The Government Reply to
the Report by Lord Carlile of Berriew Q.C.

Report on the Operation in 2007 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006

Cm 7429

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Presented to Parliament
by the Secretary of State for the Home Department,
by Command of Her Majesty

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House of Lords
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23 JUN 2008

Dear Lord Carlile

REVIEW OF THE OPERATION IN 2007 OF THE TERRORISM ACT 2000

Thank you for your report on the operation of the Terrorism Act 2000 in 2007. I am grateful to you for providing a comprehensive review and have carefully considered your comments and recommendations. I would like to take this opportunity to respond formally to these.

As before, I will be placing a copy of your report and the Government's response in the Library and on the Home Office website.

Proscription

We welcome your conclusion, repeated from previous years, that the proscription regime is 'a necessary and proportionate response to terrorism'. We also welcome your assessment that the procedures used to determine whether an organisation should be proscribed are 'generally fair and efficient'.

We welcome your appraisal of the system for reviewing proscriptions, and note your recognition that those involved 'are conscious of the human rights implications' of proscription.

You mentioned in some detail the case of the MeK which came before the Proscribed Organisations Appeals Commission (POAC) and the Court of Appeal, and you will have noted that I have laid a draft Order before Parliament for the removal of MeK from the proscribed list. I agree with your conclusion that, whatever the outcome of this particular case, it does show 'the POAC system of law to be sound'. As you say, any organisation or other person affected by a proscription should apply to the Home Secretary in the

first instance for the organisation to be deproscribed, and if that request is refused they may then appeal that refusal to POAC.

Conditions of detention for terrorist suspects

The Metropolitan Police has embarked on a project which will see new facilities constructed for the detention of suspects. It is anticipated this will take a minimum of 3 years to complete.

Pre-charge detention

As you know, we have gone to great lengths to consult on our proposals, over a long period of time and with the broadest range of stakeholders. As a result of this, we tabled a series of amendments to the CT Bill that provide the police with the power to detain suspects for up to 42 days in future in defined circumstances. Our revised proposal received its third reading in the House of Commons on 11 June.

We do not want a permanent, automatic or immediate extension to pre-charge detention beyond the current maximum limit of 28 days. Instead, we are proposing a reserve power that could only be used to investigate serious terrorist offences, with the support of the Director of Public Prosecutions, and the Secretary of State will inform Parliament after making the order that it is being put in place to investigate a grave exceptional terrorist threat. It could only continue with the backing of Parliament in a vote in both Houses, subject to judicial safeguards and for a temporary period before automatically lapsing. We believe that our proposal balances the need to protect individual human rights against providing the police with the powers they need, when they need them, to deal with terrorism.

You express concerns in your report about a parliamentary debate taking place during an ongoing police investigation. Parliament can have a full and meaningful debate on whether the reserve power should be made available. Although they will not be able to discuss the details of individual suspects, Parliament will be able to fully discuss and, if so minded, approve the order commencing the reserve power. In doing so, Parliament could debate the general security threat, the progress of the investigation, the police numbers involved, the number of suspects detained, the outline of the plot, the number of countries involved and whether the Home Secretary's decision was properly founded and all the statutory requirements had been met. Indeed, it is already the case that there have been statements and debates in Parliament following major terrorist incidents (for example in relation to the alleged airline plot and following the incidents in London/Glasgow). Although these occasions do not deal with details that would be prejudicial to the ongoing investigations it would be wrong to say that they are not meaningful – they provide a very real and important opportunity for Parliament to question the Government about events and the response to them from law enforcement agencies and others.

In relation to your point about the independent reviewer reporting within 6 months of the reserve power ceasing to be available, we will ensure that the reviewer has all the information needed to provide such a report and, in light of this, have no plans for the Home Secretary to provide a report to Parliament at the same time.

Finally, in relation to your point about the role of the independent reviewer analysing the system of holding a suspect for between 14 and 28 days, we would welcome any observations you may have on how this is working.

Threshold test

In relation to your concerns about the Threshold Test, the Code for Crown Prosecutors sets out two tests, the Full Code Test and the Threshold Test. Both of these tests have 2 stages, the evidential stage and the public interest stage. Only if the evidential stage is met does the prosecutor go on to consider if it is the public interest to prosecute the case. Under the Full Code Test, a suspect can be charged where there is a realistic prospect of conviction and it is the public interest to charge that suspect.

By contrast, the Threshold Test requires Crown Prosecutors to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and, if there is, whether it is in the public interest to charge. In deciding whether there is a reasonable suspicion, prosecutors must also make a clear evidential decision. They are directed under The Code to consider the evidence already available and the reasonableness for believing that further relevant evidence will become available within a reasonable period. Under The Code, the Threshold Test is only applied to those cases in which it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the Full Code Test is not yet available. As such, the Threshold Test is reserved for the most serious casework/ most serious offenders where the balance is always between the safety of the public and individuals affected and the rights and liberties of the accused. Charging decisions under the Threshold Test are made by the independent, legally trained, and usually (and always in terrorism cases) experienced Crown Prosecutors.

