



**Liberty's Briefing on the draft Prevention of
Terrorism Act 2005 (Continuance in force
of sections 1 to 9) Order 2009**

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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Introduction

1. On 3rd February 2009 the Home Secretary laid before both Houses the draft Prevention of Terrorism Act 2005 (Continuance in force sections 1 to 9) Order 2009. The debate on renewal in the lower House is scheduled for 3rd March 2009. The Government evidently expects Parliament to renew the control order legislation for the fourth year running. It hopes that parliamentarians will not only overlook this unjust scheme of indefinite house arrest without trial but that parliamentarians will also turn a blind eye to the ineffectiveness of the control order regime. Control orders are both grossly unfair *and* ineffective:

- 7 of the 38 people that have been made subject to control orders have absconded showing that proper criminal trials and custodial sentences for the guilty would be far more effective at protecting the public. Despite this, it has previously emerged that the Home Secretary has at times not given proper consideration to the possibility of a criminal prosecution before resorting to a control order. The legislation specifically requires this.
- The Government's argument that it is impossible to prosecute terror suspects is fast unravelling. Over the last few years the former Attorney General, the former Director of Public Prosecutions and a former Head of MI5 have argued that it should be possible to use intercept evidence in court so that more terror suspects can be prosecuted. Lord Carlile of Berriew the Government's own Reviewer of Terrorism has now also added his voice to the call for the use of intercept material.¹
- The human cost of control orders continues to mount. These orders affect not only the suspects who have become suicidal under house arrest; they have also destroyed the lives of the wives and children of these men. At least one desperate suspect chose to face the risk of torture in Algeria to ease his family's suffering.
- Control orders are fast becoming an international embarrassment criticised by, among others, the European Commissioner on Human Rights and the European Committee on the Prevention of Torture

¹ In his most recent annual report on the operation of the control order regime, available at: Available at: <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/lord-carlile-fourth-report.pdf?view=Binary>

2. We expect that the Government will try to rely on Lord Carlile's annual report on the operation of the control order regime, published on 3rd February². We urge you to be wary of any claims that the report provides a ringing endorsement of control orders and that you should therefore vote to renew the legislation. First, on closer inspection, Lord Carlile's latest report, like his previous one, points to serious problems with the operation of the regime: the constant surveillance needed to prevent people absconding; the use of control orders as an indefinite solution rather than a short-term measure; and failure to give proper consideration to the option of criminal prosecutions and to continue the investigations that would make these possible. Secondly, Parliament asked Lord Carlile to keep track of how control orders have worked in practice; not to decide whether the regime and its damage to our rights and freedoms are acceptable. That, rightly, remains a matter for Parliament.

February 2009 – time for change

3. Of course, February 2009 is very different to February 2008. In the last year, parliamentarians from across the political spectrum have already stood firm in defence of fundamental rights and freedoms. Whilst the Government's wrong-headed proposals to extend pre-charge detention to 42 days were not ultimately defeated in the Lower House, it must be remembered that the final vote took place against claims that it represented a test of confidence for the Prime Minister and what one Labour MP described as "ten days of bone-crunching pressure on potential rebels". Notwithstanding the pressure, 36 Labour MPs rebelled and 10 abstained. The Conservatives, Liberal Democrats and other political parties remained firm in their opposition to 42 days' detention. Liberty has no doubt that in a less febrile political environment 42 days would have been deleted in the House of Commons. Nevertheless the Upper House rejected the proposal by a devastating 191 votes.

4. The last year has also brought winds of change across the Atlantic. President Barack Obama, in his inaugural address, addressed, directly, the false trade-off between security and fundamental rights:

² Ibid

“As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man -- a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience sake...Recall that earlier generations faced down fascism and communism not just with missiles and tanks, but with the sturdy alliances and enduring convictions. They understood that our power alone cannot protect us, nor does it entitle us to do as we please. Instead they knew that our power grows through its prudent use; our security emanates from the justness of our cause, the force of our example, the tempering qualities of humility and restraint.”³

The brave defeat of 42 days and the shift in rhetoric and policy from across the Atlantic should embolden parliamentarians to re-think our dangerous control order regime. February 2009 is an ideal moment to take stock.

