The Government Response to
the Report by Lord Carlile of Berriew Q.C.

Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005

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

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HOME SECRETARY

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Lord Carlile of Berriew QC
House of Lords
London
SW1A 0PW

Dear Lord Carlile

THIRD ANNUAL REPORT ON THE OPERATION OF THE PREVENTION OF TERRORISM ACT 2005

Thank you for your report on the operation in 2007 of the Prevention of Terrorism Act 2005. I am grateful to you for providing another considered review. I welcome your overall conclusion that as a last resort control orders as currently operated remain a "justifiable and proportional safety valve for the proper protection of society".

I attach the Government's formal response to the main recommendations in your report. I look forward to debating the issues they raise further during the forthcoming passage of the Counter-Terrorism Bill through Parliament. A copy of this letter and the Government response will be placed in the House library and on the Home Office website.

Yours

Jacqui Smith

JACQUI SMITH

GOVERNMENT RESPONSE TO LORD CARLILE'S REPORT ON THE OPERATION IN 2007 OF THE PREVENTION OF TERRORISM ACT 2005

Necessity and proportionality of control order system

I remain 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 society. (Paragraph 76)

The Government welcomes your overall conclusion that the control order regime remains a necessary tool to protect the public from the risk of terrorism.

The Government's preference when dealing with suspected terrorists is prosecution. We continue to seek improvements in our ability to do this – for example:

- Introducing new offences in the Terrorism Act 2006 such as the preparation or encouragement of terrorist acts;
- Putting forward new measures such as post-charge questioning in the Counter-Terrorism Bill currently before Parliament; and
- Accepting the recommendations of the Chilcot report for the introduction of intercept as evidence.

Where prosecution is not possible, and the suspected terrorist concerned is a foreign national, we aim to deport them. We have agreed, and are continuing to negotiate, appropriate arrangements with other countries to protect deported individuals' human rights.

Notwithstanding these new developments, however, there remain a small number of suspected terrorists whom we can neither prosecute nor deport. Without some disruption of their terrorism-related activity, these individuals would be free to continue to facilitate or execute acts of terrorism. This is not a risk the Government is prepared to take. Control orders remain the best available means for managing the risk posed by these individuals.

Use of 'light touch' control orders

All forms of surveillance involve considerable human resources. (Paragraph 25)

This means that so-called 'light touch' control orders are not a realistic proposition save in exceptional circumstances... Other measures may be more appropriate – perhaps Anti-Social Behaviour Orders, or civil proceedings for an injunction against specified activities. (Paragraph 26)

We agree that so-called 'light touch' control orders can provide less assurance against engagement in terrorism-related activities and specifically against absconds. That said, there may remain circumstances when a less stringent control order is necessary and proportionate. Last year, a thorough review of all control orders then in force was undertaken in order to ensure that they were as effective as possible. In a number of cases, we strengthened the control order obligations where it was necessary and proportionate to do so. We continue to keep all current control orders under review – both to ensure that they and the obligations they impose remain necessary and proportionate, and that the control order regime more generally is as effective as possible.

However we do not agree that Anti-Social Behaviour Orders or other injunctions are a suitable tool for disrupting terrorism-related activity. These tools were not designed as counter-terrorism measures and there would consequently be a number of difficulties in using them for this purpose – for example, there is no provision for the use of closed material in court. Nor do we consider these measures appropriate; an individual who plans to kill coalition forces abroad for example should not be viewed as committing anti-social behaviour.

Availability of advice

Whenever controlees are willing to discuss their own position and concerns, appropriately knowledgeable and qualified persons should be made available to them. Wherever possible, credit should be given for co-operation. (Paragraph 30)

We agree. The Government considers as quickly as possible all requests from controlled individuals to meet specialist or qualified persons – as with all other requests for modifications of control order obligations. The Government also seeks representations from the individual on their own position and their concerns (both in terms of the impact of the order and its obligations on them and their family and in terms of the open national security case against them).

