The Counter-Terrorism Review

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Section Home Affairs Section

This note provides background information about the Government's review of key counter-terrorism and security powers, which was announced by the Government on 13 July 2010.

The review was originally due to report in November 2010; however it was delayed, with media reports suggesting that this was principally due to conflicts over the potential replacement to the control order regime. During the course of the review the Government consulted with key stakeholders. An announcement was subsequently made by the Home Secretary on 26 January 2011 when the Government issued a report entitled Review of Counter-Terrorism and Security Powers along with a separate report by Lord Macdonald of River Glaven QC (who had supervised the review) and a list of responses to the consultation.

The review focused on 6 specific issues:

- Control orders;
- Section 44 stop and search powers and the use of terrorism legislation in relation to photography;
- the use of the *Regulation of Investigatory Powers Act 2000* by local authorities and access to communications data more generally;
- extending the use of 'deportation with assurances' in a manner consistent with legal and human rights obligations;
- measures to deal with organisations that promote hatred and violence; and,
- pre-charge detention, including alternatives to the current measures and possibility for increased safeguards.

The two most controversial aspects of the review related to the proposed replacement for control orders and any proposals around extended pre-charge detention.

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1 Background

The UK counter-terrorism legislation has a somewhat complex background. The main counter-terrorism powers were consolidated by the *Terrorism Act 2000*; however, following the attacks on 9/11, the Government enacted a long list of new counter-terrorism measures. These included the *Anti-Terrorism Crime and Security Act 2001,* the *Prevention of Terrorism Act* 2005; The *Terrorism Act 2006* the *Counter-Terrorism Act 2008* and most recently, the *Terrorist Asset-Freezing Act 2010.*

Many counter-terrorism powers have been subjected to legal challenge, both in the domestic courts and the European Court of Human Rights. These have been briefly summarised in the House of Commons Library publication Key Issues in the New Parliament and they have impacted most obviously on the use of control order powers (under the *Prevention of Terrorism Act 2005*) and stop and search (under s 44 of the *Terrorism Act 2000*).

The counter-terrorism review was announced by the Government on 13 July 2010 and was originally due to report in November 2010.

During the course of the review the Government consulted with key stakeholders. The review was delayed, with media reports suggesting that this was principally due to conflicts over the potential replacement to the control order regime. There was also some confusion about the situation around pre-charge detention prior to the conclusion of the counter-terrorism review, as the power expired a day before the announcement was eventually made (this is discussed further below).

An announcement on the review was finally made by the Home Secretary, Theresa May, on 26 January 2011 when the Government issued a report entitled Review of Counter-Terrorism and Security Powers along with a separate report by Liberal Democrat Peer, Lord Macdonald of River Glaven QC, (who had supervised the review) and a list of responses to the consultation.

The Shadow Home Secretary, Yvette Cooper, was critical of the Government's approach to the review, particularly following the lapse of the 28 day pre-charge detention period, contending that:

> The Review process has been characterised by delays, disarray and a politicised public debate between different parts of the government.[1]

In the Lord's debate on the review, Lord Macdonald QC appeared to endorse the majority of the review's conclusions:

> My Lords, I declare an interest as the independent overseer of the counter-terrorism and security powers review. Would the Minister agree that the review has made good progress of meeting its objectives of recommendations that, if implemented, would roll back state power consistent with public safety, and that on stop and search, surveillance powers, pre-charge detention, the removal of relocation and curfews, and house arrest powers, important reforms are signalled?[2]

[1] *Evening Standard*, "Theresa May must put public safety before politics", 25 January 2011
[2] HL Deb, 26 January 2011, c 977

2 Issues covered by the Counter-Terrorism Review

The Home Office has described the "key recommendations" of its report as follows:

> Key recommendations include putting an end to:
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> - 28 day detention without charge for terror suspects. The maximum period will be 14 days
> - indiscriminate use of terrorism stop and search powers
> - use of intrusive powers by local authorities to investigate low-level offences. Magistrate approval will also be needed
> - Control orders will be replaced with a more focused regime.
> - There will also be increased efforts to deport foreign nationals involved in terrorist activities in this country, while fully respecting human rights.[3]

More detailed information about these changes is set out below.