Background

5. Control Orders were created by the Prevention of Terrorism Act 2005 ('PTA'), in response to the House of Lord's ruling against the detention powers in Part IV of the Anti-terrorism Crime and Security Act 2001 (ATCSA). As Liberty said at the time, control orders failed adequately to address the underlying human rights objections to detention without trial under Part 4 of ATCSA. The objection is to the complete abrogation of the right to fair trial and the presumption of innocence, in particular:
- Unending restrictions on liberty based on suspicion rather than proof
 - Reliance on secret intelligence (which by definition may be all the less reliable for having been gained by torture around the world)
 - The inability of the subject to test the case against him in any meaningful way

³ President Obama's inaugural address is available at: <http://www.whitehouse.gov/blog/inaugural-address/>

Punitive Restrictions

6. Control orders enable the Home Secretary to impose an unlimited range of restrictions on any person she suspects of involvement in terrorism. Among the restrictions that can be imposed are curfews of up to 16 hours enforced by an electronic tag, restrictions on the use of mobile phones and the internet, vetting of all visitors and meetings, and restrictions on the suspect's movements. In his report, Lord Carlile observes that the average curfew for those currently under house arrest is 13 hours (this is up from an average of 10 hours in 2007). The longest curfew currently in place is 16 hours. Put simply, control orders amount to indefinite house arrest without charge or trial.⁴

7. Control orders have devastatingly undermined the rights and freedoms of not only the men subject to them but also their families⁵. Some of the 15 current “controlees” have been subject to a control order for three or four years. Some of these people were previously subject to indefinite detention in Belmarsh for over three years. Discussions comparing extended pre-charge detention to internment that took place in the Chamber during the passage of the Counter-Terrorism Act 2008 are perhaps more aptly applied to individuals that have effectively been detained for eight years – whether in Belmarsh or in another place determined by the State.

8. In their most recent report the Joint Committee on Human Rights (JCHR) said of the regime:

We continue to have very serious reservations about the human rights compatibility of control orders and to believe that, without certain important

⁴ While each control order lasts for a maximum duration of 12 months they can (and have been) continually renewed.

⁵ See the report, entitled 'Besieged in Britain', written by journalist and author Victoria Brittain, and co-authored with Moazzam Begg of *Enemy Combatant: a British Muslim's journey to Guantánamo and back* published on 12th February 2009. The report describes how control orders have: led to severe mental health problems; led to suicide attempts; and led men to return 'voluntarily' to regimes where they face imprisonment and torture. See also: <http://www.guardian.co.uk/commentisfree/2009/jan/22/control-orders-justice>

*modifications to the regime the use of control orders will continue to give rise to breaches of individuals' rights both to liberty and due process.'*⁶

The JCHR have been clear that the severe extent of the restrictions imposed by control orders amount to a breach of Article 5 of the HRA. Liberty wholeheartedly agrees with this analysis.

9. There is an inevitable danger that the longer the control order regime stays in place, the easier it is to renew year on year without proper or full consideration of the punishing restrictions for those subject to it. In fact the reverse should be true. The longer the regime stays on the statute book the greater the harm. Liberty urges parliamentarians to remind themselves of the number of restrictions permitted under the regime and to consider their cumulative effect. Available restrictions include: (a) a prohibition or restriction on his possession or use of specified articles or substances; (b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities; (c) a restriction in respect of his work or other occupation, or in respect of his business; (d) a restriction on his association or communications with specified persons or with other persons generally; (e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence; (f) a prohibition on his being at specified places or within a specified area at specified times or on specified days; (g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom; (h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order; (i) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force; (j) a requirement on him to give access to specified persons to his place of residence or to other

⁶ JCHR: Counter-Terrorism Policy and Human Rights (Fourteenth Report) Annual Renewal of Control Orders Legislation 2009 available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/37/37.pdf>

premises to which he has power to grant access; (k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened; (l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force; (m) a requirement on him to allow himself to be photographed; (n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means; (o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand; (p) a requirement on him to report to a specified person at specified times and places.⁷

Presumption of Innocence/Fair trial

10. Control orders undermine the presumption of innocence, the 'golden thread' that runs back through centuries of criminal process to the Magna Carta, allowing punishment without trial. They also undermine the separation of powers as the decision to impose a control order is made directly by the Executive.

