



House of Lords
House of Commons
Joint Committee on
Human Rights

**Government Response to the
Committee's Eighth Report of
this Session: Counter-Terrorism
Policy and Human Rights: Draft
Prevention of Terrorism Act
2005 (Continuance in force of
sections 1 to 9 order 2007)**

Fourteenth Report of Session 2006-07



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Prevention of Terrorism Act 2005
(Continuance in force of sections
1 to 9 order 2007)**

**Fourteenth Report of Session
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*Report, together with formal minutes and
appendix*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current Membership

HOUSE OF LORDS

Lord Fraser of Carmyllie
Lord Judd
Lord Lester of Herne Hill
The Earl of Onslow
Lord Plant of Highfield
Baroness Stern

HOUSE OF COMMONS

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Nia Griffith MP (Labour, *Llanelli*)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and Robert Long (Senior Office Clerk).

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1 Report

Under cover of a letter of 1 May 2007 from Rt Hon Dr John Reid MP, Home Secretary, we have received the Government's Response to our Eighth Report of this Session, *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007* (HL Paper 60, HC 365). We publish this Response as an Appendix to this Report. We will comment as appropriate on this Response in future Reports which we publish on counter-terrorism and human rights.

Appendix

Letter and memorandum dated 1 May 2007 from the Rt Hon John Reid MP, Home Secretary

Parliamentary scrutiny of the human rights compatibility of control orders

In our view, a debate on a motion to approve an affirmative resolution is a wholly inappropriate procedure for renewal of provisions of such significance. To fail to provide an opportunity to amend the legislation is also, for the second year running, a serious breach of commitments made to Parliament. Parliament is being deprived once again of an opportunity to debate in detail and amend the control orders regime in the light of experience of its operation and concerns about its human rights compatibility. We draw this matter to the attention of each House. (Paragraph 15)

The Government believes the affirmative resolution procedure is the appropriate mechanism for annual renewal of the Prevention of Terrorism Act 2005, providing both Houses with the opportunity to debate renewal and the legislation.

On 2 February 2006, the former Home Secretary announced his intention to bring forward a further Counter Terrorism Bill in 2007. Since then the Government has conducted a fundamental review of our counter terrorism capabilities and resources, leading to the machinery of Government changes announced on 29 March, which will strengthen the Home Office's ability to focus on counter-terrorism. The review has also included an examination of whether our legislation remains effective. This review is now complete and we are considering the way forward. It goes without saying that the Government will inform Parliament of our legislative intentions as soon as possible.

The Government remains sympathetic to Parliament's desire to debate these serious issues but, because this is still under consideration and because there is no prospect for deportation or prosecution in the current control order cases, it was vital the legislation was renewed in order to protect the public from individuals whose control orders are designed to mitigate the threat they would otherwise pose to national security.

The fact that Lord Carlile's Report on the operation of the control order regime was not published until 19 February, only three days before the renewal debate in the Commons, provided an even more limited opportunity to consider and if necessary report in the light of Lord Carlile's Report than we received last year. (Paragraph 17)

The Government published Lord Carlile's report as soon as was practicable, which this year was the first Monday after the February recess.

Human Rights issues: Deprivation of Liberty

We acknowledge that the litigation concerning the compatibility of a significant number of current control orders with Article 5 has yet to run its course. However, we are concerned that the Home Secretary is asking Parliament to renew a power which not only this Committee but now the High Court and the Court of Appeal have said is

being routinely exercised in breach of one of the most fundamental of all human rights, the right to liberty in Article 5 ECHR. (Paragraph 28)

The Government does not accept that any of the control orders made thus far breach the right to liberty of individuals on whom they are imposed. The Government is grateful to the Committee for acknowledging that the litigation on this issue has yet to run its course. As you are aware, the Government is appealing to the House of Lords against the judgment handed down by the Court of Appeal in *The Secretary of State for the Home Department v. JJ and others*. We are also appealing against the judgements in the substantive control order reviews handed down thus far by the High Court. It remains our firm belief that the control order regime, as it is currently being implemented, does not breach Article 5 ECHR.

