PRE-CHARGE DETENTION OF TERRORIST SUSPECTS

Home Office

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INTRODUCTION

As announced on the 7 June, we have completed an extensive consultation on the measures proposed for the counter terrorism bill. This consultation included the options for pre-charge detention in terrorist cases which were published by the Home Office on 25 July 2007.

We are today publishing two documents arising from the consultation. The first is a report on the proposed measures by Lord Carlile of Berriew QC, the independent reviewer of terrorist legislation. The second is a summary of the responses to the public consultation.

We have said from the outset that we will do things differently with this bill and the consultation we have undertaken has been warmly received. A general consensus has emerged on most of the proposals put forward for the bill.

However, as these documents show, the question of whether we should extend the current limit on the detention of terrorist suspects prior to charge has given rise to considerable debate. On one side the police have made the case that in their professional judgement it is likely that, at some point in the near future, the situation will arise in a small number of exceptional cases where there will be a need to hold terrorist suspects for more than the current limit of 28 days. The independent reviewer of terrorism legislation, Lord Carlile of Berriew, has confirmed he shares this judgement. On the other side, concerns have been expressed by community groups and others that there has not yet been any firm evidence to support an extension to pre-charge detention and that any moves to do so could have a detrimental effect on community support for anti-terrorism legislation.

The Government has a duty to listen to both sides of this argument. The first priority of any Government must be to ensure the protection of its citizens. This means considering carefully the case made by the police for additional powers to detain terrorist suspects. But it also means listening to the views of community groups and others about the impact that such further powers may have on how people, particularly in minority communities, perceive the Government's work on counter terrorism.

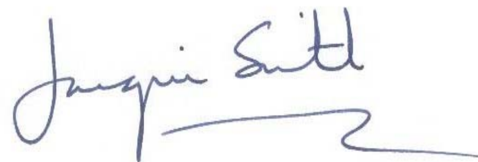
All of us can agree that, if a higher limit than 28 days is needed because of exceptional operational reasons then such powers must not be used rashly or routinely. The purpose of this paper is therefore to set out the case for making it possible to go beyond 28 days, but only where this is exceptionally required and then only for a strictly limited period of time. Such powers should only be used where there is a clear operational need related to a particular operation

or investigation and should be supported by strong parliamentary and judicial safeguards. I believe this approach is significantly different from the one originally proposed by Government and that it balances the need to protect the public by extending the limit when and where there is a compelling operational need against any risk of introducing blanket powers. I believe our new proposal addresses many of the concerns that have been raised during the consultation but still enables the police to have the powers they need to protect the public, when they need them.

As the Prime Minister said in his statement to Parliament on 14 November, we now need to discuss pre-charge detention further – both inside Parliament and with the wider community – with the aim of achieving a consensus on the way forward.

This document is the next stage in that process. Over the next few weeks, my department will be discussing the new model proposed both inside Government, with the Opposition parties, and with community and civil liberty organisations.

I believe all of us, from all sides of Parliament and in all communities, want to achieve the strongest level of public protection and to secure the successful prosecution of those who seek to terrorise us. But we also want to do this in a way that is compatible with human rights and which protects the hard won liberties of individuals. It is important that we all engage seriously in the debate about the detention of terrorist suspects before charge and that we strive to obtain that balance.



Jacqui Smith MP

THE CASE FOR EXTENDING PRE-CHARGE DETENTION

We are facing an unprecedented threat from terrorism in this country. The seriousness of the threat and the way in which the threat is developing means that it may be necessary to go beyond the current limit of 28 days if we are to bring to justice those who are guilty of carrying out serious terrorist attacks. Although there has not yet been a circumstance where more than 28 days has been needed to charge a suspect, the full 28 days have been needed in two separate investigations. The case for going beyond the current pre-charge detention limit is based on the trend for increasingly complex plots involving increasing amounts of evidence and data, in a great variety of forms, often with very significant international links.