Intercept as evidence

There may be a few cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and converted into criminal evidence. Although the availability of such evidence would be rare and possibly of limited use, I restate that it should be possible for it to be used and that the law should be amended to a limited extent to achieve that. I agree with the cautious conclusions of the Committee of Privy Councillors chaired by Sir John Chilcot, contained in their report published on the 6th February 2008. Their report contains 9 tests to be passed before any such evidence will be admitted in a court. (Paragraph 38)

The Government has accepted the recommendation of the Chilcot report that intercept as evidence should be introduced in criminal proceedings where possible, provided the conditions outlined in that report can be met. However, the Chilcot report itself states: 'We have not seen any evidence that the introduction of intercept as evidence would enable prosecutions in cases currently dealt with through control orders' (Chilcot report, paragraph 59).

Satisfying the conditions outlined in the Chilcot report requires the resolution of a number of complex issues and, as the report observes, extensive work is required to do this. We are taking this forward through an Implementation Team. An Advisory Group of Privy Councillors has also been established, building on the successful example of the original Chilcot Committee. The Government is committed to taking the work forward, swiftly, carefully and thoroughly.

Mental health of individuals subject to control orders

In the past year again I have been aware of the potential psychological effects of control orders. Certainly this is a relevant consideration in relation to the obligations imposed by such an order. Those representing the controlees must (and surely have a professional and ethical duty to) ensure that any such evidence is drawn to the attention of the Home Office as early as possible. Subject to verification, such evidence should be acted upon whenever possible. There is support in case law for the proposition that, where the State takes coercive measures that could affect the physical or mental well-being of the individual, it is under a duty to monitor effectively the impact of those measures. (Paragraph 44)

As the Government noted in its response to your last report, the Government takes the impact of control orders on the individuals concerned and their families extremely seriously. We regularly seek representations from controlled individuals on the impact of the control order. Where appropriate, we also arrange for our own independent medical assessment of individuals' mental and physical health. The impact of the control order is formally considered when the control order is imposed and every quarter from then on by the Control Order Review Group. This consideration by the Control Order Review Group was recognised in the recent High Court review of modifications to Mr Abu Rideh's control order:

> *'The Home Office was aware of Mr Abu Rideh's mental condition and his mental health was taken into account when considering whether to modify the obligations. The need to monitor his mental health and keep it under review was recognised and the letter of 4 April shows a certain proactivity by the police in relation to the risks.'*

It is also clear from recent judgments that mental health concerns do not necessarily obviate the need for a control order. In the substantive review of Mr Abu Rideh's control order last year, the High Court concluded that:

'While account must be given to his mental health problems, they do not trump the national security case against him. That national security case means it is legitimate for him to be subjected to a control order with consequent restrictions.'

Use of control orders for more than two years

It is now my view that it is only in rare cases that control orders can be justified for more than two years. After that time, at least the immediate utility of even a dedicated terrorist will seriously have been disrupted. (Paragraph 50)

I advise that there should be a recognised and possibly statutory presumption against a control order being extended beyond two years, save in genuinely exceptional circumstances. However, if a former controlee brings him/herself within the legislation thereafter, I do not suggest that they could not be made the subject of a fresh control order, on the basis of new material and a change in the circumstances. (Paragraph 51)

The Government accepts that control orders should be imposed for as short a time as possible, commensurate with the risk posed. To ensure this, each control order is subject to rigorous external judicial scrutiny. Each order is also subject to regular and rigorous internal review, including formally each quarter by the Control Order Review Group. Consideration of exit strategies from the control order is an integral and significant part of these quarterly reviews.

Exit strategies have been implemented for a number of individuals subject to control orders:

- 9 have been served with notices of intention to deport (6 of whom have been deported);
- 3 have had their orders revoked; and
- 2 orders have not been renewed.

However, the Government does not agree that there should be an arbitrary end date for individual control orders. We need to be careful about assuming individuals no longer pose a threat after a defined period of time. Each order is addressing individual risk and if the Government considers it necessary and proportionate to extend a control order beyond two years in order to protect the public from a risk of terrorism it is the Government's responsibility to do so. The statutory tests in the Prevention of Terrorism Act already ensure that the Government can only lawfully renew a control order if it is necessary to do so. In addition, a definite end date to every control order would mean the individuals subject to them could simply disengage from involvement in terrorism-related activity on the basis that they know they could re-engage at the end of that time period.

