

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

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

**September 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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## Executive Summary

The TPIM Bill replaces the control order regime with something remarkably similar, re-establishing a system of executive imposed measures which can be created where the Home Secretary “*reasonably believes*” that an individual is or has been involved in terrorism-related activities, considers specified measures are necessary for “*purposes connected with*” protecting members of the public from a risk of terrorism, and considers specified measures are necessary for “*purposes connected with*” preventing or restricting the individual’s involvement with terrorism-related activity.

While in non-urgent cases the Home Secretary is required to obtain judicial approval before imposing a TPIM notice, the Court’s role is narrowly limited to assessing whether the Home Secretary’s decision is “*obviously flawed*”. Further intervention is limited to judicial review of the lawfulness of the order and the current system of Kafkaesque-style secrecy in such hearings is to continue.

The Bill offers a wide range of punitive measures including:

- overnight curfews,
- restrictions on travel,
- exclusion from certain places or buildings,
- restrictions on movement,
- restrictions on access to financial services,
- restrictions on the possession and transfer of property,
- restrictions on the use of electronic communication devices,
- restrictions on association with others,
- restrictions on work and study,
- reporting requirements,
- requirements to submit to photography, and
- requirements to submit to monitoring including electronic tagging.

The TPIM regime mirrors the control order system in all of its most offensive elements including:

- Unconstitutional, executive-imposed punishment, with judicial interventions remaining weak and shrouded with secrecy;

- creation of an impediment to prosecution for those who may genuinely be involved in terrorist activity;
- imposition of punitive and potentially unending restrictions on individuals who may be innocent of any crime, 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 live amongst us in the community;
- furtherance of a system which creates huge costs liabilities at a time of financial strife.

Liberty urges Parliamentarians to vote against this fudged Bill which makes no real concessions to widespread objections to control orders and offers at best a re-branding of a discredited regime.

Real alternatives to the control order regime are available, including:

- allowing, pre-charge, police bail restrictions currently available in non-terror cases to be made available in terror cases,
- relaxing restrictions on the use of intercept evidence in criminal proceedings and
- redirecting the vast sums spent on maintaining the defending the control order regime in the courts for use on surveillance of those suspected of involvement in terrorism.

The pernicious nature of the control order regime is being replicated in this Bill, which threatens to normalise what had previously been understood as a temporary departure from the UK's adherence to the Rule of Law. With the recent exposure of files indicating the close working relationship between our agencies and Gaddafi's former regime in Libya, it is pertinent to remember how information obtained through torture and other inhuman and degrading treatment could (through control orders/TPIMs) form the basis of placing punitive restrictions on individuals in the UK.

## Introduction

1. The *Terrorism Prevention and Investigation Measures Bill* ('the TPIM Bill') was introduced in the House of Commons on 23<sup>rd</sup> May 2011. This followed a Government Review of the control order regime which, in addition to representing a blot on the human rights record of the UK, has proven dangerously unsafe and frequently unworkable in practice. Liberty therefore welcomed the Home Secretary's announcement in July 2010 that the most invasive and controversial counter-terror measures were to be reviewed, and we were delighted to be expressly invited to contribute to the Review.<sup>1</sup> The findings and recommendations of the Home Office Review of Counter-Terrorism Powers ('the Home Office Report') were published on 26<sup>th</sup> January 2011.<sup>2</sup> 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.<sup>3</sup>

2. Liberty was extremely disappointed by the treatment of the control order system in the Home Office Report which, while recommending that the regime be repealed, outlined a scheme which replicated the most illiberal, unconstitutional and unfair aspects of control orders. The TPIM Bill reflects and expands these proposals. Terrorism prevention and investigation measures ('TPIMs') will be imposed through a civil, and predominantly executive led process, instigated by the Home Secretary and located firmly outside of the criminal justice system. The conditions which may be placed on those subject to the regime have altered slightly but will continue to be punitive and incredibly restrictive. Breach of a TPIM will still result in criminal sanction with the same maximum penalty of five years' imprisonment. Further, while ostensibly a TPIM will have a two year limit, there is potential for the scheme to be extended where '*new evidence of terrorist related activity*' is alleged. Such a low threshold could quite easily be met given the subjective test for the Home Secretary's

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<sup>1</sup> See Statement of the Home Secretary, the Rt Hon Theresa May MP, House of Commons Hansard (13<sup>th</sup> 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>.

<sup>2</sup> Available at <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary>.

<sup>3</sup> 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>.

'reasonable belief'. The existence of 'further evidence' would be virtually unchallengeable in the secret court processes that accompany this regime. Once again we join the ranks of Zimbabwe and Burma in providing for preventative executive-imposed administrative detention, on an indefinite basis, for individuals who may be innocent of any crime.

### The provisions of the Bill

3. Clause 1 provides for the repeal of the *Prevention of Terrorism Act 2005* ('the PTA') which provides the statutory underpinning for the control order regime. Clause 2 provides for the imposition by notice ('a TPIM notice') of any of a series of measures listed in Schedule 1 on an individual by the Secretary of State where certain conditions are satisfied. Terrorism prevention and investigation measures fall into 12 broad categories covering every aspect of daily life, as set out below.

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| <p><i>Overnight residence requirements' (curfews and related restrictions)<sup>4</sup></i></p> | <p>Overnight residence measures can include both an overnight curfew and specific restrictions on an individual's movements outside his "<i>specified residence</i>" during the night. This provision is designed to remove the prospect of internal exile provided for under the PTA, by providing for residence "<i>in an appropriate or an agreed locality</i>". This is defined as one in which the individual has a residence or a connection; if he has neither the Home Secretary will pick a location which appears appropriate.<sup>5</sup> This is one of the few substantive changes from the control order regime, which became necessary following a judgment of the Supreme Court to the effect that internal exile could amount to a breach of the Right to Liberty under Article 5 of the European Convention on Human Rights.<sup>6</sup> Incredibly, the power to internally relocate a terror suspect has been retained in a recently published draft bill, reserved for an undefined emergency (as discussed below).</p> |
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<sup>4</sup> Schedule 1, Paragraph 1.

<sup>5</sup> Schedule 1, paragraph 1(4). Where accommodation is provided by the Home Secretary she may impose restrictions on occupancy as she sees fit. The Secretary of State is required to specify the duration of a restriction imposed under this paragraph. If the Home Secretary wishes to grant permission for an individual to reside elsewhere for part or all of a particular night, provision to this effect must be included in the TPIM notice.

<sup>6</sup> *Secretary of State for the Home Department v AP [2010] UKSC 24*. The Supreme Court reached the same conclusion in September 2010 in the case of *CA v Secretary of State for the Home Department [2010] EWHC 2278*.

