



THE GOVERNMENT RESPONSE TO
THE EIGHTH REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2010-11 HL PAPER 106, HC 838

Renewal of Control Orders Legislation 2011

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

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06 JUN 2011

Dear Dr Hywel

REPORT ON THE RENEWAL OF THE CONTROL ORDERS LEGISLATION

Thank you for the Joint Committee on Human Rights' report on the 2011 renewal of the control orders legislation.

I attach the Government's formal response to the recommendations in your report. Copies of the Government response will be available in the Vote Office and a copy will also be placed on the Home Office website.

The Rt. Hon. Theresa May, MP

GOVERNMENT REPLY TO THE REPORT BY THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE ANNUAL RENEWAL OF CONTROL ORDERS LEGISLATION 2011

Parliamentary scrutiny

We welcome the publication of the annual report on control orders by the statutory reviewer of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew, at the same time as the draft Order and Explanatory Memorandum. We are disappointed, however, that the EM merely asserts that the Director-General of the Security Service (Jonathan Evans), one of the other statutory consultees, is “content” with the proposal to renew the Act. It does not provide even a summary of his views in response to the Secretary of State’s consultation. Such a summary would have helped parliamentary scrutiny of the justification for the renewal. (Paragraph 9)

As the Committee notes, confirmation that all the statutory consultees, including the Director General of the Security Service, were content with the proposal to renew the powers in the Prevention of Terrorism Act 2005 (2005 Act) was included in the Explanatory Memorandum that accompanied the laying of the draft renewal Order. The report by the independent reviewer of terrorism legislation, Lord Carlile of Berriew Q.C., on the operation of the 2005 Act – which acts as his formal response to the statutory consultation – was published on 3 February 2011. However, it would not be appropriate to provide further details on the responses of the other statutory consultees where these are classified.

We are particularly disappointed in view of the fact that the Government’s summary of responses to its consultation on Counter-Terrorism and Security Powers does not include even a summary of the views of the Crown Prosecution Service, the police, the security and intelligence agencies, or other Government Departments. When we raised this with the Minister she offered to see if the Government could produce some kind of summary of those responses. To date we have not received one. We recommend that the Government publish a summary of the views of the Crown Prosecution Service, the police, the security and intelligence agencies, or other Government Departments on the Counter-Terrorism Review, in order to facilitate its parliamentary scrutiny, and also publish a summary of the views of the Crown Prosecution Service and the Director-General of the Security Service about the renewal of the control order regime pending the introduction of the replacement TPIMs regime. (Paragraph 10)

Further to the evidence Baroness Neville-Jones provided to the Committee on 8 February 2011, she wrote to the JCHR on 28 March 2011 providing a summary of the views of the Crown Prosecution Service, police, and Security and Intelligence Agencies on the outcome of the Review of Counter-Terrorism and Security Powers. It did not provide individual Departments’ views as the outcome of the Review reflected the collective agreement of Departments.

Extent of restrictions on individuals

We recommend that the Secretary of State carry out an immediate and urgent review of the eight existing control orders in the light of the conclusions of the Counter-Terrorism Review. Where the Government has already concluded that certain requirements cannot be justified because they are too intrusive (including, for example, relocation requirements, lengthy curfews, bans on communications, and other restrictions that prevent individuals leading a normal daily life), those obligations should be removed or reduced so as to be not greater than will be permissible under the proposed TPIMs regime. There is nothing in the current legal framework to prevent this from happening immediately. In our view there is no need to wait for the new legislation to be passed before taking this important step towards implementing the important conclusions of the Government's Review concerning control orders. (Paragraph 18)

We also recommend that no new control orders should be made containing obligations which are more extensive than those proposed to be available under the new regime of TPIMs. (Paragraph 19)

While the control orders system remains in operation, the necessity of each control order and its constituent obligations continues to be subject to ongoing review – and the outcome of that review is formally captured on a quarterly basis. Where it is concluded that an order or a constituent obligation is no longer necessary and proportionate in a particular case, that order or obligation will be removed.

