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Liberty's Report Stage Briefing on the Terrorism Prevention and Investigation Measures Bill in the House of Commons

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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

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Introduction

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

It has widely been accepted that, barring a concession to internal relocation (necessitated by a House of Lords ruling in *SSH D v AP*² in June 2010) and a shorter overnight curfew, the TPIM regime essentially mirrors the control order system in all of its most offensive elements including:

- abrogation of the constitutional safeguards which protect the right to a fair trial; in particular the process will continue to be Executive led, with judicial interventions remaining weak and shrouded with secrecy;
- creation of an impediment to prosecution of those genuinely involved in terrorist activity who are tipped off and then prevented from doing the very things which would allow evidence to be gathered;
- imposition of punitive and potentially unending restrictions on individuals in the absence of criminal due process;
- furtherance of a system which is as unsafe as it is unfair, ruining the lives of the innocent and allowing potentially dangerous people to live in the community and evade prosecution; and
- retention of a system which creates huge costs liabilities at a time of financial strife.³

The desire to place restrictions on those suspected of planning dangerous activities is understandable. And it is not the placing of restrictions on those suspected of terrorism that is the civil liberties problem. The principal civil liberty objection to

¹ For a more detailed outline of the principled arguments against the control order/TPIM regime see Liberty's Second Reading Briefing on the Bill (June 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-the-terrorism-prevention-and-investigat.pdf>.

² [2010] UKSC 26.

³ For a detailed comparison of the TPIM Bill provisions and those under the *Prevention of Terrorism Act 2005* see Liberty's table, available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/control-order-and-tpim-comparison-table-june-2011-.pdf>.

control orders is that these restrictions are imposed entirely separately from the criminal justice system. Restrictions, which can last indefinitely, are imposed by the Executive without even arrest or police interview and with seemingly no desire to pursue eventual prosecution.⁴ Indeed, the control order regime exists so separately from the criminal justice system, that no-one who has been placed under a control order has ever subsequently been prosecuted for a terrorism offence.

While this is unsatisfactory it is hardly surprising. As the former DPP and independent overseer of the Counter-Terror Review, Lord MacDonal of River Glaven QC, has observed, the Security Services have protective rather than prosecutorial instincts.⁵ This Bill, which continues the system of Executive imposed and controlled preventative restrictions, is not going to make eventual prosecution any more likely. Giving evidence to the Public Bill Committee Lord MacDonal noted that any system which lies outside the criminal justice system will only “warehouse people under the control of the security services and away from the prying eyes of the police” which means that “you do not get evidence”. He explained how the existence of a parallel preventative system in the form of control orders leads to the view that the threat posed by a suspect is “contained” and observed how this has resulted in “a dearth of serious investigation into these individuals”.⁶ This means that some terrorist activity, possibly the most serious, goes unpunished. We agree with Lord Macdonald that this situation “is a serious and continuing failure of public policy”.⁷

There is no reason why temporary restrictions on liberty for specific criminal justice purposes cannot be imposed on suspects where reasonable suspicion exists but where the evidence available is as yet insufficient to allow charges to be laid. The fundamental flaw of the control order/TPIM regime is the failure to ensure these restrictions are not linked to the furtherance of a criminal investigation and are imposed by Government rather than police and courts. Traditionally, restrictions on a

⁴ As noted by Lord Macdonald QC in his report on the Review of Counter-Terrorism and Security Powers (June 2011), at page 10: “It is precisely because the present control order system stands apart from criminal due process that it attracts such criticism. Indeed, on clear evidence, it is this separateness and the extent to which the security service, rather than the police, becomes the lead agency in these cases that is so undermining of criminal prosecutions.” Report available at <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>.

⁵ See Lord Macdonald’s report, *ibid*, at page 10 para 9.

⁶ Public Bill Committee Proceedings, House of Commons *Hansard*, 21st June 2011 at columns 33, 35.