There are a number of factors which together contribute to the case for saying that more than 28 days will be needed in future.

<u>The Threat</u>

The threat from international terrorism is real and severe and shows no sign of diminishing. In fact, the reverse is true. As Jonathan Evans, the Director General of the Security Service recently outlined, the police and Security Service are currently working to contend with around 30 known plots, over 200 groupings or networks, totalling around 2,000 individuals. This figure is the highest it has been. It is not a spike, but a new and sustained level of activity as evidenced by the fact that there have been 16 plots primarily targeting the UK since 2000.

In this year alone, so far a total of 42 individuals have been convicted of terrorist offences in 16 cases. The number of people charged with an offence after arrest under the terrorist legislation grew from just over 50 in 2004 to around 80 in 2006.

Since the late 1990s it has been clear that this new terrorist threat is not just quantitatively different but qualitatively different from previous threats. It is aimed at causing <u>mass casualties with no warning</u>, and with no limits on method – including the use of suicide attacks, and a clear intent (if not necessarily capability) to use chemical and biological attacks.

So as well as monitoring a wide range of threats, the police and Security Services have a duty to intervene early, to protect the public, at a point when there may not be much evidence against suspects. This means that more work needs to be done after suspects are arrested in terrorist investigations than is the case with other crimes. In the 2004 Barot case, for example, Deputy Assistant Commissioner Peter Clarke, the National Co-ordinator of Terrorist Investigations said that, “there was not one shred of admissible evidence” at the point of arrest. Barot subsequently pleaded guilty and was sentenced to 40 years.

The complexity of cases

Recent terrorist cases have confirmed that operations are growing in complexity and scale – in terms of material seized, use of false identities, multiple languages and dialects and international links. Recent operations have shown that the amount of material involved in cases is increasing and that plots are making greater use of complex technology.

Material seized: the amount of evidence that needs to be sifted during terrorist investigations has been growing. There is a greater use of encrypted computers and multiple mobile phones – in part as terrorists deliberately seek to use multiple media to cover their tracks. There is the added difficulty that material is often not in English and thereby requires translation. Translation is often not straightforward because it can involve dialects which are not common and where there are only limited translation services available. This is particularly true of those plots which have significant international links, often involving more than one country outside the UK.

International links: In relation to the 2004 fertiliser plot, Peter Clarke commented that: "At the time, it was the largest counter-terrorism operation ever seen in the United Kingdom. The success was achieved through close cooperation and sharing of intelligence between the United Kingdom, the USA, Canada and Pakistan." Since then we have seen even more complex cases. The most recent operation in Glasgow and London involved a mix of nationalities and links to Australia. The pace of the investigation can therefore sometimes be dictated by the pace of response from other countries, coupled with difficulties experienced in reconciling different legal or evidential practices and procedures in foreign countries.

To demonstrate the increasing complexity of cases, in the Dhiron Barot case in 2004, there were 274 computers seized compared with 400 computers in the alleged airline plot in 2006. In addition, there were approximately 2,000 computer discs, CDs and DVDs in the Dhiron Barot case compared with approximately 8,000 computer discs, CDs and DVDs in the alleged airline plot. Finally, there were 8,224 exhibits seized in the Dhiron Barot case compared with in excess of 25,000 in the alleged airline plot.

At the time of the arrests of the three men convicted in June this year for internet-based incitement to murder, computers, hard drives and other data storage media were seized, which together amounted to three terabytes of data, much of which was encrypted.

The case for an increased pre-charge detention limit

It is not suggested that there has yet been a case in which the current limit of 28 days for pre-charge detention has proved inadequate. But the Government has a duty to ensure that all its citizens are protected from terrorism and that means ensuring that terrorists are brought to justice wherever possible and as quickly as possible. It should never be the case that terrorist suspects escape prosecution simply because the police do not have the powers they need. Obviously any such powers must be exercised only where there is a clear operational need and, because they involve issues of personal liberty, they must be of an exceptional nature and supported by strong judicial and parliamentary safeguards. The police have given their professional judgement that the trend seen in recent cases will continue: that there may be more cases in the future which involve a further increase in complexity, with more material to be examined, with the potential for it to take longer to be able to reach the point of charge.

