YEAR 10

Six Extraordinary State Powers at the Close of the First Decade of the War on Terror

Response
From SACC to the Coalition Government's
Review of Counter-Terrorism and Security Powers 2010

Scotland Against Criminalising Communities (SACC)
5 October 2010

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SACC's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010

Executive Summary

The Review

- SACC welcomes the review but regrets that, under its terms of reference, it falls well short of being a comprehensive review of counter-terrorism and security powers.

Control Orders (including alternatives)

- Control orders should be abolished; the Prevention of Terrorism Act 2005 should be repealed.
- Alternative measures are neither necessary nor desirable, except in relation to individuals reasonably suspected of posing a direct physical threat to the public.
- Where individuals are reasonably suspected of posing a direct physical threat to the public but cannot be charged with a criminal offence, the danger they pose should be managed by precautionary policing and intelligence work under existing powers.
- It should not be assumed that people currently under control orders can be reasonably suspected of posing a direct physical threat to the public.
- No confidence can be placed in the capacity of the security and intelligence services to make a meaningful and fair assessment of the risk posed by individuals under circumstances of the sort covered by control orders.
- Reparations should be made to people whose human rights were violated by control orders.

Section 44 Stop and Search Powers and the use of Terrorism Legislation in Relation to Photography

- Section 44 of the Terrorism Act 2000 should be repealed. Blanket stop and search powers are unnecessary, counterproductive and open to discriminatory use. Existing police powers to stop and search people where there are reasonable grounds for suspicion are more than sufficient.
- Any legislation capable of being used to restrict the right to photograph police officers is open to abuse and may lead to the suppression of evidence about other police abuses, especially during demonstrations and protests.
- Section 58 of the Terrorism Act 2000, which police have used to threaten photographers with prosecution, should be repealed, as should Section 76 of the Counter Terrorism Act 2008, which extends the scope of Section 58, and Section 57 of the Terrorism Act 2000, which could be used in similar ways to Section 57. All these powers are much too widely-drawn.

The use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities and access to communications data more generally

- Directed surveillance (covert monitoring) and the use of covert human intelligence sources (informers and undercover agents) by local authorities should not be permitted. These forms of covert surveillance are severe infringements of the right to privacy and are only appropriate in relation to serious offences. Where local authorities suspect people of serious offences, they should pass their information to the police for investigation.
- Powers to access communications data by all public bodies, including the law enforcement agencies and the security and intelligence services, should be subject to prior judicial authorisation.
- The grounds on which access to communications data may be granted should be tightened.
- Britain should urge the EU to drop the EU Data Retention Directives, which require Communication Service Providers to retain data that they collect.
- Part 11 of the Anti-Terrorism, Crime and Security Act, dealing with the retention of communications data, should be repealed.

Extending the use of 'Deportation with Assurances' in a manner that is consistent with our legal and human rights obligations

- People should not be deported to countries where they would be at risk of torture.
- A diplomatic note promising that a deportee will be safe from torture, issued by a country known to practice torture, can never be an adequate assurance that the deportee and their family will be safe. The only adequate assurance of safety is a clean track-record on torture within the destination country coupled with a proven record of effective implementation of the provisions of the UN Convention Against Torture and with due regard for any special circumstances that put the deportee at risk of torture or ill-treatment.
- Legislation should be introduced to make diplomatic notes inadmissible as evidence of safety from torture.
- Secret evidence should not be admissible in deportation hearings.
- Britain should work towards a torture-free world by withdrawing or reducing cooperation in policing, law-enforcement and intelligence with countries that practice torture.
- Irrespective of the risk of torture, the deportation of foreign nationals on national security grounds is normally undesirable. Such deportations are arbitrary, discriminatory and even if well-founded they are unlikely to lessen the risk from international terrorism. Foreign nationals suspected of terrorism should be charged and brought to court.

Measures to deal with organisations that promote hatred or violence

- Police should make use of existing legislation to deal with behaviour that incites hatred or violence.
- New powers to proscribe organisations that are thought to promote hatred or violence are unnecessary and would be counter-productive.
- Sections 1, 2 and 21 of the Terrorism Act 2006, which extend the power to proscribe organisations under the Terrorism Act 2000 to include organisations that do not engage in violence or terrorism but are considered to encourage it, should be repealed.
- There is no case for banning the Islamic political party Hizb-ut-Tahrir, on these or any other grounds.

The detention of terrorist suspects before charge, including how we can reduce the period of detention below 28 days

- The legislation covering pre-charge detention in terrorism cases should be repealed, allowing pre-charge detention for terrorism suspects to revert to that permitted in other criminal cases. The ending of excessive pre-charge detention for terrorist suspects would be a powerful sign that Britain can deal with terrorism within the ordinary framework of the law and would give new confidence to our minority communities.

Powers to Freeze Terrorist Assets

- Current powers to freeze terrorist assets are unjust and oppressive and need urgent reform

Equality Impact

- Control orders, Section 44 Stop and Search Powers, and the use of terrorism legislation in relation to photography have all had specific negative impacts on equality. The repeal of these powers would be a step towards restoring the equal enjoyment by all of democratic rights and freedoms.
- Changes in the law are required in order to guarantee adequate and equal protection from torture for everyone living in Britain.

1 Introduction

Scotland Against Criminalising Communities (SACC) was set up in early 2003 to campaign for the repeal of Britain's anti-terrorism laws and to offer solidarity to the communities most affected by them[1]. SACC is affiliated to the UK-wide Campaign Against Criminalising Communities (CAMPACC). SACC is not affiliated to any political party or faith group.

SACC regards it as self-evident that the prevention of terrorist atrocities is in the public interest. But we do not think that Britain's anti-terrorism laws are an effective or a just way of doing that. And we think that some of the actions included in the statutory definition of terrorism should be regarded as legitimate forms of political activity, as indeed they were until the Terrorism Act 2000 became law.

The Home Secretary has announced a "rapid review" by the Home Office of key counter-terrorism powers "in order to restore the balance of civil liberties"[2]. The terms of reference of the review include an invitation for contributions from members of the public and interested organisations. *Year 10* is SACC's contribution to the review.

It is over 10 years since Parliament passed the controversial Terrorism Act 2000. The Act is the foundation for 4 subsequent counter-terrorism acts[3]. For much of the decade British forces have been engaged in wars in Afghanistan and Iraq which, in SACC's view (and in the view of many experts), greatly increase the risk of terrorism in Britain.

The devastating terrorist attack in London on 7 July 2005 and the essentially unsuccessful attack at Glasgow airport on 30 June 2007 were perpetrated wholly or largely in response to Britain's military involvement in the Middle East. A number of other small-scale terrorist attacks – almost all of them unconnected with the Middle East or with Islam – have been carried out at various locations around Britain over the last 10 years. There have also been terrorist attacks in Northern Ireland, linked to the still-glowing embers of the conflict there.

Juries in Britain have in a number of instances found people guilty of offences related to the planning or preparation of terrorist atrocities that did not come to fruition. In still other cases, juries have convicted people of terrorism offences without the prosecution offering any evidence that a specific terrorist atrocity was being planned. Many terrorist plots are said by officials to have been thwarted without reaching the courts, although no verifiable evidence for these claims is available.

Anti-Muslim racism is becoming an ever more potent and destructive factor in British life, fuelled in part by perceived links between Islam and terrorism. Avowedly racist organisations, such as the British National Party (BNP), the English Defence League (EDL) and the Scottish Defence League (SDL) are becoming increasingly influential. Minority communities, notably the Kurds and the Tamils, have seen their social and political lives severely constrained by the proscription in the UK of armed political movements active in their home territories.

British counter-terrorism legislation and British counter-terrorism practices around the world have brought the British Government into conflict with international human rights laws and standards.

In these circumstances, SACC believes that a comprehensive review of counter-terrorism policy and legislation is desperately needed. We are disappointed that the Government has chosen instead to initiate a very limited review focussing on just six counter-terrorism powers. We are convinced that a full review will, in the end, prove necessary.

However, we agree with the Government that the six counter-terrorism powers selected for review are matters of great importance and deserve urgent attention. We are glad to have an opportunity to contribute our views on these matters.

It is widely accepted that counter-terrorism powers need to strike an appropriate balance between respect for civil liberties and the need to counter the terrorist threat. However, we think that our

[1] SACC's aims are set out in full at www.sacc.org.uk/about
[2] Press Release from the Conservative Party, 14 July 2010
[3] the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006 and the Counter-Terrorism Act 2008. These Acts and the Terrorism Act 2000 are collectively described in this document using terms such as "the anti-terrorism laws" and " counter-terrorism laws" and "the terrorism laws."

recommendations are applicable irrespective of the level of the threat, so we have not found it necessary to include a detailed discussion of the threat level.

