

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Briefing on the draft Prevention of
Terrorism Act 2005 (Continuance in force
of sections 1 to 9) Order 2010**

House of Commons

February 2010

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.

Liberty Policy

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 1st February 2010 the Home Secretary laid before both Houses the draft *Prevention of Terrorism Act 2005 (Continuance in force sections 1 to 9) Order 2010*. The debate on renewal in the lower House is scheduled for 1st March 2010. The debate on renewal in the upper House is scheduled for 3rd March 2010. The Government evidently expects Parliament to renew the control order legislation for the fifth year running. It hopes that parliamentarians will not only overlook the injustice of this scheme of indefinite house arrest without charge or trial but that parliamentarians will also turn a blind eye to its ineffectiveness.

2. Control orders are at the same time both unsafe and unfair:

- 7 of the 45 people that have been made subject to a control order have absconded. In his most recent report, the Reviewer of Terrorism Legislation calls these absconds an “*embarrassment to the system*” and urges that “*viability of enforcement must always be considered when a control order is under consideration*”. If these individuals pose the risk that we are led to believe they do, these absconds are far more serious than just giving cause for embarrassment.
- The human cost of control orders continues to mount. These orders affect not only the suspects, many of whom have become suicidal under house arrest, they have also destroyed the lives of the parents, wives and children of these men. At least one desperate suspect has chosen to face the risk of torture in Algeria to ease his family’s suffering. And recently the control order regime has grown even more sinister and dehumanizing with those placed under control orders now frequently required to relocate to another part of the country to comply with their control order restrictions. This policy amounts to internal exile forcing individuals to leave behind all family and community links.
- The control order regime is fast unravelling. In June 2009, the House of Lords ruled that the use of secret evidence in three particular control order cases breached the right to a fair trial under the *Human Rights Act 1998* (HRA). The ruling determined that there is an ‘irreducible core’ of information that must be given to ‘controlees’ to ensure compliance

with human rights obligations. As a result of the judgment two control orders have been revoked. While the Government maintains that the regime is necessary, the number of control orders that it can now sustain continues to dwindle.

- The Government's argument that it is impossible to prosecute some terror suspects rings increasingly hollow. Since the creation of the control order regime a raft of new terror-related offences have been added to the statute book making prosecution easier. Our record for successfully prosecuting terror suspects is envied the world over and this reputation has been achieved despite the absurd and continuing ban on the admissibility of intercept evidence in criminal proceedings. Overturning this ban would most likely prove an invaluable addition to the prosecutors' toolbox. Over the last few years the former Attorney General, the former Director of Public Prosecutions, the current 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. The Government has accepted in principle that intercept evidence should be made admissible – all that remains to be overcome is institutional reluctance.
- Control orders are an international embarrassment. The regime has been criticised by, among others, the European Commissioner on Human Rights and the European Committee on the Prevention of Torture. The Home Affairs Select Committee has recently added its voice to calls for the regime to be scrapped.

3. We expect that the Government will try to rely on the annual report¹ by the Reviewer of Terrorism Legislation, Lord Carlile of Berriew QC, on the operation of the control order regime, published on 1st February 2010. However, 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, the latest report, like his previous ones, reveals serious problems with the operation of the regime. Second, and as we examine in more detail below, Parliament asked the Reviewer of

¹ Available at: <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/lord-carlile-5th-report2835.pdf?view=Binary>

Terrorism Legislation to keep track of how control orders have worked in practice; not to make value judgments about the necessity or otherwise of the regime. That, rightly, remains a matter for Parliament.

Background

4. 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); and
- The inability of the subject to test the case against him in any meaningful way.

Presumption of Innocence/Fair trial

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

6. The Home Secretary may make a control order if he has "*reasonable grounds for suspecting that the individual has been involved in terrorism-related activity*" and 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 him.

7. A 'special advocate' is appointed to represent the 'controlee' in closed proceedings and not allowed to disclose any exempt material to the 'controlee', meaning that intelligence on which the decision is based cannot be challenged. For years decisions to impose a control order have been based on secret intelligence which the individual concerned has been unable to see and has been powerless to dispute.² The secret intelligence may also have 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 able to properly communicate with their 'special advocate' once crucial information has been disclosed, and who will therefore not be able to argue their innocence. Further, 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.

