Counter-Terrorism and Security Bill

House of Commons Second Reading

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Summary

JUSTICE is concerned that little justification has been provided for the treatment of this Bill as fast-track legislation. This Second Reading debate will take place only three working days after the Bill's publication. Most of the proposals in the Bill have been subject to no prior public consultation or pre-legislative scrutiny. The limited time available – and the short programme planned for this Bill's passage – will seriously limit the ability of Parliament to conduct effective scrutiny of the proposal's impact on individual rights in practice.

JUSTICE has a number of substantive concerns about the scope of the Bill. Broadly:

- **The introduction of a police power to seize passports or other travel documents – including the documents of foreign travellers – has the potential to seriously impact on the rights of individuals in practice. The Government's explanation that these measures are necessary is scant and safeguards against arbitrary application, few.**

- **The Government's plan to create an administrative power to bar British citizens and others with a right to return from entering the UK deserves close scrutiny. If the primary goal of our counter-terrorism policy is to protect the public, does forcing individuals to choose freedom in exile over controlled return serve this purpose in practice? The UK cannot dump our would-be terrorist suspects on other countries without consequence. If other countries were encouraged to take this approach, it is highly likely that the Secretary of State would routinely seek deportation. If we are aware that an individual is a risk, we know where they are and that they are seeking to return to our jurisdiction, would public safety and global security be better served by encouraging their return with a view to full investigation and prosecution of any relevant criminal offences?**

- **Criticism of the TPIMs regime by the police and security services does not support the case for the reintroduction of more draconian restrictions, but highlights the ineffectiveness of this kind of administrative order as an alternative to criminal investigation and prosecution.**

- **The further expansion of the framework for the retention of data in the Data Retention and Investigatory Powers Act 2014 (DRIPA) is inconsistent with the right to privacy protected by both Articles 7 and 8 of the EU Charter of Fundamental Rights and Article 8 ECHR as highlighted by the *Digital Rights Ireland* decision.**

- **JUSTICE is concerned that the creation of the proposed Privacy and Civil Liberties Board will do little to improve the oversight mechanisms for either our terrorism legislation or our surveillance framework. The mechanism for the scrutiny of surveillance in the Regulation of Investigatory Powers Act 2000 is ripe for wholesale review. Parliament should exercise caution that the proposals in the Bill will, in practice, support rather than undermine the work of the Independent Reviewer of Terrorism Legislation.**

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote protection of human rights and the rule of law.

2. We have produced this short briefing to inform the House of Commons Second Reading debate. We will produce more detailed briefing in advance of Committee Stage. Where we do not comment on an issue in the Bill, this should not be read as approval.

Background

3. The UK undoubtedly faces a serious threat of terrorism, and one that poses severe practical challenges to our police and prosecutors. But the fight against terrorism requires not only measures which are effective but also measures that are compatible with our most basic principles.

4. The primary goal for the operation of any counter-terror policy must be effective investigation and prosecution of terrorism offences. We regret that in this Bill the Government proposes to further expand the operation of the Terrorism Prevention and Investigation Measures Act 2011 (TPIMs) and to introduce new ancillary administrative powers as an alternative to prosecution. We are concerned that new measures – such as excluding an individual from UK territory – will run counter to the goal of securing the prosecution of individuals in practice.

5. We regret that the Secretary of State appears to have taken a "pick and mix" approach to the recommendations of the Independent Reviewer of Terrorism Legislation in this Bill. While clarification of the burden of proof necessary before someone is subject to a TPIMs Order is positive, we regret the decision to expand the controls to which a person may be subject (see below). However, each of the new measures proposed in this Bill helps to further illustrate an overarching problem identified by the Independent Reviewer: the breadth of the definition of terrorism and terrorism-related activity used in the United Kingdom. As the Reviewer told the Joint Committee on Human Rights earlier this week:

"We're playing a guessing game with the Bill but I said in July that I thought that the definition of terrorism was far too broad. I identified three specific areas where it seemed that there was an unanswerable case for reducing it. ... The third is what I call the penumbra of terrorism, which includes concepts such as "terrorist activity" and "terrorism-related activity". It seemed that every time a new Act came along, that penumbra got broader." (Q 29, 26 November 2014)

6. The new powers in this Bill attach to a suspicion of "terrorism-related activity" with no consideration that an overbroad definition may lead to the application of overbroad draconian administrative powers to a far wider section of the population than might be considered proportionate to meet a genuine risk to our security.

