



Statewatch Analysis

UK: Review of counter-terrorism powers fails to deliver definitive change

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The recommendations of the counter-terrorism and security powers review undermine the coalition government's commitment to restore "hard-won British liberties."

On 26 January 2011, Home Secretary Theresa May announced the findings of the government's six-month review of "key counter-terrorism and security powers." Control orders and section 44 stop and search powers have effectively been watered down and renamed. The maximum period of pre-charge detention for terrorism suspects has been lowered to 14 days, but new legislation will be introduced to ensure that it can be restored to 28 days under "exceptional-circumstances." The use of the *Regulation of Investigatory Powers Act 2000* (RIPA) by local authorities has been curbed, but the astronomical scale on which police currently access retained communications data under the Act has not been addressed at all. *The Protection of Freedoms Bill* was put before the House of Commons on 11 February and will provide the legislative basis for some of the review's recommendations.[1]

Since its inception, the coalition has frequently spoken in grand terms about the need to roll back state intrusion and restore civil liberties. Recently, on 7 January 2011, Nick Clegg condemned the Labour Party for having "presided over the most aggressive period of state interference in this country in a generation" and pledged to restore "British liberties with the same systematic ruthlessness with which Labour took them away." [2] The counter-terrorism review is the first real test of this rhetoric and has been keenly anticipated as a means of gauging its worth.

The verdict: the review has diluted some draconian Labour policies by lessening the severity of restrictions imposed on terrorism suspects but fundamentally the infrastructure remains the same. This is far from bold reform. The review is distinctly modest in scope: it amends and rebrands, rather than repeals. There has not been a sea-change in approach; instead the coalition government has displayed unerring pragmatism in balancing the demands of its constituent political parties and the security services - allowing all to claim a victory of sorts.

Control Orders

Theresa May told parliament that control orders would be “repealed” and replaced with Terrorism Prevention and Investigation Measures (TPIMs). [3] The new system will be less restrictive and intrusive, and is complemented by the government’s commitment to furnish the police and security services with “significantly increased resources for surveillance and other investigative tools” with which to monitor terrorism suspects. [4] TPIMs have been left out of the *Protection of Freedoms Bill*: Theresa May indicated that they will be introduced by separate legislation in March 2011. In the meantime, the government has sought parliamentary approval for the renewal of control orders until December 2011.

The key features of TPIMs, as set out in the review, are:

- A TPIM can be imposed if the Home Secretary “has reasonable grounds to believe that the individual is or has been involved in terrorism-related activity.” This is a higher threshold than the current test for control orders of “reasonable suspicion.”
- Prior permission must be sought from the High Court before a TPIM can be imposed, except in urgent cases. Once introduced, the High Court will then conduct a mandatory review of every TPIM with the power to quash or revoke the measure.
- A TPIM can be issued for a maximum period of two years and will only be renewed “if there is new evidence that they have re-engaged in terrorism-related activities.”
- Current 16 hour curfews will be replaced by a shorter “overnight residence requirement” - typically lasting between eight and ten hours - that will be enforced by electronic tagging. The government has said that TPIMs will be more flexible and better accommodate suspects’ work commitments.
- TPIMs will permit greater freedom of communication and association than control orders. Suspects will be granted limited use of the internet provided they disclose all of their passwords.
- Exclusion from specific locations and the prevention of overseas travel will be “tightly defined.”
- Relocation orders, which forced control orders recipients to leave the community in which they live, will be scrapped. Lord MacDonald, who provided independent oversight of the review, described relocation orders in his report as “a form of internal exile, which is utterly inimical to traditional British norms.” [5]
- Breach of the conditions, without reasonable excuse, will be a criminal offence punishable by up to five years imprisonment (the same as for control orders).
- The government will have the power to introduce additional restrictive measures on suspects under “exceptional circumstances.” This would include “curfews and further restrictions on communications, association and movement.” Pauline Neville Jones, Minister of State for Security and Counter Terrorism, told the Joint Committee on Human Rights that legislation establishing these emergency powers will not be subject to parliamentary debate. [6]
- Unlike control orders, the system of TPIMs will not need to be reviewed and renewed each year by parliament.