This relates to a trend in the most complex and difficult cases over a number of years. No individual case since the alleged airline plot in August 2006 has yet exceeded that plot in complexity – though there have been a number of arrests and charges for terrorist offences in alleged plots since then. But the fact that in the period since August 2006 we have not experienced a more complex plot does not mean that we should not expect such a case to arise. That would be complacent and not consistent with our experience of the increasing complexity of cases in the last few years. The important point is that we must ensure our laws can protect everyone from terrorist attack. Those who plot such atrocities need to be dealt with using laws which are fair and proportionate. This means that we must ensure the proper legal procedures are adhered to, including the need to bring suspects before a judge at the earliest possible opportunity. But that does not mean that we can accept a system whereby terrorists are not brought to justice simply because their plots are so complex, or of such a scale, that the police are unable to charge them within the time allowed. That is why we have a duty to consider extending the current limit.

The Home Affairs Select Committee in their report on pre-charge detention in June 2006 recognised the problem when they said:

‘None of the evidence we have reviewed of current and recent investigations would have justified a maximum detention period longer than 28 days. But the growing number of cases and the increase in suspects monitored by the police and security services make it entirely possible, and perhaps increasingly likely, that there will be cases that do provide that justification. We believe, therefore, that the 28 day limit may well prove inadequate in future.’

This accords with the position of the police as set out by Sir Ian Blair at the Home Affairs Select Committee on 9 October when he said:

‘Our position remains that the number of the conspiracies, the number of conspirators within those conspiracies and the magnitude of the ambition in terms of destruction and the loss of life is mounting, has continued to mount, is increasing year by year and a pragmatic inference can be drawn that at some stage 28 days is not going to be sufficient’.

And

‘there is no case that we have so far had [where more than 28 days has been needed] but we believe that cases will emerge and when that happens we should be in a position that Parliament has discussed this and made its own conclusions before we face an atrocity. Had the bombs gone off in Haymarket then we could have been facing loss of life in the hundreds and that would have been a difficult time to discuss an extension of this particular power.’

And of Ken Jones of the Association of Chief of Police Officers who has said:

‘investigators are facing an unprecedented international dimension in terrorism cases and the necessary enquiries to ensure public safety have a time dimension to them that is not catered for within the existing timescales.’

In his report on the proposals for the counter terrorism bill published today, Lord Carlile, the independent reviewer of terrorism legislation has said:

‘I share the view of the police that there may well arise in the future a very small number of extremely important cases in which 28 days would prove insufficient’.

<u>Use of Civil Contingencies Act</u>

As part of the consultation, a number of respondents expressed support for the Civil Contingencies Act (CCA) option proposed by Liberty.

We believe that any legislation extending pre-charge detention for terrorist suspects should be done in anti-terrorism legislation. The CCA goes much wider than terrorism and we believe it would be preferable to make any changes to the law using anti-terrorism legislation rather than trying to adapt other legislation for purposes for which it was not intended. We believe the CCA option also has a number of fundamental flaws:

It is not entirely certain that the CCA could be used to detain individuals as opposed to restrict their movement. This uncertainty adds additional risks to using the CCA in a context for which it was not envisaged. It is preferable for Parliament to amend the pre-charge scheme that is already specifically provided for terrorism rather than to rely on the CCA which is aimed at different circumstances.

