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

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

06 JUN 2011

Dear Lord Carlile

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

Thank you for your report on the operation in 2010 of the Prevention of Terrorism Act 2005.

I am grateful to you for providing a helpful and considered report, and in particular for your considered commentary on the findings and recommendations of the Review of Counter-Terrorism and Security Powers in respect of control orders. I would also like to repeat my thanks to you for the great contribution you made in your time as independent reviewer of terrorism legislation.

I agree with your main conclusion that the control orders system, or an alternative system providing equivalent and proportionate public protection, remains necessary for a small number of cases. This is line with the conclusions of the Review and is reflected in the decision to replace control orders with terrorism prevention and investigation measures, complemented by increased investigative resource for the police and Security Service.

I attach the Government's formal response to the main recommendations in your report. Copies of the Government's 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 RESPONSE TO LORD CARLILE'S REPORT ON THE OPERATION IN 2010 OF THE PREVENTION OF TERRORISM ACT 2005

Necessity, proportionality and effectiveness of control order system during transition to TPIMs

The control orders system, or an alternative system providing equivalent and proportionate public protection, remains necessary, but only for a small number of cases where robust information is available to the effect that the individual in question presents a considerable risk to national security, and conventional prosecution is not realistic. (Main conclusion 1)

The control orders system continued to function reasonably well in 2010, despite some challenging Court decisions and unremitting political controversy. (Main conclusion 2)

I recognise the political judgments leading to the decision that control orders are to be abolished and replaced, though I remain of the view that the current control orders system remains fair and safe, a proper reflection of the need for balance between the considerations of national security and the liberty of the individual. (Paragraph 49)

At the time of writing it seems certain that control orders will be abolished. Having given it careful consideration, the Government has judged it necessary for control orders to be replaced by another system so far as is judged necessary by the Government. I am working on the assumption that the Counter-Terrorism Review will provide at least a strong framework for the eventual legislation – though of course the legislation is a matter for Parliament and inevitably will be examined closely during the legislative process in both Houses. (Paragraph 87)

The introduction of and procedure for new legislation is likely to take some months. Certainly it would be advisable for the legislation to be considered in the normal way, not as an emergency. (Paragraph 88)

Therefore the immediate question is whether control orders should continue until the enactment of fresh legislation. Given the factors outlined above, it is my view and advice that abandoning the control orders system now would have a damaging effect on national security. Of course, on their own control orders are not a failsafe or foolproof mechanism for full disruption of suspected terrorists. Further, because they are a resource-intensive tool for all involved in their management, self-evidently they cannot be used to manage the risk posed by all non-prosecutable suspected terrorists against whom there is robust intelligence. (Paragraph 89)

For now, control orders remain a necessity for a small number of cases, in the absence of a viable alternative for those few instances. These are the cases where, as now, the Secretary of State:

> **(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism; and**
> **(b) considers that it is necessary, for purposes connected with protecting members of the public from the risk of terrorism, to**

make a control order imposing obligations on that individual. (Paragraph 90)

I should emphasise that I have considered the effects of the Court decisions on disclosure. I do not agree that their effect is to make control orders or any replacement system impossible. There are and will be a small number of cases where the potential harm to national security will mean that there can be no control order because requisite disclosure cannot be achieved without disproportionate damage to national security. This is a familiar problem in relation to prosecutions. For example, in Northern Ireland some cases have not been prosecuted because of the risk of such damage. This is a balancing exercise for the executive in each case. (Paragraph 91)

For most cases, and especially new ones, it should be possible to provide sufficient disclosure to comply with legal requirements, without damaging the public interest. (Paragraph 92)

Control orders and other non-prosecution disruptions are regarded by the relevant authorities as cumulative in effect. I agree that the existence of the orders plays a significant part in hardening the environment and making it more difficult for terrorists to undertake terrorism-related activity. The orders contribute to a tougher environment for putative terrorists. Even a reduced number of control orders, if against critical police/Security Service targets, could still be of major operational benefit. (Paragraph 93)

In stark terms, the potential cost of losing control orders now is that the UK would be more vulnerable to a successful terrorist attack. (Paragraph 94)

The Government welcomes your conclusion that a means of protecting the public from the small number of suspected terrorists who pose a serious threat, but who cannot be prosecuted, continues to be necessary. We also agree that to repeal control orders without a replacement system in place would be damaging to national security and would put the public unnecessarily at risk. This concurs with the findings of the Government's *Review of Counter-Terrorism and Security Powers Review Findings and Recommendations (Cm 8004)* ("the Review"), laid before Parliament on 26 January 2011.