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| <i>Travel measures</i> <sup>7</sup>                           | The Home Secretary may prohibit an individual from leaving the country without obtaining permission or giving notice. Individuals may further be prohibited from obtaining or retaining a travel document.                                                                                                                                                                                                                                                                                                                                                                                        |
| <i>Exclusion measures</i> <sup>8</sup>                        | The Home Secretary may impose measures which prevent an individual from entering a particular identified area or place, or an area or place of a particular description.                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <i>Movement directions measures</i> <sup>9</sup>              | The Secretary of State may require an individual to comply with directions imposed on his movements designed to ensure compliance with measures or facilitate a requirement that an individual be escorted by a police constable when going about his daily business. Directions are for a maximum duration of 24 hours, but there is no apparent restriction on the power of the Home Secretary to impose new directions, creating the prospect of onerous rolling restrictions.                                                                                                                 |
| <i>Financial services measures</i> <sup>10</sup>              | The Secretary of State may restrict an individual's use of or access to any specified set of financial services. This may include, but is not limited to, restrictions prohibiting an individual from holding bank accounts outside of a nominated single account or using credit and debit cards to make financial transactions. <sup>11</sup>                                                                                                                                                                                                                                                   |
| <i>Property measures</i> <sup>12</sup>                        | The Secretary of State may restrict an individual's right to transfer or disclose property including rights of use over property.                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <i>Electronic communication device measures</i> <sup>13</sup> | The Secretary of State has the power to place restrictions on the possession or use of electronic communication devices by an individual and any friend, family member or other person residing with him. An electronic communication device is defined as any device capable of storing, transmitting or receiving images, sounds or electronic information by electronic means, any component part of such device, or any accessory which can be used with the device, for example discs or USB drives. The range of devices covered by this section is extremely wide incorporating technology |

<sup>7</sup> Schedule 1, Paragraph 2

<sup>8</sup> Schedule 1, paragraph 3.

<sup>9</sup> Schedule 1, paragraph 4.

<sup>10</sup> Schedule 1, paragraph 5.

<sup>11</sup> The Secretary of State must be notified of the nominated account which must be held with a bank.

<sup>12</sup> Schedule 1, paragraph 6.

<sup>13</sup> Schedule 1, paragraph 7.

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|                                               | <p>commonly considered indispensable to daily life, such as telephones, computers and fax machines.</p> <p>An individual retains the right to possess a landline telephone, a mobile which does not offer internet access and a computer from which the internet can be accessed but only by a fixed line. This right is subject to wide restrictions on use and possession, including prescriptions as to the type or make of device, e.g. a provision that he be restricted to devices supplied or modified by the Secretary of State. Other restrictions effect the times at which a device is used, including monitoring of the device use by non-specified entities, a condition accompanied by a power to access an individual's premises for the purposes of inspection or modification of devices by "<i>a specified description of person</i>" and a requirement to surrender a device temporarily for the purposes of inspection or modification.<sup>14</sup></p> |
| <i>Association measures</i> <sup>15</sup>     | The Secretary of State retains a power to impose restrictions on an individual's association or communication with others (even where communication is through a third party), including, but not limited to prohibiting or restricting association or communication with specified individuals or categories of person.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <i>Work or studies measures</i> <sup>16</sup> | Restrictions can be placed on an individual's right to work (paid or unpaid) and study including a proscription on carrying out work or studies " <i>of a specified description</i> " without the express consent of the Home Secretary. <sup>17</sup>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <i>Reporting measures</i> <sup>18</sup>       | The Home Secretary may require an individual to report at a police station at any specified time. There are no restrictions on the frequency of reporting restrictions which, on the face of the legislation, could require daily visits to a police station at times which seriously interrupt an individual's professional or family life.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <i>Photography measures</i> <sup>19</sup>     | The Home Secretary may require an individual to make himself available to be photographed at any time or location she specifies.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |

<sup>14</sup> Schedule 1, paragraph 7(4)(e).

<sup>15</sup> Schedule 1, paragraph 8.

<sup>16</sup> Schedule 1, paragraph 9.

<sup>17</sup> Schedule 1, paragraph 9(2).

<sup>18</sup> Schedule 1, paragraph 10.

<sup>19</sup> Schedule 1, paragraph 11.

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| 'Monitoring measures' (electronic tagging and surveillance) <sup>20</sup> | The Home Secretary may require an individual to comply with extensive requirements for the monitoring of every aspect of his day-to-day life including movements and communications. Modes of monitoring expressly include electronic methods, such as tagging. |
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4. Clause 3 sets out the conditions that must exist before any TPIM is imposed:

- **Condition A** - under the existing regime, the Secretary of State can make a control order if 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.<sup>21</sup> The wording of the test has been subject to a largely semantic shift. In accordance with the Bill the Secretary of State must “*reasonably believe*” that the individual is or has been involved in terrorism related activity.
- **Condition B** – requires that some or all of the suspicious activity in question is “*new terrorism related activity*”. This condition is only of relevance if a TPIM notice has previously been in force in relation to an individual. If one or more TPIM notices have been issued, a condition of issuing a further notice is a reasonable belief in the existence of terrorism related activity occurring after the most recent notice came into force.<sup>22</sup>
- **Condition C** – requires that the Secretary of State reasonably consider specified measures are necessary for “*purposes connected with*” protecting members of the public from a risk of terrorism. This condition precisely replicates a condition which must be satisfied before a control order can be imposed under the current regime.
- **Condition D** - requires that the Secretary of State reasonably considers the specified measures are necessary for “*purposes connected with*” preventing or restricting the individual involvement with terrorism-related activity. Again, this

<sup>20</sup> Schedule 1, paragraph 12.

<sup>21</sup> 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*.

<sup>22</sup> Clause 3, paragraph 6(b)-(c).

condition precisely replicates a condition which must be satisfied before a control order can be imposed under the current regime.

- **Condition E** – provides that the Secretary of State may not impose measures without the Court’s acquiescence except in an emergency. A court can only interfere with the Secretary of State’s decision if it is found to be “*obviously flawed*”; this decision may be made in the absence of the individual to whom the measures relate, without the individual’s being aware that the issue is being considered and without the individual having the opportunity to make any representations. In these respects the regime mirrors, identically, that provided for in the PTA.<sup>23</sup>

5. Where a court grants permission for the issuing of a TPIM notice or confirms the same after the event, a further hearing must be held within 7 days, at which directions are set for a “*review hearing*” where the lawfulness of the decision falls to be considered in accordance with judicial review principles.<sup>24</sup> Where individual measures are impugned the Court will have the power to direct that more proportionate and potentially less restrictive measures are substituted. A review may be discontinued in any circumstances so long as the TPIM subject and the Secretary of State have been given the opportunity to make representations.<sup>25</sup>

6. Clause 5 provides that TPIM notices, once served, remain in force for one year. They can be renewed for a further year at the imperative of the Secretary of State.

7. Clause 10 requires the Secretary of State, before imposing, or applying for permission to impose a TPIM notice, to consult a chief officer of police to ascertain the availability of evidence which could realistically be used to prosecute an individual.<sup>26</sup> This requirement does not necessitate any new consultation and is satisfied if consultation has taken place in the past.<sup>27</sup> The chief officer has a corresponding obligation to keep investigations into the individual’s conduct under

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<sup>23</sup> Schedule 2, paragraph 6(4).

<sup>24</sup> Clause 8.

<sup>25</sup> Clause 9(3)-(4).

