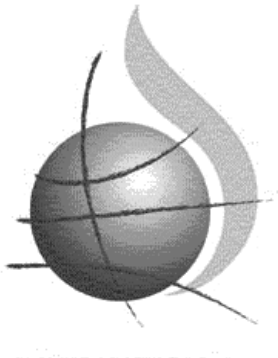

Prevention of Terrorism Bill

Joint Briefing for House of Lords Second Reading

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Who we are

1. The International Commission of Jurists is an international human rights organisation based in Geneva. Founded in 1952, the ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights.

2. JUSTICE is the British Section of the ICJ. Founded in 1957, it is one of the UK's leading human rights organisations. Its mission is to advance justice, human rights and the rule of law.

Summary

3. The scheme of control orders provided by this Bill raises serious concerns under the European Convention on Human Rights and other international human rights instruments binding on the UK, such as the International Covenant on Civil and Political Rights and the UN Convention Against Torture. This briefing aims to identify key points of concern with the Bill's provisions, including the following:

   - Lack of need for control order legislation or further derogation from the ECHR
   - Unlimited scope of the Secretary of State's power to impose restrictions
   - Lack of judicial control and inadequate judicial review
   - Absence of an effective remedy
   - Standard of proof inadequate to safeguard basic rights
   - Improper delegation of power to the Lord Chancellor to set Rules of Court
   - Proposed use of closed proceedings and special advocates
   - Failure to exclude use of torture evidence
   - Lack of provision for independent scrutiny
   - Lack of sufficient time for effective parliamentary debate

Introduction

4. To fight terrorism in a free society is not an easy labour and the UK is a society more free than most. Its ancient traditions of individual liberty and due process of law abide still. In the last century alone, it took a leading role in the creation of international treaties and institutions to monitor and protect human rights. It remains one of the leading jurisdictions in the Council of

Europe and the European Union, as well as the parent of such common law jurisdictions as Australia, Canada, Hong Kong, India, New Zealand, South Africa and the United States. The UK has a duty, then, to uphold the principles of human rights and the rule of law, not merely for its own sake and that of its inhabitants but to serve as a model to others.

5. The Prevention of Terrorism Bill is the UK's third piece of major counter-terrorism legislation since 2000. It is also the most far-reaching and intrusive. Although we welcome the proposed repeal of Part 4 of the Anti-Terrorism Crime and Security Act ('ATCSA') 2001 (authorising indefinite detention without trial) contained in clause 13(2)(a) of the Bill, we are concerned that the proposed scheme of control orders threatens to be as disproportionate in the fight against terrorism as the measures it is intended to replace.

6. Equally, while we welcome the Home Secretary's decision not to further derogate from the European Convention on Human Rights ('ECHR') at this time, this does not mean that the Bill's provisions should therefore be regarded as compatible with fundamental rights. Indeed, this Bill raises serious concern with regard to a range of individual rights set out in the ECHR and other international treaties binding on the UK such as the International Covenant on Civil and Political Rights ('ICCPR'). It is likely to be subject to serious challenge in the courts, both in relation to the proportionality of the law itself and the implementation of control orders in practice. In place of the indefinite detention of a few, the government proposes open-ended interference with the liberty of many. We doubt that such intrusiveness can ever be justified as necessary in a free society, however serious the threat it faces. Although we accept that the UK government has acted in good faith in seeking to address a serious threat of terrorism, and have the greatest respect for the difficult decisions that it must take to protect the lives of its inhabitants, upon viewing this Bill we are minded to repeat the warning expressed by Lord Hoffman in respect of Part 4 of ATCSA:[1]

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

The permissible scope of preventative counter-terrorism measures under international law

7. Under international law states may take certain preventive measures in fighting terrorism or terrorist threats. This is reflected in the jurisprudence of international bodies, including the European Court of Human Rights. Examples include judicial authorisation for covert

[1] *A and others v Secretary of State for the Home Department* [2004] UKHL 56 at para 97.

surveillance or the interception and monitoring of communication.[2] Unlike the scheme for control orders proposed in this Bill, however, such measures are typically case-specific interferences with individual rights that do not create new obligations and that anticipate – rather than circumvent – future criminal proceedings against a person suspected of involvement in terrorism.

8. We note that the European Court of Human Rights – in cases concerned with alleged Mafia activity – has not completely ruled out the possibility that a state may establish court-ordered special regimes of supervision of a suspect's residence and communications with others, if this is necessary to prevent the real risk of the commission of new crimes.[3] However, it is apparent that any such scheme must have certain key characteristics, including strict proportionality, careful limitation of scope and tight judicial control. In particular, such measures cannot be allowed to create a parallel system of justice, in which executive orders are used to avoid the bringing of criminal prosecutions with their attendant guarantees of due process. For the principle of legality, too, obliges that persons who are suspected to have committed terrorist crimes must be brought to justice – even with the risk that they may not be convicted.

9. A system of control orders would only be acceptable if shown to be strictly required to counter an identified threat, subject to tight judicial control, and not merely used as an alternative means to secure deprivation of liberty without the guarantees of a fair trial and the presumption of innocence.