The Government's view is that the public can be protected with a less intrusive and more targeted regime of terrorism prevention and investigation measures (TPIM), complemented by additional resources for covert investigative techniques. However, although we have decided – as a matter of policy – to end the use of certain restrictions with the introduction of the TPIM system, those restrictions remain proportionate and compatible with the European Convention on Human Rights (ECHR).

Moreover, the additional investigative capability will take time to put in place. We will introduce the new system in a planned and orderly way, consistent with protecting the public. Until the new system of TPIMs is implemented – together, importantly, with the increase in investigative resource – all the obligations that can be imposed under the current control orders system remain available for use where necessary and proportionate to do so. It would not be responsible suddenly to lift or reduce restrictions on individuals currently subject to a control order, where those restrictions are necessary in order to protect the public.

Duration

In view of the clear conclusion of the Government's Counter-Terrorism Review, that measures should only last for more than two years if, during that time, new evidence comes to light of their involvement in terrorism-related activity, the Government should explain to Parliament during the renewal debate in each House:

- 1) Why it is considered justifiable to maintain control orders on individuals for more than two years in the absence of any new**

evidence of their involvement in terrorism-related activity during that time;

2) Whether it is intended to impose TPIMs on individuals who have already been subject to control orders for more than two years in the absence of any new evidence of their involvement in terrorism-related activities and, if so, how that is consistent with the conclusion of the Review about the maximum time limit on such measures. (Paragraph 21)

As noted above, while the control orders system remains in operation, the necessity of each control order and its constituent obligations continues to be subject to ongoing review – and the outcome of that review is formally captured on a quarterly basis. Where it is concluded that an order or a constituent obligation is no longer necessary and proportionate in a particular case, that order or obligation will be removed.

The Government has taken a decision – as a matter of policy – to set a maximum time limit of two years for the imposition of a TPIM notice, after which it will be possible to impose further such measures only where there is evidence of involvement in terrorism-related activity taking place after service of that TPIM notice.

Until the new system is introduced – including the increase in investigative resource – it continues to be lawful to maintain control orders for more than two years where this is necessary and proportionate to protect the public.

The TPIM Bill allows the Home Secretary to impose a TPIM notice on a person who has previously been subject to a control order. When the time comes, the Home Secretary will need to consider – on a case by case basis – whether the statutory test for imposition of measures under the replacement regime is met in relation to any individual subject to a control order at that time.

The priority of prosecution

We recommend that the Director of Public Prosecutions be asked to consider whether a criminal investigation is justified in relation to each of the eight individuals currently under a control order and whether, in each case, everything possible is being done to investigate and gather evidence with a view to such prosecution. (Paragraph 23)

The Government does not consider that this is necessary. In each case where a control order is in force, the prospects of prosecuting that individual are kept under review by the police, consulting the prosecuting authorities as necessary, in accordance with their statutory duty under section 8 of the Prevention of Terrorism Act 2005. Where a prosecution does not result, this is because the case has not passed the relevant tests in the Code for Crown Prosecutors – whether the evidential threshold is met and whether a prosecution is in the public interest.

The TPIM Bill will place the police under a new statutory duty to keep the Home Secretary informed of the outcome of the police's consideration of the ongoing prospects of prosecution.

Procedural fairness

We recommend that the Minister meet representatives of the special advocates at the earliest opportunity to discuss their continuing concerns about the fairness of the special advocate system as it currently operates. (Paragraph 25)

The new Minister for Crime and Security, James Brokenshire, would be happy to meet representatives of the special advocates as part of the work surrounding the Green Paper on the use of sensitive material in judicial proceedings that was announced by the Prime Minister on 6 July 2010 and that will be published later this year. The Green Paper will aim to develop a framework for ensuring full judicial and non-judicial scrutiny of intelligence and wider national security activities in line with the Government's commitment to individual rights, the rule of law and to properly protecting national security. This work will include careful consideration of all the relevant views and concerns about the operation of the special advocate system, including those of the special advocates.

