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Liberty's briefing on The Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Draft Order 2011

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

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Introduction

1. On the 2nd of March the draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2011¹ will be debated in the House of Commons. If passed, this Order will continue the control order regime until 31st December 2011. The control order is a blot on the human rights record of the UK. Subjecting a person – and their families – to indefinite house arrest with punitive restrictions on their liberty, without there ever being a criminal charge or prosecution, is an egregious breach of their human rights. The control order system has proved to be dangerously unsafe and frequently unworkable in practice. It has been steadily eroded and derided by the judiciary, and has proved the most costly of all of the counter-terrorism measures – and those costs are enormous.

2. Liberty welcomed the Home Secretary's announcement in July 2010 that the most invasive of the former Government's counter-terror measures were to be reviewed, a review to which we were expressly invited to contribute.² The findings and recommendations of the Home Office Review of Counter-Terrorism Powers³ were published on 26th January 2011 (the Home Office Report). Published alongside the Home Office Report was the report of Lord Macdonald of River Glaven QC, who provided independent oversight of the Home Office review process, and published independent conclusions and recommendations.⁴

3. The Home Office recommendation that the control order regime be repealed is of course a welcome one. However the Report's suggested replacement in the form of the Terrorism Prevention and Investigation Measure (TPIM)⁵ is not. A review of the TPIM reveals that it is fundamentally a control order by another name. A TPIM will still be imposed by a civil, and predominantly executive led process, instigated by

¹ Available at <http://www.legislation.gov.uk/ukdsi/2011/9780111506400/contents>.

² See Statement of the Home Secretary, the Rt Hon Theresa May MP, House of Commons *Hansard* (13th July 2010), at column 797. See Liberty's submission to the Review: *From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010* (August 2010) available at <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf>.

³ Available at <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary>.

⁴ *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cm 8003) (January 2011), available at <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>.

⁵ See the Statement of the Home Secretary, the Rt Hon Theresa May MP, House of Commons *Hansard* (26th January 2011), at column 308.

the Home Secretary and located firmly outside of the criminal justice system. The conditions may have altered slightly but in substance remain the same and it is proposed that they will continue to be punitive and incredibly restrictive. Breach of a condition will still result in criminal sanction with the same maximum penalty of five years' imprisonment. And while ostensibly a TPIM will have a two year limit, this is renewable and there is no apparent limit on that power to renew – so once again, as in the case of control orders, we may have an indefinite period of effective house arrest without trial on our statute book.

4. The control order regime was only ever meant to be a temporary measure.⁶ When in opposition, the Liberal Democrats voted against renewal of control orders and the Conservatives abstained from voting. The 2010 Liberal Democrat Manifesto included a commitment to scrap control orders altogether.⁷ Both Government parties originally voted against the introduction of these when the hastily compiled Bill was pushed through Parliament in under a month in 2005. Despite this concerted opposition, on 2nd March 2011 these same parties will ask parliamentarians, for the sixth time,⁸ to vote through an unsafe and unfair regime. This is in a context where, as the current Lord Chancellor himself has noted, no transparent evidence has ever been offered as justification for the existence of such an extreme and intrusive measure.⁹

5. We urge parliamentarians to vote against this renewal order. Following the Home Office Review the system is now completely discredited. Claims that the replacement system will meet the arguments lodged against the control order are misleading. When legislation is introduced to implement the TPIM later this year, parliamentarians will have the same choice as they do now, to perpetuate a punitive system which ruins lives, runs counter to the principles of due process and effective

⁶ Section 13 of the *Prevention of Terrorism Act 2005* provides that the control order provisions expire 12 months from the date the Act is passed unless extended by the Home Secretary by statutory instrument.

⁷ The Liberal Democrat Manifesto states that the Party would “*Scrap control orders, which can use secret evidence to place people under house arrest*”, at page 94.

⁸ The Prevention of Terrorism Act 2005 (Continuance in Force of sections 1 to 9) Orders have been passed in 2006 (SI No. 512); 2007 (SI No. 706); 2008 (SI No. 559); 2009 (SI No. 554) and 2010 (SI No. 645).

⁹ In the lengthy Second Reading debate in the Commons in 2005 the current Lord Chancellor, the Rt Hon Kenneth Clarke QC MP, called on the former Home Secretary to “*accept that he has made no case at all to explain why he comes here seeking greater powers than any Home Secretary in modern times has had over British citizens and greater powers than were ever sought by his predecessor, his Government or any other Government in modern times.*” House of Commons *Hansard*, 22 February 2005, column 162.

criminal prosecution and is as a result both unsafe and unfair. We urge parliamentarians to send a strong message now, keeping in mind that the next vote that you will be asked to make is most likely, in accordance with current Home Office plans, to be not for annual renewal but to keep a new system, which is fundamentally the same, in place permanently. The stakes are high: the time has come to eradicate this blot on the UK's legal landscape.

6. In this briefing we set out our principal objections to the control order regime, together with the detail of the TPIM,¹⁰ which replicates the control order in all of its most offensive characteristics. There are alternatives to indefinite punishment without trial (whether it be a control order or a TPIM) which would focus on bringing this rogue system back where it belongs: firmly within the criminal justice system.

Background to the control order

7. Control orders were first introduced in the PTA in 2005 in response to the House of Lord's ruling in the Belmarsh case against the power to indefinitely detain foreign nationals in Part IV of the *Anti-Terrorism Crime and Security Act 2001* (ATCSA).¹¹ Caught by the unexpected defeat of the ATCSA policy at the end of 2004 in the House of Lords, the previous Government brought forward the hastily put together control order regime – managing to push it through Parliament in under a month. The gravity of what was being asked was not lost on parliamentarians during the debates which saw the Bill ping pong between the House of Commons and the House of Lords into the early hours. Although passed, the power to issue a control order must be renewed annually by statutory instrument, and was last renewed in March 2010.¹² The control order regime was only ever intended to be temporary.

8. Briefly, control orders allow for a wide range of restrictions to be imposed on individuals (British citizens and foreign nationals alike) who the Home Secretary suspects of involvement in terrorism.¹³ In imposing the order the Home Secretary can inflict any number and type of restrictions considered necessary to prevent or restrict involvement of the individual in a terrorism-related activity. To date these have included curfews, reporting requirements and bans on visitors and use of the

¹⁰ As established from recommendations made in the Home Office Report, *ibid.*

¹¹ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

¹² The Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2010.