The lack of need for control order legislation or further derogation from the ECHR

10. We accept that the UK faces a serious threat of terrorist attacks from groups and persons linked to Al-Qaeda and that the government is therefore justified in taking measures to address it. Whether this threat is qualitively different from previous threats, as the government has claimed,[4] and thus requires an exceptional response seems open to question.

11. In any event, the House of Lords ruled in December 2004 that the present threat from Al-Qaeda was incapable of justifying indefinite detention of foreign terrorist suspects without trial. We do not think that the threat is capable of justifying the introduction of a similarly disproportionate scheme of control orders, applying to both foreign nationals and British nationals alike.

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[2] *Klaas v Germany* Judgment of 6 September 1978, Series A No.28, (1979/1980); *Laender v Sweden*, Judgment of 26 March 1987, Series A No.116 (1988).

[3] *Labita v Italy*, Judgment of 6 April 2000 at para 195.

[4] Hansard, HC Debates, 22 February 2005, Col 151.

12. In particular, we note the announcement of the Home Secretary that the government does not intend to derogate further from the European Convention on Human Rights ('ECHR') at this time. Instead, it maintains that the control order powers in the Bill will be sufficient to address the threat posed by those currently detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 ('ATCSA'), as well as the threat posed by terrorist suspects who are UK nationals (and thus currently outwith the scope of Part 4).

13. The suggestion that control order powers are necessary to address the threat posed by terrorist suspects who are UK nationals is difficult to square with the fact that it has not previously been thought necessary to seek such powers in the past 3 and a half years since the attacks of 11 September 2001. On this basis alone, it is difficult to see the restrictions on Convention rights proposed by the Bill's provision for control orders surviving judicial challenge: if it has been possible to adequately address the threat posed by terrorist suspects who are UK nationals *without* such powers for the past 3 and a half years, it is difficult to see how the introduction of a power to place restrictions on a UK national without charge or conviction can now be justified as proportionate.

14. Similarly, in respect of the government's claim that provision for control orders is necessary to contain the threat posed by those previously and currently detained under Part 4 of ATCSA, we note that a wide array of immigration powers already exists to place restrictions on those subject to immigration control. For instance, section 36 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 alone contains powers for the Secretary of State to electronically tag persons subject to immigration control pursuant to paragraph 21 of Schedule 2 to the Immigration Act 1971 in order to monitor compliance with:

    - residence restrictions (section 36(1)(i)(a) of the 2004 Act);
    - reporting restrictions (section 36(1)(i)(b));
    - employment restrictions (section 36(1)(i)(c));
    - immigration bail (section 36(1)(i)(d)).

15. Given that the Secretary of State already enjoys a broad range of powers under existing law to control the residence, movement, employment and liberty of persons subject to immigration control, we regard the claim that it is necessary to introduce fresh legislation to deal with such persons as without foundation.

16. If it is correct that the proposed non-derogating orders cannot be justified as necessary (because current law provides a sufficient range of powers adequately to address the threat of Al-Qaeda-related terrorism), then the same applies *a fortiori* to the provision for derogating control orders, as well as control orders applicable to non-Al-Qaeda-related terrorism.

17. First, the Home Secretary's statement on 22 February 2005 that he does not intend to derogate further from the ECHR at this time means that provision in clauses 2, 4 and 8 for control orders that are incompatible with the controlled person's right to liberty ('derogating control orders') is wholly unnecessary. As the rapid pace of the current Bill demonstrates, Parliament is fully capable of legislating swiftly should a future emergency arise. Whereas, if the recent, lengthy debate over the Civil Contingencies Act has shown anything, it is that *contingency* legislation should never be rushed.

18. Secondly, the lack of overall necessity for the current legislation is indicated in the statement of the Home Secretary on 26 January 2005, when he indicated that the proposed control orders may apply not only to Al-Qaeda-related terrorism, but to other forms of domestic terrorism including Northern Ireland-related terrorism and the activities of animal rights extremists. As we have stated elsewhere,[5] we consider that the existing range of police powers under the Terrorism Act 2000 are more than adequate to address such activities. This view is strengthened by the fact that the government has not indicated, prior to 26 January, that its powers in respect of Northern Ireland-related terrorism (for instance) were in any way inadequate.

Unlimited scope of the Secretary of State's power to impose restrictions

19. Clause 1(2) provides that the Secretary of State may use a control order to impose '*any* obligation' on an individual that he deems necessary to prevent or restrict 'further involvement by that individual in terrorism related activity'. Although Clause 1(3) sets out a list of 15 different kinds of obligations (including prohibitions, restrictions and requirements) that the Home Secretary *may* impose by way of a control order, the list is illustrative and not exhaustive. As a consequence, the scope of the Home Secretary's powers to impose restrictions is limited only by his view that a given restriction is necessary.

20. One of the key requirements in respect of the qualified rights under Articles 8 to 11 ECHR is that any interference with their enjoyment must be either 'in accordance with'[6] or 'prescribed by' law.[7] In order to meet this condition, it is necessary that the law in question is formulated with sufficient clarity so that its effects are foreseeable. As the European Court of Human Rights stated in respect of Article 8(2) in a case involving the interception of private communications:[8]

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[5] JUSTICE Commons Report stage briefing on the Serious Organised Crime and Police Bill, February 2005.

[6] Article 8(2) ECHR.