⁷ See Lord Macdonald’s report, *ibid*, at page 10.

person's movements, communication etc are justified in three different circumstances – in the form of bail conditions imposed by police or courts pending prosecution, as a form of community punishment following conviction or as a licence condition following release from imprisonment. Crucially, all of these situations fall squarely within the criminal justice system – either pre or post prosecution. There is, however, currently a statutory bar on pre-charge bail in terrorism-related cases.⁸ This bar is a legal anomaly. There is no other offence – including serious violent and sexual offences – which is precluded from the pre-charge bail provisions provided under the *Bail Act 1976*. Liberty believes the bar on police bail for terror suspects ought to be removed and, in doing so, the arguments for the TPIM/control order fall away.

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 parallel quasi-judicial system controlled by the secret services and the Home Office and bringing suspects into the criminal justice system wherever possible, we need firm legal drivers to make this happen. A Home Secretary Order plus platitudes about seeking prosecution wherever possible, the system adopted by this Bill, will not bring these parallel systems together and is no real improvement on control orders (which already have a theoretical requirement 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 for as long as is necessary, 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.

⁸ Section 3A of the Bail Act 1976 allows for bail to be granted by a custody officer under Part 4 of the Police And Criminal Evidence (PACE) Act 1984; section 41 and Schedule 8 of the Terrorism Act 2000, provisions under which terrorist suspects are arrested and detained, do not fall within the detention provisions under Part 4 of the PACE Act and therefore police bail cannot be granted under section 3A of the Bail Act for individuals who have been detained under section 41.

Accordingly, in this briefing we suggest an amendment which would lift the prohibition on police bail for terror suspects, allowing for a person who has been arrested on suspicion of terrorism to be monitored and restricted, but in a way that will enable police investigation to continue. (Amendments **1** and **2**.)

Failing any significant amendment to the Bill, Liberty also suggests that a sunset clause is added (in the same form as that which exists in the Prevention of Terrorism Act 2005 in relation to control orders) to ensure that legislation replicating the worst excesses of punishment without trial does not go permanently on to the statute book. (Amendment **3**.)

Amendment 1

Page 1, line 5 leave out clause 2.

Effect

This is a stand part amendment to remove clause 2 of the Bill. Clause 2 allows for the imposition of a terrorism prevention and investigation measure by the Home Secretary.

Briefing

For the reasons detailed above and in other briefing,⁹ Liberty believes the proposal to replace the control order with a TPIM is fundamentally flawed and ought not to pass. Leaving out this clause of the Bill would render the remainder of the Bill obsolete and it would necessarily fall away. This Amendment could work in tandem with Amendment 2.

Amendment 2: Lifting the prohibition on police bail for terror suspects

Page 1, line 4, at end insert –

“(0) Imposition of Police Bail: detention under the *Terrorism Act 2000*

(0) In section 41 of the *Terrorism Act 2000*, after subsection (9) insert –

“(10) Where for any reason the continued detention of a person arrested under subsection (1) is no longer authorised, a chief officer of police may release the person on police bail, but only if he reasonably believes there is a need for further investigation of any matter in connection with which the individual was detained.

“2B *Bail Act 1976*

(1) After section 3A of the *Bail Act 1976*, insert -

“(3B) Police bail in relation to terrorism-related offences

(1) Section 3 of this Act applies in relation to bail granted by a chief officer of police under section 41(10) of the *Terrorism Act 2000* subject to the following modifications.

⁹ See Liberty’s Second Reading Briefing on the Terrorism Prevention and Investigation Measures Bill (June 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-the-terrorism-prevention-and-investigat.pdf>.

- (2) Any reference in section 3 to ‘custody officer’ shall be substituted by ‘chief officer of police’.
- (3) Subsection (6) does not authorise the imposition of a requirement to reside in a bail hostel or any requirement under [paragraph (d) or (e)].
- (4) Where a chief officer of police grants bail to a person, no conditions shall be imposed under this Act unless it appears to the constable that it is necessary to do so –
 - (a) for the purpose of preventing that person from failing to surrender to custody, or
 - (b) for the purpose of preventing that person from committing an offence while on bail, or
 - (c) for the purpose of preventing that person from interfering with witnesses or otherwise obstructing the course of justice, whether in relation to himself or any other person, or
 - (d) for that person's own protection or, if he is a child or young person, for his own welfare or in his own interests.