<sup>26</sup> The chief officer is required, in turn, to consult the Crown prosecution service: Clause 10(6)

<sup>27</sup> In addition, the relevant officer must also be notified that a TPIM notice has been served. In response the chief police officer must keep her investigation of the individual’s conduct under review. During the life of a TPIM notice, the Secretary of State is required to keep it “under review” - Clause 11.

review throughout the life of the TPIM notice and to report back to the Home Secretary.<sup>28</sup> These measures again substantively replicate provisions in the PTA.<sup>29</sup>

8. TPIM measures can be varied throughout the life of the notice. The Secretary of State can impose more stringent measures where she considers it “*necessary for purposes connected with preventing or restricting an individual’s involvement in terrorism related activity*”.<sup>30</sup> Notices can be revoked at the discretion of the Secretary of State and revived again if the relevant conditions are met, save where the order was revoked in compliance with directions given by a court.<sup>31</sup> In these circumstances, as in cases where the notice is actually quashed by a Court, a replacement TPIM notice may be imposed by the Secretary of State on the basis of a reasonable belief that terrorism related activity post-dating the original notice exists.<sup>32</sup>

9. Clause 16 makes provision for an individual to appeal against the extension, revival or variation of his TPIM notice; he may also appeal against a decision of the Secretary of State not to vary measures in his favour or not to revoke an order in accordance with his application. Schedule 4 makes provision for rules of the court, which may be drafted by the Lord Chancellor, governing disclosure and other aspects of the process. A guiding “*general provision*” is that rules of the court must have regard to the need to ensure that information is not disclosed where contrary to the public interest.<sup>33</sup> Subject to this provision, rules about evidence, the need to have an oral hearing, representation, non-disclosure of evidence, excluding a party (except for the Secretary of State) or his representative from proceedings and the functions of special advocates can be set out in rules of the court. In relation to disclosure specifically, any rules of the court must provide the Secretary of State with the opportunity to apply to limit disclosure to the court and any appointed special advocate, on the basis that wider disclosure would be contrary to the public interest. Schedule 4 also makes provision for rules of court relating to anonymity, the use of advisors and the appointment of special advocates, which will apparently play the same role in the TPIM system as they did under the PTA.

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<sup>28</sup> Clause 10(5).

<sup>29</sup> PTA s8.

<sup>30</sup> Clause 12(1)(c), variations favourable to the subject or agreed variations can be made at any time (12(1)(a)-(b)).

<sup>31</sup> Clause 13(8).

<sup>32</sup> Clause 14.

<sup>33</sup> Schedule 4, 2(1)(b).

10. The Secretary of State is required to prepare reports on a three monthly basis about the exercise of powers under the Bill, and must appoint an independent reviewer to conduct an annual review of the operation of the Act.<sup>34</sup>

11. Clause 21 creates a criminal offence of failing to comply with a TPIM notice which mirrors, in all its particulars, the offence provided for in the PTA. Conviction can result in a sentence of up to five years.

12. Schedule 5 provides additional powers of entry, search, seizure and retention at the time when TPIM notices are served; these largely replicate those provided for in the PTA. Further searches and seizures may be carried out on suspicion that an individual has absconded and searches can be carried out, without suspicion and without a warrant, to ascertain whether the subject of a TPIM notice is in possession of anything that is or could be used to threaten or harm another.<sup>35</sup> Once again, these provisions mirror the current regime under the PTA.

13. Schedule 6 makes provision for the taking of fingerprints and samples, including without consent and by the use of reasonable force.<sup>36</sup> Any individual who fails to comply may be arrested without warrant. Any biometric data may be retained, in the case of an individual with no previous convictions, for six months and in the case of an individual previously convicted of a recordable offence, indefinitely.<sup>37</sup> Notwithstanding these provisions, any material may be retained for the duration of any national security determination.<sup>38</sup>

14. Schedule 8, provides for a transitional period of 28 days during which existing control orders will remain in force following the enactment of the Bill. It would appear that thereafter any extant control order will cease to have effect.<sup>39</sup> Paragraph 2 of the Schedule provides for legislation which is repealed or amended by the Bill to continue to apply as if unaffected, in relation to control orders made before commencement and other aspects of the operation of the PTA. The meaning and objective of this provision is obscure. Whilst it would apparently not allow for a control order to remain in force after the conclusion of the transitional period, it appears to

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<sup>34</sup> Clauses 19 and 20.

<sup>35</sup> Schedule 5, paragraph 10.

<sup>36</sup> Schedule 6, paragraph 1(3).

<sup>37</sup> Save where the conviction relates to a non-qualifying offence committed when the individual in question was a minor.

<sup>38</sup> Schedule 6, paragraph 11.

<sup>39</sup> Schedule 6, paragraph 1 read together with paragraph 9.

envisage the ongoing application of powers accompanying the imposition of a control order. In the absence of further clarification, Liberty has concerns about the implications of this provision.

### **Liberty's objections to the regime**

15. Since control orders were first proposed, Liberty has maintained that they fail to adequately address the underlying human rights objections to detention without trial, set out so clearly and definitively in the Belmarsh judgment,<sup>40</sup> which they were intended to resolve. The new TPIM Bill mirrors the control order regime in all its most offensive aspects by imposing punitive restrictions beyond the criminal courts; undermining the right to fair trial and overturning the presumption of innocence. Most troubling, is the way in which the new system will allow for:

- unending restrictions on liberty based on belief 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.

#### *Imposed by the Home Secretary*

16. As with control orders, TPIMs will be imposed by the Secretary of State with prior permission of the Court save where cases are deemed, by the Home Secretary, to be urgent. Accordingly the TPIM will replicate perhaps the most fundamental flaw of the control order regime, which is imposition of intrusive restrictions not by police or the prosecution as part of ongoing criminal investigations, but at the instigation of the Executive, with judicial supervision permitted on a highly limited basis. As drafted, the TPIM Bill will not address the fundamental problems which arise from imposing criminal punishment by a civil procedure, even where it is imposed with the aim of investigation and prosecution. This also means that the current disjuncture between police and security services will continue. The latter continuing to be the lead agency in control order cases, which are “*so undermining of criminal prosecutions*”.<sup>41</sup> The TPIM Bill does nothing to address this fundamental divergence.

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<sup>40</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56. Detention without trial under Part IV of *Anti-terrorism, Crime and Security Act 2001*.

<sup>41</sup> Lord Macdonald at para 9.

### *Imposition on the basis of reasonable belief*

17. In what was described by Lord MacDonald as a “marginally” higher hurdle, a new standard of “reasonable belief” replaces the control order requirement of “reasonable suspicion”. This amendment leaves core objections to the regime untouched and still represents an unacceptably low threshold. The normal threshold in civil matters requires a court to be satisfied on the balance of probabilities (i.e. to accept that facts have been established on the basis of a probability of at least 51%) before ruling in favour of a party. More pertinent still, before an individual can be convicted of even the most minor criminal offence, a judge or jury must be satisfied *beyond reasonable doubt* of his or her guilt. By contrast a TPIM can be introduced simply on the basis that the Home Secretary’s *reasonably believes* that an individual is or has been involved in terrorism related activity. There is no requirement that this belief is grounded in verifiable fact, and as with a test based on suspicion, decisions may be based on conjecture and speculation.