Punitive Restrictions

8. Control orders enable the Home Secretary to impose an unlimited range of restrictions on any person he or she suspects of involvement in terrorism.³ Among the

² 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 lawyer are able to attend).

³ 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;

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. The average curfew length for those currently subjected to a control order is 12 hours per day. The longest curfew currently in place is 16 hours. Put simply, for those who do not abscond, control orders effectively amount to indefinite house arrest without charge or trial.⁴

9. Control orders have devastatingly undermined the rights and freedoms of not only the men subject to them but also their families.⁵ They may well also prove counterproductive in practice. Repeated attempts by the Government to extend the pre-charge detention limit in recent years have led to comparisons between extended pre-charge detention and internment. Such comparisons can also be aptly applied to control orders which allow for individuals to be effectively detained without charge or trial for years on end - far longer than 14, 28, 42, 56 or even 90 days. Three of those currently subject to a control order have been subjected to it for more than 2 years. One man is in his fifth year under a control order. The propensity for internment and extended pre-charge detention to act as a recruiting sergeant for terrorism is well known. Control

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- (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 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.

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; 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>

orders may well have the same impact, as individuals and communities witness injustice and discrimination first hand.

Case study
Cerie Bullivant

(Advisory note: Cerie's first name is pronounced Kerry)

Cerie Bullivant, a young British man from East London, was served with a control order in the summer of 2006. He was given no reasons whatsoever as to why the order had been imposed on him. He had been questioned by MI5 officers on only one occasion, a few months earlier when he was on his way to Syria to study Arabic and work in an orphanage. Cerie says that under a control order life changed beyond recognition:

“Friends turned against me and people were afraid...the control order grew more and more restrictive – it began with forced residence , no travelling and daily signing in at a police station and ended up with tagging, curfews, no studying and forced unemployment. It became impossible to live an ordinary life. As more and more restrictions and conditions were added, normal activities like working and studying became impossible. Not only did inflexibility of the hour that was set for the daily signing in make it difficult – between noon and 1pm – but any places of work or study had to be vetted by the Home Office. What employer is going to take the risk of hiring someone on a control order! Your life is no longer your own – you can't plan anything. Another condition was that the police could enter my home at anytime and this happened every couple of weeks or so. They would confiscate all kinds of things – once they even confiscated some passport photographs taken when I was 14.

Cerie breached his control order a number of times, mainly for signing in late and once for staying with his Mum who suffers from mental health problems. As the pressure built Cerie became depressed and desperate, it led to the breakdown of his marriage, and he eventually absconded. He disappeared for five and half months before eventually turning himself in after seeing the impact that his disappearance was having on his Mum and friends. He was arrested and charged with breaching his order and was remanded in Belmarsh and Wandsworth prisons.

He says: *“I was waiting for two trials; the criminal case, which would consider the breaches of the control order and the High Court which would consider the control order itself. It is a crime to breach a control order and the criminal case would be the first I would face. I had seven counts of breaching – I wanted the court to know the circumstances and tell them how ridiculous the control order was, that there was no evidence, that I’d never been told what I had done wrong...But the criminal trial couldn’t discuss this – only the High Court can consider the rights and wrongs of a control order and this wouldn’t happen until after the criminal case. This meant that the jury just had to accept that I was a terrorist and that the threat I presented had already been proven beyond doubt. It was impossible – I had breached my control order on all the occasions that they said I did, therefore I was guilty – but I didn’t feel guilty. I wanted them to know I’d felt I had no choice and how ridiculous and upside down the whole thing was. I pled not guilty. Impossibly, amazingly, the court found me not guilty.”*

In February 2008 the High Court quashed Cerie’s control order. The BBC reported that Tony McNulty, the Home Office Policing Minister at the time, was ‘disappointed’ that the order had been quashed. He said: *“The ruling will not affect any other control orders, all of which remain in force. For those we cannot prosecute or deport, control orders are the best available option for managing the risk to the public posed by suspected terrorists”*. No doubt this weary justification will be trotted out once again during the control order debates.

