

**REVIEW OF COUNTER-TERRORISM AND SECURITY  
POWERS**

**REVIEW FINDINGS AND RECOMMENDATIONS**



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POWERS**

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

January 2011

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## FOREWORD

I am pleased to publish the findings from my review of the most sensitive and controversial security and counter-terrorism powers. As the Coalition Programme for Government makes clear, national security is the primary duty of Government. We will not put that security at risk. The review has taken place in the context of a threat from terrorism which, as the Prime Minister has said, is as serious as we have faced at any time and will not diminish in the foreseeable future. We must, though, correct the imbalance that has developed between the State's security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary. The review's recommendations, once implemented, will do this. They will ensure that the police and security agencies have the powers to protect the public and help preserve our cherished freedoms.

Alongside this report, I am publishing a report by Lord Macdonald of River Glaven QC who has provided independent oversight of the review process. I am also publishing a summary of the consultation on the review and an equality impact assessment of the review recommendations. I am grateful to Lord Macdonald for his input to the review and to all the members of the public, experts and organisations who have made contributions to the review.

A handwritten signature in black ink, appearing to read 'Theresa May', with a large, sweeping flourish at the beginning.

The Right Honourable Theresa May MP

Home Secretary

## **INTRODUCTION**

On 13 July 2010 the Home Secretary announced her intention to review counter-terrorism and security powers.

The review was tasked to look at the issues of security and civil liberties in relation to the most sensitive and controversial counter-terrorism and security powers and, consistent with protecting the public and where possible, to provide a correction in favour of liberty.

The aim of the review is to ensure that the powers and measures covered by the review are necessary, effective and proportionate and meet the UK's international and domestic human rights obligations.

The review considered six key counter-terrorism and security powers:

- The detention of terrorist suspects before charge, including how we can reduce the period of detention below 28 days
- Section 44 stop and search powers and the use of terrorism legislation in relation to photography
- The use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities and access to communications data more generally
- Measures to deal with organisations that promote hatred or violence
- Extending the use of 'Deportation with Assurances' in a manner that is consistent with our legal and human rights obligations
- Control orders (including alternatives).

This reflects some of the key elements in the Coalition's Programme for Government, in particular that:

- The first duty of Government is to safeguard our national security
- The Government will reverse the substantial erosion of civil liberties and roll back state intrusion
- The Government will introduce safeguards against the misuse of anti-terrorism legislation
- The Government will ban the use of powers in the Regulation of Investigatory Powers Act (RIPA) by councils, unless they are signed off by a magistrate and required for stopping serious crime
- The Government will urgently review control orders, as part of a wider review of counter-terrorist legislation, measures and programmes
- The Government will proscribe any group that has recently espoused or incited violence or hatred subject to the advice of the police and security and intelligence agencies
- The Government will seek to extend verifiable guarantees that foreign nationals who threaten our security will not be tortured so that they can be deported.

## Consultation

The initial stages of the review have been led by the Office of Security and Counter-Terrorism in the Home Office who consulted a wide range of interested parties, including the police, security and intelligence agencies and other government departments including those in Scotland and Northern Ireland. Wider consultation included a range of civil liberty organisations (in particular Liberty, Amnesty, Justice and Human Rights Watch), community groups, experts and interest groups and the review also received submissions from members of the public. Consultation meetings were held in London, Manchester, Birmingham, Edinburgh and Belfast.

A summary of the extensive consultation and submissions received is published separately.

To ensure that the review has been properly conducted, that all 'relevant options' were considered and that the recommendations are 'fair and balanced' Lord Macdonald of River Glaven QC has provided external oversight of the review. He has had access to the relevant papers at each stage of their drafting and has engaged with Ministers and officials across Government and in the security and intelligence agencies, civil liberty organisations and community groups. A report from Lord Macdonald is being published alongside this review.

## Findings

The review has found that in some areas our counter-terrorism and security powers *are neither proportionate nor necessary*. Taken together the recommendations do much to restore our civil liberties while enabling the police and security services effectively to protect the public. They are in keeping with our traditions and our commitment to the rule of law. They should help restore public confidence in counter-terrorism and security legislation. The key elements are:

- A return to 14 days as the standard maximum period that a terrorist suspect can be detained before they are charged or released
- An end to the indiscriminate use of terrorism stop and search powers provided under Section 44 of the Terrorism Act 2000
- The end to the use of the most intrusive RIPA powers by local authorities to investigate low level offences and a requirement that applications by local authorities to use any RIPA techniques are approved by a magistrate
- A commitment to rationalise the legal bases by which communications data can be acquired and, as far as possible, to limit that to RIPA

- A stronger effort to deport foreign nationals involved in terrorist activities in this country fully respecting our human rights obligations
- The end of control orders and their replacement with a less intrusive and more focused regime. Additional resources will be provided to the police and security agencies to ensure the new measures are effective not only in protecting the public but in facilitating prosecution

The original written review itself included a significant amount of additional sensitive material which cannot be disclosed: to do so would undermine the police and intelligence agencies' ability to protect the public and our national security.

### **The future**

These proposals will now be extensively debated by Parliament and progress in implementing the review's findings will be set out in the Home Office's published Structural Reform Plan.

This review is not the end of the Government's review of our counter-terrorism and security powers. As a result of both feedback given by a number of community groups in the course of this review, and in the context of the Government's commitment to strengthen border security arrangements, the Government is also considering how the border security powers contained in Schedule 7 of the Terrorism Act 2000 are used. We are looking at how we can increase the evidence and intelligence dividend from defendants and prisoners in terrorism cases to support our prosecution efforts. Work continues on the use of intercept as evidence in court and updating our communications capabilities. A review of the Prevent strategy was announced on 10 November. A new version of the Government's counter terrorist strategy, CONTEST, will be published within a few months.

The principles of this review will continue to guide the Government's approach to counter-terrorism and security powers to ensure that, in protecting the public, the Government does not undermine the very civil liberties it is seeking to protect.

## **PRE CHARGE DETENTION OF TERRORIST SUSPECTS**

### **Introduction**

1. Section 41 and Schedule 8 of the Terrorism Act 2000 provide a regime for the arrest and detention of terrorist suspects which is different from arrangements for other criminal investigations. The most controversial aspect of this regime has been the length of time for which suspects can be detained without charge – a maximum of 28 days, as opposed to 4 days for other criminal investigations.

2. The detention process under TACT allows for incremental extensions of detention up to the maximum period. An individual can be detained after arrest for up to 48 hours, after which time the police or Crown Prosecution Service (CPS) may apply to a judge for a warrant of further detention. Applications for extensions of detention can only be for a maximum of 7 days at a time and are made to a designated District Judge (for detention up to a maximum of 14 days) or to a High Court Judge (for detention over 14 days). Applications for detention over 14 days are made by the Crown Prosecution Service.

### **Issues**

3. The current 28 day maximum period of pre-charge detention for terrorist suspects has to be renewed by affirmative order or it falls to 14 days. The last order was approved by Parliament in July 2010 for a period of 6 months pending the outcome of this review. That order expired at the end of 24 January 2011.

4. Concerns have been raised in Parliament and more widely about 28 day pre-charge detention. These concerns were reflected in the consultation process for this review. The broad objections are that:

- a) It is not routinely required, demonstrated by the fact that no-one has been detained for longer than 14 days since July 2007;
- b) It is out of step with other Western democracies;
- c) It is incompatible with human rights obligations (primarily the right to liberty);
- d) It has a negative impact on Muslim communities in particular and undermines other aspects of the Government's counter-terrorism strategy.

5. The case for extended pre-charge detention for terrorist suspects is based on the fact that the investigation of terrorism is substantially different from the investigation of other crimes. To preempt a terrorist incident the police may need to arrest at an earlier point than would normally be the case. Arrests are often made before sufficient admissible evidence has been

gathered to bring a charge; substantial evidence gathering often takes place *after* arrest.

6. Post arrest evidence gathering in connection with terrorist offences can take considerable time and resources, due to: the numbers of people who might be engaged in a single terrorist network and who are therefore likely to be arrested; the volume of information and modern communications/data storage methods which they may hold; the need to secure evidence from countries overseas given the very significant likelihood that there will be an overseas aspect to the terrorist operation; the fact that most of these countries will have a law enforcement and judicial system very different to our own and probably not as strong, effective or as quick to respond; the requirement to interpret multiple languages and dialects; and the need to await the results of forensic examinations. Terrorist suspects often need to be held in detention during the post-arrest phase of the investigation because of the public safety risk which they may represent.

7. Irrespective of the facts regarding the previous use of 28 day detention the arguments in its favour do not depend solely on precedent. They also reflect an assessment of the future development of the terrorist threat, including the way in which terrorists are likely to operate and the lethality of the attacks they may conduct. Supporters of extended detention have argued that it is very possible a terrorist plot or incident of such magnitude/complexity will take place in the foreseeable future that 14 days detention will not be sufficient.

8. Both opponents and supporters of 28 days have disagreed over its necessity in previous cases. To date 11 individuals have been held for over 14 days pre-charge detention – nine were arrested in Operation Overt (the so-called ‘transatlantic airline plot’ in 2006), one in Operation Gingerbread (a Manchester-based arrest in 2006) and one in Operation Seagram (the London Haymarket and Glasgow airport attacks in 2007). Six of these 11 people were held for the maximum 27-28 days: three were charged, three released without charge. Terrorist suspects were last held for more than 14 days in 2007. The review heard arguments from opponents of the powers that some of these people could have been charged earlier, and that not all those charged post-14 days were subsequently convicted.