11. The Home Secretary may make a control order if she has 'reasonable grounds for suspecting that the individual has been involved in terrorism-related activity' if she considers it is necessary to protect the public from the risk of terrorism. This is an extremely low threshold. There does not have to be any factual basis for this assessment of risk. Even if the suspicion is based on wholly inaccurate and misleading information, all that is required is that the suspicion of the Secretary of State be reasonable according to what is placed in front of her. The decision to impose a control order is based on secret intelligence which the individual concerned is unable to see and powerless to dispute⁸. The secret intelligence may also have

⁷ Part 1 of the PTA 2005

⁸ Under the 'special advocate' procedure the Attorney General may appoint a legally qualified person to represent the person in 'closed proceedings' (at which neither the 'controlee' nor his

been obtained by torture elsewhere in the world. The Government claims that judicial oversight answers those who argue that the control order system is fundamentally incompatible with fair trial rights. Even with a hobbled form of judicial procedure, control order proceedings remain the antithesis of a fair trial, involving the imposition of severe sanctions on individuals who are not told of what they are accused of, and who will not be able to argue their innocence. The judicial role in the process cannot even be deemed to constitute a minimal safeguard on arbitrariness – the Home Secretary is able to side-step any judicial decision by re-issuing an order once it has been declared unlawful.

12. Grave concerns over the lack of due process are not new. Indeed the ‘special advocate’ procedure in control order hearings has been brought into disrepute on a number of occasions with the resignation of former special advocates on principled grounds.⁹ On 1st November 2004, the first resignation took place. Ian MacDonald QC resigned as a Special Advocate “for reasons of conscience” describing the pre-control order policy of indefinite detention for foreign nationals as “*an odious blot on our legal landscape*.”¹⁰ He has since commented on the substitution of indefinite detention with control orders:

“House arrest is slightly better than imprisonment; but it is more of the same kind of medicine. And what an example it sets. Every tin pot dictator, who wishes to lock up his opponents, for an indeterminate period, without trial, from Burma to Zimbabwe and every country with internal unrest, can point to Britain and say, “well, we’re only doing what the Brits have done... I resigned because I felt that whatever difference I might make as a special advocate on the inside was outweighed by the operation of a law, fundamentally flawed and contrary to our deepest notions of justice. My role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations

lawyer are able to attend). A special advocate is not allowed to disclose any exempt material to the controlee meaning that the secret intelligence cannot be challenged.

⁹ Additionally, a number of special advocates that remain are profoundly dissatisfied with the procedure.

¹⁰ http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268

*being made and without any kind of criminal charge or trial. For me this was untenable.*¹¹

13. Concerns over due process in the Special Advocate procedure have, most recently, been upheld by the European Court of Human Rights in *A and others v UK*.¹² The court held that the indefinite detention regime (as overseen by the Special Advocate procedure) had breached Article 5 of the ECHR as Special Advocates could not perform their function in any useful way if the detainee was not provided with sufficient information regarding the evidence against him.

14. The fair trial impediments do not stop there. Breach of control order restrictions is, of course, a criminal offence giving rise to further fair trial complications. In his most recent report Lord Carlile reveals that three of the current 15 suspects subject to a control order face trials from next month for breaching the terms of their orders. In case A, the suspect is alleged to have breached his obligations involving communications and the boundary of the area where he is supposed to remain. His trial cannot take place until the outcome of a court of appeal case on whether he can face a fair trial. This only goes to further demonstrate the unsuitability of control orders. They create a legal system unto their own with a ripple effect that stretches far and wide.

Criminal Prosecution

15. The Government has consistently stated that it is not possible to bring criminal charges against those for whom control orders have been conceived. While we are not privy to the information that the Government bases this assessment on, we are well aware of the breadth of criminal law already available. There are of course numerous offences that come within the 'normal' criminal law which are relevant for the prosecution of terrorist offences and which have been frequently used successfully in recent years. Those preparatory acts that involve planning but stop

¹¹ See: http://74.125.47.132/search?q=cache:49tF55gCawAJ:www.gcnchambers.co.uk/index.php/gcn/content/download/1161/7517/file/Counsel_200503_mcdonald.pdf+ian+macdonald+siac+resign&hl=en&ct=clnk&cd=7&gl=uk