As has been consistently made clear, each order is made on a case by case basis and the obligations it imposes are tailored to meet the particular risk posed by the individual concerned. These obligations are considered necessary and proportionate to address the threat to national security posed by the individuals in question.

In our view, if the House of Lords or the European Court of Human Rights eventually decides that the control orders which have been challenged are unlawful in the absence of a derogation, the Government will effectively have been operating a de facto derogation from Article 5. Knowing how the power is currently being exercised by the Government, Parliament in our view is being asked to be complicit in such a de facto derogation, without an opportunity to debate whether such a derogation is justified. (Paragraph 29)

As the previous Home Secretary said last year, the Government acknowledges the concern about the distinction between derogating and non-derogating control orders. However, the Government does not accept that any of the control orders made thus far are derogating control orders or deprive any individual of their liberty. Consequently the Government does not believe either that a derogation is necessary or that Parliament is being asked to be complicit in a de facto derogation.

Human Rights issues: Due process

We acknowledge that the Court of Appeal in MB has upheld the compatibility of the control order regime with the right to a fair hearing in Article 6(1) ECHR and has considered and dismissed many of the due process concerns raised in our first renewal report. However, we remain of the view expressed in our earlier report. For the reasons given in that Report we are doubtful whether the procedures for judicial supervision of control orders in PTA 2005 in fact secure the substantial measure of procedural justice that is claimed for them. (Paragraph 37)

The Government does not accept the view that the control order regime violates controlled individuals' right to a fair trial. Moreover, as the JCHR's report acknowledges, 'the Court of Appeal in MB has upheld the compatibility of the control order regime with the right to a fair hearing in Article 6(1) ECHR and has considered and dismissed many of the due process concerns raised in our first renewal report'. In his second annual report on the operation of the Prevention of Terrorism Act 2005, Lord Carlile comments that, subject to

the future appeal, the judgment of the Lord Chief Justice in *Secretary of State for the Home Department v MB* ‘provides essential guidance for the future’.

Last year the previous Home Secretary outlined at length the system in place for reviewing a control order. It is worth pointing out that substantive control order review hearings have taken place in three cases now. In each of these cases the hearing has taken at least four days, which demonstrates the high degree of judicial scrutiny in each case.

In our view, due process standards should apply to the more restrictive nonderogating control orders in view of the severity of the restrictions they contain. (Paragraph 38)

The Government’s position on this has not changed in the last year; these are civil procedures with civil procedure rules. The Government does not accept that control order proceedings amount to a criminal charge.

On the human rights issues in general, the Government welcomes Lord Carlile’s statement in his second annual review of the 2005 Act that he remains of the view that, ‘as a last resort (only), the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society’.

Prosecution

In our view, the important observation by Lord Carlile that the decision whether to prosecute should be taken following detailed and documented consultation and on the basis of full consideration of the evidence and intelligence confirms our concerns in our report on Prosecution and Pre-Charge Detention that the Government is not as committed to prosecution as a last resort as it professes to be. This part of Lord Carlile’s Report provides important evidence in support of those who fear that once a control order is imposed it relieves the pressure on the police and the Home Office to bring a criminal prosecution. (Paragraph 48)

Prosecution remains the Government’s preferred option for dealing with suspected terrorists, and the JCHR’s assertion to the contrary is inaccurate. The Government fully supports Lord Carlile’s conclusion that ‘it is a given that it would be far better for prosecutions to occur, of course provided they pass the usual threshold standards’. To strengthen our ability to prosecute terrorist suspects, new offences (including ones enabling the prosecution of those involved in encouraging terrorism, preparation of acts of terrorism and terrorist training) were introduced by the Terrorism Act 2006. Up to 31 December 2006, 22 individuals had been charged with new offences introduced by that Act. Including the 22 individuals in total in 2006 85 individuals were charged after being arrested under the Terrorism Act 2000 or under other legislation where the investigation was conducted as a terrorist investigation.

