concluded that the High Court should consider the point on a case by case basis (the cases before the Lords on this issue were referred back to the High Court). This forms part of the mandatory review of each individual control order by the High Court – one of the many safeguards in place to secure the rights of the individual. As a result of the *MB* judgment, the 2005 Act is fully compliant with Convention rights.

We think it is a matter of great regret that the Minister did not see fit to discuss these issues of principle with the special advocates at their meeting with a view to the Government bringing forward amendments to the statutory regime in light of the judgment.

In advance of the meeting, the Minister for Security, Counter-Terrorism, Crime and Policing asked the special advocates what issues they wanted on the agenda for the meeting. At the meeting, he discussed with them every issue they raised.

In our view the opportunity should be taken in this Bill to make a number of amendments to the control order regime in order to ensure that, in future, hearings are much more likely to be fair.

We disagree. The effect of the *MB* judgment is to ensure the procedures set out in the 2005 Act are compliant with Article 6 in every case.

We recommend that the relevant provisions in the statutory framework, which expressly require non-disclosure, even where disclosure would be essential for a fair hearing, be amended by the insertion of qualifying words, such as “except where to do so would be incompatible with the right of the controlled person to a fair hearing.”

This is not necessary – it has been achieved by the judgment in *MB*. The effect of the *MB* judgment is to ensure the procedures set out in the 2005 Act are compliant with Article 6 in every case.

We recommend that the relevant power for making rules of court in the control orders regime be amended to make explicit reference to the right to a fair hearing in Article 6 ECHR, in the same way as the Bill itself qualifies the power to make rules of court for asset freezing.

This is not necessary. The change made by the judgment in *MB* makes this clear. The Counter-terrorism Bill qualifies the powers to make rules of court in relation to asset freezing in order to give effect to the *MB* judgment in legislation to which the judgment did not directly apply but which makes provision for a comparable situation.

We recommend that an obligation on the Secretary of State to give reasons for the making of a control order be inserted into the statutory framework.

We disagree. This was not a requirement of the judgment in *MB* as being necessary to provide individuals with a substantial measure of procedural justice.

We note that a control order always explains that the Government suspects that the individual is or has been involved in terrorism-related activity, and that the control order is necessary to protect the public from a risk of terrorism. After service of a control order, the individual is provided with the open case against him. The open case contains as much material as possible, subject only to legitimate public interest concerns. And the duty to disclose relevant material is a continuous obligation that remains in place throughout the hearings.

To give full effect to the judgment in MB, we recommend that the statutory framework be amended to provide that rules of court for control order proceedings “must require the Secretary of State to provide a summary of any material which fairness requires the controlled person have an opportunity to comment on.”

We disagree. This was not a requirement of the judgment in *MB* as being necessary to provide individuals with a substantial measure of procedural justice, despite this being a submission explicitly made in the Lords hearing by the controlled individuals. The Government’s response to the JCHR report entitled *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* outlined why we do not believe the mandatory provision of a gist of closed material is a desirable change.

We emphasise that, contrary to the recommendation of the JCHR, the majority judgment in *MB* did not rule that the Secretary of State ‘must’ provide a summary of any material which fairness requires the controlled person have an opportunity to comment on. Instead, the Law Lords envisage that in the rare circumstances where the judge concludes that there is material that it is necessary to disclose in order for the controlled person to have a sufficient measure of procedural protection, the Secretary of State will be put to her election. This means the Secretary of State is then given a choice whether to disclose the information, or withdraw it from the case. If the latter, the case then proceeds without that material included. Either way, the case continues in a manner compliant with Article 6. If the material is withdrawn from the case, the judge must consider whether it was so crucial to the Secretary of State’s case on reasonable suspicion or necessity that, in the absence of such evidence, the decision in relation to the order is flawed and so should be quashed.

Compliance with Article 6 is not in any case exclusively concerned with disclosure. The Government’s position, supported by the majority of Law Lords, is that the proceedings as a whole must be assessed for compliance with Article 6. Even where there has been extremely limited disclosure, such that the controlled individual himself cannot effectively challenge it, the proceedings could still be Article 6 compliant on the basis of the contribution of the special advocates or if the judge concludes that no possible challenge to the material (had it been disclosed) by the individual could have succeeded.

In our view the statutory framework requires amendment, to enable the controlled person to give meaningful instructions about the allegations against him, where it is possible to do so. We recommend that special advocates be given the power to apply ex parte to a High Court judge for permission to ask the controlee questions, without being required to give notice to the Secretary of State.

We disagree. This was not a requirement of the judgment in *MB* as being necessary to provide individuals with a substantial measure of procedural justice. The Government’s response to the JCHR report entitled *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* outlined why the Government does not believe unfettered communication between the individual and the special advocate after service of the closed material is a desirable change.

We recommend that the PTA 2005 be amended to provide that, in a hearing to determine whether the Secretary of State's decision is flawed, the controlled person is entitled to such measure of procedural protection (including, for example, the appropriate standard of proof) as is commensurate with the gravity of the potential consequences of the order for the controlled person.