Obviously such circumstances may apply not just in terrorism cases but in other serious criminal cases as well. The Threshold Test has been operating across a range of serious casework since its inception in 2004 – from murder to armed robbery – and there has been no evidence of injustice or any complaint by those affected. The Test exceeds the requirements of Article 5 of the ECHR, which only requires the accused to be brought before the court on reasonable suspicion. To meet the requirements of the Threshold Test, this would not be sufficient. Decisions under the Test cannot be based merely on speculation as to the evidence that is forthcoming. There must be an objective judgement by a prosecutor and that the prosecutor is satisfied that the missing evidence - which may be very little in practice – will shortly arrive.

As you know, there is exceptionally low discontinuance rate in terrorism cases and a high conviction rate, which demonstrates the specific allegations of unfairness in terrorism cases are unfounded.

There are also many safeguards in the way that terrorism and other cases are monitored both within the CPS and the managing High Court Judge. The Threshold Test is only ever applied for a limited period. The charging decision is kept under review by the prosecutor and the Full Code Test must be met as soon as reasonably practicable.

The criminal process enables the defence to be informed of the evidential basis of the Crown's case at the first court hearing. In most cases, this first hearing will take place within 24 hours of the charging decision. At that stage there will be clear consideration of the evidence in relation to the bail application. The Bail Act 1976 specifically requires the strength of evidence justifying retention in custody to be considered. The legal process already allows the Court to set time limits for the service of further material. It also permits applications to the Court to be made for the case to be dismissed due to lack of evidence at an early stage in proceedings. Finally, The Bail Act and Custody Time Limit regime further ensure that courts must consider the strength of the evidence against the defendant and the conduct of the prosecution when making a decisions in respect of whether the defendant should be bailed or remanded in custody.

In addition, I should point out that Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) carries out both thematic reviews, and area inspections. It is currently operating on a two year inspection cycle, and has now completed the end of its second cycle. The inspection regime used carefully scrutinises both the quality of CPS casework and how well the CPS manages itself. The inspectorate reports are published and available to general public. In addition, the law requires the Director of Public Prosecutions to report annually to Parliament via the Attorney-General, including any changes to the Code for Crown Prosecutors.

Consolidated bill

We still intend to provide a consolidated bill at an appropriate time.

Stop and search powers – section 44

As you acknowledge in your report, in addition to the errors reported to Parliament in December 2007, a further incident occurred in South Wales Police Force area in June 2005. There was insufficient detail available in December 2007 for us to inform the House of this error. However, I am now in a position to provide additional information.

The Home Office authorised a request for use of section 44 powers by South Wales Police until 2359 on 21 June 2005. However, a new request was not signed by an ACPO rank officer until 0925 on 24 June 2005. The force

continued to use the power on 22 and 23 June. During this period 4 people were stopped and searched, 6 people were stopped only and two unattended vehicles were searched.

Forces submit applications to the National Joint Unit (NJU) at the Metropolitan Police Service (MPS) which are then sent to the Home Office for Ministerial authorisation. This must occur within 48 hours of the request being signed by an officer of Assistant Chief Constable or above (Commander in the MPS) in the relevant force. Following this incident, South Wales changed their internal arrangements to prevent a similar occurrence. A note from ACPO (TAM) (Association of Chief Police Officers, Terrorism and Allied Matters) was disseminated to all forces on 14 November 2007 outlining the more robust Section 44 process.

No arrests occurred as a result of these stop and searches. However, South Wales police will shortly be writing to all of the individuals concerned to apologise. Further to the incidents highlighted above, Tony McNulty requested that a review of section 44 authorisations was carried out at the Home Office to ensure there had been no further occurrences. From the Home Office files available, 5 instances were noted in 2007 when the authorisation period was granted for longer than the 28 day limit set by Parliament.

One instance took place in South Wales (30 days), two instances in Sussex (29 days each application) and two instances in Greater Manchester Police (29 days and 30 days). These errors resulted from human error throughout the application process by the Police Force, the National Joint Unit in the MPS and the Home Office. Investigations following these errors have concluded that in two of the five occasions the subsequent application was submitted prior to the 29th/ 30th day and resulted in no potential for unlawful use of the power.

In the remaining three cases, the subsequent applications did not cover the 'additional' 1 or 2 days and resulted in the potential for the power to be used unlawfully. Following checks with the Forces concerned it seems that only one force used the power in the additional day. Sussex Police has confirmed that they conducted **12** stops on 12 February 2007. No arrests were made as a result of these stops. The force is now attempting to contact the individuals concerned to make them aware of the situation.