Speaking to BBC News, Nick Clegg extolled the virtues of the new system:

"It has changed in fundamental design. Firstly they cannot be kept in place, these measures, permanently, they are time limited. Secondly they are subject to complete oversight by a judge. Thirdly, house arrests, either by very, very draconian curfews or by simply relocating people to other parts of the country, go.

[Individuals] will be able to work, they will be able to study, they will be able to use mobile phones, they will be able to use the internet in a way that they weren't under the old system, whilst at all times ensuring that, of course, they can also not do anything that could do harm to the British people ...

I think people in the party will be very supportive of this package...We have always said in opposition that we need to rebalance this very important relationship between liberty and security, that is what we've done we have to show the British people we'll keep them safe." [7]

In reality the new system is seen as little more than a watered-down version of control orders - critics have been quick to label it "control orders lite." Further, the Liberal Democrat's 2010 general election manifesto did far more than call for a rebalancing of the relationship "between liberty and security." It pledged specifically to:

"Scrap control orders, which can use secret evidence to place people under house arrest."

And to:

"Make it easier to prosecute and convict terrorists by allowing intercept evidence in court and by making greater use of postcharge questioning." [8]

Neither commitment has been enacted. Control orders have been abolished in name alone: amended, not replaced. Crucially, the TPIM will retain its predecessor's most objectionable characteristic of operating outside the criminal justice system and bypassing judicial process. Under the new system individuals will continue to be punished without charge or trial on the basis of secret evidence heard in closed courts that they are not permitted to hear or contest. TPIMs will infringe suspects' civil liberties less severely than control orders currently do, but the new system will continue to undermine the presumption of innocence and remains an inadequate substitute to a fair trial.

This process stems from the fact that Britain is the only country in the common law world to ban the use of intercept evidence in court, making it incredibly difficult to prosecute individuals suspected of terrorism offences. Theresa May told Parliament that she intends to publish a written statement regarding the steps that are being taken towards allowing the use of intercept evidence in court. However, the UK's security services are intransigent in their belief that the practice would pose an unacceptable risk to national security by revealing some of their operational practices. Given the level of deference May has been accused of showing the security services over control orders and the difficulty previous governments have had in amending the practice, there is little cause for optimism. [9] Indeed, although Theresa May claims that the government is intent on finding a way to prosecute terrorism suspects, the fact that TPIMs will not be reviewed each year - as control orders were - indicates that these powers are no longer seen as exceptional but are here to stay.

The government's attempt to extend the use of control orders until December 2011 has also been criticised. The Joint Committee on Human Rights argues that the continued imposition of sanctions - such as relocation orders and lengthy curfews - can no longer be justified, and that the government should review urgently all existing control orders to ensure that they are compatible with the principal findings of its review:

"Otherwise, we are concerned that control orders will continue for another nine months to be used, unnecessarily, to "park" or "warehouse" individuals beyond the reach of the criminal justice system, and in a way which positively obstructs any realistic possibility of prosecution..."[10]

Section 44 stop and search powers

Like control orders section 44 stop and search powers are to be redesigned and reintroduced with a new name and a more tightly defined legal basis.

Section 44 of the *Terrorism Act 2000* allowed police to search individuals indiscriminately without reasonable suspicion in pre-defined 'authorisation zones.' These zones were supposed to be limited to specific locations deemed sensitive to national security (such as an airport or a major tourist attraction) for specific periods of time. Instead police created 'authorisation zones' that covered vast geographical areas and renewed them on a rolling monthly basis. For example, the Metropolitan police 'authorisation zone' covered the whole of Greater London. This allowed police to use section 44 outside its remit of combating terrorism on a vast scale. On 4 July 2010, a Human Rights Watch report showed that none of the approximately 450,000 people subjected to section 44 stop and searches between April 2007 and April 2009 had been successfully prosecuted for a terrorism related offence. [11]

In January 2010, the European Court of Human Rights (ECtHR) found section 44 to breach Article 8 of the European Convention on Human Rights which provides the right to respect for private life. [12] The judgment also objected to the whole process by which section 44 powers were authorised: parliament and the courts were not providing sufficient checks and balances against misuse and police officers were afforded too much discretion when deciding whether to stop and search someone. The Labour government appealed against the ruling, but on 30 June 2010 the Court made its decision final.