Year 10 reflects SACC's own response to the diverse experiences reported by groups and individuals with whom we work both formally and informally. We hope that other groups besides SACC and the major, well-funded NGOs (whose work is, of course, indispensable) will be able to contribute to the review in order to provide it with the widest possible input.

The views and recommendations in *Year 10* have been developed, strictly for the purposes of our response to the review of counter-terrorism and security powers, from SACC's long-standing policy of opposing the current terrorism laws and any other laws that criminalise political activity, and from public statements issued by SACC over the years. They should not be assumed to represent fixed SACC policy.

2 Six Extraordinary Powers

According to the terms of reference set out by the Home Office, the review will consider six key counter-terrorism and security powers:

1. Control orders (including alternatives)

2. Section 44 stop and search powers and the use of terrorism legislation in relation to photography

3. The use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities and access to communications data more generally

4. Extending the use of 'Deportation with Assurances' in a manner that is consistent with our legal and human rights obligations

5. Measures to deal with organisations that promote hatred or violence

6. The detention of terrorist suspects before charge, including how we can reduce the period of detention below 28 days

The review will help to inform whether any additional safeguards should be introduced in relation to the powers to freeze terrorist assets.

The review will not consider the use of intercept as evidence in criminal proceedings or the modernisation of our interception capabilities.

The Government says that an equality impact assessment will be produced on the recommendations made by the review.

The six powers selected for review are far from being the only ones that have attracted controversy for the threat they pose a threat to human rights and civil liberties. But they illustrate many of the most alarming features of the counter-terrorism measures introduced over the last decade.

3 Countering Terrorism while Respecting Human Rights – Some Recurring Themes

The following themes recur in relation to several of the powers that fall within the terms of reference of the review.

3.1 The Statutory Definition of Terrorism

> **Terms of Reference:** Control orders (including alternatives); Section 44 stop and search powers; the use of terrorism legislation in relation to photography; detention of terrorist suspects before charge

The Terrorism Act 2000 re-defined terrorism in UK law. The new definition is problematic because it criminalises some kinds of non-violent action and because it applies to action directed against any government in the world, no matter how oppressive. It is at odds with much existing non-legal usage of

the term "terrorism" and with elements of international law that confer upon people a right to resist oppression.

SACC's views on the definition of terrorism are set out more fully in our May 2006 submission to Lord Carlile's Independent Review of the Definition of Terrorism in UK Law.[4] Lord Carlile's review concluded that the current definition is "useful and broadly fit for purpose."[5] We believe that this conclusion was mistaken and that the over-wide definition of terrorism is one of the reasons why Britain's counter-terrorism laws repeatedly encroach on civil liberties, human rights and a basic sense of justice.

The wide definition of terrorism is one of the building blocks in the construction of widely-defined new criminal offences in the various anti-terrorism acts, including offences that police have used in relation to photography *(Part 5 of this document)*. The legislation dealing with control orders builds still further and even more precariously on this definition to create sanctions outside the criminal law *(Part 4 of this document)*.

Additionally, the definition amplifies to an unhealthy degree the extra powers provided to police under counter-terrorism legislation. In particular:

- it allows people suspected of a very wide range of activities (including activities previously regarded as legitimate) to be held for extended periods of time in pre-trial detention *(Part 8 of this document)*;
- it allows police making use of Section 44 Stop and Search powers *(Part 5 of this document*) to examine a very wide range of material.

3.2 Secondary Offences and the Institutionalisation of Suspicion

> **Terms of Reference:** Control orders (including alternatives); the use of terrorism legislation in relation to photography

Terrorist atrocities are offences under the ordinary criminal law. Current counter-terrorism laws create a considerable number of additional offences that are secondary in the sense that they do not involve an “act of terrorism” as defined in the Terrorism Act 2000. Instead, they involve behaviour that might be construed as being indicative of an intention to engage in an act of terrorism or to cause others to do so.

These offences are to some extent comparable to offences involving conspiracy or incitement, but they place a much lower burden on the prosecution to establish a link to an intended act of terrorism. Significant case law has developed around some of these secondary offences and has somewhat strengthened the need to establish such a link. But the offences are unquestionably draconian, even under the interpretations that have been developed, and unquestionably have a far wider scope than conspiracy or incitement offences.

SACC believes that the existence of offences of this sort is unjust and can lead to the conviction of people who have harmed no one, who pose no danger to society and who are not involved in any activity that can reasonably be described as terrorist. It can also lead to the suppression or chilling of activities that are necessary or desirable for the normal functioning of society.

Offences of this kind include Section 1 of the Terrorism Act 2006, which relates to statements that are "likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement" to terrorism; Section 57 of the Terrorism Act 2000, which relates to the possession of “an article in circumstances which give rise to a reasonable suspicion” that “possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism,” and Section 58 of the Act, which relates to collecting, making or possessing “a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism.”

[4] www.sacc.org.uk/sacc/docs/sacc_carlile_submission.pdf
[5] www.sacc.org.uk/sacc/docs/carlile-terrorism-definition.pdf

Police officers have used Section 58 to prevent journalists, tourists and others from taking photographs of landmarks, of public buildings and of police officers themselves *(see Part 5 of this document)*.

The separation of actionable behaviour from any proof of intent, and the institutionalisation of suspicion are carried still further in the Prevention of Terrorism Act 2005, which allows control orders to be imposed on individuals whose behaviour is not criminal but who are suspected by the Home Secretary of involvement in "terrorism-related activity," or on whom restrictions are thought to be necessary for purposes merely "connected with" protecting the public from a risk of terrorism.

3.3 Equality and Discrimination

Terms of Reference: Section 44 stop and search powers; the use of terrorism legislation in relation to photography; detention of terrorist suspects before charge; equality impact

Stop and Search powers that do not require "reasonable suspicion" can be applied on a police officer's hunch. Broadly-defined laws must inevitably be enforced selectively. Given the official focus of counter-terrorism strategy on "terrorists who claim to act in the name of Islam" and the widespread public association of Islam with terrorism, it is inevitable that hunches, discretion and selective law-enforcement will involve discrimination.

Innocent Muslims are much more likely than innocent non-Muslims to suffer unwarranted punishment in the shape of lengthy police detention before being released without charge. They are more likely to have to establish "reasonable excuse" for their behaviour before a court (for example in relation to Section 57 or 58 of the Terrorism Act 2000) in order to prove their innocence. They are more likely to fall victim to miscarriages of justice under ill-drafted terrorism laws.

SACC would like to see everyone in the legal process, from police officer to judge, make greater efforts to counter discrimination. But in the end, responsibility rests with Parliament. Parliament must provide legislation that is clear, that defines offences tightly and that is readily and straightforwardly capable of universal application. To do otherwise leads, predictably and inevitably, to discrimination.

3.4 Intelligence

Terms of Reference: Control orders (with alternatives); Extending the use of 'deportation with assurances' in a manner that is consistent with our legal and human rights obligations.

Intelligence currently plays a major role in counter-terrorism work. It also plays a significant role in other police activities unrelated to terrorism. But its counter-terrorism role is made qualitatively different by the central involvement of the Security Service (MI5) and by the involvement of the Secret Intelligence Service (MI6). The Security Service currently has no responsibility for dealing with non-political crime, even when it is of a serious nature.

Intelligence is particularly important in relation to control orders and deportations on national security grounds. It is generally the primary input to decision-making in these areas.

Great care is required in the use of intelligence material. Legal procedures generally strive for a high degree of transparency in order to achieve robust and fair outcomes. In law, as in science, scholarship and journalism, transparency and rigour are usually inseparable. Intelligence and intelligence assessments, on the other hand, can almost never be presented transparently.

There is an alarming tendency for officials and commentators to presume that intelligence represents a higher kind of truth than can be obtained from other viewpoints. The difficulties of presenting intelligence in court – or anywhere else where it might be rigorously and critically examined – are considered to be pedantic, technical and obstructive. This outlook can have very serious

consequences. It led US officials, in the months before the invasion of Iraq, to assert that intelligence provided a more meaningful insight into Iraqi weapons of mass destruction than UN weapons inspectors could achieve. They were utterly mistaken.

In addition to the generic difficulties involved in using intelligence, the conduct of the British security and intelligence services over the last decade has raised serious concerns:

- There is no reasonable doubt that the British security and intelligence services have been to some degree responsible for the torture and ill-treatment of rendition victims and Guantánamo detainees. The degree of responsibility may perhaps be established by the forthcoming torture inquiry and the civil action brought by former detainees.
- Intelligence officers giving evidence in open sessions of the Special Immigration and Appeals Commission (SIAC) have done so in a manner so opaque and evasive that it is very difficult to accept that they were acting in good faith or in any genuine public interest.

A comprehensive overhaul of the operation of the security and intelligence services is desperately needed. In the absence of such an overhaul, their role in deportations and in the control order regime must be viewed with great caution.

