

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's Committee Stage Briefing on  
the Terrorism Prevention and  
Investigation Measures Bill in the  
House of Lords**

October 2011

## **About Liberty**

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.

## **Liberty Policy**

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.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## Introduction

1. Control orders are the most controversial legislative legacy of the War on Terror: a system of preventative administrative detention, controlled by the Secret Services and the Home Office, which allows the most draconian sorts of punishments and restrictions to be imposed on individuals on an indefinite basis. It is a system which is entirely separate from the criminal justice system – indeed there is no need for those subjected to it to be arrested or charged, let alone tried.

2. It has been widely accepted that, barring an original concession to internal relocation<sup>1</sup> (which has now been re-inserted into the Bill and which is also included in a draft emergency bill) and a shorter overnight curfew, the TPIM regime essentially mirrors the control order system in all of its most offensive elements including:

- Abrogation of the constitutional safeguards which protect the right to a fair trial. In particular the process will continue to be Executive led, with judicial interventions remaining weak and shrouded with secrecy.
- Creation of an impediment to prosecution of those genuinely involved in terrorist activity who are tipped off and then prevented from doing the very things which would allow evidence to be gathered.
- Imposition of punitive and potentially unending restrictions on individuals in the absence of criminal due process.
- Furtherance of a system which is as unsafe as it is unfair ruining the lives of the innocent and allowing potentially dangerous people to evade prosecution.
- Retention of a system which creates huge costs' liabilities at a time of financial strife.

3. The desire to place restrictions on those suspected of planning dangerous activities is understandable. And it is not the placing of restrictions on those suspected of terrorism that is the civil liberties problem. The principal civil liberty objection to control orders is that these restrictions are imposed entirely outside the criminal justice system. Restrictions, which can last indefinitely, are imposed by the Executive without even arrest or police interview and with seemingly no desire to pursue eventual prosecution. Indeed, the control order regime exists so separately from the criminal justice system, that **no-one who has been placed under a control order has ever subsequently been prosecuted for a terrorism offence.**

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<sup>1</sup> Necessitated by a House of Lords ruling in *SSHD v AP* in June 2010

4. While this is unsatisfactory it is hardly surprising. As the former DPP and independent overseer of the Counter-Terror Review, Lord MacDonald QC, has observed, the Security Services have protective rather than prosecutorial instincts. This Bill, which continues the system of Executive imposed and controlled preventative restrictions, is not going to make eventual prosecution any more likely.

5. There is no reason why temporary restrictions on liberty for specific criminal justice purposes cannot be imposed on suspects where reasonable suspicion exists but where the evidence available is, as yet, insufficient to allow charges to be laid. Indeed, traditionally, within the criminal justice system, restrictions on a person's movements, communication etc are justified in three different circumstances – in the form of *bail conditions pending prosecution*, as a form of *community punishment following conviction* or as a *licence condition* following release from imprisonment. Crucially, all of these situations fall squarely within the criminal justice system – either pre or post prosecution.

6. There is however currently a statutory bar stopping police from releasing terror suspects on bail after they have been arrested but before they have been charged. Liberty sees no reason why restrictions placed on those suspected of terrorism could not be brought within the criminal justice system by allowing for pre-charge restrictions in the form of police bail, or a system akin to it, to be imposed on terror suspects.

7. Second Reading of the Bill in the House of Lords revealed widespread concern that the Bill fails to address the fundamental failings of the control order regime. During the debate there were a number of proposals mooted aimed at improving the Bill's provisions:

*A greater role for the Court/ Commissioner*

8. One way of inserting supposedly greater safeguards into the system would be to amend the Bill to provide that while the Secretary of State may apply for a TPIMs notice, it cannot be imposed without the permission of a Court or a specially appointed Commissioner. In conjunction, it has been suggested that the threshold for whether or not TPIMs can be imposed could be raised to the civil test – the balance of probabilities. While such amendments would in theory offer some additional

protection to those subjected to this regime, the regime would remain fundamentally unchanged and our legal system ever-more compromised. TPIMs would still provide for Executive led punishment without arrest, charge or trial; secret intelligence being passed to a judge (or Commissioner) that the person subjected to TPIMs would be unable to challenge and restrictions which could last up to 2 years (and potentially longer) without any requirement for criminal investigation and therefore no institutional levers to guarantee that further information/evidence is sought. Given that all the other fundamental features of the regime would remain the same, there is a real risk that requiring a judge rather than a politician to make the order on the basis of secret intelligence (that cannot be tested) will turn the judge into a secret commissioner and decorate – rather than dismantle – a fundamentally flawed regime of internment. As was ultimately recognised over the course of the debate about extending pre-charge detention to 42 days, there are real dangers inherent in embroidering further judicial fig leaves on to a perversion of justice that remains fundamentally unsafe and unfair.

