PO Box 2278
Ilford
Essex
IG1 9XT

T: 020 7330 8796
E: info@iengage.org.uk
W: www.iengage.org.uk

ENGAGE consultation response

Review of Counter-terrorism and Security Powers

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ENGAGE welcomed the party manifestos of the Conservative and Liberal Democrat parties with their assertion that *"security measures must be proportional and consistent with liberal democratic values and the rule of law",* and *"the best way to combat terrorism is to prosecute terrorists, not give away hard-won British freedoms*," respectively.

We welcome this opportunity to contribute to the review of counter-terrorism and security powers and present our responses to the six strands forming the scope of the review below:

1. Control orders (including alternatives)

Both the Conservative and Liberal Democrat parties have voiced concerns and offered policy proposals in their respective election manifestoes on dealing with the introduction by the former government of the control order system.

The Conservative Party Green Paper on national security, A Resilient Nation, argued that the party would:

"review the Control Order system with a view to reducing reliance on it and, consistent with security, replacing it."

A view the Liberal Democrat manifesto reinforced in stating:

"We will –

Scrap control orders, which can use secret evidence to place people under house arrest."[1]

The coalition manifesto stated:

"We will urgently review Control Orders, as part of a wider review of counter-terrorist legislation, measures and programmes. We will seek to find a practical way to allow the use of intercept evidence in court."[2]

The control order system has not been without controversy since the measure was introduced by the former government. The measures have invited legal challenges to the perpetuation of severe restrictions of movement for people on whom the orders are imposed, as well against the citing of secret evidence in defence of the measure and its use.

Terrorist suspects against whom control orders have been invoked have successfully challenged the secret evidence defence with the Lord Chief Justice, Lord Phillips of Worth Matravers, ruling in the case of three such suspects in June 2009, arguing that *"A trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him."*

The ruling is consistent with the rights enshrined under Article 9 of the International Convention on Civil and Political Rights.

[1] **Liberal Democrat manifesto 2010** (London: Liberal Democrats) p. 94
[2] **The Coalition: our programme for government**. (London: Cabinet Office, 2010). p. 24

The ruling of the Lord Chief Justice was further reinforced by a High Court decision in December 2009 in which judges threw out the denial of bail conditions for individuals incarcerated without being offered reasons for the interference in their freedom of movement on grounds of secret evidence.

The measure has attracted attention and demands for the assessment of the validity of the measure with 92 MPs signing an early day motion submitted by Diane Abbott MP on the use of secret evidence to justify "indefinite detention, severe bail conditions or control orders."[3]

The Home Affairs select committee in its sixth report on 'The Home Office's Response to Terrorist Attacks', criticised the control order system as:

"…no longer provid[ing] an effective response to the continuing threat and it appears from recent legal cases that the legality of the control order regime is in serious doubt. It is our considered view that it is fundamentally wrong to deprive individuals of their liberty without revealing why. The security services should take recent court rulings as an opportunity to rely on other forms of monitoring and surveillance."[4]

The control order system has also come under scrutiny by the Joint Committee on Human Rights in its assessment into the future of the system.

The dangers of the control order system lie not solely in the cavalier approach to suspending the civil liberties of those that are placed under control orders with no regard for a justification of the measure imposed, but also in the weakening of trust between citizens and politicians and citizens and the security agencies on which they rely for their collective security.

We would concur with the view of Gareth Pierce, legal counsel to a number of terror suspects, that while the measures were devised to target the few, its effect resonated with the many and consequently *"In terms of its contribution to what people might term the folklore of injustice, its impact is colossal."*

We would argue that the commitment to ensure that *"security measures are proportional and consistent with liberal democratic values and the rule of law*" is the benchmark against which the control order system must be assessed. It is, in our view, evident from the contributions and arguments to date from human rights agencies, legal practitioners who have successfully defended clients against control orders, and the ruling of our courts, that the measures do not work and that a greater reliance on more robust intelligence should replace the current system of incapacitating people without informing them of why, or of proceeding with a legal case against them.

