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**Responses to Home Office papers  
on a future  
Counter-Terrorism Bill**

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1 This paper responds principally to two documents:

- Possible Measures For Inclusion In A Future Counter Terrorism Bill (Home Office, 25 July 2007) (referred to as the '*Possible Measures Paper*')
- Options For Pre-Charge Detention In Terrorist Cases (Home Office 25 July, 2007) (referred to as the '*Pre-Charge Detention Paper*')

However, other related documents regarding pre-charge detention and the examining magistrate system have also been consulted and are touched upon.

## **Pre charge detention**

2 The background justifications offered for the extension of pre-charge detention periods do not amount to a convincing case, and therefore it must be concluded that the period should not be extended.

3 First, the argument that there is a 'duty to intervene early, to protect the public, at a point when much work remains to be done to put together a case for suspects to be charged'<sup>1</sup> is certainly true. However, the statement ignores that the law already fully recognises that situation by granting extraordinary powers. The power to arrest under section 41 of the Terrorism Act 2000 for 'terrorism' and without proof of a specific offence and without giving specific reasons is an extraordinary departure from normal standards observed by police powers. The granting of a period of detention beyond four day detention under Part IV of the Police and Criminal Evidence Act 1984 is likewise an extraordinary incursion into the right to liberty and potentially into rights of due process. Of course, one could go further and further still, which has been the direction of reform in 2003 and again in 2006. But one wonders whether any limit is acceptable? It should be realised in response to that question that potential provisions which completely undermine notions of liberty and fairness in investigation are not worthwhile in the context of an ongoing campaign against terrorism which requires the cooperation of the public in general and minority communities in particular. The very goal of the CONTEST strategy is 'to reduce the risk from international terrorism, so that people can go about their daily lives freely and with confidence'.<sup>2</sup> Freedom cannot be delivered by legislation which substantially diminishes civil, political, economic or social life. Confidence cannot be secured if people are fearful of the arbitrary and ineffective impact of security measures.

4 The other background factor relied upon is that cases are now qualitatively different.<sup>3</sup> But that perception depends on one's time frame. Cases may be qualitatively different from when the Provisional IRA was the main threat. But how are cases qualitatively different from 2003, when 14 days was set, or 2006, when 28 days was set? What is new in 2007 compared to 2006? The matter was fully debated in 2005-06 and the Government did not convince Parliament that more than 28 days was necessary or proportionate. It is difficult to see what has changed since then, and most cases cited in the Home Office papers pre-date those debates and so were taken into account. Thus, there is a claim of a shift of quality in time without evidence as to the time frame in mind or the precise changes of importance in that time. The same argument applies to the argument about

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<sup>1</sup> Pre-Charge Detention Paper p.2.

<sup>2</sup> Home Office, Countering International Terrorism (Cm 6888, 2006) para.5.

<sup>3</sup> Pre-Charge Detention Paper p.2.

factors producing complexity.<sup>4</sup> How are these factors qualitatively different to the prevailing situation in 2003 or 2006, given that the same cases were previously in the minds of the legislators?

5 A further argument in favour of a longer period and based upon the sequencing of investigations is also spurious.<sup>5</sup> Surely if more resources can speed up each stage of the investigation, it does not matter that there are several stages. The remedy is to apply more resources to all stages. In this connection, it would significantly speed up pre-charge investigations if more defence legal resources were to be provided, since a major delay factor is the unavailability of defence lawyers or the time they take to complete their inquiries either with clients or otherwise. Their availability has always represented a drag on the detention clock – as identified by Detention Commissioners in Northern Ireland and more recently by Lord Carlile. It is therefore highly counter-productive that changes in legal aid funding arrangements are decimating the number of available solicitors in criminal practice.

6 Next a claim is made at several points that ‘the Parliamentary decision to increase pre charge detention limits from 14 to 28 days has been justified. We have been able to bring forward prosecutions that otherwise would not have been possible.’<sup>6</sup> Equally, it is said that the change in 2006 ‘has enabled suspects to be charged who may otherwise have had to be released.’<sup>7</sup> These assertions are troubling. In so far as there is a claim that the increased period is justifiable because it has been actually used, that is a weak claim which proves nothing in terms of results or outcomes. So, the second leg of the argument is much more persuasive, if true. But where is the evidence? The evidence seems to consist once again mainly in the amount of evidence which has been generated by the grave and complex attacks such as on 21/7 or in the case of Barot. But the generation of a large amount of evidence is not the same issue as whether within 14 days there is sufficient evidence for a prosecution to succeed on the basis of some serious charges. On the one hand, the fact that there is a surfeit of evidence is not a reason to demand more time to make a charge which could have been made in any event. On the other hand, it is far from clear that there was a deficit of evidence to make a charge – charges were actually brought against the 21/7 bombers and against Barot which resulted in convictions and lengthy sentences. The other case mentioned is the 2006 airline plot.<sup>8</sup> But is it really claimed that, after 28 days, that evidence was not available for a charge in any given case and that, if more time had been given, everyone arrested would have been charged? That would be an astonishing admission, given the seriousness of the allegations made against the suspects and the wholesale disruption to international air travel which was caused. Furthermore, is there an implied assertion that those who were released without charge at the end of 28 days really are guilty of terrorism? What is the basis for that assertion and, if true, why were they not subjected to control orders? All of these cases show that 28 days was sufficient time for the police to compile a compelling case to bring serious charges, a case so compelling that it has so far resulted in convictions being sustained in every case to reach the courts in recent times. Nor has it been shown that other arrestees have escaped the net and gone on to engage in further terrorism. If there are such cases, then they should be described. In summary, there is no

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<sup>4</sup> Pre-Charge Detention Paper p.3.

<sup>5</sup> Pre-Charge Detention Paper p.3.

<sup>6</sup> Possible Measures Paper para.12.

<sup>7</sup> Pre-Charge Detention Paper p.5.