During the debates on renewal four options were put forward by the opposition parties for increasing the number of successful prosecutions of suspected terrorists: introduction of the so-called ‘threshold test’; making greater use of plea-bargaining so ‘supergrass’ give evidence; the use of intercept as evidence; and extending the use of post-charge questioning. Two of these measures are already in place (plea-bargaining and the ‘threshold test’).

The Government is looking at the issue of post charge questioning as part of a wider review of police powers. It is also considering its specific application in terrorism cases in light of the recommendations made by both the Home Affairs Committee and JCHR in their reports last year on pre-charge detention. The Government believes there is merit in the proposal but needs to make sure that all the implications are addressed.

Similarly, as the Committee is well aware, the Government is again looking at the issue of intercept as evidence. A comprehensive review was conducted in 2003/04. The Government concluded that it was not the right time to change the law and that the impact of new technology needed to be properly considered and factored into the decision making process. Work is continuing to identify, if possible, a legal model which would provide the necessary safeguards to allow intercept material to be used as evidence. The large number of reviews (5 reviews) that have been conducted in the last 13 years is illustrative of the difficulties of identifying a model that will deliver the desired outcome without compromising capability. The Government's position is that it will only change the law to allow intercept as evidence if the necessary safeguards can be put in place and the benefits outweigh the risks.

It is worth noting that while Lord Carlile supports the use of intercept in court cases, he observes that, 'the availability of such evidence would be rare and possibly of limited use'. Sir Swinton Thomas, who has recently retired from his role as the Interception of Communications Commissioner, sets out in his final annual report why he believes a change in the law is undesirable, a view which he recently reinforced in his evidence to the Committee.

In any case, even with all the legislative changes already made or proposed, a small number of cases will remain where prosecution is not possible. It is wrong to suggest otherwise, and opponents of the control order system have not proposed an alternative means of protecting the public from the risk these individuals pose. The Government would welcome any suggestions the Committee has. Control orders were never our preferred option, but the Government remains of the view that they remain the best available means of dealing with those small number of cases where it is not possible to prosecute or deport an individual.

Lord Carlile's belief that continued investigation could yield prosecutions of individuals subject to control orders, and the fact that he considers it necessary in his report to encourage such investigation to continue, suggests to us that at present there is insufficient continuing investigation with a view to prosecution. (Paragraph 49)

In our view, the judgment of the High Court in E v Secretary of State for the Home Department provides further powerful evidence confirming our concerns about the seriousness of the Government's commitment to prosecuting as its first preference. The lack of effective systems to keep the prospects of prosecution under review, revealed by this case, belies the Government's professed commitment to do so. (Paragraph 54)

As I set out above, the Government remains committed to prosecuting suspected terrorists as the preferred option. However, whether or not to prosecute is an operational matter for the police and CPS.

The Secretary of State always consults the police before making a control order as to whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism, as required by Section 8 of the Prevention of Terrorism Act 2005. All of these cases are kept under review and it remains the case that there are no individuals subject to a control order where there is currently considered to be evidence available that could realistically be used for the purpose of a prosecution of the individual for an offence relating to terrorism (other than for breaches of control order obligations in some cases).

The Government is appealing against the judgment in the case of E. Even so, in light of the court's ruling about the possible relevance of court judgments in Belgium in relation to this individual, the Home Office asked the police and CPS to review the position again – including these judgments – to consider whether there are grounds for prosecuting E for a terrorism-related offence. The CPS have now done this and have confirmed that there is still insufficient available admissible evidence that could realistically be used for the purposes of prosecuting E for a terrorism-related offence. The investigation of the conduct of E with a view to prosecuting him for an offence relating to terrorism will remain under review.

