



**Draft Prevention of Terrorism Act 2005 (Continuance in
Force of Sections 1 to 9) Order 2011**

JUSTICE Briefing for House of Commons Debate

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. The Prevention of Terrorism Act 2005 was a deeply flawed response to the ruling of the House of Lords judgment in the Belmarsh case in December 2004. It should never have been enacted. Its repeal is long overdue.
3. In outline, the control order regime created by the 2005 Act imposes severe and effectively indefinite restrictions on persons who have neither been charged nor convicted of a criminal offence, in cases where the Home Secretary suspects them of involvement in terrorism. In principle, those subject to control orders have a right of appeal. In practice, the evidence against them is classified material which they and their lawyers are prohibited from seeing. Only after several years and a series of adverse court rulings did the government concede that defendants were entitled to a minimal degree of disclosure to enable them to meet the case against them. As a result, a number of control orders have been lifted and, as of December 2010, only eight men remained subject to orders, all of whom are British nationals.
4. In its programme for government, the Coalition promised to 'urgently review Control Orders as part of a wider review of counter-terrorist legislation, measures and programmes'.¹ This review was announced in July and reported in January. The review concluded that control orders under the 2005 Act 'can and should be repealed' and instead replaced with a 'less intrusive and more focused regime', which will include an end to 'forced relocation and lengthy curfews' but would retain other elements of the control order system.² However, the independent report by Lord Macdonald of River Glaven QC, the former Director of Public Prosecutions, found that control orders impede the effective criminal investigation of those subject to control orders by preventing 'those very activities that are apt to result in the discovery of evidence fit for prosecution, conviction and imprisonment':³

We may safely assume that if the *Operation Overt* (airline) plotters had, in the earliest stages of their conspiracy, been placed on control orders and subjected to the full gamut of conditions available under the present legislation, they would be living amongst us still, instead of sitting for very long years in the jail cells where they belong.

¹ *The Coalition: Our Programme for Government* (May 2010), p24.

² Home Office, *Review of Counter-Terrorism and Security Powers* (Cm 8004, January 2011) p41.

³ Cm 8003, p9.

5. It has always been JUSTICE's view that control orders are unnecessary, ineffective and offensive to basic principle. Despite the government's promise to repeal the 2005 Act, we are unable to welcome its proposed replacement - Terrorism Protection and Investigation Measures ('TPIMs') – on the basis that it will involve many of the key features of the current regime. These criticisms are set out in more detail below.
6. We instead take the view that no statutory replacement is necessary. Therefore, although we recognise that the draft order would not extend the current regime beyond 31 December 2011 in any event, we consider that even to extend it by another nine months would be nine months too long.
7. Accordingly, we recommend that the House vote against the renewal order and allow the 2005 Act to lapse forthwith.

Control orders are unnecessary

8. The basic problem control orders were designed to address is the risk posed by suspected terrorists whom the authorities are unable or unwilling to prosecute. We recognise that this is a problem. However, it is hardly a problem that is unique to the United Kingdom. Nor is it a post-9/11 development. On the contrary, it seems to us to be endemic to every western jurisdiction that relies on intelligence material in the fight against terrorism. Despite this, no other western country apart from Australia has introduced control orders. Even there, they have been little used: only two orders were ever made, both have since been discharged and no orders have been made since 2007.⁸
9. Nor does it appear that the UK faces a significantly greater threat of terrorist attack than other western countries. Certainly the UK suffered a grave terrorist attack in 2005 with the 7/7 bombings, but then Spain suffered an even more deadly attack in 2004 with the Madrid bombings and did not introduce control orders. It is true that a number of serious terror plots have been disrupted in the UK by police, including the 2006 plot to destroy transatlantic airliners using liquid explosives, and that this indicates the continuing threat of terrorist attack. Nonetheless, other western countries have faced terror plots of similar seriousness across the same period (see e.g. the arrests made in Canada, Denmark, and Germany in 2006-2007),⁹

⁸ See Attorney General of the Commonwealth of Australia, *Control Orders and Preventative Detention Orders: Report for the year ending 30 June 2009*. No report for 2009-2010 has been issued.