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[3] Early Day Motion 1308, **'Secret Evidence'**, 21 April 2009. [Online] Available at: http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=38455

[4] House of Commons Home Affairs Committee, **'The Home Office's Response to Terrorist Attacks, Sixth Report of Session 2009–10**' (London: The Stationery Office). p. 20

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

The use of stop and search powers under Section 44, which allows police forces to stop and search individuals without "reasonable suspicion" has been frequently criticised for its discriminatory impact on ethnic minorities and its disproportionate use against Blacks and Asians.

The powers have been somewhat curtailed by the introduction earlier this year of a higher threshold following the successful challenge mounted by human rights group Liberty in Gillan and Quinton v the United Kingdom in the European court.

The ruling of the European Court of Human Rights on stop and search powers in the Gillan and Quinton case found that the measures were not *"sufficiently circumscribed nor subject to adequate legal safeguards against abuse,"* posed *"a clear risk of arbitrariness"* and therefore, not *"in accordance with the law".*

Recognising the strong probability of arbitrary use reinforcing discriminatory application, the judges ruled added that,

"While the present cases [Gillan and Quinton] do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration."

The case prompted the introduction of "interim guidance" on the use of the powers and of a higher threshold for conducting a stop and search in the Statement to the House of Lords by The Minister of State, Home Office (Baroness Neville-Jones) 8 July 2010.

The interim guidance *"chang[es] the test for authorisation for the use of Section 44 powers from requiring a search to be 'expedient' for the prevention of terrorism, to the stricter test of it being 'necessary' for that purpose."*

It also involves *"a new suspicion threshold"* with the Minister disclosing that police forces would *"no longer be able to search individuals using Section 44 powers. Instead, they will have to rely on Section 43 powers, which require officers reasonably to suspect the person to be a terrorist."*

The introduction of the interim guidance and of a higher threshold in the use of stop and search powers does not deflect from the importance of assessing the utility of stop and search, whether under Section 44 or Section 43, in the protection of collective security.

The question arises not just in relation to the abuse of the powers against protestors and photographers, but also the illegal use of the powers which was uncovered following a Freedom of Information request earlier this year.

An FOI request found fourteen police forces were left trying to contact tens of thousands of individuals who had been subject to the illegal use of the powers to stop and search.[5]

[5] 'Stop and search used illegally against thousands', **The Guardian**, 10 June 2010.

A more pertinent question remains on the contribution of the powers to the minimisation of security risks and the apprehension of individuals suspected of terrorism.

According to figures contained in the Home Office Quarterly update to September 2009[6]:

- In the year ending September 2009 there were 200,444 people stopped and searched under Section 44 of the Terrorism Act 2000;
- The Metropolitan Police made 1,896 stop and searches under Section 43 of the Terrorism Act 2000;
- There were 1,759 terrorism arrests since September 11 2001;
- For the year ending September 11 2009, a total of 201 people were arrested of which 66 people were charged - 17 (26%) were charged under terrorism legislation while seven (11%) were charged with terrorism-related offences.

The figures show the use made of Section 44 powers, as well as the numbers of arrests under terrorism legislation or for terrorism-related offences. According to total figures released for 2008-09,

- 256,000 searches were carried out under section 44 of the Terrorism Act, with only a tiny proportion – 0.6 per cent – of them leading to an arrest[7]

The effectiveness of stop and search powers to pursuing counter-terrorism goals have long been questioned by the police authorities themselves and the Government's independent reviewer of terrorism legislation, Lord Carlile of Berriew, who said of the powers:

"In my view, section 44 is being used far too often on a random basis without any reasoning behind its use."

Chief Superintendent Ali Dizaei of the Metropolitan Police in 2004 voiced concerns of the effects of stop and search in hampering co-operation by communities in policing arguing that *"Community intelligence should tell us about the people acting oddly, and stop and search is stopping this. We need that community intelligence to deal with terrorism and street crime in our areas*."[8]

Speaking at a Metropolitan Police Authority inquiry in December 2006, the then assistant commissioner of the Metropolitan Police, Andy Hayman, questioned the merit of stop and search powers which yielded little by way of contribution to counter-terrorism goals while having the adverse effect of alienating the very community, Muslims, whose co-operation was necessary to generating intelligence and awareness of threats to collective security.