¹² Application No. 3455/05 [GC], judgment of 19 February 2009

short of any violence are likely to be criminalized under offences of conspiracy, incitement or attempt. In addition, the Terrorism Act 2000 (TA) creates a raft of offences and creates a list of 'proscribed' or banned organizations. Being a member of, or belonging to, a proscribed organization is an offence under section 11(1) TA and carries a maximum penalty of ten years imprisonment. It is also an offence: to possess something "in circumstances which give rise to reasonable suspicion that (the) possession is for a purpose connected with terrorism" (section 57); to collect "information of a kind likely to be useful to a person committing or preparing an act of terrorism" (section 58); or to incite "terrorist activity overseas" (section 59).

16. Perhaps most importantly, whatever criminal and terrorism-specific offences that existed before the enactment of the PTA, a good deal more exist today. The creation of several new broad offences¹³ since the enactment of the PTA demonstrates yet another reason why the control order regime cannot be sustained.

17. For some, the sheer irrationality of control orders may be reason enough to oppose them. Allowing people genuinely suspected of the most serious type of criminality to live amongst us is not, as the Government would have us believe, 'tough on terror'. It could be quite the reverse. It is reasonably easy for a 'controlee' to abscond¹⁴. Further it is not difficult to imagine that a person with terrorist intent made subject to a control order may be able to continue to co-ordinate certain terror-related activities while under house arrest. Indeed, Lord Carlile indicates in his report that he believes that a number of the 'controlees' who have maintained in contact with other terrorist individuals. Putting aside whether or not this is the case, the possibility and belief that this could be the case simply serves to highlight the ineffectual nature of the control order.

¹³ See in particular the offences created under the Terrorism Act 2006 and the Counter-Terrorism Act 2008 which include the offences of: encouragement of terrorism; dissemination of terrorism publications; preparation of terrorist acts and training for terrorism.

¹⁴ As demonstrated by the fact that 7 of the 38 individuals that have been made subject to control orders have absconded.

Admissibility of Intercept Evidence

18. At present, the kind of intercept material that is likely to have been gathered as part of terrorism investigations cannot form part of the evidence base for a charge because it is not admissible in criminal proceedings. In legal terms this bar is an anomaly. The UK is the only country in the world, with the exception of Ireland, to maintain the ban on such evidence. Elsewhere in the world, intercept evidence has been used effectively to convict those involved in terrorism and other serious crimes. While RIPA forbids the use of domestic intercepts in open UK court proceedings, foreign intercepts can be used if obtained in accordance with foreign laws. Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping can be admissible even if they were not authorized and interfere with privacy rights. There is no fundamental civil liberties or human rights objection to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings.

19. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.¹⁵ The imperative behind the historic bar on the admissibility of intercept was clearly the protection of Security Services' methods rather than any obvious concerns for the fair trial process. In Liberty's view, removing this bar would overcome one of the primary obstacles to bringing criminal proceedings against those suspected of terrorist offences, rather than subjecting them to severe restrictions on their liberty on the say-so of a politician. Indeed the inadmissibility of intercept has become one of the main planks in the Government's arguments when embarking on many of the worst excesses in the 'war on terror'¹⁶.

20. Claims that lifting the bar would not make a significant difference in terrorism investigations are very hard to reconcile with the extent of surveillance in the UK (including phone tapping). Roughly 2000 intercept warrants are authorised by the Home Secretary each year.¹⁷ In any event, claims that intercept admissibility would not affect the ability to charge those suspected of terrorism are waning. The Government's

¹⁵ Cf Liberty's evidence to the JCHR on this subject at www.liberty-human-rights.org.uk

¹⁶ including arguments made in support of control orders and the extension of pre-charge detention

¹⁷ See the Interception of Communications Commissioners Report for 2007

reviewer now even accepts that: “*the use of intercept evidence in a criminal court possibly has the potential for reducing the number of control orders*”.¹⁸

21. Adding to this common sense consensus, the Chilcott review into the admissibility of intercept reported in February last year and recommended that the bar be lifted¹⁹. The Prime Minister’s initially indicated that he intends to implement the Chilcott conclusions. We are disappointed that efforts in this area have not been expediated and we question why this is the case. Especially given the fact that a piecemeal repeal of the absolute ban is taking place in other spheres. Intercept evidence is already relied on by the state in non-criminal proceedings. The Counter-Terrorism Act 2008 allowed intercept evidence to be used in terrorist asset-freezing proceedings and the Coroners and Justice Bill 2009 currently before Parliament proposes that intercept should be used in inquest proceedings. Repeal of the absolute bar in a piecemeal fashion is illogical and unjustified.