⁹ For Canada, see e.g. '17 Held in Plot to Bomb Sites in Ontario', *New York Times*, 4 June 2006. The plot involved 18 men (the so-called 'Toronto 18') who planned to use truck bombs to attack high-profile targets across southern Ontario, including Toronto and Ottawa. In a series of trials held in between 2008 and 2010, seven pleaded guilty and a further four were convicted of terrorist offences following trial. For Denmark, see e.g. 'Denmark arrests bomb suspects', *BBC News*, 5 September 2007. Seven men were arrested in Copenhagen in September 2007 on suspicion of plotting a bomb attack. The head of the Danish police intelligence agency was reported as saying 'we have prevented a terror attack', and described the suspects as 'militant Islamists with international contacts, including leading members of al-Qaeda'. For Germany, see e.g. 'Germany Says It Foiled Bomb Plot', *Washington Post*, 6 September 2007. The case involved 4 Muslim men who had received training in Pakistan in a

and there is no reason to think the threat of attack to those other countries has diminished either. Even the United States, which introduced a range of highly exceptional measures after 2001, declined to alter its domestic criminal justice system in response to the risk posed by suspected terrorists in the continental US.¹⁰

10. How do these other countries cope with the problem of suspects against whom there is no realistic prospect of prosecution? The answer, obviously enough, must be that they rely on lawful surveillance to ensure that suspects' activities remain under observation. We are of course aware that surveillance can be very resource-intensive, and that it can sometimes raise significant human rights issues of its own. Nonetheless, we note that the control order regime is already extremely expensive to administer and defend: approximately £10.8 million was spent on control orders between August 2006 and August 2009¹¹ and the legal costs alone have been estimated at £8 million.¹¹ All this, moreover, for the sake of a relatively small number of individuals – never more than forty and currently only eight men. In the circumstances, we have no doubt that the public funds involved would be much better spent on effective surveillance of suspects than on maintaining the current regime. Moreover, surveillance is bound to be a more proportionate and more palatable interference with a suspect's rights than subjecting them to virtual house arrest on an indefinite basis.
11. We therefore welcome the government's commitment to devote 'significantly increased resources to surveillance and other investigative tools'.¹² In our view, however, the government's decision to continue the essential features of the control order regime (i.e. indefinite restrictions on suspects based on the belief of the Home Secretary rather than in relation to criminal prosecution) under the proposed system of TPIMs is open to the same objections as the control order regime. Indeed, as Lord Lloyd of Berwick noted, the government has already shown itself able to address the threat posed by controlees by other means. Between August and September 2009, the Home Secretary withdrew control orders against two men – AE and AF – in August and September 2009 respectively. The reason for the Home Office's decision was not a change in the threat assessment concerning either man, but because of the June 2009 judgment of the House of Lords in *Secretary of State for the Home Department v AF and others* which required greater disclosure of the closed material in each man's case. The Home Office, for its part, declined to do so, presumably because it judged the public interest in nondisclosure to be greater than that of maintaining the control

plot to attack US bases in Germany using car bombs. All 4 were convicted of terrorist offences following trial (see 'Four jailed over plot to bomb US bases', MSNBC, 4 March 2010).

¹⁰ See our 2007 report *From Arrest to Charge: Complex terrorism cases in the US after 9/11*, which details how the FBI, state and local law enforcement arrested over 50 suspects in alleged plots aimed at causing widespread loss of life, including the destruction of such key US landmarks as the Sears Tower and the Brooklyn Bridge.

¹¹ Lord Carlile of Berriew QC, *Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (1 February 2010), para 81. Note that this figure only covers a 3 year period between 2006-2009. Assuming that similar costs were incurred for the 16 month period before August 2006, and the 12 month period since August 2009, this would bring the total cost for the control order regime to approximately £19.2 million.

¹² Dame Pauline Neville-Jones, 'The Government's Expectations – what should CONTEST deliver', 28 February 2011.

orders. Instead, it elected to withdraw the control orders. As Lord Lloyd pointed out in March last year:¹³

AF's control order was revoked in August 2009. Since then, he has been a free man. Yet a year ago on 5 March the noble Lord, Lord West [the Home Office minister] described him as 'highly dangerous' That was the advice which the noble Lord had received from the Security Service and the police, and which he had accepted. Yet AF, that highly dangerous man, is now free, without the dire consequences which were then predicted. What is the explanation for that? The answer can be only this: the Home Office has indeed found some other means of dealing with him If using a control order was not necessary in the case of AF, why should we accept that it is necessary in the case of the other 11 individuals who are subject to control orders? The answer is, of course, that it is not necessary. We know now that other means can be found to contain the risk posed by these few remaining wretched individuals. If that is so, it is high time that we brought control orders to an end. They are, and always have been, a blot on our jurisprudence.