9. The limited number of times that the powers have been required has been used to support the claims of both supporters and opponents; the former have argued that the safeguards in place are working and the exceptional nature of the powers has been recognised; the latter that the powers are not routinely needed

#### *Operation Overt*

10. There has been a significant debate about the use of the maximum 28 days in 2006 for a number of the suspects arrested under Operation Overt. Nine people were held for over 14 days during this operation. Of these nine, six were charged and three released. It has been claimed by David Davis MP (in the House of Commons on 14 July 2010) and by Liberty (in their

contribution to the review) that the evidence used to charge two of the people who were held for 27-28 days, was available before the 14 day point (at the third and twelfth days respectively), and they could have been charged earlier. If this was the case then the operational argument for 28 days would rely either on other past cases or more hypothetical cases about investigations that *might* be conducted in future.

11. In their submission to the review, the CPS emphasised that the evidential picture in many terrorism cases comprises numerous pieces of information from a very wide range of sources. Only when put together into a coherent case is it possible to determine if there is sufficient evidence to charge. Vast amounts of collected material never form part of the evidence at trial but are nevertheless essential. With regard to the Operation Overt suspects charged on the 27<sup>th</sup> day, the CPS state that the investigation, analysis and enquiries took place up to the date of charge. They disagree with claims that these individuals could have been charged earlier.

### *International comparisons*

12. Critics of 28 days have also emphasised differences between the UK approach and that of our international counter terrorist partners. The review found that these comparisons were not always accurate or appropriate given the differences in criminal justice systems. Countries which appear at first to have much lower pre-charge detention limits in practice do not. In France and Italy, the judicial system based on investigating magistrates can lead to suspects being held for months or years before they are released or then subject to what we would consider to be a 'charge'.

### *Schedule 8*

13. While the debate on pre-charge detention has focused on the maximum period that a terrorist suspect can be detained before they are charged or released, there has been concern whether Schedule 8 to the Terrorism Act 2000 is incompatible with the right to liberty under Article 5 of the ECHR. The two key areas which some critics have suggested are incompatible with Article 5 relate to the assertions that:

- (a) Suspects are not told the basis on which they are being detained in sufficient detail in order to allow them properly to challenge their continuing detention without charge.
- (b) There is insufficient judicial control over decisions to hold a suspect in pre-charge detention.

14. The review considered these points in the light of recent court cases. The *Sultan Sher (Sultan Sher and Others (2010) EWHC1859)* case concerned three of the suspected terrorists arrested under Operation Pathway (the arrests in the North West of England in April 2009). In his judgment, the judge referred to the House of Lords judgment in *Ward v Police Service of Northern Ireland* [2007] UK HL 50 which held that the procedures under

Schedule 8 were entirely in accordance with Article 5 and held that this remains the case. The judge also said that the House of Lords' judgment in *AF & Others*, which provides that a minimum level of disclosure must be given to the individual in control order cases, does not apply to pre-charge detention cases. This was partly on the basis that the provisions of Schedule 8 already provide for the individual to be told the basis of their detention. There remain, though, outstanding legal proceedings relating to the compatibility of Schedule 8 with the ECHR.

#### *Post-charge questioning / holding charges*

15. It has been argued, including in submissions to the review, that the use of holding charges and the introduction of post-charge questioning would remove any need for extended pre-charge detention. Provisions for post-charge questioning of terrorist suspects are included in the Counter Terrorism Act 2008 but the provisions have not yet been commenced. Post-charge questioning does not remove the need for a charge to be brought in the first place, or assist the process of gathering evidence before charge, which is the driver behind pre-charge detention. Based on the evidence submitted, the review concluded that post-charge questioning is unlikely to make much, if any, difference to the need for extended pre-charge detention. It is, however, likely to be a useful tool in cases where further substantial evidence emerges after charge.

16. The review considered whether 'holding charges' could remove or reduce the need for extended pre-charge detention. A 'holding charge' would entail charging the suspect with some lesser offence while he was being investigated for the main charge. The review did not conclude that the use of holding charges would be appropriate: it would weaken safeguards, would not provide sufficient public protection (a minor 'holding' charge may not justify detention post-charge) and evidence supporting such a 'holding charge' may not in any event be available.

#### *Threshold test*

17. It has also been argued that the 'threshold test' is an adequate alternative to pre-charge detention. The threshold test is set out in the Prosecutors Code, drawn up independently of Government by the Director of Public Prosecutions. It allows the CPS to charge a suspect at an earlier stage than is normally required. For the threshold test to be used certain conditions need to be met including that there are reasonable grounds for believing that further evidence (to meet the evidential test) will become available within a reasonable period. The review found that the threshold test has been used in preference to extended pre-charge detention in some cases and as such plays a part in reducing reliance on the need for extended pre-charge detention. But in the rare cases when extended detention has been used and when open ended lines of enquiry are still being pursued (sometimes overseas) there is not always the degree of confidence that further information will be available which the threshold test requires. The review, therefore, shared the view of the CPS that the threshold test cannot always be relied

upon to provide an alternative to extended pre-charge detention. The review did not support suggestions that the threshold tests should be lowered given that this would introduce a potentially more significant infringement of civil liberties.

### *Police bail*

18. Pre-charge police conditional bail is currently not available for people detained under Schedule 8 to the Terrorism Act 2000 because of concerns that it would not be appropriate for those who might be intent on engaging in terrorist activity, including attack planning, or who plan to leave the country, possibly under an assumed identity. There are, however, arguments that bail ought to be available in terrorism cases.

19. The Joint Committee on Human Rights has argued that questions on whether to grant bail in a particular case, irrespective of the suspected offence, should be a matter for a court to determine. The evidence presented to the review confirmed that there could be merit in a pre-charge bail regime akin to the existing police conditional bail for non-terrorist cases. This could be used in terrorist investigations against those suspected of less serious offences, but there would be risks for public safety in releasing terrorist suspects when the nature and extent of their involvement in terrorism was still being investigated. Police bail was unlikely, therefore, to be a substitute for extended pre charge detention.

### *Resources*

20. It has been argued that additional resources would reduce the need for extended pre-charge detention. The review received submissions that additional resources, whilst always welcome, would not assist the police and CPS given the sequential nature of terrorism investigations. The review considered that additional resources, even if they were available, would not in themselves remove the difficulties that 28 days was designed to help address.

### *Concluding remarks*

21. The fact that detention beyond 14 days has not been used in the past three years is clearly important. Both critics and supporters of 28 days argued in submissions to the review that this supported their case: critics argued that it demonstrated 28 days was not necessary; supporters that it was clearly an exceptional power exercised responsibly. The review simply drew the conclusion that 28 days is not routinely required and that a detention limit set at 14 days should at present be the norm. But the review also concluded that there could be circumstances in the future in which detention for longer than 14 days will be required.

22. The review also concluded that alternatives to 28 day detention cannot adequately address the circumstances in which 28 day detention might be required.

## Options considered

23. On the basis of the Government's commitment to seek ways to reduce the maximum period of detention over time, the review considered the case for extended pre-charge detention and the implications of reducing it. The review also looked at options for creating a contingency power that would enable a new lower limit of 14 days detention to be increased to 28 days under urgent circumstances and subject to the judicial process for authorising specific extensions summarised above at paragraph 2. Reducing the pre-charge period to 14 days recognises that a longer period will rarely be needed; allowing provision for an extension reflects our understanding of the developing terrorist threat and the continuing challenge of investigating and prosecuting terrorist cases.

24. Against this background the key options considered were:

- **Option 1: Allow 28 days to lapse, revert to 14 days, but make provision for reintroducing 28 days if required.** There would be four possible means of reintroducing 28 days.
  - i. The first would require an order using the existing provisions under section 25 of the Terrorism Act 2006 (which extends 14 to 28 days). Because of the time needed to make the order under section 25, it would be very difficult to extend 28 days in response to or during a specific investigation. But in different circumstances an order under section 25 would allow proper Parliamentary scrutiny: it could, for example, be introduced in the case of a wider change in the threat level, rather than a specific investigation. It would mean that, although no order would be in force at present, 28 days as an option would remain on the face of existing primary legislation.
  - ii. The second means would be via urgent primary legislation. This could be passed through Parliament more quickly than an order under section 25, for example in response to multiple co-ordinated attacks or multiple preemptive arrests or investigations. If an active investigation were underway, Parliamentary debates would require particularly careful handling to avoid jeopardising the fairness of future trials.
  - iii. The third would involve a new order making power that would allow the period of detention to be increased to 28 days immediately by order of the Home Secretary if operationally necessary. This order making power would be subject to annual Parliamentary renewal, but individual orders would not be debated by Parliament. This option may not be regarded as an enhancement of safeguards given the lack of real Parliamentary scrutiny.

iv. The final option would include the order making power but require that Parliament vote on it within 40 sitting days. This would result in greater scrutiny but there may be a risk that trials could be prejudiced by the Parliamentary debate if they were not carefully handled. Parliament may also prefer to be able to vote on primary rather than secondary legislation.