4 Control Orders

Terms of Reference: Control orders (including alternatives)

4.1 Introduction

Control orders were introduced under the Prevention of Terrorism Act 2005 in response to a ruling by the Law Lords[6] against the internment, under Part IV the Anti-Terrorism Crime and Security Act 2001 (ATCSA), of foreign nationals suspected of links to terrorism.

The use of control orders is closely linked to the use of deportation with assurances. Both strategies have been used against foreign nationals initially interned under ATCSA.

Control orders allow the Home Secretary, in a variety of widely defined circumstances, to impose a range of restrictions, including restrictions amounting to house arrest, on anyone, whether a British citizen or a foreign national.

Control orders are remarkable because:

- they allow the Government to place punitive restrictions on people on the basis of mere suspicion;
- the suspected behaviour that can trigger a control order includes a range of behaviour that is not criminal;
- people subject to control orders had (prior to a Law Lords ruling in June 2009[7]) no right to know the evidence against them;
- people subject to control orders have minimal recourse to the courts to seek redress.

45 people had been placed under control orders at one time or another by December 2009[8]. On 10 September 2010, 9 control orders were in force, all of them on British citizens[9].

[6] A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), 16 December 2004

[7] Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action, 10 June 2009

[8] Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew QC, 1 February 2010

[9] Written ministerial statement on control orders: 11 June 2010 – 10 September 2010

The control order legislation was drafted in haste to allow the internment by other means of foreign nationals held until that time under ATCSA. It was not so much a serious attempt to address the human rights issues raised in connection with ATCSA, as a temporary expedient calculated to evade the Law Lords ruling and save Government face until human rights challenges to the new legislation emerged, as they were bound to.

Control orders were initially directed almost exclusively against foreign nationals. The inclusion in the Prevention of Terrorism Act 2005 of the power to impose control orders on British citizens protected the legislation from challenge on the grounds of discrimination – one of the grounds on which the Law Lords had ruled against ATCSA in December 2004.

A British citizen was placed under a control order during the first months of the control order regime. Since then, the proportion of British citizens amongst people under control orders has grown more or less steadily. All of the people placed under control orders to date have been men.

The secrecy surrounding appeals against control orders parallels the secrecy that previously surrounded appeals to the Special Immigration Appeals Commission (SIAC) against ATCSA detention and that still surrounds appeals to SIAC against security-related deportation. For foreign nationals suspected by the Government of links to terrorism, the control order regime and SIAC together constitute a unified system, secretive and separated from the normal machinery of British law.

A historic Law Lords ruling in June 2009 apparently stripped the control order regime of some of its secrecy and arbitrariness. It is unclear whether the current control order regime, as modified by the ruling, is capable of fulfilling the expectations placed on it. There have been some indications that the Home Office may attempt to fly under the radar of the ruling, for example by making minimal disclosures, by repeated changes of the grounds for imposing a control order on the same individual, or by using control orders whose effects may be thought insufficiently severe to trigger the right to a fair trial.

Lord Carlile of Berriew QC, in his February 2010 review of the Prevention of Terrorism Act 2005[10], gave strong support to the control order regime and considered at some length the possible ways of dealing with the Law Lords ruling, without arriving at any satisfactory strategy. This might easily be taken as a green light for the use by the Home Office of a variety of "under the radar" approaches. To do so would, in SACC's view, be deeply misguided.

The difficulties created by the Law Lords ruling are no doubt part of the reason for the welcome decision by the new Coalition Government to include control orders in its review of counter-terrorism powers.

The history of control orders is one of scare-mongering, obstinacy and political posturing coupled with a complete disregard for the human cost to the individuals concerned and their families. These individuals (like those targeted for "deportation with assurances") have experienced a chain of events evocative of Victor Hugo's *Les Misérables*. The Prevention of Terrorism Act 2005 is one the most draconian and offensive pieces of legislation to have disgraced British statute books in modern times. The current review of counter-terrorism powers provides a welcome opportunity to draw a line under this shameful story.

4.2 Statutory Basis for Control Orders

Under Section 1(2) of the Prevention of Terrorism Act 2005:

> *The Secretary of State may make a control order against an individual if he –*
>
> *(a)has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and*
>
> *(b)considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.*

Under Section 1(9) of the Prevention of Terrorism Act 2005:

> *For the purposes of this Act involvement in terrorism-related activity is any one or more of the following -*

[10] Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew QC, 1 February 2010

(a)the commission, preparation or instigation of acts of terrorism;

(b)conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so;

(c)conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so;

(d)conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity;

and for the purposes of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.

These provisions include elements that are almost identical to criminal offences defined in other anti-terrorism acts. But they also include elements that go far beyond any offences that currently exist in criminal law (including the anti-terrorism laws), or that could be included in criminal law without stretching fundamental legal principles to breaking point. In particular:

- under 1(2) (b), a person who is entirely blameless can be placed under a control order for reasons that are merely "connected with" protecting the public, perhaps because the animosity of a foreign government towards that person could lead to the public being put at risk, or because the person may impede some course of action without which the Home Secretary believes the public would be at risk;
- 1(2) (b) relates not to protecting the public from an "act of terrorism" (even construed as "an act of terrorism generally") , but from "terrorism" itself (as defined in the Terrorism Act 2000);
- under1(9) (c), various forms of association constitute grounds for a control order, human rights campaigners in contact with current or former detainees are at risk of a control order, friends of a person who, unknown to them, is believed to be involved in terrorism-related activities are at risk of a control order;
- 1(9) (d) creates a baffling circularity that appears to allow control orders to extend to an infinitely receding horizon of people associated indirectly with the initial subject of a control order.

A person can be placed under a control order for reasons best described as "reasons of state," with no requirement that there is even a suspicion that they are engaged in criminal activity or in any kind of activity that would ordinarily be regarded as blameworthy. Some of the people placed under control orders allege that the orders were linked to their refusal to work as informers for MI5[11]. The terms of Sections 1(2) and 1(9) of the Terrorism Act 2005 lend themselves to this sort of coercive use of control orders.

The prospects for challenging in court the interpretation of Sections 1(2) and 1(9), or of challenging the factual basis for a control order, have been greatly hampered by the secrecy surrounding control orders. This obstacle has been significantly reduced by the June 2009 Law Lords ruling, at least in the case of control orders that impose severe restrictions.

A control order can only be imposed for a period of a year, but the order can be renewed indefinitely. Breach of a control order is a criminal offence carrying a possible jail sentence of up to 5 years or an unlimited fine.

4.3 Restrictions on people under control orders

The Home Secretary can impose a very wide range of restrictions on a person under a control order, including confinement to the person's house for up to 16 hours a day (this limitation followed a Law Lords ruling in October 2007[12] against longer periods of confinement). Daily confinement for periods falling short of 24 hours was described as house arrest when imposed by the apartheid regime in South Africa and should be called house arrest in Britain too.

Sanctions that have been used also include electronic tagging, restrictions on the use of the internet or mobile phones, vetting of visitors, restrictions on meeting with other people and restrictions on the

[11] for example, see evidence given by solicitor Gareth Peirce to the Joint Committee on Human Rights, 3 February 2010

[12] Secretary of State for the Home Department (Appellant) v. JJ and others (FC) (Respondents), 31 October 2007

distance the person can travel from their home. Restrictions of this sort are reminiscent of the banning orders imposed by the apartheid regime in a South Africa. The comparison is particularly apt in view of the potentially highly political grounds on which a control order may be imposed.

Some people under control orders have been required to live at locations distant from their normal family home. In other words, they have been subject to internal exile.

All these restrictions affect not only the person under a control order, but their family as well. The restrictions are clearly severely punitive, although their punitive character is supposedly only a side-effect of a control order. Anyone subjected to punishment of this severity, or anything approaching it, must undoubtedly fall under the protection of Article 6 of the European Convention on Human Rights, which guarantees a fair trial.

But control orders are imposed without charge and without any procedure that meets the normal standard for a fair trial.

Oppressive though control order restrictions are, they would present no real obstacle to a person intent on serious harm, as has been demonstrated by the apparent ease with which people under control orders have absconded (harmlessly, as it happens).

Following the June 2009 Law Lords ruling that gave people under punitive control orders the right to know essential evidence against them, the Government has moved towards "light touch" control orders that do not include the element of house arrest or other grossly disruptive restrictions. The change is based on a hope that the Supreme Court (previously the Law Lords) will consider that these measures are not unpleasant enough to trigger the human right to a fair trial. The "light touch" measures are nevertheless very disruptive to everyday life.

"Light touch" measures raise serious questions about the rationale for control orders. If heavy control orders were typically necessary to ensure public safety prior to June 2009, how can much lighter restrictions now make a worthwhile contribution to public safety? A question of proportionality also arises. If a person poses a threat so minor that it can be contained using a "light touch" control order, can the disruption and stress of even "light touch" restrictions really be justified?

