

OPTIONS FOR PRE-CHARGE DETENTION IN TERRORIST CASES

Response to the Home Office paper of 25th July 2007 by the Mission & Public Affairs Council of the Church of England

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Introduction

1. Before proceeding to substantive issues, we express our appreciation of the consultative process in which the Government is currently engaged and its declared aim of enabling a new Counter-Terrorism Bill to go forward as far as possible on a consensual basis, after thorough discussion and reflection. It is highly desirable that such measures should not be enacted in a hasty or adversarial manner.
2. We recognise the force of the developments in terrorism and counter-terrorist activity which have prompted this review of the adequacy of current legislation. We welcome the identification of two key areas for improvement: sharing of information between agencies involved in countering terrorism and measures to deal with suspects after charging. However, we share the Government's recognition that the issue of pre-charge detention is "particularly sensitive" (para. 11 of the paper *Possible Measures for Inclusion in a Future Counter Terrorism Bill*) on account of its implications for individual liberty, and will offer detailed comments on proposals to increase the maximum period of detention and to amend the process of judicial supervision.
3. Although the aim of protecting the public from death, injury and intimidation through terrorist acts may need to be balanced at particular points against the protection of the rights of terrorist suspects, we reject the assumption that a general inverse relation exists between security and liberty such that a threat to security will necessarily require curtailment of liberty, and that curtailment of liberty will necessarily result in an increase in security. The Christian tradition, in common with liberal democratic political theory and human rights law, upholds the safeguarding of public safety and civil liberties alike as major claims upon government.
4. The protection of liberty within the rule of law is itself a major motive for resisting terrorism, and its erosion in response to threats to security constitutes a partial victory for terrorism. We accept that a blanket refusal to countenance any curtailment of liberty may give opportunities to those who seek to destroy it through indiscriminate violence. Nevertheless, the contention that liberty and security stand in conflict with one another, and any consequent remedies to resolve the conflict, must be justified by convincing evidence and rigorous argument.

Pre-Charge Detention

5. The issue of pre-charge detention must be set within the challenge to prosecute terrorists through the criminal justice system. We recognise that this challenge has deepened in recent years with the increasing complexity of terrorist activity and the corresponding complexity of counter-terrorist investigations. The quadrupling of the maximum period of detention from 7 days in 2000 to 28 in 2006 is one consequence of this. While acknowledging the importance of this factor, we support the Government's intention to pursue other means of making investigations more effective in leading to prosecutions with a realistic chance of success.

6. Terrorism differs from most other offences in the weight that must be given to preventing its commission, especially in the age of the suicide bomber and attacks without warning. The need to forestall major acts of violence means that those suspected of planning attacks must often be apprehended on the basis of information derived from intelligence and at a stage when a great deal of evidence remains to be gathered and evaluated. It is readily understood that the police face a challenge in assembling admissible evidence as the cumulative result of the factors adduced on pp. 3-4 of the paper: the volume and nature of material to be sifted in an investigation, the use by suspects of false identities and the international links involved in such cases. The police have also highlighted practical constraints in the process of detaining and interviewing, such as the provision of interpreters, consultation of multiple clients with solicitors and allowance of time for religious observance by suspects, but these appear to be less important impediments and more easily resolvable.

7. What is less clear is the precise bearing of these difficulties on the setting of a maximum period for pre-charge detention. Since the 28-day maximum was introduced in July 2006, it does not appear to have prevented anyone from being charged, though 3 suspects were charged on the 27th or 28th day. Of the 24 suspects arrested in connection with the alleged airline bomb plot in August 2006, 17 were charged, 6 after the extension of their detention beyond 14 days and 2 just 4 hours before the 28-day deadline expired. On the other hand, 7 were released without charge, 1 on the 24th day and 2 on the 28th. On the face of it, the figures imply both that in some cases the 28-day maximum was necessary and that in others it led to unnecessary detention for a longer period.

