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### **Paper:**

Macdonald, S. (2007). ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions.  
*Parliamentary Affairs*, 60(4), 601-624.

<http://dx.doi.org/10.1093/pa/gsm034>

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**ASBOs and Control Orders: Two Recurring Themes, Two Apparent  
Contradictions**

*Stuart Macdonald\**

**Introduction**

The Control Order does bear a number of similarities to the ASBO; both are civil orders, breach of which (without reasonable excuse) is a criminal offence punishable by up to five years' imprisonment. In fact, when the Government first proposed the creation of the Control Order, some responded by labeling it the Anti-Terrorist ASBO.<sup>1</sup> But there are also a number of dissimilarities. Apart from the obvious fact that they are targeted at different types of behaviour, there is a two-tier system of Control Orders – derogating Control Orders (which may deprive an individual of his/her liberty) and non-derogating Control Orders (which may only restrict an individual's liberty). There is no equivalent with ASBOs. ASBOs may only impose negative prohibitions, whereas Control Orders can also impose positive obligations.<sup>2</sup> Derogating Control Orders last for six months, at the end of which they may be renewed.<sup>3</sup> Non-derogating Control Orders last for 12 months, at the end of

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<sup>1</sup> See, e.g., HC Deb vol 430 col 310 26.01.05.

<sup>2</sup> Compare Crime and Disorder Act 1998, s. 1(4), with Prevention of Terrorism Act 2005, s. 1(4).

<sup>3</sup> Prevention of Terrorism Act 2005, ss. 4(8)-(9).

which they may also be renewed.<sup>4</sup> ASBOs, by contrast, last for a minimum of two years and may be indefinite, but there is no procedure for the renewal of an ASBO.<sup>5</sup>

The aim of this paper is not simply to list all the similarities and dissimilarities between the two remedies. Its aim is to draw out two deeper themes which, it will be argued, not only marked the development of the Control Order but also the development of the ASBO several years earlier. For each theme an apparent contradiction will also be identified. After introducing each remedy the paper will examine the first of the two themes – New Labour’s repeated insistence that the executive can be trusted to employ wide-ranging powers responsibly – and contrast this with their insistence, during the passage of the Human Rights Act 1998, that individuals need to be protected against the misuse of state power. It will then turn to the second theme – New Labour’s willingness to circumvent the criminal law – and contrast this with their apparent confidence in the criminal law to solve a wide variety of societal problems. The paper will conclude by arguing that these two recurring themes and two apparent contradictions indicate a lack of commitment to fostering a culture of human rights.

## **The ASBO**

In 1995 New Labour published the consultation paper *A Quiet Life*.<sup>6</sup> Claiming that consultation with the police, local authorities, councillors and MPs had revealed ‘intense dissatisfaction with the extent and speed of existing procedures’ used to tackle anti-social behaviour,<sup>7</sup> the paper proposed the creation of a Community Safety

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<sup>4</sup> Prevention of Terrorism Act 2005, ss. 2(4)-(8).

<sup>5</sup> Crime and Disorder Act 1998, s. 1(7).

<sup>6</sup> *A Quiet Life: Tough Action on Criminal Neighbours*, Labour Party, 1995.

<sup>7</sup> *Ibid*, at p. 6

Order. Innovatively, breach of this ‘special form of injunction’<sup>8</sup> would not amount to the normal contempt of court; rather it would constitute a criminal offence. Although the proposal was initially dismissed as ‘merely window dressing on Labour’s part’<sup>9</sup> by Prime Minister John Major, the pressure exerted by the strong opposition and local authorities forced the politically weak government into action. Part V of the Housing Bill (to become the Housing Act 1996) accordingly contained three chapters aimed at confronting the problem of anti-social behaviour.<sup>10</sup> For New Labour, however, the measures did not go far enough. They proposed a number of amendments to the Bill geared at strengthening both its civil and criminal law provisions, including one at the Commons Standing Committee stage which would have had the effect of creating an Order broadly similar to the one proposed in *A Quiet Life*. Although this was rejected by the Committee, New Labour continued to pursue the idea of a hybrid remedy. In March 1996, following a spate of high-profile cases, Labour MP Janet Anderson introduced a Private Member’s Bill aimed at addressing the problem of stalking. The remedy she advanced – a prohibitory civil order, breach of which would constitute a criminal offence – followed the formula of the *A Quiet Life* proposal. This, coupled with pressure from the media, led the Conservative Government to hastily publish the consultation paper *Stalking – The Solutions*.<sup>11</sup> The resulting Protection from Harassment Act 1997 contains a combination of civil and criminal law provisions, including two civil orders, breach of which constitute criminal

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<sup>8</sup> Ibid, at p. 8.

<sup>9</sup> HC Deb vol. 262 col. 472 22.06.95.

<sup>10</sup> The three chapters introduced an introductory tenancy scheme, strengthened the grounds on which social and private landlords could evict secure tenants for nuisance, and provided that a power of arrest may be attached to an injunction obtained by a public landlord against one of its tenants (Housing Act 1996, ss. 124-158).

<sup>11</sup> Home Office, 1996.

offences<sup>12</sup> – leading one commentator to describe the Act as a ‘cuckoo’s egg neatly placed by Labour in the nest of the Conservative Government.’<sup>13</sup>

Although Home Secretary Michael Howard was keen to stress that the Act’s provisions could be used against disruptive neighbours as well as stalkers,<sup>14</sup> this did not satisfy New Labour. Shadow Home Secretary Jack Straw claimed that the Act contained ‘serious defects,’ pointing in particular to the fact that the ‘civil remedies provided by [the Act] are available only at the suit of the individual victim.’<sup>15</sup> So, four months after their landslide General Election victory, New Labour repeated their proposal for a Community Safety Order in a Home Office consultation paper.<sup>16</sup> Three months later they introduced the Crime and Disorder Bill to the House of Lords, with the proposed new remedy, which by now had been renamed the Anti-Social Behaviour Order, proudly showcased in clause one of the Bill. During its passage through Parliament, the ASBO faced little opposition. Only two amendments relating to the Order – both tabled by Liberal Democrat peer Lord Goodhart – were pressed to a division; both were heavily defeated. The Bill received Royal Assent on 31<sup>st</sup> July 1998, and ASBOs became available on 1<sup>st</sup> April the following year.

Despite initial projections that 5000 Orders would be issued a year,<sup>17</sup> only 1017 were reported to the Home Office by the end of 2002. This low uptake

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<sup>12</sup> ss. 3(6), 5(5). The first may be imposed in civil proceedings (s. 3) and the other following conviction for either the offence of ‘putting people in fear of violence’ or the offence of ‘harassment’ (s. 5(1)).

<sup>13</sup> A. Rutherford ‘An Elephant on the Doorstep: Criminal Policy without Crime in New Labour’s Britain’ in P. Green and A. Rutherford (eds) *Criminal Policy in Transition*, Hart Publishing, 2000.

<sup>14</sup> HC Deb vol. 287 col. 781 17.12.96.

<sup>15</sup> HC Deb vol. 287 cols. 792-793 17.12.96.

<sup>16</sup> *Community Safety Order: A Consultation Paper*, Home Office, 1997.

<sup>17</sup> HC Written Answers vol. 305 col. 138 27.01.98.

prompted several layers of reform, following which a complex regime now governs the ASBO – contained in sections 1, 1A, 1AA, 1AB, 1B, 1C, 1CA, 1D, 1E, 1F, 1G, 1H and 1I of the Crime and Disorder Act 1998. In addition to local authorities and chief officers of local police, an Order may now also be applied for by registered social landlords, the chief constable of the British Transport Police, Housing Action Trusts and (in England) county councils,<sup>18</sup> provided that the statutory consultation requirements have been met.<sup>19</sup> Applications can be made to the magistrates’ court, to the county court and (post-conviction) to the criminal court.<sup>20</sup> There is also now provision for interim ASBOs.<sup>21</sup> An ASBO may be imposed if it is shown that the individual has acted in ‘an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself,’ and that an Order is necessary to prevent further continuation of the behaviour.<sup>22</sup> The House of Lords has held that the first of these preconditions must be established beyond reasonable doubt, while the second requires an exercise of judgment or evaluation.<sup>23</sup> The Order must last for a minimum of two years (and may be indefinite).<sup>24</sup> The prohibitions it imposes must be necessary to protect others from further anti-social acts by the defendant, and may cover any defined area within, or the whole of, England and Wales.<sup>25</sup> To breach an Order without reasonable excuse is a criminal offence, punishable by up to five years’

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<sup>18</sup> s. 1(1A).