The review has provided an opportunity to ensure a more robust audit trial and to provide a more effective oversight of the application process. Should any similar errors occur in the future, the Home Office has asked the Chairman of ACPO TAM to ensure the Home Office is informed as soon as possible. We will then inform you and work with the force to ensure appropriate measures are taken.

Finally, as you know, the Prime Minister announced last year a review of the guidance on the use of stop and search powers under the Terrorism Act 2000. The purpose of the review is to make sure that this power, which is useful in

creating a hostile environment for would-be terrorists to operate in, is being applied appropriately and proportionately and we will continue to keep you updated with progress.

Attendance at a place used for terrorist training

You expressed concern in your report that this offence from the Terrorism Act 2006 would criminalise a journalist who enters a terrorist training camp for the purpose of reporting on the activities there. Prosecutions are a matter for the police and prosecuting authorities and much depends on the specifics of each case. A prosecution for this offence may only be instituted with the consent of the DPP. However, during passage of the bill, concerns were raised that journalists attending terrorist training camps would be breaking the law, and thus the law would limit journalistic research, but the Government made it clear that it did not believe that 'attendance at a terrorist training camp can ever be considered legitimate'.

Northern Ireland provisions

We are very grateful to you for your work in reviewing the temporary Northern Ireland provisions. It is a mark of the tremendous progress made there that these provisions have now all been repealed, but the assurance provided about their use during the seven months of 2007 during which they were in place is important in providing transparency and public confidence in the application of the law.

Terrorism law in Northern Ireland is now largely the same as that in the rest of the UK. Sadly, the permanent provisions remain necessary there, both in respect of the threat from loyalists and dissident republicans, but also the threat from international terrorism. Your reviews will continue to include the operation of the permanent provisions in NI as well.

The police and military powers contained in the Justice and Security (Northern Ireland) Act 2007 are the subject of separate review arrangements. Robert Whalley CB has been appointed to conduct these reviews. I look forward to the results of the first such review, which will cover the period 1 August 2007 to 31 July 2008.

Intuitive stops at ports

We agree that there is a need for better use of intelligence and have been looking at a range of techniques to supplement current approaches. Some individual forces have been looking to improve their use of intelligence and to use behavioural analysis to spot persons of interest. We are working with the National Coordinator of Special Branch on a more consistent, national approach for the police service in these areas. Attempts at automated profiling have been used in trial operations and has proved that the systems and technology currently available are of limited use. Intelligence improved during the trials when officers reverted to the traditional intuitive methods, albeit applied in the context of intelligence provided by the security service.

It is likely that with more effective use of intelligence, and possibly some behavioural analysis training the quality of intelligence retrieved from persons of interest will improve and the number of people stopped will decrease.

Reading passports electronically

In the long term (by 2014) e-Borders will provide full border coverage of both inbound and outbound journeys. E-Borders is a cross cutting initiative which UKBA is co-ordinating in partnership with the Police Service and Intelligence Agencies.

Investment has been made to roll out pilot projects to use portable passport readers at air and sea ports. You have recently seen a demonstration of this passport reading technology that will enable important information to reach ports officers immediately.

Ports policing and Special Branch

The amount of grant paid to police forces towards the costs of funding their Special Branch activities at ports has increased by about £2 million in 2008/9. However, we agree that the abstraction of Special Branch officers, particularly from ports, remains a concern. We are working closely with the National Co-ordinator Ports Policing who is working on the Dedicated Security Post funding review that will include practical measures to tackle these concerns, including force visits. Furthermore, a requirement by the Office for Security and Counter Terrorism that a senior officer in each individual force must endorse staffing returns should help to address this situation.

We welcome your observation of the continuing and effective work at ACPO and Home Office level to ensure national co-ordination and consistency.

You go on to mention that 'Performance is far more important than structure' and then recommend that promotion opportunities be available to experienced younger highly capable officers to recognise the importance of the work they do. While we accept this in principle we believe there would be difficulties in breaking with force wide promotion assessment practices but we shall consult NCPP and the Police Federation on your suggestion.

Exchange and sharing of information

The issue has been addressed by the introduction of the Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008, which came into effect on 1 March 2008. This information sharing gateway provides HMRC and BIA (now UKBA) and the police with the ability to share information where it is likely to be of use for immigration, police or Revenue and Customs purposes, and where the information relates to a passenger, member of crew, freight or any person associated with those movements (including carrier data). It places an obligation on the agencies to share information in certain circumstances and

can be used (again in certain circumstances) to provide one agency with direct access to a system owned by a partner agency (police, customs or BIA).

You also mentioned that there is uncertainty about the legality of sharing of information in some contexts – for example passenger information in the hands of airlines. The Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008, will help to resolve this particular issue when sharing is necessary between HMRC, police and BIA.