- **Option 2: Reverting to 14 days and introducing a pre-charge terrorism ‘bail’ regime for a further 14 days.** This would allow individuals to be released after 14 days but for the Court to impose stringent bail-like restrictions on individuals for a further 14 days. Release under such conditions would be preferable from a civil liberties perspective to a full 28 days detention. Given the conditions that could, in principle, be imposed on an individual, however, there is a risk that such bail could be seen as a ‘mini control order’. There would also be a limited increase in risk in releasing, even on strict conditions, a terrorist suspect still under investigation.
- **Option 3: Reduce the pre-charge detention limit to 21 days.** This would be a relatively straightforward change with the existing judicial processes remaining in force in relation to granting and extension of detention warrants. While such a change is consistent with the commitment to seek to reduce the period of detention over time, it may be regarded as a compromise which fulfils neither the objective of security nor a sufficient enhancement of civil liberties.

25. The review also considered the case for a time limit shorter than 14 days but assessed that there was a high risk that such a reduction would have a significant impact on the ability of police and prosecutors to charge and prosecute those suspected of terrorist activity.

## **Recommendations**

26. The review concluded that the limit on pre-charge detention for terrorist suspects should be set at 14 days, and that limit should be reflected on the face of primary legislation. The review accepted that there may be rare cases where a longer period of detention may be required and those cases may have significant repercussions for national security.

27. The review found that there were challenges with many of the options for a contingency power, particularly if it was intended to extend the period of detention during an investigation. Parliamentary scrutiny of a decision to increase the maximum period of detention in the wake of a particular investigation carried some risks of prejudicing future trials and would need to be handled particularly carefully.

28. The review, therefore, recommends that:
- i. The 28 day order should be allowed to lapse so that the maximum period of pre-charge detention reverts to 14 days. The relevant order making provisions in the Terrorism Act 2006 should be repealed.
29. In order to mitigate any increased risk by going down to 14 days, the review recommends:
- ii. Emergency legislation extending the period of pre-charge detention to 28 days should be drafted and discussed with the Opposition, but not introduced, in order to deal with urgent situations when more than 14 days is considered necessary, for example in response to multiple co-ordinated attacks and/or during multiple large and simultaneous investigations.
30. The review recommends the following further changes:
- iii. The post-charge questioning provisions in the Counter Terrorism Act 2008 should be commenced as an additional investigative tool and their impact on the need for pre-charge detention should be kept under review. This could help in individual prosecutions and may encourage terrorist suspects to assist investigators either by turning 'Queen's Evidence' – i.e. becoming a witness for the Crown – or by providing intelligence (further work, separate to the review, is being taken forward to increase the evidence and intelligence dividend from defendants and prisoners in terrorism cases).
  - iv. Part of the independent reviewer of terrorism legislation's role should include publishing reports following any use of pre-charge detention beyond 14 days.
  - v. The enhanced safeguards for terrorist suspects in detention in the Coroners and Justice Act 2009 should be commenced as soon as possible. These relate to strengthening the role of independent custody visitors and establishing in legislation the role of the independent reviewer of terrorism legislation in reporting on the treatment of those in pre-charge detention.
  - vi. The Government should make clear that it can see no scenario that would ever require the use of 42 days pre-charge detention.

## **TERRORISM STOP AND SEARCH (SECTION 44)**

### **Introduction**

1. Sections 44 to 46 of the Terrorism Act 2000 (referred to frequently as “section 44”) enable a police constable to stop and search pedestrians or vehicles within an authorised area for the purposes of searching for articles of a kind which could be used in connection with terrorism, whether or not the constable suspects such articles are present. The power can only be used in a place and during a time where an authorisation is in place. An authorisation may be made by a senior police officer but must be confirmed by the Secretary of State if it is to last more than 48 hours.

2. The police have found the power useful in a range of counter-terrorism operations and situations. But its utility reflects the very broad way in which the legislation is framed (in particular the lack of requirement for any suspicion). This has led to concerns about misuse, both in terms of the authorisation process, individual stops and searches, and the overall volume.

3. In June 2010, the European Court of Human Rights (ECtHR) made final its decision in the case *Gillan and Quinton* which found the legislation to be in breach of Article 8 (the right to privacy and family life) of the European Convention on Human Rights (ECHR) because it was not “in accordance with the law”. The ECtHR found the legislation was too broadly expressed and the safeguards in place were not sufficient. The Home Secretary took immediate steps to bring the use of the powers into line with the judgment whilst the issue was considered by this review.

### **Issues**

4. The review took as its starting point the need for the powers to comply with the ECtHR ruling and the ECHR generally and to reflect the commitment in the Coalition Programme to introduce safeguards “*against the misuse of anti-terrorism legislation*”. As well as the legal challenge to section 44, there have been:

- (a) Concerns over the breadth of section 44 and allegations of overuse and misuse. The increase in use of section 44 (from around 42,000 in 06/07 to over 250,000 in 08/09 before falling to just over 100,000 in 09/10) and the nature of its use, has led to concern that there are no effective constraints on the use of the powers. The perception of disproportionate use against people from Asian communities may also fuel perceptions that the police employ racial profiling techniques and that terrorism legislation is not being applied equally. The last available statistics show that of the stops and searches conducted in Great Britain (the vast majority of which were carried out by the Metropolitan Police Service) between April 2009 and March 2010, 59% of

individuals were white, 10% were black and 17% Asian. Because of its broad use, section 44 is the counter terrorism power of which the public are most likely to have direct experience. Grievances about section 44 are more common than grievances about many other counter-terrorism powers.

(b) Questions over the necessity of section 44. In Great Britain section 44 searches have not led to convictions for terrorism offences. Supporters of the power believe it has been useful because of its deterrent and disruptive effect on terrorists and because it can be used flexibly in a variety of counter terrorism operations and situations. Opponents question these claims.

(c) Authorisation errors. In April 2010 the Home Office became aware of a number of historic authorisations which contained errors. The majority of these errors related to authorisations which 'ran' for longer than the statutory 28 day maximum; in most cases the authorisation was for 29 days. The Home Secretary announced on 10 June 2010 that she would review the authorisation process.

5. In the course of this review, the police and others argued that there will continue to be circumstances where there is an urgent operational need for a stop and search power which does not require reasonable (or any) suspicion. For instance, the police may become aware of an intended attack on a particular site or transport network, but have no description of a suspect and no specific information which could allow individual officers to form a reasonable suspicion that particular individuals were terrorists and needed to be searched: section 43 of the Terrorism Act 2000, which allows the police to stop and search a person whom they reasonably suspect is a terrorist, could not therefore be used.

6. Lord Carlile, the statutory independent reviewer of terrorism legislation, and some civil liberty groups (including Liberty, who represented Mr. Gillan and Ms. Quinton in the European Court case), have indicated that a restricted form of section 44 could be justified and proportionate. In their contribution to the review, Liberty said they had *"always maintained that exceptional stop and search powers (i.e. stop and search without suspicion) may be justified in certain very limited circumstances – for example where, due to a particular event or the nature of a particular areas, it is reasonably suspected that an act of terrorism may be planned; or where specific information linked to a place or event has been received which indicates the same."*

7. The threat from Northern Ireland-related terrorism is also an important consideration. Section 44 has been used in a more targeted way in Northern Ireland and it has successfully resulted in terrorist attacks being disrupted, and arrests and charges. Given the high volume of terrorist attacks in Northern Ireland – there were 40 attacks on national security targets in 2010 – the review considered it was especially important to ensure that the Police Service of Northern Ireland had sufficient powers to protect the public.

## Options considered

8. The review considered two main options for changing section 44 powers: the repeal of section 44 in its entirety; or its replacement with a much more tightly defined and specific power.

### *Should the power be repealed without replacement?*

9. Repeal would be the simplest way of implementing the ECtHR judgment. But there remain arguments against this on grounds of continued necessity. The absence of any arrests under the Terrorism Act 2000 in Great Britain (where there has been the highest volume of section 44 use) after hundreds of thousands of stop and searches is clearly relevant; but the scenario of concern to the police (noted above) is also credible and arguably inevitable. The experience of section 44 in Northern Ireland is also important.

10. There are other related powers otherwise available to the police. They include the stop and search power under section 43 of the Terrorism Act 2000 (though this only relates to people rather than vehicles and vessels); the stop and search power under section 1 of PACE; a common law ability for the police to stop individuals and ask them to account for themselves; powers to establish terrorist cordons; anti-terrorist road orders; and various non-terrorist powers. Moreover, the police can use high visibility patrols to replicate some of the deterrence effect of section 44. There are also some specific Northern Ireland powers that allow the police to stop and search individuals for munitions (though the intention is to amend these powers to reflect the proposed changes to section 44).

11. The review considered whether these powers sufficiently address the gap left by repealing section 44 and concluded that they would not do so. Not all these powers were or are intended for counter terrorist purposes and it would not be appropriate for the police to make widespread use of them to disrupt terrorist operations. The review concluded that the absence of any form of 'no suspicion' terrorism stop and search power would lead to an increase in the levels of risk.

### *Should the power be replaced with a tightly circumscribed version?*

12. The review also considered whether, and how, to create a more precise and specific power that could be used in more tightly defined circumstances, so significantly reducing the number of stops and searches and the scope for the powers to be used inappropriately.