<sup>19</sup> s. 1E.

<sup>20</sup> ss. 1(3), 1B & 1C.

<sup>21</sup> s. 1D.

<sup>22</sup> s. 1(1).

<sup>23</sup> *R (McCann and others) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787.

<sup>24</sup> s. 1(7).

<sup>25</sup> s. 1(6).

imprisonment in the case of adults,<sup>26</sup> and a Detention and Training Order of up to 24 months' duration in the case of under-18s.<sup>27</sup> The alterations made by the Home Office, particularly the introduction by the Police Reform Act 2002 of the post-conviction ASBO,<sup>28</sup> have helped increase the use of the Order. By the end of 2005, a total of 9853 had been made, with the rate at which they are being issued still increasing.<sup>29</sup>

### **The Control Order**

The Control Order celebrated its second birthday on 11 March 2007. The catalyst for the creation of the Order had been the House of Lords' decision that the power under Part IV of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) to indefinitely detain foreign nationals suspected of being terrorists was incompatible with the European Convention on Human Rights (ECHR).<sup>30</sup> Then Home Secretary Charles Clarke explained that Control Orders were 'designed to address directly two of the Law Lords' concerns: discrimination and proportionality.'<sup>31</sup> The majority of the Law Lords had held that the purported Article 15 derogation from the Article 5 right to liberty should be quashed (Lord Walker dissenting). Even if (unlike Lord Hoffman) one accepted that there was a public emergency threatening the life of the nation, the power of indefinite detention was disproportionate and so not strictly required by the exigencies of the situation. The terrorist threat derives from both

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<sup>26</sup> s. 1(10).

<sup>27</sup> Powers of Criminal Courts (Sentencing) Act 2000, s. 100.

<sup>28</sup> 63% of all ASBOs issued between 1/01/03 and 30/09/05 were post-conviction ASBOs (figures obtained from Home Office).

<sup>29</sup> 1336 were imposed in 2003, 3440 in 2004 and 4060 in 2005 (Home Office website).

<sup>30</sup> *A v Secretary of State for the Home Department* [2004] U.K.H.L. 56, [2005] 2 A.C. 68.

<sup>31</sup> HC Deb vol. 430 col. 307 26.01.05.

British and foreign nationals, yet the power of indefinite detention only applied to foreign nationals. As Baroness Hale remarked, 'if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners.'<sup>32</sup> The majority of the Law Lords also held that there had been a violation of the Article 14 right to be free from unjustifiable discrimination; since the power of indefinite detention did not apply to British suspected terrorists, foreign suspected terrorists were being unjustifiably discriminated against in their enjoyment of the Article 5 right to liberty. Clarke explained that the Control Order would be available against both British and foreign nationals, thus addressing the problem of discrimination. The problem of proportionality would also be addressed since the controls imposed in any given would be tailored to meet the threat posed by the particular suspect.

When the Prevention of Terrorism Bill was first introduced to Parliament, much of the media attention focussed on the derogating Control Order. The Bill originally provided that the Home Secretary would be empowered to impose derogating Control Orders if an order derogating from Article 5 ECHR had been made and if he was satisfied, on the balance of probabilities, that the individual is/had been involved in terrorism-related activity and that the imposition of an Order, and each of the obligations contained within it, were necessary. The Bill stated that, if the Home Secretary decided to impose a derogating Control Order, the High Court must review this decision within seven days and decide whether there were reasonable grounds for it. If there were such grounds, a full hearing would then follow at which the Court would make its own decision whether an Order should be imposed. The failure to provide for any judicial involvement in this procedure prior to an individual being deprived of his liberty was fiercely criticised. Charles Clarke, then Home Secretary, claimed that this was justified:

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<sup>32</sup> At [231].

‘The Bill gives certain responsibilities to the Secretary of State. I know that some honourable Members would prefer those responsibilities to be allocated entirely to the judiciary ... [However], the Government’s, and my, prime responsibility is to protect the nation’s security. In many ways, that is our paramount task. Decisions in this area are properly for the Executive, who are fully accountable to Parliament for their actions’<sup>33</sup>

Shadow Home Secretary David Davis described this as ‘a remarkable, novel and hazardous doctrine.’<sup>34</sup> The Joint Committee on Human Rights (JCHR) described it as ‘an eccentric interpretation of the constitutional doctrine of the separation of powers,’ and insisted that ‘Both Parliament and the Executive have long accepted and respected the judiciary’s responsibility for the liberty of the individual. To invoke national security to deny that role is to subvert our traditional constitutional division of powers.’ The JCHR added that the absence of judicial involvement prior to the imposition of a derogating Control Order would violate Article 5 ECHR.<sup>35</sup>

This strong criticism ultimately led to the Government amending the Bill during the committee stage in the House of Lords. Following these amendments, the Prevention of Terrorism Act 2005 provides that the Home Secretary must apply to the High Court for a derogating Control Order.<sup>36</sup> If such an application is made, a preliminary hearing must take place immediately.<sup>37</sup> This hearing may be held in the absence of the individual in question, without him being given notice of the application, and without him being given an opportunity to make representations to

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<sup>33</sup> HC Deb vol. 431 col. 154 22.02.05.

<sup>34</sup> *ibid*, col. 157.

<sup>35</sup> *Prevention of Terrorism Bill: Preliminary Report* (9<sup>th</sup> Report of Session 2004-05) HC 389, paras. 11-12.

<sup>36</sup> s. 1(2)(b).

<sup>37</sup> s. 4(1)(a).

the court.<sup>38</sup> If the court decides that there is a prima facie case it may impose an Order.<sup>39</sup> A full inter partes hearing then follows which (unless the court otherwise directs) must take place within seven days.<sup>40</sup> At this hearing – which may include closed sessions, during which the individual is represented by a special advocate<sup>41</sup> – the court must decide whether to confirm or revoke the Order.<sup>42</sup> The court may confirm the Order if a derogation order has been made, if the court is satisfied on the balance of probabilities that the individual is/has been involved in terrorism-related activity, and if it considers that the imposition of obligations on the individual is necessary to protect the public from a risk of terrorism.<sup>43</sup> The Act also provides that, when confirming an Order, the court may modify the obligations which the Order

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<sup>38</sup> s. 4(2). Although the statutory wording is discretionary, the Lord Chancellor stated that preliminary hearings ‘will almost invariably be on an ex parte basis’ (HL Deb vol. 670 col. 364 3.03.05).

<sup>39</sup> According to s. 4(3), the court may impose an Order if a derogation order has been made, if the court believes there is material which is capable of establishing that the individual is/has been involved in terrorism, and if it appears to the court that there are reasonable grounds for believing that the Order and the obligations it contains are necessary to protect the public from a risk of terrorism.

<sup>40</sup> s. 4(1)(b); Civil Procedure Rules 1998 (SI 1998/3132), para. 76.5(1) (as amended by Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005/656)).

<sup>41</sup> Schedule 1, para. 7; Civil Procedure Rules 1998 (SI 1998/3132), paras. 76.22–76.25. Once the Special Advocate has received the closed material relied on by the Home Secretary, he cannot communicate about the proceedings with the individual he is representing (para. 76.25).

<sup>42</sup> s. 4(5).

<sup>43</sup> s. 4(7). The obligations which may be imposed include those listed in s. 1(4). A list of terrorism-related activities is set out in s. 1(9). s. 15(1) states that ‘terrorism’ has the meaning set out in Terrorism Act 2000, s. 1.

imposes.<sup>44</sup> Although the JCHR welcomed the greater degree of judicial involvement in this amended procedure, it nonetheless voiced several concerns, stating that, absent exceptional circumstances, the preliminary hearing should be *inter partes*, that the threshold for the making of an Order at the preliminary stage is very low, and expressing concern that the subsequent full hearing may include closed sessions.<sup>45</sup> It concluded by doubting whether the amended procedure ‘constitutes a sufficient safeguard against arbitrary detention to satisfy the basic requirement of legality.’<sup>46</sup>

The appropriate procedure for the imposition of a non-derogating Control Order was equally contentious. The Prevention of Terrorism Bill originally provided that non-derogating Control Orders were to be made by the Home Secretary. An individual issued with an Order would have a right to challenge it in the High Court. The Court hearing such a case would decide whether the decision to impose an Order was flawed, which the Bill explained meant that the court should apply the principles applicable on an application for judicial review. In spite of strong criticism of this procedure from the JCHR,<sup>47</sup> and from members of both Houses of Parliament, Charles Clarke rejected calls for it to be changed to provide for a greater degree of judicial involvement prior to the making of an Order. Stressing that there is ‘an

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<sup>44</sup> s. 4(6). s. 7(4) also provides that the Home Secretary and the controlled person may apply to the court for a derogating Control Order to be revoked or modified.