<sup>8</sup> Pre-Charge Detention Paper p.5.

compelling case for an extension beyond 28 days based on these events, and there is a strong argument that the extension from 14 to 28 days is yet to be justified.<sup>9</sup>

7 Next is an argument that something more by way of incriminating evidence may turn up if more time were to be given.<sup>10</sup> Of course, it is also possible that some evidence will emerge at a later date, but on that argument, police detention should be unlimited, and liberty should be abolished. Given the recent history of developments in DNA profiling and 'Cold case review', should terrorist detainees be held for years to allow for further scientific development to be deployed against them? Likewise unacceptable on grounds of constitutionality is the test given in the Pre-Charge Detention Paper that:<sup>11</sup>

'The principle by which the limit should be determined remains the same: the need to balance the right to individual liberty against the risk to national security. In particular, against the risk that police will have to release individuals suspected of committing a terrorist offence, who might then be free to commit a terrorist offence in the future, because the police were unable to charge them within the time limit.'

This is neither a fair nor proportionate test. Of course, any person released, whether suspected criminal or suspected terrorist, might commit a future offence. But the legal system cannot hold people for ever on a hunch if it places any value at all on personal liberty. Furthermore, can the police really be sure that everyone they arrest is actually guilty of an offence? Since it is not the case that everyone tried for a terrorist offence is convicted (or indeed that all convicted persons are guilty, as shown by cases like the Birmingham 6 and Guildford 4), this assertion seems most unlikely to be true and is not justified by statistics which show that most persons arrested under section 41 are released without charge, in most cases well before 28 days. Rather than the foregoing test, the real questions are as follows:

- Has any person released without charge after prolonged detention after 2003 been found to have committed later terrorist offences? No such case is cited or reported.
- Where the police believe that the person is really guilty but have not been able to prove it to a criminal standard, are they able to resort to control orders in order to manage the continuing risk? There has been one case. Rauf Abdullah Mohammad, a mini-cab driver of Iraqi origin, was charged under the Terrorism Act 2000, section 57, with making a video which might be useful to terrorists.<sup>12</sup> He claimed that his discussion about the killing of U.K. and U.S. political leaders, the background noise of religious chants and explosives were not to be taken seriously. The jury returned a not-guilty verdict, but he was immediately subjected to a control order or 'conviction lite', according to one commentator.<sup>13</sup> Control orders could be considered where substantial lurking suspicion remains at the end of 28 days. If the evidence is so firm, then monitor the person further and build the case in a way which does not wholly sacrifice individual liberty.

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<sup>9</sup> Report of the Joint Committee on Human Rights, Terrorism Policy and Human Rights (2006-07 HL 157, HC 394) para.32.

<sup>10</sup> Pre-Charge Detention Paper pp.6, 7.

<sup>11</sup> Pre-Charge Detention Paper p.8.

<sup>12</sup> See Dominic Kennedy, 'Film of High-Profile Targets Was Made as a Joke, Trial Told', *The Times*, Aug. 23, 2006 p.23.

<sup>13</sup> See Dominic Kennedy *et al.*, 'Restriction Order on Cab Driver Cleared in Terror Case', *The Times* Aug. 30, 2006 p.4 (quoting Gareth Crossman, Liberty).

8 Next is the argument that senior police officers say they support an extension.<sup>14</sup> But the police organisations have stated explicitly that they do not seek an extension.<sup>15</sup> Likewise the DPP has not called for any extension. There is no growing consensus for an extension of the period. If anything, the force of support present in 2005 seems to have diminished.

9 It is accepted that a period of 28 days may not represent the end of the investigation or indeed the end of the charges on an indictment. Therefore, there might be some profit in reviewing the laws relating to the amendment of indictments. It would also be helpful to consider how control orders might be used to facilitate a form of further examination period (described further below).

10 Turning to other evidence, the useful survey recently published by the Foreign and Commonwealth Office<sup>16</sup> reveals that no other country allows three month detentions for the purposes of interrogation by the police and in pursuance of an investigation under police control. Two other jurisdictions not mentioned in that paper are Sri Lanka and Zimbabwe, neither of which has garnered a reputation for showing great restraint in the use of emergency measures. Section 7 of the Sri Lankan Prevention of Terrorism (Temporary Provisions) Act allows for police detention limited to just 72 hours. As for Zimbabwe, in February 2004, President Mugabe used regulations under the Presidential Powers (Temporary Measures) Act 1990 to amend the Criminal Procedure and Evidence Act 1974, section 32. The result was to allow for pre-trial detention of 28 days (up from 7 days) of people suspected of certain economic crimes or certain offences under the Public Order and Security Act 2002. This period was later reduced to 21 days by the Criminal Procedure and Evidence (Amendment) Act 2004.

11 Regarding the four options presented, the paper fairly and cogently assesses their respective merits, subject to the overall conclusion above that no extra period is currently justified. Option (i) has the merit of certainty both in terms of invocation and the limits on the loss of liberty. However, it seems to assume that no problems are raised under article 5 of the European Convention on Human Rights, no matter what period of detention is chosen, provided there is judicial review within four days and regularly thereafter, as asserted since *Brogan*.<sup>17</sup> But *Brogan* was a case based on article 5(3). The question yet to be seriously considered is at what point does a continuation of detention without charge under police control and with police-led investigation, even with judicial superintendence, become equivalent to a form of detention without trial beyond article 5?<sup>18</sup> The situation being proposed would be significantly distinct from the French system. Once a person is held beyond the *garde a vue*, there is a decision to bring before the courts on charges (not just a conditional intention), and the investigation is directed by the examining magistrate and not the police. These are important distinctions from English pre-charge detention. But what is being proposed here is a substantial period of time – 56 days or 90 days perhaps – where there is no certainty of trial and no judicial control. It is arguable that such a substantial period of detention amounts to a detention without trial under article 5(1). The argument that it amounts to a detention

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<sup>14</sup> Pre-Charge Detention Paper p.8.

<sup>15</sup> Report of the Joint Committee on Human Rights, Terrorism Policy and Human Rights (2006-07 HL 157, HC 394) para.22.

<sup>16</sup> Counter-terrorism legislation and practice: a survey of selected countries (2005).

<sup>17</sup> *Brogan v. U.K.*, App. nos. 11209, 11234, 11266/84, 11386/85, Ser. A 145-B.