Cerie says *“The day the judgment was handed down, I was ecstatic – it was over! I couldn’t wait for the police to come and remove my tag, so I cut it off and hand delivered it to them myself. Finally, after two years, my life could begin again. Looking back, I see how naïve I was. There was no way my life would return to normal. I’ve had to move – I still get abused in the street, shouted and spat at. The police still stop me – in fact some police stopped me as they believed me still ‘wanted’. I can’t open a bank account. I’ve lost friends. I have always mixed with all kinds of people regardless of their creed or colour - but now, no one wants to mix with me...I’ve always tried to live a good life but now I’m the lowest of the low – and I’ve never been charged, tried or convicted of any terror offences. The only times I’ve been arrested in my life were for breaches of the control order. The name of Liberty’s campaign - ‘Unsafe, Unfair’- makes so much sense because the irony is that had I actually been someone dangerous, with criminal intent,*

the control order wouldn't have stopped me. Instead all it achieved was to beat me down for two years and change my life forever."

House of Lords decision impugning control orders – June 2009

10. While the supposed judicial safeguards do little to mask the glaring injustice of the regime there was a significant legal development in 2009 which serves to make control orders even less workable in practice. In June 2009, three 'controllees' argued that they should be entitled to an "irreducible minimum" of disclosure in order to satisfy Article 6 (right to a fair trial) of the HRA.⁶ The House of Lords held that by failing to disclose sufficient information to the controlled person for him or her to know the essence of the case against the person, the Government had violated Article 6 of the HRA. The House of Lords followed the decision of *A v United Kingdom*⁷, by the European Court of Human Rights, stating that:

non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.

It was further held that:

where the open material consisted purely of general assertions and the case against the controlled person was based solely or to a decisive degree on closed materials, the requirements of a fair trial would not be satisfied, however cogent the case based on the closed materials might be.

The House of Lords held that the right to a fair trial:

⁶ *Secretary of State for the Home Department v AF and another* [2009] UKHL 28

⁷ *A v United Kingdom* (2009) 26 BHRC 1 addressed the extent to which the admission of closed material was compatible with the fair trial requirements of art 5(4). 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.

belongs to everyone, as the opening words of art 6(1) of the European Convention on Human Rights remind us – even those who are alleged to be the most capable of doing us harm by means of terrorism.

Following this important decision, the Government, unable to meet the disclosure requirements laid down, has revoked two control orders.

11. 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, not only by the 2009 House of Lords judgment, but also by a number of resignations of former special advocates.⁸ 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*.”⁹ 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 being made and without any kind of criminal charge or trial. For me this was untenable.”¹⁰

⁸ Additionally, a number of special advocates that remain are profoundly dissatisfied with the procedure.

⁹ http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268

¹⁰ 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. The fair trial impediments do not stop there. Breach of a control order without reasonable excuse is a criminal offence punishable on indictment by imprisonment for up to 5 years or an unlimited fine, giving rise to further fair trial complications. One individual currently subject to a control order has been charged with breaching the terms of the order. The 'controlee' is alleged to have breached his curfew, tampered with his electronic tagging equipment and entering a prohibited area. Another 'controlee' has in the past been convicted for a control order breach and sentenced to 5 months imprisonment. Previously also, an individual who was not subject to a control order was convicted and sentenced to 3 ½ years' imprisonment for assisting an individual to breach their control order.

13. In addition to the 2009 House of Lords judgment, criticism of the control order regime has gained momentum in the last year. On 2nd February 2010 the Home Affairs Select Committee published a report on the Home Office's response to the terrorism threat. Among other observations and recommendations the Committee said:

In 2006 we supported the introduction of control orders. We believed at the time that they could be used to disrupt terrorist conspiracies and that there would be circumstances in which it would not be possible to charge individuals but where close monitoring of a suspect would be necessary. However, control orders no longer provide an effective response to the continuing threat and it appears from recent legal cases that the legality of the control order regime is in serious doubt. It is our considered view that it is fundamentally wrong to deprive individuals of their liberty without revealing why. The security services should take recent court rulings as an opportunity to rely on other forms of monitoring and surveillance.¹¹

The Role of the Reviewer of Terrorism Legislation

14. As noted above, Liberty expects that the Government will rely to a large extent on the most recent report by the Reviewer of Terrorism Legislation in the forthcoming control order renewal debates. As such we believe it is important that parliamentarians are reminded of the narrow statutory function of the Reviewer, particularly in relation to