(2) After section 3(8) of the Bail Act 1976 insert-

“() Where a chief officer of police has granted bail under section 41(10) of the *Terrorism Act 2000*, the High Court may on application by or on behalf of the person to whom bail was granted vary or discharge the conditions of bail.

(8A) In determining whether or not to vary or discharge the conditions of bail, the High Court must be satisfied, in relation to each measure or restriction, that it is necessary –

- (a) to secure that he surrenders to custody,
- (b) to secure that he does not commit an offence while on bail,
- (c) to secure that he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,
- (d) to secure his own protection or, if he is a child or a young person, for his own welfare or in his own interests”.

Effect

These amendments amend the *Terrorism Act 2000* and the *Bail Act 1976* to allow for police bail to be granted in terror cases.

The amendment also amends the *Bail Act 1976* to provide that an individual who is released on police bail for a terror-related offence is able to apply to the High Court to vary or discharge his conditions. The High Court will need to be satisfied that the conditions are necessary for Bail Act purposes in order to uphold them. Currently, when police bail with conditions is granted in other (non-terror related) cases, it is granted by the relevant custody officer and the bailed individual can apply to the

Magistrates Court to vary the conditions. In recognition of the seriousness of terrorism, we have suggested that a chief constable should be responsible for the granting of bail and that an application to vary or discharge conditions should be made to the High Court and dealt with by a High Court judge.

Briefing

These amendments would allow for the current prohibition on police bail after arrest but before charge for terror suspects to be lifted. Allowing for police bail would mean that where a criminal investigation into a terrorism offence is under way but there is insufficient evidence for charge, police could impose conditions on the suspect, for criminal justice purposes, while further evidence is gathered.¹⁰

The conditions which can be imposed under police bail are wide ranging. Police and the courts have discretion to set a variety of bail conditions, ranging from curfews, requiring a person to surrender their passport, notification of residence or avoiding named people or places. The majority of the restrictive measures currently contained in Schedule 1 of the Bill could be imposed as bail conditions.¹¹ There are also offences attached to failing to comply with a condition of police bail. For example, where a person is bailed after arrest and fails to attend at a police station as required, he or she will be guilty of an offence¹² and can be arrested without a warrant.¹³

The practical importance of police bail for investigation purposes was starkly demonstrated by the recent *Police (Detention and Bail) Act 2011*, passed in an emergency session following the *Hookway* judgment.¹⁴ Referring to the implications of the *Hookway* judgment in restricting the use of police bail in non-terror cases, the

¹⁰ Sections 3(6) and 3A of the Bail Act allow a custody officer to impose police bail conditions where it appears necessary to ensure that the person: surrenders to custody; does not commit an offence while on bail; does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person; for his own protection or, if a child or young person, for his own welfare and in his own interests.

¹¹ See the evidence of Lord Macdonald in the Public Bill Committee proceedings, *ibid*, at column 38.

¹² Under section 6 of the Bail Act. A warrant can be issued for a person who has absconded: s 7 Bail Act.

¹³ Sections 37C and 46A of the PACE Act.

¹⁴ Decision of Mr Justice McCombe of the High Court in *R(Chief Constable of Greater Manchester Police) v City of Salford Magistrates Court and Paul Hookway* (19th May 2011), upholding an earlier decision by District Judge Jonathan Finestein sitting at Salford Magistrates' Court on 5th April 2011. See *Liberty's briefing on all stages of the Police (Detention and Bail) Bill in the House of Commons* (July 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-briefing-on-all-stages-of-the-police-detention.pdf>.