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[6] '**Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches'**, Quarterly update to September 2009. (London: Home Office, 25 February 2010)

[7] '**Stop and think: A critical review of the use of stop and search powers in England and Wales'** (Equalities and Human Rights Commission, March 2010). p 17

[8] **Jane's Police Review**, 24 Sept 2004.

Asst. Commissioner Hayman said:

"I am not sure what purpose it serves, especially as it upsets so many people, with some sections of our community feeling unfairly targeted.

"It seems a big price to pay."[9]

And Commander Richard Gargini in a presentation to the Muslim Safety Forum in 2007 outlined the approach of the Association of Chief Police Officers (ACPO) which would seek to put intelligence ahead of appearance in selecting individuals for stop and search, saying use of the powers would be *"led by intelligence and not by appearance - not led by the way people are, or by the communities they come from."*[10]

Notwithstanding the efforts and knowledge to counter and repudiate the disproportionate impact of the powers on Blacks and Asians, the fact remains that the powers are used discriminatorily with the civil rights of ethnic minorities infringed at levels which seriously undermine trust in policing and undermine our equality and anti-discrimination legislation.

A study prepared by the Defence Science and Technology Laboratory (Dstl) for the Office of Security and Counter Terrorism (OSCT) entitled 'What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?,' found that the limited amount of evidence available for assessing perceptions of counter-terrorism legislation as opposed to the way it is implemented was "…*derived from the Muslim community and was almost exclusively related to negative perceptions of the way in which 'Stop and Search' practices have been implemented by the police."*[11]

The Equalities and Human Rights Commission in its 2010 report on the use of stop and search powers in England and Wales (not specific to counter-terrorism legislation but including the scope of Section 44) states that:

"The evidence points to racial discrimination being a significant reason why black and Asian people are more likely to be stopped and searched than white people. It implies that stop and search powers are being used in a discriminatory and unlawful way."[12]

Further studies done on the disproportionate impact of stop and search powers on Muslims and other ethnic minorities and its adverse effects on community cohesion and trust in policing, all of which are imperative to our counter-terrorism strategy's embracing the important role played by communities, are the Open Society Justice Institute report on Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory, and the Demos report, 'Bringing it Back Home'.

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[9] Terror stop and search questioned , **BBC News Online**, 12 December 2006 [Online] Available at: http://news.bbc.co.uk/1/hi/uk_politics/6171775.stm

[10] Police rethink on stop and search, **BBC News Online**, 24 January 2007 [Online] Available at: http://news.bbc.co.uk/1/hi/uk_politics/6295411.stm

[11] **'What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?'** (London: Defence Science and Technology Laboratory (Dstl) Ministry of Defence, March 2010).

[12] Ibid pg 6

We would reiterate the concerns raised in these various reports that the disproportionate use of stop and search powers against Muslims and other minorities under Section 44 of the Terrorism Act violates anti-discrimination and equalities legislation, threatens social cohesion, undermines trust in police forces and imperils the important role communities have to play under the Prevent dimension of our counter-terrorism strategy.

The Conservative Party green paper 'A Resilient Nation' advancing the party's 'new, integrated approach to national security,' underscored the party's recognition of the infringement of civil liberties that had occurred under the previous government by putting forth *"a new concern with ensuring that security legislation does not compromise civil liberties, and with strengthening social cohesion."*

We would urge the Government to reconsider stop and search powers in light of the arguments raised above, including the near negligible contribution of the powers to actual arrests and detention of persons suspected of terrorism or terrorist-related activity, and consistent with the coalition's promise to *"introduce safeguards against the misuse of anti-terrorism legislation."*

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

It would seem pertinent to us that this review comes as Birmingham City Council has been forced to dismantle the £3million Project Champion, which placed almost 200 security cameras in 81 sites around Birmingham amounting to a covert surveillance operation against overwhelmingly Muslim residents of the city.

West Midlands police and the city council were compelled to backtrack on project Champion following the threat of legal action by human rights group Liberty and the intervention of local MP Roger Godsiff, despite first attempting to portray the scheme as tackling anti-social behaviour and vehicle crime in the city.

Project Champion and the invasion of a citizen's right to privacy is perhaps the most significant example of the misuse of the Act, although numerous examples are available of local authorities using the provisions to determine, among other things, whether a family legally resides within a particular jurisdiction to qualify for a school placement.