It has always been clear that the conditions imposed on control order victims were deeply inhumane. A series of legal rulings is now demonstrating, step by step, that this inhumanity involved the violation of the victims' human rights. The Government should take steps to provide reparations to those whose rights have been violated.

4.4 Their Day in Court?

The Home Secretary must apply to a High Court judge for permission to impose a control order. However, the judge can only refuse the order if the application is 'obviously flawed'. The person who is the subject of the order is not present at the hearing and is not told that it is happening. If the order is granted, he is arrested, the order is served on him, and in some cases he is moved to a new location far from his home. He may then begin the process of appealing against the order. While this is underway he continues to suffer punitive restrictions on the basis of a process that has, thus far, involved no semblance at all of a trial, fair or unfair.

The appeal is inevitably a slow affair. The person's legal team must deal somehow with the extreme breadth of Sections 1(2) and 1(9) of the Terrorism Act 2005. If he is successful in the Supreme Court (before October 2009, the Law Lords), his case will return to the High Court.

The entire process is deeply unjust from beginning to end. It is completely at odds with what is usually meant by the rule of law.

The structural injustice of the process is enormously compounded by its secrecy. The court hearing involves closed sessions in which secret material is presented by the Home Office. Neither the person subject to the control order nor their lawyer can see the material. A Special Advocate appointed by the court may see it, but cannot consult the person concerned or their lawyer about anything in the secret material. The closed sessions are generally crucial to the outcome of the case.

Secrecy inevitably means that the detailed factual basis of the Home Office evidence is concealed. But the degree of secrecy in control order cases is so great that even the general nature of any threat that a person is alleged to pose remains obscure, both to the person concerned and to the public.

In June 2009 the Law Lords ruled that people under control orders have a right to be given enough information about the allegations against them for them to be able to mount an effective challenge.

The ruling falls well short of a guarantee of a level legal playing field. When the Home Office presents evidence in secret, it no doubt hopes that all of the secret evidence will be helpful to its case. The Law Lords ruling does not require full disclosure of this material and inevitably (as seems to be accepted in some of the comments made by the Law Lords) leaves people under control orders at a disadvantage.

The Law Lords ruling is complex but should lessen the difficulties faced by people under control orders seeking legal redress. However, their lawyers say that no more material is being disclosed to them now than prior to the ruling. On the other hand, some control orders have been revoked by the Home Secretary since the ruling.

4.5 Ensuring Public Safety

Much of the debate on control orders has concerned an apparent dilemma: what is to be done if there are reasonable grounds to suspect that someone is a danger to the public, but a prosecution cannot be brought (for example, because evidence is inadmissible or because it would be against the public interest to disclose key evidence)?

Such a situation is indeed a dilemma, but it is not unique to this area of the law and is somewhat tangential to the key issues that need to be addressed in relation to control orders. Dealing with critical public safety issues does not seem to be the main role for which control orders have actually been used.

The grounds on which a control order can be imposed include reasonable suspicion that a person is engaged in activity that, if proven, would be criminal. But the most striking feature of the legislation is that it extends far beyond the criminal law. The relevant sections of the Prevention of Terrorism Act 2005 *(see Part 4.2 of this document)* conspicuously avoid making any reference to a direct risk of physical harm to the public, even where doing so would greatly simplify the statutory language. It does not look as if the legislation was drafted solely, or even mainly, to deal with such a risk. The secrecy surrounding control orders makes it impossible to establish with any certainty the nature of the risks that control orders have in practice been used to manage. But the circumstances surrounding some cases suggest very strongly that the risks either had nothing to do with physical harm to the public or were entirely illusory.

7 individuals under control orders have absconded over the years that control orders have been in operation[13]. No obvious harm has befallen the public as a result. Nor has there been any sign that the authorities have been worried enough by the disappearances to mount major manhunts.

Other individuals have had control orders either quashed by the High Court or revoked on the direction of the Court at the end of lengthy legal battles involving the sustained insistence by the Home Office that the orders were essential. No harm to the public appears to have resulted, and there is no sign that major efforts by the authorities have been needed in order to keep the public safe from these people.

We will perhaps never know why the Home Office considered any of these individuals to be dangerous. But in any cases where a person under a control order is reasonably suspected of posing a physical threat to the public (and therefore of involvement in crime), a straightforward 2-pronged strategy would protect the public much more reliably than a control order:

1. If the danger to the public is great enough to consider trampling on established legal principles through the use of a control order, it will generally also be great enough to warrant exposing intelligence sources (with appropriate measures to ensure the safety of people involved) or disclosing material that is in some other way embarrassing or troublesome in order to bring a prosecution.
2. If prosecution is impossible because adequate evidence is simply not (or not yet) available, or if, exceptionally, the dangers posed by both the suspect and by disclosure are genuinely severe, the risk can be managed through preventative police and intelligence work within the law. This is in any case being done almost routinely in relation to serious terrorist plots, according to official sources.

[13] Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew QC, 1 February 2010

4.6 Control Orders and Communities

Control orders are deeply damaging to people placed under them and to their families and friends. Some of the social and psychological damage inevitably seeps into the wider community. But control orders damage the community in another way too.

A Home Office application for a control order is presumably triggered by a warning or a report from a security or intelligence officer, with whom the subject of the control order may or may not be acquainted. The person under the control order will almost inevitably experience the subsequent events – from the shock of arrest through the long, Kafkaesque appeal process – as suggesting that his fate is in the hands of the security and intelligence services. It is likely to seem to him that the security and intelligence services can trump almost any power in the land, and that they stand a fair chance of trumping the Supreme Court.

This impression may well serve what the security and intelligence services believe to be their short-term interests. But it is hard to imagine anything more likely to create a climate in which terrorism can thrive than the seepage across a community of such a bleak view of society.

4.7 Summary

The control order regime is incompatible with the rule of law. It is built on excessive executive power, cemented with statutory provisions of bewildering scope, maintained by utterly inadequate court procedures and defended by secrecy. It lends itself to institutional abuse. It corrupts our society. It contravenes Article 6 of the European Convention on Human Rights (guaranteeing the right to a fair trial) and the common-law principle of fairness. It would be in irreconcilable collision with inalienable human rights even if it served some useful purpose. It does no such thing. Instead, it creates a climate of fear and suspicion that will help terrorism to grow.

The use of "light-touch" control orders does nothing to change the structural injustice of the process. It simply demonstrates the absence of any credible rationale for the control order regime. If continued, "light-touch" control orders will create from the wreckage of the old harshly punitive regime a new system of extraordinary complexity dedicated to the manufacturing of harassment.

4.8 Recommendations

- Control orders should be abolished; the Prevention of Terrorism Act 2005 should be repealed.
- Alternative measures are neither necessary nor desirable, except in relation to individuals reasonably suspected of posing a direct physical threat to the public.
- Where individuals are reasonably suspected of posing a direct physical threat to the public but cannot be charged with a criminal offence, the danger they pose should be managed by precautionary policing and intelligence work under existing powers.
- In view of the extremely broad terms of the Prevention of Terrorism Act 2005, and of the circumstances surrounding a number of control order cases, it should not be assumed that people currently under control orders can reasonably be suspected of posing a direct physical threat to the public.
- In view of the issues discussed in *part 3.4* of this document, and of the circumstances surrounding a number of control order cases (including allegations that attempts have been made to use control orders to coerce people into working for MI5), no confidence can be placed in the capacity of the security and intelligence services to make a meaningful and fair assessment of the risk posed by individuals under circumstances of the sort covered by control orders.
- Reparations should be made to people whose human rights were violated by control orders.

5 Section 44 Stop and Search and the use of terrorism legislation in relation to photography

Terms of Reference: Section 44 stop and search powers and the use of terrorism legislation in relation to photography

5.1 Section 44 Stop and Search

5.1.1 Background

Section 44 of the Terrorism Act 2000 gives the police the blanket power to stop and search pedestrians and vehicles in designated areas (which have at times covered much of Britain) for "articles of a kind which could be used in connection with terrorism."

SACC believes that blanket police powers should always be cause for concern. We regret that the terms of reference of the review of counter-terrorism and security powers do not include the blanket police power under Schedule 7 of the Terrorism Act 2000 to stop and question people travelling into or out of the country – a power which abolishes the right to silence for travellers.

The police do not need to have any grounds for suspicion before carrying out a search under Section 44 of the Terrorism Act 2000. The wide definition of terrorism in the Terrorism Act 2000 means that "an article of a kind which could be used in connection with terrorism" can mean almost anything, giving police the power to search for and examine almost anything, including documentary material.

Searches can only be carried out in designated areas, but the area can be large and designations can be renewed on a rolling basis. Designations may be made in secret and no judicial or parliamentary involvement is required. The whole of Greater London was designated as a stop and search area for 8 years.