¹¹ See The Home Affairs Committee Report - *The Home Office's Response to Terrorist Attacks* available at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117/117i.pdf>

this policy. In creating the present role of Reviewer of Terrorism Legislation¹² we believe that Parliament intended this important position would enable greater transparency and oversight about the operation of terrorism legislation. This is particularly the case with regards to control orders where without reports by the Reviewer little would be known about the numbers in place and the level of restrictions imposed. The post of Reviewer of Terrorism Legislation is currently derived from section 14 of the PTA and section 36 of the *Terrorism Act 2006* (TA 2006). The Reviewer's remit includes reporting on the operation of the *Terrorism Act 2000* (TA 2000), the operation of the PTA (control orders) and the operation of Part 1 of the TA 2006 (terrorism offences). As regards control orders, the Reviewer's statutory functions are to carry out "*a review of the operation of this Act during [the preceding 12 month] period*" and to "*send the Secretary of State a report on its outcome.*"¹³ There is, in statute, one tightly drawn requirement for the Reviewer to provide an opinion within the annual control orders report – that requirement is found in section 14(5) of the PTA, which provides:

- (5) *[The] report must also contain the opinion of the person making it on—*
- (a) *the implications for the operation of this Act of any proposal made by the Secretary of State for the amendment of the law relating to terrorism; and*
 - (b) *the extent (if any) to which the Secretary of State has made use of his power by virtue of section 3(1)(b) to make non-derogating control orders in urgent cases without the permission of the court.*

15. In addition to producing reports on certain pieces of terrorism legislation, the Reviewer now also responds to ad hoc requests from the Home Office. These requests frequently go beyond the remit of the role as laid out in statute. One such example was the request for the Reviewer to review the definition of terrorism, looking at international sources and providing comparative analysis.¹⁴ In fact, the latest control orders report is in part a response to another such request. On the 10th September 2009 the Rt Hon Alan Johnson MP, the Home Secretary, wrote to the Reviewer:

¹² First in the *Terrorism Act 2000* and later in the PTA and *Terrorism Act 2006*.

¹³ See section 14(3) and (4) of the PTA.

¹⁴ See *The Definition of Terrorism: A Report by Lord Carlile* available at: <http://www.homeoffice.gov.uk/documents/carlile-terrorism-definition2835.pdf?view=Binary>

*“I am writing to ask if, in your forthcoming report on the operation of control orders legislation in 2009, you could specifically consider whether the House of Lords judgment on 10 June 2009 in AF and Others affects your view that control orders remain a largely effective, justifiable and proportional safety valve for the proper protection of civil society”.*¹⁵

The Reviewer took up the Home Secretary’s request, describing his 2010 annual control orders report as a “*viability review*”¹⁶ of the control order regime. The report contains a number of value judgments as to the worth and appropriateness of the control order regime. This latest report also offers conclusions and recommendations about the wider legal framework for dealing with the terrorist threat; proposes a new type of civil order; and expresses the following view on the recent European Court of Human Rights judgment regarding the use of secret evidence:

*The effect is to make the UK a safe haven for some individuals whose determination is to damage the UK, hardly a satisfactory situation save for the purist.*¹⁷

The report then goes on to suggest:

A different approach to the European Court of Human Rights and European Convention on Human Rights could be considered... Another possibility would be for the UK government to follow the example of Italy, and ignore directions from the ECtHR to defer deporting an individual pending the Court’s consideration of an application.

This suggestion is however then ruled out for being “*undesirable: it has done considerable reputational damage to Italy*”.

¹⁵ See Annex 1 of the Reviewer’s 5th Annual Report available at: <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/lord-carlile-5th-report2835.pdf?view=Binary>

¹⁶ At paragraph 12 of the 5th Annual Report.

¹⁷ At paragraph 69 of the 5th Annual Report.