2.1 Control Orders

The control order regime was commenced under the *Prevention of Terrorism Act 2005*; legislation that was introduced hurriedly following the decision of the House of Lords in *A v Home Office* [2004] UKHL 56 (often referred to as the 'Belmarsh case'). A full briefing on the historical issues that arose is available[4], but in short, a series of issues arose following a string of legal challenges. These included:

- **The severity of restrictions placed on 'controlees'**. These included geographical relocation (sometimes dubbed internal exile); 16 hour home curfew (sometimes referred to by critics as 'house arrest'); electronic tagging; and, restrictions on telephone and internet usage. Measures applied should not infringe Article 5 of the *European Convention on Human Rights* (the right to liberty). Home curfew in excess of 16 hours was ruled unlawful by the courts.

- **Whether the suspect should be told at least the gist of the case against him.** One of the most contentious features of the control order regime was that suspects (and their lawyers) were not told even the essence of the case against them. Instead their interests were represented by security cleared 'Special Advocates' in closed hearings. This issue was subject to extensive litigation, to the House of Lords and the European Court of Human Rights. In 2009, the House of Lords ruled that the suspect must be given the gist of the case against him (or her), or the imposition of a control order would not meet the fairness requirements of Article 6 of the *European Convention on Human Rights* (fair trial).

- **The length of the orders**. Concerns arose as some of the suspects had been subject to control orders for several years. Once it became apparent that they could not be charged with any form of criminal conduct, it was suggested by some commentators that orders were being used as a method of 'warehousing' suspects. Lord Carlile, the Government's Independent Reviewer of Terrorism Legislation until the end of 2010, expressed some concerns about indefinite use of orders in several

[3] Home Office ,"Changes to Counter-Terrorism Powers Recommended" 26 January 2011
[4] Control Orders and the Prevention of Terrorism Act 2005, SN/HA/3438

> of his reports and suggested that they should not be used for more than two years save in exceptional cases.[5] Professor Clive Walker, the author of Blackstone's Guide to the Counter-Terrorism Legislation, recommended that any replacement to control orders should only apply whilst the police or security services are actively investigating an individual (say for a period of one year).

Following the review, the Government has announced that it is proposing to end the control order system and replace it with what it describes as a "less intrusive" system that would be "more clearly and tightly defined and more comparable to other restrictions imposed under other powers in the civil justice system". It is suggested that the new system will be branded "Terrorism Prevention and Investigation Measures".[6]

The Government has promised to end "forced relocation" and "lengthy curfews". It is suggested that the new measures would last for no more than two years, unless "there is new material to demonstrate that a person concerned poses a continued threat" and that they have "re-engaged in terrorism related activities".

The Government has also indicated that additional resources would be made available for covert investigative techniques, such as surveillance of suspects.

The review states that there may be a need for some "additional restrictive measures" in case of future emergency (including curfews and further restrictions on association, communication and movement). It has undertaken to discuss draft legislation on these additional measures with the Opposition. The Home Office has suggested that legislation to introduce the new regime will be put before Parliament "in the coming weeks".[7] In her statement, the Home Secretary said that while Parliament considers that legislation, "we will renew the current regime control order regime to the end of the year."

The proposals on reforming control orders are likely to prove the most controversial. Some critics have already branded the new Terrorism Prevention and Investigatory Measures 'control orders lite'. The Shadow Home Secretary, Yvette Cooper, argued that the changes were more an "amendment" of control orders rather than a replacement.

She said:

> Actually what's happened is the rhetoric we've seen in opposition has been replaced by the reality of Government and they've had to face some difficult political facts.[8]

In his report overseeing the counter-terrorism review, the former Director of Public Prosecutions, Lord Macdonald QC, questioned some of the detail of the Government's proposals. He has stated that "the evidence obtained by the Review has plainly demonstrated that the present control order regime acts as an impediment to prosecution". He went on to say that:

> 8. I have no doubt that were a regime of restrictions against terrorist suspects to be linked to a continuing criminal investigation into their activities, many of the constitutional objections to such a regime would fall away. It is precisely because the

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[5] Although it is worth noting that he considered that all the actual cases in which orders exceeded that 2 year limit would have met that "exceptional cases" test

[6] BBC Online, 'Theresa May: Control Orders to be scrapped', 26 January 2011

[7] Home Office, "Changes to Counter-Terrorism Powers Recommended" 26 January 2011

[8] Politics Home, "Yvette Cooper: TPIMS are an 'amended' control order" 26 January 2011