### *Outside the criminal justice system*

18. Liberty’s over-arching concern is that this system remains outside the criminal justice system. Since control orders were first introduced under the PTA Liberty has continuously advocated for terrorist suspects to be investigated and prosecuted in accordance with the Rule of Law. A textual reference to criminal investigation cannot remedy the constitutional flaws in a system of executive imposed orders, reviewable only by a civil court and absent the protections built into the criminal justice system. This pernicious nature of punishment without trial has not been lost on others assessing this Bill:

- Lord Macdonald concluded that it “*is precisely because the present control order system stands apart from criminal due process that it attracts such criticism*”.<sup>42</sup>
- The Joint Committee on Human Rights concluded that the “*overriding priority of public policy in this area should be the criminal prosecution of individuals who are suspected of involvement in terrorist activity*” and the Bill is “*not going far enough to bring the restrictions back into the domain of criminal due*

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<sup>42</sup> Lord Macdonald’s Report, *ibid*, at para 8, page 10.

process”.<sup>43</sup> Agreeing with Lord Macdonald, the Committee made a number of recommendations to bring the system back within the criminal justice system.<sup>44</sup>

- The House of Lords Select Committee on the Constitution concluded that the Bill fails to sufficiently address the concerns of Lord Macdonald that control orders act as an impediment to prosecution: “*the reforms could have gone considerably further*”.<sup>45</sup>
- Baroness Manningham-Buller, former head of MI5, recently stated “*the best result of a counter-terrorist operation is a successful prosecution*”,<sup>46</sup> and that the “*democracies of the West believe in the rule of law and we should prosecute these crimes within proper law*”.<sup>47</sup>

### *Impediment to prosecution*

19. 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*”.<sup>48</sup> 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*”.<sup>49</sup> He said:

*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*

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<sup>43</sup> See Joint Committee on Human Rights *Sixteenth Report of Session 2010-12: Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (11 July 2011) at pages 3, 9 to 12.

<sup>44</sup> See the JCHR Report, *ibid*, at page 19.

<sup>45</sup> See the House of Lords Select Committee on the Constitution *19<sup>th</sup> Report of Session 2010-12, Terrorism Prevention and Investigation Measures Bill* (15 September 2011) at para 10 to 13.

<sup>46</sup> BBC Reith Lectures 2011: *Securing Freedom* (Lecture Two: Security), Tuesday 13<sup>th</sup> September 2011, at page 17; available at <http://www.bbc.co.uk/radio4/features/the-reith-lectures/transcripts/1948/>.

<sup>47</sup> BBC Reith Lectures 2011: *Securing Freedom* (Lecture One: Terror), Tuesday 6<sup>th</sup> September 2011, *ibid*.

<sup>48</sup> Home Office Report, *ibid*, at para 7.

<sup>49</sup> Lord Macdonald’s Report, *ibid*, at para 2, page 9.

*amongst us still, instead of sitting for very long years in the jail cells where they belong.*<sup>50</sup>

The Home Office Counter-Terror Review recommended that measures should be imposed with a view to investigation and prosecution as well as in order to prevent any terrorist activity.<sup>51</sup> Successful prosecution, it was stated, will always be the objective.

20. However the Bill itself makes only fleeting reference to the purported prioritisation of prosecution in clause 10 of the Bill. In that provision there is a duty of consultation, comprising an obligation to make inquiries of a chief officer of police regarding the availability of evidence which could realistically facilitate prosecution, prior to issuing a TPIM notice.<sup>52</sup> No further obligation is placed on the Secretary of State in this respect, save to inform police when a TPIM notice is served.<sup>53</sup> This supposedly strengthened legal duty to be imposed on police does no more than require that an investigation is kept 'under review' during the life of a TPIM notice; no substantive obligations are imposed and there is no requirement that a TPIM expire if a prosecution is not brought within a set period of time.<sup>54</sup> While the chief officer must report back to the Secretary of State on the outcome of his review, any subsequent action falls entirely within the wide discretion afforded to the Home Secretary. Clause 10 is also a replica of the provisions which are already in force under the PTA.<sup>55</sup> Lord Macdonald has concluded that current police and prosecutorial assessment and scrutiny of 'controlee' cases is "*frankly inadequate*".<sup>56</sup> Further, it is the types of restrictions sanctioned in the TPIM Bill which prevent the very activities likely to result in the discovery of evidence fit for prosecution, conviction and imprisonment.<sup>57</sup>

21. Worryingly, since tabling this Bill in Parliament the Government has apparently modified its policy. In response to the tabling of criminal justice alternative

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<sup>50</sup> Ibid, at para 4, page 9.

<sup>51</sup> Home Office Report, *ibid*, at para 24, page 41.

<sup>52</sup> Clause 10(1)-(2).

<sup>53</sup> Clause 10(4).

<sup>54</sup> Clause 10(5).

<sup>55</sup> Section 8(2) PTA provides that before making of 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. 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: section 8(4).

<sup>56</sup> Lord Macdonald, para 10.

<sup>57</sup> Lord Macdonald's review, at para 3, page 9.

amendments to the Bill in the Public Bill Committee proceedings in the House of Commons (which were not pushed to a vote) and recommendations from the JCHR aimed at bringing the Bill closer to the criminal justice system, the Government appears to have abandoned the notion that TPIMs are geared towards prosecution. Contradicting earlier statements, and rendering pointless clause 10, the Government has now stated that TPIMs will be imposed as a last resort where

*there is no realistic prospect of a prosecution, and there is no imminent prospect that further investigation will yield evidence that could be used to prosecute. ...In such a case the purpose of the measures is not to facilitate the gathering of evidence – which process will already have been exhausted...*<sup>58</sup>

22. This most recent insight into the Government's policy is a departure from previous statements of intent which emphasised how TPIMs - unlike control orders – would encourage prosecutions. It also does not bode well for collective safety to continue a regime which actively impedes prosecution of supposedly dangerous individuals.

### *Unsafe*

23. According to the quarterly reports of the former Government Reviewer of Terrorism Legislation, 7 of the 48 people that have been made subject to a control order have absconded.<sup>59</sup> Rather than being merely an “*embarrassment to the system*” meaning only that the “*viability of enforcement must always be considered when a control order is under consideration*”,<sup>60</sup> the rate of disappearances indicates a threat that the control order regime is failing to meet. There is nothing in the TPIM Bill that alters this situation. 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.

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<sup>58</sup> The Government Reply to the Sixteen Report from the Joint Committee on Human Rights Session 2010-12 HL Paper 180, HC 1432, at page 4.

<sup>59</sup> Lord Carlile's Sixth Report, *ibid*, at para 15, page 8.

<sup>60</sup> See Lord Carlile's comment at para 39 of his Sixth Report, *ibid*, para 39.