The Civil Contingencies Act (CCA) could not be used in <u>all</u> the circumstances where the police might need more than 28 days. Although it may be possible

to use it in a 9/11 type situation where there is significant disruption to the life of the nation, it might not be possible to use it where the police have *disrupted or foiled* a large and complex plot where the suspects have been arrested. This is because there is some legal doubt whether such a case would meet the CCA test of an emergency where there must be a war or terrorism which threatens serious damage to the security of the UK (or the threat of serious damage to human welfare or the environment in the UK). Such an emergency must have occurred, be occurring or be about to occur. The fact that the plot was being monitored and was foiled and the suspects were in custody could be taken to mean that no such emergency had occurred, was occurring or was about to occur. There would also be a question as to whether the CCA could be used where a plot was foiled in this country which involved a conspiracy to commit a terrorist outrage overseas.

The police may need to detain individuals beyond 28 days because of the particular nature of the case not because it is part of an outrage that would constitute an emergency as defined in the CCA – for example, there may be a case where a plot is foiled but which is particularly complex in terms of the amount or type of material involved or which involves a vast number of international connections. Such an operation may not constitute a national emergency but might require more than 28 days to enable suspects to be charged.

The CCA requires confirmation of the emergency regulations by affirmative debate in both Houses within 7 days. These debates would be limited in what could be said because of the ongoing operation and would take resources away from dealing with the immediate situation.

Other alternatives to extended pre-charge detention

It has been suggested that greater use of the threshold test and enabling post charge questioning and the use of intercept material as evidence would remove the need to extend the current pre-charge detention limit.

Threshold test

The threshold test is already frequently used in terrorist cases. It enables suspects to be charged at a much lower threshold than that required by the Code for Crown Prosecutors ‘full code test’ which requires enough admissible evidence for there to be a realistic prospect of securing a conviction. The threshold test means that a suspect can be charged when much of the evidence is not available but there is at least a reasonable suspicion that an offence has been committed and a likelihood that sufficient evidence will become available within a reasonable time. Where these conditions are satisfied and the individuals detained present a threat either to other individuals or to the public if released pending the outcome of the investigation, the CPS may authorise the police to charge him/her. The test is already fully used in terrorism cases but it cannot be used in all instances. An

extension of pre-charge detention for more than 28 days may be needed in a case where although there is reasonable suspicion that an offence has been committed, and evidence is anticipated to be found in the material to be examined (or expected from overseas), the likelihood of that evidence being available within a reasonable time is not sufficiently certain for the threshold test to be met. So while the threshold test is useful in some cases it is not the whole answer to this question.

Post Charge Questioning

Time is needed pre-charge to uncover and analyse evidence against a suspect as well as to put that evidence to the person in interview. Terrorist suspects very often give 'no comment' interviews in any event so post charge questioning does not address the same need as pre-charge detention.

We do, however, believe that post charge questioning for the offence for which the suspect has been charged would help the police and CPS to strengthen the case against terrorist suspects thereby helping to secure more successful prosecutions as an important element of this will be to allow adverse inferences to be drawn where the suspect refuses to answer questions. The police are already able to question a suspect post charge about other offences as, if the police have a reasonable suspicion (perhaps based on further evidence coming to light) that the suspect has committed another terrorist offence, they can simply arrest them for that offence and question them in the normal way.

We therefore agree with the Home Affairs Select Committee that while post charge questioning will reduce the pressure on investigation teams, it will not eliminate the need for extended pre-charge detention because it will not reduce the evidential threshold that is needed to charge a person in the first place.

Intercept as evidence

It has been suggested by some commentators that a repeal of the current statutory bar on the use of intercept material would make the prosecution of terrorist cases significantly easier, and that this would therefore avoid the need to consider any change to the period of pre-charge detention.

The Privy Counsellor Review Committee, chaired by Sir John Chilcott, is currently looking at the issue of whether intercept material could safely be used as evidence. It would be premature to comment in any detail before the committee has reported. It is fair to say though that previous reviews of particular cases have suggested that allowing intercept to be used as evidence would not make a significant difference in the ability to bring charges in terrorist cases or to reduce the time taken to bring charges.