¹³ Section 1 PTA.

internet.¹⁴ Taken together¹⁵ these restrictions are incredibly punitive, isolating the individual to such an extent that it effectively amounts to house arrest and solitary confinement. The conditions have been extreme, perhaps the most sinister being the subjection of individuals to internal exile by requiring them to relocate hundreds of miles from their community, friends and family to serve out their punishment (the imposition of this requirement was declared incompatible with human rights by the Supreme Court in June 2010.)¹⁶ The orders themselves can go on indefinitely, and individuals have been subjected to a control order for years on end. All of these factors are exacerbated by the fact that controlees have never been arrested, let alone charged or convicted of any offence. Further compounding the effects of the order is the fact that controlees will know only of core allegations against them while the substance of any suspicion against them remains obscure.

9. Since the measure was first introduced, control orders have been made in relation to 48 individuals in total. There are currently eight people subject to an order, all of whom are British citizens.¹⁷

Liberty's objections to the control order regime

10. Since the control order was first proposed in the PTA Bill, and at every stage thereafter, Liberty has consistently said that the control order regime fails to adequately address the underlying human rights objections to detention without trial under Part IV of ATCSA, set out so clearly and definitively in the Belmarsh judgment,¹⁸ which they were introduced to resolve. The objection is to the complete abrogation of the right to fair trial and the presumption of innocence brought about by, in particular:

- unending restrictions on liberty based on suspicion rather than proof;
- reliance on secret intelligence (which by definition may be all the less reliable for having been gained by torture around the world); and
- the inability of the subject to test the case against him in any meaningful way.

We discuss these in further detail below.

¹⁴ Sections 1(3) and (4) PTA.

¹⁵ The Supreme Court has held that restrictions placed on a 'controlee' ought to be viewed cumulatively rather than separately in a consideration of whether the control order breaches human rights: *Secretary of State for the Home Department v AP* [2010] UKSC 24.

¹⁶ *Secretary of State for the Home Department v AP* [2010] UKSC 24.

¹⁷ See statement of the Rt Hon Nick Herbert MP on 7th February 2011, House of Commons *Hansard*, at column 29W.

¹⁸ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

Procedure for imposing a control order: the right to a fair trial

11. The Home Secretary may make a control order if he or she has “*reasonable grounds for suspecting that the individual has been involved in terrorism-related activity*” and considers it necessary to protect the public from the risk of terrorism.¹⁹ Reasonable suspicion is an extremely low threshold. The PTA strictly confines the role of the court in this process to one of supervision – giving permission on an *ex parte* basis (that is, without the individual’s knowledge of the proceedings), and determining whether the Secretary of State’s decision is flawed. It is not open to the court to make an order, whether on an application or otherwise.²⁰ The Secretary of State need only ever show that there is a reasonable ground for her suspicion.²¹ There does not have to be any factual basis of this assessment of risk. Even if the suspicion is based on wholly inaccurate and misleading information, all that is required is that the suspicion of the Secretary of State be reasonable according to what is placed in front of him or her.

12. Compounding the unfair nature of this process is the secrecy inherent in the regime. The ‘controlee’ is appointed a ‘special advocate’ to act on their behalf in closed proceedings.²² The special advocate puts their ‘client’s’ case, but is not allowed to disclose any sensitive material to the ‘controlee’.²³ This not only means that proper and effective legal representation is impossible, but also that intelligence on which the decision is based cannot be challenged. For years decisions to impose a control order have been based on secret intelligence which the individual concerned has been unable to see and has been powerless to dispute. The secret intelligence may also have been obtained by torture elsewhere in the world. That the judicial process is simply a rubber stamp for executive action is evidenced by the fact the Home Secretary is able to side-step any judicial decision by re-issuing an order once it has been declared unlawful.²⁴

¹⁹ Section 1 PTA. A non-derogating control order – that is, where there is no derogation from Article 5 of the *European Convention on Human Rights* as incorporated into UK law by the *Human Rights Act 1998*, protecting the right to liberty – can be made under s 2 PTA. An order where derogation is necessary is possible under s 4 PTA. There have been no derogating control orders imposed: para 13 of Lord Carlile’s *Sixth Report*, *ibid*.

²⁰ The role of the court is one of ‘supervision’, s 3 PTA; see also *AN v SSHD; SSHD v AE & Anor* [2010] EWCA Civ 869, per Maurice Kay LJ (VP) at para 23.

²¹ Section 3 PTA.

²² See para 7 of the Schedule to the PTA.

²³ Para 9 of the Schedule to the PTA.

²⁴ Para 8(2) of the Schedule to the PTA.

13. The process is further undermined by the fact that breach of a control order without reasonable excuse is a criminal offence punishable on indictment by imprisonment for up to five years or an unlimited fine,²⁵ giving rise to further fair trial complications. Since December 2009 three individuals have been charged with breaching the terms of the order; two await trial, one received a 15 month sentence.²⁶ In previous years other ‘controlees’ have been similarly sentenced, and an individual who was not subject to a control order has been convicted and sentenced to three and a half years’ imprisonment for assisting an individual to breach their control order.

14. Arguments that this hobbled form of judicial procedural oversight makes the control order system human rights compliant simply do not withstand scrutiny. Preventing a person from knowing the substantive case against them and appointing a special advocate who cannot properly communicate with their so-called client once crucial information has been disclosed are features of a system which incorporates the antithesis of fair trial principles. All other criminal defendants will not just be informed of the crime with which they are charged, they will know detail of the evidence against them and will be able to test it to ensure it is sound. They will have afforded to them all the safeguards which are an entrenched part of our criminal justice system which has been modelled throughout the world. In comparison, the control order system is inherently and indisputably unfair, as has been well established across the legal and political spectrum including:

- *in the courts*: the House of Lords in 2009 held that individuals subject to a control order must be informed of the case against them, the failure in that case to disclose evidence against the appellants amounted to a breach of their Article 6 rights;²⁷
- *by special advocates*: Ian MacDonald QC, for example, resigned as a ‘special advocate’ “for reasons of conscience”, describing the role as providing “a fig leaf of respectability and a false legitimacy to indefinite detention” without charge, trial, or knowledge of the accusations being made;²⁸ and

²⁵ Section 9(4)(a) PTA.

²⁶ Lord Carlile of Berriew QC’s *Sixth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism act 2005* (3 February 2011), at page 65.

²⁷ *Secretary of State for the Home Department v AF & Ors* [2009] UKHL 28, following the decision of the European Court of Human Rights in *A v United Kingdom* (2009) 26 BHRC 1.