On 8 July 2010, Theresa May responded by suspending the use of section 44 against members of the public (it could still be used against vehicles). Police were forced to rely on section 43 of the *Terrorism Act 2000* under which they can search individuals anywhere in the country but only if they can demonstrate reasonable suspicion. Perhaps inevitably, within six months the police were calling for section 44 powers to be made available to them again. Senior officers are reported to have told the government that they believe the power to search individuals without reasonable suspicion to be essential to the effective policing of large public events, like the Olympics, and political summits, such as the G20. [13]

The government's review of counter-terrorism and security powers supports this stance. It concludes "...that the absence of any form of 'no suspicion' terrorism stop and search power would lead to an increase in the levels of risk." However, so as not to "fall foul of the ECtHR judgment" the creation of 'authorisation zones' will now require reasonable suspicion that an act of terrorism will take place:

“The review recommends significant changes to bring the power into compliance with ECHR [European Convention on Human Rights] rights:

i. The test for authorisation should be where a senior police officer reasonably suspects that an act of terrorism will take place. An authorisation should only be made where the powers are considered “necessary”, (rather than the current requirement of merely “expedient”) to prevent such an act.

ii. The maximum period of an authorisation should be reduced from the current maximum of 28 days to 14 days.

iii. It should be made clear in primary legislation that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat. The duration of the authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent a suspected act of terrorism.

iv. The purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism.

v. The Secretary of State should be able to narrow the geographical extent of the authorisation (as well being able to shorten the period or to cancel or refuse to confirm it as at present).

vi. Robust statutory guidance on the use of the powers should be developed to circumscribe further the discretion available to the police and to provide further safeguards on the use of the power.” [14]

The *Protection of Freedoms Bill* implements these recommendations. Clause 48 of the Bill provides for the repeal of section 44, while clause 60 creates replacement stop and search powers under section 43B of the *Terrorism Act 2000*, as outlined in the security review.

The government is attempting to tread a fine line between retaining section 44 powers and abiding by the ECtHR’s judgement. Certainly this new scheme is not what critics of section 44 had hoped for in July 2010 when the Home Secretary announced that it would be scrapped. Though it can legitimately be argued that under exceptional circumstances the use of stop and search without reasonable suspicion is justified and it is encouraging that the legal basis of section 43B will be more tightly defined, the new system is not fundamentally different from that which it will replace and could be similarly susceptible to misuse.

It is worth emphasising that it was never intended for section 44 to be used as broadly as it has been. It was seized upon by the police as a convenient ‘catch-all’ power that quickly became entrenched within common police practice. There is legitimate reason for concern that new powers of stop and search may suffer a similar fate. Encouragingly, section 61 of the *Protection of Freedoms Bill* establishes a code of practice for their use, but there is no guarantee that it will be effective. Between 2008 and 2010, the National Policing Improvement Agency, the Home Office and even the Prime Minister’s Office all published guidance for the police in an attempt to rectify the routine misuse of section 44 with negligible impact. [15]

Police chiefs will still be able to request the creation of authorisation zones for 14 days - down from 28 days - covering “a geographical area as wide as necessary.” Whether they will follow the new rules and seek to do so only if they have “reasonable suspicion” that an act of terrorism will be committed - and perhaps more importantly whether the Home Secretary will refuse to grant the request if they do not - remains to be seen. JUSTICE

argues that, although an improvement, section 43B's legal safeguards "are not in themselves enough to ensure its compatibility with article 8 ECHR" and called for 'authorisations' made under the new system to require the approval of a crown court judge. [16]

Pre-trial detention of terrorism suspects

The Terrorism Act 2000 introduced a seven day maximum pre-charge detention period for terrorist suspects. This was subsequently raised to 14 days by section 306 of the *Criminal Justice Act 2003*, and raised again to 28 days by section 25 of the *Terrorism Act 2006*. Parliament is required to renew this 28 day limit periodically through an affirmative order that can last up to 12 months. The coalition government successfully proposed a six month extension on 25 July 2010 pending the outcome of the counter-terrorism and security powers review. On 24 January 2011, this order was allowed to lapse and the maximum period of pre-charge detention reverted automatically to 14 days. On 26 January 2011, Theresa May confirmed that this reduction would be made permanent through primary legislation. Accordingly, clause 57 of the *Protection of Freedoms Bill* will amend Schedule 8 of the *Terrorism Act 2000*, and scrap section 25 of the *Terrorism Act 2006*.