<sup>18</sup> See *Lawless v Ireland (no.3)*, App.no.332/57, Ser.A 3 (1961).

without trial may be further underlined by the facts that (i) there is a high rate of release without charge at the end of the period and (ii) the person is held in prison and so has an experience which is the same as a remand prisoner but without the safeguard of a judicially-checked charging process. Thus, the measure can only be lawful if there is a derogation under article 15. In conclusion, whilst the Home Office favours option (i), it is submitted that it is not justifiable for the reasons already given in terms of factual justifications sufficient to overcome the principle of liberty, nor would it be lawful without a derogation notice.

12 One other comment on option (i) is that the suggested scrutiny of each case by the independent reviewer is a valuable safeguard.<sup>19</sup> My suggestion is that this review should apply to any detention beyond the PACE limit of four days. The idea that detention periods are only exception if beyond 28 days show a degree of contempt for the value of liberty. Any detention beyond four days is wholly exceptional and should be subject to the utmost scrutiny.

13 Option (ii) is not practical for the reasons given. Parliament will not be allowed to see the relevant information regarding an individual case on grounds both of national security and also to avoid prejudicing the case. In addition, the suspect and the police deserve to know with certainty the applicable legal powers. Thirdly, it is an improper breach of the rule of law (as set out in the Constitutional Reform Act 2005, section 1) for Parliament to have direct influence on the legal treatment of individuals.<sup>20</sup> The dangers of bias and prejudice are obvious.

14 Option (iii) is likewise impractical, unprincipled and poorly conceived. Of course, Part II of the Civil Contingencies Act 2004 is available in any given situation and can be invoked in the circumstances of a true emergency. Arguments against Parliamentary intervention in individual cases and the hindrances to open debate again arise.<sup>21</sup> But there are two other fundamental objections. First, most terrorist attacks do not justify a declaration of emergency. Especially in the light of the contingency planning which has been carried out under Part I, any widespread or serious disruption should be manageable within 'normal' (including anti-terrorism legislation) resources and powers. The second serious criticism is that Liberty seem to be unaware that the government has refused to publish any drafts of Part II regulations. In other words, there is no certainty that, if invoked, the regulations about pre-charge detention will be as limited or as carefully designed with safeguards as would legislation in advance of an emergency. Nor is there certainty that emergency powers will be confined to detention before charge. For Liberty to encourage the potentially widespread use of the 'Doomsday' powers in Part II is astonishing.

15 Option (iv) is worthy of consideration but with variants. For the reasons given in the review paper on the French system, it is not easy to transcribe one aspect of a foreign system, especially if only transcribed to a given category of cases. Rather than any wholesale transcription, the following model (Option (v)) should be considered. Once the detention period has expired at 28 days, the person must be released from police custody. However, use can then be made of control orders under the Prevention of Terrorism Act 2005 to reduce the risks of releasing a person still considered dangerous. At that point, the monitoring and search powers under the 2005 Act can be

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<sup>19</sup> Pre-Charge Detention Paper p.10.

<sup>20</sup> Compare *Buckley (and others) v A.G.* [1950] I.R. 67.

<sup>21</sup> It would be possible to avoid Parliamentary debate in advance of action under the Civil Contingencies Act 2004 ss.20(2) and 27(1)(a), but to plan to do so would weaken the safeguards of the legislation.

invoked to continue to investigate the case.<sup>22</sup> In addition, the Explosives Act 1883, section 6, allows a form of judicial examination in relation to explosives offences. This power could be amended to allow the questioning by a judge of a person subject to a control order but in the guise of post-charge questioning (see further below). Powers of this kind have also existed in Canada.<sup>23</sup> This device would overcome the problem of suspects refusing to answer questions – a refusal could be a contempt and adverse inferences could be drawn from silence. The power could be triggered by a prosecutor. The detailed arrangements could be based in an expanded version of the Protocol for Managing Terrorist Cases (2007). In sum, these arrangements do not require any extension of detention beyond 28 days. Nor do they require the importation of the examining magistrate system, but they do further develop the role of the presiding judge. The police continue to be the primary investigators, but they can seek further powers for questioning in strictly controlled circumstances as necessary for the duration of the control order. In this way, some of the aspects of the examining magistrate system would be secured.

16 One further matter regarding pre-charge detention which is not raised in any paper concerns the conditions of detention. There is no police station which is equipped to hold suspects for more than four days – not even Paddington Green, as Lord Carlile has acknowledged. Therefore, PACE Code H paragraph 14 should be amended to require the transfer to a prison after, say, 7 days.

## **Intercept as Evidence**

17 The points in favour of the use of intercept evidence have been exhaustively explored by JUSTICE in its paper, *Intercept Evidence: Lifting the Ban in 2006*. The concerns expressed in the Home Office papers - the protection of sensitive techniques and capabilities, and avoiding putting additional disproportionate burdens on the security authorities in order to generate intercept material to an evidential standard<sup>24</sup> - apply in other comparable jurisdictions such as Australia, Canada, and the US, all of which manage the potential problems without undue difficulty. Intercept evidence is not only used in those jurisdictions but is seen as vital and prime evidence in terrorist cases.

## **Information sharing**

18 The extension of section 19 of the Terrorism Act 2000 to volunteers, such as the trustees of charities, is described as ‘a very minor change to close a possible gap in the current provisions’.<sup>25</sup> This statement grossly misrepresents the purposes behind the design of section 19. The reason why section 19 is confined to professionals is that it imposes higher duties than those applicable to the general public (which exist under section 38B of the Terrorism Act 2000). The width of the duty is striking; it is sufficient to have a subjective belief or suspicion which can only be safely suppressed if the intermediary has a ‘reasonable excuse’ under subsection (3) for not making the disclosure. This defence is not subject to section 118. Consequently, the full legal and evidential burdens fall

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<sup>22</sup> However, control orders should not last for longer than 12 months, non-renewable: see Walker, C., ‘Keeping control of terrorists without losing control of constitutionalism’ (2007) 59 *Stanford Law Review* 1395.