> present control order system stands apart from criminal due process that it attracts such criticism.
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> [...]
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> 16. There can be no doubt that the absence of any mandated link between control orders and criminal investigation significantly calls into question their legitimacy. The Review should give serious consideration to pursuing this option in the interests of due process.[9]

Nonetheless, Lord Macdonald acknowledged that there were circumstances in which individuals believed to be involved in terrorist activity could not presently be prosecuted, because there was insufficient, or no admissible evidence against them "*for the time being*." In those circumstances, Lord Macdonald accepted that the evidence also showed that:

> It may be appropriate for the State to apply some restrictions upon those people, so long as those restrictions are strictly proportionate and do not impede or discourage evidence gathering with a view to conventional prosecution.[10]

Shami Chakrabarti, the Director of the Human Rights NGO Liberty argued:

> We welcome movement on stop and search, 28-day detention and council snooping, but when it comes to ending punishment without trial the government appears to have bottled it. Spin and semantics aside, control orders are retained and rebranded, if in a slightly lower-fat form [...] As before, the innocent may be punished without a fair hearing and the guilty will escape the full force of criminal law.[11]

In contrast Lord Carlile QC was reported as having commented on Radio 4 that:

> I believe that the Government has taken a very mature view of this, they have come a long way from the manifestos, which were written when they hadn't seen the evidence, I believe that ministers from both coalition parties now recognise that there is a special system of law needed for a very small number of people.[12]

Developments following publication of the Review

The Security Minister, Baroness Neville Jones, gave evidence to both the Home Affairs Select Committee[13] and the Joint Committee on Human Rights[14] in February 2011. While she was not able to give a precise date for the introduction of the legislation to replace control orders, she informed the Home Affairs Committee that it should be published "before Easter".[15]

It also emerged that the Government intended to renew the control order legislation until the end of 2011, to allow time for the abovementioned legislation to be introduced. The renewal vote in the House of Commons is on 2 March 2011.

The Joint Committee on Human Rights pressed the Security Minister to subject any "additional restrictive measures" which could be contained in emergency legislation to pre-

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[9] Lord Macdonald, Review of Counter-Terrorism and Security Powers, Cm 8003
[10] *Ibid*
[11] The Guardian, 'Control orders: Home Secretary tables watered down regime', 26 January 2011
[12] Telegraph, 'Nick Clegg's opposition to control orders made without evidence' 26 January 2011
[13] Home Affairs Select Committee, The Government's Review of Counter-Terrorism, HC 675-iii
[14] Joint Committee on Human Rights, Counter-Terrorism Review, HC 797-i, 8 February 2011,
[15] Home Affairs Select Committee, The Government's Review of Counter-Terrorism, HC 675-iii, 1 February 2011, q 205

legislative scrutiny.[16] While she initially suggested that there was no commitment to do this, she promised to "take the Committee's point away".

2.2 Pre-charge detention

The current Government has allowed the period of 28 day pre-charge detention, introduced under the *Terrorism Act 2006,* to lapse. A vote on annual renewal was not held and a statement was made by the Minister for Immigration, Damien Green, following an urgent question from the then Shadow Home Secretary, Ed Balls, on 20 January 2010.

Damien Green indicated that the Government would not be seeking to extend the order allowing the 28 day limit and that accordingly, the pre-charge detention limit in terrorism cases would revert to a maximum of 14 days (the limit established by the *Criminal Justice Act 2003*). Mr Green's statement appeared to indicate that if the Government wished to reinstate a longer period of pre-charge detention, this would be done by way of emergency legislation.[17]

At present, an order making power (contained in s 25(2) of the 2006 Act) could be exercised at any time to restore extended pre-charge detention - if the Government laid a draft of the order before Parliament (and it was approved by a resolution of each House) 28 day pre-charge detention could be reinstated.