Nevertheless, in the light of Lord Carlile's report and the recent High Court judgments, the Government is reviewing, with police and CPS, the procedures in place regarding the consultation in relation to prosecution that takes place as part of the control order process.

Effectiveness of the control orders regime

In our view, the Government's explanation that individuals who have absconded from control orders or disappeared do not pose a threat to the public raises questions about whether control orders are being used for the purposes for which Parliament was told they were necessary during the passage of the 2005 Act, namely to protect the public from the risk of harm by suspected terrorists. (Paragraph 61)

This is not true. Control orders are used for the purpose outlined in Parliament and indeed on the face of the legislation – protecting the public, whether in the UK or abroad, from a risk of terrorism. It is a matter of public record that some control orders are in place to reduce the risk of an individual going abroad to engage in terrorism-related activities rather than because the individual poses a direct and current threat to the public in the UK itself. As Lord Carlile notes in his second report: 'in some cases control orders against British citizens have been founded on solid intelligence of their intention to join insurgents in Iraq or Afghanistan, with resulting risks to British and other allied troops'.

The main significance of the fact that the subjects of three control orders have either absconded or disappeared is that it shows the limitations of control orders as a means of protecting the public. In our view, this again demonstrates the urgency of bringing forward measures to facilitate prosecution, which will provide much more effective protection for the public. (Paragraph 62)

The Government has never claimed that control orders are completely effective and it remains the case that they are not our preferred option for dealing with suspected terrorists. As a result of the successive court judgements, there is inevitably a real and

increased risk that individuals on control orders will re-engage in terrorism or abscond. The Government will continue to work closely with the police and Security Service to consider what more might be necessary to improve the effectiveness of the control order regime.

However, the Security Service view is that control orders have been successful in preventing or limiting individuals' involvement in terrorism-related activity. Similarly, Lord Carlile argues that 'the disappearance of a small minority does not necessarily undermine the benefits of the orders in relation to the majority'.

Conclusion

In light of the concerns expressed in this report, we have reached the same conclusion as in last year's report on renewal of control orders: we seriously question renewal without a proper opportunity for a parliamentary debate on whether derogations from Articles 5(1) and 6(1) ECHR are justifiable, that is, whether the extraordinary measures in the Prevention of Terrorism Act 2005, which the Government seeks to continue in force, are strictly required by the exigencies of the situation. In our view, Parliament should therefore be given an opportunity to debate and decide that question. (Paragraph 63)

We also draw to Parliament's attention our serious concerns about the vigour with which the Government is pursuing prosecution as its preferred counter-terrorism measure, and what we now consider to be the urgency of the need to bring forward measures to facilitate prosecution. (Paragraph 64)

For the reasons outlined above, we still do not consider that non-derogating control orders are being operated in a way that amounts to a deprivation of liberty requiring derogation from the ECHR.

As with last year, it remains the Government's firm belief that the 2005 Act strikes the right balance between safeguarding society and safeguarding the rights of the individual.

The Government considers that control orders are the best available means of addressing the continuing threat posed by suspected terrorists who cannot currently be prosecuted or, in respect of foreign nationals, cannot be removed from the UK. Lord Carlile expresses a similar view in his second report:

'My conclusion from my review this year is as follows. I would prefer it if no control order system was necessary. However, in my view it remains necessary given the nature of the risk of terrorist attacks and the difficulty of dealing with a small number of cases. Control orders provide a proportional means of dealing with those cases, if administered correctly'.

Formal Minutes

Monday 14 May 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Fraser of Carmyllie	Dr Evan Harris MP
Lord Judd	
Lord Lester of Herne Hill	
The Earl of Onslow	
Lord Plant of Highfield	
Baroness Stern	

Draft Report [Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)], proposed by the Chairman, brought up and read the first and second time, and agreed to.

Resolved, That the Report be the Fourteenth Report of the Committee to each House.

A Paper was ordered to be appended to the Report.

Ordered, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

[Adjourned till Monday 21 May at 3.30pm.]

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787

Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716