Minister for Policing and Criminal Justice noted in his oral statement to the House of Commons on 30th June 2011: “*We cannot, must not and will not ask the police to do their work with one hand tied behind their backs*”.¹⁵ Maintaining the prohibition on police bail in terror cases arguably does just that - meaning that terror suspects are warehoused for lengthy periods under a parallel administrative detention regime instead of being further investigated and eventually prosecuted if additional evidence comes to light. Liberty supported the passage of the *Police (Detention and Bail) Act 2011* because we recognise the importance of police bail in investigating and prosecuting crime. That said, we do remain concerned about certain aspects of the police bail regime, most notably the indefinite duration of onerous conditions.¹⁶ We are, therefore, encouraged by the Government’s stated commitment to reviewing the police bail framework later this year in response to this and other concerns raised during Parliamentary debate on the Bill.¹⁷

If pre-charge restrictions were available to police in terror cases, any perceived need for a parallel system of preventative restrictions falls away. In his evidence to the TPIMs Public Bill Committee, 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*”.¹⁸ 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

¹⁵ See Oral Statement by the Rt Hon Nick Herbert MP, Minister for Policing and Criminal Justice: House of Commons *Hansard*, 30 June 2011 at column 133.

¹⁶ See Liberty’s briefing on the emergency Bill, *ibid*.

¹⁷ As noted by the Minister of State for the Home Office, Baroness Browning: House of Lords *Hansard*, 12th July 2011 at column 609.

¹⁸ *Ibid*, at column 29 to 30.

*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.*¹⁹

During Committee proceedings a set of amendments which would have allowed for police bail for terror suspects was tabled by Dr Julian Huppert MP. These proposed changes would have allowed for the general bar on police bail in terror cases to be lifted by the Home Secretary in individual cases. A TPIM could then have been imposed on a suspect by a relevant Chief Constable as part of police bail with conditions.²⁰ Amendment 2 proposed here is a more simple amendment which would lift the bar on police bail in terror cases altogether. Under this amendment, bail with conditions could be imposed on a terror suspect by a Chief Constable before charge. A suspect released on police bail in a terror related case could then apply to the High Court for the conditions to be varied or discharged. We are yet to see an argument which adequately addresses the reason why police bail, or a variation of it, cannot be imposed on terror suspects. The Government's current position is contradictory. On the one hand it states that the prosecution of terror suspects is the best option to protect the public. On the other hand, it accepts that control orders/TPIMs can make the possibility of further evidence gathering and prosecution remote or impossible. A solution to the present stalemate - which neither adequately protects the public nor upholds rights and freedoms - must be found. We believe that allowing for restrictions to be imposed on terror suspects where further investigation is required within the police bail model is that solution.

Amendment 3: Sunset clause

Page 15, line 44, at end insert

- (i) Duration of sections 2 to 18, 21 to 25**
- (1) Sections 2 to 18 and 21 to 25 expire at the end of the period of 12 months beginning with the day on which the Act is passed.
- (2) The Secretary of State may, by order made by statutory instrument –

¹⁹ Public Bill Committee Proceedings, House of Commons *Hansard*, 21st June 2011 at column 34.

²⁰ See Liberty's Committee Stage briefing on the Terrorism Prevention and Investigation Measures Bill in the House of Commons (June 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-committee-stage-briefing-on-the-tpims-bill-june-2011-.pdf>.

- (a) repeal sections 2 to 18;
 - (b) at any time revive those sections for a period not exceeding one year; or
 - (c) provided that those sections
 - (i) are not to expire at the time when they would otherwise expire under subsection (1) or in accordance with an order under this subsection; but
 - (ii) are to continue in force after that time for a period not exceeding one year.
- (3) Before making an order under this section the Secretary of State must consult
- (a) the person appointed for the purposes of section 20(1);
 - (b) the Intelligence Services Commissioner; and
 - (c) the Director-General of the Security Service.
- (4) No order may be made by the Secretary of State under this section unless a draft of it has been laid before Parliament and approved by a resolution of each House.
- (5) Where sections 2 to 18 expire or are repealed at any time by virtue of this section that does not prevent or otherwise affect
- (a) the court's consideration of any application by the Secretary of State made before that time for permission to impose measures on an individual under section 6(1)(b);
 - (b) the holding or continuation of any hearing after that time in pursuance of directions under section 8;
 - (c) the holding or continuation of any review hearing after that time under section 9; or
 - (d) the bringing or continuation after that time of any appeal, or further appeal, relating to a decision in any proceedings mentioned in paragraphs (a) to (c) of this subsection;
- but proceedings may be begun or continued by virtue of this subsection so far only as they are for the purpose of determining whether a TPIM notice of the Secretary of State should be quashed or treated as quashed.
- (6) Nothing in this Act about the period for which a TPIM notice is to have effect or is revived or replaced after the provision under which it was made or last revived or renewed has expired or been repealed by virtue of this section.