Fast-track legislation and Parliamentary scrutiny

7. JUSTICE is concerned that the proposals in this Bill are rushed and ill-considered. The Bill and its Explanatory Notes were published on Wednesday 26 November 2014, following a speech by the Home Secretary to the Royal United Services Institute on 24 November 2014. It will have its Second Reading on 2 December 2014, three working days after its publication. JUSTICE understands that the Government intends to "fast-track" the Bill through the House of Commons during December. While there is a general election in May, if there is a genuine cross-party support for reform, it is difficult to understand the rush to legislate. Parliament may wish to test the Minister's stated reasons for expediency, set out in the Explanatory Notes:[1]

    a. **The terrorist threat has shifted from significant to severe.** The threat level lifted in August. Identifying a greater level of threat is not automatic justification for legislation. What is the evidence that the counter-terrorism powers already in place are insufficient to address the threat concerned?
    b. **There is a particular threat from ISIL and people travelling to and from the Middle East:** The Government has identified that around 500 individuals have travelled to Syria and that a number have returned to the UK. Members may wish to ask the Minister to identify what steps have been taken to deploy existing counter-terrorism powers against those individuals where there are reasonable grounds to suspect that they are engaged in terrorism-related

[1] EN, paras 20-40

activity. We deal with the Minister's argument that new powers will be effective to address the threat, below. However, as a precursor, the Minister should be asked to clarify whether existing powers have been deployed – such as the use of a travel restriction order under a TPIM – and failed, and if not, why not? How many of those individuals have been investigated in connection with an offence under existing counter-terrorism law, for example?

c. **The opposition have been consulted and generally support the need for reform:** That all of the main parties have considered the issue without debate is perhaps greater reason for external scrutiny, not cause to circumscribe the usual parliamentary process.

d. **Key stakeholders have been consulted:** The Explanatory Notes explain that the Government has consulted the police and the security services, internet service providers and the Independent Reviewer of Terrorism Legislation. Again, select consultation is no substitute for effective scrutiny of draft legislation. Notably, in evidence to the Joint Committee on Human Rights, on the day the Bill was published, the Independent Reviewer noted that even he had not seen the text of the Bill and could not be certain what would be proposed.

e. **Previous parliamentary scrutiny may be relevant:** The Government notes that the TPIMs regime has been subject to earlier widespread scrutiny within Parliament. This suggests that there is a need for closer scrutiny of its expansion, not less. Similarly, the Explanatory Notes cite the highly critical report of the Joint Committee on the Draft Communications Bill as support for earlier Parliamentary engagement in the issues surrounding the expansion of data retention powers. That that Committee recommended wholesale redrafting of the Draft Bill might suggest caution, not haste.

8. We regret that the time for consideration of the Bill and its provisions has been extremely short. **In the time available, we do no more than raise points of concern and questions Parliamentarians may wish to ask the Minister.**

Seizure of Passports and Travel Documents (Chapter 1)

9. Clause 1, together with Schedule 1, would enable police (and other authorised persons, who may include customs officers) to seize passports and other travel documents of any British person or foreign national "suspected of intending to leave Great Britain or the United Kingdom in connection with terrorism-related activity". Officers are granted

associated search powers, and the power to use reasonable force ancillary to the powers of seizure. It will be a criminal offence to refuse to comply.