<sup>45</sup> *Prevention of Terrorism Bill* (10<sup>th</sup> Report of Session 2004-05) HC 334, paras. 4-7.

<sup>46</sup> *ibid*, para. 10.

<sup>47</sup> In its preliminary report the JCHR opined that where an Order infringed an individual’s rights under Articles 8, 10 or 11 ECHR, the courts’ limited supervisory jurisdiction could result in the infringement being deemed disproportionate. It added that if the obligations imposed amounted to the determination of the individual’s civil rights, there could be an infringement of the Article 6(1) requirement that there be a right of access to a court with full jurisdiction (n35 above, paras. 15-17). These concerns were subsequently reiterated in the Committee’s full report (n45 above, para. 12).

important qualitative difference' between a deprivation of liberty and a restriction of liberty, Clarke explained that he had amended the procedure for the imposition of a derogating Control Order because he had 'reluctantly accepted' that the making of an Order depriving an individual of his liberty 'was such a serious matter that it could not be left in the hands of a Minister.' However, he argued, this argument does not apply to non-derogating Control Orders, because such Orders only restrict an individual's liberty.<sup>48</sup> Clarke's refusal led to the House of Lords accepting, by 249 votes to 119, an amendment tabled by Liberal Democrat peer Lord Goodhart, which provided that non-derogating Control Orders would be made by the High Court, not by the Home Secretary. This defeat, and the concern to ensure that Control Orders would be available before the impending release of those detained under Part IV ATCSA, meant that, when the Bill was returned to the Commons from the Lords, Clarke accepted that 'some measure of judicial involvement [in the making of a non-derogating Control Order] is necessary and desirable.'<sup>49</sup> He accordingly tabled amendments to the procedure for imposing such Orders. These amendments were accepted, and formed part of the Bill that ultimately received Royal Assent.

According to the Prevention of Terrorism Act 2005, the Home Secretary may make a non-derogating Control Order if two conditions are satisfied. The first of these – that he has reasonable grounds for suspecting that the individual is/has been involved in terrorism-related activity – was the subject of much debate. At Committee stage the Lords had changed the standard of proof required from reasonable grounds for suspicion to on the balance of probabilities. This amendment was rejected by the Commons, but then reinserted by the Lords. Finally, after a 32 hour sitting of Parliament in which the two chambers sent the Bill back and forth a total of five times, and after an agreement had been reached that the provisions would be reviewed on their first anniversary, the Lords voted to accept the lower

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<sup>48</sup> HC Deb vol. 431 cols. 698-699 28.02.05.

<sup>49</sup> HC Deb vol. 431 col. 1579 9.03.05.

threshold of reasonable grounds for suspicion.<sup>50</sup> The second of the two conditions which must be satisfied for an Order to be made is that the Home Secretary considers that the imposition of an Order is necessary to protect the public from a risk of terrorism.<sup>51</sup> Importantly, though, the Home Secretary may not (save in cases of urgency) issue a non-derogating Control Order unless he has first received permission to do so from the High Court.<sup>52</sup> The Court may grant permission as long as it does not consider the Home Secretary's decision that there are grounds for an Order to be obviously flawed.<sup>53</sup> In urgent cases the Home Secretary may impose an Order without first obtaining permission, but the Order must immediately be referred to the High Court for the Court to decide whether the decision to impose the Order was obviously flawed.<sup>54</sup> A court considering an application for permission to make an Order or the making of an urgent Order may hear the case in the absence of the individual in question, without him being notified of the application, and without him being given an opportunity to make representations to the court.<sup>55</sup> After the Home Secretary has issued an Order with the High Court's permission (or an urgently made Order has been confirmed) there must follow, as soon as is reasonably practicable, a full hearing.<sup>56</sup> At the full hearing the Court must decide whether the Home Secretary's decision that the conditions for the making of an Order were

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<sup>50</sup> s. 2(1)(a).

<sup>51</sup> s. 2(1)(b).

<sup>52</sup> s. 3(1). s. 3(1)(c) provided that Orders could be imposed on those detained under Part IV ATCSA, before the expiry of this legislation, without prior permission being obtained from the High Court.

<sup>53</sup> s. 3(2).

<sup>54</sup> s. 3(3). The Court's consideration of the Order must begin within seven days of the Order being made (s. 3(4)).

<sup>55</sup> s. 3(5).

<sup>56</sup> ss. 3(2)(c), 3(6)(b), 3(6)(c).

satisfied was flawed, and whether his decision to impose the obligations contained in the Order was flawed.<sup>57</sup> In deciding whether or not these decisions were flawed, the Court must apply the principles of judicial review.<sup>58</sup> If the Home Secretary's decisions were not flawed, the Control Order must remain in force.<sup>59</sup> As with derogating Control Orders, the full hearing may include closed sessions, during which the individual is represented by a special advocate.<sup>60</sup>

The Court of Appeal has considered the procedure for the imposition of a non-derogating Control Order.<sup>61</sup> Disagreeing with the verdict of Sullivan J. in the High Court,<sup>62</sup> the Court concluded that there had been no breach of the respondent's Article 6(1) ECHR right to a fair hearing in the determination of his civil rights.<sup>63</sup> Lord Phillips CJ explained that the European Court of Human Rights has accepted that there are circumstances where reliance on closed material is not incompatible with Article 6. And, whilst 'this can only be on terms that appropriate safeguards against the prejudice that this may cause to the controlled person are in place,' the

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<sup>57</sup> s. 3(10).

<sup>58</sup> s. 3(11).

<sup>59</sup> s. 3(13). s. 7(1) states that the controlled person may apply to the Home Secretary for a non-derogating Control Order to be revoked or modified. s. 10(1) provides that the controlled person also has a right of appeal if the Home Secretary exercises the power under s. 7(2) to modify the obligations contained in such an Order without the controlled person's consent, and if the Home Secretary decides to renew an Order.

<sup>60</sup> n41 above.

<sup>61</sup> *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [2006] 3 WLR 839.

<sup>62</sup> *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin), [2006] HRLR 29.

<sup>63</sup> Lord Phillips CJ opined that the proceedings did not involve the determination of a criminal charge, pointing to the fact that s. 8(2) provides that a terrorist suspect must be prosecuted if there is sufficient available evidence (at [53]).

provision of a Special Advocate and the accompanying rules of court ‘constitute appropriate safeguards.’<sup>64</sup> Indeed, in the High Court Sullivan J. had held that the use of closed material, when coupled with the appointment of a Special Advocate, does not of itself result in non-compliance with Article 6(1). His conclusion that the procedure for imposing non-derogating Control Orders violates Article 6 was strongly influenced by the statement in section 3(10) of the Prevention of Terrorism Act that the function of the court at the full hearing is to determine whether the Home Secretary’s decision to impose an Order *was* flawed; Sullivan J. explained that this limits the court to consideration of the material which was available to the Home Secretary at the time he made his decision, which necessarily excludes the individual’s response to the allegations and the Special Advocate’s response to the closed evidence. In the Court of Appeal, however, Lord Phillips CJ said that there were ‘cogent reasons’ for reading section 3(10) down ‘so as to require the court to consider whether the decisions of the Secretary of State in relation to the control order *are flawed* as at the time of the court’s determination.’<sup>65</sup> On this interpretation, the court at the full hearing may have regard to all available evidence. This will involve forming its own opinion on ‘a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion,’ in order to determine whether the Home Secretary has reasonable grounds for suspecting that the individual is/has been involved in terrorism-related activity.<sup>66</sup> This purposive construction of section 3(10), which Lord Phillips CJ conceded is not the ‘natural’ reading of the subsection,<sup>67</sup> thus ensures a greater degree of judicial supervision over the procedure for imposing non-derogating Control Orders.

