



JOINT RESPONSE OF THE LAW REFORM COMMITTEE OF THE GENERAL COUNCIL OF THE BAR AND THE CRIMINAL BAR ASSOCIATION TO THE HOME OFFICE CONSULTATION ON PROPOSALS FOR THE COUNTER TERROR BILL 2007.

INTRODUCTION.

1. The Law Reform Committee of the General Council of the Bar (“LRC”) and the Criminal Bar Association (“CBA”) welcome the opportunity to respond to the Home Office Consultation ahead of the Proposed Counter Terrorism Bill, dated 25 July 2007.
2. In drafting our response we have reviewed the following documentation:-
 - a. The preliminary Government Discussion Document issued at the same time as the Home Secretary’s announcement of the consultation on the 7th June 2007.
 - b. The Home Office Consultation document “Possible Measures for Inclusion in a Future Counter terrorism Bill” dated the 25th July 2007, and associated documents, including
 - i. Scrutiny of Pre Charge Detention in Terrorist cases prepared by the CPS;
 - ii. “Options for pre-charge detention in Terrorist cases” Issued by the Home Office on the 25th July 2007;
 - iii. “Terrorist investigations and the French Examining Magistrates System” issued by the Home office in July 2007.
3. We note the general nature of the proposals, which, in their current form, lack sufficient detail to comment in anything other than the most general fashion. We note the expressed intention to share “draft clauses” later this year¹, and will welcome the opportunity to make further representations on the detail of the bill, during this further consultation period. We would be more than happy to meet with representatives from the Home Office once they have had the opportunity to consider our response.
4. Our response at this stage is therefore general, and obviously lacks detail. We propose to consider the principle of the proposals under the headings in which they appear in these documents.

PRE CHARGE DETENTION

¹ See para 2 of the June discussion document.



5. The General Council of the Bar was opposed to the introduction of the 28 day detention without trial provision contained within the 2006 Terrorism Act. The case for any extension of the 28 day time limit has not been made out. The LRC and CBA therefore oppose options (i)², (ii)³ and (iv)⁴ in the options paper. Option (iii) would not require any further legislation and empowers the Government to take emergency powers justifying detention up to 30 days with parliamentary approval.

6. The purported justifications advanced for an extension of the 28 day limit in the document entitled “Options for Pre-charge detention in Terrorist case”, are selective and somewhat misleading. Dealing with matters raised in the document chronologically we comment as follows:-
 - a. Whilst obviously accepting the gravity of the threat, the suggestion that the statement of the Deputy Assistant Commissioner that in the case of Barot there was no “admissible evidence” on the day of arrest, cannot justify any further extension. The state of the admissible evidence well justified charge of all defendants in the Barot case long before the expiry of the 28 day period.⁵ The case cannot found a justification for any further extended period of detention

 - b. **Complexity.**⁶ Whilst terrorist cases may be complex in the sense that they may involve seizures of large volumes of material, the use of false identities, and international links, the scale of the investigations is not unusual. Investigations of comparable size and with the same features are found in drug trafficking and fraud cases. These features are not unique to terrorist cases and cannot justify further extension. The experience of the Bar is that very often whilst (due to the thoroughness of the investigative teams) large volumes of materials are seized, the real issues frequently involve a modest number of exhibits, the existence of which is well known from shortly after arrest. Detailed questions based upon recovered material are put to suspects in interview within the early stages of detention (the “interview material”), and this material is only exceptionally shown not to fairly represent the thrust of the allegation against suspects. Whilst further evidence may subsequently come to light which puts this “interview material” into a fresh light this is unlikely to bear upon the decision to charge.

² Immediate extension of the 28 day deadline for unspecified period, subject to judicial scrutiny.

³ Taking the powers in option (i) but not immediately introducing the same.

⁴ Adopting a French system of judicially supervised prosecution

⁵ See for example the detailed allegations put to them during the course of their interviews within the period.

⁶ See pages 3-4



7. The LRC and CBA remain convinced that appropriate use of other measures means that the 28 day period should not be extended. To give two examples, we believe the admission of intercept evidence, and appropriate use of the “threshold test” for determination of whether there is sufficient evidence to charge, militate against any extension of the existing pre-charge detention provisions.