[7] Articles 9(2), 10(2), 11(2) ECHR and 12(3) ICCPR.

[8] *Malone v United Kingdom* (1984) 7 EHRR 14 para 67.

> [T]he law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

21. By contrast, many of the possible obligations listed in clause 1(3) are of such generality ('specified purposes'; 'specified people', 'specified facilities', 'specified activities') that persons who may be subject to an order cannot predict the type and extent of interference they may face. The Bill's failure to limit the nature and kind of possible control order obligations means that it is not possible to identify with sufficient clarity the full extent of possible interference with specific rights.

22. Similarly, there is no explicit requirement for proportionality in the setting of particular restrictions, other than the view of the Home Secretary that the restrictions are 'necessary' (clause 1(2)). The Bill's provisions contain no obligation on the Secretary of State to show how the specific restrictions imposed relate to some concrete threat presented by a particular individual. Nor is there any requirement for the Secretary of State to show that the same purpose (of controlling terrorism) could not be achieved by way of less restrictive means.

23. Furthermore, the scheme of the Bill seeks to distinguish between control orders which contain obligations that are 'incompatible with the controlled person's right to liberty' (clause 2(1)) and those which do not ('non-derogating control orders'). However, given the broad range and extent of restrictions that may be imposed, it will be very difficult to say with sufficient certainty in an individual case whether certain kinds of restriction or (as is more likely) a particular set or combination of different kinds of restrictions may amount to an obligation incompatible with a person's rights under Article 5(1). Contrary to the Home Office guidance on control orders released on 28 February 2005, it will not always be possible to say in advance whether 'the extent to which a person's physical liberty is curtailed is of a degree and intensity sufficient to justify a conclusion that liberty has been deprived and not merely restricted'.[9]

24. Accordingly, the unlimited scope for control order restrictions, the lack of any explicit requirement that the restrictions be proportionate, and the inherent lack of certainty due to the breadth of the provisions in our view render these powers incompatible with the requirements of the ECHR.

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[9] *Official guidance on control orders proposed in the prevention of terrorism bill* (Home Office, 28 February 2005).

Lack of an effective remedy with regard to control order restrictions

25. Under Article 13 ECHR, everyone whose Convention rights have been violated must have an effective remedy against this violation. However, the Bill provides only the possibility of appeal against the making of a control order (clauses 7 and 8) and modification of its specified obligations (clause 5). There is no possibility in the Bill for any remedy in respect of the *implementation* of control orders. This is of fundamental importance since an obligation in a control order may be itself be lawful but nonetheless capable of being implemented in a manner that is arbitrary or disproportionate. This shortcoming is further amplified by the fact that many of the control order measures and restrictions are likely to affect third parties (see below). Given that control order decisions may not be questioned outside of the narrow jurisdiction provided by clause 9, and even then limited to applications on the grounds listed in clauses 5, 7 and 8, there is no scope in the Bill to provide a remedy in respect of such wrongs.

26. Accordingly, the Bill fails to satisfy the requirements of Article 13. The absence of provision for an effective remedy, moreover, has been considered by the European Court of Human Rights as one of the key indicators of a lack of proportionality in respect of the acts of public authorities, particularly as regards the protection of private life, home and correspondence under Article 8 ECHR.

Lack of provision to consider the impact of control orders on family members and third parties

27. Another fundamental gap in the proposed scheme of control orders is the lack of consideration to the potential impact of control orders on the rights of third parties, particularly those related to the person subject to the order such as wives, husbands, children, or other dependent relatives.

28. Given the broad range of restrictions, prohibitions and requirements that may be applied to an individual under the powers in clause 1, it seems inevitable that the imposition of a control order would have a serious impact not merely on the life of the controlled person but also all those who live with them and, to a slightly lesser extent, those who work with them and/or have daily or regular contact with them.

29. Thus spouses and children living in the same house will also be seriously affected by the terms of an order, including by becoming the subjects of surveillance, having their communications intercepted, and having their residence subject to regular entry and search by police and security services in order to ensure compliance with the control order. Indeed, we note that under clause 5(6), the Secretary of State may authorise the entry and search of any premises (if necessary by force) merely in order to effect the *service* of a control order. Clause 6(3) moreover makes it a criminal offence intentionally to obstruct the exercise of these entry

and search powers. In other words, any family member present who objected to, or refused to cooperate with, the search of the family home would be liable to arrest by those conducting the search.

30. Similarly, where restrictions are imposed on a person's employment or business (clause 1(3)(c)) or the ability of a person to used specified services or facilities (clause 1(3)(b)), the terms of a control order are likely to have a significant negative impact on that person's dependents, employers, and/or business associates.

31. Nothing in the present legal framework indicates that the Bill's drafters have had regard to the interests of family members and third parties affected by a control order, nor is there any requirement in the Bill for authorities to take their rights into account. It is also unclear whether family members or third parties would have any remedy against possible violations of their rights, given that clause 9(1) directs that 'control order decisions are not to be questioned in any proceedings' other than control order proceedings themselves (in which family members and third parties have no standing).