<sup>23</sup> See Criminal Code (as amended by the Anti-Terrorism Act 2001 s.83.28; *Re an Application under s. 83.28 of the Criminal Code* [2004] SCR 242.

<sup>24</sup> Possible Measures Paper paras.14, 15.

<sup>25</sup> Possible Measures Paper para.22.

on the defence. Furthermore, under section 19(7), the duty has a global reach since a person shall be treated as having committed an offence under one of sections 15 to 18 if (a) he has taken an action or been in possession of a thing, and (b) he would have committed an offence under one of those sections if he had been in the United Kingdom at the time when he took the action or was in possession of the thing. The result is that this proposal will penalise community-spirited individuals, and the new burdens may deter such people in the future. If it is really intended to treat volunteers as if they had the benefit of a professional education, then at very least the new duty should be confined to very specific classes such as the trustees of charities. Furthermore, those who take on such duties should be warned specifically about their new duties, and there should be readily available advice given to them (including a hotline) furnished by the Charity Commissioners.

19 Having taken the decision to allow special powers to take and retain DNA samples, the proposed measures<sup>26</sup> in relation to the taking, retention and use of the DNA samples of terrorist suspects seem sensible. One might as well secure maximum benefit from the exercise. However, it remains the case that the indefinite retention of DNA samples relating to persons suspected of terrorism (more of whom are not charged than criminal arrestees) is disproportionate and should be reconsidered, as recently argued by the Nuffield Council on Bioethics.<sup>27</sup> This is a general problem of disproportionality. Indefinite retention causes concern because the person has not been subject to the usual safeguards of reasonable suspicion of a specific criminal offence which would be necessary for the NDNAD. The same problem of a lack of regulation applies to the retention of materials by the Security Service or from controlled persons.<sup>28</sup>

20 The proposals relating to data-sharing powers for the intelligence agencies are somewhat opaque in their intention.<sup>29</sup> Why is it necessary to replicate section 32 of the Serious Organised Crime and Police Act 2005? What are the distinct functions which may not allow the use of information? Under section 34, since much of the information will be held by public agencies, will there be guidelines or compulsion for disclosure? Next, can there be meaningful independent oversight by a Secretary of State?<sup>30</sup> Surely, oversight should be provided by the Information Commissioner if it meant to be more than a token provision. And why does the proposal not mention also section 35 which deals with restrictions on further disclosure? Why should this not correspondingly apply?

21 Regarding the extension of section 58 in the light of the repeal of section 103,<sup>31</sup> it can be accepted that section 103 is wider than section 58 in several respects. The *actus reus* includes publishing, communicating or attempting to elicit as well as collecting or recording. However, it is difficult to see that the example given in the Possible Measures Paper, the eliciting of targeting information about service personnel would not be caught by section 58. Furthermore, it should be noted that some of these activities are now covered by sections 1 and 2 of the Terrorism Act 2006. What is left as perhaps exclusive to section 103 is 'attempting to elicit'. But attempting to commit

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<sup>26</sup> Possible Measures Paper para.23.

<sup>27</sup> The Forensic Use of Bioinformation (London, 2007).

<sup>28</sup> Possible Measures Paper paras.27, 28.

<sup>29</sup> Possible Measures Paper para.29.

<sup>30</sup> Possible Measures Paper para.31.

<sup>31</sup> Possible Measures Paper para.32.

an offence under section 58 is already an offence. And an eliciting which is successful is much the same as collecting. Nevertheless, it may clarify the law to include 'elicit' in section 58(1). If section 58 is widened in this way, it is doubtful whether it is also necessary to list specific targets such as service personnel, police officers or prison officers. If the term 'terrorism' is valued for its breadth of coverage, this advantage applies to section 58 as elsewhere.

## Post-charge questioning

22 All questioning, whether pre-charge or post-charge, should be voluntary and fair, as required by PACE, sections 76 and 78.<sup>32</sup> If post-charge questioning is to become the accepted norm, not only in terrorism cases but also under PACE, there may need to be some further reforms. These reforms must take account of the fact that the English legal system remains in the business of running an adversarial process and must secure fairness in that context. One consequence is that if the police are afforded new powers to examine their chief suspect at any time up to trial and on pain of adverse inferences, then the defendant's barrister should be likewise enabled to examine the police and their witnesses on the same terms under the principle of equality of arms, as required by article 6 of the European Convention. Second, how can we disentangle what might be said to be legitimate questioning which is akin to documentary disclosure by the defence, a principle first controversially enshrined in the Criminal Procedure and Investigations Act 1996 but now barely questioned, and the questioning of an accused with a view to uncovering the defence's legal tactics? Surely, the pursuit of the latter is not fair in the light of the principle of legal privilege and right to counsel? But who will police the police questioning in these sensitive circumstances? Compulsion through police questioning may contravene article 6 of the European Convention where other criminal proceedings are pending as in *Shannon v United Kingdom*.<sup>33</sup> For both these reasons, it is troubling to put the police in effective charge of a post-charge process which might impinge upon pre-trial processes which are normally the province of the presiding judge. A better response is to explore an enhanced role for the presiding judge rather than the police. The intervention of the judge will avoid the demand for equality of questioning opportunities and will reduce concerns about voluntariness and fairness. Therefore, there is much to be said for the precedent of the Explosive Substances Act 1883, section 6, by which, in exceptional cases arising from terrorism, there may be questioning after charge, but it must be conducted by the judge. This role would fit with the Protocol on the Management of Terrorist Cases. Section 6 is now outdated and would need revision as follows:

- It should be applied not only to explosives offences but also to other terrorist offences and even (as argued above) to persons subject to control orders.
- It should be triggered by a request from either prosecution or defence on the basis of compelling new evidence which has arisen after the pre-charge process and where the judge is satisfied that it is in the interest of justice to investigate further. The possibility of defence requests might seem unlikely, but evidence might arise which can lead to a dismissal of charges at an early stage.
- An amendment is required to section 6(2) by which 'A witness examined under this section shall not be excused from answering any question on the ground that the answer thereto may criminate, or tend to criminate, [that witness or the husband or wife [spouse or civil partner] of

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<sup>32</sup> Possible Measures Paper para.34.