13. The review considered how a limited 'no suspicion' terrorism stop and search power could be formulated in a way that would not fall foul of the ECtHR's judgment; was operationally useful; and was not vulnerable to misuse. On balance, it concluded that an authorisation for no suspicion stop and search could only be made where there was reasonable suspicion that an act of terrorism will take place and that the stop and search powers are considered necessary to prevent such an act.

14. Some contributors to the review suggested that a more tightly defined section 44-type power should be available in limited circumstances to protect individual sites or events because of their potentially vulnerable nature. High profile public events and the Critical National Infrastructure were particularly relevant factors in this consideration. The review concluded that invoking this power on the basis of vulnerability and impact, without information about a specific potential threat, might well fall foul of the ECtHR judgment. Only where there are reasonable grounds to suspect an act of terrorism will take place could a no suspicion section 44 type power be used. The formulation of such a power should, however, allow it to be used around sites or events where there are reasonable grounds to suspect an act of terrorism will take place.

## **Recommendations**

15. The review concluded that a power to stop and search individuals and vehicles without reasonable suspicion in exceptional circumstances is operationally justified.

16. The review recommends significant changes to bring the power into compliance with ECHR rights:

- i. The test for authorisation should be where a senior police officer reasonably suspects that an act of terrorism will take place. An authorisation should only be made where the powers are considered “necessary”, (rather than the current requirement of merely “expedient”) to prevent such an act.
- ii. The maximum period of an authorisation should be reduced from the current maximum of 28 days to 14 days.
- iii. It should be made clear in primary legislation that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat. The duration of the authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent a suspected act of terrorism.
- iv. The purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism.
- v. The Secretary of State should be able to narrow the geographical extent of the authorisation (as well being able to shorten the period or to cancel or refuse to confirm it as at present).
- vi. Robust statutory guidance on the use of the powers should be developed to circumscribe further the discretion available to the police and to provide further safeguards on the use of the power.

17. Taken together, this new scheme should result in a significant and permanent reduction in the volume of stop and searches compared to the use of section 44 powers. Given the fundamental change, the review also recommends that:

vii. Section 44 should be repealed and replaced with the new power.

18. In relation to section 43 of the Terrorism Act 2000 (where reasonable suspicion is required to conduct stops and searches of individuals), the review also recommends that:

viii. Section 43 should be amended to include the power to stop and search a vehicle in which a suspected terrorist is stopped; and that provision is made for the stopping and searching of vehicles which are reasonably suspected of being used for purposes of terrorism.

19. Given the Government will need to legislate to replace the existing section 44 powers, the review recommends that consideration is given to whether the replacement provisions can be implemented more quickly than would be possible through the Freedom Bill to fill the potential operational gap.

20. In parallel to the review of section 44 the Home Office undertook a review of previous authorisations made under section 44 in the light of errors identified in June 2010. That review found that a number of authorisations submitted prior to 2008 were processed incorrectly, principally as a result of a lack of understanding of the requirements of the legislation. These lessons should be reflected in the robust statutory guidance to ensure that errors are not repeated in the authorisation of the proposed new exceptional power.

## PHOTOGRAPHY AND THE USE OF COUNTER-TERRORISM POWERS

### Introduction

1. A wide range of counter-terrorism powers may be used by the police to stop people from taking photographs. There is a legitimate need for the police to be able to stop people taking photographs if it is suspected that the activity is part of terrorism reconnaissance or targeting activity. But the public otherwise have a right to take photographs without fear of being stopped, questioned or searched by the police.

2. The following terrorism powers may be used to stop people taking photographs:

- (a) Under **section 43 of the Terrorism Act 2000** a police officer may stop and search a person they reasonably suspect to be a terrorist, to discover whether that person has in their possession anything which may constitute evidence that they are a terrorist. Section 43 allows the seizure of photographs/film if the officer reasonably suspects it constitutes evidence that the person is a terrorist. Film and memory cards may be seized as part of the search, but police officers cannot delete images or destroy film.
- (b) **Section 44 of the Terrorism Act 2000** provides police with the power to stop and search anyone within an authorised area for the purpose of searching for articles of a kind that could be used in connection with terrorism (the use of Section 44 in this way was, however, suspended by the Home Secretary in July 2010). The powers do not require a reasonable suspicion that the articles are present. As with section 43, section 44 does not prohibit the taking of photographs. Section 44 is the subject of a separate section of this review.
- (c) **Section 57(1) of the Terrorism Act 2000** makes it an offence for a person to possess an article in circumstances which give rise to reasonable suspicion that their possession is for terrorism-related purposes. A photograph, film or camera could fall within the definition of “article”.
- (d) **Section 58 of the Terrorism Act 2000** makes it an offence to collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or to possess a document or record containing information of that kind. The legislation explicitly defines a “record” to include a photographic or electronic record.
- (e) **Section 58A of the Terrorism Act 2000** makes it an offence to elicit, or attempt to elicit, or publish or communicate information about an individual who is, or has been, a constable or a member of the armed

forces or intelligence services. The information must be of a kind that is likely to be useful to a person committing or preparing acts of terrorism. Information for these purposes could include photographs. This offence is based on an earlier offence which was contained in section 103 of the Terrorism Act 2000 which extended to Northern Ireland only and expired on 31 July 2007.

## **Issues**

3. The review noted the widespread concern, notably amongst photographers and journalists, that counter-terrorism powers are being used to stop people legitimately taking photographs. While statistics are not available to show which of the offences/powers listed above have created most concern, anecdotal evidence and submissions to this review suggest that section 44 stop and searches of people taking photographs are the key issue.

4. The power to conduct a search under section 43 of the Terrorism Act 2000 can only be exercised if the constable reasonably suspects the person in question to be a terrorist. For this reason, it does not appear to have generated significant public concern. The public response to section 43 will, however, need to be kept under review in the light of the proposed replacement of section 44. While the offence at section 58A of the Terrorism Act 2000 is relatively new and has not yet been used, section 58A also appears to have contributed to the general concern amongst photographers and journalists. Whilst section 58 has been used and does contain an offence more explicitly directed at the taking of photographs, it does not appear to have generated significant public discussion or concern in this context.

## **Options considered**

5. The stop and search powers under sections 43 and 44 are being reviewed separately. Sections 57 and 58 have been used extensively and are considered by the police and prosecutors to be important offences in addressing the threat from terrorism. In his 2009 and 2010 reports on the Terrorism Act 2000, Lord Carlile, the independent statutory reviewer of terrorism legislation concluded that: *“The working of sections 56-58 is satisfactory, and they remain a necessary and proportionate part of the legislation.”* Section 58A is a more recent offence and as set out above has attracted some concern. In addressing the concerns about photography the review, therefore, focused on four main options set out below.

### *Rely on section 44 changes alone*

6. Photography organisations welcomed the Home Secretary’s decision to suspend the use of section 44 as a ‘no suspicion’ power following the European Court of Human Right’s judgment becoming final in June 2010. Intensive use of section 44 has ceased. Recommendations elsewhere in this review on section 44 should significantly allay concerns.

### *Amend non-statutory guidance*

7. Over the last two years the Home Office and the police have issued a series of guidance notes regarding the use of counter-terrorism powers in relation to photographers:

- The National Policing Improvement Agency (NPIA) issued revised guidance on the use of stop and search powers in November 2008 which made it clear that the section 44 power does not stop the taking of photographs in an authorised area and that the police should not prevent people from taking pictures using these powers.
- In August 2009, the then Minister for Policing wrote to all chief constables whose forces had standing section 44 powers to make it clear they cannot be used to stop photographs being taken in public places or to make people delete images.
- The Home Office published in the same month a national circular clarifying the use of counter-terrorism legislation in regards to photography in public places. The circular is publicly available on the Home Office website.
- On 14 December 2009, Assistant Commissioner John Yates reminded all Metropolitan Police officers and staff that people taking photographs should not be stopped and searched unless there is a valid reason.
- In March 2010, the then Minister for Policing met representatives from the Royal Photographic Society, the British Institute of Professional Photography and the photography rights campaigner Austin Mitchell MP. The Minister agreed that individual cases of concern over the use of police powers to restrict photography should be passed to the Association of Chief Police Officers (ACPO) lead in this area for his consideration (there have been no cases raised with ACPO since then – though there have been cases raised in the media).

8. The review judged that over the last two years the guidance available to the police had improved significantly – it is now clear, publicly available and had been promoted within police forces. The consultation with representatives from photography groups (Royal Photographic Society, British Institute of Professional Photography, Amateur Photographer; British Photographic Council) on the guidance had also been helpful. The guidance appears to have reduced, though not eliminated, concerns about the alleged misuse of counter-terrorism powers by the police. There is scope for the guidance to be improved further to reflect the proposed changes on section 44 and to reduce the risk of misuse yet further. The review also received submissions relating to ‘over-zealous’ security guards taking action against photographers. While not directly related to counter-terrorism powers, the review considered that the guidance and training for the security guards could also be strengthened to reflect better photographers’ rights.

## *Repeal section 58A*

9. The section 58A offence is designed to deal with terrorist targeting activity directed at members of the protected groups. This is of most concern in Northern Ireland where there has been a long history of dissident groups targeting members of the security forces and Government. Submissions were made to the review arguing that the offence remained important given the clear and evident threat of terrorists targeting members of the security forces – a threat which is assessed to be increasing in Northern Ireland. There is a concern that repealing section 58A would lead to increased targeting of soldiers, police officers and Security Service personnel in Northern Ireland.