16. The above is just one example of how the scope, tone and content of this latest report represents a somewhat creative interpretation of the Reviewer's statutory role. This no doubt results in part from the fusing of this report with an ad hoc Home Office request but even by his own admission, the present Reviewer intentionally strays outside his statutory terms of reference. For example in October 2005 the Reviewer produced an ad hoc report on the draft Terrorism Bill (which became the TA 2006). Stating that the report was produced under section 14(5)(a) of the PTA, the Reviewer justified the publication of the report as a kind of early instalment of his annual PTA report:

Given that new legislation has now been drafted and is intended to be in force before the routine publication of my first report under section 14, it would have been absurd for me to wait until early next year to prepare my report on government proposals. Therefore, having received the draft Terrorism Bill 2005, I have decided to prepare this short additional report to be published prior to the Parliamentary debates on that Bill. I hope that it will assist in informing the debate. I may have strayed somewhat beyond the tightest interpretation of my role under section 14(5), but if so that is inevitable in preparing a report of this kind.¹⁸

Again, in his 2006 report on the operation of the TA 2000 he wrote:

It is outside my terms of reference to advise as to whether such legislation is required at all. Nevertheless I take it as part of my role to make recommendations accordingly, if it were to be my view that a particular section or part of the Act is otiose, redundant, unnecessary or counter-productive. I have been informed that this is considered useful.¹⁹

17. It is undeniable that a huge amount of terror-related legislation has been passed in the last ten years and that many of the laws proposed and adopted have been contentious. Notably plans to extend pre-charge detention to 90 days in 2005 (which

¹⁸ Report on Proposals by Her Majesty's Government For Changes to the Laws Against Terrorism available at: <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/carlike-review-1210052835.pdf?view=Binary>

¹⁹ At paragraph 18 of the "Report on the Operation in 2006 of the Terrorism Act 2000", available at <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/A2000-review061.pdf?view=Binary> .

were defeated in the House of Commons) and later plans to extend the period to 42 days (which proved hugely divisive in the Commons and were ultimately defeated in the House of Lords). The present Reviewer of Terrorism Legislation publicly supported both of these measures and has supported the vast majority of other measures – sometimes campaigning in support of them before they had been put before parliament.²⁰

18. We believe the role of Reviewer of Terrorism Legislation is incredibly important. This is particularly the case at the moment, while the control order regime remains on the statute book. As we have said, without this role much of what goes on in relation to control orders would remain hidden. However, we urge that in the control order renewal debate parliamentarians consider carefully the limited statutory role of the Reviewer of Terrorism Legislation.

Alternative to control orders - Criminal Prosecution and Admissibility of Intercept

19. In a recent debate during a Parliamentary Question in the House of Lords, the Minister, Lord West of Spithead, stated:

*I am constantly meeting the control order team, because I do not like the orders. None of us in our party or in this House likes them; but I believe that they are necessary, and that is why they are there. We are constantly looking for some other way of achieving this.*²¹

20. Since control orders appeared on the statute book we have been told that they are a necessary evil – that while Ministers dislike them, scrapping them would put us all, unacceptably, in harms way. This tired defence has been rehearsed time and again despite the absconds, despite the number of new terror-related offences now at prosecutors' disposal, despite the number of successful terrorism prosecutions and despite first hand accounts of the tortuous lives lived by those subjected directly and indirectly to the orders.

²⁰ For example in November 2005 Lord Carlile made his support for 90 days detention without charge known in the press (http://news.bbc.co.uk/1/hi/uk_politics/4433410.stm) and in May 2007 he called for tougher control orders in an interview on Radio 4's World This Weekend programme http://news.bbc.co.uk/1/hi/uk_politics/6700577.stm

²¹ See Hansard 3 Feb 2010 : Column 196 available at: <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100203-0002.htm>

21. Liberty has consistently argued that the breadth of criminal law now available, combined with a repeal of the ban on the use of intercept material in criminal cases, provides a viable alternative to the control order regime. The Government's response to this argument lacks coherence. We are told that on the one hand that there is credible and significant information and intelligence that those subjected to control orders have criminal intent or have committed criminal acts. We are also told that they cannot be prosecuted and that making intercept admissible would not substantially aid prosecution. Something, simply does not add up. Successful prosecutions essentially depend upon (i) the robustness and scope of the offences with which individuals can be charged along with (ii) the quality and admissibility of the evidence that can be adduced.