<sup>33</sup> *Shannon v United Kingdom*, App. no.6563/03, 4 October 2005.

that witness]; but any statement made by any person in answer to any question put to him [or her] on any examination under this section shall not, except in the case of an indictment or other criminal proceeding for perjury, be admissible in evidence [against that person or the husband or wife [spouse or civil partner] of that person] in any proceeding, civil or criminal.’ The purpose of the amendment would be to make the answer admissible, but in circumstances of judicial control which might be distinguished from the *Shannon* case.

This model of judicial examination is one which is worthy of further consideration (and is referred to as Option (v) above).

23 It should be emphasised that a judicial examination of this kind is not the same as appointing a judge as investigator. Under the proposal, the judge can retain the role of umpire, with a prosecutor or defence counsel putting the questions which have been screened by the judge. It is submitted that this is far preferable to the confusion of roles which would be represented by a judge-investigator. Judges have no training in police investigation. Furthermore, they would have to rely on police sources of intelligence and evidence, assuming they were forthcoming from the police which may not always be true where an ‘outsider’ is involved, and so could not really act independently. To be viable, a judge-investigator would therefore need independent resources as well as training. Furthermore, it would be contrary to the rules about bias if such a person appeared at the same time as a judge in other cases, for their independence would be fatally compromised during the period of office as investigator.

24 A number of substantial advantages would flow from judicially-managed examinations. Existing time-limits regarding detention could be respected. At that point, the person would be charged or be subject to a control order or be set free. If further evidence arose from later investigations, further questioning would be possible by reference to judicial examination, which would have the major benefit of ensuring that the responses would be admissible evidence and ensuring respect for the independence of the judiciary. It would also ensure clearer circumstances of fairness and humanity for the suspect.

## **Enhanced sentences**

25 Enhanced sentencing is championed both by Lord Carlile<sup>34</sup> and by the Possible Measures Paper.<sup>35</sup> One doubts the need for this measure. The judges have made it clear in countless cases, that terrorism is to be treated with the utmost severity.<sup>36</sup> The main purpose behind the proposal seems to be to catch those who are charged with low-level non-terrorist-specific offences, such as forgery. But if these are the charges, rather than, say, an offence under the Terrorism Act 2000, section 12, then one wonders whether it can be proven to a satisfactory level that the person is knowingly involved in terrorism. The reason why these non-terrorist-specific offences are sometimes charged is because there is a lack of clarity sufficient for a terrorist-specific offence. This point raises the question as to the level of proof for the enhanced sentence. It seems unfair to apply an extra penalty if it is not possible to prove a terrorist offence beyond reasonable doubt.

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<sup>34</sup> The Definition of Terrorism (Cm.7052, 2007) para.44.

<sup>35</sup> Possible Measures Paper para.38.

<sup>36</sup> See *R v Hindawi* (1988) 10 Cr App Rep (S) 104; *R v Barot* [2007] EWCA Crim 1119.

26 If this first point is not accepted, then the measure should only apply in proportionate circumstances: where it can be shown that there is an intention to commit terrorism or to do an action to aid persons known to be terrorists by way of a criminal offence. These alternatives should be an added element of proof beyond reasonable doubt for this power to be triggered.

27 The notification issue is a separate point which deserves separate consideration - it is wrong to conflate these issues and to say that one follows from the other.<sup>37</sup>

### **Quasi-control and control**

28 Regarding possible terrorist notification requirements,<sup>38</sup> following the case of Brett James (regarding Indeterminate Public Protection Sentences), there should be greater clarity as to what restrictions will apply and what facilities for rehabilitation will be available in these cases. How long will the order last, and is there any possibility of redemption for an individual? Bear in mind that many convictions under the Terrorism Act 2000 are for low level offences, such as the withholding of information in a specific relationship with a relative or partner. This proposal will create extra workload for the police, and one wonders whether its blanket application will be worthwhile. The extension to overseas applicants is especially problematic.<sup>39</sup> Different countries have very different definitions of terrorism. Would this have been applied to the opponents of President Saddam Hussein or to the current plotters against President Bashar al-Assad? How consistent with political asylum will be the device of notification?

29 The idea of foreign travel orders<sup>40</sup> raises similar issues as to the duration of orders, as well as the level and point of proof. These matters are insufficiently elaborated in the paper to allow for serious discussion, but one wonders why available powers including arrest under the Terrorism Act 2000, section 41, cannot be invoked as well as powers of detention at ports under schedule 7 for the purposes of examination. A standing order is simply an admission that there is no specific suspicion of involvement at any given point.

30 In relation to all these ideas, there is the added point as to why the existing device of control orders fails to achieve all these restrictions? In addition, control orders embody the advantage of special procedures to deal with sensitive evidence as well as review systems both of the orders and of the system itself. There is no equivalent for sex offenders. So why not use the device of control orders? These new powers would be needlessly complicated and possibly unworkable. The only attraction of new measures would be to apply them automatically and to avoid the safeguards of proof and review which apply under the Prevention of Terrorism Act 2005. To apply automatic restraints on liberty without consideration as to individual circumstances would be disproportionate in itself.

31 Turning to control orders under the Prevention of Terrorism Act 2005, the proposal regarding powers of entry<sup>41</sup> relates to the wording of section 1(4)(j) which allows the imposition of

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<sup>37</sup> Possible Measures Paper para.39.

<sup>38</sup> Possible Measures Paper para.42.

<sup>39</sup> Possible Measures Paper para.45.

<sup>40</sup> Possible Measures Paper para.51.

<sup>41</sup> Possible Measures Paper para.57.

a requirement on the controlled person to give access to specified persons to his place of residence or to other premises to which he has power to grant access. On this wording, it is arguable that if a controlled person is out of the residence or has gone missing, the police cannot require him to grant access. But the statute is worded in this way as a safeguard - that the person should be aware of intrusions into privacy - otherwise, the police should rely on normal PACE or TA powers and enter under warrant. Otherwise, the person has lost any semblance of privacy.