## *The role of the judiciary and Special Advocates*

24. As with the PTA, the TPIM Bill 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 “*obviously flawed*”.<sup>61</sup> The Secretary of State need only ever show that she reasonably believes the relevant conditions are satisfied on the basis of the material provided. As under the PTA the judiciary will have no opportunity to test the accuracy of the information which forms the basis of her assessment. We can only assume that decisions to impose TPIMs will continue to be based on secret intelligence which the individual concerned is unable to see and powerless to dispute. Recent exposure of intelligence service connections within Libya, a State widely acknowledged to torture its citizens, raises again the likelihood that secret intelligence used in such contexts may well be being obtained by torture.<sup>62</sup>

25. Replicating its predecessor, the Bill would provide for the High Court to review each TPIM after the measure has been imposed.<sup>63</sup> The High Court has the power to quash or revoke measures, but can only interfere where the Home Secretary’s decision is found to be unlawful in accordance with judicial review principles. 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 latter, in normal circumstances, being a key safeguard against misuse of power against an individual facing the might of the state.

26. 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 imposing a new TPIM notice on an individual on the basis that the existence of “*new terrorism relating activity*” is established to the very low standard of reasonable belief.<sup>64</sup>

27. Compounding the unfair nature of this process is the secrecy inherent in the system. The much maligned ‘special advocate’ regime will continue to operate under

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<sup>61</sup> Clause 6(4).

<sup>62</sup> The extent to which UK authorities shared intelligence about individuals with the Libyan regime is now subject to investigation by the Sir Peter Gibson Inquiry into Torture. See <http://www.guardian.co.uk/world/2011/sep/05/torture-inquiry-investigate-uk-libya-rendition>.

<sup>63</sup> Clause 9.

<sup>64</sup> Para 8(2) of the Schedule to the PTA.

the TPIM Bill, with specific provision made for further rules of court, which may be drafted in the first instance by the Lord Chancellor, governing the functions of special advocates.<sup>65</sup> It was suggested in the Home Office's Report that the role of special advocates may be reviewed in a Green Paper dealing with the use of sensitive material in judicial proceedings, however there is no evidence of any shift on the face of the Bill.<sup>66</sup> In any event, we are given to understand that the Green Paper will focus on ways in which the jurisdiction of our courts can be narrowed, thus potentially investing the special advocate regime with more secrecy rather than less. As under the PTA, provision is made for the non-disclosure of documents considered "*contrary to the public interest*", save to the court and a government appointed special advocate.<sup>67</sup> The special advocate will continue to put their 'client's' case, but is not allowed to disclose any sensitive material to the subject of a TPIM. 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.

28. Arguments that this hobbled form of judicial procedural oversight provided for in the Bill ensure the TPIM system is human rights compliant simply do not withstand scrutiny. Preventing a person from knowing the substantive case against him 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 is entirely divorced from 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 TPIM regime, like its predecessor, 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.<sup>68</sup> Less than two months ago, another control order was ruled unlawful and quashed by the Court of Appeal, on the basis that the

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<sup>65</sup> Schedule 4(2)(f). For general provisions see Schedule 4(10).

<sup>66</sup> See para 7 of the Schedule to the PTA.

<sup>67</sup> Schedule 4(4).

<sup>68</sup> *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.

evidence relied upon to impose it was “*too vague and speculative*”.<sup>69</sup> Control orders administered by this Home Secretary, as well by her predecessors have been routinely quashed on the grounds of violations of Articles 5, 6 and 8 of the European Convention on Human Rights.<sup>70</sup>

- *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;<sup>71</sup> and
- *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*”;<sup>72</sup> 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’*”.<sup>73</sup>

#### *Normalising preventative detention outside the criminal justice system*

29. Far from representing a positive innovation, the TPIM regime is, in one crucial respect, more offensive than the system it is designed to replace in that it is intended to establish this system as a normal part of the legal landscape. When this Bill was first tabled in the House of Commons it was proposed that its measures would become permanent. Following an amendment tabled at Report stage, clause 21 now provides that the TPIM powers will expire at the end of five years beginning with the day the Act comes into force.<sup>74</sup> After five years, the Secretary of State can revive the powers by statutory order approved by both Houses of Parliament for a further period

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<sup>69</sup> *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366 (05 April 2011).

<sup>70</sup> The right to Liberty (Article 5), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8). See, for example *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366 (05 April 2011) and *CA v Secretary of State for the Home Department* [2010] EWHC 2278.

<sup>71</sup> Ian MacDonald QC resigned on 1<sup>st</sup> 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:49tF55gCawAJ:www.gcnchambers.co.uk/index.php/gcn/content/download/1161/7517/file/Counsel\\_200503\\_mcdonald.pdf+ian+macdonald+siac+resign&hl=en&ct=clnk&cd=7&gl=uk](http://74.125.47.132/search?q=cache:49tF55gCawAJ:www.gcnchambers.co.uk/index.php/gcn/content/download/1161/7517/file/Counsel_200503_mcdonald.pdf+ian+macdonald+siac+resign&hl=en&ct=clnk&cd=7&gl=uk).

<sup>72</sup> 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>.

<sup>73</sup> Joint Committee on Human Rights, Nineteenth Report (16<sup>th</sup> July 2007), at para 192. Available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15702.htm>.

<sup>74</sup> Clause 21(1).

up to five years in length.<sup>75</sup> The Secretary of State also has the power to urgently renew the powers by declaration without approval by Parliament, after which the order must be laid and approved by both Houses.<sup>76</sup>

30. Liberty urges Parliamentarians not to allow the TPIM/control order regime to become a permanent or semi-permanent feature of the statute book. The tabling of a sunset clause in the House of Commons is a step in the right direction. However if we are to have a mechanism which remains beyond the rule of law, we agree with the Joint Committee on Human Rights<sup>77</sup> that at the very least this aberration must be debated and justified on an annual basis. At the time the PTA was passed it was recognised that this was an unconstitutional system which therefore had to be exceptional and which Parliament should keep under continuing review. A five year sunset clause will only normalise a system of preventative detention. Indeed we have already seen that civil orders with criminal consequences on individuals have crept across the statute book, such as ASBOs, Gangbos, football banning orders etc. Liberty considers this to be a dangerous trend and entirely disagrees with the Government's assertion last month that "*imposing restrictions...on individuals who have not necessarily been convicted and who are not subject to any other ongoing criminal justice process*" is a "*well-established principle across our legal system*".<sup>78</sup>

31. The requirement for annual review under the PTA has paved the way for ongoing debate within and outside Parliament and has helped to ensure that the odious control order regime did not become acceptable over time. Thanks, in part, to annual renewal debates and votes, control orders have remained on the political agenda. It is almost unthinkable that, ten years after the misguided 'war on terror' began, the Government is asking Parliament to repackage the control regime on the basis that this is an accepted part of our legal system and without even the protection offered by annual parliamentary review. As concluded by the House of Lords Select Committee on the Constitution, the TPIM is an 'unsatisfactory compromise', a

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<sup>75</sup> Clause 21(2), (4). Before making the order the Secretary of State must consult the independent review of terrorism legislation the Intelligence Services Commissioner and the Director-General of the Security Service: clause 21(3).

<sup>76</sup> Clause 21(5) and (6).

<sup>77</sup> See the Joint Committee on Human Rights Sixteenth Report of Session 2010-12, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (11 July 2011) at para 1.45.

<sup>78</sup> The Government's Reply to the Sixteenth Report from the Joint Committee on Human Rights Session 2010-12 HL Paper 180, HC 1432, at page 6.