INTERCEPT AS EVIDENCE.

8. The General Council of the Bar has long been in favour of the admission of intercept evidence. We welcome the proposed review on Privy Council terms of the intelligence ramifications of such a reform provided that it is not being used to evade a prompt resolution of the issue. However, we have one substantial reservation about the review: it would be highly inappropriate for Parliament to reconsider the length of pre-charge detention before it determines whether intercepts should be admissible:
 - a. Parliament should be made aware of the procedures adopted for listening to, recording and reporting upon telephone intercept material. If intercept material were admitted, it is likely that in many cases sufficient material to justify charge could be placed before the Crown Prosecutor either before or shortly after arrest and initial detention. Whilst the material may not at that stage be in an evidential form, application of the “threshold test” would justify charge immediately.
 - b. The position is perhaps best illustrated by consideration of the assistant commissioner’s remarks concerning Barot, that “no admissible” evidence existed at the date of charge. We doubt such a statement could have been made had intercept evidence been admissible at the time. The use of intercept evidence is likely to foreshorten periods of pre-charge detention significantly
9. We would encourage the Government to accelerate the review, and not place before Parliament any attempt to extend pre-charge detention, until the outcome of the review is known.

The Threshold Test.

10. We see no objection to the proper application of the “threshold test”. The proper application of this test also substantially lessens the need for any extended period of pre-charge detention. Early access by the Crown Prosecutor to other material, such as that protected by Public Interest Immunity claims from disclosure to the defence, can similarly



be used to justify early charge, where the production of the material in evidential form may take some time. We give a number of examples:-

- a. The interception of e-mail traffic and the reading of the contents of computers for intelligence-gathering purposes, are without doubt highly sensitive. The evidence of how interception is carried out can never be given, because to do so would disclose highly confidential techniques. However, the prosecutor in making his decision to charge, based upon the “threshold test”, could properly have regard to this material in determining whether to charge, if the computers from which the communications were made had been seized for examination.
- b. Similarly, investigations abroad, are most often stimulated by intelligence already gathered by the time of arrest. An assessment can readily be made as to whether it can eventually be used in evidence. If this is the case, such intelligence could properly be used in the application of the “Threshold test”.
- c. Finally the use of “supergrasses” referred to in the consultation document⁷ can not form any justification for delay in charge. Again, if it is known that the “supergrass” is co-operating, gives relevant evidence, but that evidence is not in suitable admissible form, then appropriate use of the “threshold test” can justify charge, prior to the evidence being placed in admissible form.

11. In the circumstances the LRC and CBA considers there is no case made out for any extension of detention, indeed there is little to suggest that the 28 day limit has thus far achieved its aim in any significant way.

12. **Procedural safeguards for extended pre-charge detention.** Being opposed in principle to any extension, we do not propose to comment in detail upon procedural safeguards. The document entitled “Scrutiny of Pre-Charge detention in Terrorist cases” produced by the Crown Prosecution Service sets out some of the steps taken. The due diligence test applied by the courts is similar to that applied day in and day out in consideration of applications to extend custody time limits. The suggestion that the work which goes into these applications is “extensive”, “extremely onerous” and “a huge resource burden”⁸ is an exaggeration when taken out of its proper context in the consideration of non-terrorist police and prosecution procedure, these applications being similar to those made by the CPS routinely in the course of prosecutions where defendants are held in custody.

INFORMATION SHARING TO ASSIST INVESTIGATIONS & SECURE MORE CONVICTIONS

⁷ Page 7.

⁸ Para 10 p2



Disclosure in relation to suspected terrorist financing

13. Subject to appropriate safeguards, we welcome in principle the proposal to include the voluntary sector within these provisions. However, no doubt the voluntary sector is best placed to comment upon this particular proposal.

Measures in relation to DNA of terrorist suspects

14. We welcome the initial three proposals; to put the police counter terrorism DNA database on a proper statutory footing, to ensure that DNA samples and fingerprints obtained under the Terrorism Act 2000 can be loaded onto the national databases and to allow the security services to cross reference material they obtain with the National DNA database for national security purposes.