We disagree. A change in the statutory test of reasonable suspicion was not a requirement of the judgment in *MB* as being necessary to provide individuals with a substantial measure of procedural justice. The Government's response to the JCHR report entitled *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* outlined why the Government does not believe this is a desirable change.

We recommend that the PTA 2005 be amended to provide that, where permission is given by the relevant court not to disclose material, special advocates may call witnesses to rebut the closed material.

It is already in principle open to special advocates to apply to the court to call expert witnesses, though in national security matters it is hard to see who those expert witnesses would be and what value they would be able to add to the proceedings. The Security Service provides training to special advocates to enable them understand and analyse the closed evidence that is disclosed to them and thus to make arguments of the kind that would ordinarily be assisted by expert evidence.

We are not aware of any such independent review [of the operation of the threshold test in practice] having been carried out and we reiterate that such a review would be valuable.

The CPS does not believe that any such independent review is either necessary or practicable. It is not necessary because the criminal justice system already effectively provides a review of the charging process on a case by case basis, either by abuse of process submissions or judicial review. Senior prosecutors also keep these cases under constant review until the point of conviction or acquittal. It is not practicable because, in respect of terrorism cases, there are issues of intelligence and national security which necessarily mean that the information released to others would be severely restricted.

We recommend that the CPS be required to disclose to the suspect and the court when it has charged on the threshold test in order to provide the opportunity for the court to subject the prosecution's timetable to independent scrutiny and to ensure that the defence is in a better position to challenge the basis of the charge.

The CPS cannot see any benefit for any party in the criminal justice system in an express requirement that the court and defence must be informed that the initial decision to charge is based on either the 'Threshold Test' or the 'Full Code Test'. The criminal process already enables the defence to be informed of the evidential basis of the Crown's case at the first hearing and permits applications to be made for the case to be dismissed at an early stage. Moreover, the courts already scrutinise the prosecution's timetable and can set time limits of their own for the service of material. The defence can also bring any perceived dilatoriness on behalf of the prosecution to the attention of the court, which can then impose a strict time table upon the prosecution. The Bail Act and Custody Time Limit regime further ensure that courts must consider the strength of the evidence against a defendant and the conduct of the prosecution when making a decision whether to remand in custody or not.

In our view, although we regard the advent of the threshold test in terrorism cases as a largely beneficial development, it would benefit from thorough parliamentary scrutiny.

Parliamentary scrutiny is already provided by section 10 of the Prosecution of Offences Act 1985 which requires the Code for Crown Prosecutors (which contains the 'Threshold Test') to be laid before Parliament annually. If it is thought necessary, a debate can be held on its contents. In addition, the Code is subjected to public consultation when it undergoes revision. This last occurred in 2004 when members of the public and professional organisations were invited to comment, inter alia, on the 'Threshold Test'. Parliament has already considered the point and given the Director powers to issue guidance under the Prosecution of Offences Act 1985 and (as amended) Police and Criminal Evidence Act 1984.

The Bill provides an opportunity to put the threshold test in terrorism cases on a statutory footing and to specify some necessary basic safeguards, to ensure that the use of the lower charging threshold does not result in terrorism suspects being held for longer than necessary before being released without trial. We recognise that the threshold test for charging is not unique to the terrorism context, but we think there is a strong case for making special provision for this category of offence because of the extremely lengthy period of pre-charge detention which is available.

Parliament has considered the matter as recently as 2003 in the Criminal Justice Act of that year, and decided that the DPP should have powers to issue guidance on the standard of charging to be applied. The standard of bringing a prosecution has never been placed in primary legislation before. Enshrining the 'Threshold Test' in statute would necessitate similar treatment for the Full Code Test. This would restrict the ability of the DPP to react to legal situations which may demand a change in the Code. Moreover, the legislation would inevitably be complex and might thereby possibly restrict prosecutorial discretion through the rules of statutory interpretation.

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.

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.

We remain of the view expressed in earlier reports, that providing for the admissibility of intercept evidence would remove one of the main obstacles to prosecuting terrorist crime, a view shared by the Director of Public Prosecutions. We believe it is essential that the Chilcot review reports as soon as possible and in time to enable any legislation to be brought forward as part of this Bill. We therefore call on the Government to publish the product of the long running internal review of this question, including the work done to date on the "public interest immunity plus model".

The Chilcot Report was published on 6 February. In his statement to the House, the Prime Minister accepted the recommendation of the Chilcot Review that it should be possible to find a way of using some intercept material as evidence, providing certain key operational requirements can be met. He committed the Government to taking forward the necessary work to address how these operational requirements can best be met, and how to take into account the impact of new technology.

The PII plus model was considered by the Chilcot review and a description of the model included in the report.

The Chilcot review recognised that further extensive work was required and that this could not be completed in time for inclusion within the Counter-Terrorism Bill.

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