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<sup>64</sup> At [86].

<sup>65</sup> At [46], *emphasis original*.

<sup>66</sup> At [67].

<sup>67</sup> At [42].

## **The first recurring theme: the insistence that the executive can be trusted to employ wide-ranging powers responsibly**

To illustrate the type of behaviour targeted by the ASBO, New Labour relied on two case studies – Family X from Blackburn and the Finnie brothers from Coventry.<sup>68</sup> Both involved individuals who persistently committed criminal offences (including burglary, intimidation, attempted robbery, criminal damage and public disorder) in a particular area, making the lives of those living there unbearable and intimidating witnesses into silence. But, in spite of the fact that the ASBO was aimed at behaviour of this gravity, in the parliamentary debates on the Order New Labour refused to qualify the statutory definition of ‘anti-social behaviour’ as acting ‘in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.’<sup>69</sup> The result of this has been that enforcement agencies have been able to invoke the legislation in contexts far removed from the type of situation for which it was designed. For example, Kim Sutton, a 23 year-old woman from Odd Down, was issued with an ASBO prohibiting her from jumping into rivers, canals or onto railway lines after she had attempted suicide on four occasions. After his pigs and geese escaped and caused damage to his neighbour’s property, farmer Brian Hagan was issued with an ASBO prohibiting him

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<sup>68</sup> As well as being frequently referred to in the parliamentary debates, the case studies appear in both *A Quiet Life* (n6 above) and the Home Office guidance published in March 1999 (*Anti-Social Behaviour Orders – Guidance*, Home Office, 1999).

<sup>69</sup> One of the amendments which Lord Goodhart pressed to a division would have prevented an ASBO from being imposed unless the individual acted with an *intention* to harass or cause alarm or distress and his actions were likely to cause *serious* and *justified* alarm and distress. For an alternative proposal, see S. Macdonald ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of Anti-Social Behaviour’ (2006) 69 MLR 183.

from letting them escape again. And 63 year-old Graham Branfield was issued with an ASBO prohibiting him from feeding pigeons in his garden.<sup>70</sup> Proponents of the ASBO respond by claiming that such uses of the Order are exceptional. Whether this is the case or not – and the list of outlandish ASBOs does seem to grow ever longer<sup>71</sup> – the use of the Order in other contexts for which it was not designed also gives cause for concern. ASBOs are commonly used to prohibit prostitutes from soliciting, or to exclude them from a specified area altogether.<sup>72</sup> This tactic, which it seems merely relocates or buries the problem rather than address it, has had the effect of reintroducing the use of imprisonment for ‘common prostitutes’ found guilty of loitering or soliciting in a street or public place for the purposes of prostitution, even though Parliament abolished the use of custody against those convicted of this offence on the ground that it caused unacceptable hardship.<sup>73</sup> ASBOs have also been used to prohibit (non-aggressive) begging.<sup>74</sup> This has been criticised, with the charity Crisis arguing that the act of begging is best understood and dealt with as a manifestation of social exclusion, and that the use of enforcement measures like

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<sup>70</sup> ‘Woman banned from jumping in the river’ *The Daily Telegraph* (26.02.05); ‘Pigs that fly the coop land owner with Asbo’ *The Guardian* (14.12.04); ‘Bird lover gets Asbo for feeding pigeons’ *The Times* (31.07.06).

<sup>71</sup> See the list compiled by Statewatch (<http://www.statewatch.org/asbo/ASBOwatch.html> - last visited 14.05.07).

<sup>72</sup> Prostitution appears in the Home Office’s list of behaviours which might give rise to an ASBO (*A guide to anti-social behaviour orders*, Home Office, 2006, p. 8). See also S. Campbell, *A Review of Anti-Social Behaviour Orders* Home Office Research Study 236, Home Office Research, Development and Statistics Directorate, 2002.

<sup>73</sup> Street Offences Act 1959, s1(1). See further H. Jones & T. Sagar ‘Crime and Disorder Act 1998: Prostitution and the Anti-Social Behaviour Order’ [2001] *Criminal Law Review* 873.

<sup>74</sup> See n71 above. Like prostitution, begging appears in the Home Office’s list of behaviours which might give rise to an ASBO (n72 above, p. 8).

ASBOs may exacerbate the problems faced by vulnerable homeless people.<sup>75</sup> The National Association of Probation Officers thus stated, ‘the original purpose of the ASBO has been abused in some areas. In many incidents, individuals are receiving a custodial sentence where the original offence was not itself imprisonable ... The ASBO is clearly, therefore, moving offenders up tariff and resulting in the inappropriate use of custody.’<sup>76</sup>

There are also concerns about the use of ASBOs against young people. During the Parliamentary debates on the Crime and Disorder Bill the Government stated that the Order would not be used routinely against 10-15 year-olds; this was reflected in the draft Home Office guidance produced at the time.<sup>77</sup> But in the months between the Bill receiving Royal Assent and the ASBO coming into force, in response to strong representations from a number of local authorities, the draft guidance was revised, so that the version published shortly before ASBOs became available encouraged the routine use of the Order against 12-17 year-olds.<sup>78</sup> Following this U-turn, just over 40% of all ASBOs issued in England and Wales up to the end of 2005 were against 10-17 year-olds.<sup>79</sup> The significance of this is that the ASBO was designed for use solely against adults, and so infringes key principles of juvenile justice. The remedy’s civil classification, upheld by the House of Lords in *R (McCann and others) v Crown Court at Manchester*,<sup>80</sup> means that it falls outside the diversionary system of

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<sup>75</sup> Memorandum submitted to the Home Affairs Committee inquiry *Anti-Social Behaviour*, 5<sup>th</sup> Report of 2004-05, HC80, The Stationery Office, 2005, vol II, Ev 35.

<sup>76</sup> Memorandum submitted to the Home Affairs Committee inquiry (*ibid*), vol III, Ev 185.

<sup>77</sup> *Draft Guidance Document: Anti-Social Behaviour Orders*, Home Office, 1998.

<sup>78</sup> n68 above.

<sup>79</sup> Information on the age of the recipient is available for 9544 of the 9853 ASBOs issued to the end of 2005. Of these 9544, 3997 (41.88%) were imposed on 10-17 year-olds (Home Office website).

<sup>80</sup> n23 above.

reprimands and warnings which applies where a child commits a criminal offence, with the result that some young people receive ASBOs when other, more constructive, forms of intervention would have been possible, that applications for Orders are heard in the adult magistrates' court instead of the youth court, with little being done to help the young person understand and participate in the proceedings, and that the presumption in favour of anonymity is reversed so that there is instead a presumption in favour of disclosure,<sup>81</sup> notwithstanding the welfare-based protection afforded to young people's anonymity in the United Nations Convention on the Rights of the Child and the Beijing Rules.<sup>82</sup>

During the passage of the Crime and Disorder Bill critics warned that the definition of 'anti-social behaviour' was too broad, saying that it could potentially be applied in a discriminatory manner. They insisted that a far more tightly-drawn definition was needed, which clearly excluded the eccentric, the unconventional and the unpopular from its scope.<sup>83</sup> They also argued that the Bill should be amended so as to provide that ASBOs would only be available against those aged 16 and over.<sup>84</sup> Had these suggestions been heeded, outlandish ASBOs and the use of the Order against prostitutes, beggars and young people might have been avoided. New Labour, however, resisted these suggestions. First, they claimed that the critics' concerns about the definition of 'anti-social behaviour' were unfounded since there is a

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<sup>81</sup> Confirmed in *R (T) v St Albans Crown Court* [2002] EWHC 1129 (Admin).

<sup>82</sup> See further S. Macdonald & M. Telford 'The use of ASBOs against young people in England and Wales: lessons from Scotland' (2007) 27 *Legal Studies* (forthcoming).

<sup>83</sup> See A. Ashworth, J. Gardner, R. Morgan, A.T.H. Smith, A. von Hirsch & M. Wasik 'Neighbouring on the Oppressive: The Government's "Anti-Social Behaviour Order" Proposals' (1998) 16(1) *Criminal Justice* 7.