“scheme of extraordinary executive powers” which are not “*constitutionally appropriate to place on a permanent basis*”.<sup>79</sup>

### *Potentially ongoing obligations*

32. Liberty is also concerned that TPIM notices will be able to go on for extended periods, as has been the case for a number of individuals who have already been subject to a control order for a number of years. Currently control orders must 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.<sup>80</sup> In the monitoring report immediately prior to this one, a man was in his *fifth* year of a control order.<sup>81</sup>

33. At first glance, the TPIM appears to remove the prospect of renewal on a rolling basis, however on closer analysis it becomes apparent that potentially indefinite restrictions remain a feature of the rebadged regime. Whilst the Bill provides for TPIMs to be in force for a year only and specifies that they may be renewed for another one year and no more, the Home Secretary may apply for new measures to be imposed on an individual on an unlimited number of subsequent occasions. The only restriction on this power, is the obligation to show, to the unacceptably low standard of reasonable belief, that evidence of terrorist related activity post-dating the imposition of the last order, exists. The evidentiary process will continue to be shrouded in secrecy and the role of the court will still be limited to partial review.

### *Breach of a TPIM*

34. Mirroring the control order regime to the letter, breach of a TPIM without reasonable excuse is a criminal offence punishable on indictment by imprisonment

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<sup>79</sup> House of Lords Select Committee on the Constitution, 19<sup>th</sup> Report of Session 2010-12 Terrorism Prevention and Investigation Measures Bill Report (15 September 2011), at page 5 para’s 8 and 13.

<sup>80</sup> Lord Carlile’s Sixth Report, para 55; Home Office Review, at para 6.

<sup>81</sup> Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005, at para 43.

for up to five years or an unlimited fine,<sup>82</sup> 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.<sup>83</sup> 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.

### **Punitive restrictions**

35. Under the control order regime, the Home Secretary can impose an unlimited range of restrictions on a person made subject to a control order.<sup>84</sup> There are up to 25 measures currently being used by the Home Secretary.<sup>85</sup> 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.<sup>86</sup> One of the big claims of the Government when the proposed TPIM regime was announced in January was that the most onerous restrictions on controlees would be scrapped creating a more moderate and less punitive regime. However, as under the control order regime, the TPIM system will grant the Home Secretary huge discretion to impose measures selected from a vague and expansive list. Parliamentarians are being asked, once again, to trust the Home Secretary to use eye-watering powers and broad discretion in a way which will not unduly infringe human rights. The fact that control orders already administered and renewed by this Government have been quashed by the Courts on human rights grounds undermines the safety of any such assumption.

36. While the TPIMs Bill does codify the measures available to the Home Secretary, there is likely to be little substantive shift in the type of measures imposed

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<sup>82</sup> Clause 21.

<sup>83</sup> 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.

<sup>84</sup> 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.

<sup>85</sup> Lord Carlile's Sixth Report, *ibid*, at para 19.

<sup>86</sup> See Annex 2 (Current cases – 10 December – 8 cases) of Lord Carlile's Sixth Report, at page 64.

on individuals. The Secretary of State will no longer, in the ordinary course of things, be able to impose measures amounting to internal exile, however new clauses recently added to the Bill, raise the possibility of internal exile being re-introduced on a case by case basis.<sup>87</sup> The new rebadged system will still include electronic tagging and an individual may further be required to submit to any procedures designed to facilitate monitoring, including wearing and maintaining any required apparatus.

37. So-called 'overnight residence requirements' in accordance with which an individual may be forced to remain in doors throughout the night will be amongst the new package of restrictions. The announcement of this particular restriction was rightly met with ridicule when it was announced in the House of Commons in January. The average length of control order curfews in the latest monitoring report was 11.9 hours.<sup>88</sup> 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. Other listed measures also mirror those currently in use and most allow for wide and often ill-defined restrictions to be placed on day-to-day activity. Individuals can have unspecified restrictions placed on their movements for 24 hour periods to ensure compliance with a TPIM notice. As with control orders, measures imposed under the Bill can proscribe international travel and suspects can be prohibited from entering specific areas or buildings. This provision is extremely wide covering for example, religious buildings, educational institutions, parks, libraries and a variety of other non-specific locations identified by certain common features.

38. 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.<sup>89</sup> Measures provided for in the Bill place restrictions on financial services including, but not limited to, accepting deposits and using credit and debit cards to conduct a financial transaction. An individual retains the right to hold one bank account, but only where prior notice of the nominated account is given to the Home Secretary. Measures relating to communication technology, whilst allowing for access to the internet and the possession of telephones, provide for restrictions on their use. These restrictions apply not only to the subject of a measure, but to anyone else who happens to live in his house including children. As with control orders,

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<sup>87</sup> See paragraphs 47-49 below.

<sup>88</sup> Lord Carlile's Sixth Report, *ibid*, at Annex 2, page 64.

<sup>89</sup> See the recently enacted *Terrorist Asset-Freezing etc Act 2010*.

under the TPIM Bill individuals can be restricted in their access to work and study on the basis that this could facilitate or increase the risk of involvement in terrorism-related activity.

39. As now, it is impossible to see how anyone subjected to these measures would be able to work, study or lead anything resembling a normal life. 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 series of measures which have the same fundamental principle at 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 for any extended period of time 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 the restrictions which can be implemented in the Bill clearly constitute punishment in themselves. Any Government that retains this kind of measure will continue to excuse and encourage 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, will continue if the Bill is passed in its current form.

40. In any discussion of the TPIM Bill the human cost must be kept squarely in mind. Control orders have devastated the lives not only of the men subject to them but also their families.<sup>90</sup> 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:

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<sup>90</sup> 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 12<sup>th</sup> 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>

*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.<sup>91</sup>*

41. 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 account of her experience makes for harrowing reading.<sup>92</sup> 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?<sup>93</sup>*

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<sup>91</sup> 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*.

<sup>92</sup> 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>.

<sup>93</sup> *Ibid*.

## Huge financial burden

42. As well as being an impediment to prosecution, control orders have proven the most costly of all the counter-terror measures. For its *Annual Renewal of Control Orders Legislation 2010 Report*<sup>94</sup> 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 Special Advocates and Special Advocates Support Office and meeting costs for the other side when ordered by the court,<sup>95</sup>
- b. £2.7m on administrative costs; and
- c. £2m spent by the Legal Services Commission on publicly funded representation.<sup>96</sup>

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.<sup>97</sup> A further cost to the Home Office of administering control orders between 2006 and 2010 was £3.07m.<sup>98</sup>

43. 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*”.<sup>99</sup> 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*”.<sup>100</sup> This is due to a number of other

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<sup>94</sup> 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>.

<sup>95</sup> *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>.

<sup>96</sup> *Ibid*, at par 102.

<sup>97</sup> *Ibid*, at para 103.

<sup>98</sup> As outlined by the Rt Hon Nick Herbert MP on 7<sup>th</sup> February 2011: House of Commons Hansard, column 36W.

<sup>99</sup> *Ibid*, at para 99.

<sup>100</sup> *Ibid*, at para 100.

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).<sup>101</sup> All these features are characteristics of the TPIM regime and there is every reason to believe that the costs will be replicated and may increase while fundamental aspects of the new regime are made the subject of legal challenge.