## Finance

32 The proposals concerning the forfeiture of terrorist assets are based upon a curious, almost self-contradictory statement which emphasises the relevance but then the relative unimportance of money:<sup>42</sup>

'Money underpins all terrorist activity - without it there can be no attacks and more fundamentally no training, recruitment, facilitation or welfare support for terrorist groups. Furthermore, terrorist attacks can often be mounted using relatively small amounts of money – the July 7 bombings, for example, cost around £5000.'

In truth, personal commitment is what underpins terrorism,<sup>43</sup> and money is secondary. In addition, the assertion that the only powers in existence are forfeiture powers is in error. The Proceeds of Crime Act 2002 is so broad that it is arguable that these forfeiture powers could be repealed. It follows that there is probably no need for an expansion of the special powers.

## Northern Ireland powers

33 Is it necessary to preserve the power in section 95 of the Terrorism Act 2000 to remove a vehicle for further searches?<sup>44</sup> It is evident that these powers already exist. They were graphically illustrated by the removal of vehicles following the bombings in Glasgow airport and the attempted bombings of London nightclubs in June 2007. Leaving aside common law powers to secure the scene of a crime, section 36(1)(d) allows for the removal of a vehicle from a cordoned area. Outside of a formal cordon under the 2000 Act, there are also common law and Police and Criminal Evidence Act 1984 powers of relevance. Under the Police and Criminal Evidence Act 1984, sections 18, 19, 23, vehicles are treated as 'premises' under section 23 and the whole of a vehicle may be seized as well as anything from it.<sup>45</sup> As far as the common law is concerned, Lord Justice Denning in *Ghani v Jones* stated:<sup>46</sup>

'The robbers of a bank “borrow” a private car and use it in their raid, and escape. They abandon it by the roadside. The police find the car, i.e., the instrument of the crime, and want to examine it for fingerprints. The owner of the “borrowed” car comes up and demands the return of it. He says he will drive it away and not allow them to examine it. Cannot the police say to him: “Nay, you cannot have it until we have examined it”? I should

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<sup>42</sup> Possible Measures Paper para.54.

<sup>43</sup> See Richardson, L., *What Terrorists Want* (Random House, 2006).

<sup>44</sup> Possible Measures Paper para.61.

<sup>45</sup> *Cowan v Commissioner of the Metropolitan Police* [2000] 1 WLR 254.

<sup>46</sup> [1970] 1 QB 693 at p.708.

have thought that they could. His conduct makes him look like an accessory after the fact, if not before it. At any rate it is quite unreasonable. Even though the raiders have not yet been caught, arrested or charged, nevertheless, the police should be able to do whatever is necessary and reasonable to preserve the evidence of the crime.'

Add to this the fact that there may be a public right of way across premises. Furthermore, the Court in *DPP v Morrison* considered it may be ineffective in law for the owner of premises, such as a shopping centre, to withdraw consent.<sup>47</sup>

34 As for the seizure of documents under section 87 of the 2000 Act, it is a mistake to say that 'In most cases this would be on the footing of a search warrant obtained through the normal channels or in conjunction with an arrest of a person.'<sup>48</sup> Actually, most cases would involve stop and search powers under section 44. Given the lack of safeguards in the initial exercise of that power, it would be wrong to extend further its consequences in this way. Even in premises searches, it should be realised that the natural consequence of casting suspicion of documents in foreign languages will be to cast suspicions on minority communities. This will amount to a form of racial profiling applied to documents. The demand for reasonable suspicion under section 19 of PACE is not a demanding standard and should be retained.

### **Definition of Terrorism**

35 The recommendation that the existing definition should be amended to ensure that it is clear that terrorism motivated by a racial or ethnic cause<sup>49</sup> is included risks the further extension of anti-terrorism legislation to situation of individuals where its powers are simply not needed. The draconian powers are needed where there is group organisation and repeated acts of violence. Individuals engaged in singular acts of racism, even racist violence, do not require the might of the anti-terrorism legislation.

36 This initial point raises a deeper concern about the current definition of terrorism in section 1 of the Terrorism Act 2000. The definition should be amended to take account of whether the offences are organised and have substantial impact. Lord Carlile concurs with this requirement since he recommends a new requirement in the CPS Code that prosecutions for terrorist offences should be brought only in these circumstances and that 'normal' offences not appropriate.<sup>50</sup> The Government Reply accepts this principle.<sup>51</sup>

37 There is also need for a positive response to two other points raised in Lord Carlile's paper. First, the extension of the concept of 'terrorism' to foreign conflicts should at least be controlled by the approval of the Attorney General to any criminal justice response.<sup>52</sup>

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<sup>47</sup> [2003] EWHC 683 Admin.

<sup>48</sup> Possible Measures Paper para.63.

<sup>49</sup> Possible Measures Paper para.65.

<sup>50</sup> The Definition of Terrorism (Cm.7052, 2007) para.16.

<sup>51</sup> (Cm.7058, 2007) p.5. The idea is in line with the principles enunciated by Lord Lloyd in his report, Inquiry into Legislation against Terrorism (Cm.3420, 1996) para.3.1.

<sup>52</sup> The Definition of Terrorism (Cm.7052, 2007) para.81.

38 Second, there is a need to implement Lord Carlile's point that the word 'influence' should be replaced by 'intimidate'.<sup>53</sup>

### **Critical National Infrastructure**

39 The deployment of the MOD Police at gas installations is indeed remarkable and should be clarified in legal terms.<sup>54</sup> But piecemeal legislation on gas installations merely scratches the surface. The organisation of policing and the police powers in relation to CNI is in need of urgent review in general terms. A fuller paper on this topic can be supplied upon request.

### **Other issues not within the consultation agenda**

40 The bulk of this paper has responded to the agenda set by the Home Office in its papers. Yet, it should be understood that the agenda being pursued is far from comprehensive. There are other important matters which have not been addressed, even though the legislative timetable has been commendably measured and could allow for a more comprehensive reform programme.