10. The need for section 58A does not, however, just relate to Northern Irish-related terrorism. The police/Security Service investigation, Operation Gamble, in 2008 related to two people collecting information about British soldiers in order to kill them. There have been a number of terrorist attacks against the intelligence services in countries overseas (for example in the US, Saudi Arabia, Jordan, Pakistan and the Yemen).

11. When this new offence was being considered in the passage of the Counter-Terrorism Bill in 2008, journalists and photographers were concerned that the law would prevent them from taking photographs of police officers. The review did not, however, find any evidence that the section 58A offence has had the practical effect which was feared.

12. The review did, however, consider that section 58A only captures a very limited range of additional potential terrorist activity given other existing terrorism-related offences such as sections 39, 57 and 58 of the Terrorism Act 2000 and sections 1, 2 and 5 of the Terrorism Act 2006. The offences contained in sections 58 and 58A were very similar, the principal differences being that:

- (a) The section 58A offence refers to “eliciting or attempting to elicit”. “*Eliciting*” information under section 58A is arguably broader than “*collects or makes a record of information*” in the section 58 offence. “*Eliciting*” is a more elastic term than collecting or recording (which requires data to be amassed) and, unlike section 58A, section 58 is specifically directed at “*attempts*”.
- (b) Section 58A makes it an offence to “*communicate*” or “*publish*” information, whereas the section 58 offence centres of the acquisition or possession of information.
- (c) It may be more feasible to use section 58A than section 58 to prosecute an individual who has unsuccessfully sought to obtain personal information about a member of the security forces, or who has successfully made telephone enquiries to elicit such information which is then passed on orally.

### *Narrow / restrict section 58A*

13. It has been argued in some submissions to the review that the section 58A offence is too broadly framed and needs to be amended to include an element of intent. This would mean that the offence would become very similar to the section 57 offence and there may therefore be little point in such a change.

### **Recommendations**

14. The review has found that the proposed curtailment of section 44 powers should significantly reduce concerns that counter-terrorism laws are being used against photographers. This is reflected in the public response of photography groups' to the Home Secretary's announcement in July 2010 on section 44 and in discussions with photography and journalist groups as part of the review.

15. Based on this, the review recommends that:

- i. Sections 57 and 58 are not repealed or amended given their importance in terrorist prosecutions.
- ii. Changes are made to guidance on the use of powers which could be used inappropriately to prevent photography. Guidance to private security guards should be reviewed to ensure that that it sufficiently reflects the right of the public to take photographs.

16. The review considered the case for repealing section 58A given it is a relatively new and therefore unused offence but accepted the arguments about the deterrent effect of the provision and the concern that its repeal would cause to security forces in the current threat environment. For these reasons, the review recommends:

- iii. Keeping Section 58A under close review but not repealing it.

## **THE REGULATION OF INVESTIGATORY POWERS ACT AND LOCAL AUTHORITIES**

### **Introduction**

1. The Regulation of Investigatory Powers Act (RIPA) sets out a regulatory framework to govern the use of a number of investigatory covert techniques. Local authorities may use:
  - a) Some forms of communications data (CD) such as telephone billing information but not the most intrusive forms of CD, which can be used to identify the location of communications devices;
  - b) Directed surveillance (covert surveillance on individuals in public places); and
  - c) Covert human intelligence sources that is, someone who establishes a relationship for covert purposes (CHISs).
  
2. Local authorities have responsibility for investigating a wide range of crimes. They may only use these techniques if they are necessary to prevent or detect crime. In practice, local authorities use and depend on the three RIPA techniques to which they have access mainly for investigating benefit fraud, environmental crime and trading standards violations. Local authorities have no role in counter terrorism investigations and RIPA was not simply intended (as is sometimes claimed) to facilitate counter terrorist work. Local authorities cannot under any circumstances use the most sensitive techniques in RIPA, in particular the interception of communications (i.e. the content of a phone call or an email) or intrusive surveillance (which is covert surveillance on individuals in a private place).

### **Issue**

3. The Government has committed to stop local authority use of RIPA (Regulation of Investigatory Powers Act 2000) unless it is for serious crime and approved by a magistrate: local authorities have been criticised for using covert surveillance in less serious investigations including, for example, dog fouling or checking an individual resides in a school catchment area.
  
4. In light of the coalition commitment this review considered the appropriate extent of local authorities' access to RIPA and the associated approvals process.

### **Options considered**

5. *Magistrate's Approval:* the Government has committed to ensuring that all authorisations made by local authorities to use these techniques will be subject to a magistrate's approval and be required for stopping serious crime. The review considered whether this approval should apply to all or only some of the techniques.

6. *Serious Crime*: At present there is no limit on the type of criminal case for which the RIPA techniques can be employed, although RIPA requires that use of the techniques must be necessary and proportionate to the case being investigated. Although there is no standard definition of what is 'serious crime', the review considered whether definitions set out in other legislation could be applied here.

7. A serious crime threshold might be applied in two different ways: by listing serious crime offences where RIPA might be applied; or by enabling RIPA techniques where the offence under investigation carries a specified maximum custodial sentence.

8. The review favours the latter because a list, potentially detailing hundreds of offences, would be cumbersome, difficult to scrutinise, and would require frequent updating. There are, as noted below, however, consequences to such an approach.

9. The threshold based on a custodial sentence could be set at one of a range of levels and the review considered thresholds of 6 months, 1 year and 3 years maximum custodial sentence. The review assessed the impact of these thresholds on local authority investigations: the higher the threshold the greater the restrictions to local authority use of the techniques. Applying any of these thresholds would mean that offences that attract a fine rather than a custodial sentence will be excluded. This includes issues such as dog fouling, but also some of more concern such as underage sales of alcohol and tobacco and some anti-social behaviour offences which are investigated by local authorities.

10. A threshold of 6 months would allow local authorities to continue using the covert techniques in their investigations of offences under the Gambling Act, against safety regulations, and some investigations into benefit fraud and licensing offences. A threshold of 1 year would exclude those allowed by the 6 months threshold but would allow use in some wider trading standards cases including the marketing of knives and would incorporate the most serious health and safety offences, product safety offences and more serious benefit fraud offences. A three year threshold would be consistent with the RIPA threshold for use of interception and intrusive surveillance. It would, however, rule out use in most local authority investigations apart from the most serious benefit fraud and waste dumping cases. It would also exclude some product safety regulations for which trading standards departments have sole responsibility.

11. A judgment between a 6 month and 1 year threshold is a fine one. Adopting a threshold of 6 months, rather than 1 year, would exclude the use of RIPA techniques for more trivial offences while still allowing these techniques to be used in the investigation of trading standards offences (which has been a considerable concern of local authorities and local communities). Any threshold would, though, still exclude investigations into underage sales and anti-social behaviour. The review considered that it

would be possible to include a 'carve-out' for a limited number of offences that rely heavily on the use of these techniques; such 'carve-outs' would need to be tightly defined if they were not to undermine a new regime.

12. The review considered to which of the three RIPA techniques used by local authorities the threshold should apply. Directed surveillance is the most intrusive and controversial of the three techniques. It is also the technique used the most by local authorities. CHIS (Covert Human Intelligence Source) and CD (Communications Data) are not used to the same extent by local authorities and have been less controversial. They are also essential elements in some specific types of local authority investigations, such as tracking down rogue traders who particularly target vulnerable people (these offences may not attract custodial sentences).

### **Recommendations**

13. The review recommends that:

- i. Magistrate's approval should be required for local authority use of all three techniques and should be in addition to the authorisation needed now from a local authority senior manager (at least Director level) and the more general oversight by elected councillors.
- ii. Use of RIPA to authorise directed surveillance only should be confined to cases where the offence under investigation carries a maximum custodial sentence of 6 months or more. But because of the importance of directed surveillance in corroborating investigations into underage sales of alcohol and tobacco, the Government should not seek to apply the threshold in these cases. The threshold should not be applied to the two other techniques (CD and CHIS) because of their more limited use and importance in specific types of investigation which do not attract a custodial sentence.

## **ACCESS TO COMMUNICATIONS DATA**

### **Introduction**

1. Communications data is information about the who, where and when of communications such as phone calls and email. It does not include the content of communications. It plays a key role in nearly all national security and serious crime investigations. It is also used in the investigation of less serious offences, and for the protection of public health and safety.

2. Communications data is created and processed by communications service providers (CSPs) and may be retained by them if necessary for their own purposes. There are regulations (the Data Retention Regulations 2009, implementing the EU Data Retention Directive) under which CSPs are required to keep certain types of communications data for longer periods so that public authorities may apply for access to it on a case by case basis. The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) and its Code of Practice also provide for voluntary agreements on the retention of certain communications data by CSPs for purposes relating to national security.

3. The vast majority of requests by public authorities for communications data – 80% of them – are simple subscriber checks. These involve asking a CSP for the identity of the subscriber of a particular phone number, or the account-holder of a given email address. These are most frequently needed when individuals provide their numbers, but give no name or a false name. This sort of check is relatively unintrusive but often provides the key information to start an investigation.

### **Issue**

4. In launching this review, the Home Secretary committed to examining the question of access to communications data by public authorities more generally, in addition to the specific commitment in relation to local authorities. The purpose of this work would be to tighten the safeguards on the acquisition and handling of communications data and ensure that any intrusion into privacy is clearly demonstrated to be necessary.