22. With regard to the former – we know that the criminal law is robust and comprehensive. Five terrorism related Acts of Parliament were passed between 2000 and 2008 (not to mention recent ministerial appetite for an annual piece of criminal justice legislation). The statute book is now crammed with every foreseeable terror-related offence, from dangerously overbroad offences that may capture a wide variety of innocent behaviour, to reasonably framed offences that plug specific gaps in the law.²² 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 used to huge success in recent years. Preparatory acts that involve planning, but stop short of any violence, are likely to be criminalised under offences of conspiracy, incitement or attempt. In addition, the 2000 Act created a raft of offences to catch activities of a preparatory nature, as well as allowing for organisations to be banned and criminalising actions and behaviour related to proscribed organisations. Perhaps most importantly, whatever criminal and terrorism-specific offences existed before the enactment of the control order regime in 2005, a good deal more exist today.²³ In particular the TA 2006 criminalised among other things: encouragement of terrorism,²⁴ dissemination of terrorist

²² See for example section 8 of the TA 2006 which criminalised attendance at a place used for terrorist training whether in the UK or overseas.

²³ See in particular the offences created under the TA 2006 and the *Counter-Terrorism Act 2008* (CTA).

²⁴ Section 1 of the TA 2006.

publications,²⁵ preparation of terrorist acts,²⁶ training for terrorism,²⁷ and attendance at a place used for terrorist training.²⁸

23. In examining the Government's argument that criminal prosecution could not be a substitute for control orders it is instructive to examine the suspicions held about those currently subjected to control orders. In his latest report the Reviewer of Terrorism Legislation summarises the suspicions held about these 12 individuals. We are told that there is "*credible and significant intelligence*" that three individuals "*continue to present an actual or potential and significant danger to national security and public safety*". We are told that of those remaining on control orders, two are alleged to continue to associate with extremist groups, one is alleged to be a dangerous terrorist that would engage in terrorism activity as soon as possible, two are said to be wishing to travel abroad for terrorist training, two have already received terrorist training abroad and two have trained in terrorist activity and have been involved in considerable terrorist planning and facilitation in the UK. Crucially then, each of the suspicions outlined above, if supported by credible evidence, would be prosecutable.

24. Further, our assessment of the robustness or otherwise of the criminal law need not exist in the abstract. The rate of successful prosecutions for terror related offences is extremely high and since 11th September 2001 nearly 250 people have been convicted as a result. Proper criminal trials and custodial sentences for those suspected of terrorist activity have been hugely effective at protecting the public.

25. If then there are sufficient means for prosecuting those subject to control orders, the only conceivable flaw in the argument for criminal prosecution is in the quality or admissibility of the evidence that could be presented against each 'controlee'. Without being privy to this information we have to assume – perhaps generously so – that the quality of information and potential evidence against those currently subject to control orders is first rate. All that remains therefore is the issue of admissibility.

²⁵ Section 2 of the TA 2006.

²⁶ Section 5 of the TA 2006.

²⁷ Section 6 of the TA 2006.

²⁸ Section 8 of the TA 2006.

26. At present intercept material 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 such proceedings. In legal terms this bar is an anomaly. Elsewhere in the world, intercept evidence has been used effectively to convict those involved in terrorism and other serious crimes. While our domestic law²⁹ forbids the use of domestic intercepts in criminal proceedings, foreign intercepts can be used in such proceedings if obtained in accordance with foreign laws, and domestic intercept material is increasingly used in civil proceedings.³⁰ Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping can be admissible even if they were not authorised. This means that the transcript of a telephone conversation that is picked up using a bugging device concealed near a telephone is admissible in court while the same transcript if produced as a result of intercepting the phone conversation (rather than bugging it) is not.

27. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.³¹ The imperative behind the historic bar on the admissibility of intercept was the protection of Security Services' methods rather than any obvious concerns for the fair trial process. Indeed there are no fundamental human rights objections to the use of intercept material, properly authorised by judicial warrant,³² in criminal proceedings. Indeed the consensus around the admissibility of intercept in criminal proceedings is growing. In 2007 the Home Affairs Select Committee concluded:

*We consider it ridiculous that our prosecutors are denied the use of a type of evidence that has been proved helpful in many other jurisdictions ... We can learn from other similar countries, such as the USA and Australia, how to protect our intelligence sources ... It would not be compulsory to use intercept evidence if it were felt that the damage from doing so outweighed the benefit.*³³

²⁹ See section 17 of the *Regulation of Investigatory Powers Act 2000* (RIPA)

³⁰ Intercept evidence is already relied on by the state in non-criminal proceedings and the absolute bar on the use of intercept in court is being eroded in a piecemeal and ultimately illogical way. Exclusions to the absolute bar on admissibility are found in section 18 of RIPA. Most recently the CTA allowed intercept evidence to be used in terrorist asset-freezing proceedings.