We would also raise concerns here that have previously arisen in consideration of the use of information Sharing Agreements (ISAs) by local authorities and other agencies as part of the Prevent strand of the counter-terrorism strategy (CONTEST), that the terms of these agreements have been open to abuse infringing the rights to privacy of persons as protected under Article 8 of the European Convention on Human Rights.

We have raised this in correspondence with the then Home Secretary, Alan Johnson, following disclosures in the Guardian newspaper and in an Institute of Race Relations report, 'Spooked! How not to prevent violent extremism', that aspects of the Prevent programme were being used by practitioners to 'spy' on British Muslims (letter enclosed).

Indicating its commitment to review RIPA and access to communications data in general, the Conservative election manifesto proposed the following measures:

- curtailing the surveillance powers that allow some councils to use anti-terrorism laws to spy on people making trivial mistakes or minor breaches of the rules;

- requiring Privacy Impact Assessments of any proposal that involves data collection or sharing; and,

- ensuring proper Parliamentary scrutiny of any new powers of data-sharing[13]

We would cite Project Champion and the examples contained in the IRR report mentioned above as necessary and sufficient grounds for the Government to investigate the abuse of the RIPA Act to encroach on rights to privacy of citizens and to the reinforcement by abuse of the perception of Muslims as a 'suspect community'.

We would further cite the judgment of Lord Neuberger in the case of Binyam Mohamed and the complicity of security agents in his torture while detained at Guantanamo, that a "culture of suppression" pervades MI5 and that parliamentary oversight of the security agency has been found lacking.

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

The ruling on 9 April 2008 by the Court of Appeal of England and Wales in the cases of Abu Qatada (a Jordanian national) and two Libyan nationals (known in the proceedings only by their initials 'DD' and 'AS'), brought into question the Government's use of the policy of 'Deportation with Assurances'. The Court of Appeals in its judgment refuted the Government's claim that the assurances received from Libya in the form of a Memorandum of Understanding provided sufficient protection against torture for the Libyan nationals marked for deportation.[14]

The 'Deportation with Assurances' policy which amounts to 'diplomatic assurances' offered by the receiving state to honour human rights and protection against torture has been severely criticised by human rights agencies as reneging on UK commitments under the European Convention on Human Rights, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights.

The policy has also been criticised for its 'unenforceability', with bilateral assurances between states deemed insufficiently robust particularly in regards to states whose human rights records are abysmal.

A sustained critique on the use of the policy is contained in Amnesty International's report, 'The State of the World's Human Rights.'[15]

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[13] **'Invitation to join the Government of Britain,'** Conservative Party election manifesto 2010 (London: The Conservative Party) p. 79

[14] 'Time to abandon UK government's policy of 'deportation with assurances,' **Amnesty International**, 14 April 2008

[15] 'The State of the World's Human Rights', **Amnesty International**, (London: Amnesty International publications, 2010)

We would remind of the coalition's manifesto promise,

"We will never condone the use of torture"

And urge that promise be upheld in respect of British citizens and those whose deportation may present the risk of torture abroad.

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

We have previously voiced concern over the Conservative party's stated intent to ban Hizb ut-Tahrir.[16]

We have criticised the move as contradicting commitments to reversing the erosion of civil liberties under the last Government, as well as exhibiting a contradictory stance towards Muslim organisations, leaving other similar groups no less disposed to provocation and inciting violence, like the English Defence League and its regional spin-offs, unaffected.

We noted with interest the commitment in the Conservative election manifesto to:

"Restore the right to protest by reforming the Public Order Act to safeguard non-violent protest even if it offends"

And the coalition manifesto commitment to:

"Restore rights to non-violent protest."

It would appear to us that Hizb ut-Tahrir would fit within the category of groups engaging in non-violent protest, including the caveat of non-violent protest that may be deemed offensive.

We would reiterate the comments of the former Justice Secretary that, to date, no evidence has been brought forth which would justify the closure of Hizb ut-Tahrir.[17]

We would contend that the proscription of organisations in a democracy must adhere to very strict measures to validate the action, the measure itself constituting a restriction on the parameters of free debate and the exercise of free opinion in a liberal democracy. It must, in addition, be evidence-based with clear arguments presented in justification of proscription.