15. We are concerned by the current proposal to treat DNA and fingerprint samples following the service of a control order in the same way as those obtained following arrest under either the Terrorism Act 2000 or ("PACE"). A person who is no longer subject to a control order (assuming they are not under arrest of the subject of a criminal charge) should be afforded the same rights as an individual who has never been the subject of such an order.

Collection of Information likely to be of use to terrorists

16. We agree that section 58 of the Terrorism Act 2000 should protect service personnel and key, specified personnel. We do not think it necessary for the provision to be extended to cover other groups.

MEASURES TO DEAL WITH TERRORIST SUSPECTS POST CHARGE & AFTER SENTENCE

Post-Charge questioning

The Proposals

17. The Government want to legislate for post-charge questioning for persons who have been arrested under the Terrorism Act 2000 'on any aspect of the offence for which they have been charged'. No consent



would be required. Adverse inferences would be available from failure to mention facts later relied on, as with interviews under caution. Such questioning is not presently permitted.

18. The Government intend to bring this measure in now, before they evaluate the results of an existing consultation process on the review of the Police & Criminal Evidence Act 1984 (PACE), which deals among other things with the issue of post-charge questioning in relation to all offences.

Our View in Summary

19. Our view is that the introduction of compulsory, inference-bearing questioning after charge is undesirable and unnecessary, and represents a very substantial change to well-established and sound practice. We do not think that the Government has made out its case for any such change in terrorism offences, and in particular it has not demonstrated an urgent need to introduce it now, in advance of the PACE review which would be pre-empted by it.
20. We object in principle to the proposal, and so do not make comments on the types of safeguards that would be called for, save to say that any such change must be accompanied by strict procedural rules to eliminate unfairness and the risk of oppressive conduct by the police.

The Origin of the No Post-Charge Questioning Principle

21. Under the common-law, judges sought to exclude any confession that might have been involuntary – made as a result of oppressive conduct or improper inducements by the police. It was widely recognised that the longer a person was in detention, the greater the temptation by the police to use improper methods and the greater the risk that the suspect would make a false confession in the hope of release of improved treatment. The principle was informally codified in the ‘Judges’ Rules’ and then put on a statutory footing in PACE and especially in Code C of the PACE Codes of Practice (see below).
22. The rationale for the presumptive bar on post-charge questions is the same: at the prolonged period of detention and questioning, the value of the suspect’s answers is likely to diminish. The bringing of a charge should be the end of the process: any unjustified continuation creates a risk that each side will see the charge as a negotiating chip: there may be a temptation to try to plea-bargain, by (falsely) confessing to



something in the hope that the charge will be reduced or dropped altogether.

Existing Powers

23. Paragraph 16.5 of Code C of the Codes of Practice drawn up by the Secretary of State pursuant to section 66(1) of the Police and Criminal Evidence Act 1984 ('PACE') governs interviews by police conducted after charge. It states:

'A detainee may not be interviewed about an offence after they have been charged with, or informed they may be prosecuted for it, unless the interview is necessary:

- to prevent or minimise harm or loss to some other person, or the public;
- to clear up an ambiguity in a previous answer or statement;
- in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted.'

24. This exception to the general rule was also in the Judge's Rules, and has long been recognised.

25. The interviewee is cautioned as follows: 'you do not have to say anything, but anything you say may be given in evidence'. Thus, there is no sanction in the form of an adverse inference if a suspect elects to make no comment to any such questioning.

26. There is no statutory provision placing a time-limit on post-charge questioning, which may (in theory) occur at any stage of the post-charge process as and when the need arises.

Comment

27. The provisions of Code C 16.5 extend only to questioning in relation to an offence with which the suspect has already been charged. If continuing police investigations disclose further offences, the suspect is liable to be re-arrested for them. When that happens, the entire process re-starts, and the suspect will be interviewed under the full



caution, so that any failure to answer may attract the inference under Section 34 of the Criminal Justice & Public Order Act 1994. Likewise, the time during which he may be detained before he is charged starts to run again.