<sup>84</sup> See the amendment (no. 74) advanced by A.J. Beith, and associated debate, at the Third Reading of the Bill in the Commons (23.06.98).

filtering process within the legislation,<sup>85</sup> adding that the breadth of the definition has the advantage of flexibility. Second, even though they did not anticipate the Order being routinely used against those aged under-16, they left the minimum age at ten years, insisting that it was sufficient to rely on Home Office guidance to regulate the use of the remedy against 10-15 year-olds. New Labour's justifications for resisting the critics' suggestions were thus rooted in a benevolent view of state power. Those vested with discretion could be trusted to limit the use of the remedy by operating the filtering process within the legislation effectively. And the Home Office could be relied upon to produce, and enforcement agencies to follow, guidance which limited the use of the remedy against 10-15 year-olds.

The debate over the procedure for the making of derogating and non-derogating Control Orders also stemmed from different views of executive power. Critics insisted that the Home Secretary should not be granted the power to make Control Orders since his judgment could be influenced by political considerations (consciously or otherwise). In an illuminating paragraph of their final report on the Prevention of Terrorism Bill, the JCHR commented:

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<sup>85</sup> First, New Labour argued that enforcement agencies faced with frivolous or vexatious requests for ASBOs would simply refuse to apply for an Order. This was reinforced by the statutory consultation requirements and by the publication of guidance notes by the Home Office. And even if an enforcement agency were to apply for an ASBO in an undeserving case, the court would have complete discretion whether or not to impose an Order (s. 1(4)). Moreover, the court hearing the application must disregard any act of the defendant which he shows was reasonable in the circumstances (s. 1(5)), may only impose an Order if it is necessary to protect others from further anti-social acts by the defendant (s. 1(1)(b)), and should only impose an Order if the individual's behaviour warrants an ASBO of at least two years' duration (s. 1(7)).

‘[W]e make a brief observation about whether members of the executive or courts are best placed to make the decision as to whether control orders should be made in individual cases. Both the Home Secretary and the Prime Minister have been very candid in saying that they are proposing legislation of this exceptional kind because they do not want it to be possible for them to be accused of not doing more to protect the public in the event of a terrorist attack succeeding. Although we find this sentiment to be entirely understandable in elected representatives who are directly accountable to the public, we also consider that it demonstrates precisely the reason why independent safeguards for individual liberty are essential. A person who is determined to avoid being accused of failing to do more to protect the public is extremely unlikely to be the best person to conduct a rigorous scrutiny of the strict necessity of a particular order. That role is best performed by independent courts’<sup>86</sup>

By contrast, New Labour adopted a more benevolent view of executive power, insisting that the Home Secretary could be trusted to exercise the power to issue Control Orders responsibly. Charles Clarke reassured the House of Commons that ‘Control orders ... will be used carefully and only in serious cases. One has only to examine how sparingly the [powers under part 4 ATCSA] have been used to see that the Government take their responsibilities very seriously and act only when strictly necessary, and I believe that the same will be true of the new control orders.’<sup>87</sup>

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<sup>86</sup> n45 above, para. 16.

<sup>87</sup> HC Deb vol. 431 col. 769 28.02.05. In the same vein, he told BBC Radio 4’s *Today Programme* that ‘a lot of the discussion around this revolves around the extent to which I as Home Secretary, or the Prime Minister, of the Head of the Security Services or the Commissioner of the Metropolitan Police can be trusted with the assessments that we make’ (27.01.05).

Former Home Secretary David Blunkett delivered a number of speeches in which he urged the ‘vital role of good, trusted government in ensuring freedom and security.’<sup>88</sup> The features of the ASBO and Control Order outlined hitherto are just two examples of this benevolent view of state power. Another stark example is the Legislative and Regulatory Reform Act 2006. The original version of the Legislative and Regulatory Reform Bill was fiercely criticised for the breadth of the powers it would confer on Ministers; it would have enabled a Minister to amend, repeal or replace any existing legislation, including Acts of Parliament, for the purpose of ‘reforming’ it. A group of six eminent Cambridge academics warned that this would make it possible for the Government, by delegated legislation, to do such things as abolish jury trial and rewrite the law on immigration.<sup>89</sup> Jim Murphy (then Parliamentary Secretary in the Cabinet Office) attempted to assuage these concerns by giving ‘a clear undertaking ... that orders will not be used to implement highly controversial reforms,’<sup>90</sup> but this did little to reassure critics. Although the Government subsequently made substantial amendments to the Bill before it received Royal Assent in November 2006, many critics remained of the opinion that the powers being conferred on Ministers were unnecessarily broad.<sup>91</sup> In a similar vein, during the second reading of the Racial and Religious Hatred Bill (now Act 2006) Charles Clarke responded to suggestions that the offence of incitement to hatred on religious grounds could be used to prosecute those who vigorously debate matters of religion or who proselytise by stating that the requirement that the Attorney-General give his consent before any prosecution is brought and the guidance notes produced

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<sup>88</sup> ‘Security and Justice, Mutuality and Individual Rights’ Lecture at John Jay College New York 3.04.03.

<sup>89</sup> See their letter in *The Times* (16.02.06).

<sup>90</sup> HC Deb vol. 442 cols. 1058-1059 9.02.06.

<sup>91</sup> See, for example, Lords Select Committee on the Constitution *Legislative and Regulatory Reform Bill* (11<sup>th</sup> Report of Session 2005-2006) HL Paper 194.

by the Home Office would ensure ‘that spurious and vexatious cases will not come to court.’<sup>92</sup> Home Office Minister Paul Goggins echoed these sentiments when the Bill returned to the Commons, after the Lords had defeated the Government by amending the Bill. As well as claiming that the need to obtain the Attorney-General’s consent would constitute a ‘hurdle ... that ought to give people additional confidence,’<sup>93</sup> Goggins sought to reassure the Commons by undertaking ‘personal responsibility to ensure that the guidance reflects the legislation that we pass.’<sup>94</sup> These comments failed to prevent the Commons from voting to accept the Lords’ amendments, only the second Commons defeat experienced by New Labour since coming to power in 1997.<sup>95</sup> The first such defeat had come two months previously, during the Report stage of the Terrorism Bill. In spite of Tony Blair’s insistence that the vote came down to a straightforward choice whether or not to ‘back the police and those charged with fighting terrorism in our country, who tell us—in my view, rightly—that they need this power to make our country safe,’<sup>96</sup> the Commons voted against giving police the power to hold terrorist suspects for up to 90 days without charge, and opted instead to increase the maximum detention period to 28 days.<sup>97</sup> The offence of encouragement of terrorism, contained in clause one of the Bill, also proved contentious, in particular the express inclusion within the offence of statements

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<sup>92</sup> HC Deb vol. 435 cols. 671, 679 & 683 21.06.05.

<sup>93</sup> HC Deb vol. 442 col. 196 31.01.06.

<sup>94</sup> *ibid*, col 203.

<sup>95</sup> The Act thus provides that only threatening (as opposed to threatening, abusive or insulting) words/behaviour suffice for the offence, only an intention to stir up religious hatred suffices, and there is a provision which expressly protects freedom of expression (Public Order Act 1986, ss. 29B(1) and 29J).

<sup>96</sup> HC Deb vol. 439 col. 300 9.11.05.

<sup>97</sup> See the alterations made to schedule 8 of the Terrorism Act 2000 by Terrorism Act 2006, s.23.

glorifying the commission or preparation of (past, present or future) acts of terrorism.<sup>98</sup> Critics expressed concern that the vagueness of the term glorification – which was only added to the offence after plans to create a standalone offence of glorification of terrorism had been abandoned in the face of strong criticism<sup>99</sup> – coupled with the existing broad definition of terrorism, could result in inappropriate prosecutions against, inter alia, those who voice support for opponents of, or who celebrate the overthrow of, dictatorial and tyrannical regimes. New Labour sought to address such concerns by saying that any such people would be safeguarded against prosecution by the fact that prosecutions could only be brought with the consent of the Director of Public Prosecutions – ‘an important safeguard’ that should not ‘be taken lightly.’<sup>100</sup> Such confidence is characteristic of the benevolent view of state power that has been described in this section. The executive can be entrusted with broadly drafted powers since it will exercise those powers carefully and responsibly.

**The first apparent contradiction: the insistence that individuals need to protected against the misuse of state power**

This benevolent view of the executive stands in stark contrast to the rhetoric which surrounded the introduction of the Human Rights Act 1998, described by the Attorney-General as ‘one of the great achievements of recent years and indeed of this

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<sup>98</sup> Terrorism Act 2006, s. 1.