We are unconvinced that there exists a body of evidence that would justify the outlawing of Hizb ut-Tahrir. We are aware of arguments presented by so-called 'ex-extremists' in support of proscription but would contend that these are mere opinions and not arguments underwritten by robust inquiry or legal defences on the merits or validity of such a measure.[18]

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[16] 'Tory Shadow Home Secretary pledges again to immediately ban HT', **ENGAGE** [Online] Available at: http://www.iengage.org.uk/component/content/article/1-news/564-tory-shadow-home-secretary-pledges-again-to-ban-immediately-ht

[17] 'The Great Survivor', **New Statesman magazine**, 3 December 2009

[18] 'Why I was not surprised about the Christmas Day bomber's UK links', Rashad Ali in **The Observer**, 3 January 2010

We would further argue that the UK possesses sufficient legislation to prosecute under Incitement to Racial and Religious Hatred (the former provision – racial – being more robust than the latter – religious) and Public Order offences instances of 'promoting hatred or violence'.

We would contend that reactions to the marches and demonstrations of the English Defence League in cities across the UK have not been to proscribe the organisation but to prosecute violations of the law, including laws on promoting hatred or violence. Petitions on banning moving demonstrations have involved the assessments of local councils and local police forces on the best response, on balance, to deal with the protests. The reaction has not been a blanket ban on any such protest.

We would further contend that views espoused by individuals belonging to Hizb ut-Tahrir are best challenged through rigorous debate and critical inquiry.

We would support the findings of the Demos report, 'The power of unreason: conspiracy theories, extremism and counter-terrorism,'[19] that unpalatable views, including conspiracy theories, are best challenged by civil society actors, individual and collective, through critical cognitive engagement with the ideas of others.

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

The detention of terror suspects without charge has been a blight on our moral conscience and our stated commitment to civil liberties since the introduction of ever more punitive measures on detention without charge under the previous Labour governments.

The proposed measures of extending the period of detention for up to 90 days has solicited widespread consternation on the abrogation of treaty commitments on the rights of persons detained on suspicion of criminal activity. Britain has the longest pre-charge detention period in a western democracy, a matter which puts to shame our proud history of championing liberal rights and freedoms.

The pre-charge detention measure has provoked reaction from Muslim communities and human rights agencies on the suspension of civil liberties of citizens for long durations without knowledge of the charge/s to be levied against them.

The practice of detention without charge has been particularly damning in respect of individuals who have been detained only to be released without any charge being brought against them.

We would reiterate concerns raised above in the section under stop and search powers, that measures which play cavalier with the human rights of citizens and which reinforce the perception of 'dual justice', endanger the collective security of us all by driving a wedge between communities and between communities and the agencies tasked with protecting our security.

We would contend that our counter-terrorism efforts must be led by strong intelligence revoking the need for holding suspects without charge for long periods of time. Detention without charge

[19] '**The power of unreason: conspiracy theories, extremism and counter-terrorism'**, (London: Demos, August 2010)

runs the risk of criminalising individuals who have committed no act of criminality. The longer the period of detention, the greater the costs, personal, mental and financial, to the individual unjustly apprehended.

We would concur with Liberty, in its response to the consultation on the review of counter-terrorism and security powers, that:

"The continuous renewal of the extended pre-charge detention limit and the injustice that inevitably results does not help us to win that battle [for hearts and minds]. On the contrary, pre-charge detention for almost a month can and has damaged community relations, potentially making it more difficult for police and intelligence agencies to maintain all-important relationships with Muslim communities. In some extreme cases, it could even operate as a recruiting sergeant to terrorism."[20]

We would argue that oppressive laws and their use in Northern Ireland have proven their disutility in enhancing our collective security and gaining the confidence of affected communities. We would urge the Government to take stock of our past harmful and ruinous policies in Northern Ireland and to review the pre-charge detention provision for the better bringing the UK back in line, and none too soon, with practices in other western democracies.

[20] **'From 'war' to law: Liberty's response to the Coalition Government's Review of Counter-terrorism and Security Powers 2010'** (London: Liberty) p. 110