28. The Government rely on the large scale and urgency of terrorist investigations to justify extended pre-charge detention and post-charge questioning. In the 'Options of Pre-charge Detention in Terrorist Cases' document, dated 25 July 2007 ('Options'), they claim that post-charge questioning 'would help the [investigating] team build the case against the accused...'
29. A likely factual scenario involves the CPS making use of the 'threshold' principle to charge a terrorism suspect with an offence for which it is reasonably anticipated that evidence will be obtained from ongoing investigations – for example, possession of an article for terrorist purposes under Section 57 of the Terrorism Act 2000. Later, when such material has been obtained (typically, it may be a computer with encrypted data), it may indicate the suspect's involvement in specific offences such as conspiracy to cause explosions.
30. The police may re-arrest the suspect for the newly discovered offences and re-interview him, relying on the information they have now obtained.
31. We bear in mind that the criminal justice system remains adversarial, and continues to respect the rights of those suspected of committing offences. A key element of the adversarial principle is that the Crown should present its case whole, for the defence to respond to if necessary. In our view, while recognising the challenges that the investigation of terrorist offences presents, it is vital to continue to respect the fundamental principles. It is potentially oppressive to allow the prosecution unlimited opportunities to question suspects, and to repeat the questioning, with a sanction of the adverse inference if they elect not to answer.
32. The reality is that, for the reasons given by the Government, the length and complexity of some investigations may mean that months will pass before a charged defendant is recalled for further questioning. He will probably have been remanded in custody, and the longer he has been in prison, the more likely (it may be thought) he is to be vulnerable and susceptible when repeatedly interviewed.



33. In addition, he will have begun preparing his defence case – defending himself against what he perceives to be the case against him. If that case is permitted to change substantially after he has begun his defence, there is the potential not only for unfairness, but also for further delay, as each fresh allegation may require rebuttal, and potentially the obtaining of further defence evidence. It would be unfair and prejudicial to allow the police to conduct interviews about the contents of a defence case statement, or other steps taken by a defendant while preparing his defence such as instructing an expert.
34. The proposition that the police need this power to build their case is worrying because it suggests a disproportionate reliance on interviews – particularly therefore confessions and inferences from silence – extending over a period of many months.
35. If highly probative material only becomes available post-charge, it is the material – online bomb-making instructions, or jihadi material for example – that will ‘build the case’ against the suspect. It is perhaps disingenuous to suggest that fairness requires giving the suspect the opportunity to be interviewed, because Code 16.5 already permits it. The substance of the proposed change is to continue to hold the threat of the adverse inference over the suspect long after charge. It should also be borne in mind that by the time the defendant serves his defence case statement, much more evidence will have been served than was known about at the point of charge: a failure in the defence case statement to plead facts later relied on in the course of the defence case at trial itself attracts an adverse inference.
36. It should also be borne in mind that the fact of making arrests is likely to disrupt any on-going terror plot, and that once taken out of play the suspect is likely to be of limited use to any other plotters. While not wishing to challenge the assertion that these investigations are urgent and conducted under pressure of time, we are not satisfied from the material that the Government has produced that public safety requires an unlimited power to interview a detained suspect.
37. If the Government to decide to adopt the proposals for post-charge questioning in some circumstances, we will seek to make detailed recommendations about the necessary limitations and safeguards.



38. However, as a general starting point, if there is a further interview after charge the reason for it should be clearly stated and there should be additional and separate pre-interview disclosure”.

Enhanced sentences

39. In principle we do not object; we note that the Court would decide whether an offence is terrorism related. Again, we await the publication of the proposals before making detailed comments.

Terrorist notification requirement

40. We welcome this proposal and note that its application is limited to terrorist related offences where a defendant was sentenced to a term of imprisonment of at least 12 months.