²⁸ Ian MacDonald QC resigned on 1st November 2004 from his special advocate post under the pre-control order policy of indefinite detention for foreign nationals. See: <http://74.125.47.132/search?q=cache:49tF55qCawAJ:www.gcnchambers.co.uk/index.php/gc>

- *by Senior Parliamentary bodies:* the Home Affairs Select Committee in 2010 withdrew its former support for such a flawed scheme, concluding “*It is our considered view that it is fundamentally wrong to deprive individuals of their liberty without revealing why*”,²⁹ similarly the Joint Committee on Human Rights in their 2007 report on counter-terrorism was “*left in no doubt...that proceedings involving special advocates, as currently conducted, fail to afford a ‘substantial measure of procedural justice’*”.³⁰

Punitive restrictions

15. The Home Secretary can impose an unlimited range of restrictions on a person made subject to a control order.³¹ There are up to 25 measures currently being used by the Home Secretary.³² Of the eight individuals currently under a control order, every one is electronically tagged; their curfews range from 8 hours to 14 hours; four have visitor bans; all must gain permission before they arrange to meet someone; all have restrictions on where they can go and are prohibited from leaving the country; seven have financial obligations, meaning they can only hold one account; six are not allowed to go to certain places; eight have to report regularly in person to a police station.³³

16. Control orders are required to be renewed annually, however a number of orders have been in place for years. We know from the latest monitoring report released in February 2011 that two ‘controlees’ have been the subject of an order for more than two years, one between three to four years, the other between two to three years. Four have been on orders for one to two years.³⁴ In the monitoring report immediately prior to this one, a man was in his *fifth* year of a control order.³⁵ The

[n/content/download/1161/7517/file/Counsel_200503_mcdonald.pdf+ian+macdonald+siac+resign&hl=en&ct=clnk&cd=7&gl=uk](http://content/download/1161/7517/file/Counsel_200503_mcdonald.pdf+ian+macdonald+siac+resign&hl=en&ct=clnk&cd=7&gl=uk).

²⁹ See The Home Affairs Committee Report - *The Home Office’s Response to Terrorist Attacks* available at:

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117/117i.pdf>.

³⁰ Joint Committee on Human Rights, *Nineteenth Report* (16th July 2007), at para 192.

Available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15702.htm>.

³¹ Section 1(3) PTA provides that the Secretary of State or court may impose any obligations considered necessary for purposes connected with preventing or restricting involvement in terrorism-related activity. Section 1(4) provides a non-exhaustive list of restrictions.

³² Lord Carlile’s *Sixth Report*, *ibid*, at para 19.

³³ See Annex 2 (Current cases – 10 December – 8 cases) of Lord Carlile’s *Sixth Report*, at page 64.

³⁴ Lord Carlile’s *Sixth Report*, para 55; Home Office Review, at para 6.

³⁵ *Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, at para 43.

Government is reassuringly bringing 28 days pre-charge detention back to a more palatable, but still lengthy, 14 days.³⁶ But how does this, as well as concerted opposition by the Coalition parties to punishment without charge for 42 days or even 90 days, square up with punishment under the control order regime which can last forever?

17. In any discussion of control orders the human cost must be kept squarely in mind. Control orders have devastatingly undermined the rights and freedoms not only of the men subject to them but also their families.³⁷ Cerie Bullivant, a British man from East London, placed under a control order in 2006, has spoken openly (since the order was revoked after two years) about the irrevocable impact the order had on his life. During the imposition of the order:

Friends turned against me and people were afraid...the control order grew more and more restrictive – it began with forced residence, no travelling and daily signing in at a police station and ended up with tagging, curfews, no studying and forced unemployment. It became impossible to live an ordinary life.

After it was revoked, it became impossible for this life to return to normal:

Finally, after two years, my life could begin again. Looking back, I see how naïve I was. There was no way my life would return to normal. I've had to move – I still get abused in the street, shouted and spat at. ...I've always tried to live a good life but now I'm the lowest of the low – and I've never been charged, tried or convicted of any terror offences.³⁸

18. The wife of former 'controlee' Abu Rideh has spoken of the traumatic impact that her husband's control order has had on her life and those of her children. The full

³⁶ Clause 57 of the Protection of Freedoms Bill.

³⁷ See report entitled 'Besieged in Britain', written by journalist and author Victoria Brittain, and co-authored with Moazzam Begg of *Enemy Combatant: a British Muslim's journey to Guantánamo and back* published on 12th February 2009. The report describes how control orders have led to severe mental health problems; suicide attempts; and led men to return 'voluntarily' to regimes where they face imprisonment and torture. See also: <http://www.guardian.co.uk/commentisfree/2009/jan/22/control-orders-justice>

³⁸ See Cerie Bullivant's statement in full at Annexure Two of Liberty's submission to the Home Office Counter Terror Review, *From War to Law*, ibid.

account of her experience makes for harrowing reading.³⁹ She states:

My husband was a wreck, a shattered man. He could not sleep, he would sweat and shake, he would have nightmares and flashbacks. It was almost impossible to deal with him. He was ill and had complex psychological needs – I am not a trained nurse and he required specialist help. One week later he attempted suicide by taking an overdose of his depression and anti-psychotic medications. I found him on the floor unconscious, in a pool of vomit foam coming from his mouth. He was taken to the hospital and remained unconscious for three days.

My life is ruined. I cannot sleep. I cry so much. It is having an effect on my children. ...I am British. So are my children. Why, then, is it acceptable for us to be treated in this manner? The police came many times to search my house, violating the sanctity that is a home. What do they expect to find among my clothes and my children's clothes?⁴⁰

Unsafe, and an impediment to prosecution

19. According to the quarterly reports of the Reviewer of Terrorism Legislation, seven of the 48 people that have been made subject to a control order have absconded.⁴¹ Rather than being, according to the Reviewer, merely an “embarrassment to the system” meaning only that the “viability of enforcement must always be considered when a control order is under consideration”,⁴² the rate of absconds indicate a threat that the control order regime is failing to meet. If someone is a threat to our society, we have a broad range of terrorism offences and a robust criminal justice system to effectively address this threat, as occurs with all serious and complex crime.

20. That terrorists ought to be investigated and prosecuted is actually something on which the Home Office, Lord Macdonald and Liberty agree. The problem is that the control order system, in place we are told to protect us from the most dangerous

³⁹ See the full statement as set out in *The Independent* at <http://www.independent.co.uk/news/uk/home-news/life-with-a-control-order-a-wifes-story-1729620.html>

⁴⁰ Ibid.

⁴¹ Lord Carlile’s *Sixth Report*, *ibid*, at para 15, page 8.