Duration and renewal of control orders

32. Clause 3(1)(a) provides that the duration of non-derogating control orders is 12 months. Clause 4(1)(a) provides that the duration of derogating control orders is 6 months. However, both clauses also provide that control orders may be renewed and – in the case of non-derogating orders – renewed at any time (clause 3(3)). The only limit on the power of the Secretary of State to renew a derogating control order is a requirement that he make an order stating 'that it continues to be necessary for him to have the power to impose derogating obligations' (clause 4(3)(b)(ii)), subject to a further procedure that the draft of the order be approved by resolution of each House of Parliament (clause 4(5)) *unless* the order needs to be made *without* such 'by reason of urgency' (clause 4(6)).

33. Similarly, although clause 5(2) permits the Secretary of State to revoke a control order or relax or remove a control order obligation at any time, he is under no *duty* to do so even where he may be satisfied that the material situation justifying a control order has changed.

34. In our view, merely to provide a fixed-term of standard length for control orders regardless of circumstances lacks proportionality. If Parliament is to contemplate introducing a regime of control orders to complement the criminal justice system, it must ensure that the duration of any such orders is limited to a period 'up to/not exceeding' a maximum term. For a scheme of control orders to be compatible with fundamental rights, the specific duration of any order should be determined by the court according to the evidence available. Furthermore, there would need to be a positive duty upon the Secretary of State to seek the quashing of the order

as and when he becomes aware of a material change in evidence justifying the order. It would be similarly essential to ensure through judicial authorization that the renewal of orders is subject to a stringent necessity test, preventing the automatic repetition of control orders over long periods.

Search and seizure powers

35. Among the many different kinds of obligations that may be imposed by way of control order under clause 1(3), the provisions in subclauses 1(3)(j) to (k) are especially disproportionate.

36. In effect, these clauses would allow for the Secretary of State to enjoy an unlimited 12 month-long search and seizure power in respect of a person subject to this obligation. We note that the European Court of Human Rights has already raised concerns under Article 8 ECHR (right to respect for private and family life) about individual home searches conducted without judicial authorisation.[10] In the UK, searches are currently closely regulated under section 8 of the Police and Criminal Evidence Act 1984. Given the strict judicial controls that currently exist in respect of search powers, it is difficult to see how such a broad licence to conduct searches over such an extended period of time could be justified within the requirements of Article 8 ECHR. Any search of a home must be based on an individual application by the specified person and subject to judicial authorization unless there is an imminent risk of the commission of a criminal offence.

37. It is similarly objectionable under clause 1(3)(l) that a control order may entitle a 'specified person' to seize or remove for testing 'anything found' for the term of the order. This provision allows interferences into the right to property under Article 1(2) of Protocol 1 ECHR. While the temporary seizure of property items and even their testing may constitute an acceptable preventive measure where sufficient proof exists, it is objectionable that a 12 month seizure order with the possibility of extension should be left only to an executive order, implemented by a delegated person and without continuing judicial supervision of any kind or remedy against abuse.

Undefined requirement of 'cooperation'

38. Another profoundly problematic requirement is the obligation in clause 1(3)(n) for a person subject to a control order to 'comply … with a demand … to provide information to a specified person in accordance with the demand'.

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[10] *Funke and others v France* Judgment of 25 February 1993, Series A 256-A.

39. Not only does this requirement lack sufficient clarity to meet the demands of legal certainty (see para 23 above), but it also represents an unrestricted licence to question a person without the well-established safeguards contained in Code C of the Police and Criminal Evidence Act 1984, not to mention the guarantees of Article 6 ECHR (the right to fair proceedings) that apply to the examination of defendants in a court of law. In particular, the unrestricted use of such control order powers to obtain information from defendants without the benefit of legal representation is likely to breach the right against self-incrimination under Article 6.[11]

Control orders and freedom of movement

40. The control order powers contain a full range of possible prohibitions, restrictions and requirements that interfere with the right to freedom of movement and residence enshrined in Article 12(1) ICCPR. This right includes the guarantee to freedom of movement in the 'whole territory of a state' and to seek residence at one's free choice. Moreover, it guarantees the right to leave and enter one's country, Article 12(2) ICCPR.

41. The scope of powers includes the ability 'to place a restriction in respect to the persons' residence or on the person to whom he gives access to his place of residence' (clause 1(2)(e)), 'a prohibition to be at specified places or specified area at specified times or specified days' (clause 1(2)(f)), 'a prohibition or restriction on his movement to from or within the United Kingdom, to a specified part of the United Kingdom or a specified pace or area within the United Kingdom (clause 1(2)(g)). In addition it includes 'a requirement on him to comply with such other prohibitions or restrictions on his movement as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with any other obligation imposed by the order' (clause 1(2)(h)). In addition he has to accept a 'requirement on him to co-operate with specified arrangements for enabling his movement (…) to be monitored by electronic or other devices' (clause 1(2)(m)). It is important to note that the Bill contains a more general encompassing clause in clause 1(4)(a) that 'any power under a control order includes the imposition of a requirement on him to remain at or within a particular place or areas whether for a particular time or generally'.

42. Freedom of movement and the right to choose one's residence are not unlimited under international law. Article 12(3) ICCPR allows limitations on the grounds of national security that are necessary in a democratic society. Movement restrictions of person considered to be a terrorist threat are thus not as such precluded. This will certainly hold true with regard to those restrictions that are on the lower scale of interferences. However, the broad scope of

[11] *Saunders v United Kingdom* (1997) 23 EHRR 313 and recently *R v Staines, R v Morrisey* (CA 24 April 1997).

movement restrictions in the Bill raises serious concerns in its present form. The powers are only insufficiently defined and do not set clear limits. This increases the inherent risk of their being applied in a disproportionate manner.