Yvette Cooper raised this issue in the debate on the counter-terrorism review. She said:

> On Monday, the Home Secretary told the House that she could extend detention through an order under section 25 of the Terrorism Act 2006, yet her own review concludes that
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> "it would be very difficult to extend 28 days"
>
> in that way
>
> "in response to or during a specific investigation"
>
> owing to the length of time it would take to go through the House.
>
> The Home Secretary is putting the House in a very difficult position. The old powers lapsed on Monday; her review says that she may need to restore them quickly to deal with a difficult case; the order making power will take too long and the emergency legislation is not ready.[18]

The review considered the necessity of retaining extended pre-charge detention. It noted that:

> 8. Both opponents and supporters of 28 days have disagreed over its necessity in previous cases. To date 11 individuals have been held for over 14 days pre-charge detention – nine were arrested in Operation Overt (the so-called 'transatlantic airline plot' in 2006), one in Operation Gingerbread (a Manchester-based arrest in 2006) and one in Operation Seagram (the London Haymarket and Glasgow airport attacks in 2007). Six of these 11 people were held for the maximum 27-28 days: three were charged, three released without charge. Terrorist suspects were last held for more than 14 days in 2007. The review heard arguments from opponents of the powers that some

[16] Joint Committee on Human Rights, Counter-Terrorism Review, HC 797-i, 8 February 2011, Qq51-56
[17] HC Deb, 20 January 2011, c 1013
[18] HC Deb, 26 January 2011, cc 310-11

of these people could have been charged earlier, and that not all those charged post-14 days were subsequently convicted.

9. The limited number of times that the powers have been required has been used to support the claims of both supporters and opponents; the former have argued that the safeguards in place are working and the exceptional nature of the powers has been recognised; the latter that the powers are not routinely needed.[19]

The review made the following recommendation on the issue of pre-charge detention:

Recommendations

26. The review concluded that the limit on pre-charge detention for terrorist suspects should be set at 14 days, and that limit should be reflected on the face of primary legislation. The review accepted that there may be rare cases where a longer period of detention may be required and those cases may have significant repercussions for national security.

27. The review found that there were challenges with many of the options for a contingency power, particularly if it was intended to extend the period of detention during an investigation. Parliamentary scrutiny of a decision to increase the maximum period of detention in the wake of a particular investigation carried some risks of prejudicing future trials and would need to be handled particularly carefully.

28. The review, therefore, recommends that:

i. The 28 day order should be allowed to lapse so that the maximum period of pre-charge detention reverts to 14 days. The relevant order making provisions in the Terrorism Act 2006 should be repealed.

29. In order to mitigate any increased risk by going down to 14 days, the review recommends:

ii. Emergency legislation extending the period of pre-charge detention to 28 days should be drafted and discussed with the Opposition, but not introduced, in order to deal with urgent situations when more than 14 days is considered necessary, for example in response to multiple co-ordinated attacks and/or during multiple large and simultaneous investigations.

30. The review recommends the following further changes:

iii. The post-charge questioning provisions in the Counter Terrorism Act 2008 should be commenced as an additional investigative tool and their impact on the need for pre-charge detention should be kept under review. This could help in individual prosecutions and may encourage terrorist suspects to assist investigators either by turning 'Queen's Evidence' – i.e. becoming a witness for the Crown – or by providing intelligence (further work, separate to the review, is being taken forward to increase the evidence and intelligence dividend from defendants and prisoners in terrorism cases).

iv. Part of the independent reviewer of terrorism legislation's role should include publishing reports following any use of pre-charge detention beyond 14 days.

v. The enhanced safeguards for terrorist suspects in detention in the Coroners and Justice Act 2009 should be commenced as soon as possible. These relate to strengthening the role of independent custody visitors and establishing in legislation

[19] Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004

> the role of the independent reviewer of terrorism legislation in reporting on the treatment of those in pre-charge detention.
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> vi. The Government should make clear that it can see no scenario that would ever require the use of 42 days pre-charge detention.

Subsequent developments

A clause to omit s 25 of the 2006 Act is contained in the *Protection of Freedoms Bill.* This would have the effect of removing the order making power contained in the 2006 Act (ensuring that it was not possible to reinstate 28 day pre-charge detention through the use of that provision).

The draft legislation mentioned in the review was published on 11 February 2011 as the *Draft Detention of Terrorist Suspects (Temporary Extension) Bills.* The Explanatory Notes to the Draft Bills indicate that both would have the effect of extending the maximum period of pre-charge detention to 28 days for a period of three months, should either of them be introduced and approved by Parliament. "One bill could be used immediately while the order-making provisions of the 2006 Act are still in force and the other once those provisions have been repealed."

The draft legislation will be subject to pre-legislative scrutiny. The Government has indicated that it would only be brought forward in "exceptional circumstances."