⁴² See Lord Carlile’s comment at para 39 of his *Sixth Report*, *ibid*, para 39.

of criminals, actually precludes the chances of successful prosecution. In the Home Office Counter-Terror Report it was concluded that control orders can mean “*that prosecution and conviction (a principal purpose of our counter-terrorism work) becomes less not more likely*”.⁴³

21. Lord Macdonald in his independent report on the Home Office Review concluded that evidence obtained by it in relation to the operation of the control order “*plainly demonstrated*” that the regime “*acts as an impediment to prosecution*”.⁴⁴ Indeed it is the types of restrictions which can be imposed under a control order which prevent the very activities likely to result in the discovery of evidence fit for prosecution, conviction and imprisonment.⁴⁵ Lord Macdonald concluded that control orders mitigate firmly against successful prosecution:

*the current control order regime turns our conventional approach to the detection and prosecution of crime upon its head. We may safely assume that if the Operation Overt (airline) plotters had, in the earliest stages of their conspiracy, been placed on control orders and subjected to the full gamut of conditions available under the present legislation, they would be living amongst us still, instead of sitting for very long years in the jail cells where they belong.*⁴⁶

Huge financial cost of control orders

22. As well as being an impediment to prosecution, control orders are the most costly of all the counter-terror measures. For its Annual *Renewal of Control Orders Legislation 2010 Report*⁴⁷ the Joint Committee on Human Rights (JCHR) was able to ascertain that approximately £13m was spent on control orders between 2006 and 2009, which included:

- a. £8.1m on legal costs, including the costs of the Government’s counsel (in court, preparing for court and the provision of legal advice before the imposition of the order), charges by the Treasury Solicitor, the cost of the

⁴³ Home Office Report, *ibid*, at para 7.

⁴⁴ Lord Macdonald’s Report, *ibid*, at para 2, page 9.

⁴⁵ Lord Macdonald’s review, at para 3, page 9.

⁴⁶ *Ibid*, at para 4, page 9.

⁴⁷ Joint Committee of Human Rights *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010. Ninth Report of Session 2009-2010* (HL Paper 64; HC 395) (26 February 2010) (TSO: London). Accessed at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf>.

Special Advocates and Special Advocates Support Office and meeting costs for the other side when ordered by the court;⁴⁸

- b. £2.7m on administrative costs; and
- c. £2m spent by the Legal Services Commission on publicly funded representation.⁴⁹

This does *not* include any figure for the cost of policing, of court hearings or the actual cost of legal representation of controlled persons given the Legal Services Commission is not invoiced until the matter is closed.⁵⁰ A further cost to the Home Office of administering control orders between 2006 and 2010 was £3.07m.⁵¹

23. The JCHR noted that control orders have been the most litigated of the counter-terrorism measures since 2001 *“and quite probably the most litigated ever”*, with *“no sign of the litigation abating”*.⁵² The cost of this litigation is *“unusually high”* given every control order triggers an automatic judicial review, which is appropriate given the interference with fundamental rights caused by an executive order, *“but it means that every order carries a high price tag”*.⁵³ This is due to a number of other factors, such as the large number of special advocates retained (50 at the time of the report); the amount of closed evidence; the costs associated with the Special Advocate Support Office; the legal representatives of the controlled person (who are publicly funded through legal aid, a system currently being subject to drastic cuts); and the number of preparatory hearings involved (given the extensive arguments over disclosure).⁵⁴

24. The costs led the Committee to conclude that *“we and others have had a growing sense that the financial cost of control orders may have become disproportionate to any benefit which can plausibly be claimed for them”*.⁵⁵ The Committee directly asked the Government at the time whether it was justifiable to

⁴⁸ Ibid, at para 102. See also the more detailed evidence provided in the Letter to the Chair of the Joint Committee on Human Rights from the Rt Hon David Hanson MP on 27 November 2009, extracted p 141 to 142 of the Joint Committee on Human Rights report, *Work of the Committee in 2008-09, Second Report of Session 2009-10* (HL Paper 20, HC 185) (15 January 2010) (TSO: London). Accessed at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/20/20.pdf>.

⁴⁹ Ibid, at par 102.

⁵⁰ Ibid, at para 103.

⁵¹ As outlined by the Rt Hon Nick Herbert MP on 7th February 2011: House of Commons *Hansard*, column 36W.

⁵² Ibid, at para 99.

⁵³ Ibid, at para 100.

⁵⁴ Ibid, at para 100.

⁵⁵ Ibid, at para 101.

spend such vast amounts on lawyers or whether it could be better spent on front-line counter-terror measures such as surveillance officers.⁵⁶

25. It has proven difficult to compare the costs of control orders with the costs of other measures – for example targeted surveillance. The JCHR was told that it could not be given even a ball-park figure of the cost of 24-hour surveillance.⁵⁷ The Intelligence Services Commissioner includes in a confidential annex to his annual report (unavailable to the public) the statistics and figures of warrants and authorisations issued to security and intelligence agencies, alongside, presumably, the associated costs. The reason given for this confidentiality is that disclosure would “assist those unfriendly to the UK were they able to know the extent of the work of the Security Service, Secret Intelligence Service and Government Communications Headquarters in fulfilling their functions. The figures are, however, of interest”.⁵⁸

26. Without any publicly available information about the costs of surveillance under the *Regulation of Investigatory Powers Act 2000* it is difficult to make any meaningful comment on the relative costs of control orders. What is however beyond doubt is the exorbitant cost of the operation of control orders and associated costs. These costs and the litigation that can increase them show no sign of abating. Indeed a recent Court of Appeal judgment has now opened up a further category of costs in the form of claims for damages for revoked control orders.⁵⁹

The Counter-Terror Review: the TPIM replacement

27. The Home Office Report recommended that the control order be repealed and a new regime put in place: the TPIM (Terrorism Prevention and Investigation Measure). If legislation introducing the TPIM follows the recommendations of the Home Office Report, parliamentarians will yet again be debating a civilly imposed order with criminal sanction, far beyond the realms of the criminal court. And this time the stakes will be even higher, because this legislation is likely to implement the TPIM on a *permanent basis*. What we know about the TPIM from the Home Office Report is that it replicates the worst and most illegitimate aspects of the control order regime – in many respects, this is replacement of one rotten regime with another.

⁵⁶ Ibid, at para 105.

⁵⁷ Ibid.

⁵⁸ See *Report of the Intelligence Services Commissioner for 2007, and 2008*, at para 35 in each report.

⁵⁹ See *AN v SSHD; SSHD v AE and AF* [2010] EWCA Civ 689.

Lord Macdonald, providing independent oversight of the Review, was critical of the lack of detail and clarity around the new restrictions noting that *“it is going to be terribly easy to see things at the end of the scale slipping into the Bill”*.⁶⁰

28. Set out below is a detailed comparison of the provisions of the TPIM, as recommended in the Home Office Report, and control order regime. Annexed to this briefing is a table summarising the key elements of both regimes, showing how starkly similar the two are.