<sup>99</sup> The Lords voted to remove the glorification limb from the offence at the Bill’s Report stage. However, the Commons twice refused to accept this amendment and, in view of the Government’s undertaking to review all of the law on terrorism within 12 months, their Lordships accepted the glorification limb on the second occasion the Bill was returned to them.

<sup>100</sup> Charles Clarke (HC Deb vol. 438 col. 335 26.10.05).

Labour Government.’<sup>101</sup> During the passage of the Human Rights Bill, the Government stressed the importance of protecting individuals from misuse of state power. Then Home Secretary Jack Straw urged that ‘[the freedoms that our citizens already enjoy] need to be complemented by positive rights that individuals can assert when they believe that they have been treated unfairly by the state, or that the state and its institutions have failed properly to protect them.’<sup>102</sup> These claims of the necessity of human rights legislation are at odds with the benevolent view of state power outlined above; it is inconsistent to simultaneously stress the potential for the state to misuse the powers vested in it and also urge that the executive can be entrusted with wide-ranging powers.

This observation should not be taken as a claim that discretionary power has no place in any system of government. Such a view would be unrealistic; the fact of discretionary power is inevitable.<sup>103</sup> Moreover, discretionary power can be beneficial.<sup>104</sup> And, since the dangers associated with discretion – such as arbitrariness, inconsistency and irrelevant considerations being taken into account – can only be expressed in general terms, their relevance in a particular context cannot simply be assumed.<sup>105</sup> The claim is simply that these issues should be given careful consideration before wide-ranging powers are vested in the executive.

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<sup>101</sup> Lord Goldsmith ‘UK Terrorism Legislation in an International Context’ Speech delivered at RUSI Homeland Security and Resilience Department (10.05.06).

<sup>102</sup> HC Deb vol. 306 col. 767 16.02.98.

<sup>103</sup> K. Culp Davis *Discretionary Justice: A Preliminary Inquiry*, University of Illinois Press, 1971.

<sup>104</sup> L. Gelsthorpe and N. Padfield (eds) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond*, Willan Publishing, 2003.

<sup>105</sup> N. Lacey ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ in K. Hawkins (ed) *The Uses of Discretion*, Clarendon Press, 1992.

The history of the ASBO provides a cautionary tale. As has been explained, the Order was introduced to tackle nuisance neighbours who make the lives of others a misery by persistently committing criminal acts and intimidating witnesses into silence. Critics warned of the dangers of the definition of ‘anti-social behaviour,’ but, instead of trying to construct a narrower definition, New Labour chose to rely on enforcement agencies to operate the legislation responsibly. The result has been that, not only have numerous outlandish ASBOs been imposed, undermining the credibility of the Order, but it has also been employed in other contexts, such as prostitution and begging, as a heavy-handed instrument of social control.

The breadth of the discretion vested in the Home Secretary by the Prevention of Terrorism Act 2005 is also a cause for concern. Although Lord Carlile has stated that ‘I would have reached the same decision as the Secretary of State in each case in which a control order has been made’ – a statement the Government has used to suggest that the legislation has always been used appropriately<sup>106</sup> – he immediately qualified this with the words ‘... as far as the actual making of the order is concerned,’ explaining that ‘In some cases the extent of obligations under the order was more cautious and extensive than absolutely necessary.’<sup>107</sup> In *Secretary of State for the Home Department v JJ & others*<sup>108</sup> the Court of Appeal considered whether the cumulative effect of the obligations imposed on six controlees – whose Control Orders included an 18 hour curfew, electronic tagging, a requirement to report to a monitoring company twice a day, limitation of visitors and pre-arranged meetings to persons approved by the Home Office, submission to searches, a prohibition on cellular communications and the internet, and a requirement to remain at all times within a specified urban area (varying in size from 12.7 to 62 square miles) with

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<sup>106</sup> See the 2006 and 2007 Parliamentary debates on the renewal of the Control Order.

<sup>107</sup> *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, Home Office, 2007, para. 36.

<sup>108</sup> [2006] EWCA Civ 1141, [2006] 3 WLR 866.

which they had no previous connection – was to deprive the controlees of their liberty. The European Court of Human Rights has held that, since the difference between a deprivation of liberty and a restriction of liberty is ‘one of degree or intensity, and not one of nature or substance,’ a very onerous combination of restrictions on an individual’s liberty falling short of house arrest may nonetheless amount to a deprivation of liberty.<sup>109</sup> In the High Court Sullivan J. likened the controlees’ situation to detention in an open prison, stating that they were unable to lead a normal life and so had been deprived of their liberty. Since only derogating Control Orders may deprive a controlee of his liberty, the Orders breached the controlees’ Article 5 ECHR right to liberty, and so were quashed.<sup>110</sup> This decision was approved by the Court of Appeal, who agreed that the orders in question fell on the ‘wrong side of the dividing line.’<sup>111</sup>

Another, less onerous, Control Order was upheld by the Court of Appeal in *Secretary of State for the Home Department v E*<sup>112</sup> since it was adjudged to have only restricted the controlee’s liberty. Whilst broadly similar to the ones in *Secretary of State for the Home Department v JJ & others*, this Order imposed a curfew for a period of 12 hours a day as opposed to 18 and contained no requirement to remain within a specified geographic area. However, a further Order has been quashed by

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<sup>109</sup> *Guzzardi v Italy* (1981) 3 EHRR 333.

<sup>110</sup> [2006] EWHC 1623 (Admin), [2006] ACD 97.

<sup>111</sup> At [23]. The Home Secretary subsequently imposed new, less onerous, Orders (although one controlee absconded prior to the Court of Appeal’s judgment, and so the Order could not be served).

<sup>112</sup> *Secretary of State for the Home Department v E* [2007] EWCA Civ 459. Since the terms of the Control Order quashed by the High Court in *Secretary of State for the Home Department v Abu Rideh* [2007] EWHC 804 (Admin) were essentially the same as those in *Secretary of State for the Home Department v E*, it must be concluded that this Order should now be regarded as merely restricting the controlee’s liberty.

the High Court on the ground that it amounted to a deprivation of liberty. Although this Order allowed the controlee to continue living in the same flat with his father and, outside curfew hours, only prohibited him from meeting with six named individuals and anyone subject to a Control Order as opposed to requiring all visitors and pre-arranged meetings to be approved by the Home Office, it did impose a curfew for a total of 14 hours a day as opposed to 12 and, importantly, restricted him to an area totaling 9.3 square miles. This limitation cut him off from the area where he used to gravitate; in particular, it stopped him from going to the mosques he used to attend and prevented him from going to any significant educational establishment where he could study English. Concluding that the Order had ‘cut him off to a large extent from his previous life,’ Ouseley J held that the Order amounted to a breach of Article 5 ECHR.

The JCHR has urged that the ‘significance of these judicial decisions ... should not be underestimated,’ stressing that they ‘confirm the concern we expressed a year ago that the power to make control orders is being operated in practice in a way which is incompatible with the right to liberty in Article 5(1) ECHR.’<sup>113</sup> In fact, the JCHR’s previous report had urged that some safeguards be built into the legislative framework to prevent non-derogating Control Orders from depriving controlees of their liberty in the absence of a derogation from Article 5 ECHR.<sup>114</sup> When such a suggestion was made to Charles Clarke during the legislation’s parliamentary passage, his response was that this was unnecessary:

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<sup>113</sup> *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007* (8<sup>th</sup> Report of Session 2006-07) HC 365, para. 27.

<sup>114</sup> *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (12<sup>th</sup> Report of Session 2005-06) HC 915, paras. 37-42.

‘[T]he Home Secretary is not unlimited in what he or she can do on these measures. First, the Bill itself makes it clear that a control order can impose only obligations that the Secretary of State considers ‘necessary’ for preventing or restricting further involvement of the individual in terrorism related activities ... Secondly, the Secretary of State is required by section 6 of the Human Rights Act 1998 to act compatibly with the convention rights of the individual and his family ... [The] concern that there would be some process of slide, whereby a combination of non-derogated deprivations that added up to a derogation [*sic.*] would slip past the courts and procedures, is simply wrong’<sup>115</sup>

This comment displays the familiar assumption that the executive will exercise its powers impeccably; the Home Secretary can be trusted to act compatibly with the Human Rights Act 1998. Experience, however, has shown that it is insufficient to simply trust the Home Secretary to ensure that non-derogating Control Orders merely restrict controlees’ liberty and do not deprive them of it.