³¹ Cf Liberty's 2007 evidence to the Joint Committee on Human Rights on this subject at <http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf>

³² The Home Secretary currently authorises interception warrants.

³³ Home Affairs Committee, First Report of Session 2007–08, *The Government's Counter-Terrorism Proposals*, HC 43-i, para 86

When the Committee re-examined and reported on the Home Office's response to the terrorism threat earlier this year it concluded:

We see no reason to revise our earlier conclusions and strongly recommend that the Government immediately introduce legislation allowing the admission of intercept evidence in court.³⁴

28. Most recently the admissibility of intercept has been accepted in principle by a *Privy Council Review of Intercept as Evidence*³⁵ whose findings were accepted by the Prime Minister in February 2008. Since then, a pilot project on implementation has been established for which an interim report was published in December 2009. On 10th December 2009, the Rt Hon Alan Johnson MP, the Home Secretary, in a written statement to the House of Commons, reiterated the Government's commitment to making intercept admissible and stated:

*Any implementation of intercept as evidence must, as set out in the original Privy Council review, ensure that trials continue to be fair and that the operational requirements to protect current capabilities are met. As noted in the advisory group's interim report to the Prime Minister, reported in my predecessor's written ministerial statement of 12 February and placed in the Libraries of both Houses, there is an intrinsic tension between these legal and operational requirements. The work programme set out to develop a model for intercept as evidence that successfully reconciled these requirements, based on the approach recommended by the Privy Council review. This model has been subject to extensive practical testing, with the close involvement of senior independent legal practitioners. This testing has demonstrated that the model, if fully funded, would be broadly consistent with the operational requirements. However, it would not be legally viable, in that it would not ensure continued fairness at court. This has been confirmed by a recent European Court of Human Rights case (*Natunen v**

³⁴ Ibid at footnote 11.

³⁵ Privy Council Review of Intercept as Evidence (January 2008) available at: <http://www.official-documents.gov.uk/document/cm73/7324/7324.asp>

Finland). The result would be to damage rather than enhance our ability to bring terrorists and other serious criminals to justice.³⁶

It is unfortunate but perhaps not unexpected that experiments premised on the secrecy preferences of the security services have not met the UK's fair trial obligations. Indeed we have long been concerned that institutional inertia will unnecessarily delay reform in this area. As noted by former Director of Public Prosecutions, Sir Ken MacDonald, in oral evidence to the Home Affairs Committee on 10th November 2009:

There is serious concern within the [security] agencies in particular that the use of intercept as an evidential tool would result in significant bureaucratic burdens upon them ... There is a feeling that this is a reform that would be burdensome and might impact on the relationship between the agencies and law enforcement in a way which is unattractive.³⁷

In commenting on the 'cultural response' of the security services to the issue of admissibility of intercept, the Home Affairs Select Committee recently concluded:

These concerns may be plausible and deeply-felt, but we fear that this is a case of the tail wagging the dog. Other states have adopted the use of intercept evidence without compromising the work of their security agencies so it is clear that a way can be found without impacting on security services too adversely. We suspect that that the apparent unwillingness of security agencies to approach this matter in a constructive manner is attributable as much to institutional inertia and a deeply felt cultural reflex as to insurmountable technical barriers. The clear desire of Prime Ministers and the Government to allow the admission of intercept material should not be frustrated by such responses.³⁸

29. Further, according to the current Director of Public Prosecutions, Keir Starmer QC, any legal barriers to admissibility can be overcome:

³⁶ The Home Secretary's written statement is available at: <http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091210/wmstext/91210m0002.htm>

³⁷ Oral Evidence of the former Director of Public Prosecutions, Sir Ken MacDonald QC, to the Home Affairs Select Committee (10/11/09) available at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117-ii/9111001.htm>

³⁸ Ibid at Footnote 11.