The proposed TPIM procedure, compared with the current control order regime

➤ *Imposed by the Home Secretary*

29. The Review recommends that the TPIM *“be imposed by the Home Secretary with prior permission from the High Court”*, except in urgent cases where confirmation is required within seven days.⁶¹ In relation to control orders under the PTA, the power to make a non-derogating control order lies with the Home Secretary,⁶² who must have applied to the High Court for permission to make the order and been granted that permission,⁶³ except for urgent cases in which case the court must consider the order made within seven days.⁶⁴ In reviewing the application for permission to make a non-derogating control order, the Court is only able to consider whether the Home Secretary’s decision to make the order is obviously flawed.⁶⁵

30. Accordingly, as recommended, the TPIM will replicate the fundamental flaw of the control order regime, which is imposition of an order not by police or the prosecution, but at the instigation of the Executive, with judicial supervision permitted on a limited basis. Lord Macdonald concluded it *“is precisely because the present control order system stands apart from criminal due process that it attracts such criticism”*,⁶⁶ and the TPIM as currently envisaged will not address this criticism. Even if the TPIM will be imposed with the aim of investigation and prosecution, a

⁶⁰ Uncorrected evidence of Lord Macdonald given to the Joint Committee on Human Rights on 8th February 2011 (to be published as HC 675-iii), at question 13.

⁶¹ Home Office Report, *ibid*, at para 26(i), page 42.

⁶² Section 1(2) PTA.

⁶³ Section (3)(1)(a) PTA.

⁶⁴ Section 3(1)(b), 3(3), 3(4) PTA.

⁶⁵ Section 3(2) PTA.

⁶⁶ Lord Macdonald’s Report, *ibid*, at para 8, page 10.

recommendation of the Report outlined below, this will have little impact on the viability of the measure when the mechanism to impose it lies in the hands of the Home Secretary and a civil court.

➤ *Imposed on the basis of reasonable belief*

31. Before the Home Secretary makes the order, it is recommended that she have “*reasonable grounds to believe that the individual is or has been involved in terrorism-related activity*” and be satisfied that the TPIM is necessary to protect the public from a risk of terrorism.⁶⁷ Under the PTA, a control order can be made by the Home Secretary where she has “*reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity*” and where she considers it necessary to make the order to protect the public from the a risk of terrorism.⁶⁸ At best, the shift in standard from reasonable suspicion to reasonable belief is, according to Lord Macdonald, a “*marginally*” higher hurdle.⁶⁹

➤ *Power of the court and special advocates*

32. It is recommended the High Court review each TPIM after the measure has been imposed. The Court will have a power to quash or revoke the measures.⁷⁰ The possibility that a judge may impose restrictions under a TPIM is mentioned in the Review findings, but this is not then listed in the recommendations.⁷¹ It is unclear from the Home Office Report on what bases the Court will be able to exercise its power of review. Under the PTA, the High Court must review the control order and the conditions imposed.⁷² The High Court has the power to quash or revoke the order or a restriction, but must make its decision on set grounds that the Home Secretary’s decision was flawed and must apply the principles applicable in judicial review.⁷³ Therefore under both regimes the hands of the judiciary are likely to be tied by legislation limiting their role to one of supervision rather than judicial oversight, the

⁶⁷ Home Office Report, *ibid*, at para 26(i), page 42.

⁶⁸ Section 2(1) PTA.

⁶⁹ Uncorrected evidence given by Lord Macdonald to the Joint Committee on Human Rights by Lord Macdonald, at question 4.

⁷⁰ Para 26(iii), page 42.

⁷¹ Compare para 21(d), page 40, with recommendations for the procedure made at para 23, page 42.

⁷² Section 2(c) PTA.

⁷³ Section 3(10), (11), (12).

latter, in normal circumstances, being a key safeguard against misuse of power against an individual facing the might of the state.

33. Further, special advocates will continue to be used, as under the current control order regime,⁷⁴ however it is suggested that their role may differ following the publication of a Green Paper on the use of sensitive material in judicial proceedings.⁷⁵ As outlined above, the special advocate regime has been discredited in relation to control orders and certainly does not equate to proper legal representation, a crucial ingredient of fair criminal justice. Keeping an individual in the dark about the substance of the allegations against him, whilst subjecting him to such onerous and punitive restrictions, is clearly unfair and impedes the right to a fair trial.

➤ *Imposed with a view to prosecution*

34. It is recommended that the TPIM be imposed in order to facilitate further investigation as well as prevent any terrorist activity.⁷⁶ Successful prosecution, it is stated, will always be the objective.⁷⁷ It is also recommended that a strengthened legal duty be imposed on the police to ensure the person's conduct is continually reviewed with a view to prosecution. The police will also have to inform the Home Secretary about the ongoing prospects for prosecution.⁷⁸

35. These recommendations do not constitute a marked departure from the current control order regime. Under the PTA, before making or applying a control order the Home Secretary is required to consult the chief officer of police as to whether there is evidence which could be realistically used for the purposes of a prosecution.⁷⁹ If the order is made the chief officer is under a duty to secure the investigation of the 'controlee' "*with a view to his prosecution*" and must keep this under review throughout the period the control order is in force.⁸⁰ Lord Macdonald found that police assessment and scrutiny of 'controlees' was "*frankly inadequate*".⁸¹ Part of the current problem is the disjuncture between police and security services, with the latter being the lead agency in control order cases which "*is so undermining*

⁷⁴ See para 7 of the Schedule to the PTA.

⁷⁵ Para 26(xiii), page 43.

⁷⁶ Home Office Report, *ibid*, at para 24, page 41.

⁷⁷ Home Office Report, *ibid*, at para 24, page 42.

⁷⁸ Home Office Report, *ibid*, para 26(ii), page 42.

⁷⁹ Section 8(2) PTA.

⁸⁰ Section 8(4) PTA.

⁸¹ Lord Macdonald, para 10.

of criminal prosecutions”.⁸² There is no evidence to suggest that this practical problem will be addressed under the TPIM, and with the system remaining as it is, with the Home Secretary deciding to make the order on the basis of information put to her by the security services, it is unlikely that it will be any different.

➤ *Duration*

36. It is proposed that TPIMs will be available for a maximum two year period, after which the measure can be re-imposed if there is new evidence or material to suggest that the individual continues to be a threat.⁸³ There is no recommendation that there be a limit to how many times a TPIM can be imposed. Under the PTA, the Home Secretary may renew a control order on one or more occasions for 12 month periods, if she considers it necessary for the order to continue for public protection and to prevent or restrict involvement of the ‘controlee’ in terrorism-related activity.⁸⁴ As outlined above, some individuals have been under a control order for years on end as there is no limit on how many times the Home Secretary can apply for renewal. With the TPIM, there may be a slightly different test requiring ‘new evidence’ before it will be re-imposed, but without a limit imposed on the number of applications for renewal, and with the evidentiary process likely to continue to be shrouded in secrecy, the risk that the TPIM will amount to yet another punitive measure of indefinite duration is undeniably high.