Terrorism Bail

Lord Carlile and the Joint Committee on Human Rights have both previously suggested the introduction of a terrorism bail power. In a report addressing 'Operation Pathway', Lord Carlile noted that once a person has been arrested under s 41 of the *Terrorism Act 2000* "they cannot be granted bail during that detention whilst further enquiries continue. This is to be compared with the situation in Northern Ireland, where bail was always available from a High Court judge even when the arrest was in respect of generic terrorism; and with immigration law, under which SIAC has the power to grant bail."

The review examined the arguments for replacing extended pre-charge detention with a special pre-charge bail regime, but rejected this option on the grounds that:

> [T]here would be risks for public safety in releasing terrorist suspects when the nature and extent of their involvement in terrorism was still being investigated. Police bail was unlikely, therefore, to be a substitute for extended pre charge detention.[20]

2.3 Groups that incite hatred and violence

Groups that are "concerned in terrorism" – meaning that they commit, prepare for, encourage, promote or are otherwise involved in serious violence designed to intimidate the public or a section of the public for the purpose of advancing an ideological, religious or political cause – can be proscribed (banned) under the *Terrorism Act 2000*.

Detailed information about the proscription regime can be found in the Library Standard Note The Terrorism Act 2000: Proscribed Organisations.

The review stated that there are, however, no equivalent powers currently available to proscribe or ban groups which espouse or incite hatred or other forms of violence which falls

[20] Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004, p 11

outside the criteria contained in the 2000 Act. The review considered whether changes should be made to the law to address this issue.

It concluded that:

> i. It would be disproportionate and possibly ineffective to widen the definition of terrorism or lower the proscription threshold to try to include groups which incite hatred and violence. There would be unintended consequences for the basic principles of freedom of expression.
>
> ii. The focus for tackling groups of concern who do not meet the statutory test for proscription should continue to be the prosecution of people who have been engaged in illegal activities.
>
> iii. The Department for Communities and Local Government is also taking forward work to tackle intolerance and non-violent extremism which falls short of terrorism. This work is directly relevant to the issues considered here.[21]

2.4 Stop and Search Powers

Sections 44 to 46 of the *Terrorism Act 2000* (referred to frequently as "section 44") enable a police constable to stop and search pedestrians or vehicles within an authorised area for the purposes of searching for articles of a kind which could be used in connection with terrorism, whether or not the constable suspects such articles are present. The power can only be used in a place and during a time where an authorisation is in place. An authorisation may be made by a senior police officer but must be confirmed by the Secretary of State if it is to last more than 48 hours.

The extensive use of stop and search powers (without the need for the police to demonstrate a 'reasonable suspicion' that someone was involved in illegal activity) had been criticised by civil liberties groups and the Government's Independent Reviewer of Terrorism Legislation. (However, it is worth noting that while he criticised the way the police used the power, Lord Carlile indicated that he was not in favour of repealing s 44 since he thought retention was both necessary and proportionate). Complaints included the targeting of certain ethnic or religious groups, the fact that people who fell completely outside suspect profiles were being stopped to 'balance the numbers', and the fact that the entirety of London had been designated for the purposes of s 44 (allowing the police to use the powers).

It was also suggested that the police were using s44 of the 2000 Act (possibly in combination with a new provision introduced under s76 of the *Counter-Terrorism Act 2008*, precluding photographing the police without reasonable excuse) to stop people photographing public buildings and (perhaps of more concern) recording footage of public demonstrations. This became an issue following the death of Ian Tomlinson at the G20 protests in 2009. The Parliamentary Joint Committee on Human Rights (JCHR) has suggested that there is not a problem with the legislation governing photography *per se*, but that the actions of the police could have a 'chilling effect' on legitimate activities.

Following a decision of the European Court of Human Rights in the case of *Quinton and Gillan v UK* in 2010, Theresa May, made a statement in July 2010 indicating that she was introducing "interim guidelines for the police". The test for authorisation for the use of section 44 powers was changed from requiring a search to be "expedient" for the prevention of terrorism, to the stricter test of its being "necessary" for that purpose.

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[21] Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004, p 32

More importantly, officers would not in future be able to search individuals using section 44 powers; instead, they will have to rely on section 43 powers, which require officers to reasonably suspect the person to be a terrorist. Officers are now only able to use section 44 in relation to searches of vehicles.

The review considered the long-term future of these powers, taking as its starting point "the need for the powers to comply with the ECtHR ruling and the ECHR generally and to reflect the commitment in the Coalition Programme to introduce safeguards 'against the misuse of anti-terrorism legislation'".