If it has been possible for the Home Office to address the threat allegedly posed by AF and AE without resort to control orders, then it is equally true that it is able to address the threat they pose without resort to TPIMs.

Control orders are ineffective

12. At the time they were introduced, control orders were described by the Home Secretary as being:¹⁶

for those dangerous individuals whom we cannot prosecute or deport, but whom we cannot allow to go on their way unchecked *because of the seriousness of the risk that they pose to everybody else in the country.*

13. Since the 2005 Act was introduced, 48 people have been subject to control orders at some point, of which 7 have absconded – an apparent failure rate of about 14%. Following two ascondments in late 2006, a junior Home Office Minister said that he 'did not believe the public was at risk' from the escaped men,¹⁷ and Lord Carlile of Berriew QC, then he government-appointed reviewer of terrorism legislation, agreed that the disappearances

¹³ Hansard, HL Debates, 3 March 2010, col 1528.

¹⁶ Rt Hon Charles Clarke MP, Hansard, HC Debates, 23 Feb 2005: Column 339. Emphasis added.

¹⁷ BBC News, 'Two terror suspects 'on the run'', 17 October 2006.

'present little direct risk to public safety in the UK at the present time'.¹⁸ We find it difficult to reconcile the Home Secretary's original claims of dangerousness in 2005 with the mild assessments offered the following year. It is equally hard to see how control orders could in any event be effective in preventing terror attacks with a failure rate of roughly 1 in 7.

14. We note that , under TPIMS, suspects will not be subject to some of the more egregious features of the current control order regime, including internal relocation and bans on telephone and internet use. Although we welcome the government's decision to abandon such restrictions, we note that it also somewhat undercuts its argument that the remaining restrictions will be effective in maintaining public protection. We do not agree with the control order regime is needed to protect the public nor do we believe it is effective in doing so. However, it seems likely that with a relaxing of restrictions there will be more opportunities for those subject to them to abscond. Just as we doubt the public is protected by control orders, still less will they be protected by the proposed watered-down version that is TPIMs.

Control orders are offensive to basic principle

15. Control orders represent a fundamental departure from the principle that any suspected criminal activity should be dealt with by due process of law, the basis of which is a fair trial in which allegations are proved in open court to the criminal standard of proof. These arguments apply with equal force to their proposed replacement, TPIMs.

16. In February 2009, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights identified the UK use of control orders as part of an international trend undermining the priority of the criminal law in the fight against terrorism. In particular, it noted that there were 'many important safeguards missing' in the UK control order system, including:¹⁹

- the evidentiary standard required is often low – that of 'reasonable suspicion';
- there is a limited ability to test the underlying intelligence information;
- there are no definite time-limits and the orders can last for long periods;
- there are limitations on effective legal representation and to legal counsel of one's own choose the right to a full fair hearing (guaranteed in both civil and criminal proceedings) is denied.

¹⁸ Lord Carlile, *Report in connection with the Home Secretary's quarterly reports to parliament on control orders* (Home Office, 11 December 2006), para 21.

¹⁹ *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (International Commission of Jurists, February 2009), p121.

17. Justice Arthur Chaskalson, the chair of the Panel and the former Chief Justice of South Africa, had previously likened the UK control order scheme to the repressive measures of the old Apartheid regime.²⁰

Control orders may be much worse than they sound. They can require the victim of the order to remain at his or her home for up to 18 hours a day, with constraints upon receiving visitors, attending gatherings, meeting people or going to particular places during the 6 hours of 'freedom'. We had measures like that in South Africa. We called them house arrest, distinguishing between 12 hours house arrest and 24 hours house arrest. The people affected by such orders found it almost impossible to comply with their terms, resulting in their breaking their orders, which in turn led to their often being prosecuted for doing so.

18. Although TPIMs would not involve as lengthy curfews and would be based on reasonable 'belief' rather than suspicion, we do not think these changes are sufficient to alter the underlying nature of the regime. In addition, a central feature of the unfairness of the control order regime has been its heavy reliance on closed material withheld from both the controlee and his lawyers.²¹ So far as we are currently aware, the TPIMs regime will operate on the same basis.

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²⁰ 'The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law', 7th Sir David Williams Lecture, Faculty of Law, University of Cambridge, 11 May 2007.

²¹ See JUSTICE's 2009 Report, *Secret Evidence*.