*Certification that a prosecuting authority is investigating*

9. During the Bill's passage through the House of Commons, the Joint Committee on Human Rights (JCHR) published its 16<sup>th</sup> Report – Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill<sup>2</sup> which included a number of suggested amendments to the Bill to ensure that TPIMs could only be imposed by the Executive where there was evidence from the relevant prosecuting authority that a criminal investigation into terrorism was justified. The suggested amendments additionally require the prosecuting authority to be satisfied that none of the specified TPIMs to be imposed would impede the investigation and that a TPIM notice must be revoked by the SoS where they are notified by the prosecuting authority that a criminal investigation into the individual is no longer justified.

10. While a requirement for a certificate from the relevant prosecuting authority would represent an improvement to the Bill in its current form, Liberty does not believe that this would be sufficient to bring restrictions properly within the criminal justice system. While the amendment would certainly strengthen the current requirement in the Bill – that a chief officer secure that the investigation of an individual's conduct, with a view to prosecution is kept under review throughout the

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<sup>2</sup> JCHR's 16<sup>th</sup> Report – Legislative Scrutiny: Terrorism Prevention and Investigation Measures available at - <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/180/18002.htm>

period the TPIM is in force – it would not remove the fundamental objections to the regime, namely: Executive imposed punishments that are fashioned principally as preventative rather than investigative measures. While the existence of a live criminal investigation would provide reassurance, under this model the nature and imposition of restrictions on the one hand and the conduct of a police investigation on the other would be institutionally separate and the current framework (including secret hearings, restrictions overseen by the Secret Services and the Home Office etc) would remain.

*Police bail (or a system akin to it) in terror cases*

11. Lifting the bar on police bail and allowing TPIMs to be imposed as bail conditions in individual cases was raised as a possible way to amend the Bill during Committee proceedings in the House of Commons, but the amendments were not pushed to a vote and were not discussed at Report stage. Members of the House of Lords will remember the recent passage of the *Police (Detention and Bail) Act 2011* which aimed to deal with the implications of the *Hookway* case. The fall-out from the *Hookway* decision ably demonstrated the value of police bail in allowing complex investigations into serious suspected criminality to continue while also allowing suspects to be released with certain restrictions imposed. There is however currently a statutory bar on pre-charge bail in terrorism related cases. Police bail can be granted after arrest but before charge for all other offences, including serious violent and sexual offences. However police bail for terrorist suspects who are arrested and detained under section 41 and Schedule 8 of the *Terrorism Act 2000* is specifically excluded.<sup>3</sup>

12. Where suspicion of terrorism exists but there is believed to be insufficient evidence to charge, restrictions are instead imposed by the Home Secretary under the control order regime which this Bill will largely replicate. Police and prosecutors may have little if any involvement and once a control order is in force, case files are kept and overseen by the Home Office and the Security Services with no requirement for prosecutors to review them. Indeed the Home Office's own Counter-Terror Report concluded that control orders can mean "*that prosecution and conviction (a principal*

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<sup>3</sup> Section 3A of the BA applies to bail granted by a custody officer under Part 4 of the PACE Act. Section 41 and Schedule 8 of the *Terrorism Act* (providing for the arrest without a warrant a person reasonably suspected of being a terrorist) however do not fall within the detention provisions under Part 4 of the PACE Act. Police bail, therefore, cannot be granted under section 3A for individuals who have been detained under section 41.

*purpose of our counter-terrorism work) becomes less not more likely*".<sup>4</sup> This unhelpful system is set to be retained under the TPIMs Bill. Referring to the way in which the *Hookway* judgment would restrict police bail in non-terror cases, the Minister for Policing and Criminal Justice noted in his oral statement to the House on 30<sup>th</sup> June 2011: "*We cannot, must not and will not ask the police to do their work with one hand tied behind their backs*".<sup>5</sup> Maintaining the prohibition on police bail in terror cases arguably does just that – meaning that terror suspects are warehoused for years on end under a parallel administrative detention regime instead of being further investigated and eventually prosecuted if additional evidence comes to light.