➤ *Breach of a TPIM*

37. Breach of a TPIM condition without reasonable excuse will be a criminal offence, the penalty for which will be a maximum five years’ imprisonment.⁸⁵ Breach of a control order, without reasonable excuse, is an offence with a maximum penalty of five years’ imprisonment or a fine (which is not limited by statute) or both.⁸⁶ Breach of the TPIM will be the same as under the control order – even with the removal of the unlimited fine penalty the most serious punishment, imprisonment, remains exactly the same. Both regimes amount to a civil order initiated by the Home Secretary which has punitive consequences for the individual when imposed, and criminal consequences if breached.

⁸² Lord Macdonald at para 9.

⁸³ Home Office Report, *ibid*, at para 24, page 41.

⁸⁴ Section 2(4), (6) PTA.

⁸⁵ Home Office Report, *ibid*, at para 26(xi), page 43.

⁸⁶ Section 9 PTA.

Restrictions

38. As with the procedural changes made to control orders, little concession has been made in relation to the restrictions available under a TPIM, despite a lot of the political tussle over the Review focussing on what conditions and terms will remain under the new regime. It is recommended that restrictions be codified in legislation, rather than the vague unlimited power currently afforded to the Home Secretary. There will be an end to forced relocation.⁸⁷ The prevention of internal exile is of course a welcome announcement, however this is a limited concession considering this has already become necessary after a Supreme Court judgment declared the measure to be unlawful.⁸⁸ Similarly we are asked to accept that curfews have been abolished when in fact they have been renamed overnight residence requirements with compliance to be monitored by electronic tagging.⁸⁹ Curfews have been as long as 18 hours in the past, however the average length of the curfew in the latest monitoring report was 11.9 hours.⁹⁰ In practice, therefore, we are faced with the difference between imposing a curfew between the hours of 8pm and 8am, and requiring a person subject to a TPIM to remain in their residence overnight. Lord Macdonald concluded that the use of a curfew and an electronic tag in this context is “disproportionate, unnecessary and objectionable” serving “no useful purpose”.⁹¹ Individuals will still be required to report regularly to the police.⁹²

39. The restrictions recommended in the Report are largely similar to the ones currently imposed under the control order regime. There is very little detail provided in the Report, only reference to the new restrictions being more tightly defined in legislation. On this basis we are asked to accept that the TPIM will allow for greater freedom of communication and association than under the control order regime, with only limited restriction.⁹³ Lord Macdonald considered the lack of clarity surrounding new restrictions to be an omission; he further pointed to the fact that in any other criminal investigation, restrictions on the ability of co-conspirators to communicate would be “regarded as bizarre and wholly counter-productive”.⁹⁴ As with control orders, the TPIM will allow for the individual to work and study, unless

⁸⁷ Home Office Report, *ibid*, at para 23, page 41.

⁸⁸ *Secretary of State for the Home Department v AP* [2010] UKSC 24.

⁸⁹ Home Office Report, *ibid*, at para 26(v), page 42.

⁹⁰ Lord Carlile’s *Sixth Report*, *ibid*, at Annex 2, page 64.

⁹¹ Lord Macdonald’s Report, para 28, page 13.

⁹² Home Office Report, *ibid*, at para 26(x), page 43.

⁹³ Home Office Report, *ibid*, at para 26(vii), page 42.

⁹⁴ Lord Macdonald’s report, *ibid*, at para 29, page 13.

this could facilitate or increase the risk of involvement in terrorism-related activity.⁹⁵ Similarly under the TPIM the individual will be excluded from particular places, and overseas travel will be prevented,⁹⁶ as we have seen with control orders. And finally, it is recommended that there be limited restrictions in defined circumstances on financial transactions overseas.⁹⁷ Restrictions on bank accounts are already in place under the control order regime, not to mention the terror asset-freezing regime under newly passed legislation.⁹⁸

40. Just as no amount of amendments and tightening up of the control order regime would make control orders viable, nor will the situation be remedied by the imposition of an order which has the same fundamental principle at its core: that is, punishment without trial on the basis of secret suspicion. It has long been an essential part of British justice that there can be no punishment without trial – before punitive measures can be imposed a person must, after having had access to a full and fair trial, be held to be guilty of committing an offence. Preventative measures seeking to ensure a person does not commit an offence must never become punishment, yet surely the restrictions under either of these old and new regimes constitute punishment in themselves. Any Government that maintains these kinds of measures on the statute book will continue to excuse the actions of repressive regimes around the world who maintain similarly oppressive regimes of house arrest and administrative detention. Further, the TPIM replacement risks the endless litigation that we have already seen under the control order regime. The severe deprivation of liberty, the interference with the right to a private and family life, the unfair hearings, the impact on freedom of speech and so on means that court applications (and appeals) have been inevitable under the control order regime and, as the above comparison shows, are likely to continue.

Alternatives to control orders

41. Since control orders appeared on the statute book they have been continually justified as a necessary evil⁹⁹ – we have been told there is simply no alternative to them, that while Ministers dislike them, scrapping them or changing their form would

⁹⁵ Home Office Report, *ibid*, at para 26(viii), page 42.

⁹⁶ Home Office Report, *ibid*, at para 26(vi), page 42.

⁹⁷ Home Office Report, *ibid*, at para 26(ix), page 43.

⁹⁸ See the recently enacted *Terrorist Asset-Freezing etc Act 2010*.

⁹⁹ See, for example, that statement of Lord West of Spithead earlier this year, House of Lords *Hansard*, 3 February 2010, at column 196.

put us all in harms way. These empty and tired defences were continually put forward, despite the absconds, despite the number of new terror-related offences now at prosecutors' disposal, despite the number of successful terrorism prosecutions and despite first hand accounts of the tortuous lives lived by those subjected directly and indirectly to the orders. Liberty believes that the proper place for this kind of counter-terror measure is within the criminal justice system. Terrorism is a crime and suspected terrorists should be prosecuted; to remove criminal activity from the jurisdiction of the criminal courts defies logic and puts us all at risk. Indeed this was the primary conclusion reached by Lord Macdonald,¹⁰⁰ and is a step the Home Office Review refused to take.

42. While there is no simple answer to the complex problem which international terrorism presents, there are alternatives available which would be far more effective in terms of securing prosecutions and therefore safeguarding public safety. Liberty has consistently argued that there *are* alternatives to control orders which negate any justification for their continued existence. These include a repeal of the ban on the use of intercept material in criminal cases; greater use of the myriad criminal offences designed to target terrorist activity; use, with appropriate safeguards, of the current powers available under the *Regulation of Investigatory Powers Act 2000*; and the use of other mechanisms such as police bail, firmly rooted in the criminal justice system, to place restrictions on those suspected of criminal activities.