It is also telling that both of the recommendations in Lord Carlile’s first annual report were aimed at structuring the discretion within the Control Order regime. The first recommendation – motivated by the concern that, since ‘It would not be acceptable for significant restrictions on liberty to continue for years on end for UK residents,’ investigations should continue with a view to criminal prosecution and conviction as long as a Control Order is in place – was the establishment of a Home Office led procedure, whereby officials and representatives of the control authorities would meet regularly to monitor each case and advise on a continuing basis as to the necessity of the obligations imposed on each controlee.<sup>116</sup> This resulted

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<sup>115</sup> HC Deb vol. 431 cols. 701-702 28.02.05.

<sup>116</sup> *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, Home Office, 2006, paras. 46, 59, 72.

in the creation of the Control Order Review Group (CORG), discussed further below. The second recommendation related to the obligation placed upon the Home Secretary by section 8(2) of the Prevention of Terrorism Act 2005 to consult with the relevant chief police officer before making a Control Order about whether there is a realistic prospect of bringing a criminal prosecution against the individual in question. Having stated that the letters he had seen from chief police officers certifying that there was no realistic prospect of prosecution contained ‘little ... by way of reasons,’ Lord Carlile insisted that such letters should in future contain ‘clear reasons for the conclusion that there is not evidence available that could realistically be used for the purposes of a terrorism prosecution.’<sup>117</sup> Although this was accepted by the Home Secretary,<sup>118</sup> Lord Carlile’s second annual report states that the letters sent since still fail to give adequate reasons.<sup>119</sup>

The rhetoric surrounding the introduction of the Human Rights Act 1998 stressed the potential for the state to misuse the powers vested in it. In spite of this, New Labour has shown a willingness to unquestioningly adopt a benevolent view of state power. This has resulted in the ASBO being employed as a heavy-handed instrument of social control and the imposition of Control Orders which breach controlees’ Article 5 ECHR right to liberty.

### **The second recurring theme: a willingness to circumvent the criminal law**

Although one effect of the ASBO has been to broaden the reach of the criminal law – an Order may prohibit behaviour that is not otherwise criminal, thus creating ‘a

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<sup>117</sup> *ibid*, para. 58.

<sup>118</sup> See Charles Clarke’s letter to Lord Carlile dated 26.04.06.

<sup>119</sup> n107 above, para. 57.

form of personalised criminal law<sup>120</sup> – behind the creation of the remedy lay the conviction that the criminal law was incapable of tackling anti-social behaviour effectively. ‘Nowhere is the failure of the criminal justice system greater than in dealing with the problems of local disorder’<sup>121</sup> complained Jack Straw. Two principal reasons were given for this failure. The first, which New Labour illustrated using the Family X case study, was that the penalties imposed on perpetrators of anti-social criminal acts all too often failed to reflect the aggregate impact of their courses of conduct. The ASBO was designed to remedy this by making it possible to impose a single composite sentence. Breach of an ASBO should, New Labour insisted, be viewed as the continuation, in defiance of a court order, of a course of anti-social behaviour. The penalty imposed for breach should therefore reflect the aggregate impact of the entire course of conduct. While at first glance this objective might seem to have been frustrated – the courts have insisted that any sentence imposed for breach of an ASBO should reflect the seriousness of just the act of breach – the courts have also accepted that, where the act of breach also constituted a criminal offence in its own right, the sentence imposed for breach may exceed the statutory maximum for the standalone offence, thus permitting the imposition of severer sentences than would have been possible had no ASBO been in place.<sup>122</sup> The second reason for the perceived inadequacy of the criminal law, which New Labour illustrated using the Finnie brothers case study, was witness intimidation. Victims of anti-social behaviour were often intimidated into silence, which meant that the rule against

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<sup>120</sup> R. Leng, R. Taylor and M. Wasik *Blackstone’s Guide to the Crime and Disorder Act 1998*, Blackstone, 1998, p. 13.

<sup>121</sup> HC Deb vol 267 col 549 21.11.95.

<sup>122</sup> *R v H, Stevens & Lovegrove* [2006] EWCA Crim 255, [2006] 2 Cr App R (S) 453. The decision in this case raises important questions of principle, which are discussed in S. Macdonald ‘The Principle of Composite Sentencing: Its Centrality To, And Implications For, The ASBO’ [2006] Crim LR 791.

hearsay evidence made it difficult to secure criminal convictions. In order to avoid the application of the hearsay rule, New Labour insisted that applications for ASBOs should be classified as civil proceedings. This classification was subsequently confirmed by the House of Lords in *R (McCann and others) v Crown Court at Manchester*, with Lord Steyn commenting that, had their Lordships decided differently, the 'procedure for obtaining anti-social behaviour orders [would have been rendered] completely or virtually unworkable and useless.'<sup>123</sup>

The ASBO was thus designed to avoid the criminal law's focus on single events and the rule against hearsay evidence. Instead of circumventing these basic features of the criminal law, New Labour could have tried to work within the boundaries of the criminal justice process. Rather than simply assume that the hearsay rule should either apply in all cases (criminal proceedings) or in none at all (civil proceedings), they could have considered whether the problems presented by witness intimidation could have been dealt with within a framework incorporating a principled application of the hearsay rule. The hearsay provisions in the Criminal Justice Act 2003 and the European Court of Human Rights' approach to Article 6(3)(d) ECHR<sup>124</sup> demonstrate that such an approach was possible. Similarly, New Labour could have sought to develop the concept of composite sentencing, expounding the circumstances which justify imposing one sentence on a course of conduct and considering whether there are other contexts in which composite sentencing might also usefully be employed.

The Control Order's first two years also suggests a lack of commitment to the criminal law. The Government has insisted that its 'preferred approach is to

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<sup>123</sup> n23 above, at [18]. For comment on the case, see S. Macdonald 'The Nature of the Anti-Social Behaviour Order – *R (McCann & others) v Crown Court at Manchester*' (2003) 66(4) MLR 630.

<sup>124</sup> See, e.g., *Doorson v Netherlands* (1996) 22 EHRR 330 and *Kostovski v Netherlands* (1990) 12 EHRR 434.

prosecute and convict terrorists,<sup>125</sup> and that the Control Order is a solely a last resort way of ‘containing and disrupting those whom we cannot prosecute or deport.’<sup>126</sup> This professed commitment to prosecuting suspected terrorists – which was one of the justifications given for the creation of a new offence of preparation of terrorist acts in the Terrorism Act 2006 – has nonetheless been questioned, for two reasons. First, in addition to the statutory duty to consult with the relevant chief police officer before making a Control Order – in relation to which Lord Carlile stated that the letters sent by chief police officers have failed to adequately explain why there is no realistic prospect of bringing a criminal prosecution against the individual in question – the Home Secretary also has a continuing duty to keep the question of possible prosecution under review, and to ensure that this review is meaningful. Yet in *Secretary of State for the Home Department v E*<sup>127</sup> the Court of Appeal held that the Home Secretary had breached this duty. Following the imposition of a Control Order on E in March 2005, new material became available, in the form of two Belgian court judgments in cases in which associates of E were successfully prosecuted for terrorism offences. The judgments came to the notice of the Home Secretary in September 2005. Yet the judgments were not sent to the police, nor to the CPS, and when CORG reviewed the Control Order prior to its renewal in March 2006, it did not review the question of prosecution in light of the Belgian judgments. The JCHR thus opined that the creation of CORG has done little to address the ‘fundamental lack of any systematic approach to keeping the possibility of prosecution under review in

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<sup>125</sup> Charles Clarke (HC Deb vol 431 col 151 22.02.05).

<sup>126</sup> Charles Clarke (HC Deb vol 430 col 307 26.01.05).