As far as SACC is aware, Section 44 stop and search was not used in Scotland until the terrorist attack at Glasgow airport on 30 June 2007. All the areas covered by the Scotland's regional police forces were then designated for Section 44, but the designations were allowed to lapse after 28 days. SACC is not aware of any subsequent Section 44 designation by any the Scotland's regional police forces. However, Section 44 designations for railway stations covered by British Transport Police were renewed on a rolling basis.

No one has so ever been convicted of a terrorism offence as a result of Section 44 stop and search.

In January 2010 the European Court of Human Rights ruled that Section 44 stop and search powers breach the right to privacy.

SACC believes that Section 44 stop and searches are a denial of the right to privacy, that they have predictably and inevitably been used in a discriminatory way, and that they are unnecessary and unhelpful in the fight against terrorism.

Section 43 of the Terrorism Act 2000 gives police the power to stop and search anyone reasonably suspected of being a terrorist. The over-wide definition of terrorism leads to serious concerns over the way this power could be used, but SACC nevertheless believes that reasonable suspicion is better than a blanket power as a basis for searches.

Section 60 of the Criminal Justice and Public Order Act, in places where this power has been authorised, allows police to stop and search people for a weapon without any need for reasonable suspicion. SACC has significant concerns over the way this power has been used. For example, it was used to harass and obstruct peaceful demonstrators during the G8 protests in Scotland in July 2005. However, we note that for the present it provides a method available to police if they believe that a particular event or building requires this sort of protection.

5.1.2 Recommendations

Section 44 of the Terrorism Act 2000 should be repealed. Blanket stop and search powers are unnecessary, counterproductive and open to discriminatory use. Existing police powers to stop and search people where there are reasonable grounds for suspicion are more than sufficient.

5.2 The Use of Terrorism Legislation in Relation to Photography

5.2.1 Background

Photographers have on numerous occasions been stopped and searched by police, and their photographs viewed, under Section 44 of the Terrorism Act 2000. This has often happened during peaceful demonstrations. People have also been stopped and searched while photographing well-known landmarks.

Police have prevented people from taking photographs by threatening them with arrest under Section 58 of the Terrorism Act 2000 (which relates to making "a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism"), and especially with Section 58 as amended by Section 76 of Counter Terrorism Act 2008, which relates to the collection of information about police officers, soldiers etc.

Section 57 of the Terrorism Act 2000 could also be used to prevent photography. Section 57 relates to possession of an "article" in circumstances which give rise to a reasonable suspicion that is for terrorist purposes. An "article" can be almost anything, including a photograph.

Even if a defence against prosecution under Section 58 or Section 57 would have a good chance of success in court, the threat of arrest for a terrorism offence, with the potential for lengthy police detention, is a very powerful deterrent to photographers.

As such, it creates essentially arbitrary powers for police to interfere in a wide range of ordinary day to day activity, given the currently ubiquitous nature of photography. It also has, at the very least, a chilling effect on the recording by journalists and others of information that is in the public interest.

As far as SACC is aware, interference with photography under Section 58 and Section 44 has not been usual in Scotland (where Section 44 designation has in any case been much more limited than south of the border). However, we have received a report, witnessed by a passer-by, of an incident in which a female Muslim tourist was stopped and searched after taking photographs at a railway station, concern at her actions having been expressed to the police by a member of the public.

Legislation capable of being used to restrict the right to photograph police officers is open to abuse and may lead to the suppression of evidence about other police abuses, especially during demonstrations and protests.

Voluntary restraint by the police in their use of Section 58 and Section 57 offences, through official guidelines or instructions from Chief Constables, will inevitably leave large areas of doubt arising from the extremely broad terms of current legislation. Such restraint will be least reliable in exactly the situations in which it is most needed. Parliament needs to ensure that legislation is straightforward and clear and is not open to interpretations that inappropriately or arbitrarily restrict the right to take photographs.

5.2.2 Recommendations

Section 58 of the Terrorism Act 2000, which police have used to threaten photographers with prosecution, should be repealed, as should Section 76 of the Counter Terrorism Act 2008, which extends the scope of Section 58, and Section 57 of the Terrorism Act 2000, which could be used in similar ways to Section 57. All these powers are much too widely-drawn.

6 The use of the Regulation of Investigatory Powers Act 2000 (RIPA)

Terms of Reference: The use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities and access to communications data more generally

6.1 Introduction

The Regulation of Investigatory Powers Act came into force on 2 October 2000. Investigatory powers that fall under the authority of the devolved government in Scotland are covered by the Regulation of Investigatory Powers (Scotland) Act (RIPSA), which also came into force on 2 October 2000.

The passage of RIPA through the Westminster Parliament was closely linked to the passage of the Terrorism Act 2000. In the Scottish Parliament, justice minister Angus MacKay told MSPs:

> *"The legislation that we are discussing is vital to protecting the use of those techniques by law enforcement agencies in coming to grips with organisations and activities over which - as I am sure every member of the chamber would agree - we wish to see effective law enforcement. I am thinking especially of serious organised crime and terrorist activities. The bill will allow surveillance to remain an important tool in the fight against serious crime, today and in future."*

In fact, RIPA and RIPSA are by no means confined to investigations into serious crime and terrorism. They cover a wide range of powers, including the use by the police and the security and intelligence services of "covert human intelligence sources" (informers and undercover agents). The use of informers in relation to campaigning groups unconnected with serious crime or terrorism attracted widespread public concern following the revelation in April 2009 that police had tried (unsuccessfully) to recruit an environmental campaigner in Scotland.[14] It subsequently emerged that police are engaged in widespread monitoring of people they regard (with no legal basis) as "domestic extremists."[15] SACC believes that this kind of surveillance undermines democracy and we regret that it does not fall within the terms of reference of the current review of counter-terrorism and security powers.

RIPA/RIPSA together constitute an extremely complex body of legislation than cannot be adequately summarised here. Appeal Court judges are amongst those who have complained of the difficulty of interpreting RIPA.

RIPA/RIPSA generally seeks to create a framework for the authorisation of surveillance, as required by the Human Rights Act (which, like RIPA, came into force in October 2002). Many of the surveillance powers that it covers existed prior to RIPA, either because they had been created by earlier legislation or because they were not expressly prohibited.

However, RIPA also created completely new powers for local authorities and a wide range of other public bodies to require communications service providers to give them access to "communications data." This data does not include the content of a communication (telephone conversation, email message etc), but includes information such as telephone number, email address, website visited, geographical location of a mobile phone etc.

Additionally, RIPA and, in Scotland, RIPSA, set out a framework for the authorisation by local authorities and public bodies of a range of surveillance techniques that would previously have been assumed by many people to be impermissible, even if they were not expressly prohibited by law.

The ubiquitous CCTV cameras are not covered by RIPA/RIPSA, provided that they are overt and not being used for "a specific operation or investigation." According to advice published by the Office of Surveillance Commissioners[16]:

[14] *Police caught on tape trying to recruit Plane Stupid protester as spy*, The Guardian, 24 April 2009
[15] The Guardian, 29 October 2009
[16] www.surveillancecommissioners.gov.uk/advice_ripa.html

"Automatic Number-Plate Recognition is unlikely to constitute directed surveillance unless the program routinely captures the faces of front seat occupants, whereas Automatic Facial Recognition can hardly fail to be directed surveillance."

RIPA/RIPSA distinguishes between 5 types of surveillance:

Interception of communications: eg intercepting telephone conversations or accessing the content of emails or correspondence.

Intrusive surveillance: covert surveillance in residential premises or private vehicles, e.g bugging a home or car.

Directed surveillance: covert surveillance in a public place, such as covertly monitoring the movements and actions of particular people.

Covert Human Intelligence Sources (CHIS): undercover agents and informers.

Communications data: the record of a communication, such as telephone number, email address, website visited, but not the content of the communication.

Surveillance is categorised as **covert** if and only if it is carried out in a manner calculated to ensure that persons subject to the surveillance are unaware it is taking place.

The terms of reference of the review of counter-terrorism and security powers only include surveillance by local authorities. However, RIPA/RIPSA consistently groups local authorities and other public bodies together, giving them the same powers. The concerns that arise in relation to local authority surveillance arise at least as forcefully in relation to other public bodies. A further concern is that the list of public bodies that are given surveillance powers under RIPA can be added to by statutory instrument, with minimal opportunity for parliamentary debate.

Of the 5 types of surveillance dealt with by RIPA/RIPSA, 3 are available to local authorities and other public bodies: directed surveillance, use of covert human intelligence sources and access to communications data.

6.2 Surveillance by Local Authorities

The use of directed surveillance and covert human intelligence sources by local authorities in England, Wales and Northern Ireland is dealt with by RIPA. The use of these types of surveillance in Scotland is dealt with by RIPSA. The rules set out by RIPA and RIPSA for these kinds of surveillance are very similar.