Operation of the special advocates procedure

I have received no complaints from controlees or those representing them to the effect that court procedures are not working satisfactorily. (Paragraph 55)

Again this year I have received no complaints about the special advocate procedure in control order cases. The special advocates are skilled and conscientious, and certainly useful. They have had an effect in the outcome of cases. (Paragraph 56)

There has been concern expressed about the apparent circularity of the read down. There can be no doubt that the lack of certainty in the language used will ensure the most careful consideration of each case by the Home Secretary. (Paragraph 61)

One is left with the clear conclusion that control orders will never be regarded by the courts as acceptable routine, as opposed to an exceptional jurisdiction; and that challenges will not be regarded as an acceptable means of opening the door to wide disclosure if national security is to be affected. The decided cases strengthen the role of the special advocates. (Paragraph 64)

We agree that the oversight of control orders by the court demonstrates the robust safeguards in place to protect the rights of individuals subject to control orders.

The House of Lords' judgment on *MB* in October 2007 'read down' the control order legislation in order to ensure that the procedure adopted under it would be compatible with Article 6 of the European Convention on Human Rights in every case. The Lords concluded that the High Court should consider the compatibility of each control order with the individual's Article 6 rights on a case by case basis. Where the judge concludes that there is material that it is necessary to disclose in order for the controlled individual to have a sufficient measure of procedural protection, the Secretary of State will be put to her election. In other words, the Secretary of State is given a choice whether to disclose the information, or withdraw it from the case. If the latter, the case then proceeds without that material included. Either way, the case continues in a manner compliant with Article 6. This consideration forms part of the mandatory review of each control order by the High Court – one of the many safeguards in place to secure each individual's human rights.

Therefore, as a result of the House of Lords' judgment in the case of *MB*, no control order will be upheld through a process whereby the individual's Article 6 rights have not been protected. Control orders legislation, including the special advocate system, as supplemented by this judgment, is therefore fully compliant with Article 6 of the European Convention on Human Rights.

A number of current judicial challenges before the High Court and Court of Appeal will help to clarify the practical impact of the House of Lords' judgment.

It is worth emphasising that even before the Lords' judgment, there was, and remains, a duty of full and frank disclosure of material (in closed, if necessary) in control order proceedings. This is a continuous obligation throughout the hearings. The Government is under an obligation to present a fair and balanced picture from the outset, by producing relevant material whether it advances the Government's case or not. There is judicial scrutiny of this process.

Consultation on the prospects of prosecution

I have seen letters from chief officers of police in relation to each controlee certifying that there was no realistic prospect of prosecution. Last year I urged that there should be more detail in those letters – for example, and if necessary in a closed version, an explanation of the sensitivity of material that could not be placed before a court of trial. The decision whether to prosecute should be taken following detailed and documented consultation in every case between the CPS, the police, the Security Service and the Home Office, on the basis of full consideration of the evidence and intelligence. Given the small number of cases, this cannot be an excessive request. As independent reviewer, I would hope to be shown the minuted results of that process in every case, as a matter of routine. (Paragraph 73)

The quality of the letters concerning possible prosecution has improved, in the sense that some reasoning is now given. However, I should like to see further detail given to the Home Secretary in every case as to why additional investigation, or different forms of evidence gathering, might not enable a criminal investigation. (Paragraph 74)

The procedures relating to consideration of the prospects of prosecution were reviewed following a similar recommendation in your report last year. New procedures have been put in place with the police including more detail in the letters than previously. We do not consider it appropriate for any further detail to be included in the letters.