Criminal prosecution and intercept

43. Successful prosecutions essentially depend upon (i) the robustness and scope of the offences with which individuals can be charged, along with (ii) the quality and admissibility of the evidence that can be adduced. With regard to the former – we know that the criminal law is robust and comprehensive. Five terrorism related Acts of Parliament were passed between 2000 and 2008 which contain offences including encouragement of terrorism,¹⁰¹ dissemination of terrorist publications,¹⁰² preparation of terrorist acts,¹⁰³ training for terrorism,¹⁰⁴ and attendance at a place used for terrorist training.¹⁰⁵ The statute book is now crammed

¹⁰⁰ Lord Macdonald's Report, *ibid*, at para 9, page 10.

¹⁰¹ Section 1 of the TA 2006.

¹⁰² Section 2 of the TA 2006.

¹⁰³ Section 5 of the TA 2006.

¹⁰⁴ Section 6 of the TA 2006.

¹⁰⁵ Section 8 of the TA 2006.

with every foreseeable terror-related offence, from dangerously overbroad offences that may capture a wide variety of innocent behaviour, to reasonably framed offences that plug specific gaps in the law.¹⁰⁶ These are in addition to numerous offences that come within the 'normal' criminal law which are relevant to the prosecution of terrorist offences – such as conspiracy, incitement and attempt. Indeed Lord Macdonald presided over some of the most successful criminal prosecutions for terrorist offences under this new legislation, including the airline plotters case and the fertiliser bomb case.¹⁰⁷

44. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.¹⁰⁸ The admissibility of intercept evidence should go some way to ensuring prosecution for terrorist offences, rather than have some languish in administratively imposed detention for years on end. The issue of intercept evidence, however, did not form part of the Home Office Review terms of reference, and so consequently receives scant attention in the Home Office Review although it has obviously been considered as an alternative.¹⁰⁹ Perhaps this is unsurprising given the lethargic way government has approached this issue in the past, despite growing consensus that intercept ought to be available in terrorism trials to alleviate the problems created by a control order regime identified in both the Home Office and Lord Macdonald reports. The current Director of Public Prosecutions, Keir Starmer QC, has given evidence to the Home Affairs Select Committee that barriers to admissibility of intercept can be overcome.¹¹⁰ The Home Affairs Select Committee has repeatedly called for government to immediately introduce legislation to allow for the admission of intercept evidence in court in 2008¹¹¹ and again in 2010.¹¹² In 2008 a *Privy Council Review of Intercept as*

¹⁰⁶ See for example section 8 of the *Terrorism Act 2006* which criminalised attendance at a place used for terrorist training whether in the UK or overseas.

¹⁰⁷ Known also as Operation Overt, see http://cms.met.police.uk/met/news/convictions/airline_bomb_plotters_jailed_for_life; and for the fertiliser bomb plot, one of the biggest terrorism prosecutions, see http://www.cps.gov.uk/news/press_releases/128_07/.

¹⁰⁸ See para's 44 to 49, *From War to Law*, *ibid*; see also Liberty's 2007 evidence to the Joint Committee on Human Rights on this subject at <http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf>

¹⁰⁹ Intercept is concisely dealt with in the Home Office Report at para 11 at page 37.

¹¹⁰ Oral Evidence of Director of Public Prosecutions, Keir Starmer QC to the Home Affairs Select Committee (10/11/09) available at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117-ii/9111001.htm>

¹¹¹ Home Affairs Committee, First Report of Session 2007–08, *The Government's Counter-Terrorism Proposals*, HC 43-i, para 86.

¹¹² Home Affairs Committee, Sixth Report of Session 2009-10, *The Home Office's Response to Terrorist Attacks*, HC 117-I, para 42, available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/117/117i.pdf>.

*Evidence*¹¹³ accepted in principle that intercept should be made admissible in criminal trials, and since then a pilot project on implementation has been established for which an interim report was published in December 2009. In 2009 in a written statement to the House of Commons the former Home Secretary, the Rt Hon Alan Johnson MP, again reiterated that Government's commitment to making intercept admissible.¹¹⁴ Yet no progress has been made since that statement and no final report has been published.¹¹⁵ Most recently, on 26th January 2011 the Home Secretary, the Rt Hon Theresa May MP made a statement that the Government was committed to "*find a practical way to allow the use of intercept evidence in court*". Further, the Home Secretary stated that the Government has reviewed the two previous Privy Council reviews on intercept, and will now report back in the summer.¹¹⁶

45. The Home Office Report states that using intercept as evidence in the control order cases it considered would not have made any practical difference.¹¹⁷ In recent JCHR proceedings immediately after the release of his Report, Lord Macdonald agreed with a Committee Member that this conclusion is surprising and stringently reiterated his support for the use of intercept, having

*never accepted the argument that its effect would be marginal. You simply have to raise that argument in Washington, and see the reaction on people's faces when you suggest that intercept would not be useful, or ask people in Canberra or Ottawa, or anywhere else. They simply cannot believe that people are making this argument.*¹¹⁸

46. The imperative behind the historic bar on the admissibility of intercept was the protection of Security Services' methods rather than any obvious concerns for the integrity of the criminal justice system. Indeed there are no fundamental human rights

¹¹³ Privy Council Review of Intercept as Evidence (January 2008) available at: <http://www.official-documents.gov.uk/document/cm73/7324/7324.asp>

¹¹⁴ 10th December 2009, available at: <http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091210/wmstext/91210m0002.htm>.

¹¹⁵ As noted by Lord Carlile in his *Sixth Report*, *ibid*, in which he stated in reference to the statement of the Rt Hon Alan Johnson MP on 10th December 2009 "*no progress has been made as yet towards intercept evidence becoming available in terrorism trials*", at para 68.

¹¹⁶ Statement of The Secretary of State for the Home Department, House of Commons *Hansard*, 26th January 2011 at column 14WS.

¹¹⁷ Home Office Review, *ibid*, at para 11, page 37.