8. However, the interpretation of such statistics is not straightforward, because the timing of decisions to charge or release inevitably reflects the maximum detention period in force. A decision to charge at a point close to the maximum does not prove that the decision could not have been taken earlier, and a longer maximum period might lead in some cases to longer searches for evidence before deciding not to charge. We note the judgment of the independent reviewer of terrorism legislation, Lord Carlile of Berriew, that he expects to see cases in which the maximum of 28 days will be proved inadequate, but as JUSTICE argues in its latest submission to the Home Affairs Committee, "since there is no natural upper limit to investigations in terrorism cases, arguments for extending pre-charge detention could...run for as long as the police continue to show diligence in pursuing the investigation." (*Counter Terrorism Proposals*, para. 10)

9. Given the right to liberty and the presumption of innocence, the justification for pre-charge detention must always be the expectation that evidence will be found to support the bringing of charges. In its 2006 report *Terrorism Detention Powers* the Commons Home Affairs Committee suggested that arrests were increasingly being made at an early stage in order to disrupt terrorist conspiracies, and therefore pre-charge detention was being used not only to gather evidence but to protect the public. It went on to argue that the legal system should take account of the existence of an element of preventive detention. In its response to the Committee's report, the Government insisted that while the timing of arrests was affected by the duty to protect the public, investigation thereafter "must be focused on the collection of evidence in accordance with the relevant legislation" (para.7).

10. It is impossible to disregard the preventive aspects of counter-terrorist action. However, as the Joint Committee on Human Rights observed in its 2006 report *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, this gives rise to a challenge: "how to deploy the criminal process in support of a preventive strategy in a way which does not undermine the very essence of the due process guarantees which are both a part of our traditional common law and a central part of our international human rights obligations" (para. 12). The lengthening of the period of investigation accentuates the importance of independent scrutiny of the grounds for continuing to detain suspects while searching for evidence.

11. Lord Carlile and some representatives of the police are advocating a new approach, namely to remove the maximum period of detention in return for improved judicial safeguards. It can be argued that any time limit is arbitrary and runs the risk of marginal over-shoot with potentially serious consequences in the release of dangerous people, whereas what matters is for the necessity of gathering evidence to be assessed independently in the particular case. We do not favour this course, because it views the issue in terms of the interests of the investigating and prosecuting authorities rather than the rights of the suspect whose life would be put 'on hold' for a substantial period, and even with judicial oversight it would run the risk of grave abuse. We note that the Government is not proposing this as an option.

12. The Terrorism Act 2006 permits continued detention of a suspect for the purpose of obtaining relevant evidence, by questioning or otherwise; for the preservation of relevant evidence; and pending the results of an examination or analysis of relevant evidence or of anything being carried out with a view to obtaining relevant evidence. We are encouraged by the assignment of oversight to senior circuit judges after 14 days, and by indications that applications for extension are rigorously examined and not always granted. However, the grounds for extension are quite broad, and in the nature of things exploratory rather than demonstrative. Since the failure to find evidence to support charges can never demonstrate conclusively that the expectation of finding it was ill-founded, some limit must be set to the time allowed for searching. The statutory maximum period for detention should be determined by consideration of the relation between what is operationally necessary – rather than merely desirable in the eyes of the

police – in order to produce evidence to justify initial suspicion, and what is tolerable in terms of the right to liberty of the suspect.

Alternatives to extending pre-charge detention

13. The paper repeatedly refers to the desirability of finding ways to reduce the pressure on investigation teams. This objective is surely better expressed as preventing the release of suspects who ought to have been charged. One means to this end is the new offence of committing acts preparatory to terrorism. We recognise that it has increased the available charging options, but accept that it will not be applicable in all cases, and that where it is applicable it will not always reduce the length of the investigation.

14. The option of allowing the admissibility of intercept evidence in terrorist cases has been debated for many years. We note that the proposal gives rise to complex practical objections (which seem to weigh more heavily with the security services than with the prosecuting authorities) and that the UK is almost alone in disallowing such evidence, but we confine ourselves to agreeing with the paper that even if the change were to be made, it would not of itself overcome potential problems with the time limit.

15. It has also been suggested that the so-called ‘threshold test’ should be used more frequently to bring charges at a lower evidential level. This test combines the requirement of reasonable suspicion that an offence has been committed with the reasonable expectation that sufficient evidence will be forthcoming to uphold the charge. The paper argues that “the police will rarely have the necessary certainty that sufficient evidence will come to light to sustain particular charges”, but there seems to be a difference of opinion about the applicability of the threshold test. The Joint Committee on Human Rights argues that a combination of use of the test with active judicial management of terrorism cases would weaken the case for an extension of pre-charge detention. It is difficult for us to decide between these opinions.

16. It was suggested in 2005 during discussion of the Terrorism Bill that holding charges carrying a remand in custody might be used to avoid extending pre-charge detention. However, the usefulness of this is limited, because it requires evidence to sustain the lesser charge and carries the possibility that the suspect might be granted bail.