And although the Government has concluded that the public can be protected by a less intrusive system of preventative measures, supported by increased investigative resource, we also welcome your judgment that the control orders system remains effective and legally viable. It is important – in order to avoid a gap in public protection – that the control orders system, and all the obligations that can be imposed under it, should continue to be available until it can be replaced.

The Government agrees with your suggestion that the replacement regime should not be expedited as emergency legislation. The control order powers have been renewed until 31 December 2011. The Terrorism Prevention and Investigation Measures (TPIM) Bill was introduced in the House of Commons on 23 May 2011; the intention is that it will follow a normal Parliamentary timetable.

There are up to 25 types of measures which are currently in use. As of 10 December, the longest curfew in place was 14 hours, and the average curfew 11.9 hours (12.0 hours last year). The advice of the authorities is that there are considerable safety advantages from the requirement that the controlee should spend every night at a specified address, within hours which are clearly specified. This is the purpose of curfews, though there are evidence based advantages for the authorities in some cases if the curfewed hours are in blocks rather than merely overnight. However, in my view the new overnight obligation proposed in the Counter-Terrorism Review is sufficient to manage risk, with the Secretary of State (and subsequently the court) able to review, and if necessary increase or reduce the length of the overnight requirement to meet the merits of the individual case (including, as appropriate, any relevant work or social issues). (Paragraph 19)

The Government agrees with your assessment that the proposed overnight residence requirement under the TPIM system is sufficient to manage risk. As you note, this will be a flexible measure capable of being adapted to the individual circumstances of each case.

Statutory test

The threshold for a non-derogating control order is *reasonable grounds to suspect*. Many have argued at the very least for the threshold to be raised to *reasonable grounds for belief*. There is a real difference between these two thresholds – see, for example, the judgment of Lord Justice Beldam in *R v Elizabeth Forsyth* [1997] 2 Cr.App.R 299; and the speech of Lord Brown of Eaton-under-Heywood in *R v Saik* [2006] UKHL 18 at paragraphs 104-120. (Paragraph 28)

In my view every one of the control orders confirmed by the Courts since the system was introduced has at least satisfied the standard of reasonable grounds for belief, and in most cases by some distance the full civil standard of balance of probabilities. (Paragraph 29)

The Counter-Terrorism Review proposes the raising of the standard of proof to reasonable grounds for belief. As will be clear from the above, I support this change. In my judgment it will make no material difference to the existing controlees. (Paragraph 30)

The Government welcomes your endorsement of the move to reasonable belief. We consider the introduction of this higher threshold in relation to TPIMs to be an appropriate safeguard.

Electronic monitoring

The Counter-Terrorism Review has considered the application of electronic monitoring technology. I believe that all improvements to the available technology should be examined: although tagging is physically intrusive as a sort of permanent electronic handcuff, if in the future improved technology provides for effective monitoring it may enable other restrictions to be eased.

The Government continues to keep electronic monitoring technology under review.

Emergency contact system for controlled persons

Last year I described a complaint by controlees that they claimed to have no personal point of contact for emergencies. This was not accepted as a fair criticism by the police or officials in the Home Office. However, attention has been given to the issue. Given that some controlees have been moved compulsorily to neighbourhoods where they are unknown and have no family contacts, this emergency contact system should be as personal in its approach as possible. In the current system or any that replaces it, the fact that the State is permitted to impose restrictions on individuals who have not been convicted in a criminal court should be reciprocated by a careful pastoral care approach. (Paragraph 35)

Given the intention following the Counter-Terrorism Review that there should no longer be a power to compel a controlee to relocate, the pastoral problems should diminish. (Paragraph 36)