13. The Government has yet to make any plausible argument as to why police bail – or something akin to it - in terror cases would not be an adequate replacement to the unsafe and unfair control order regime. Liberty maintains that imposing pre-charge restrictions through a model which is akin to police bail is far preferable to the mechanism proposed in the TPIM Bill:

- As a matter of principle, the precise limits on a person's liberty should be a matter for independent law enforcement professionals and the courts rather than a politician (one of the most offensive features of control orders).
- If we are serious about ending the quasi- judicial system run by the Home Office and the security services and bringing suspects into the criminal justice system wherever possible, we need firm legal drivers to make this happen. A Home Secretary Order plus platitudes about seeking prosecution wherever possible will not bring these parallel systems together and is no real improvement on control orders (which already have theoretical requirements for constant prosecution case review).
- Further, a civil order that isn't linked to a bail-like system will allow the continuance of special secret courts and the resulting injustices. Allowing for police bail or similar in terror cases will mean there will be no need for these special devices. The courts will allow reasonable bail-like conditions for as long as is necessary if it can be shown that a criminal investigation is ongoing and that the conditions are necessary for the normal range of purposes.

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<sup>4</sup> Home Office Report, *ibid*, at para 7.

<sup>5</sup> See the Oral Statement by Nick Herbert, the Minister for Policing and Criminal Justice in House of Commons (Hansard: 30 Jun 2011 : Column 1133)

14. Such is our objection to the prospect of *permanent* legislation replacing the temporary control order scheme that, failing any significant amendment to either the mechanism for, or nature of, the restrictions to be imposed, Liberty believes, with huge regret, that it would be better for the current odious but temporary control order regime to remain in place, than for the TPIM Bill to pass in its current form. Accordingly we propose here **Alternative Amendment 6** which would amend the sunset clause in the Bill, providing for annual rather than five yearly renewal.

### **Amendment 1: Imposition of a TPIMs notice**

Page 1, line 5 leave out clause 2 and insert –

#### **“2 Imposition of a terrorism prevention and investigation measures notice**

- (1) The Secretary of State may apply to the High Court for a terrorism prevention and investigation measures notice (a “TPIM” notice) in relation to an individual if conditions A to D in section 3 are met.
- (2) The High Court may grant a TPIM notice in accordance with section 6.
- (3) In this Act a TPIM notice is a notice which specifies that terrorism prevention and investigation measures may be applied to a particular individual following their arrest and subsequent release from police custody without charge.”

#### ***Consequential amendments –***

Page 3, line 9 delete “imposition of measures” and insert “TPIM notice application”.

Clause 6(1)(b), page 3, line 13 delete “impose measures” and insert “grant a TPIMs Notice”.

Clause 6, page 3, line 15, leave out subclause (2).

Clause 6(3), page 3, line 19 delete subclause (b) and insert – “to determine whether to grant a TPIM notice.”

#### **Effect**

This amendment will amend clause 2 so that the Secretary of State will not be able to impose terrorism prevention and investigation measures directly on an individual. Instead he or she will have the power to apply to the High Court for a TPIMs notice which will only be granted if the conditions in clause 3 are made out (see below).

Under this scheme then, a TPIMs notice (if granted) would allow for the Chief Constable or Met Commissioner to impose terrorism prevention and investigation

measures (TPIMs) on an individual following their arrest for a terrorism offence but before charge. These would include the TPIMs measures as listed in Schedule 1. Crucially, in the first instance it will be the relevant chief officer of police (and not the Secretary of State) deciding which measures should be imposed. This would be similar to the way in which police bail conditions are imposed by the police and overseen by the courts. The requirements and restrictions that could be imposed would be those contained in Schedule 1.

Suggested amendment 1 also contains consequential amendments which deal clause 6. Under the new suggested scheme, the TPIMs notice itself will not contain restrictive measures but will instead allow for a relevant chief constable to impose TPIMs. The amendment therefore accordingly amends clause 6.