17. The introduction of post-charge questioning is advanced in the paper as a separate option with the purpose of strengthening the prosecution case. We agree that because it requires an appropriate charge to have been brought in the first place, it is hard to see how it could operate as an alternative to extending pre-charge detention.

18. Although we agree with the paper that most of the alternatives canvassed here would not eliminate the risk of investigation teams coming up against the pre-charge detention limit, we make two comments about the presentation of the argument. First, the problems faced by investigation teams are set out in terms of their cumulative impact.

It is surely right that possible solutions should also be considered cumulatively rather than being picked off one by one as not being “the whole answer”. Second, defining the objective as the elimination of the risk of premature release of suspects sets the bar high, without considering the corresponding risk of unjust or oppressive detention of suspects.

The Government’s four options

Option (i) Extension of the limit on pre-charge detention, with additional safeguards for the period beyond 28 days

19. This is clearly the option signalled by the drift of the paper. We agree with the conclusion of the Joint Committee on Human Rights in its report of 16th July 2007 that “any extension is an interference with liberty that requires a compelling, evidence-based demonstrable case” and that the evidence should demonstrate “the actual number of cases in which the current limit had either prevented charges from being brought at all, or required the police to bring the wrong or inappropriate charges.” (para. 42). It is of course legitimate to appeal to the risk that such consequences will result, but general appeals to relieving pressure on investigation teams are no substitute for a close examination of what is happening and its implications. We do not believe that the case for an extension has yet been made out. Furthermore, we believe that the case must be specific both in terms of the maximum period and the justification for it.

20. We press the point that procedural safeguards cannot compensate for deficiencies in the criteria for detention, and doubt the suitability of some of those proposed. While we appreciate the intention to provide an additional level of review of applications for extension beyond 28 days, we are not convinced of the rationale for the involvement of the Director of Public Prosecutions. We believe that the proposal to refer particular cases to Parliament confuses the responsibility of the judiciary for examining applications for extension of detention with the responsibility of Parliament, advised by the Independent Reviewer, to scrutinise the operation of the whole system.

Option (ii) Extension subject to affirmative resolution by both Houses

21. The purpose of requiring affirmative resolution is unclear. If the extension were justified in itself, it would seem illogical not to implement it forthwith. If the assumption is that certain conditions for its implementation would need to be fulfilled, those conditions should be spelled out. If the conditions involved a national emergency, the appropriateness of a specific extension would need to be justified in relation to the circumstances. There is little to be said for this option.

Option (iii) Regulation by emergency powers under the Civil Contingencies Act

22. This option, which was originally advanced by Liberty, underlines the exceptional nature of extended pre-charge detention by requiring the use of emergency powers. It seems contrary to the overall contention of the paper that even without future

emergencies the present situation is likely to lead to the avoidable release of dangerous people. Since the use of the Civil Contingencies Act is always a possibility, it is hard to see what this option adds to the debate, apart from ruling out changes to the *status quo* under so-called ‘normal’ circumstances.

Option (iv) Judge-managed investigations

23. As the paper recognises, the deployment of specialist judges to oversee terrorist investigations in order to protect both the rights of the subject and the needs of the investigation would be a radical change to our prosecution procedures, which rest on an adversarial rather than an inquisitorial basis. Such a system was advocated by Lord Carlile in his response to the Terrorism Bill and his proposals were endorsed, and further recommendations added, by the Home Affairs Committee in its 2006 report.

24. Lord Carlile took the view that substantial periods of pre-charge detention demanded more robust protection of the rights of suspects. The Home Affairs Committee asserted that a shift to independent judicial oversight from the point of arrest was required to acknowledge the element of preventive detention in terrorist investigations – the latter point, as we have seen, being denied by the Government in its response. In both cases there is a sense of a major change in our experience of terrorist activity warranting a qualitative change in our methods of countering it.

25. Although it can be argued that exceptional circumstances justify exceptional measures, both the Joint Committee on Human Rights in its 2006 report and the recent Home Office paper conclude that the system of examining magistrates in other jurisdictions cannot simply be transplanted into the legal system of the UK. It is also worth noting that some countries which do employ it, such as France and Spain, are often criticised for the excessive length of their terrorist investigations. There may be good reasons for considering this option, but this would require far more extensive analysis and reflection than the current consultation permits.

Conclusion

26. While acknowledging the real difficulties for counter-terrorist action which the paper raises, we do not believe that the case for an extension of the maximum period of pre-charge detention has yet been made out. We do not find any of the four options satisfactory in the form in which they are set out here, and we await the presentation of a case for specific change based on clear evidence rather than conjecture.

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