As you note, the Government does not accept that controlled individuals have no personal point of contact in an emergency. Controlled individuals are provided with contact numbers for use, including in emergency situations. They are always permitted a telephone available in their home that can be used to call health professionals, the emergency services or friends and family in an emergency. All controlled individuals can contact the Home Office team that is responsible for the management of control orders during office hours. Where the individual is subject to electronic monitoring and a curfew he can also contact the electronic monitoring company at any time in respect of his compliance with his curfew and any other monitoring conditions; the electronic monitoring company can contact local police officers and relevant Home Office officials on a 24 hour basis. Where a controlled individual is required to reside in Home Office-provided accommodation, the controlled individual is also provided with an emergency contact number to call in the event of a serious problem with the accommodation. All controlled individuals also have an assigned police 'contact officer' whose role is to provide regular and familiar contact with the controlled individual.

We agree that – insofar as this is an issue – it will diminish once the TPIM system is implemented, as it will no longer be possible to relocate individuals to another part of the country without their consent. The Government is committed to ensuring that we implement the new system in a way that is commensurate with our duty to ensure that the restrictions interfere with normal life to the minimum extent necessary to protect the public.

Numbers of control orders

The continuing relatively small number of control orders, set alongside the vastly greater number of known terrorism suspects, confirms that the Home Secretary remains rightly reluctant to expand their use; and that they are reserved for very troubling cases. (Paragraph 43)

We welcome your comments, and your assessment that the Government has taken a measured approach to the use of control orders pending their replacement with the TPIM system. We are clear that, until the new system is implemented – including the increase in investigative resource – control orders should remain available for use where necessary and proportionate. 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. But we are equally clear that the Government's priority is to prosecute such individuals wherever possible.

There is of course no linear relationship between the number of known terrorist suspects and the number of control orders in force. The imposition of control orders is considered on a case by case basis; in each case the statutory test (reasonable suspicion of the individual's involvement in terrorism-related activity, and necessity of the order to protect the public from a risk of terrorism) must be met for an order to be imposed.

DV vetting and intelligence briefing for opposition spokespersons

It is uncontradicted that the manifestos of the political parties then in opposition were written without detailed knowledge of the evidence base for control orders, generally and in relation to individuals. In my view this is regrettable, and should be remedied in the present system and any legislative replacement. Whether it needs to be included in the legislation or (probably) not, for the future I recommend that one or two senior spokespersons for at least the official Opposition should be 'DV' vetted (developed vetted): the purpose of this would be that, whilst respecting confidentiality and national security, they should be able to give informed advice to their shadow colleagues on the merits of the legislation. (Paragraph 45)

I do not regard briefings on Privy Council terms to be a satisfactory method for dealing with the need for the Opposition to be briefed adequately. DV vetting provides a sense of security for the relevant authorities, given the intensive and personal nature of the vetting process. It also facilitates greater contact between relevant officials and Opposition politicians: in my view this would improve not only knowledge levels, but also the quality of the debate. The independent reviewer could reasonably be expected to comment on the functionality of this revised information flow, given his necessary contact with the political parties. (Paragraph 46)

I hope that the modest change suggested in the two preceding paragraphs would take some of the political steam out of what at times has been a poorly informed debate. A multi-partisan approach to counter-terrorism legislation would provide a stronger platform for focused debate. As the Counter-Terrorism Review demonstrates, all the main political parties now accept that a system is required to protect the public against a small and potentially very dangerous cohort of individuals, against whom a criminal prosecution cannot be brought on the evidence presently available. (Paragraph 47)

The Government agrees that well-informed debate and a cooperative approach is essential when considering matters of such importance as terrorism legislation. We are happy to consider any suggestion that may increase the quality of dialogue on national security matters. However, having carefully considered your recommendation and noting your view to the contrary, we do not consider there to be deficiencies in the ability to brief Opposition spokespeople – where appropriate – on sensitive issues by doing so on Privy Council terms.