43. Moreover, movement restrictions, requirements or prohibitions are at the heart of the control-order powers. They are likely to form the basis of control orders imposed on individuals in combination with a full range of further restrictions, prohibitions and requirements. This may include restrictions on association and communication with others, a notification and/or prior permission system of any movement. It also allows for obliging the carrying of electronic devices and permanent monitoring and supervision of these requirements, including through house searches at any time during the 12 months validity of the order. These wide ranging powers are not only applicable in response to a specific and imminent threat, but for a significant duration of time. In addition, any such obligation contains the possible trigger of criminal punishment for violation of any of the orders' requirements. In light of this concentration of possible powers and interferences the implementation of the orders will severely limit any autonomous and independent life.

44. This illustrates a broader concern with the present law. While individual clauses seen in isolation may not directly breach international standards, their likely application in combination with other conditions for a prolonged period risks disproportionate interference with individual rights. More than any ordinary restriction into personal freedom, the Bill provides for a separate legal regime to be placed on the individual for considerable duration that will affect most if not all aspects of the affected person's life.

Control orders and deprivation of liberty

45. The Bill provides a 'contingency option' for the Home Secretary to enact executive control orders that constitute a deprivation of liberty upon derogation from Article 5 ECHR. We agree that any control order amounting to deprivation of liberty can only be lawful under the stringent requirements of Article 15(1) ECHR. Even under the assumption of the existence of a state of emergence threatening the life of the nation, any derogation would need to be 'necessary in the exigencies of the situation'.

46. Control orders providing for a deprivation of liberty would constitute - even as presently proposed – a system of executive and therefore administrative detention of terror suspects. While applicable to both UK citizens and foreigners alike, it raises similar legal challenges as those voiced with regard to administrative detention under SIAC. It is therefore questionable whether the 'preventive' legislating of such powers following the House of Lords ruling is a *bona fide* implementation of the ruling. While one may already question the justification of the need for the far reaching system of preventive control-orders described-above, it is difficult to

conceive that the even more far reaching powers for additional administrative detention could constitute a measure strictly 'necessary in the exigencies of the situation'.

47. Control orders that allow for the deprivation of liberty also raise another concern, namely the lack of sufficiently clear separation between such orders and other intensive and intrusive 'non-derogating orders'. Clause 2 stipulates that control orders constituting deprivation of liberty require a derogation order and bring a different set of legal rules into operation. However, the law does not define under what circumstances movement and residence restrictions constitute a deprivation of liberty. The legal basis for the specific content of any of the control orders is based on the broad provisions under clause 1(2). The European Court of Human Rights has regarded 'house arrest' under supervision to constitute a deprivation of liberty under Article 5 ECHR, 'house arrest' including forced residence on a small island with substantial restrictions of movement and communication.[12] The case law suggests that most of the restrictions referred to in the Bill would constitute a system of supervised interference with the freedom of movement. However, the qualification will depend to a considerable extend on the type, duration, effects and manner of implementation. In this regard it is problematic that the Bill does not distinguish in any clear terms between those interferences that would require derogations and those possible under the general 'control-order' scheme. As we have noted above, a number of the specific powers in clause 1(2) could in fact lead to restrictions amounting to forms of deprivation of liberty.

Lack of judicial control and inadequate judicial review

48. One of the Bill's most glaring flaws is the fact that the power to make control orders restricting individual liberty is in the hands of the executive rather than the courts (clause 1(1)). Instead, the Bill provides only for 'judicial supervision' of control orders (see e.g. clause 7(7)), with the level of scrutiny depending on the kind of restriction imposed (clauses 2, 7 and 8). The decision to impose a control order is made by the Home Secretary, not by a court, and the court has no power to substitute less restrictive measures itself. Instead, it may only direct the Secretary of State to make modifications to the order (clause 7(8)(c), 8(4)(d)).

49. In circumstances where Parliament is considering establishing a scheme of preventative control orders, we believe that judicial *control* of such orders is an *essential minimum* condition of such a scheme. This is because judicial review of executive decisions engaging individual liberty following administrative law principles has been shown to be insufficient to protect basic rights. As Lord Nicholls of Birkenhead noted in respect of the executive orders to

[12] *Guzzardi v Italy*, Judgment of 6 November 1980 (7367/67).

indefinitely detain terrorist suspects under Part 4 of the ATCSA in the Belmarsh judgment last December:[13]

> Nor is the vice of indefinite detention cured by the provision made for independent review by [SIAC]. The commission is well placed to check that the Secretary of State's powers are exercised properly. But what is in question … is the existence and width of the statutory powers, not the way they are being exercised.