This is a welcome move, but as with the abolition of control orders and section 44 stop and search powers, the devil is in the detail. The UK's 14 day limit remains the longest anywhere in the western world, and "emergency legislation" will allow the government to revert to the 28 day limit under "exceptional circumstances." This power will be established by the *Detention of Terrorist Suspects (Temporary extension) Bill*, [17] which was published on 11 February, the same day as the *Protection of Freedoms Bill*. As with control orders and section 44, the coalition government appears unwilling or unable to abandon Labour's counter-terrorism legislation completely.

The Regulation of Investigatory Powers Act 2000 (RIPA)

The government's review of security and counter-terrorism powers also covered "the use of the *Regulation of Investigatory Powers Act 2000* (RIPA) by local authorities, and access to communications data more generally." RIPA provides a regulatory framework for the use of covert investigatory techniques. These powers are currently afforded to nearly 800 public bodies, up from nine public bodies in 2000. RIPA gives local authorities the power to use three types of covert technique:

- "a) Some forms of communications data (CD) such as telephone billing information but not the most intrusive forms of CD, which can be used to identify the location of communications devices;*
- b) Directed surveillance (covert surveillance on individuals in public places); and*
- c) Covert human intelligence sources that is, someone who establishes a relationship for covert purposes (CHISs)."*[18]

In recent years, local authorities have used these powers to monitor overtly non-criminal behaviour such as littering, breaches of planning regulations, dog fouling, and violations of the smoking ban. In May 2010, Big Brother Watch revealed that councils had conducted 8,575 RIPA operations in the previous two years at an average of 11 a day. [19] The reason for this inflated figure is that these powers are currently "self-authorising" which means that a council official can access communications data or authorise a surveillance operation without needing to obtain the approval of an outside authority such as a

magistrate or the police. In its *Programme for Government*, the coalition pledged to put this right:

"We will ban the use of powers in the Regulation of Investigatory Powers Act (RIPA) by councils, unless they are signed off by a magistrate and required for stopping serious crime." [21]

Accordingly, the review of counter-terrorism and security powers recommended:

"i. Magistrate's approval should be required for local authority use of all three techniques and should be in addition to the authorisation needed now from a local authority senior manager (at least Director level) and the more general oversight by elected councillors.

ii. Use of RIPA to authorise directed surveillance only should be confined to cases where the offence under investigation carries a maximum custodial sentence of 6 months or more. But because of the importance of directed surveillance in corroborating investigations into underage sales of alcohol and tobacco, the Government should not seek to apply the threshold in these cases. The threshold should not be applied to the two other techniques (CD and CHIS) because of their more limited use and importance in specific types of investigation which do not attract a custodial sentence." [21]

Clauses 37 and 38 of the *Protection of Freedoms Bill* will put these changes into effect.

Greater regulation of the use of RIPA by local authorities was needed, but overall the Bill's scope is very limited. Local authorities are responsible for a tiny percentage of total RIPA use and yet are the only public body to have their powers curbed by the Bill. Other public bodies, such as the police, will be unaffected despite utilising RIPA on a far greater scale and with similarly inadequate safeguards against misuse. *Hawktalk blog* analysed statistics published in the 2010 Annual Reports of the Surveillance Commissioner and the Interception of Communications Commissioner, and concluded that 99.95% of RIPA activity will not be influenced by the Bill's provisions: "quite simply, there is no significant change to privacy protection." [22]

Further, the review's commitment to evaluate "access to communications data more generally" has not been adequately met. Access to communications data by the police will continue to require only an authorisation from a senior officer without judicial scrutiny. Between 2005 and 2009 this allowed police to use RIPA to view communications records a staggering 1.7 million times (1,164 times per day) in what inevitably included speculative 'fishing', data-mining and subject-based profiling exercises. [23] This figure will rise if the coalition follows through with its plan to revive Labour's Interception Modernisation Programme because it would vastly increase the amount of data Communications Service Providers are obliged to retain. [24] Clearly, the police's use of RIPA needs to be subject to greater external regulation.