Permanent Exceptionalism

22. During the swift passage of the PTA, parliamentarians were assured that control orders would be a temporary measure. Control orders have now been in force for four years. Most worryingly, the Government has made no indication that they intend to scrap the regime any time soon. In fact, the Government has sent clear signals that they intend the control order regime to become a permanent ‘parallel’ fixture of our legal landscape.

23. Acts of Parliament continue to strengthen and reinforce the Control Order regime. Section 78 of the Counter-Terrorism Act 2008 inserted additional provisions into the PTA allowing police powers of entry and search for those under control orders as well as a host of other strengthening and enforcement powers.

24. Meanwhile, the control order model is currently being extended into other areas. On 12th February 2009 Home Office Minister, Vernon Coaker, introduced a

¹⁸ See footnote 1 above

¹⁹ Privy Council review of Intercept as Evidence available at: <http://www.official-documents.gov.uk/document/cm73/7324/7324.asp>

substantive amendment to the Policing and Crime Bill to provide for “*injunctions to prevent gang-related violence*”. In effect these are a mix of control orders/ ASBOs for anyone suspected of engaging in or encouraging or assisting gang-related violence. Liberty has serious concerns about the introduction of these provisions and the continual blurring of the civil and criminal law. We see this most recent example as being part and parcel of a misguided approach to law enforcement. It is very disheartening to see repeated efforts by the Government to deal with law enforcement issues outside the normal criminal justice processes.

25. The provisions introduced to the Policing & Crime Bill would allow a chief officer of police, the British Transport Police Force or a local authority to apply to the High Court or a county court for an ‘injunction’ against a person (which may initially be made without notice). The court can grant the injunction if it is satisfied on the civil standard of proof, that the person “*has engaged in, or has encouraged or assisted, gang-related violence*” and it is necessary to do so to prevent that person from doing so again or to protect the person from gang-related. What constitutes a ‘gang’ is not defined. An injunction made by a court could prohibit the person from doing something, which includes (but is not limited to) prohibiting the person from going to a particular place; associating with particular people in particular places; having an animal in a particular place; wearing certain clothing or using the internet to facilitate or encourage violence. The court could also require the person to do certain things which again are not limited, but could include requirements to notify any change of address; “*be at a particular place between particular times on particular days*” (up to 8 hours a day) and report to a person at that place; and participate in particular activities when required. The injunction can be in force for a specified period or indefinitely. If the person subject to the injunction fails to comply with it they may be subject to arrest, and can be remanded while the matter is dealt with (which could mean up to 8 days in detention). ASBOs only allow the court to “*prohibit the defendant from doing anything described in the order*”.²⁰ These amendments would allow an injunction to order that a person notify of change of address, be at particular places at certain times, participate in certain activities and impose reporting requirements. In this way this proposed system is more akin to that of the control

²⁰ Section 1(4) of the Crime and Disorder Act 1998.

order regime which is currently applicable to people suspected of involvement in terrorism.

26. The control order regime was originally stated as being only 'temporary'. The extension of its principles into other spheres of the law is extremely worrying and should be rejected by parliamentarians.

Conclusion

27. Notwithstanding the growing catalogue of control order failures, the Government will no doubt continue the tired mantra that anyone who questions the wisdom of control orders is "soft on terror". Liberty urges you to resist these over-simplistic claims and to send an unequivocal message that Parliament will not stand back while the rule of law, our democratic values and our human rights continue to be undermined in the name of the war on terror. Even if not defeated, a reduction in the Government's majority for renewal will send a powerful message that extraordinary exceptionalism needs to be re-examined. As the Prime Minister said at his first speech to the Labour Conference as Labour leader:

"Human rights are universal and no injustice can last forever"²¹

²¹ Extract from the Prime Ministers speech to the Labour Party conference, 24th September 2007