The issues being addressed by the Review Committee relate to whether it is possible to preserve national security – including maintaining secrecy about

interception techniques and capabilities – while also introducing intercept material for use both by the prosecution and the defence. Clearly, this does not directly address the increasing complexity of cases highlighted earlier in this paper: increasing amounts of material seized, use of false identities, multiple languages and dialects, and international links. Nor is intercept intelligence inevitably available or relevant to all cases. If the Review Committee were to find, and the Government to accept, that there is a way safely to introduce intercept material into criminal cases, then it is possible that in some cases this might help bring charges earlier. But there is no reason to suppose this would assist in all the cases in which a longer period of pre-charge detention might be operationally needed.

Even taken together, therefore, we do not therefore believe that these measures will remove the need for extended pre-charge detention in all the cases where we envisage it might be required.

International comparisons

It has also been suggested by some commentators that the existing period of pre-charge detention in the UK exceeds that in any comparable country. In this country a judge needs to authorise any detention beyond 48 hours and this compares very well with the judicial safeguards in other countries. Comparisons on the number of days suspects can be held before charge can be misleading. It is not straightforward to try and compare the UK's pre-charge detention scheme with figures from countries which have very different systems and approaches to ours. It is simply not a case of comparing like with like. No other European country has the identical charging process and threshold tests that we have or the same adversarial system. Judicial detention in some countries is frequently authorised on lesser tests and can continue for months and, in some cases, years. For example in France, while it is true that the initial period of police detention following arrest can only continue for 6 days, after that it is possible for a suspect to be detained under the authority of an examining magistrate for up to 4 years while the investigation continues but before a formal charge of the kind recognised in UK law is made.

We can all think of recent examples where suspects are considered under investigation for considerable periods of time before they are charged, which may not be until very near the beginning of a trial. For example, the suspects in the Meredith Kercher killing can be held in Italy for a year and yet they have not been charged – their system simply works in a different way to ours.

Even for some common law countries, simple comparisons of number of days can be misleading because such countries outside the EU are not bound by the requirements of the ECHR.

We believe, on balance, that the systems and safeguards we have in the UK compare favourably to those in other countries.

AN OPERATIONALLY TRIGGERED, EXCEPTIONAL AND TIME LIMITED INCREASE WITH ADDITIONAL SAFEGUARDS

The Government cannot ignore the risk that, in the near future, it is possible that a serious terrorist suspect may need to be released because the police have insufficient time to bring a charge for a terrorist related offence. It is the responsibility of Government to protect all citizens and to ensure that the appropriate legislation is in place to enable law enforcement agencies to carry out their difficult task. We cannot leave it until a situation arises where the necessary powers are found to be inadequate and public protection is compromised by the police having to release a terrorist suspect who might then go on to commit a terrorist attack. Based on the trends outlined in this paper, the Government believes there is a clear case for going beyond 28 days in future in a small number of exceptional cases.

But the Government also accepts that any powers which affect personal liberty must only be used when there is clear evidence that they are needed, that the powers should therefore only come into force when a specific situation suggests that there are exceptional operational circumstances, and that the powers should be temporary in nature, with strong parliamentary and judicial oversight of the use of such powers.

That is why we wish to consult further on this issue with a view to reaching a broad consensus on the way forward.

It is clear, however, from the extensive consultation that we have carried out so far that many are concerned about the implications of extending the possibility of pre-charge detention beyond 28 days. We have listened carefully to the views of community groups and others on this issue. In particular we have looked again to see if there is any way we can meet the need to protect the public without bringing in permanent powers. This approach is significantly different from the Government's original proposal – including as it does the need for a clear operational trigger and substantial parliamentary safeguards.

We have considered further the option of using the Civil Contingencies Act to go beyond 28 days. We believe there are problems with using the Civil Contingencies Act as set out above. However, we have considered if there is some way we can make use of the Civil Contingencies Act's guiding principle which makes any increase in pre-charge detention exceptional, temporary and dependent upon specific operational need.