The review stated that:

> Lord Carlile, the statutory independent reviewer of terrorism legislation, and some civil liberty groups (including Liberty, who represented Mr. Gillan and Ms. Quinton in the European Court case), have indicated that a restricted form of section 44 could be justified and proportionate. In their contribution to the review, Liberty said they had *"always maintained that exceptional stop and search powers (i.e. stop and search without suspicion) may be justified in certain very limited circumstances – for example where, due to a particular event or the nature of a particular areas, it is reasonably suspected that an act of terrorism may be planned; or where specific information linked to a place or event has been received which indicates the same."*

The review recommended:

- Section 44 should be repealed and replaced with the new power.
- Section 43 should be amended to include the power to stop and search a vehicle in which a suspected terrorist is stopped; and that provision is made for the stopping and searching of vehicles which are reasonably suspected of being used for purposes of terrorism.
- 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.
- The maximum period of an authorisation should be reduced from the current maximum of 28 days to 14 days.
- 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.
- 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.
- 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).

- 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.[22]

In relation to the issue of photography, the review "judged that over the last two years the guidance available to the police had improved significantly". It suggested that:

> The guidance appears to have reduced, though not eliminated, concerns about the alleged misuse of counter-terrorism powers by the police.

It concluded that "the proposed curtailment of section 44 powers should significantly reduce concerns that counter-terrorism laws are being used against photographers" and that the relevant counter-terrorism powers (sections 57, 58 and 58A of the *Terrorism Act 2000*) should be retained.

Provisions to reform the use of stop and search powers have been included in the *Protection of Freedoms Bill.*

2.5 Deportation of foreign nationals engaged in terrorism

Background information on the difficulties in deporting suspected international terrorists can be found in the House of Commons Library Note Deportation of Individuals Who May Face the Risk of Torture.

As the counter-terrorism review sets out, while the primary means of dealing with people engaged in terrorist related activity in this country will be by prosecution in the courts where such a prosecution is not possible (and where the individuals concerned are foreign nationals) it may be possible to deport them.

There are some difficulties with this process, however, since any deportation has to be undertaken in compliance with obligations under the *European Convention on Human Rights*. Following the well known case of *Chahal v UK*, it became apparent that suspects could not be deported to third countries where there was a real risk that they would be tortured or subjected to ill treatment. The judgment in *Chahal* was more recently upheld by the Grand Chamber of the European Court of Human Rights in the case of *Saadi v Italy.*

In order to try to get around this prohibition, when seeking to deport foreign national terrorist suspects, the Government may seek diplomatic assurances from the receiving state about the person's treatment on return, so ensuring that the deportation is consistent with human rights obligations.

The review notes that:

> The UK currently has generic arrangements with five countries: Algeria, Jordan, Lebanon, Libya and Ethiopia. Nine people have been deported under these arrangements with Algeria, and there are currently fourteen other cases in the appeals process. Those subject to deportation can be detained in this country or subject to stringent bail conditions while they appeal. Deportation decisions based on these arrangements have been upheld by domestic courts, including the House of Lords.[23]

The UK is currently awaiting a judgment from the Strasbourg court in the case of Abu Qatada, which the Government acknowledges could "have a significant impact on

[22] Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004, pp 18-19
[23] Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004, p 33

deportation policy."[24] Neither the domestic, nor the Strasbourg courts, have accepted the idea of "deportation with assurances" in every case. Moreover, the policy has been subject to criticism by human rights NGOs.[25]JUSTICE has said that:

> Algeria, Jordan and Libya are all countries that have signed and ratified the UN Convention Against Torture and yet each is acknowledged by the Foreign Office to be regularly in breach of it. Promises against torture from a government that tortures its own citizens are worth nothing.[26]

Lord Macdonald considered the issue and concluded (in contrast), that:

> 4. [...] a number of arrangements are in place and some nine individuals have been deported under their protection. Importantly, I have seen no credible evidence that any of these individuals have experienced mistreatment since their removal from this country.
>
> 5. Some NGOs have suggested to the Review that the UK's programme of deportations gives succour to regimes that torture or, worse, that it actively encourages the practice of abuse and mistreatment.
>
> 6. My conclusion on the evidence is that the opposite is more likely to be true. It seems to me that the very process of engaging with other countries on the issue of the appropriate treatment of prisoners, and obtaining guarantees in that regard, is likely to have a positive effect upon the regimes in question. I cannot see how UK government insistence upon the proper treatment of detainees encourages torture and I conclude that it does not.[27]