#### ***Review systems and scope***

41 The first point requiring attention is the legislative review systems. Not all parts of the legislation are subject to independent review now that the Privy Council review by Lord Newton is spent. The failure to respond to many of the recommendations in that report is itself a major concern. But the fact that comprehensive review on that model is no longer available should prompt some further examination of the appropriate model for ongoing scrutiny. The sole reviewer, Lord Carlile, performs an excellent service, but his remit has continued to expand and in part has become repetitive. In those circumstances, in order to allow for the expansion of inquiries in line with workload and to ensure a fresh look is taken at recurrent issues and also to ensure a breadth of expertise, the work should be undertaken by a panel of three reviewers, appointed to different terms.

#### ***Consolidation***

42 The Terrorism Act 2000 was designed to consolidate all measures into one Act. But there are now, or will be, five different sources. The government should commit to tidying up the statute book so that citizens can readily ascertain their legal position. Lord Carlile has so recommended.

#### ***Victims***

43 The counter-terrorism legislation ignores the plight of victims, the shabbiness of which has been highlighted by the July 7 bombings in London. There is a need for special regulations for various reasons. One is that mass casualties can otherwise be kept waiting for unacceptable periods. The other concerns the principles of social solidarity with the victims of an attack on the public and also the need for the recovery of normality. Finally, the types of losses from terrorism may be different to other crimes. It is the contention of this paper that the laws and policies on this topic are grossly under-developed. Such laws as do exist fall broadly into two categories - personal injury and property or other financial loss.

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<sup>53</sup> The Definition of Terrorism (Cm.7052, 2007) para.59.

<sup>54</sup> Possible Measures Paper para.67.

44 The aspect of personal injury is dealt with by two non-statutory schemes - the Criminal Injuries Compensation Authority<sup>55</sup> and the Compensation Agency (Northern Ireland).<sup>56</sup> So far as personal injury is concerned, the schemes are both very similar. A victim may make an application if:<sup>57</sup>

- '(a) a victim of a crime of violence, or injured in some other way covered by the Scheme;
- (b) physically and/or mentally injured as a result;
- (c) in England, Scotland or Wales at the time when the injury was sustained; and
- (d) injured seriously enough to qualify for at least the minimum award available under the Scheme; or
- (e) a dependant or relative of a victim of a crime of violence who has since died.'

There is a variety of limitations inherent in this scheme which make it neither generous nor wholly appropriate when dealing with the victims of terrorism. Consider the following shortcomings.

45 One is that the emphasis on 'crime of violence' does not capture the whole of the definition of terrorism. Though part of the controversy surrounding the definition in section 1 of the Terrorism Act 2000 is that it extends well beyond violence, there seems to be a mismatch between what is criminalised as terrorism and what might be compensated as terrorism. For example, the definition includes actions which creates a serious risk to the health or safety of the public or a section of the public or which is designed seriously to interfere with or seriously to disrupt an electronic system. According to the rules of the system:<sup>58</sup>

' There is no legal definition of the term but crimes of violence usually involve a physical attack on the person, for example assaults, wounding and sexual offences. This is not always so, however, and we judge every case on the basis of its circumstances. For example, the threat of violence may, in some circumstances, be considered a crime of violence.'

46 Next, there is the problem that the victim must be in England, Scotland or Wales at the time when the injury was sustained. This leaves out, for example, of British diplomats or military attachés who have been targeted abroad (such as in Greece in 2000) and also persons unattached to the British state who are selected for attack simply as British or even Western European residents - hostages in Lebanon, for example. Though many other Western European countries operate similar schemes of state compensation,<sup>59</sup> the victim may find that to make claims abroad is cumbersome, and outside Western Europe and North America one cannot be sure that such systems exist at all.

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<sup>55</sup> <http://www.cica.gov.uk>.

<sup>56</sup> [www.compensationni.gov.uk](http://www.compensationni.gov.uk).

<sup>57</sup> Guide to the 2001 Criminal Injuries Compensation Scheme, para.2.3.

<sup>58</sup> Para.7.9.

<sup>59</sup> European Convention on the Compensation of Victims of Violent Crimes of 1983 (ETS 116, 1983; Cm.1427, 1991; Katsoris, C.N. (1990-91) 'The European Convention on the Compensation of Victims of Violent Crime', *Fordham International Law Review* 14: 186; Greer, D.S. (ed.) *Compensating Crime Victims*, (Edition Iuscrim, Freiburg , 1996).

47 Thirdly, the victim must be injured seriously enough to qualify for at least the minimum award available under the Scheme. According to note 12 in the Tariff of Awards:

' Minor multiple physical injuries will qualify for compensation only where the applicant has sustained at least 3 separate physical injuries of the type illustrated below, at least one of which must still have had significant residual effects 6 weeks after the incident. The injuries must also have necessitated at least 2 visits to or by a medical practitioner within that 6-week period.'

In addition to the minimum, there is also a maximum payment of £500,000.<sup>60</sup> It is also the case that compensation is not payable for the first 28 full weeks of lost earnings or earning capacity,<sup>61</sup> and that persons convicted of an unspent offence are disqualified, even if the offence is wholly unrelated to terrorism.<sup>62</sup>

48 Even greater qualifications apply to the second aspect of victimology, property or other financial loss. The troubled situation in Northern Ireland, and the fact that it has for many decades scared away insurance companies from offering cover for terrorist-related damage means that the Northern Ireland scheme (which is based on the Criminal Damage (Compensation) (Northern Ireland) Order 1977)<sup>63</sup> does allow for compensation for terrorist acts. However, there are again limits. The terrorism must arise from activities by or on behalf of an unlawful association. It follows that isolated individuals, such as David Copeland, who planted three nail bombs in 1999, may not be covered.<sup>64</sup> In addition, compensation will not be paid in respect of:<sup>65</sup>

- 'a. any damage to, destruction or theft of
  - i. coins, bank notes, foreign currency, postal orders, money orders, or any postage stamps;
  - ii. any articles of personal adornment, including watches and jewellery unless kept by the owner as part of stock in trade; or
- b. property taken from a damaged vehicle or building except in certain circumstances e.g. if the property was stolen from a damaged building in the course of a riot.'