*As a matter of principle I think that a legal regime could be devised in which evidence obtained by intercept could be admissible in evidence ... you can devise a legal model that would permit evidence obtained by an intercept to be used.*³⁹

30. It is indeed frustrating that the apparent political will to make intercept admissible seems currently to be thwarted by institutional reluctance. We are convinced that a repeal of the ban would make a significant difference to the ability of our prosecutors to prosecute suspected terrorists. Claims to the contrary are very hard to reconcile with the extent of interception in the UK⁴⁰ and recent comments by both the current and former DPP. Indeed we have examined the issue of intercept in this briefing because we believe firmly that a repeal of the ban on admissibility would allow those genuinely suspected of criminal deeds or intent, who cannot currently be prosecuted, to be so. The offences exist; and prosecutorial talent exists, and so if the suspicion is credible and genuine the only missing piece of the jigsaw is the admissibility of evidence. If, however, admissibility would not assist in prosecution of those under control orders as has been suggested, this raises serious questions over the quality of the information and evidence against 'controlees'. Parliamentarians should then be extremely concerned that indefinite house arrest - in a manner that imposes untold misery on individuals and their families and strains the very fabric our legal system - is being imposed simply not enough evidence to charge. There is a reason why the criminal justice system has, over the centuries, required a high burden of proof to be satisfied before a person can face punishment – to ensure the innocent are not swept up with the guilty. In doing away with the need for proof before punishment, this new and unusual regime inevitably sweeps the innocent up in its wake.

³⁹ Oral Evidence of Director of Public Prosecutions, Keir Starmer QC to the Home Affairs Select Committee (10/11/09) available at:

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117-ii/9111001.htm>

⁴⁰ See for example, "Annual Report of the Chief Surveillance Commissioner for 2008–09", July 2009, HC 704 <http://www.official-documents.gov.uk/document/hc0809/hc07/0704/0704.pdf>

No longer temporary

31. 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 five 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. Indeed 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, the taking of DNA from controlees as well as a host of other strengthening and enforcement powers. The Crime and Security Bill currently in its Committee Stage in the House of Commons sets out the period for which the DNA profile of someone previously made subject to a control order can be retained. Meanwhile, the control order model is currently seeping into other areas. The *Policing and Crime Act 2009* introduced "*injunctions to prevent gang-related violence*" which are in effect a mix of control orders/ ASBOs for anyone suspected of engaging in, encouraging or assisting gang-related violence.

32. 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.

Conclusion

33. At the renewal debates the Government will no doubt continue the tired mantra that anyone who questions the wisdom of control orders is 'soft on terror'. This is notwithstanding the growing catalogue of control order failures. In addition to the 16% abscond rate, parliamentarians should not forget the other ways in which control orders are ineffective: two of the individuals currently subjected to control orders are believed to continue to associate with extremist groups; three others, despite being subject to control orders for extended periods of time, are believed to present the same level of risk as when they were first placed under house arrest. It is absurd and irrational that those that we are told present a grave and real risk to our lives, those that the Home Secretary

genuinely suspects of the most serious type of criminality, continue to be left to live amongst us without charge. An illustrative example of this occurred last year when an evidently distressed man who was subject to a control order attended Liberty's 75th anniversary conference, a stone's throw away from Parliament, along with hundreds of members of the public and senior politicians. If this man had indeed been as dangerous as we have been led to believe, this situation should never have happened. As it was, his presence served as a visible and troubling reminder of the human impact of this unsafe and unfair regime.

34. The Government will also rely on the argument that those subject to control orders cannot be prosecuted. We are not privy to the information that the Government bases this assessment on but we do believe that parliamentarians are entitled to know how many of the current control order cases have been referred to independent professional prosecutors. Under the PTA chief constables are entitled to keep criminal prosecution 'under review' for control order cases but are only required to consult the relevant prosecuting authority 'to the extent he or she considers it appropriate to do so'.⁴¹

35. Without information about the extent to which control order cases are reviewed by police and without any information about the consultation of prosecutors we have sought (as set out above) to use what we do know about the breadth of the criminal law, suspicions about those currently subject to control orders and the record of our prosecutors to debunk the claim that prosecutions are impossible. We expect that those who are privy to more information and who support the control order regime will rely in the debate on the 'if you knew what I know' trump card rather than engage in the detail of why criminal prosecution and the admissibility of intercept would not prove a viable alternative. We urge parliamentarians to interrogate this line of argument and to vote against the fifth renewal of control orders.

⁴¹ See section 8 of the PTA