50. Although SIAC was an independent specialist tribunal chaired by a senior High Court judge, it was apparent that judicial review by such a body was not in itself capable of delivering justice to those detained. In JUSTICE's submission to the Joint Committee on Human Rights review of counter-terrorism powers in 2004, we submitted that any scheme for control orders (then called 'civil restriction orders') should have the following features in order to safeguard individual rights:[14]

- *Application procedure*: any order should be made by the High Court on application by the Secretary of State. This is in contrast to the current procedure under Part 4 whereby SIAC merely reviews the legality of a certificate issued by the Secretary of State. The application procedure must be adversarial, allowing suspects to challenge the legality of any order sought and the evidence upon which it is based.

- *Powers of the court:* the court must have the power to dismiss any application. The court should also have the power to assess the proportionality of specific restrictions sought by the Secretary of State in respect of a suspect, and substitute less restrictive measures than those sought where justified by the evidence.

51. Measured against these principles, the provisions of the current Bill fall far short of the appropriate standard. In particular, we note that provision for executive power to make such orders is in marked contrast to other kinds of restriction orders in UK law which may only be imposed by a court, and in the most serious cases effected by way of a punishment for a criminal offence (e.g. football banning orders).[15] It seems an unusual state of affairs that someone faced with the imposition of an Anti-Social Behaviour Order or a Football Banning Order enjoys a greater degree of due process than someone suspected of involvement with terrorism. Without full judicial control of control orders, we are concerned that this Bill will lead to the establishment of a system of quasi-criminal justice in which the courts act merely to confirm the suspicions of the executive without the safeguards of the criminal law.

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[13] *A and others v Secretary of State for the Home Department* [2004] UKHL 56 at para 82.

[14] See Joint Committee on Human Rights, *Review of Counter-Terrorism Powers* (HL 158/HC 713, 4th August 2004) at para 79.

[15] See Football (Offences and Disorder) Act 1999, section 6.

Standard of proof insufficient to safeguard basic rights

52. Clause 1(1) sets out the standard of proof required for the Secretary of State to impose a control order – the Secretary of State need only have 'reasonable grounds for suspecting' a person's involvement in 'terrorism-related activities'.

53. We note that this standard of proof is identical to that operating in proceedings before the Special Immigration Appeals Commission ('SIAC') under Part 4 of the 2001 Act, which the House of Lords found incompatible with the Human Rights Act in December 2004.[16] In essence, SIAC was not asked by the government whether those detained were guilty of any criminal offence but only to determine – on a standard of proof below even that of the ordinary civil standard – whether the Home Secretary had reasonable grounds for suspecting that a detainee has been involved in terrorism and, hence, posed a risk to the national security of the UK.[17] As SIAC itself noted in October 2003, 'it is not a demanding standard for the Secretary of State to meet'.[18]

54. By contrast, we note that the appropriate standard of proof for the imposition of a free-standing Anti-Social Behaviour Order is that of the criminal law, i.e. proof beyond a reasonable doubt.[19] If such an exacting standard is demanded in cases where individuals are accused of fly tipping, we do not see that a lesser standard can be brought to bear where the allegation is one of involvement in terrorism. Accordingly, we recommend that any system of control orders must involve a court being satisfied to the criminal burden of proof.

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[16] See *A and others*, n1 above.

[17] See *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003), para 48: "The test is … whether reasonable grounds for suspicion and belief exist. *The standard of proof is below a balance of probabilities* because of the nature of the risk facing the United Kingdom, and the nature of the evidence which inevitably would be used to detain these Appellants' [emphasis added].

[18] Ibid, para 71. In *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123, the Court of Appeal subsequently noted that SIAC's expression was 'unfortunate' but correct insofar as it was merely emphasising that 'the standard is a different one from that applied in ordinary litigation which is routinely concerned with finding facts' (para 49 per Pill LJ).

[19] See *R v Crown Court at Manchester ex parte McCann* [2002] UKHL 39 per Lord Steyn at para 37: 'in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard'. Note that even this ruling is currently under appeal to the European Court of Human Rights who are likely to view the matter differently: see e.g. Andrew Ashworth QC, 'Social Control and 'Anti-Social Behaviour': The subversion of Human Rights?' (2004) 120 LQR 263-291 at 290: 'In holding that the anti-social behaviour order is not a penalty, the House of Lords in the [*McCann*] decision attributed much less significance to the possible consequences of breaching the order than the Strasbourg Court might do'.

Proposed use of closed proceedings and special advocates

55. We note that provision is made in paragraphs 4, 6 and 7 of the Schedule to the Bill for the use of closed proceedings (proceedings in the absence of the defendant) and the use of special advocates. In our view, the use of closed sessions and special advocates involves serious limitations on an appellant's right to fair proceedings. The rights limited include the appellant's right to know the case against him; be present at an adversarial hearing; examine or have examined witnesses against him; be represented in proceedings by counsel of his own choosing; and to equality of arms.

56. As regards the notion of 'equality of arms' in particular, it is plain that the appellant (the detainee) in closed proceedings does not enjoy anything remotely close to an equal footing with the respondent (the Secretary of State): not only is the respondent able to withhold relevant material from the appellant, but the respondent is entitled to be present at all times. Nor does the respondent suffer any of the kinds of restrictions upon communication with counsel that are imposed on the appellant.