5. The Regulation of Investigatory Powers Act 2000 (RIPA) provides the only legal framework designed specifically to govern the acquisition and disclosure of communications data. RIPA contains:

- a comprehensive range of safeguards
- a regulatory framework
- independent oversight
- a complaints mechanism.

6. RIPA ensures that the acquisition and handling of communications data is consistent with the European Convention on Human Rights (ECHR). RIPA specifically requires the applicant for data to demonstrate that any intrusion into individuals' privacy is necessary and proportionate. This RIPA regime is used extensively by public authorities in the UK.

7. Although RIPA is the principal legal framework under which communications data is acquired from CSPs, it may also be acquired by various public authorities under many other regimes, including the Social Security Fraud Act 2001 (SSFA) and the Financial Services and Markets Act 2000 (FSMA). These, and other general information-gathering powers, are not specific to communications data. Most were not designed with communications data in mind and they contain fewer safeguards for its acquisition.

### **Options considered**

8. The review considered how safeguards with respect to the acquisition of communications data by public authorities could be increased and what changes to RIPA might be necessary.

9. It would be possible to amend safeguards in RIPA, the purposes for which data could be acquired and the public authorities entitled to acquire data under the Act. A separate section of this review deals with safeguards associated with local authorities' use of RIPA techniques, including the use of magistrates in the authorisation process.

10. Amending RIPA would not on its own necessarily increase the protection of privacy and civil liberties. Indeed it might be counter-productive strengthening RIPA's safeguards, or limiting the extent to which the techniques it regulates can be used, as it might lead public authorities to use other, less tightly regulated mechanisms to acquire communications data. A broader approach is necessary.

### **Recommendations**

11. Based on this assessment, the review recommends that:

- i. Government departments, agencies, regulatory authorities and CSPs should be consulted to establish the range of non-RIPA legislative frameworks by which communications data can in principle be acquired from CSPs, and for what purposes. This consultation is currently taking place.
- ii. These legal frameworks should then be streamlined to ensure that as far as possible RIPA is the only mechanism by which communications data can be acquired.

## **GROUPS THAT ESPOUSE OR INCITE VIOLENCE OR HATRED**

### **Introduction**

1. Groups that are “concerned in terrorism” – meaning that they commit, prepare for, encourage, promote or are otherwise involved in serious violence designed to intimidate the public or a section of the public for the purpose of advancing an ideological, religious or political cause – can be proscribed (banned) under the Terrorism Act 2000 (TACT). There are, however, no equivalent powers currently available to proscribe or ban groups which espouse or incite hatred or other forms of violence. The review considered whether changes should be made to the law to address this.

### **Issue**

2. Proscription is one of the ways in which the Government – and a wide range of our international partners – currently disrupts terrorist activity. Proscription aims to deter and disrupt any terrorist organisations from operating in the UK. It also supports foreign governments and sends a strong signal that the UK rejects these organisations and their claims to legitimacy. Unlike prosecution, control orders or deportation, it is aimed primarily at groups rather than individuals. But proscription does make it a criminal offence for a person to belong to a proscribed organisation or to wear the uniform of that organisation. It is also a criminal offence for a person to support a proscribed organisation, including by fundraising and arranging meetings to support the organisation.

3. Under Part II of TACT, the Home Secretary may proscribe an organisation only if she believes it is “concerned in terrorism”. For the purposes of TACT, an organisation is concerned in terrorism if it: commits or participates in acts of terrorism; prepares for terrorism; promotes or encourages terrorism (including the unlawful glorification of acts of terrorism); or is otherwise concerned in terrorism. Should the statutory test be met, the Home Secretary must consider as a matter of discretion whether to proscribe the organisation having regard to all the relevant factors.

4. As there are currently no powers available to ban organisations which espouse or incite hatred or violence of a sort which falls outside the criteria in TACT 2000, to do so would require either amendments to the current legislation or the introduction of a new statutory regime.

### **Options considered**

5. The review considered whether it would be practical to widen the current definition of terrorism or to amend the statutory test for proscription under TACT to include organisations that promote views which incite violence or hatred.

6. It would be possible to amend the definition of terrorism to include additional actions. But this would present a number of challenges. An amendment would in effect define a wider range of behaviours as “terrorism”, behaviours which are already covered by existing hatred legislation, for example inciting racial or religious hatred. Amending the definition would also expand the scope of application of all the police and executive powers that utilise the current definition of terrorism. Stop and search powers, pre-charge detention and control orders would consequently apply to a much wider group of people than at present.

7. In theory, another option might be to amend the statutory test for proscription, namely that a group must be “concerned in terrorism”. However, the review considered that the test is already sufficiently broad in scope and that the threshold is appropriate, notably in relation to the inclusion of “otherwise concerned in terrorism” as a criterion for proscription. The current test is certainly broad enough to encompass any terrorism-related activity by an organisation.

8. The review therefore considered whether it would be possible to create a new proscription regime. The basis for such a new regime would be existing hatred legislation contained within the Public Order Act 1986 (as amended by the Racial and Religious Hatred Act 2006 and the Criminal Justice and Immigration Act 2008). Under such a regime the Home Secretary would have the power to ban an organisation if she believed that its activities or publications were intended – or potentially just likely – to incite hatred on the grounds of race, religion or sexual orientation.

9. The review considered that such a regime would be lawful and the procedural aspects (for example banning, lifting the banning and appeal) and the offences (membership, support and, if thought necessary, the wearing of uniforms) could potentially be constructed along lines similar to the existing proscription regime under TACT.

10. There would, however, be significant challenges in introducing a new regime on this basis. Existing hatred legislation is complex with particular difficulties associated with proving the required intention or likelihood as a result of particular acts (see below). For example, Part III of the Public Order Act 1986 (Racial Hatred) contains a number of offences relating to the stirring up of racial hatred. For each of these offences the words, behaviour or actions must be threatening, abusive or insulting and they must either be intended or likely to stir up racial hatred.

11. The Racial and Religious Hatred Act 2006 amends the Public Order Act 1986 to insert provisions about hatred on the grounds of a person’s religious belief and introduces a number of offences of stirring up religious hatred. For each of these offences the words, behaviour or action must be threatening, and, in order to protect legitimate freedom of expression, the prosecution must certainly prove intention as well as likelihood, to stir up

religious hatred. These offences therefore have an even higher threshold than the racial hatred offence outlined above.

12. There have been a very limited number of prosecutions against individuals under existing hatred legislation and it may therefore be difficult to establish that certain groups would meet the threshold to be banned. A new regime could also be difficult to frame in a way that limits its scope to the intended target without including a wider range of organisations with varying views on race, religion and sexual orientation. It could also be viewed as an unwarranted interference with the principles of freedom of speech and political activity.

13. The review therefore concluded that introducing a banning regime based on hatred legislation would have a number of disadvantages.

### **Recommendations**

14. The review recommends that:

- i. It would be disproportionate and possibly ineffective to widen the definition of terrorism or lower the proscription threshold to try to include groups which incite hatred and violence. There would be unintended consequences for the basic principles of freedom of expression.
- ii. The focus for tackling groups of concern who do not meet the statutory test for proscription should continue to be the prosecution of people who have been engaged in illegal activities.
- iii. The Department for Communities and Local Government is also taking forward work to tackle intolerance and non-violent extremism which falls short of terrorism. This work is directly relevant to the issues considered here.

## **DEPORTATION OF FOREIGN NATIONALS ENGAGED IN TERRORISM**

### **Introduction**

1. The primary means of dealing with people engaged in terrorist related activity in this country must be by prosecution and conviction in the courts. Where prosecution is not possible, and where the person concerned is a foreign national, it may be possible to deport them. But deportation must be consistent with the UK's commitments on human rights, in particular domestic law and international obligations under the European Convention on Human Rights (ECHR). ECHR case law provides that the UK cannot deport a person if there are substantial grounds for believing there is a real risk the person concerned will face torture or other inhuman or degrading treatment or punishment.

2. When seeking to deport foreign national terrorist suspects the Government may seek assurances from the receiving state about the person's treatment on return, so ensuring that the deportation is consistent with our human rights obligations. These assurances do not presuppose that the person concerned will be detained at all – that remains a decision solely for the other government.

3. The UK currently has generic arrangements with five countries: Algeria, Jordan, Lebanon, Libya and Ethiopia. Nine people have been deported under these arrangements with Algeria, and there are currently fourteen other cases in the appeals process. Those subject to deportation can be detained in this country or subject to stringent bail conditions while they appeal. Deportation decisions based on these arrangements have been upheld by domestic courts, including the House of Lords.

### **Issues**

4. Whilst deportation is a valuable tool, it cannot be used in all terrorist cases. Only foreign nationals can of course be deported. Negotiating and maintaining successful arrangements is complex and requires significant diplomatic resources, sometimes at the cost of other important policy objectives.

5. A person has a statutory right of appeal against deportation. The court process can take years and is also resource intensive. Judgment from the European Court of Human Rights (ECtHR) on the lead case, the Jordanian preacher Omar Othman (also known as Abu Qatada) is expected at some point in 2011 and the outcome could have a significant impact on deportation policy.