As far as claims within Great Britain within the purview of the Criminal Injuries Compensation Authority, there is no scheme whatsoever for compensation where the property or other financial loss is unrelated to personal injury. In such cases, the only state aid is by way of the Pool Re scheme which is designed to ensure that, unlike in Northern Ireland, insurance cover remains available. The scheme arose from bombings in the City of London in St Mary Axe 1992 and Bishopsgate in 1993 which produced a response from the government, concentrated around the Reinsurance (Acts of Terrorism) Act 1993.<sup>66</sup>

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<sup>60</sup> Criminal Injuries Compensation Scheme 2001, para.24.

<sup>61</sup> Guide to the 2001 Criminal Injuries Compensation Scheme, para.4.13

<sup>62</sup> Criminal Injuries Compensation Scheme 2001, para.13(e)

<sup>63</sup> SI No. 1247. See Greer, D.S. and Mitchell, V.A. (1982) *Compensation For Criminal Damage*, Belfast: SLS Legal Publications

<sup>64</sup> (2000) *The Times* 1 July p.1; Wolkind, M., and Sweeney, N., 'R v David Copeland' (2001) 41 *Medicine Science and Law* 185

<sup>65</sup> A Guide to Criminal Damage Compensation in Northern Ireland, para.10

<sup>66</sup> See Walker, C., 'Political violence and commercial risk' (2004) 56 *Current Legal Problems* 531.

49 In conclusion, it could be argued that the present structures for dealing with the victims of terrorism suffer from two defects. First, there are the gaps and shortcomings which have already been listed. Provision and cover are far from total or generous. The second issue arises from a wider perspective and is the overall impression given of a legalistic and grudging attitude, in which victims must fight every step of the way to win compensation. It may be that in context of the victims of crime, no other stance is affordable. However, the same attitude in regard to terrorism arguably fails to give due prominence to social solidarity and the state's interest in restorative measures as an aspect of anti-terrorism policy.

50 One might contrast, with some hesitation, the US Department of Justice's Office for the Victims of Crime,<sup>67</sup> which has a Terrorism and International Victims Unit to provide positive assistance to individuals and communities, as well as responding to financial claims. A whole array of changes to the Victims of Crime Act of 1984, as amended,<sup>68</sup> affecting the Antiterrorism and Emergency Assistance Program, were brought about by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (commonly called the USA PATRIOT Act).<sup>69</sup> The list of potential applicants has been expanded to include not only eligible State crime victim compensation and assistance programs, but also victim service organisations, public agencies, and non-governmental organisations that provide assistance to victims. Prior amendments allowed for payment to victims of international terrorism outside the US.<sup>70</sup> The scheme also encourages support for victim participation in criminal justice proceedings against terrorists by including travel costs to court or closed-circuit viewing facility, counselling, and advocacy. Available funding includes:

'A. Crisis Response Grant. Funding to help rebuild adaptive capacities, decrease stressors, and reduce symptoms of trauma immediately following a terrorism or mass violence incident.

B. Consequence Management Grant. Funding to help victims adapt to the trauma event and to restore the victims' sense of equilibrium.

C. Criminal Justice Support Grant. Funding to help facilitate victim participation in an investigation and prosecution related to an act of terrorism or mass violence.

D. Crime Victim Compensation Grant. Funding to reimburse victims for out-of-pocket expenses related to an act of terrorism or mass violence. Emergency Fund dollars may not be used to cover property loss or damage.

E. Training and Technical Assistance. Funding to assist in identifying resources, assessing needs, coordinating services to victims, and developing strategies for responding to an act of terrorism or mass violence.'

Moving to business and property victimisation, this aspect is taken up by the recently maligned Federal Emergency Management Agency (FEMA).<sup>71</sup> The agency co-ordinates emergency planning and response but also makes Federal grants to assist state governments to overcome disasters. In the case of September 11<sup>th</sup>, one might compare Pool Re and the ad hoc UK government grants to

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<sup>67</sup> <http://www.ojp.usdoj.gov/ovc/familycallcenter.htm>

<sup>68</sup> 42 U.S.C. §10601.

<sup>69</sup> PL 107-56

<sup>70</sup> Antiterrorism and Effective Death Penalty Act of 1996.

<sup>71</sup> <http://www.fema.gov/>

FEMA's Mortgage and Rental Assistance (MRA) Program.<sup>72</sup> The program covers the rent or mortgage payments for those who suffer financial hardship as a result of a major disaster declared as such by the President.<sup>73</sup> The household must have suffered at least a 25 percent loss of income and be in peril of eviction, dispossession, or foreclosure as a result of the disaster. In the case of New York, this could apply to a business (or its employees) in the World Trade Center area that was either physically damaged or inaccessible or even someone who suffered because their company did business with a World Trade Center area firm, even someone outside New York and even a non-US national.

### ***Organisations***

51 There remains a strong case for an organisational review by a public inquiry. Does the United Kingdom have the right organisational structures to attain its strategic goals against terrorism? Are the reforms within the police (the setting up of a Counter Terrorist Command and regional structures) and Home Office (in the form of the Office for Security and Counter Terrorism) really appropriate? Does the division between Security Service and Secret Intelligence Service 'enhance information sharing between those agencies involved in combating terrorism' which is said to be vital?<sup>74</sup> And does it really 'provide better co-ordination and focus for our counter terrorism effort across government' when vital functions regarding planning and emergency (two strands of CONTEST) are left primarily within the Cabinet Office?

### ***Foreign suspects***

52 The rendition of suspects on the foot of memorandums of understanding has been widely condemned. As argued elsewhere,<sup>75</sup> these devices may eventually prove to be worthwhile, but in the short-term, there should be much stronger and clearer legislation to set standards for such arrangements, as well as review mechanisms.

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<sup>72</sup> Section 408(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act

<sup>73</sup> <http://www.fema.gov/diz01/d1391tp07.shtm>.

<sup>74</sup> Possible Measures Paper para.3.

<sup>75</sup> Walker, C., 'The treatment of foreign terror suspects' (2007) 70 *Modern Law Review* 427.