Directed surveillance, according to the RIPA/RIPSA definition, is always covert. Covert surveillance is always a severe breach of the right to privacy and in SACC's view can only be justified where there are reasonable grounds to suspect a serious offence has been committed or is intended. But RIPA/RIPSA allows local authorities to use directed surveillance in relation to a range of minor offences, regulatory infringements and non-criminal activity such as anti-social behaviour.

RIPA/RIPSA does not give local authorities powers of intrusive surveillance. But directed surveillance can include the use of a surveillance device that monitors the interior of a house or car from a position outside it, unless it

"consistently provides information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in the vehicle"[17]

So local authorities are empowered to use potentially sophisticated surveillance technology to watch and/or eavesdrop on people in their own homes, provided the results fall short (as they almost inevitably must) of those from a "bug" in the room. Such methods could capture private conversations and the most intimate information about people's personal lives. This amounts to a gross breach of privacy. Any distinction between this kind of surveillance and surveillance that is "intrusive" in RIPA/RIPSA terminology is purely arbitrary.

The use of covert human intelligence sources (CHIS) – available to local authorities under RIPA – is also likely to involve gross breaches of privacy. And it is likely to take a heavy toll on the CHIS by inciting them to betray trust. It is very hard to see how these negative impacts could ever be proportionate to the kind of suspected misdemeanours that local authorities are empowered to investigate.

[17] Section 26(5) of RIPA, Section 1(5) of RIPSA

Access to communications data by local authorities throughout the UK is regulated by RIPA. The legislation gives local authorities and other public bodies have the power to require communications service providers to give them access to communications data.

This may appear to be one of the least intrusive powers provided under RIPA, since it does not include access to the content of communications. However, it is now widely recognised that a record of websites visited by a person – to take just one example - can reveal an enormous amount of information about a person. But the situation is a good deal worse than this, since RIPA access to communications data includes "subscriber details" – information such as name and address, direct debit details and mobile phone location.

In June 2008 SACC published[18] statistics on local authority surveillance obtained (under Freedom of Information legislation) from 13 of Scotland's 32 unitary authorities. The results are summarised below[19]:

Authority	Period	No. of surveillance operations
Edinburgh	01/04/02-01/04/08	1252
Glasgow	02/10/00-09/05/08	282
Dundee	02/10/00-30/04/08	280
Renfrewshire	02/10/00-30/04/08	216
East Renfrewshire	01/01/02-29/04/08	152
Aberdeen	01/01/03/31/12/07	87
North Ayrshire	02/10/00-28/04/08	33
Clackmannanshire	02/10/00-22/04/08	31
Perth and Kinross	02/10/00-24/04/08	23
Dumfries and Galloway	02/10/00-30/04/08	8
Eilean Siar	02/10/00-01/05/08	3
Orkney	02/10/00-22/04/08	1
Shetland	02/10/00-29/04/08	0

For each local authority, the table shows the total number of surveillance operations carried out under all 3 of the powers provided under RIPA.

It will be seen that the use of surveillance powers in Scotland was both widespread and very uneven. Edinburgh, with a much lower population than Glasgow, made much greater use of surveillance.

In Edinburgh, 83% of surveillance operations authorised in the financial year 2007/8 targeted anti-social behaviour. In Dundee 77% of the 280 surveillance operations authorised in the period 02/10/00 to 30/04/08 targeted anti-social behaviour. In Eilean Siar (Western Isles), 2 of the three uses of surveillance powers concerned anti-smoking.

A minority of operations by local councils involved the acquisition of communications data. Glasgow authorised 44 such operations over the period 02/10/00 to 09/05/08. It says:

> *"The 44 uses of the power were almost all in relation to investigating suspected offences under the Consumer Credit Act, such as illegal money lending."*

In contrast Edinburgh made no use of this power over the period 01/04/02 to 01/04/08.

Numerous media reports indicate that the use of directed surveillance in England and Wales is also very uneven and apt to be for purposes such as investigating and fly-tipping and irregularities in school applications.

SACC believes that it is self-evident that local authority surveillance powers are being abused. We find it hard to imagine many uses of RIPA powers by local authorities that would *not* be abusive, given the relatively trivial character of most of the matters that local authorities are empowered to investigate. It should always be remembered that the subject of a surveillance operation is not an offender, but only a suspected offender.

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[18] Anti-terror/organised crime measures targeting anti-social behaviour, SACC, 9 June 2008 www.sacc.org.uk/index.php?option=content&task=view&id=570&catid=27

[19] SACC acknowledges the help given by the local authorities listed in providing the information requested under the Freedom of Information (Scotland) Act. These local authorities hold the copyright for the material published here.

Of course there are a wide range of matters that require investigation by local authorities. Straightforward, common-sense methods should generally suffice: overt monitoring, the use of official inspections, examination of local authority records etc.

Where matters elude such methods and are serious (illegal money-lending, for example), the information should be passed to the police for investigation.

SACC believes that powers to carry out directed surveillance and to use human intelligence sources should be removed from local authorities and from all other public bodies apart from the law enforcement agencies and the security and intelligence services.

This is not to suggest that we believe that the current use of surveillance powers by law enforcement agencies and the security and intelligence services gives rise to no concerns. But we think that these concerns (which largely fall outside the terms of reference of the review of counter-terrorism and security powers) are better dealt with in the context of organisations whose job is the careful investigation of serious offences.

Power to access communications data should be subject to prior judicial authorisation, irrespective of whether the power is available to local authorities or confined to the law enforcement agencies and the security and intelligence services.

6.3 Communications data – General Issues

Ready access to communications data is likely to lead to widespread abuse of the right to privacy. The depth of information about people that can be gleaned from their web-browsing habits, coupled with the known police interest in monitoring political activists that they regard as "domestic extremists", makes ready access to this data a threat to the normal functioning of democracy as well as to individual rights.

SACC believes that the grounds on which access to communications data may be granted should be tightened, and that access to communications data by all public bodies, including the law enforcement agencies and the security and intelligence services, should be subject to prior judicial authorisation.

The retention of communication data by service providers poses a significant threat to privacy by creating a store of information about subscribers that is potentially sensitive and that becomes extremely powerful and sensitive when accumulated over long periods. The recording of such information, at least briefly, is part of the routine functioning of many communications service providers. Instead of discouraging the long-term retention of this information, current legislation requires it.

Part 11 of the Anti-Terrorism Crime and Security Act provided for the creation of voluntary agreements between the Government and communications service providers for the fixed-term retention of data.

EU Data Retention Directives go further and require communications service providers to retain any data that they collect for 6-24 months. EU Directive 2006/24/EC has since April 2009 been embodied into British law with a retention period of 12 months.

Domestic legislation and international agreements that compel or encourage the long-term retention of communications data are against the public interest and should be scrapped. The Government should defend the right to privacy by pressing for EU data retention directives to be dropped and should then actively discourage long-term data retention through legislation or through the use of voluntary guidelines.

6.4 Recommendations

- Directed surveillance and the use of covert human intelligence sources by local authorities should not be permitted. These forms of covert surveillance are severe infringements of the right to privacy and are only appropriate in relation to serious offences. Where local authorities suspect people of serious offences, they should pass their information to the police for investigation.
- Powers to access communications data by all public bodies, including the law enforcement agencies and the security and intelligence services, should be subject to prior judicial authorisation.
- The grounds on which access to communications data may be granted should be tightened.

- Britain should urge the EU to drop the EU Data Retention Directives, which require Communication Service Providers to retain data that they collect.
- Part 11 of the Anti-Terrorism, Crime and Security Act, dealing with the retention of communications data, should be repealed.

7 Extending the use of 'Deportation with Assurances'

Terms of Reference: Extending the use of 'Deportation with Assurances' in a manner that is consistent with our legal and human rights obligations

7.1 Introduction

International law prohibits deporting anyone to a country where they would be at risk of torture or other ill-treatment.

In the immediate aftermath of the 9/11 atrocities, the Anti-Terrorism Crime and Security Act 2001 (ATCSA) was rushed through Parliament to authorise the indefinite detention, without charge or trial, of foreign nationals who the Government suspected of broadly-defined links to terrorism but who could not be deported because they would be at risk of torture in their home countries. People detained under ATCSA were held in a high security prison under restrictive, isolated and secretive conditions, to the severe detriment of their mental health.

Following the Law Lords ruling against ATCSA detention in December 2004, further legislation (the Prevention of Terrorism Act 2005) was rushed through Parliament to create the control order regime *(part 4 of this document).* The ATCSA detainees were then released from prison and placed under control orders. The Government subsequently began a series of determined attempts to deport former ATCSA detainees on national security grounds. It has also attempted to deport a number of other foreign nationals, not previously detained under ATCSA, who it says are linked to terrorism and who would be at risk of torture if deported.