44. The costs of the control order regime led the Committee to conclude that *“the financial cost of control orders may have become disproportionate to any benefit which can plausibly be claimed for them”*.<sup>102</sup> The Committee directly asked the Government at the time whether it was justifiable to spend such vast amounts on lawyers or whether money could be better spent on front-line counter-terror measures such as surveillance officers.<sup>103</sup> That the Committee’s concerns have been ignored is obvious from a review of the TPIM Bill.

45. 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.<sup>104</sup> 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”*.<sup>105</sup>

46. 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 TPIMs. What is however beyond doubt

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<sup>101</sup> Ibid, at para 100.

<sup>102</sup> Ibid, at para 101.

<sup>103</sup> Ibid, at para 105.

<sup>104</sup> Ibid.

<sup>105</sup> See Report of the Intelligence Services Commissioner for 2007, and 2008, at para 35 in each report.

is the exorbitant anticipated cost of the TPIM regime. 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.<sup>106</sup>

## Enhanced TPIMs

47. At the final hour of the Bill's passage in the House of Commons, the Government tabled a set of controversial amendments and published an associated draft Enhanced Terrorism Prevention and Investigation Measures (ETPIMs) Bill providing for a more extensive range of restrictions which could be imposed by the Home Secretary in an undefined emergency.<sup>107</sup> New clauses 26 and 27 provide for a temporary power enabling ETPIMs to be imposed when Parliament is dissolved.<sup>108</sup> Under these clauses (or under the draft Bill if enacted while Parliament is sitting) the Secretary of State will be able to impose enhanced measures on an individual where the Secretary of State is satisfied, on the balance of probabilities, that the TPIM conditions are met and that the measures considered necessary cannot be imposed by a standard TPIM notice.<sup>109</sup> Restrictions under the ETPIM regime include internal exile and isolated residence;<sup>110</sup> a greater curfew power than currently provided for in the Bill;<sup>111</sup> bans on leaving a locality;<sup>112</sup> and even greater restrictions on communication and association with other persons.<sup>113</sup> Under the ETPIMs regime a person could also be subject to the normal TPIM restrictions (which don't relate to residence, association and communication).<sup>114</sup> ETPIM measures can be imposed for a year, when the emergency Act would expire, although by statutory instrument the Secretary of State could renew this period for a further year.<sup>115</sup> A person cannot be subject to both an ETPIM notice and a TPIM notice, but there is nothing to stop a

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<sup>106</sup> See *AN v SSHD; SSHD v AE and AF* [2010] EWCA Civ 689.

<sup>107</sup> CM 8166. (September 2011)

<sup>108</sup> Clause 26(1). The ETPIM powers can be exercised for a 90 day period while Parliament is dissolved, following which it is assumed the draft ETPIM Bill would be tabled in Parliament.

<sup>109</sup> Clause 26(2).

<sup>110</sup> Clause 26(3)(a) provides for a restriction to be imposed on an individual in relation to an individual in relation to the residence in which he lives, including a requirement to reside in a specified residence in the UK and a requirement not to allow others to reside at that residence without Secretary of State permission.

<sup>111</sup> Clause 26(3)(a)(iii).

<sup>112</sup> Clause 26(3)(b).

<sup>113</sup> Clause 26(3)(d).

<sup>114</sup> That is, the normal TPIM measures will be available unless they relate to residence, overnight restriction and association and communications. Accordingly, in addition to the enhanced measures described above a person can also be subject to the restrictions under para's 2 to 6, 7(1) and (2) and (4) to (6), and para's 9 to 12, of Schedule 1.

<sup>115</sup> Clause 9 of the ETPIM Bill.

person being placed on end to end ETPIM and TPIM notices. With the publication of the draft Bill and clauses 26 and 27 any substantive difference between TPIMs and control orders falls away. The clauses which have been inserted into the Bill reinstate measures which have regularly been declared unlawful by the courts in individual cases and will mean that this Bill continues the most pernicious legacy of the so-called war on terror.

48. The Explanatory Memorandum for the draft ETPIM Bill states the Bill will be needed *“in the event of a very serious terrorist risk that cannot be managed by any other means”* when *“more stringent measures may be required to protect the public”*.<sup>116</sup> There is no definition or threshold which will act to keep a check on when the enhanced powers can be exercised under clause 26 or the draft Bill. The publication of the draft ETPIMs Bill follows the practice adopted in relation to the possible extension of pre-charge detention from 14 to 28 days in an emergency, in relation to which a draft Bill has also been published alongside the Protection of Freedoms Bill. These Bills are supplementary to the provisions in the *Civil Contingencies Act 2004* (CCA), which already provides for sweeping Executive powers in the case of a genuine emergency threatening the life of the nation. Under Part 2 of the CCA a Minister is able to make regulations *“for the purpose of preventing, controlling or mitigating an aspect or effect”* of an emergency<sup>117</sup> after certain conditions are met.<sup>118</sup> It is clear that these powers are intended to deal with an emergency and would enable the Government to act quickly and decisively to meet unprecedented threat. Given these emergency powers are available it is unclear why these draft Bills are even needed.

49. Not only are these draft Bills an impractical way to legislate, there are also significant constitutional problems related to legislating by having draft emergency bills in reserve. With no threshold that needs to be met before enactment, there is nothing to stop the Executive bringing forward such ‘emergency Bills’ for operational convenience rather than in a genuine emergency. The constitutional concerns about such an approach have been clearly set out by the Joint Committee on the Pre-

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<sup>116</sup> Explanatory Memorandum to the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (September 2011).

<sup>117</sup> Section 2.

<sup>118</sup> Under s 21 of the CCA. These conditions are that an emergency has occurred, is occurring or is about to occur; that is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect of the emergency; and that the need to make such provision is urgent. An ‘emergency’ is widely defined in section 19.

charge Draft Extension Bill<sup>119</sup> and more recently in relation to the ETPIMs Bill by the House of Lords Constitution Committee, who recommended that the Government “provide a comprehensive response to the constitutional concerns” which the Draft Extension Bill Committee raised before once again using this device.<sup>120</sup> This dubious approach to governing is a dangerous trend about which we are seriously concerned.

### **Real alternatives**

50. Since control orders appeared on the statute book they have been continually justified as a necessary evil<sup>121</sup> – we have been told there is simply no alternative to them; that while Ministers dislike them, scrapping them or changing their form would put us all in harms way. These empty and tired defences are still offered up, despite the disappearances, 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,<sup>122</sup> and is a step the Home Office Review refused to take.

51. 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 than the regime set out in the TPIM Bill. Alternatives include allowing for police to impose restrictions on those suspected of terrorist activity; 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; and use, with appropriate safeguards, of the current powers available under the *Regulation of Investigatory Powers Act 2000*.

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<sup>119</sup> See the report on the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills (Session 2010-12) (HL Paper 161; HC Paper 893) (23 June 2011), available at

<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdetent/161/161.pdf>.

<sup>120</sup> See the House of Lords Select Committee on the Constitution, *ibid*, at para 20.

<sup>121</sup> See, for example, that statement of Lord West of Spithead earlier this year, House of Lords Hansard, 3 February 2010, at column 196.