Terrorism prevention and investigation measures

The Counter-Terrorism Review makes available the following key elements:

1. **Electronic tags**
2. **Overnight stay requirements**
3. **Restrictions on freedom to associate**
4. **Some restrictions (but availability) on mobile telephony and internet**
5. **Regular reporting to police**
6. **Prohibited geographical areas**
7. **Prohibition on travel overseas**
8. **Some restrictions on transfer overseas of money and goods**
9. **Notification of employment/academic/training courses with power to object**

If these are not available, then the new system will fail to protect the public against the dangers posed by the cohort of individuals concerned. (Paragraph 50)

The minimum restrictions compatible with national security should be imposed in each case. (Paragraph 51)

The Government agrees. The Review emphasised that restrictions imposed under the replacement system for control orders should be the minimum necessary, and should allow the person subject to them to live a normal life as far as is possible while protecting the public. In line with the Review's commitment to specify in greater detail the measures that will or will not be available under the TPIM system, Schedule 1 to the TPIM Bill provides an exhaustive list of the types of restrictions or requirements that may be imposed on an individual.

The proposed replacement system shares several characteristics with control orders (and would provide commensurate protection). There is an acceptable balance of risk against other considerations. It should be seen as adopting a new approach to public protection against terrorism. This will be emphasised by raising the threshold to *reasonable grounds to believe*. (Paragraph 52)

The Government welcomes your conclusions on the new system of terrorism prevention and investigation measures.

I would expect the replacement system to be required for a narrower range of cases than now (though one cannot predict that there will be fewer cases: that depends on the emerging picture). (Paragraph 53)

We anticipate the new system being used, as has been the case with control orders, to protect the public from the small number of suspected terrorists we can neither prosecute nor deport. Individual cases will be considered under the new system on their own merits. Although, as you identify, the number of future cases will necessarily depend on the operational picture at the time and cannot accurately be predicted, we expect that the new system will apply to the same limited range of cases as the existing system of control orders.

Certificates Restricting Travel

I have suggested before that, for the lighter touch cases (as in Annex 6) a system of Certificates Restricting Travel could usefully be introduced, with some elements similar to ASBOs (Anti-Social Behaviour Orders) available too. Though not contained as a separate category in the Counter-Terrorism Review, I believe this suggestion merits further consideration. (Paragraph 54)

The Government notes your continued support for a separate category of civil order designed specifically to prevent travel abroad by suspected terrorists. This issue was considered as part of the Review of Counter-Terrorism and Security Powers. While recognising the need to prevent suspected terrorists from travelling outside the UK where necessary and proportionate, the Review concluded that this could be effectively delivered by the TPIM system. It also noted that the main difficulty of a limited set of obligations designed solely to prohibit travel was that they were particularly vulnerable to abscond: as you note, five of the seven absconds from control orders were from so-called 'light touch' control orders. As such, we do not currently consider that a separate, parallel regime is necessary.

Two-year time limit

In the current system, and for its replacement, I remain of the opinion I have expressed before about duration. Therefore I agree with the intention expressed in the Counter-Terrorism Review that there should be a maximum duration of the intervention of two years, with a new one available after that time only if there is new evidence that the individual has continued to be engaged or has re-engaged in terrorism-related activities. (Paragraph 55)

In addition, I suggest that the threshold for intervention after two years should be raised to *the balance of probabilities*. (Paragraph 56)

The Government notes your longstanding recommendation for a two year time limit in relation to control orders, and welcomes your support for its adoption as one of the conclusions of the Review. The Review concluded that a TPIM notice should be subject to an overall two-year time limit (a notice lasts for a year and can only be extended once), beyond which further measures could only be imposed where there is evidence of involvement in terrorism-related activity taking place after the coming into force of that TPIM notice.

However, the Government is not persuaded that there are grounds for the statutory threshold being higher for imposing new measures after two years. In circumstances where the individual has re-engaged in terrorism-related activity, the public protection requirement will be the same: we therefore consider that the statutory threshold should be the same. The TPIM Bill includes a range of safeguards for the imposition of a new TPIM notice to ensure that its imposition is necessary and proportionate. Not only must there be evidence of new terrorism-related activity, but the imposition of the notice must be necessary to protect the public and the specific measures must be necessary to prevent or restrict the individual's involvement in terrorism-related activity. The Secretary of State must seek the permission of the court before imposing new measures (unless the case is urgent in which case the TPIM notice must be immediately referred to the court for consideration.) And after service of the notice, the court will substantively review the imposition of

the TPIM notice (automatically, without the individual having to initiate such proceedings), with the court reviewing the Secretary of State's decisions relating to the imposition of the further notice.