6. Deportation has been criticised by human rights groups, who have argued that assurances from countries with records of systematic human

rights abuses are unreliable and that seeking assurances undermines the universal prohibition on torture. There has also been criticism of the use of closed evidence in deportation cases.

7. Having bilateral arrangements in place makes deportation possible but not inevitable. Even where the UK has an arrangement in place, the Government would not seek to deport if there were substantial grounds for believing that there was a real risk of the person concerned being subject to torture or other inhuman or degrading treatment or punishment, or that the death penalty would apply.

8. The review did not accept the claims that deportation with these assurances provides insufficient protection or that the policy undermines the absolute prohibition of torture. The review was satisfied that assurances have been upheld, and the people deported under these agreements have not been mistreated: the court has agreed in the cases it has considered. The review considers that engaging with countries on these issues is more likely to secure an improvement in the general human rights situation than would be achieved by refusing to engage at all.

9. The review recognises that the role of the courts is vital. The Government does not always have the final say when it comes to deciding whether or not the assurances given in a particular case by another government provide adequate safeguards. Because there is a statutory right of appeal, the courts – the domestic courts and the ECtHR – deliver intense, detailed scrutiny of our case for deportation.

10. The monitoring arrangements in place in the countries concerned mean that any mistreatment of deportees following their return would be quickly identified and would enable the UK to raise the matter with the other government. The UK invests in these monitoring bodies, and provides training to increase their skills, capacity and effectiveness.

### **Options considered**

11. Against this background, the review has considered a range of options for implementing the Government's commitment to extend the deportation of foreign national terrorists in a manner that is consistent with our legal and human rights obligations.

12. The review examined the scope for extending this policy to more countries, notably those whose nationals have engaged in terrorist related activity here. The review recognises that the Government should consider opening negotiations only with those countries where it can secure credible and reliable assurances and where these assurances will be strong enough to stand up to close scrutiny in the courts.

13. The review recognised that further arrangements will require significant Ministerial and senior official engagement from a number of Departments and

agencies. A coordinated Government approach which prioritises arrangements is vital.

14. The review considered the relative advantages of seeking generic agreements or assurances for specific individuals on a case-by-case basis.

15. While the UK's track record of winning appeals in these cases is good, the review considered whether the Government's presentation of the 'safety on return' aspect of cases was as strong as it could be. The review considered: how the UK might better use available expertise relevant to each country under consideration; provide expert, broader independent advice to the court (particularly independent legal advice on the country in question); how we might introduce additional independent oversight of these deportations; and whether we should carry out additional follow-up on deportees who are not in practice detained when they are deported.

16. The review also examined whether the policy could be better communicated and best practice shared. There are benefits to stepping up the UK's engagement on these issues overseas: an increased understanding of and support for the UK's approach; potentially helpful interventions in cases in which the UK is involved in the ECtHR; and sharing the UK's experiences, information, assessments and best practice to strengthen our own approach and that of other countries. Opportunities to engage with partners are increasing as more countries begin to experience similar problems with foreign national terrorist suspects. The review considered also that there could be further engagement with NGOs to respond to their concerns about the UK's approach.

## **Recommendations**

17. The review recommended that the Government should:

- i. Actively pursue deportation arrangements with more countries, prioritising those whose nationals have engaged in terrorist related activity here or are judged most likely to do so in future.
- ii. Continue to pursue generic arrangements as a preference, but seek assurances for specific individuals, without a wider arrangement, if viable assurances can be obtained.
- iii. Examine how to increase the number of expert witnesses the Government provides in court; consider commissioning an annual independent report on deportations under this policy; and explore options for improving monitoring of individuals after their return.
- iv. Engage actively with other countries, more international organisations, and more NGOs to increase understanding of, and support for, this policy in the context of our work to promote and improve human rights around the world.

## CONTROL ORDERS

### **Introduction**

1. Control orders were introduced in 2005 as emergency legislation. They were designed to address the threat from a small number of people engaged in terrorism in this country whom the Government could neither successfully prosecute nor deport. The objective of the orders was to prevent these individuals engaging in terrorism-related activity by placing a range of restrictions on their activities, including curfews, restrictions on access to associates and communications and, in some cases, relocation.

2. Control orders were introduced after the House of Lords ruled that powers allowing the detention of foreign national suspected terrorists pending deportation, even if deportation was not currently possible, were unlawful. But control orders can be imposed on both British citizens and foreign nationals.

3. The activities intended to be controlled by these orders have included the planning of mass casualty attacks in the UK, providing financial, material or other logistical support for terrorism-related activity, travelling overseas to attack British or allied military forces or travelling to attend a terrorist training camp. There is no single list of restrictions which have applied in each case: where the primary purpose of the control order has been to prevent travel the obligations imposed have been relatively light. In other cases the obligations have been much more extensive – including a lengthy curfew, a requirement to relocate to a different part of the country and bans on the use of mobile phones and the internet.

4. Control orders have been imposed based on an intelligence case including a mix of open material and sensitive (closed) material with special advocates (lawyers cleared to see intelligence material) representing the interests of those subject to the order. In some early control order cases the person who was subject to the order did not know the substance of the case against them. As a result of a House of Lords judgment in June 2009, however, those subject to control orders must now be given a summary of the core allegations against them.

5. Since they were introduced, 48 people have been made subject to a control order. 28 of the orders have been imposed on foreign nationals. 10 of these foreign nationals were on a control order until the necessary arrangements were in place to begin deportation proceedings. Most of those who have been subject to a control order have been on an order for less than 2 years. Two foreign nationals spent more than 4 years on an order before their orders were revoked.

6. As of 10 December 2010, there were 8 people – all British citizens – on control orders. Of these: 2 had been on orders for over 2 years (one between

3-4 years, the other between 2-3 years); 4 had been on orders for between 1-2 years; and the remaining 2 had been on orders for less than a year.

## **Issue**

7. Control order powers have always been controversial because they are imposed without the person on whom they are applied being convicted for the terrorist activity in which he is judged to be engaged, because of the use of closed material and because of the very intrusive restrictions that they can involve. Moreover, control orders can mean that prosecution and conviction (a principal purpose of our counter-terrorism work) becomes less not more likely. For all these reasons the Government has been committed to an urgent review of control orders, as part of this wider review of counter-terrorist legislation.

## **Options considered**

8. The review considered whether the control order regime should be retained, removed, reformed, or replaced. It looked at the arguments made against control orders, as well as their necessity, effectiveness, legal viability and cost. The review also assessed the proportionality of the regime and specifically its impact on the rights of people subject to restrictions, on the wider community, and on broader public consent to the Government's approach to terrorism and civil liberties.

9. The review accepted that for the foreseeable future there are very likely to be a small number of people in this country who are assessed to pose an immediate and significant terrorist threat but who we can neither prosecute nor deport.

10. There are a number of reasons for this. The severe consequences of a successful attack may mean that the police and other agencies have to intervene early in order to pre-empt an attack and protect the public. This disrupts a specific plot, at least temporarily, but may mean that in the opinion of the Crown Prosecution Service there is insufficient evidence to sustain a prosecution. The people concerned are therefore set free. In these and other cases the investigation may have been significantly dependent on intelligence material from this country or overseas (or more commonly a combination of the two) which it may not be possible to use in court.

11. It has been at times argued in the consultation process of this review that the use of communications intercept material as evidence in court would remove the need for control orders by making prosecution easier. The evidence presented to the review does not support this position. The cross-party Privy Council review, chaired by Sir John Chilcot, has considered this, amongst other issues relating to intercept as evidence. In the context of that work, a review of nine now former control order cases by independent senior criminal counsel concluded intercept as evidence would not have resulted in a criminal prosecution being brought in any of the cases studied. In his last report on the control order regime Lord Carlile stated that intercept as

evidence would not be “the quick and easy solution that some have assumed and asserted”. It is also important to note that not using intercept as evidence does not mean that intercept is of no value. The UK has always used intercept material as intelligence; this intelligence can then lead to evidence which facilitates a prosecution but which better protects intelligence sources and methods.

12. In the case of foreign nationals deportation may not always be possible, notably because of the risk to the individuals’ safety on return if deported. This issue is considered further in the preceding section of this review. While the Government proposes to enhance arrangements for deportation there are likely still to be some foreign nationals who pose a terrorism-related risk and who cannot be deported.

13. Submissions to the review argued that increased human and technical surveillance could on their own adequately manage the risk posed by people on control orders. These claims were contested by the police and the security agencies who argued that surveillance does not provide control. It monitors activities to some extent. It can also be important in the evidence-gathering process, which can lead to prosecution and conviction. But surveillance does not of itself prevent or disrupt any activities. The review concluded that for these reasons, while increased covert investigative resources could form an important part of any arrangements replacing control orders, surveillance alone could not mitigate risk to the level of a control regime. Moreover, the costs of surveillance exceed by a considerable margin the costs of control orders.

14. The review also considered whether a new regime allowing the imposition of a limited range of obligations directed only at preventing travel could be used, in combination with relevant monitoring arrangements, to address risk. This reflects the fact that most recent control orders have been directed in part at preventing individuals from travelling abroad. The review noted that the main difficulty with orders with very limited obligations of this kind was that five of the seven people who absconded from control orders in 2006-2007 were on orders of that kind. There have been no absconds since June 2007.