People subject to these deportation attempts have, while fighting their deportation, been placed at various times under control orders, under immigration bail (with punitive conditions similar to those imposed through control orders) and in immigration detention in high security prisons. Like ATCSA detention, these conditions have taken a heavy toll on the men's mental health. Some of the men eventually elected to return "voluntarily" to their home countries, saying they preferred the risk of torture there to the conditions they were enduring in Britain.

Appeals against national security deportations are heard by the Special Immigration Appeals Commission (SIAC). Like control order hearings, SIAC hearings involve closed sessions, secret evidence, and the use of Special Advocates.

In order to persuade SIAC (and higher courts) that people said to be linked to terrorism can safely be returned to countries that practice torture, the Government has obtained unenforceable diplomatic assurances from several such countries. These take the form either of 'memorandums of understanding' (MoUs) or of case-by-case agreements. Amnesty International and other human rights groups have long taken the view that no weight whatever can be attached to these diplomatic assurances. SACC shares this view.

If the use of "deportation with assurances" is to be extended or continued, an entirely different approach to assurance will be needed, as will an overhaul of appeal proceedings against deportations on grounds of national security.

7.2 Diplomatic Assurances

The UK has agreed 'memorandums of understanding' (MoUs) with the Lebanon, Jordan, Libya and Ethiopia. The MoUs give assurances as to how people who are returned will be treated, and also relate to 'monitoring' of these assurances by a local organisation. The UK has been unable to agree an MoU with Algeria, but has instead agreed with the Algerian government to negotiate bilateral assurances for humane treatment and fair trial on a case by case basis. None of these diplomatic

assurances are binding under international law. No mechanism has been provided for their enforcement.

The governments of all these countries are bound by the general international prohibition on torture. Additionally, they are all signatories to the UN Convention Against Torture. Nevertheless, they all practice torture. To suppose that non-binding assurances given to the UK will be effective where solemn and binding commitments under international law have so far failed seems, at the very least, implausible.

Amnesty International and many other human rights organisations and experts believe that no reliance whatever should be placed on diplomatic assurances when other evidence establishes a real risk of torture or ill-treatment.

A Law Lords ruling in February 2009[20] expressed grave reservations about the value of diplomatic assurances, but held that courts should determine the reliability of assurances, as a matter of fact, in the light of conditions in the relevant country, the attitude of the authorities to observing human rights, how much control the authorities had over their police and security services etc. The ruling upheld the deportation of Abu Qatada (one of the men originally interned under the Anti-Terrorism, Crime and Security Act 2001) to Jordan, and of two men known as RB and U to Algeria. All three men have lodged an appeal with the European Court of Human Rights.

Commenting on the ruling, Abu Qatada's lawyer Gareth Peirce, said:

> *"The House of Lords has said in terms that the trial of a civilian before a military court will not debar deportation, but more importantly, it will not stop deportation on the basis of the certain use in that trial of evidence very likely to have come from torture."*

SACC called the ruling a *"landmark ruling against human rights."*[21]

In SACC's view, the Law Lords ruling establishes that British law does not, at present, adequately support the worldwide fight against torture or provide adequate protection against torture for foreign nationals living in Britain.

Additionally, the ruling leaves an area of uncertainty over the use of diplomatic assurances that needs to be resolved. Parliament should legislate to make diplomatic assurances inadmissible in cases where it has otherwise been established that there is a real risk of torture.

Since the Law Lords ruling, SIAC has continued to reach decisions that appear to attach substantial weight to diplomatic assurances. For example, in September 2010 it ruled that a man known as XX could be deported to Ethiopia. This was described by the Home Office as "a test case for deportations with assurances."

Ethiopia has a very poor human rights record. The monitoring of human rights in Ethiopia is difficult and there are serious concerns over the independence of the Ethiopian organisation charged with post-return monitoring. These are exactly the kind of circumstances in which it might be expected that an MoU would carry no weight at all.

People said to be linked to terrorism are at particular risk of torture in any country where torture is practised. The only adequate assurance of safety for such people, as for anyone else, is evidence of systemic respect for human rights in the destination country, coupled with a careful assessment of any risks arising from the particular circumstances of the individual whose deportation is sought.

Britain should work towards assuring a torture-free world by withdrawing or reducing cooperation in policing, law-enforcement and intelligence with countries that practice torture.

7.3 Deportation Proceedings

Appeals against deportation on national security grounds are heard by the Special Immigration Appeals Commission (SIAC). SIAC hearings involve closed sessions, secret evidence, and the use of Special Advocates.

The Government's secret material, including intelligence material, is relied on to claim both that the individual poses a threat to national security and that they would not face a risk of torture or other ill-

[20] RB (Algeria) (FC) and another v Secretary of State for the Home Department, OO (Jordan) v Secretary of State for the Home Department, 18 February 2009

[21] Landmark ruling against human rights, SACC statement, 19 February 2009

treatment on return. Neither the deportee nor their lawyer is allowed to see the material. A Special Advocate appointed by the court may see it, but cannot consult the deportee or their lawyer about anything in the secret material.

It is extremely difficult for a deportee to refute Government evidence under these circumstances.

According to Dinah Rose QC[22]:

> *"Although SIAC looks and sounds like a court, and the judges and barristers behave with the courtesy and formalities that are used in court, it is in reality nothing of the kind. Often it feels to me like an elaborate charade, in which we are all playing the roles of barrister, solicitor, appellant and judge, but where the basic substance of a court hearing — the testing of evidence to establish where truth lies — is entirely missing."*

SACC believes that the use of secret evidence is completely unacceptable.

7.4 Public Safety

The terms of reference of the review of counter-terrorism and security powers do not invite any consideration of alternatives to deportation. However, the question inevitably arises if national security deportations are blocked on human rights grounds.

As with control orders, court proceedings in relation to national security deportations are so secretive that it is impossible to conclude that any of the people so far deported or threatened with deportation present a direct physical risk to the public.

Where foreign nationals genuinely present such a risk, SACC believes that the 2-pronged approach outlined in Section 4.5 – prosecution or preventative policing – would provide an effective and just means of ensuring public safety.

If a person is genuinely a dangerous terrorist, we think prosecution, conviction and jail in Britain would be a far better guarantee of public safety and a stronger contribution to the global struggle against crime than deportation to a country where his containment would be at best uncertain and at worst linked to torture or the threat of torture.

7.5 Summary

The international prohibition on torture is an absolute one. People should not be deported to countries where they would be at risk of torture. Attempts to circumvent the prohibition on doing so are shameful, undermine the struggle to rid the world of torture, and cannot be in the public interest. To tolerate torture in the name of fighting terror is absurd – torture *is* terror.

Britain should not be seeking to achieve minimal compliance with its legal and human rights obligations but instead should be seeking to lead the way in the struggle against torture.

A diplomatic note promising that a deportee will be safe from torture, issued by a country known to practice torture, can never be an adequate assurance that the deportee and their family will be safe.

British courts have so far failed to uphold the international prohibition on deportation to possible torture and have shown undue deference to Government. Legislation is needed to plug loopholes that allow unsafe deportations. The process of appeal against national interest deportations needs to be overhauled to make it open, robust and fair.

7.6 Recommendations

- The only adequate assurance of safety is a clean track-record on torture within the destination country coupled with a proven record of effective implementation of the provisions of the UN Convention Against Torture and with due regard for any special circumstances that put the deportee at risk of torture or ill-treatment.
- Legislation should be introduced to make diplomatic notes inadmissible as evidence of safety from torture.
- Secret evidence should not be admissible in deportation hearings.

[22] Speaking at a meeting in the House of Commons chaired by Diane Abbott MP on 30 March 2009

- Britain should work towards a torture-free world by withdrawing or reducing cooperation in policing, law-enforcement and intelligence with countries that practice torture.
- Irrespective of the risk of torture, the deportation of foreign nationals on national security grounds is normally undesirable. Such deportations are arbitrary, discriminatory and even if well-founded they are unlikely to lessen the risk from international terrorism. Foreign nationals suspected of terrorism should be charged and brought to court.

8 Measures to deal with organisations that promote hatred or violence

> **Terms of Reference:** Measures to deal with organisations that promote hatred or violence

8.1 Background

SACC is seriously concerned about the growth of groups such as British National Party (BNP), the English Defence League (EDL) and the Scottish Defence League (SDL) that promote race hatred. We would like to see a greater willingness by police and prosecutors to bring charges in relation to publications, statements and actions by these groups that incite race hatred. But we think that any attempt to proscribe groups like these would create great difficulties and would neither serve justice nor the struggle to unite people in opposition to racism.

Current proposals for measures to deal with organisations that promote hatred or violence do not properly fall within the evolving framework of legislation to deal with racism and hate-crime, but rather within the expanding machinery for suppressing organisations for political reasons linked to foreign policy.