The review examined the scope for extending the policy to additional countries (notably those whose nationals have engaged in terrorist related activity in the UK). It recommended that the Government should:

> i. Actively pursue deportation arrangements with more countries, prioritising those whose nationals have engaged in terrorist related activity here or are judged most likely to do so in future.
>
> ii. Continue to pursue generic arrangements as a preference, but seek assurances for specific individuals, without a wider arrangement, if viable assurances can be obtained.
>
> iii. Examine how to increase the number of expert witnesses the Government provides in court; consider commissioning an annual independent report on deportations under this policy; and explore options for improving monitoring of individuals after their return.
>
> iv. Engage actively with other countries, more international organisations, and more NGOs to increase understanding of, and support for, this policy in the context of our work to promote and improve human rights around the world.[28]

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[24] In the case of *RB & U (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10 The House of Lords ruled that the UK could lawfully deport two men to Algeria and one man to Jordan (the Muslim cleric Abu Qatada) on national security grounds. They have appealed to the European Court of Human Rights in an effort to halt their deportation

[25] For an analysis of this position, see for example: Metcalfe, E. *The false promise of assurances against torture*, JUSTICE Journal, Volume 6, Number 1 (May 2009)

[26] JUSTICE, Press release, 28 May 2009

[27] Lord Macdonald, Review of Counter-Terrorism and Security Powers, Cm 8003, p 8

[28] Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004, p 35

2.6 The Regulation of Investigatory Powers Act

The review considered two issues that are covered by the *Regulation of Investigatory Powers Act 2000* (RIPA).[29]

Local Authority Use of RIPA powers

The first issue considered by the review was local authorities' use of surveillance techniques and other RIPA powers. The review recommended that these powers should be subject to additional restrictions, due to concerns about their use in less serious investigations (including, for example, dog fouling or checking an individual resides in a school catchment area).

Accordingly, the Government has undertaken to stop local authority use of RIPA powers unless it is for the detection of serious crime and approved by a magistrate, in addition to the authorisation needed now from a local authority senior manager (at least Director level). Furthermore the review recommended that the use of RIPA to authorise directed surveillance should be confined to cases where the offence under investigation carries a maximum custodial sentence of 6 months or more.[30]

Access to Communications Data

As the review notes, communications data is created and processed by communications service providers (CSPs) and may be retained by them if necessary for their own purposes. There are regulations (the *Data Retention Regulations 2009*, implementing the EU Data Retention Directive) under which CSPs are required to keep certain types of communications data for longer periods so that public authorities may apply for access to it on a case by case basis. The *Anti-Terrorism, Crime and Security Act 2001* (ATCSA) and its Code of Practice also provide for voluntary agreements on the retention of certain communications data by CSPs for purposes relating to national security.

RIPA provides the only legal framework designed specifically to govern the acquisition and disclosure of communications data and is meant to ensure that the acquisition and handling of communications data is consistent with the provisions of the *European Convention on Human Rights.* Although RIPA is the principal legal framework under which communications data is acquired from CSPs, it may also be acquired by various public authorities under many other regimes.

The review considered, amongst other things, how safeguards with respect to the acquisition of communications data by public authorities could be increased and what changes to RIPA might be necessary. It recommended that:

> i. Government departments, agencies, regulatory authorities and CSPs should be consulted to establish the range of non-RIPA legislative frameworks by which communications data can in principle be acquired from CSPs, and for what purposes. This consultation is currently taking place.

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[29] N.B. This subject is principally dealt with by Grahame Danby, the specialist for privacy and data protection enquiries.

[30] However, due to the importance of directed surveillance in corroborating investigations into underage sales of alcohol and tobacco, the review recommended that the Government should not seek to apply the threshold in these cases. The threshold should not be applied to the two other techniques (namely Communication Data – such as such as telephone billing information and Covert Human Intelligence Sources) because of their more limited use and importance in specific types of investigation which do not attract a custodial sentence. Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004, p27

ii. These legal frameworks should then be streamlined to ensure that as far as possible RIPA is the only mechanism by which communications data can be acquired.[31]

3 Other issues

3.1 A review of the CONTEST counter-terrorism strategy

The CONTEST counter-terrorism strategy is currently organised into four work streams, namely:

- Pursue – to stop terrorist attacks;
- Prevent – to stop people from becoming terrorists or supporting violent extremism;
- Protect – to strengthen our protection against terrorist attack;
- Prepare – where an attack cannot be stopped, to mitigate its impact.