Ongoing review of the possibility of prosecution

As last year, I believe that continuing investigation into the activities of some of the current controlees could provide evidence for criminal prosecution and conviction. I encourage such investigation to continue. Information about international contacts, financial support for insurgents in Iraq, and the use of guarded language to refer to potential terrorism targets might be progressed to evidence of significant terrorism crime. (Paragraph 74)

As stated in the Government's formal response to your last report, a decision on whether to prosecute a particular individual is an operational matter for the police and the Crown Prosecution Service. The making of a control order does not preclude further investigation of the prospects for prosecution. Indeed, the police are under a duty to keep the possibility of prosecuting individuals subject to control orders under review. The possibility of prosecution is considered on an ongoing basis and formally captured quarterly through the Control Order Review Group. As with the initial consideration of the possibility of prosecution, new procedures are in place. The police review any new material brought to their attention and, where it is necessary to do so, update the existing police file and consult the Crown Prosecution Service on the prospects of prosecution for a terrorism-related offence. The Crown Prosecution Service examines every case as part of the procedures pertaining to the imposition of a control order and has been asked to reconsider some cases where a review is being carried out. In those cases, prosecution has not resulted because the case has not passed the prosecution tests in the Code for Crown Prosecutors. Clearly, it is not appropriate for the Government to comment on any individual cases.

High Court's ability to take into account new evidence, errors of fact or a change of circumstances for an individual subject to a control order

Last year I expressed the view that a controlee should be able to say to the court that the facts upon which the order was based can be shown to be seriously erroneous, or that subsequent events have caused a substantial change to the situation. For example, a very young person may be able to show, truly, the abandonment of an earlier expressed commitment to violent jihad. It seems to me a matter of common sense that the court should be able to take into account such a change of circumstances. The government should ensure that there is sufficient clarity in the legislation and recent judicial decisions to secure this end. (Paragraph 82)

Judicial Review, as an examination of its developing history shows, is a robust jurisdiction where it applies... It is clear to me that it was intended by Parliament that the judicial review of control orders should encompass the correction of any serious mistakes, even factual, that could be established by evidence. I am strongly of the view that the High Court should be able to take into account any new evidence or error of fact of sufficient importance potentially to affect the appropriateness of a control order. (Paragraph 83)

As the Government noted in our formal response to your report last year, the High Court can already do this. The Court of Appeal judgment on *MB* of 1 August 2006 requires the court to consider the circumstances at the time of the hearing rather than at the time of the creation of the control order.

Last year's High Court, Court of Appeal and Law Lords' judgments in relation to *E* provide examples of new material being taken into account in determining whether a control order remains necessary. Similarly, the recent judgment in the case of *Bullivant*, in which his control order was quashed, demonstrates that judges can and do consider circumstances at the time of the court hearing. The judgment stated that, 'even if the grounds were reasonable on the material when the order was made, they may be shown not to have been reasonable by subsequent material.' The judge went on to say that he was 'satisfied the decision to make a control order was justified on the material available at the time,' but that he was 'equally satisfied that reasonable grounds for suspicion do not now exist'.

Controlled individuals can also ask for modifications to their control order if there has been a change in circumstances – and appeal if the Government refuses those modifications.

No amendment to the Prevention of Terrorism Act on this point is therefore necessary.

Proposed amendments to counter-terrorism legislation

There are amendments to the Act proposed in the Counter-Terrorism Bill 2008 currently before Parliament. (Paragraph 85)

Clause 71 **clarifies in a necessary and proportional way the powers of entry and search available without warrant where it is reasonably suspected by the police that a controlee has absconded; and where the search is to ensure that the controlee is where directed by a control order. Power of entry is also given, with a warrant, to secure compliance with the other requirements of an order. (Paragraph 86)**

Clause 72 **of the Bill proposes amendment of** ***section 1(9)*** **to clarify the meaning of involvement in terrorism-related activity. (Paragraph 87)**

Clause 73 **amends notice periods in a minor way, and** ***Clause 74*** **the anonymity provisions. (Paragraph 88)**

Clauses 10-13 **provide equivalent powers relating to the retention, storage and use of fingerprints and DNA of controlees as currently apply when arrests are made under the Police and Criminal Evidence Act 1984. This will mean that the procedures and safeguards that generally apply, also apply in control order cases. Reporting at the time the Bill was announced that the police cannot currently take fingerprints or DNA from individuals on control orders is inaccurate. (Paragraph 89)**

The Government welcomes your comments on the elements of the Counter-Terrorism Bill relating to control orders.

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