The Terrorism Act 2000 provides powers to proscribe organisations involved in terrorism. The Terrorism Act 2006 extends these powers to organisations that do not engage in violence or terrorism but are considered to encourage it.

There have been a number of suggestions that proscription powers should be extended still further to include organisations that promote hatred. It has specifically been suggested (for example, in the Conservative Party Manifesto 2010) that the Islamic political party Hizb-ut-Tahrir should be banned.

Hizb-ut-Tahrir does not promote violence and cannot reasonably be said to promote hatred. It is a significant opposition force in a number of countries with mainly Muslim populations and is banned in a number of such countries. It is opposed to the current war in Afghanistan and its views on this matter are to a very large extent shared with other people who oppose the war.

Many of the views on other matters for which Hizb-ut-Tahrir has been criticised are shared or sympathised with by many British Muslims who are not supporters of Hizb-ut-Tahrir and disagree with its approach to politics. It is impossible for them to fail to notice that attacks on Hizb-ut-Tahrir very much resemble attacks on Muslims generally.

Any attempt to ban Hizb-ut-Tahrir would be an affront to the rights to freedom of speech and freedom of association. It would also make Britain's Muslim communities feel even more isolated than at present.

8.2 Recommendations

- Police should make use of existing legislation to deal with behaviour that incites hatred or violence.
- New powers to proscribe organisations that are thought to promote hatred or violence are unnecessary and would be counter-productive.
- Sections 1, 2 and 21 of the Terrorism Act 2006, which extend the power to proscribe organisations under the Terrorism Act 2000 to include organisations that do not engage in violence or terrorism but are considered to encourage it, should be repealed.

- There is no case for banning the Islamic political party Hizb-ut-Tahrir, on these or any other grounds.

9 The detention of terrorist suspects before charge

> **Terms of Reference:** The detention of terrorist suspects before charge, including how we can reduce the period of detention below 28 days

9.1 Introduction

Police powers to detain terrorist suspects before having to charge them or release them have increased steadily over the last decade up to the current limit of 28 days – longer than in any country whose legal and constitutional arrangements are at all comparable to Britain's.

For non-terrorist crime, including serious crimes such as murder, the normal limit for detention without charge in England and Wales is 24 hours. This may be extended, subject to approval, up to a maximum of 4 days. Under the somewhat different procedures used in Scotland, people arrested for non-terrorist crimes must be brought to court on the next working day after their arrest.

The Terrorism Act 2000 initially allowed terrorism suspects to be detained by police for up to 7 days without charge. The Criminal Justice Act 2003 amended the Terrorism Act 2000 to allow a maximum of 14 days pre-charge detention.

Subsequent attempts to increase the limit on pre-charge detention for terrorism suspects have met with widespread opposition and have given rise to notable parliamentary battles. An attempt to raise the limit to 90 days in November 2005 ended in Prime Minister Tony Blair's first Commons defeat. In 2006 Parliament accepted a compromise limit of 28 days, subject to annual renewal.

In June 2007 the Government announced a new package of anti-terrorism measures that were to include, once again, the extension of pre-charge detention to 90 days. The public battle over pre-charge detention went on for a year. In the end, a compromise figure of 42 days was put before Parliament as part of the Counter Terrorism Bill. When the House of Commons voted on the 42-day detention in June 2008, Prime Minister Gordon Brown was forced to rely on support from the Democratic Unionist Party to secure a hairsbreadth victory. The Government's heavy-handed use of petty threats and incentives to pressure its own backbenchers showed that it had lost the argument for 42-day detention and dealt a serious blow to the Prime Minister's reputation and authority. 42-day detention was defeated in the House of Lords in October. The measure could not realistically be put before the Commons again and was dropped.

The limit for pre-charge detention has remained since then at 28 days, having been renewed by Parliament every year since 2005. The most recent renewal was on 14 July 2010 and was for 6 months instead of the usual 12 months, in order to give Parliament an opportunity to respond to the current review of counter-terrorism and security powers. If the legislation is not renewed at the expiry of the 6-month period, pre-charge detention will revert to 14 days – a limit that SACC believes is far too long, but nevertheless an improvement on 28 days.

9.2 The injustice of lengthy pre-charge detention

Victims of lengthy police detention say that they found the experience deeply disturbing and disorienting. Lengthy police detention can set the stage for miscarriages of justice. Victims who are, in the end, released without charge will by then have suffered significant punishment without charge or trial and are likely to encounter a range of obstacles in resuming their work and their social and family lives.

Terrorism investigations can often be complex and demanding. So can investigations into other forms of serious crime. Normal pre-charge detention limits have nevertheless been thought adequate in such cases.

The extremely wide terms of many terrorism offences mean that people can be arrested under terrorism legislation on suspicion of activity that falls far short of involvement in a complex terrorist plot, or of anything that would otherwise be considered a serious crime. A person who has aroused police

suspicion by taking a photograph of a public building (or a policeman) is at risk of being held in a police cell for 28 days. He or she may be able to persuade a judge to order his or her release at one of the stages where the law provides judicial oversight of detention, but the judicial playing field is tilted steeply towards continuing detention.

Authorisation by a judge is required for continuing pre-charge detention beyond 48 hours, and again for detention beyond 14 days up to a maximum of 28 days. However, the law does not require the judge to decide whether the police have reasonable grounds for suspicion, but only whether there are *"reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain relevant evidence."* The police can present material to the judge in secret and the defendant and his/her lawyer can be excluded from any part of the hearing.

It has been said by senior police officers and others that the success of counter-terrorism operations should not be assessed simply on whether arrests lead to charge or conviction, but should also be seen as deterring and disrupting terrorist activity. This strongly suggests that pre-charge detention is seen as a form of preventative internment, or at the very least as occupying a grey area between preventative internment and detention directed towards prosecution. There can be no such grey area. Any use of pre-charge detention as internment by the back door would be completely improper.

Supporters of lengthy pre-charge detention have in the past suggested that it might be necessary in order to deal with a future "nightmare scenario" of multiple terrorist attacks. They will no doubt do so again, especially if terrorism nightmares happen to be in the public eye through speculative media stories.

The "nightmare scenario" involves multiple terrorist attacks, perhaps each on a 9/11 scale. It is suggested that police would then be at risk of swamping themselves with arrests that could not be processed within the normal pre-charge detention period. Setting aside the plausibility or otherwise of the scenario, the suggestion that police would swamp themselves in such a way raises serious questions.

If terrorist gangs were captured in action, there would be no difficulty charging them. If police had the capacity to conduct investigations leading them rapidly to a large number of suspects not captured in action, they would also be likely to have the capacity to continue those rapid, intense investigations into the pre-charge detention period. The notion of police being "swamped" seems to suggest that a terrorist catastrophe would not be followed by cool, evidence-based policing but by a panic-stricken round-up. It is an invitation to contemplate internment, which would inevitably be discriminatory. Nothing could be more divisive and damaging in a country reeling from a string of major terrorist attacks. The "nightmare scenario" is crude scare-mongering.

Lengthy pre-charge detention, the now-defunct ATCSA detention, and the arrest of foreign nationals for "immigration detention" in high security conditions are all symptoms of the same mistake – flirtation with internment. They should all be rejected.

9.3 Recommendations

The legislation covering pre-charge detention in terrorism cases should be repealed, allowing pre-charge detention for terrorism suspects to revert to that permitted in other criminal cases. The ending of excessive pre-charge detention for terrorist suspects would be a powerful sign that Britain can deal with terrorism within the ordinary framework of the law and would give new confidence to our minority communities.

10 Freezing of terrorist assets

Terms of Reference: Freezing of terrorist assets

Current powers to freeze terrorist assets are unjust and oppressive and need urgent reform. Freezing the assets of those who have never been arrested, charged or convicted in relation to a terrorism offence denies the presumption of innocence. It can have devastating effects on the individuals to whom it is applied and on their families.

A recent Supreme Court ruling highlights these issues (Ahmed and others v HM Treasury, 2010). The Deputy President of the Supreme Court, Lord Hope said in giving judgement:

> *"It is no exaggeration to say … that designated persons are effectively prisoners of the state …. Their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating."*

SACC's sister organisation CAMPACC will be making a submission on the Freezing Assets Bill to the Joint Human Rights Committee.

11 Equality Impact

Terms of Reference: Equality Impact

Control orders, Section 44 Stop and Search Powers, and the use of terrorism legislation in relation to photography have all had specific negative impacts on equality. The repeal of these powers would be a step towards restoring the equal enjoyment by all of democratic rights and freedoms.

Foreign nationals living in Britain do not at present enjoy adequate protection from torture. They are vulnerable to deportation to possible torture through an arbitrary and secretive procedure. Changes in the law are required in order to guarantee adequate and equal protection from torture for everyone living in Britain.