<sup>127</sup> [2007] EWCA Civ 459, at [97]. The Court of Appeal nonetheless disagreed with the decision of Beatson J. in the High Court ([2007] EWHC 233 (Admin)) that the Order should be quashed, holding that, since the material could not have been reduced to a form appropriate for prosecution within the relevant timescale, no different decision about the maintenance and renewal of the Order would have been taken.

control order cases.’ The failure to conduct a meaningful review of the possibility of bringing a criminal prosecution against E, coupled with Lord Carlile’s statement that ‘continuing investigation into the activities of some of the current controlees could provide evidence for criminal prosecution and conviction,’<sup>128</sup> led the JCHR to question ‘the seriousness of the Government’s commitment to prosecuting as its first preference. The lack of effective systems to keep the prospects of prosecution under review ... belies the Government’s professed commitment to do so.’<sup>129</sup>

The second reason is the Government’s refusal to lift the self-imposed blanket ban on the use of intercept evidence in court. Various reasons have been given for the ban, including an unwillingness to reveal existing technologies and the assertion that intercept evidence would be unlikely to assist in prosecuting terrorist suspects.<sup>130</sup> Yet there is no bar on domestic courts using foreign intercepts obtained in accordance with foreign laws or on foreign courts using British intercept evidence if the intelligence and security services are willing to provide it. Nor is there a bar on the admission of bugged communications. In fact, no other country except for the Republic of Ireland has such an extensive ban on intercept evidence. Even though he conceded that ‘the availability of such evidence would be rare and possibly of limited use’, Lord Carlile recommended that the law be changed to allow intercept evidence to be used in those ‘few cases in which it would be appropriate and useful.’<sup>131</sup> The Director of Public Prosecutions has also recommended that the ban be relaxed, as have Lord Lloyd and Lord Newton.<sup>132</sup> In fact, the Newton Report set out a number of

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<sup>128</sup> n107 above, para. 58.

<sup>129</sup> n113 above, para. 54.

<sup>130</sup> See, e.g., HC Written Ministerial Statements vol. 430 col. 18WS 26.01.05.

<sup>131</sup> n107 above, para. 35.

<sup>132</sup> ‘Security and Rights’, public lecture to the Criminal Law Bar Association, 23.01.07; *Inquiry into Legislation against Terrorism*, Cm. 3420, 1996; *Anti-terrorism, Crime and Security Act 2001 Review: Report*, The Stationery Office, 2003.

suggestions for increasing the number of criminal prosecutions, which also included the development of a more structured process for the disclosure of evidence and adopting an investigative approach in terrorism cases, with a security cleared judge being responsible for assembling a fair, answerable case.

All of this is not to say that special measures to deal with cases where both deportation and prosecution are impossible are unnecessary, although this argument has been advanced by some.<sup>133</sup> Rather it is simply to say that it may be possible to reduce the number of such cases. The failure to attempt to do so reflects a willingness to circumvent the criminal law.

**The second apparent contradiction: the apparent confidence in the criminal law to solve a wide variety of societal problems**

Research commissioned by Liberal Democrat shadow Home Secretary Nick Clegg found that, up to August 2006, New Labour had created a total of 3023 new criminal offences.<sup>134</sup> This number – which consisted of 1169 offences introduced by primary legislation and 1854 by secondary legislation – constituted almost one a day since the party came to power in 1997. Its magnitude is further illustrated by the fact that it is double the rate at which the previous Tory administration created new offences, and by the fact that in 1980 it was estimated that there were a total of 7000 crimes *in existence*.<sup>135</sup> What is more, the rate at which new offences are being created is still increasing; 527 new offences were created in 2005, compared with 346 in 2000 and 160 in 1998. Clegg concluded that this demonstrates ‘a marked erosion of

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<sup>133</sup> See, e.g., *Liberty Renewing the Prevention of Terrorism Act 2005: Submission to the Joint Committee on Human Rights*, 2006, and E. Metcalfe ‘Protecting a Free Society? Control Orders and the Prevention of Terrorism Act 2005’ (2005) 2(1) JJ 8.

<sup>134</sup> *The Independent* (16.08.06)

<sup>135</sup> JUSTICE *Breaking the Rules*, 1980.

the trust which should exist between the Government and the governed’ – an irony given the first of the themes outlined in this paper.

The number of new offences has led one leading commentator, Professor Andrew Ashworth, to question whether the criminal law is ‘a lost cause’:

‘From the point of view of governments it is clearly not a lost cause: it is a multi-purpose tool, often creating the favourable impression that certain misconduct has been taken seriously and dealt with appropriately. But from any principled viewpoint there are important issues – of how the criminal law ought to be shaped, of what its social significance should be, of when it should be used and when not – which are simply not being addressed in the majority of instances’<sup>136</sup>

The inconsistent approach to the criminal sanction outlined in this paper is a stark example of this failure to address important questions of principle. The design of the ASBO stemmed from the conviction that the criminal law was *incapable* of tackling anti-social behaviour effectively. And the Government has been accused of relying on the use of Control Orders in cases where it might be possible, perhaps with modified rules of evidence, to bring criminal prosecutions, even though it admits that prosecuting those suspected of involvement in terrorism is the most *appropriate* course of action. This willingness to circumvent the criminal law stands in marked contrast to the Government’s frequent use of the criminal sanction to tackle a wide range of other societal problems, without giving adequate consideration to whether the criminal law is capable of tackling those problems effectively, nor whether it is an appropriate vehicle for doing so.

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<sup>136</sup> ‘Is the Criminal Law a Lost Cause?’ (2000) 116 LQR 225

## **Conclusion**

When the Prevention of Terrorism Bill passed through Parliament, many expressed anxiety that the Bill's rapid progress meant there was insufficient opportunity to scrutinise its provisions properly. This resulted in the insertion of (what is now) section 13, according to which the Control Order regime would expire on its first anniversary unless renewed by the Home Secretary. Before the Bill received Royal Assent Charles Clarke assured the Commons that, once Lord Carlile's report on the Control Order's first nine months had been published, he would introduce fresh counter-terrorism legislation in spring 2006, which would provide an opportunity to revisit the Control Order before its first anniversary. However, following the terrorist attacks in London in July 2005, Clarke announced that, with cross-party agreement, this timetable had been changed. A new Terrorism Bill (to become the Terrorism Act 2006) was introduced in October 2005. This was decoupled from consideration of the Control Order so that, when Lord Carlile's report was published, Clarke announced that he intended to exercise his power to renew the Prevention of Terrorism Act by order – thereby limiting examination of the legislation to a single debate in each House with no opportunity to table amendments. This was condemned by the JCHR, who insisted that the many human rights concerns surrounding Control Orders warranted detailed Parliamentary debate and scrutiny.<sup>137</sup> The Government's responded by saying that it would introduce a draft terrorism consolidation bill in the first half of 2007, which would provide an opportunity for a full review of the Control Order regime. In the event, however, the Bill did not appear and, for the second year running, the Prevention of Terrorism Act was renewed by order – with no guarantee that the consolidation Bill will appear before the next annual renewal. The JCHR described this as 'a serious breach of

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<sup>137</sup> n114 above, paras. 5-14.

commitments made to Parliament,' lamenting the lack 'of an opportunity to debate in detail and amend the control orders regime in the light of experience of its operation and concerns about its human rights compatibility.'<sup>138</sup>

This is a further example of what has been the underlying theme of this paper – a lack of commitment to fostering a culture of human rights. During the parliamentary passage of the Human Rights Act 1998, New Labour stressed the potential for the state to misuse the power vested in it. In spite of this, they have repeatedly displayed a benevolent view of state power, unquestioningly entrusting the executive with wide-ranging powers. This has resulted in the imposition of non-derogating Control Orders which deprived controlees of their liberty in violation of Article 5 ECHR, and in the use of the ASBO in contexts for which it was neither designed nor suited. They have also displayed an inconsistent approach to the criminal law. The combination of stigma and loss of liberty makes the criminal sanction the severest deprivation that government can inflict on the individual. Yet New Labour frequently seek to tackle a whole range of societal problems using the criminal law, giving inadequate consideration to whether it is an appropriate vehicle for tackling those problems and whether it is capable of doing so effectively. During the same period they have responded to the problem of nuisance neighbours who persistently commit anti-social criminal acts by constructing the ASBO – which was designed to circumvent the procedural protections, principally the rule against hearsay evidence, that apply in criminal proceedings – and they have relied on the use of extremely restrictive Control Orders – imposed in civil proceedings which often include closed sessions involving special advocates – on suspected terrorists against whom it might be possible to bring successful prosecutions. The two recurring themes and two apparent contradictions outlined in this paper thus cast

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<sup>138</sup> n113 above, para. 15.

doubt upon New Labour's professed commitment to nurturing a culture of human rights.