### **Amendment 2: – New condition B**

Clause 3, line 15, leave out “E” and insert “D”.

Clause 3, page 1, line 19, leave out sub-clause (2), and insert -

(2) Condition B is that the Secretary of State has received a certificate from the relevant prosecuting authority certifying that criminal investigation into the individual is justified and being undertaken.

Clause 3, page 2, line 10, leave out subclauses (5) and (6) and insert -

(5) For the purposes of this section “relevant prosecuting authority” is -  
(a) in the case of offences that would be likely to be prosecuted in England and Wales, the Director of Public Prosecutions;  
(b) in the case of offences that would be likely to be prosecuted in Scotland, the appropriate procurator fiscal;  
(c) in the case of offences that would be likely to be prosecuted in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.

Clause 5, page 3, line 4 delete “C and D” and insert “B, C and D”.

### **Effect**

Clause 3 currently relates to the conditions that need to be satisfied before the Secretary of State can impose measures directly on an individual. Amendment 1 (above) amends the role of the SoS so that he/she is able to apply to the High Court for a TPIMs notice to be granted. If granted a TPIMs notice would allow the relevant chief constable to imposed specified TPIMs measures.

Amendment 2 relates to the conditions that must be satisfied before the SoS can make an application for a TPIMs notice. Condition A (“that the SoS reasonably believes that that individual is or has been involved in terrorism related activity”) would remain, but we suggest that Condition B is amended so that before an application can be successful, the SoS must have received from the relevant prosecuting authority a certificate stating that a criminal investigation into the individual’s involvement in terrorism-related activity is justified and that the investigation is ongoing. This condition would incorporate the recommendation made by the JCHR and Lord Macdonald.<sup>6</sup> Conditions C and D remain.

### **Amendment 3: Imposition of TPIMs**

Page 2, line 23, insert –

#### **3A Imposition of terrorism prevention and investigation measures**

- (1) Where a TPIMs notice has been granted under section 6 the relevant chief constable can impose specified terrorism prevention and investigation measures on an individual if –
- (a) having been arrested for a terrorism-related offence, the chief constable determines that there is insufficient evidence with which to charge the individual with the offence;
  - (b) the chief constable reasonably believes there is a need for further investigation of any matter in connection with which he was detained;
  - (c) and the chief constable reasonably believes that the imposition of specified TPIMs restrictions are necessary and proportionate to ensuring that the suspect in question –
    - (i) surrenders to custody,
    - (ii) does not commit an offence while on bail, or
    - (iii) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.

(2) In order to impose specified TPIMs on an individual, the chief officer must issue the individual concerned with a terrorism prevention and investigation measures certificate (“TPIMs certificate”) containing the specified measures imposed.

(3) In this section “terrorism prevention and investigation measures” means requirements, restrictions and other provision which may be made in relation to an individual by virtue of Schedule 1 (terrorism prevention and investigation measures).

(4) In this section and Part 1 of Schedule 1 “specified” means specified in the TPIM certificate.

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<sup>6</sup> See the Joint Committee on Human Rights Sixteenth Report of Session 2010-12 *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (HL Paper 180; HC 1432) (19 July 2011), at para 1.17 and 1.23, Annex.

### **3B Review of TPIMs restrictions**

- (1) This section applies if a chief constable imposes specified terrorism prevention and investigation measures on an individual under section 3A.
- (2) If an individual is made subject to specified terrorism prevention and investigation measures under section 3A he or she shall be entitled to appeal the imposition of the measures to the High Court.
- (3) On appeal under subsection (2) the function of the High Court is to determine whether the restrictions imposed by the chief officer of police are necessary and proportionate to ensure that the suspect in question -
  - (i) surrenders to custody;
  - (ii) does not commit an offence while on bail;
  - (iii) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;
- (4) Having made a determination under subsection (3) the Court may vary or discharge the specified terrorism prevention and investigation measures accordingly to ensure that the requirements of that subsection are met.

#### **Effect**

These amendments would mean that if the Secretary of State's application for a TPIMs notice is granted by the High Court, a chief officer may impose TPIMs in circumstances where: an individual has been arrested for a terror-related offence; there is insufficient evidence to charge but a need for further investigation; the chief officer believes it necessary to impose TPIMs on the individual to ensure that the individual does not fail to surrender to custody; commit an offence; interfere with witnesses or otherwise obstruct the course of justice.