<sup>122</sup> Lord Macdonald’s Report, *ibid*, at para 9, page 10.

## *Pre-charge restrictions*

52. There are already measures available within the criminal justice system providing for temporary restrictions on liberty which can be imposed on suspects where reasonable suspicion exists but where the evidence is as yet insufficient to allow charges to be laid. In such a case, police are able to impose restrictions on a person's movement, communication and so on in order to protect the public while investigation continues. This system of police bail is available for all offences, including the most heinous murders and assaults, apart from terror offences. Liberty sees no reason why restrictions placed on those suspected of terrorism could not be brought within the criminal justice system by either lifting the statutory bar or amending the law so that the prohibition could be lifted in individual cases on application to a court. Giving evidence to the Public Bill Committee in the House of Commons Lord Macdonald made clear his support for the creation of a system for terror suspects either "*akin to, if not exactly the same as, bail conditions*". Unlike the control order or TPIM, he noted that such a system would be "*constitutionally unobjectionable*" and would "*encourage investigation and the gathering of evidence, rather than impeding it, as I think the old control orders tended to do*".<sup>123</sup> He further stated:

*I am not arguing that people who are plausibly suspected of terrorist crimes should not be subject to restrictions – of course they should – but they should also be subject to investigation. ...If we have not obtained enough evidence so far, we need to keep trying, and in the course of that attempt, of course we can put them on something that is analogous to police bail. Of course, we can put them on curfews, tell them they cannot go to certain places and tell them they cannot meet with certain people. Those are common or garden bail conditions. ...There is a great misunderstanding about this; it is not constitutionally objectionable to restrict people who have not been charged. It happens all the time, but you have to get the process right, so that it is a part of criminal justice, and not just handing people over to be surveilled by the security services on control orders, which does not create...any evidence at all.*<sup>124</sup>

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<sup>123</sup> Ibid, at column 29 to 30.

<sup>124</sup> Public Bill Committee Proceedings, House of Commons *Hansard*, 21<sup>st</sup> June 2011 at column 34.

53. Changing the law to allow for police bail for terror suspects would mean that where a criminal investigation is underway but there is currently insufficient evidence for charge, police could impose conditions on suspects, for criminal justice purposes, while further evidence is gathered. This would encourage the Security Services to work with police and prosecutors to ensure that criminal investigations are underway before proportionate and purpose-specific restrictions could be imposed. It would also mean that secret court processes could be abandoned, restoring British justice standards and preventing the embarrassing and expensive defensive litigation which will almost certainly continue if control orders are effectively retained. Imposing pre-charge restrictions through the police bail model 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 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 intelligence services, and to prioritise prosecution, we need firm legal drivers to make this happen. A Home Secretary order plus platitudes about seeking prosecution wherever possible presents real dangers of abuse and is no real improvement on control orders (which already have a theoretical requirements for constant prosecution case review).
- Further, a civil order that isn't linked to normal criminal bail will allow the continuance of special secret courts and the resulting injustices. Allowing for police bail in terror cases will mean there will be no need for these special devices. The courts will allow reasonable criminal bail conditions as long as it can be shown that a criminal investigation is ongoing and that the conditions are necessary for the normal range of purposes.

#### *Criminal prosecution and intercept*

54. Liberty has long argued that the bar on the use of intercept evidence in terrorism trials should be lifted.<sup>125</sup> 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

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<sup>125</sup> 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>

intercept evidence, however, did not form part of the Home Office Review terms of reference, and is in no way built into the TPIM. This is perhaps 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.<sup>126</sup> 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 2008<sup>127</sup> and again in 2010.<sup>128</sup> In 2008 a *Privy Council Review of Intercept as Evidence*<sup>129</sup> 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. Most recently, on 26<sup>th</sup> 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.<sup>130</sup>

55. This notwithstanding, the Home Office Report states that using intercept as evidence in the control order cases would not have made any practical difference.<sup>131</sup> 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*

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<sup>126</sup> 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>

<sup>127</sup> Home Affairs Committee, First Report of Session 2007–08, The Government’s Counter-Terrorism Proposals, HC 43-i, para 86.

<sup>128</sup> 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>.

<sup>129</sup> Privy Council Review of Intercept as Evidence (January 2008) available at:

<http://www.official-documents.gov.uk/document/cm73/7324/7324.asp>

<sup>130</sup> Statement of The Secretary of State for the Home Department, House of Commons Hansard, 26<sup>th</sup> January 2011 at column 14WS.

<sup>131</sup> Home Office Review, *ibid*, at para 11, page 37.

*Canberra or Ottawa, or anywhere else. They simply cannot believe that people are making this argument.*<sup>132</sup>

56. 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 objections to the use of intercept material, properly authorised by judicial warrant,<sup>133</sup> 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.<sup>134</sup> 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?*<sup>135</sup>

#### *Surveillance and other restrictions on liberty*

57. One of the core ambitions of the TPIM regime, like its predecessor, 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 disappearances 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

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<sup>132</sup> Uncorrected evidence of Lord Macdonald to the Joint Committee on Human Rights, 8<sup>th</sup> February 2011, at question 26.

<sup>133</sup> The Home Secretary currently authorises interception warrants.

<sup>134</sup> Uncorrected evidence of Lord Macdonald given to the JCHR on 8<sup>th</sup> February 2011, *ibid*, at question 30.

<sup>135</sup> Uncorrected evidence of Lord Macdonald given to the JCHR on 8<sup>th</sup> February 2011, *ibid*, at question 27.

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.<sup>136</sup> No legislative change is necessary to facilitate these investigation measures; but the obstacle to their successful use - the control order and potentially the TPIM - ought to be removed. The ultimate disruption for potential terrorist activity is trial, conviction and imprisonment.

58. The TPIM, like its predecessor, is designed to restrict the behaviour of the individual. The problem with the 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 measure imposed by the Secretary of State, it is the unending restrictions which affect all aspects of their lives and 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).<sup>137</sup>

59. The difficulty with the TPIM Bill is clear. The Home Office got so bogged down in the detail of the restrictions to be permitted under the Bill 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 measures 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, so far, been

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<sup>136</sup> 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>.

<sup>137</sup> Police bail can be granted after arrest but before charge for the vast majority of offences under the Bail Act 1976 and PACE. 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.

disregarded despite the glaring inadequacies of the current system, which is now set to be replicated and arguably made worse by its purported permanence.

## **Conclusion**

60. In light of the sustained critique of the control order system from the judicial, political, legal and social spheres, it is critical that Parliamentarians ensure we do not replace it with an equivalent or more potent evil. The consequences of doing so impact not just on the individual subject and his family, but will also undermine core British rights and freedoms and thereby impact upon us all. Lord Macdonald aptly summarised the deficiency which infects the TPIM just as it did the control order:

*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.*<sup>138</sup>

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 normal legislative feature, we urge Parliamentarians to oppose a Bill which is rotten to the core. This tired policy will only perpetuate a regime which is unfair and puts us all at risk.

**Rachel Robinson**  
**Sophie Farthing**

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<sup>138</sup> Lord Macdonald's Report, *ibid*, at para 11, page 10.