The Home Office has said that CONTEST (which was last reviewed in 2009) is currently subject to a further review. The Home Office Business Plan suggests that this should be published in April 2011.

3.2 Prevent

In addition to the above mentioned revisions to CONTEST, the Government also announced that it would undertake a specific review of the 'Prevent' strand of CONTEST. The Home Office has indicated that this is designed to lead to a clear separation between 'Prevent' which will retain a Home Office lead and 'integration' which will be addressed by the Department of Communities and Local Government. This review commenced in December 2010 and was due to be published in January 2011.[32]

3.3 Intercept Evidence

The use of intercept evidence in terrorism cases did not form part of the review of counter-terrorism powers. Nonetheless, some commentators have argued that the admission of intercept evidence would aid in the prosecution of terror suspects. The issue has been long running and a briefing note on the historical background is available.[33]

A Written Ministerial Statement, setting out the Coalition Government position, was made on 26 January 2011. It stated that:

> **Secretary of State for the Home Department (Theresa May):** The lawful interception of communications is a vital tool for tackling the threat posed by terrorism and other serious crime.
>
> The Coalition Government is committed to building on this by seeking to find a practical way to allow the use of intercept evidence in court.
>
> The issues are complex. Because of this a first step has been to review previous analysis, including that in the Privy Council review (Cm 7324) and in 'Intercept as

[31] Home Office, Review of Counter-Terrorism and Security Powers, Cm 8004, p 29

[32] In a recent Structural Reform Plan Monthly Implementation Update, the Home Office stated that work on this had not commenced in December 2010 and that although Public consultation and regional events had taken place in November and December 2010, the work to develop a new Prevent strategy would commence in January 2011 with a planned end date of February 2011

[33] The Use of Intercept Evidence in Terrorism Cases, SN/HA/5249

Evidence a report' (Cm 7760). Having done so, the Government is now in a position to set out next steps.

As recognised in the Privy Council review the State has an overriding duty to protect the public, including from threats such as international terrorism and serious organised crime. Bringing prosecutions against and securing convictions of offenders is an important means of doing so.

Equally, the effective use of intercept as intelligence already makes a vital contribution to public protection and to national security more widely.

Therefore, the programme of work to be undertaken will focus on assessing the likely balance of advantage, cost and risk of a legally viable model for use of intercept as evidence compared to the present approach. The intention is to provide a report back to Parliament during the summer.

Recent work on intercept as evidence has benefited significantly from the experience of the Advisory Group of Privy Counsellors, comprising the Right Honourable Sir John Chilcot, the Right Honourable and noble Lord Archer of Sandwell, my noble friend, the Right Honourable Lord Howard of Lympne and the Right Honourable Sir Alan Beith MP. I am pleased to be able to confirm that the members of the Advisory Group have, at my request and that of the Prime Minister and Deputy Prime Minister, agreed to continue to provide assistance and oversight.

3.4 The use of intelligence material by the courts

The recently published National Security Strategy (NSS) acknowledged certain difficulties that have developed where the security and intelligence services have obtained intelligence from third countries which may not share British values on the rights of individuals. In particular, the courts have been faced with a series of allegations that the UK security services have been "complicit in torture" or 'extraordinary rendition'. During the course of the litigation, which was settled by the Government in November 2010, concerns were expressed over the court's approach to the 'control principle' on intelligence sharing. The NSS indicates that it is not always easy to strike an appropriate balance, but that the Government will be publishing a Green Paper in 2011, "seeking views on a range of options, designed to enable the courts and other oversight bodies to scrutinise modern day national security actions effectively, without compromising national security".

Interestingly, despite the fact that the Government has settled the 'complicity in torture' litigation, it was reported recently that the Supreme Court has started hearing *Al Rawi and others* (Respondents) *v The Security Service and others (Appellants)* on the issue of *whether* it is open to a court, in the absence of statutory authority, to order a 'closed material procedure' for part (or conceivably, the whole) of the trial of a civil claim for damages in tort and breach of statutory duty.[34]

[34] http://ukscblog.com/in-the-supreme-court-wc-24-january-2011