Annual review by Parliament

We recommend that the replacement regime, when it is brought forward, should provide for annual review to ensure that Parliament has the same opportunity to scrutinise and debate the way in which that successor regime is working in practice. (Paragraph 28)

The Government does not consider that it is necessary for the TPIM Bill to be subject to annual renewal. The threat from international terrorism is as serious as we have faced at any time, and will not diminish at any point soon. The Review of Counter-Terrorism and Security Powers concluded that for the foreseeable future there is likely to be a need for measures to protect the public from the risk posed by the small number of people who pose a real threat to our security but who cannot be prosecuted or, in the case of foreign nationals, deported. Should this situation change, we will of course review the continuing need for the legislation, with a view to ensuring that the powers available match the nature and scale of the threat.

The package of measures we are putting in place is the result of a lengthy and considered Review, and will be subject to full Parliamentary scrutiny during its passage. The Government believes that it makes significant improvements to the control orders system, and is a good framework that ought to be able to operate on an ongoing, stable basis.

The TPIM Bill makes provision for annual review of its operation by the independent reviewer of terrorism legislation, and for the Secretary of State to report quarterly on the exercise of her powers under it.

Parliamentary scrutiny of draft emergency measures

We do not accept the Government's reasons for not providing Parliament with the opportunity to subject its proposed draft emergency legislation to proper pre-legislative scrutiny. We welcome the Government's publication of the draft bills for extending the period of pre-charge detention of terrorism suspects beyond 14 days and we can see no reason in principle why the same approach should not be taken

in relation to the proposed draft emergency legislation authorising measures going beyond TPIMs. (Paragraph 30)

We recommend that the proposed draft emergency legislation authorising more restrictive measures than those which will be available under TPIMs should be published and made available to Parliament for pre-legislative scrutiny by this and other interested committees. (Paragraph 31)

There was no national security requirement to finalise this emergency Bill urgently as the restrictions under the 2005 Act will continue to be available until that Act is repealed or expires at the end of the year. The Government's priority was therefore to draft and introduce the main TPIM Bill as soon as possible in order to maximise the time available for Parliamentary scrutiny of it.

The Government had already made clear that draft legislation providing for enhanced TPIMs would be discussed with the Opposition with a view to reaching agreement on its terms.

However, the Government understands that there is considerable interest in the draft enhanced TPIMs legislation. The Government is therefore pleased to confirm that it has decided there should be pre-legislative scrutiny of this draft legislation.

Conclusion

In this Report we welcome the Government's commitment to replace the control order regime and to a more vigorous pursuit in future of the possibility of prosecution, but we question whether merely renewing the control order regime is consistent with the Government's own findings and recommendations in its Review of Counter-Terrorism Powers. In our view, renewal for a further nine months is only capable of justification if the Government undertakes to review urgently all existing control orders to ensure that they are compatible with the principal findings of its Review, and to ensure that any new control orders will also be compatible with those findings. 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, which has been correctly identified by Lord Macdonald as one of the "central problems" with the current system. (Paragraph 33)

The Government welcomes the Committee's support for the outcome of the Review. But the Government rejects the suggestion that it is contrary to those findings to renew the control order legislation pending introduction of TPIMs, and to continue to operate the powers as is necessary and proportionate in order to protect the public.

The Government also does not agree that control orders are used 'unnecessarily to "park" or "warehouse" controlled individuals'. We recognise that preventative measures like control orders can mean that prosecution and conviction becomes less likely, because the obligations imposed significantly – and intentionally – reduce someone's ability to engage in terrorism-related activity. However, the Government's clear conclusion is that for the

foreseeable future there will continue to be a small number of people in this country who are assessed to pose a terrorism-related threat to the public but who can neither be prosecuted nor deported. Control orders and TPIMs are preventative tools designed to manage the risk posed by such individuals.

While restrictions are in force, the police keep – and will continue to keep – the prospects of prosecution under review in each case. Clause 10 of the TPIM Bill sets out a range of duties in relation to the prospects of prosecution. As noted above, where a prosecution does not result, this is because the case has not passed the relevant tests in the Code for Crown Prosecutors – whether the evidential threshold is met and whether a prosecution is in the public interest.

The Review concluded that the new system of TPIMs should be complemented by additional resources for covert investigative techniques. This will enhance the overall investigative and evidence-gathering capacity of the police and Security and Intelligence Agencies.



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