15. The review concluded that it remains important to be able to prevent travel abroad by those suspected of travelling for terrorism-related purposes and to be able to do so on the basis of closed material. However the review also concluded that relying solely on such a specific power would significantly increase the level of risk both because it would not stop absconds and because it would not address the other threats that people engaged in terrorism-related activity here may pose.

16. The review examined whether control orders are effective. It noted that the regime had clearly not been fully effective – the seven abscondee in 2006-07 demonstrate its limitations. But the review recognised that the regime had had success in mitigating risk and took detailed evidence in support of that claim from the agencies.

17. The review considered the effect of recent litigation on the viability of any regime. As a result of extensive litigation there is now greater clarity on the application of Article 5 (right to liberty) and Article 6 (right to a fair trial) of the ECHR. The litigation on Article 6 changed the way the control order regime operates and means that control orders can no longer be imposed if the necessary disclosure of the core allegations against an individual cannot be made. Those subject to control orders know in some detail why they are on a control order. This means that it is not possible to impose orders in cases where such disclosure could not be given because of the nature of the intelligence. However a number of orders have been imposed and upheld by the courts since the key judgment on Article 6 in June 2009. This supports the view that it is possible to operate a regime that makes use of closed material in a way that is compatible with the right to a fair trial.

18. The review considered the issue of proportionality – including the impact that control orders have had on individuals and their families. It found that the more restrictive obligations in particular can have a significant impact on an individual's health and personal life and their ability to go about their normal lives. The review found that lengthy curfews and relocating an individual to a different part of the country raised particularly difficult issues. The review noted that these issues had to be set against the threat that these people posed to the lives of others in this country or overseas.

19. In relation to the wider impact of control orders, the review heard arguments that control orders have had a negative impact in communities here. But the review noted that evidence to support this claim was lacking and that there were some indications that much greater concern was created by other counter terrorism powers which had an impact on many more innocent people (notably stop and search).

20. In sum, the review therefore accepted a continuing need to control the activities of terrorists who can neither be successfully prosecuted nor deported. The introduction of intercept as evidence in criminal trials was unpromising as an alternative. Surveillance and foreign travel restrictions alone would also be inadequate. But an approach that scrapped control orders and introduced more precisely focused and targeted restrictions, supported by increased covert investigative resources, would mitigate risk while increasing civil liberties. Such a scheme could better balance the priorities of prosecution and public protection.

#### Essential features of any regime

21. The review considered what the objectives, obligations and procedures should be of any regime which sought to address the challenges outlined above. The review considered a wide range of options – some of which have been suggested by Lord Carlile or by the Joint Committee on Human Rights. It looked in particular at the following issues and reached conclusions as stated below:

a. *The priority for prosecution*

- Prosecution of people engaged in terrorist activity in this country must remain our priority: imposing restrictions on the actions of those believed to be engaging in terrorism will be an imperfect if sometimes necessary alternative.
- In future there is a compelling case for imposing time limits on restrictions to reflect the fact that they are neither a long term nor a satisfactory solution.
- Whilst restrictions are in place every effort must continue to be made to gather evidence and prosecute. The CPS must be constantly engaged.

b. *The requirements for protection*

- It would be possible to devise a regime that significantly mitigated risks without the level of intrusion which exists at present.
- Some restrictions on communications, association and movement will be required for the regime to be effective.
- Restrictions should be compatible with work and study provided these do not affect public safety. Where possible we should allow individuals to continue to maintain a typical pattern of daily activity.
- Restrictions should be more closely comparable with those which exist under other prevention measures intended to prevent sexual crimes and anti-social behaviour.
- Whilst surveillance cannot be a complete substitute for measures to restrict activity it can and must complement those measures. Where possible, restrictions should facilitate surveillance, although the priority of protection may be paramount.

c. *The statutory test for imposing restrictions in future*

- At present the Home Secretary must have 'reasonable grounds to suspect' the individual's involvement in terrorism-related activity before imposing a control order. In the context of the provisions relating to terrorist asset freezing the Government has raised the threshold to "reasonable belief". To ensure a consistent approach, the same threshold would be justified in this context too.

d. *Making restrictions: roles and responsibilities*

- Restrictions introduced by a judge would increase the level of court oversight and would reflect practice in other civil preventative orders such as ASBOs and football banning orders which are court-made.
- The courts could be made responsible for setting the obligations at the start of the process, rather than reviewing the Home Secretary's decisions later in the process.
- However, executive actions, relating to national security and based on sensitive intelligence material, are currently taken by the Home Secretary with subsequent oversight by the courts. The Home

Secretary has responsibility for national security, and takes decisions in individual cases with the benefit of the broader knowledge of the threat picture that sits with her role.

- Judge-made orders could also be more difficult to make quickly in urgent cases, and would require greater resources up front to prepare the case.

e. Derogation from the ECHR

- A derogating control order is at present one that imposes obligations that would breach Article 5 of the ECHR (right to liberty). This could only be done in circumstances of a national emergency and would require the UK to derogate from Article 5. A derogating order would be subject to additional safeguards. No derogating order has ever been made and it is highly unlikely that derogation will be required in future.

22. The review also considered some of the issues raised by the use of the special advocate regime, although it noted that these issues will be addressed in more detail in the forthcoming Green Paper on the use of sensitive material in judicial proceedings. It recommended some enhancements relating to access to potentially relevant closed judgements and continuing work on the training of special advocates that can be made without prejudice to the issues that will be addressed in the Green Paper. It also considered a wide range of options for more detailed legislative and technical changes to the operation of the control orders system, and in relation to Articles 5 and 6 and the prospects of prosecution.

### **Recommendations**

23. The review has concluded that the current control order regime can and should be repealed. The Government will move to a system which will protect the public but will be less intrusive, more clearly and tightly defined and more comparable to restrictions imposed under other powers in the civil justice system. There will be an end to the use of forced relocation and lengthy curfews that prevent individuals leading a normal daily life. Under control orders the Government could implement any measure deemed necessary provided it was not struck down by a court. Under this regime, the Government will specify in greater detail the measures that will and will not be available.

24. This system is neither a long term nor an adequate alternative to prosecution, which remains the priority. The restrictions imposed may facilitate further investigation as well as prevent terrorist activities. Whilst restrictions are in place every effort will continue to be made to collect evidence sufficient to prosecute. These measures will be time limited to two years maximum to emphasise that they are a short term expedient not a long term solution. They may be reimposed after two years only where there is new material to demonstrate that the person concerned poses a continued threat. While that person might reach the end of the two year period with

prosecution not having been possible, successful prosecution will always be the objective.

25. Additional resources will be made available to complement the new regime. Covert investigative techniques, including surveillance, cannot themselves control, but can help to do so and may produce evidence for use in a prosecution.

26. The key features of these new measures will be as follows:

- i. They will be imposed by the Home Secretary with prior permission from the High Court required except in urgent cases (where confirmation by the court within 7 days will be necessary). Before making the order the Home Secretary must have reasonable grounds to believe that the individual is or has been involved in terrorism-related activity and be satisfied that it is necessary to apply measures from the regime to protect the public from a risk of terrorism.
- ii. The measures applied will have a protective effect, whether through disruption or through facilitating investigation. The police will then be under a strengthened legal duty to ensure that the person's conduct is kept under continual review with a view to bringing a prosecution and to inform the Home Secretary about the ongoing prospects for prosecution.
- iii. The High Court will undertake a mandatory full review of each case after the measures have been imposed, with a power to quash or revoke the measures.
- iv. They will be subject to a maximum time limit of 2 years. It would only be possible to impose a new set of measures on an individual after that time if there is new evidence that they have re-engaged in terrorism-related activities.
- v. They will allow for an overnight residence requirement with some additional flexibilities e.g. in relation to overnight stays outside the residence. The overnight stay would be verified by an electronic tag.
- vi. They will allow only tightly defined exclusion from particular places and the prevention of travel overseas.
- vii. They will allow greater freedom of communication and association than the control order regime, placing only limited restrictions on communications, including use of the internet, and on the freedom to associate.
- viii. Those subject to these conditions will be free to work and study unless this could facilitate or increase the risk of involvement in terrorism-related activity.

- ix. These measures will be able to place only limited restrictions in certain defined circumstances on financial transactions overseas.
- x. These measures will be able to require an individual to report regularly to the police.
- xi. Breach of the conditions, without reasonable excuse, will be a criminal offence. The maximum penalty for breach will be 5 years' imprisonment.
- xii. There will be no provision to impose conditions that would require derogation from the (ECHR) – in other words no provision for measures which would deprive a person of their right to liberty.
- xiii. Some enhancements will be made to the operation of the special advocate regime pending fuller consideration in the forthcoming Green Paper on the use of sensitive material in judicial proceedings.

#### Exceptional emergency measures

27. The review concluded that there may be exceptional circumstances where it could be necessary for the Government to seek Parliamentary approval for additional restrictive measures. In the event of a very serious terrorist risk that cannot be managed by any other means more stringent measures may be required. Such measures would include curfews and further restrictions on communications, association and movement. They would only be allowed if the Secretary of State is satisfied on the balance of probabilities (a higher threshold than reasonable belief) that the person is or has been involved in terrorism-related activity.

28. Draft legislation regarding these additional measures will be discussed with the Opposition with a view to reaching agreement on its terms. These measures would be brought forward if and when it became necessary to have them in place to protect the public from the risk of terrorism. They would only be available following the agreement of both Houses of Parliament.



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