The amendments also provide that where specified restrictions are imposed by a chief officer of police, the individual concerned will have an automatic right of appeal to the High Court. As with police bail conditions in the magistrates court, the High Court will be responsible for determining whether the measures are necessary and proportionate to meet Bail Act objectives (to ensure that the individual surrenders to custody etc). Accordingly the Court will be able to vary or discharge some or all of the measures after making their determination.

#### **Amendment 4: Directions hearing and Review hearing of the TPIMs Notice**

Clause **8(1)**, page **4**, line **7**, delete subclauses (a) and (b) and insert

“grants the application of the Secretary of State for a TPIMs notice”

Clause 8(5), page 4, line 23, delete from “measures” and insert – “the TPIMs Notice”.

Clause 9(1), page 4, line 35, at end insert

(1A) On a review hearing held in compliance with directions under section 8(5)(b),

Clause 9(5), page 5, line 7, delete subclauses (b) and (c).

Clause 9, page 5, line 13, delete subclause (7).

### **Effect**

Clauses 8 and 9 deal with the automatic review of a TPIMs notice once it is served. Under our suggested scheme it is intended that this mechanism for automatic review of a TPIM notice continues. However, as per our earlier suggested amendments, a TPIM notice will not itself impose restrictions but rather allow for a chief constable to impose them. These amendments consequentially restrict the role of the Court on review to reviewing the imposition of the Notice but not the imposition of the measures themselves. Suggested amendment 3 above (containing new clauses 3A and 3B) deals with the imposition of measures by a chief constable and provides for an automatic appeal whereby the Court will have the ability to quash or vary individual measures.

### **Amendment 5: Ongoing Review of criminal investigation**

Page 5, line 22, leave out clauses 10 and 11 and insert

#### **Clause 10: Criminal investigations into terrorism-related activity**

(1) Where a chief officer of police imposes specified TPIMs on an individual under section 3A, the chief officer is required to -

- (a) secure that the investigation of the individual’s conduct, with a view to a prosecution of the individual for an offence relating to terrorism, is kept under review throughout the period the TPIMs are in force, and
- (b) report to the Secretary of State at quarterly intervals on the review carried out under paragraph (a).

#### **Clause 11: Review of ongoing necessity**

(1) Where a criminal investigation into an individual who is subjected to TPIMs is terminated, the chief officer must inform the relevant prosecuting authority.

(2) Where the relevant prosecuting authority is informed under subsection (1) that the criminal investigation into the individual is no longer ongoing he must withdraw the certificate issued under section 3 and inform the Secretary of State.

(5) Where the Secretary of State is informed that section 3 conditions are no longer satisfied, he or she must make an application to the High Court for the TPIMs notice to be withdrawn.

(6) The function of the court on application under subsection (3) is -

- (a) to discharge the TPIMs notice, and
- (b) to discharge the TPIMs imposed under the TPIMs notice.

### **Effect**

By inserting a condition that a TPIM notice can only be applied for where the relevant prosecuting authority has certified that a police investigation is ongoing and justified, the need for existing clauses 10 and 11 falls away. Instead, Amendment 8 inserts two clauses. Suggested new clause 10 will ensure that where TPIMs are imposed, a chief officer keeps the progress of the investigation under constant review making reports on the progress of the investigation to the SoS at quarterly intervals. Suggested new clause 11 provides that where TPIMs are in force and a criminal investigation ceases, the relevant chief officer must inform the prosecuting authority who in turn must inform the SoS. The SoS must then apply to the High Court to have the TPIM notice withdrawn and the Court must then discharge the notice and the TPIMs conditions imposed as a result of it.

## **ALTERNATIVE AMENDMENT**

### **Amendment 6 – annual sunset**

Clause 21, page 13, line 3, delete '5 years' and insert '1 year'.

Clause 21, page 13, line 8, delete '5 years' and insert '1 year'.

Clause 21, page 13, line 14, delete '5 years' and insert '1 year'.

### **Effect**

This would replace the 5 year sunset clause with an annual sunset clause. As is currently the case with control orders, this would mean that Parliament would be required to review the operation of exceptional preventative detention each year and to determine whether it still considers the regime to be necessary.