57. The appellant, by contrast, is not entitled to be present throughout the proceedings. He is also prevented from knowing all the evidence against him, as the special advocate who represents him in closed session is forbidden to discuss the closed material with him. Although the special advocate is able to cross-examine witnesses on the appellant's behalf, the appellant is denied the full benefit of this right – without knowing the closed evidence against him, he cannot indicate to counsel the points upon which witnesses should be challenged. In the same way, the entitlement of the appellant to his own counsel throughout the proceedings is useless to the extent that his own counsel would also be prohibited from attending the closed hearings and knowing the closed evidence against him.

58. The fact that a special advocate is appointed by a government official and that the appellant has no say in the choice of advocate is another plain interference with the appellant's right to counsel 'of his own choosing'.[20] This lack of choice is significant, not least because choice of counsel is an important factor in promoting the confidence of persons subject to proceedings in their legal representatives. Such choice is even more important in proceedings where the government is the respondent.

59. Despite the severity of such limitations on procedural rights, JUSTICE recognises that they may nonetheless be justified in certain cases because of a compelling need to protect some countervailing interest, such as the life of a witness or an intelligence source. In our view, the

[20] The right to a counsel of one's own choice is not absolute under Article 6(3)(c) ECHR but the general rule is that the appellant's choice should be respected.

extent to which such restrictions can be justified depends not only on the seriousness of the risk posed by disclosure of the evidence, but also on the *kind* of proceedings in question. Indeed, in some circumstances, we note that the use of special advocates may even improve the fairness of proceedings towards an appellant – such as in deportation proceedings on grounds of national security (i.e. SIAC's original function) or in public interest immunity applications made *ex parte* in criminal proceedings (as approved by the House of Lords).[21] Even in such cases, however, we consider that the use of special advocates must remain 'a course of last and never first resort'.[22]

60. In our view, the use of special advocates cannot be justified in situations where an appellant's right not to be deprived of liberty is engaged. This is because the kinds of restrictions that may be acceptable to protect national security in an employment tribunal hearing or a deportation hearing are unacceptable where an individual faces imprisonment or other serious interference with their right to liberty. Although special advocates might be used to determine *preliminary* issues in such cases (such as non-disclosure applications on grounds of public interest immunity), the notion that a person could ever be subject to criminal sanction or other deprivation of liberty without knowing the full case against them is antithetical to basic concepts of justice.

Improper delegation of power to the Lord Chancellor to set rules of court

61. While we recognise it is appropriate for the Lord Chancellor to set rules of court under delegated powers, we regard the scope of the powers delegated to the Lord Chancellor by the provisions of this Schedule to be unacceptably broad. In particular, we note that the Lord Chancellor would have power to set:

    - The burden of proof (paragraph 4(1)(a));
    - The right of a party in proceedings to know the full reason for decisions (paragraph 4(2)(a));
    - The right of a party to be present in proceedings (paragraph 4(2)(b));
    - The right of a party to legal representation in proceedings (paragraph 4(1)(c);

62. In our view, these measures relate to fundamental safeguards in the right to fair proceedings. Accordingly, we consider it wholly improper for such provisions to be made the subject of delegated legislation. Rather, provision for such measures should be made in the body of the Bill itself.

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[21] *R v H and C* [2004] UKHL 3

[22] Ibid, para 22.

Failure to prohibit the use of evidence obtained under torture from third countries

63. We are concerned at the government's continuing failure to outlaw the reliance on any evidence that may have been obtained by torture or other forms of ill-treatment in any control order proceedings, including if such evidence originates from another state. This concern is particularly acute in light of the likely use of sensitive intelligence material in control order proceedings, as was the case in proceedings before the Special Immigration Appeals Commission ('SIAC') under Part 4 of ATCSA. We note that paragraph 4 of Schedule 1 of the Bill contains identical provisions to those of SIAC in terms of the use of closed evidence.[23]

64. The principle that states may not use information obtained by torture or other forms of ill-treatment, whether by their own agents or agents of other states, (the "Exclusionary Rule") is expressly stated in Article 12 of the 1975 General Assembly Declaration against Torture:

> Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

65. The same rule is also expressly stated in Article 15 of the UN Convention against Torture (UNCAT):

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

66. This rule forms part of, or is derived from, the general and absolute prohibition of torture and constitutes a customary rule of international law.[24] As a part of the general prohibition of torture, the Exclusionary Rule not only applies to the United Kingdom as a result of the United Nations Convention Against Torture, but also as a matter of customary international law.

67. The obligation expressed in Article 15 UNCAT applies to 'any proceedings', whether criminal or civil or quasi-judicial. The proceedings under the Prevention of Terrorism Bill would qualify in the same way as proceedings before SIAC under Part 4 of ATCSA. In November 2004, the

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[23] See e.g. section 7 of the Special Immigration Appeals Commission Act 1997, Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034).

[24] Human Rights Committee, *General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 10 March 1992, UN Doc. HRI/GEN/1/Rev.7, at paragraph 12; Committee against Torture, Communication No. 193/2001, *P.E. v. France*, Views adopted on 21 November 2002, CAT/C/29/D/193/2001, 19 December 2002 at paragraph 6.3; Committee against Torture, Communication No 219/2002, *G.K. v. Switzerland*, Views adopted on 7 May 2003, CAT/C/30/D/219/2002, at paragraph 6.10.

