

TERRORISM PREVENTION AND INVESTIGATION MEASURES ACT 2011

EXPLANATORY NOTES

BACKGROUND

The Prevention of Terrorism Act 2005

3. In 2001, the UK derogated from Article 5 (right to liberty) of the European Convention on Human Rights (ECHR) and introduced the provisions in Part 4 of the Anti-terrorism Crime and Security Act 2001. These powers allowed the detention pending deportation of foreign nationals, even if removal was not currently possible, if the Secretary of State reasonably believed that the person's presence in the UK was a risk to national security, and reasonably suspected that the person was involved with international terrorism linked with Al Qaeda. In December 2004, the House of Lords acting in its judicial capacity quashed the derogation order made under the Human Rights Act 1998 and concluded that Part 4 of the 2001 Act was incompatible with Articles 5 and 14 (prohibition of discrimination) of the ECHR.
4. Consequently, in the Prevention of Terrorism Act 2005 ("the 2005 Act"), the Government repealed Part 4 of the 2001 Act and replaced it with a system of control orders to manage the risk to the public posed by suspected terrorists (regardless of nationality). The 2005 Act provided the Secretary of State with powers to make a non-derogating control order against a person the Secretary of State had reasonable grounds for suspecting was or had been involved in terrorism-related activity, where the Secretary of State considered it necessary for purposes connected with protecting the public from a risk of terrorism. A control order placed obligations upon the individual designed to prevent or restrict his or her involvement in terrorism-related activity.
5. The 2005 Act also contained a power for the court – on application by the Secretary of State – to make a derogating control order against a person. A derogating control order was one that imposed obligations that amounted to a deprivation of liberty within the meaning of Article 5 of the ECHR. An example of such a control order would have been one that imposed a 24 hour curfew – i.e. house arrest. By way of contrast, a non-derogating control order was one in which the obligations imposed did not amount to such a deprivation of liberty. Before the Government could have imposed a derogating control order, it would have needed to derogate to the extent strictly necessary from Article 5. No derogation from Article 5 was ever made in relation to control orders; only non-derogating control orders were ever made. A reference to a control order in the rest of this document is therefore a reference to a non-derogating control order.

Control order-related provisions in the Counter-Terrorism Act 2008 and the Crime and Security Act 2010

6. Subsequent legislation made further provision relating to control orders.

Provision relating to fingerprints and non-intimate samples

7. Sections 10-13 of the Counter-Terrorism Act 2008 (“the 2008 Act”) made specific provision for the routine taking, use, storage and retention of fingerprints and non-intimate samples of individuals subject to a control order. In broad terms, these sections provided equivalent powers, procedures and safeguards as apply generally to fingerprints and samples taken from individuals on arrest (in line with the relevant existing legislation in the constituent countries of the UK).
8. The 2008 Act powers relating to the fingerprints and samples of controlled individuals were never commenced as a result of the judgment of the European Court of Human Rights (ECtHR) in *S and Marper v United Kingdom* [2008] ECHR 1581 (*S and Marper*) that the ‘blanket and indiscriminate’ indefinite retention of such data where there had been no conviction was in breach of Article 8 ECHR (right to respect for private and family life). Under the Crime and Security Act 2010 (“the 2010 Act”) the then Government therefore introduced different retention periods for various categories of material, one of which was biometric material taken from a person subject to a control order, and also introduced provisions allowing the retention of such material beyond the prescribed periods where necessary for national security purposes. These provisions of the 2010 Act were also never commenced (see below paragraph on the Coalition Government’s position on the retention of DNA). Both sets of provisions are repealed by the Act.