Priority of prosecution

I emphasise that control orders are a targeted tool of last resort, used to plug what is perceived to be a gap in the absence of viable alternatives. (Paragraph 61)

Prosecution remains the preferred approach for dealing with suspected terrorists. There has been considerable success in prosecuting terrorists. (Paragraph 62)

The Government agrees. The Government is committed to ensuring that suspected terrorists are prosecuted whenever possible. This was both the starting point and a key conclusion of the Review. As you identify, the Government only uses control orders – and will only use TPIMs once introduced – as a last resort, for a small number of cases in which it is not possible to prosecute or deport an individual who nonetheless poses a terrorism-related threat to the public.

Prospects of prosecution

I am satisfied that prosecution is pursued whenever there is a case satisfying the charging standards contained in the Code and policies of the Crown Prosecution Service. The CPS is assiduous in pursuing prosecutions where there is sufficient admissible evidence. (Paragraph 64)

I have seen letters from chief officers of police in relation to each controlee certifying that there was no realistic prospect of prosecution. In 2006, 2007 and 2008 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, and the Security Service, so that the Secretary of State can be satisfied that full consideration of the evidence and intelligence has occurred. The process is followed: I am satisfied that no control order has been made where a prosecution for a terrorism offence would have satisfied the CPS standards for the institution of a prosecution, in the period covered by this report. (Paragraph 144)

The quality of the letters concerning possible prosecution continued to improve in 2009 and 2010, in the sense that some reasons are now given. As much detail as possible should be given to the Home Secretary in every case as to why additional investigation, or different forms of evidence gathering, would not enable a criminal prosecution to take place. It is a given that it would be far better for prosecutions to occur, of course provided they pass the usual threshold standards for prosecution (evidential and public interest, respectively) applied in all cases by the CPS. (Paragraph 145)

The Government welcomes your acknowledgement that the prospects of prosecution are always considered before making a control order.

As you know, the decision on whether to investigate a particular individual is an operational matter for the police and the decision on whether to prosecute is a matter for the Crown Prosecution Service. However to highlight the priority that the Government places on prosecution, and the importance of the prospects of prosecution being kept under meaningful review while restrictions are in force, the TPIM Bill will, in addition to maintaining all the duties on the Secretary of State and the police relating to the prospects of prosecution contained in the Prevention of Terrorism Act 2005, place the police under a new statutory duty to keep the Home Secretary informed of the outcome of their consideration of the ongoing prospects of prosecution.

Intercept as evidence

Intercept evidence has continued to be discussed widely, and has been the subject of a Privy Council review. That review has reconvened to assess the current potential for intercept as evidence. A Written Ministerial Statement to this effect was made in Parliament on the 26 January 2011. (Paragraph 65)

As independent reviewer, I have said repeatedly that I welcome the admissibility of intercept if this can be achieved without (a) affecting national security, and (b) decreasing the effectiveness of the criminal trial process. I am however convinced that it is not the quick and easy solution that some have assumed and asserted. (Paragraph 66)

It is unlikely that the admissibility before the jury of intercept would have led to the prosecution of any controlees since control orders were introduced in 2005. (Paragraph 72)

The Coalition Agreement commits the Government to 'seek to find a practical way to allow the use of intercept evidence in court,' with, as you mention, next steps set out in the Written Ministerial Statement of 26 January. The work is being overseen by the cross-party Advisory Group of Privy Counsellors, and is focusing on the likely balance of advantage, cost and risk of legally viable models for intercept as evidence, compared to the present approach.

Where possible we are determined to make real progress in this area, but we agree with your assessment that the use of intercept evidence in criminal trials would not be the 'quick and easy' solution that some have suggested. In particular, we note your conclusion that the use of intercept evidence is unlikely to have led to the prosecution of individuals subject to control orders.

The Government is serious about seeking ways forward and welcomes your suggestion of a possible approach. We will ensure that the 'interception case' model is assessed robustly and fairly, including in terms of compatibility in practice with Article 6 of the ECHR.