UN Committee Against Torture had expressed specifically its concern that UK law failed to implement fully its obligations under Article 15 and recommended that:[25]

> the [UK] should appropriately reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government's intention … not to rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture; the [UK] should also provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture

68. This followed the decision in August 2004 of the Court of Appeal, which held that SIAC was not obliged to exclude evidence that had been obtained under torture in another country by non-UK officials.[26] Given that the government again proposes to rely on the use of closed evidence similar to that used before SIAC (see Schedule 1, para 4), the failure of the Bill to prohibit the use of evidence gained under torture abroad stands in contrast to its international obligation. Neither can the Home Secretary base his determination of control orders on such evidence, nor can the judicial review under the new Bill rely on such evidence. The present Bill and the rules of procedure should ensure that the individual subjected to control orders has an effective way to challenge such evidence.

69. Indeed, it also contrasts markedly with the position set out in the FCO's 2004 Human Rights Report that '[t]orture is abhorrent and illegal and the UK is opposed to the use of torture in all circumstances'.[27] The report further quotes the Foreign Secretary Jack Straw as saying, 'I am proud of the UK's leading efforts in the campaign to prevent torture worldwide'.[28] On the basis that the use of torture evidence anywhere weakens the struggle against torture everywhere, the government's refusal to exclude such evidence from proceedings involving the use of sensitive intelligence material is a thoroughly retrograde step.

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[25] Para 5(d), Conclusions and recommendations of the Committee against Torture in respect of the United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, CAT/C/CR/33/3, 25 November 2004. See also, *Liberty and JUSTICE submission to the United Nations Committee Against Torture in response to the United Kingdom's fourth periodic report* (October 2004), paras 8-14.

[26] The appeal court held that Article 15 CAT was not enforceable as it had not been incorporated into domestic law. It also ruled that torture evidence obtained abroad was not excluded by either common law principles or the provisions of the European Convention on Human Rights.

[27] Foreign and Commonwealth Office, *Human Rights: Annual Report 2004* (Cm 6364: September 2004) at 182.

[28] Speech at the UK ratification of the Optional Protocol to the UN Convention Against Torture, 10 December 2003, ibid at 183.

Lack of provision for independent scrutiny

70. Clause 11(2) makes provision for the appointment of a person to review the operation of clauses 1 to 6. This is analogous to the statutory review of the operation of Part 4 of ATCSA provided by Lord Carlile of Berriew QC under section 28 of that Act.

71. However, we note there is no provision for a review of the Bill itself along the lines of the Privy Counsellor Review Committee chaired by Lord Newton of Braintree appointed under section 122 of the 2001 Act.

72. We consider this to be a striking omission from the Bill given the government's continued reliance on closed evidence to justify exceptional measures in this case. Unlike the role accorded to the courts, the report of the Newton Committee in December 2003 was the first authoritative independent review addressing the *merits* of indefinite detention as a counter-terrorism measure. Given the importance of that committee's findings to the subsequent ruling of the House of Lords in December 2004,[29] we consider such broad-based review to be an essential element in maintaining effective independent scrutiny of contentious counter-terrorism legislation.

Lack of sufficient time for effective parliamentary debate

73. We are deeply concerned at the parliamentary timetable afforded such a sweeping piece of legislation. Whereas the previous Anti-Terrorism Crime and Security Act 2001 was passed in a mere 32 days, it is proposed that the present Bill will become law in less than 21 days. Not only is such a short period of time wholly inadequate to deliberate upon matters of this importance, but it flies in the face of the government's own commitment to foster a wider public debate on counter-terrorism measures. In February 2004, the then Home Secretary David Blunkett introduced the Home Office discussion paper on counter-terrorism powers in the following terms:[30]

> I … hope this document will begin a wider debate over the next months. It is important that this debate should be inclusive and genuinely consultative. I am therefore proposing a far longer period of consultation – six months – than would normally be the case …. The debate needs to begin now so that we – Parliament and the wider public – *can reach an informed judgement* on how to proceed in the years ahead [emphasis added].

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[29] See e.g. Lord Bingham at para 34 of *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

[30] *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*, Cm 6147 (Home Office: February 2004), at ii-iii.

74. On 26 January 2005, the current Home Secretary outlined his current proposals and again indicated the need for public debate in the following terms:[31]

> All parts of our society—Parliament, the legal system and the media—need an open debate about this so that we understand the complexities of the security situation that we face. I will shortly be bringing forward detailed proposals for the best way to conduct that debate.

75. At this time, no detailed proposals have been brought forward. In their absence, we question the government's dedication to promoting informed judgment on these issues when it affords less time to passing laws relating to counter-terrorism than it does for those relating to clean neighbourhoods[32] or consumer credit.[33]

76. We note that the democratic law-making process is a key component of the definition of the rule of law and is itself the best safeguard against arbitrary rule. Such a process is even more important where the questions before Parliament relate to fundamental freedoms and counter-terrorism. This is even more true for a law that purports to lay the foundation for further derogation from human rights standards. In such circumstances, it is the duty of Parliament to ensure the strictest compliance with human rights standards.

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[31] Hansard, HC Debates 26 January 2005, Col 309.

[32] Clean Neighbourhoods and Environment Bill, introduced in the House of Commons 7 December 2004.

[33] Consumer Credit Bill, introduced in the House of Commons 16 December 2004.