Effect

This amendment would insert a sunset clause into the Bill which would provide for the Act's expiration at the end of a 12 month period following it being brought into force unless a renewal order is approved by Parliament. A renewal order would need

to be approved every 12 months thereafter for the Act to remain in force. This amendment would not affect clause 1, allowing for the repeal of the control order regime, nor clauses 19 and 20, providing for a report on the exercise of powers under the Act and reviews of the operation of the Act. The amendment would allow for the continuation of any application for a TPIM notice, review of a TPIM condition and any appeal for the sole purpose of determining whether the TPIM ought to be quashed or treated as quashed on the expiry of the Act.

Briefing

In the event that the Bill is to pass in its current form, we believe it is essential that a sunset clause is inserted so that the necessity of the regime can be reconsidered by Parliament on an annual basis, as has been the case with the control order under the *Prevention of Terrorism Act 2005*. Annual renewal allows for continued debate on whether a regime which departs from adherence to the rule of law continues to be necessary and effective.

An amendment to this effect was moved in Committee proceedings,²¹ but was not pushed to a vote following a Government commitment to look further at the issue of whether a sunset clause ought to be included in the Bill.²² During Committee proceedings the Government sought to justify the permanency of this legislation by drawing a distinction between the *Prevention of Terrorism Act 2005* and this Bill on the basis that this Bill is not being passed as emergency legislation and because they believe the regime has been improved.²³ However this Bill will still allow for punishment imposed by the Executive and not by a court, and it will still continue to be an obstacle to police investigation and prosecution. In that sense the improvements noted by the Government do nothing to remedy the fundamental problem. Indeed the fact this Bill seeks to put in place a regime fundamentally similar to one which was only ever meant to be temporary ought to sound as a warning.

In Committee proceedings the Government admitted that this Bill is exceptional in nature:

²¹ Amendment 141, tabled by Labour MPs Shabana Mahmood MP, Gerry Sutcliffe MP and Mark Tami MP. See Public Bill Committee proceedings, House of Commons *Hansard* 5th July 2011 at column 305.

²² See Public Bill Committee proceedings, House of Commons *Hansard*, 5th July 2011 at column 307.

²³ See the comments on the Parliamentary Under-Secretary of State for the Home Department, James Brokenshire MP, Public Bill Committee proceedings, House of Commons *Hansard*, 5th July 2011 at column 307.

*We acknowledge and accept that the TPIM regime, as we would wish to put it in place, is perhaps regarded as exceptional. It is regarded as something that none of us would wish to have. We wish to bring people to justice.*²⁴

The enactment of permanent legislative provisions has the effect of normalising that which is intended to be exceptional. Given the Government's acknowledgement that this regime deviates from normal standards it should, at the very least, be required to continue to review, explain and justify to both the public and Parliament why it believes this deviation remains necessary. Annual review is even more pertinent given the Government's commitment to review the use of intercept evidence, which may have a significant impact on our current ability to prosecute terror suspects. Accordingly for reasons of both principle and practice there must be a sunset clause.

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²⁴ See the comments on the Parliamentary Under-Secretary of State for the Home Department, James Brokenshire MP, Public Bill Committee proceedings, House of Commons *Hansard*, 5th July 2011 at column 307.