Special category of intercept criminal cases

I have suggested that a category of intercept cases could be devised. If in an inquiry it became clear that material of real evidential value in the courtroom could be made available without damaging national security, in such a case the Attorney General or the Director of Public Prosecutions could designate it an 'intercept case'. From that time onwards it would be known by those carrying out the inquiry that intercept material might have to be disclosed if it satisfied the legal

requirements for disclosure, and that it could be used as evidence. The case might then take on the characteristics of an FBI 'sting' operation, of which there are many examples. This approach might be extended to other serious crime. I believe that a system of this kind would be manageable, and might prove successful. I have been told that there is some doubt as to whether such a category of cases would be compliant with *ECHR Article 6*: I am wholly unpersuaded by that doubt. (Paragraph 76)

The Government notes your suggestion which, as you say, you have raised previously. As outlined above, the Coalition Agreement commits the Government to 'seek to find a practical way to allow the use of intercept evidence in court.' We are serious about doing so, and will ensure that all possible approaches – including this one – are assessed robustly and fairly. However, this is a complex and difficult issue. We are concerned – as you note – that further consideration needs to be given to the compatibility of this proposal with Article 6. If it is not compatible, it would of course not be a viable means of securing the use of intercept as evidence in court.

Deportations with assurances

I support the proposals in the Counter-Terrorism Review that the Government should pursue deportation arrangements with more countries. I support very strongly efforts to pursue verifiable assurances for named individuals, in relation to countries with which there is no generic agreement. (Paragraph 80)

In addition, I suggest that my successor should be commissioned to provide an annual independent report on deportations in terrorism cases, and the monitoring/verification of their situation after deportation. (Paragraph 81)

The Government welcomes your support for the conclusions of the Review relating to deportation with assurances. We are considering your recommendation relating to independent oversight.

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 97)

The Government considers as quickly as possible all requests from controlled individuals to meet specialist or qualified persons; as we do with all other requests for modifications of control order obligations – and will of course similarly consider as quickly as possible all requests for variations under the TPIM system where these are required.

Support for those who wish to raise with the authorities concerns about family members or friends

In addition, every facility should be provided for families and friends to raise with the authorities concerns about their nearest and dearest, and they should be dealt with sensitively and securely. All who are opposed to terrorism must be able to feel that a contribution towards disruption and detection will be dealt with the utmost discretion. Where the

disruption contributes materially to a genuine decision by the individual to abandon any terrorist aims and activities, the authorities should always be prepared to consider leniency. (Paragraph 98)

There are already well-established and well-publicised channels for concerned members of the public to report their concerns, including the police anti-terrorist hotline (0800 789 321 or text phone service number 0800 032 4539 for people with speech or hearing difficulties – text messages from mobile phones are not accepted) and the Security Service threat reporting phone number (0800 111 4645 or 020 7930 9000), as well as 999, which should always be used where there is an imminent terrorist threat, a threat to life or when a crime is in the course of being committed. Additionally the police and Security Service can be contacted online:

https://secure.met.police.uk/athotline/index.php

https://www.mi5.gov.uk/output/contact-form.html?subject=Reporting%20suspected%20threats

It is also possible to write to the Security Service:

The Enquiries Desk
PO Box 3255
London SW1P 1AE

These channels are discreet, manned by counter-terrorism professionals and offer a secure means for people to report any concerns, whether urgent or non-urgent. The precise handling of any concerns is considered on a case-by-case basis.

Control order powers and obligations

Following court judgments in 2009, there is no personal search obligation included in or permitted under section 1. This is an anomaly that has the potential for absurd consequences, and should be avoided in the replacement system. (Paragraph 101)

It is logical and necessary that powers of personal search be available. In the light of judicial decisions in 2009, I recommended that as a compliance tool and to ensure police and public safety, such powers should be added by legislative amendment, as soon as possible. Section 56 of the 2010 Act added new sections 7D and 7E to the PTA 2005. Section 7D adds a power to search controlees; section 7E deals with the retention and use of things seized. These sections have not yet been commenced, pending the outcome of the Government's Counter-Terrorism review. (Paragraph 139)

The powers contained in the Crime and Security Act 2010 ("2010 Act") will not now be commenced, given the conclusion of the Review that control orders should be replaced by the TPIM system; the control order-related search powers in the Counter-Terrorism Act 2008 and the 2010 Act are being repealed by the TPIM Bill. The TPIM Bill as introduced on 23 May 2011 provides certain specific powers of search and entry in relation to TPIMs.