¹¹⁸ Uncorrected evidence of Lord Macdonald to the Joint Committee on Human Rights, 8th February 2011, at question 26.

objections to the use of intercept material, properly authorised by judicial warrant,¹¹⁹ in criminal proceedings. Before the JCHR Lord Macdonald stated that he could see no reason why safeguards could not be introduced to protect intelligence sources, noting that prosecution of criminal offences frequently involves the use of informers, bugs and various other probes – indeed these secretive measures were successfully used in key terrorism prosecutions including the airline plotters case and the fertiliser bomb case.¹²⁰ It is clearly frustrating to have apparent political will being thwarted by institutional reluctance. As noted by Lord Macdonald, another key objection to intercept is that it would require “a higher standard of handling of that material” by intelligence and security agencies which would require resourcing. Further, Lord Macdonald stated

It is also a simple position that, from their point of view, if they can conduct intercept without all the worry of trials and judicial scrutiny, why wouldn't they prefer to keep that system?¹²¹

Surveillance and other restrictions on liberty

47. One of the core functions of the control order/TPIM regime is to disrupt potential terrorist activity and thereby prevent public harm. But surely public harm could be far better protected if measures adopted included increased surveillance with a view to collecting evidence to facilitate criminal trial. We have noted above that the rate of absconds is just under 15%, and that the control order/TPIM actually hinders rather than facilitates prosecution. We have extensive surveillance mechanisms available to police under the *Regulation of Investigatory Powers Act 2000*, including intercept of communication (with Home Secretary warrant); intrusive surveillance, e.g. placing bugs and filming in private places; direct surveillance, e.g. filming and monitoring specific people generally in public places; use of covert human intelligence sources, e.g. informants and undercover operatives; and accessing communications data, e.g. accessing the record (but not the content) of emails, telephone calls and websites visited.¹²² No legislative change is necessary to facilitate these investigation measures; but the obstacle to their successful use, the

¹¹⁹ The Home Secretary currently authorises interception warrants.

¹²⁰ Uncorrected evidence of Lord Macdonald given to the JCHR on 8th February 2011, *ibid*, at question 30.

¹²¹ Uncorrected evidence of Lord Macdonald given to the JCHR on 8th February 2011, *ibid*, at question 27.

¹²² See Liberty's *Summary of Surveillance Powers under the RIPA* (August 2010), available at <http://www.liberty-human-rights.org.uk/policy/reports/introduction-to-ripa-august-2010.pdf>.

control order, ought to be removed. The ultimate disruption for potential terrorist activity is trial, conviction and imprisonment.

48. As well as disruption of terrorist activity, the control order/TPIM is designed to restrict the behaviour of the individual. But there are already restrictions which can be imposed on suspected criminals within the criminal justice process, indeed it is something police and the criminal courts do all the time. The problem with the control order/TPIM regime is not the monitoring and surveillance that forms part of it (and sometimes goes along with it) but the punishment that results from placing onerous restrictions on a person's freedom of movement, communication, residence, activities, employment and so on, and making a breach of these restrictions a criminal offence. For those who choose to comply with a control order, it is the unending restrictions which affect all aspects of their lives which are the cause of so much anguish. Restrictions on liberty, imposed with proper safeguards are not objectionable per se. Many, such as the requirement to surrender one's passport and report regularly to a police station, are perfectly acceptable as conditions of police bail (which is imposed after arrest and before charge, but which is currently not permitted by legislation if the relevant alleged offence is a terrorist offence).¹²³

49. The difficulty with this counter-terror Report is clear. The Home Office got so bogged down in the detail of the restrictions accompanying the order that it failed to seize the opportunity to bring a range of restrictions legitimately within the criminal justice system. The Home Office lost sight of the fact that, if these orders were properly imposed under police bail and with effective recourse to the courts, a number of the restrictions currently imposed by executive order could be legitimately, and effectively applied. As it is, these restrictions tip off potential suspects, prevent activities which allow evidence to be collected, and surveillance (with a view to gathering evidence) is not properly carried out. There are alternatives available, but these have been disregarded despite the glaring inadequacies of the current system, which is now set to be replicated in a new system which retains the core features of its predecessor.

¹²³ Police bail can be granted after arrest but before charge for the vast majority of offences under the Bail Act 1976 and the Police and Criminal Evidence Act 1984. However police bail for terrorist suspects who are arrested and detained under section 41 and Schedule 8 of the Terrorism Act 2000 is specifically precluded.

Conclusion

50. In light of all the sustained critique of the control order system from the judicial, political, legal and social spheres, it is high time parliamentarians put an end to this odious system. This is not just about the impact on the individual controlee and their family, but about the undermining of core British rights and freedoms. This is not to say that public protection is not the most important function of government. But the tired arguments emanating from the Home Office simply perpetuate a system which puts us all at risk. Lord Macdonald aptly summarised the deficiency which infects both old and the new control order regime:

*The reality is that controlees become warehoused far beyond the harsh scrutiny of due process and, in consequence, some terrorist activity undoubtedly remains unpunished by the criminal law. This is a serious and continuing failure of public policy.*¹²⁴

With the re-emergence of the control order in the guise of the TPIM, and the prospect of this type of punishment without charge becoming a permanent feature of our law, we urge parliamentarians to vote against renewal and relegate these orders to the historical pages of our statute book.

¹²⁴ Lord Macdonald's Report, *ibid*, at para 11, page 10.

Annex: Control Order/TPIM comparison

CONTROL ORDER	TPIM (as recommended)
Annual Renewal	Potentially permanent .
Instigated and made by the Home Secretary with the permission of the High Court.	Instigated (potentially made) by Home Secretary with prior permission from the High Court.
Made on the basis of reasonable suspicion of involvement in terrorism.	Made on the basis of reasonable grounds of belief .
Control orders are indefinite: renewable every 12 months on unlimited occasions.	Duration: 2 years , but renewable (on unlimited occasions?) on new evidence.
High Court reviews an order after it is made; it can quash or revoke the order or a condition of the order on the basis the Home Secretary's decision was flawed.	High Court will review each TPIM after it is made; it can quash or revoke ; and potentially impose the restrictions (but this is not recommended).
Closed proceedings and Special Advocates to examine secret evidence forming the basis of the Order, a hearing from which the 'controlee' and their lawyer are excluded.	Role of the Special Advocate , and therefore closed proceedings hearing secret evidence to continue (possibly reformed following the forthcoming Green Paper).
Made "with a view to prosecution": <ul style="list-style-type: none"> • Home Secretary asks chief officer of police if there is evidence for prosecution before making the order. • Chief officer under a duty to secure investigation of 'controlee' in order to prosecute. 	Made to facilitate further criminal prosecution: <ul style="list-style-type: none"> • Police to inform Home Secretary about ongoing prosecution prospects. • Strengthened legal duty to be imposed on police to ensure constant review with a view to prosecution.
Breach of CO without reasonable excuse is a crime: max 5 years' imprisonment.	Breach of a TPIM without reasonable excuse is a crime: max 5 years' imprisonment.
Curfew (averaging 11.9 hours in 2010); electronic tagging.	Overnight residence requirement; potentially use of electronic tagging.
Restrictions on communication and association.	Limited restriction on communication and association.
Prohibited and vetted visitors, banning from particular places , no overseas travel ; restriction on bank accounts.	Exclusion from particular places ; overseas travel bans ; restrictions on bank accounts.
Forced relocation.	No longer available under the TPIM regime.