Provision relating to powers of entry and search

9. Section 78 of the Counter-Terrorism Act 2008 amended the 2005 Act to add sections 7A, 7B and 7C to the 2005 Act, which comprised powers for a constable to enter and search premises relating to controlled individuals in specified circumstances for specified purposes. These powers were commenced but are repealed by the Act. (Previously, the 2005 Act provided only limited specific powers of entry and search for the police, relating to service of the control order. It also made explicit provision that an obligation could be imposed on a controlled person requiring him or her to allow the police access to his or her premises and to allow searches of his or her premises for compliance purposes.)
10. The 2005 Act did not make express provision that the Secretary of State may impose an obligation on the individual to submit to a search of his or her person. However, given that it provided that the list of types of obligations it included in section 1 was indicative rather than exhaustive, control order obligations used to refer to searches of the individual as well as the premises. But in July 2009, the Court of Appeal in the case of *Secretary of State for the Home Department v GG* [2009] EWCA Civ 786 held that the 2005 Act did not provide the power to impose an obligation in a control order to submit to a personal search. In November 2009, the High Court in the case of *BH v Secretary of State for the Home Department* [2009] EWHC 2938 (*Admin*) found that a requirement for a controlled person to submit to a personal search prior to being escorted by the police outside the controlled person’s boundary, as a condition of the temporary relaxation of the controlled individual’s boundary, had no statutory authority and was unenforceable.
11. Consequently, section 56 of the 2010 Act further amended the 2005 Act by adding new sections 7D and 7E to the 2005 Act, which introduced new powers allowing a constable, for specified purposes, to conduct a search of a person subject to a control order and to seize and retain articles found. These powers were not commenced, pending the outcome of the Coalition Government’s review of control orders (see below) and are repealed by the Act.

Other provision

12. Sections 79-81 of the 2008 Act contained technical amendments to the 2005 Act that did not substantively affect the implementation of control orders. These sections were commenced but are repealed by the Act.

Coalition Government's review of Counter-Terrorism and Security Powers

13. The Coalition's Programme for Government, launched by the Prime Minister and Deputy Prime Minister on 20 May 2010, stated that the Government would "urgently review control orders as part of a wider review of counter-terrorist legislation, measures and programmes". The Programme for Government can be found at:

<http://webarchive.nationalarchives.gov.uk/20100526084809/http://programmeforgovernment.hmg.gov.uk>

14. On 13 July 2010 the Home Secretary made a statement to the House of Commons confirming that such a review was underway. And on 26 January 2011 the Government published its *Review of Counter-Terrorism and Security Powers Review Findings and Recommendations (Cm 8004)*.
15. The review findings and recommendations included a commitment to repeal the 2005 Act and introduce a new system of terrorism prevention and investigation measures (TPIM). These would be a civil preventative measure intended to protect the public from the risk posed by persons believed to be involved in terrorism who can be neither prosecuted nor, in the case of foreign nationals, deported, by imposing restrictions intended to prevent or disrupt their engagement in terrorism-related activity. The regime would be capable of imposing less intrusive restrictions than those available under control orders, and there would be increased safeguards for the civil liberties of those subject to the measures. There would be no provision in the replacement system for derogation from the ECHR. The Act makes provision for these recommendations.
16. The review also concluded that, in the event of a very serious terrorist risk that cannot be managed by any other means, more stringent measures may be required to protect the public than those available under the Act. The Government therefore committed to preparing draft emergency legislation for introduction should such circumstances arise. The draft Enhanced Terrorism Prevention and Investigation Measures Bill ("ETPIM Bill") and accompanying Explanatory Notes have separately been published for pre-legislative scrutiny. They can be found at:

<http://www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill/>

Coalition Government's position on the retention of DNA

17. Following the May 2010 general election, the Coalition Government decided not to commence the sections of the 2010 Act that made provision for retention periods for DNA material and fingerprints taken under various powers. The Government decided instead to adopt the "protections of the Scottish model" in relation to the general rules on destruction and retention of such material. It also decided to introduce further rules in relation to material retained on national security grounds (so that it would be possible to retain such material for a longer period, where necessary). The Protection of Freedoms Bill that is currently before Parliament contains provisions for the retention of material generally and for the purposes of national security, but not in relation to individuals subject to a control order (or, generally, to terrorism prevention and investigation measures). However, further provisions in that Bill establish an independent Commissioner for the Retention and Use of Biometric Material, and the Commissioner will have oversight of material taken under the Act and retained on national security grounds beyond the time by which it would otherwise be required to be destroyed.