We are therefore proposing to legislate in the counter terrorism bill to increase the pre-charge detention limit beyond 28 days to 42 days only for a strictly limited period of time and in response to a specific operational situation. The higher limit could only come into force where there is a specific operation exceptionally requiring the powers, and then remain in force only where there are compelling operational reasons. The decision to bring a higher limit into force could only be made by the Home Secretary after receiving a joint report from the Director of Public Prosecutions and the police setting out their

reasonable grounds for believing that more than 28 days will be required to obtain, preserve or examine relevant evidence and stating that the investigation is being carried out diligently and expeditiously. The higher limit would therefore not be made available unless the Home Secretary was satisfied it was required in relation to a specific operation and would only remain in force for a limited period.

The decision to introduce a higher limit must be made by someone who is accountable to Parliament and the people for their actions, although it will, of course, need to be based on operational advice. If after considering all the relevant operational advice, the Home Secretary decides to bring into force the higher limit, it would come into effect on the day on which he or she signs the order making the higher limit available. The Home Secretary's decision could be subject to judicial review.

The Home Secretary would then be required to provide a statement to Parliament within 2 days, or as soon as practicable, after bringing the higher limit into force. This statement would include statements such as that:

- a terrorist investigation is occurring which has given rise to an exceptional operational need.
- The investigation relates to the threat of serious damage as a result of terrorism.
- The higher limit is urgently needed and is necessary in order to prevent, control or mitigate terrorism.
- The higher limit is compatible with ECHR.
- The Home Secretary has received the required report from the DPP and police.

To emphasise that the higher limit is exceptional it can only remain in force for a maximum of 60 days. The higher limit would need to be agreed following a debate in both Houses of Parliament within 30 days of it coming into force. If not approved, the limit would revert after 30 days to the lower limit. Even if the agreement of Parliament was obtained, the higher limit would fall automatically after a further 30 days. The maximum amount of time that the higher limit could therefore remain in force would be 60 days and only then if it had been debated and approved by Parliament. We believe that the need for parliamentary approval at the 30 day point is a substantial safeguard which will ensure the higher limit is subject to full parliamentary scrutiny. The fact that the higher limit must fall automatically at the maximum 60 days after coming into force means that it can only ever be a temporary power. We believe this is right and that it addresses some of the main concerns about extending the pre-charge detention limit that have been raised as part of the consultation.

Under this proposal, the 14 day limit would remain the standard, permanent limit with the 28 day limit needing to be agreed annually by Parliament as now. The new, temporary, upper limit of 42 days could only become law where there was an exceptional operational need and under a 'triple lock'

comprising of a report by the police and DPP on a specific operational need, the agreement of the Home Secretary and a set of strong parliamentary and judicial safeguards. The 42 day limit could only ever remain in place for a maximum of 2 months. We believe the 42 day limit, together with the proposed safeguards, balances the needs of the police against understandable concerns regarding excessive detention.

The detention of individual suspects beyond 28 days would remain a matter for judges to decide. The exceptional and temporary higher limit would be backed up by strong judicial controls and parliamentary scrutiny:

- Continued detention in individual cases beyond 28 days would need to be approved by a judge at least every 7 days – as is currently the case beyond 48 hours. Judges will only be allowed to approve the continued detention of a suspect if this is necessary to obtain or preserve evidence and where they are content that the investigation is being carried out diligently and expeditiously.
- Applications for such extensions will require the consent of the Director of Public Prosecutions.
- Parliament would be required to approve the 42 day limit 30 days after it was made available and the higher limit would apply for a maximum of 60 days.
- Parliament would be informed each time an application to hold someone for more than 28 days was approved by the courts.
- The independent reviewer of terrorist legislation would report to Parliament on the operation of the higher limit in individual cases and on the decision to bring the higher limit into force. There would be a debate in Parliament on the report.

A diagram showing how this proposal would work is attached. We believe this proposal balances the concerns of the police against those in the wider community but we would now like to discuss it further with interested parties both inside and outside Parliament.