Terrorism travel overseas

41. The proposals seek consultation on the following:

- (a) An extension of paragraph 11 (2) of Schedule 7 of the Terrorism Act to enable the police to temporarily seize travel documents when it is suspected that an individual is travelling abroad for a terrorist purpose.
- (b) The introduction of a new foreign travel order to empower the courts to place limitations on foreign travel by convicted terrorists, and
- (c) Whether amendment to the Bail Act 1976 is necessary to “tighten up bail conditions in cases that are linked to terrorism but which do not involve specific terrorist activity”

42. The police should be given effective powers to prevent those suspected of wanting to travel for a terrorism-related purpose from so doing. However, the withholding of legitimate travel documents is a significant restriction on an individual’s freedom of movement and as such requires careful consideration. We note that under paragraph 11 (2) of Schedule 7 to the Terrorism Act 2000 the police already have the power to detain property at ports and borders (for seven days) in order to determine whether an individual, “*is or has been concerned in the commission, preparation or instigation of acts of terrorism.*” The consultation document does not make plain what further powers the police seek. We would welcome a proposal that an individual be required to provide all additional travel documents to those that they



are carrying at the time to the police. However, we would oppose any proposal to extend the period for which the police may retain property beyond seven days. Our view is that where the police have sufficient information to justify retention of the document beyond that period, the reality is that there would be sufficient information to reasonable suspect the commission of an offence and therefore move to arrest.

43. Further, we would be concerned to ensure that any draft clause ensures that this power could not be exercised in an arbitrary fashion. For example the power should not be used as a convenient means of preventing individuals, who are not the subject of a control order, from travelling abroad.
44. In principle, we do not impose the introduction of a new foreign travel order. We note that such an order would apply to convicted terrorists and be imposed by the Courts.
45. The Bail Act 1976 already empowers a court, when granting bail, to impose conditions where there is a substantial risk that a defendant would fail to surrender or commit further offences. Two conditions regularly imposed on defendants with connections abroad or weak community ties are to surrender all travel documents and not to apply for further travel documents. When objecting to bail or seeking that certain conditions are imposed, the Crown may put before the Court all the information it considers to be relevant. There is no requirement for the information to be available in evidential format. We do not consider it necessary to amend the Bail Act 1976 in order to further restrict the Court's discretion as to bail. For example, we cannot find any justification for altering the presumption of bail for those accused of terrorism or terrorism-related cases.

Forfeiture of terrorist assets

46. We welcome in principle the seizure of assets, if it can be shown those assets would be used to fund terrorism. There is insufficient detail to comment on these proposals in any meaningful way. The proposal is summarised as follows:

“We are considering extending this power to cover all those convicted of a terrorist or terrorist related offence where the court believes that their assets might be used for terrorist purposes.”



47. We are concerned that the proposal is too broad and prefers the test as currently set-out in s.23 (2) Terrorism Act 2000; which provides that property may be forfeited:

“(a) which, at the time of the offence, he [a defendant] had in his possession or under his control, and

(b) which, at that time, he intended should be used, or had reasonable cause to suspect might be used, for the purposes of terrorism.”

48. Further we are of the view that the Court should only be permitted to seize assets when it would be proportionate to do so. For example it might not be considered proportionate to seize a family home, simply because whilst at home, a defendant used his computer for a terrorist related purpose. It must also be the case that anyone with an interest in the property has the right to make representations to the Court before an order is made.

49. Clearly, these proposals are in their infancy and the LRC and CBA will comment further when they are more detailed.

OTHER MEASURES

Control orders

50. In principle we do not object, however, again, we await the publication of the proposals before making detailed comments.

Power to remove a vehicle & power to examine documents

51. We would welcome the extension of this power to the UK as a whole. We note that documents would only be examined during a lawful search and that the appropriate safeguards would be put in place to protect items subject to legal privilege.

Definition of Terrorism

52. We would welcome the acceptance of this proposal

Increased security of key gas sites



53. We do not propose to comment on this proposal.

Transfer of functions to the Advocate General (Northern Ireland)

54. We do not propose to comment on this proposal.

Minor technical amendments to Anti Terrorism, Crime and Security Act (ATCS) 2001

55. We would not oppose technical amendment to ensure consistency with other legislation.

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FOR AND ON BEHALF OF THE LAW REFORM COMMITTEE

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