There will be powers for police, without a warrant, to: enter and search premises to locate an individual for the purpose of serving a TPIM notice (or

other specified notice) on him; search an individual or premises when serving a TPIM notice, for the purpose of discovering anything that might breach any measure specified in the TPIM notice; search premises on suspicion that an individual subject to a TPIM notice has absconded; and search an individual subject to a TPIM notice for public safety purposes. And there will be powers for police, with a warrant, to search an individual or premises to determining whether the individual is complying with the measures specified in the TPIM notice.

Role of the Control Order Review Group (CORG)

Officials and representatives involved in managing control orders meet regularly in the CORG to monitor each case, with a view to advising on a continuing basis as to whether the order should continue and how it should be administered. Included in those considerations must be the effect on the families of controlees, especially any children living with them. The CORG is now a matter of public knowledge, and its activities have been scrutinized by the High Court. I have attended some of its meetings, as an observer. I have been able to contribute when matters of principle and relevance to the review process have arisen. CORG includes officials from the Home Office, police and Security Service. They consider each control order in detail, and discuss the proportionality and necessity of the order and its obligations. One of the matters always discussed is the potential for bringing the order to an end, and the necessity of the obligations imposed on each controlee. (Paragraph 112)

I presume and expect that a committee similar to CORG will operate in the replacement system. (Paragraph 113)

The Government agrees and can confirm that it intends to operate an equivalent system of quarterly reviews to CORG under the TPIM system.

Court supervision

Section 4 provides the powers of the courts to make derogating control orders; section 5 deals with issues of arrest and detention pending derogating control orders; and section 6 provides for their duration. As no derogating control orders have been made to date, again I remain unable to report on the operation of the derogation provisions. Given the restrictive nature of non-derogating orders, and the reverberations that derogation would cause, I hold as strongly as before to my often expressed hope that no derogating orders will ever be required. Plainly, the moment one was made it would require intensive review of every step in the statutory procedure and of its effect on the controlee. (Paragraph 119)

The Government agrees with your concerns about the impact of the use of derogating control orders. Accordingly, the TPIM Bill repeals the power to make derogating control orders entirely, and does not provide a corresponding power to impose derogating TPIM notices.

Special advocates

The SAs continue to consider that a relaxation of the current rule prohibiting communication is necessary – or "essential" as the JCHR put it in 2007. They propose:

- **(i) To allow communication on matters of pure legal strategy and procedural administration (i.e. matters unrelated to the particular factual sensitivities of a case). If necessary, it could be required that all such communications be in writing.**
- **(ii) (ii) To give SAs power to apply ex parte to a High Court Judge for permission to ask questions of the appellant, without being required to give notice to the Secretary of State. If the Judge considered that the proposed communication gave rise to any possible issue of national security, then it could be directed that the Secretary of State be put on notice of the communication, if the SA wished to pursue it, so as to enable any objection to be considered**

(Paragraph 129)

I remain broadly sympathetic to the complaints made by the SAs. I am fully aware of security concerns about modifying the system in the way they suggest. Those concerns are not about the SAs themselves, but about inadvertent leakage of sensitive material to controlees who may be extremely security-aware and adroit. (Paragraph 130)

In the Counter-Terrorism Review the Government has promised some enhancements to the operation of the special advocate regime pending fuller consideration in the forthcoming Green Paper on the use of the intelligence services in judicial proceedings. I trust that the SAs will be consulted fully, and will provide their own considered response to the Green Paper. (Paragraph 131)

As you are aware, this is a difficult and complex matter of long-standing debate. The Government has undertaken to consider the key concerns that have been expressed about the operation of the special advocate system in 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. This 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, including those of the special advocates. As the new Minister for Crime and Security, James Brokenshire would be happy to meet special advocates as part of the Green Paper process.

Independent review of the TPIM system

This report is my response to my duties under section 14(3) and (4), namely to report on "the operation of this Act". This duty of course will lapse with the current legislation. I trust that my successor as independent reviewer will have a commensurate duty under the replacement system. (Paragraph 158)

The Government agrees that there should be independent review of the operation of the TPIM legislation and the TPIM Bill makes provision for this.

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