HMRC deployment

Following your last report and the issues you raised in respect of HMRC Detection's intelligence-led brigading approach, HMRC undertook a series of operational deployments into areas where, currently, there are no "fixed" HMRC staff (i.e. no permanent attendance). These deployments were designed to gather information and intelligence about the traffic, using General Aviation and small ports points of entry into specific locations in the UK. The data gathered has updated assessments of the threats posed to the UK in those locations.

Additionally, the development of the new business model for the border activities of the UK Border Agency seeks to support the principles of the Cabinet Office Report, "Security in a Global Hub". The development of a strategy which is focused on achieving the right balance between control and facilitation, supported by appropriate delivery mechanisms and the requirement to provide a reassurance and deterrent effect through, amongst other things, improved visibility, should go a significant way to addressing your concerns.

HMRC performance indicators

You suggested that the introduction of terrorism-related performance indicators by HM Revenue and Customs would be a valuable step. This issue has been resolved, and is one of the key benefits of bringing Border Control and HMRC Detection together as the Border Force. The UK Border Agency will shortly finalise its Counter Terrorism strategy. That strategy will set out a comprehensive approach, aligned with CONTEST, to enhance the Agency's ability to detect and deal with terrorism risks across the whole UKBA business. The strategy will also include a robust set of performance indicators, including metrics on the receipt and dissemination of information reports related to counter terrorism.

The Formation of the UK Border Agency

Although the police are not formally within the UK Border Agency announced in 2007, Ministers are keen to continue building on existing arrangements for policing, and to strengthen the collaboration with UKBA without ruling out the prospects of more radical changes in the future. The Memorandum of

Understanding signed on 3 April 2008 between the Association of Chief Police Officers (ACPO) and the UK Border Force is being followed up with more specific details of where greater collaboration and data sharing can take place.

We would stress, however, that we have not ruled out structural options in the longer term where the business case and operational benefits are clear. ACPO have proposed a new model for a single border police force (uniformed and Special Branch) comprising some 3000 staff. This is being aired in the Police Reform Green Paper being published in June 2008 and wider views sought.

General Aviation

The Department for Transport has noted your flagging of the potential for small aircraft to be used as vehicle bombs, and your observation that there is presently no intelligence to suggest this forms part of terrorist thinking. The Department keeps this potential threat under review as part of its wider protective security responsibilities, and is participating in discussions in Europe of the possible security regulation of general aviation at the EU level. In the meantime, police forces remain proactive in providing support to airports hosting general aviation flights and flying schools, and during the year the Department for Transport assisted the police National Counter Terrorism Security Office in producing a leaflet providing advice to general aviation operators and flying schools on how to deal with suspicious activity and concerns.

Under Recommendation 10 of the Cabinet Office review – Security in a Global Hub, the UK Border Agency is asked to give specific consideration to controls at small ports and airports, working closely with the police. Some good work is already being conducted by the border agencies in engaging with the general aviation community to raise awareness of security issues.

Juxtaposed Controls

We note your comments on the improved efficiency of the juxtaposed controls. In addition to the ongoing collaboration, the French Government has recently indicated that they are proposing to make some constitutional changes later this year. These changes, if effected, will enable us to amend the relevant treaties to allow British police officers to use their counter terrorism powers, currently successfully exercised at Coquelles, to other juxtaposed controls in Northern France.

Passenger Manifests

You expressed your ongoing concern about the provision of passenger and crew manifest data to ports officers.

In the response to your 2006 report, we referred to the powers in the Immigration, Asylum and Nationality Act 2006 (IAN Act 2006) allowing the

police to request passenger, crew and service data for international air and sea journeys. We are pleased to say that these powers came into force on 1 March 2008.

The passenger and crew data captured using these police powers will be shared with the Border and Immigration Agency and HM Revenue and Customs under the data sharing power (Section 36 of the IAN Act 2006) which came into force at the same time. This power requires routine sharing of specified travel related information between the Border Agencies, supporting the joint pooling and analysis of bulk information under e-Borders and other joint working initiatives.

We also referred to the power in section 14 of the Police and Justice Act 2006 which will allow the police to request passenger, crew and service data on domestic air and sea journeys. The specific police requirements under this power, which will include details of the routes affected and data required will be subject to a 12 week public consultation which is currently expected to take place later in 2008.

These combined powers will greatly increase the ability of the police to investigate terrorism and serious organised crime.

Fingerprints at ports

The introduction of Livescan at ports will now allow the police to take fingerprints of a detained person to identify them. We acknowledge your ongoing concerns that statistics should be kept by the Home Office of the use of this power.

We will, as ever, continue to keep you updated on the progress that we are making and welcome the comprehensive nature of your reports.

Thank you again for your report.

JACQUI SMITH

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