Footnotes

1. Protection of Freedoms Bill:

<http://www.statewatch.org/news/2011/feb/uk-protection-of-freedom-bill.pdf>

2. Liberal Democrats website, 7.1.11:

http://www.libdems.org.uk/latest_news_detail.aspx?title=Nick_Clegg:_Restoring_British_liberties&pPK=7781a555-f93b-4818-b08f-f6382841dc89

3. Home Office website, 26.1.11:

<http://www.homeoffice.gov.uk/publications/parliamentary-business/oral-statements/ct-review/>

4. Speech by Pauline Neville-Jones, Minister of State for Security and Counter Terrorism:
<http://www.cjp.org.uk/news/crime-control/crime-prevention/the-governments-expectations-what-should-contest-deliver-28-02-2011/>

5. Review of counter-terrorism and security powers - A report by Lord Macdonald of River Glaven QC, p.12:

<http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>

6. Joint Committee on Human Rights report on Renewal of Control Order Legislation 2011:
<http://www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/106/10604.htm#a9>

7. The Guardian, 26.1.11:

<http://www.guardian.co.uk/politics/2011/jan/26/politics-blog-pmq-s-live>

8. Liberal Democrat Manifesto 2010:

http://www.libdems.org.uk/our_manifesto.aspx

9. The Guardian, 31.10.10:

<http://www.guardian.co.uk/commentisfree/2010/oct/31/andrew-rawnsley-coalition-terrorism-laws>; BBC website, 10.12.09: <http://news.bbc.co.uk/1/hi/uk/8405109.stm>

10. Joint Committee on Human Rights report on Renewal of Control Order Legislation 2011:

<http://www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/106/10604.htm#a10>

11. Human Rights Watch, 4.7.10:

<http://www.hrw.org/en/news/2010/07/02/uk-terrorism-search-power-violates-rights>

12. Case of Gillan and Quinton v. The United Kingdom (Application no. 4158/05), 12.1.10:
<http://www.statewatch.org/news/2010/jan/echr-judgment-gillan-quinton.pdf>

13. The Guardian, 29.12.10:

<http://www.guardian.co.uk/uk/2010/dec/29/police-stop-and-search-powers>

14. Review of counter-terrorism and security powers - review findings and recommendations, p.18: <http://www.statewatch.org/news/2011/jan/uk-gov-response-finding-review-findings-and-reccom.pdf>

15. Amateur Photographer website, 5.12.09:

http://www.amateurphotographer.co.uk/news/Photographers_campaign_forces_police_U_turn_AP_comment_news_292612.html

16. *JUSTICE briefing on the Protection of Freedoms Bill, March 2011:*
<http://www.justice.org.uk/images/pdfs/JUSTICE%20briefing%20on%20Freedoms%20Bill%20Commons%202R.pdf>

17. *Draft Detention of Terrorist Suspects (Temporary Extension) Bills:*
<http://www.homeoffice.gov.uk/publications/counter-terrorism/draft-detention-terrorist-bills?view=Binary>

18. *Review of counter-terrorism and security powers - review findings and recommendations, p.25:* <http://www.statewatch.org/news/2011/jan/uk-gov-response-finding-review-findings-and-reccom.pdf>

19. *Big Brother Watch website, 23.5.10:*
<http://www.bigbrotherwatch.org.uk/home/2010/05/the-grim-ripa-local-councils-authorising-11-covert-surveillance-operations-a-day.html>

20. *The Coalition: our programme for government, p. 12:*
http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

21. *Review of counter-terrorism and security powers - review findings and recommendations, p.27:* <http://www.statewatch.org/news/2011/jan/uk-gov-response-finding-review-findings-and-reccom.pdf>

22. *Hawktalk blog, 7.3.11:*
<http://amberhawk.typepad.com/amberhawk/2011/03/ripa-changes-in-freedoms-bill-negligible-improvement-in-privacy-protection.html>

23. *So far four sets of figures have been put on record: 1 January 2005 - 31 March 2006: 439,054; 1 April - 31 December 2006: 253,557; 2007: 519,260; 2008: 504,073:*
<http://www.statewatch.org/uk-tel-tap-reports.htm>

24. *See Part II, No. 11 of Statewatch analysis: Six months on: An update on the UK coalition government's commitment to civil liberties:*
<http://www.statewatch.org/analyses/no-118-uk-civil-liberties-six-months-on.pdf>

This analysis first appeared in *Statewatch Journal* vol 21 no 1

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