10. Documents can be held for up to 14 days (or 30 days on application to a magistrate), where an officer has "reasonable grounds to suspect" that a person has the "intention of leaving the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom". Documents may only be retained during this period while a) the Secretary of State considers whether to cancel the person's passport; b) a charging decision is being taken; and c) the Secretary of State is considering making a TPIM Order. After 72 hours, the seizure and retention of documents will be subject to review by a senior police officer with at least the rank of Chief Superintendent. After 14 days, the police may extend their retention of the documents to 30 days but must persuade a magistrate that they (and the Secretary of State, and any other persons relevant) are acting 'diligently and expeditiously'.

11. There is no limit on how often this power may be used against a single individual. The Bill provides a very narrow restriction against repeat use. If used more than twice in six months, retention is limited to 5 days rather than 14. This restriction may have little effect on the impact on an individual. Planned travel booked and paid for becomes impossible. Within the scope of this Bill, these powers could be exercised repeatedly, or without restriction four times a year, against a single individual, without any charge or any other action. In effect, these measures could operate as a *de facto* travel ban, without any of the, albeit limited, procedural standards which might accompany the making of a travel restriction associated with a TPIM Order.

12. The impact of this decision on the individual concerned is clear: if travel documents are seized at a point of departure, not only will free movement be restrained, but it is likely that the individual will suffer any financial and other non-pecuniary loss associated with that immediate restriction. A missed meeting, a cancelled holiday, a lost opportunity to see your family, a fruitless expense; it is easy to imagine the personal impact of having your own passport confiscated at the boarding gate. In practice, this may engage a range of individual rights in domestic and EU law. For example, the right to respect for private and family life (Article 8 EHRC) is likely to be engaged in most cases if an individual is prevented from travelling.

13. The first question for Parliament must be whether these proposals pose a proportionate and necessary interference with those rights, serving a legitimate aim. JUSTICE is

concerned that the Explanatory Notes explain the Government's view that existing powers are inadequate, but provides little consideration of how those measures fall short.[2] It explains, in this connection, that while the Royal Prerogative permits the Home Secretary to remove a individual's passport (subject to current litigation before the courts) that there is a "gap in existing powers" as this power cannot be used to "disrupt immediate travel" nor can it be used against foreign citizens. However, it makes no assessment of why – or how often - a need to disrupt "immediate" travel will be necessary, and, in that regard why existing powers to disrupt travel more generally are inadequate.

14. Beyond the disputed prerogative power on passports, given that the Government has the power to impose a travel restriction in connection with a TPIM Order and a broad range of powers in connection with offences ancillary and preparatory to terrorism which might lead to arrest and charge for criminal activity in the UK, Parliamentarians might wish to ask how likely or feasible it may be that police and intelligence services will have somehow failed to act, but on arrival at a port or an airport a reasonable suspicion of a terrorism-related activity might crystallise? Parliamentarians may wish to consider whether and in what circumstances the Government may expect that seizure of a passport might be preferable to arrest before an individual reaches the airport.

15. The safeguards proposed against such arbitrary action are few:

    a. This power will attach to any suspicion of "terrorism-related activity", including, for example, conduct which "facilitates" or "gives encouragement to" the preparation or instigation of terrorism and which "gives support or assistance to individuals who are known to be involved" in that facilitation or encouragement. Does the Minister accept that the breadth of this definition will create a wide range of circumstances in which this power might apply, heightening both the risk that it might be applied arbitrarily and the need for safeguards?

    b. There is limited consideration in the Bill, or the accompanying Explanatory Notes, of the treatment of the individual concerned after their documents are taken. The Bill purports to grant the Secretary of State a delegated power to *"make whatever arrangements he or she thinks appropriate in relation to that*

[2] EN, paras 45 – 52.

person" during the period of seizure while the individual is unable to leave the UK.

An exceptionally broad power, this perhaps alludes to a concern acknowledged in the Government's Human Rights Memorandum, that leaving an individual at a port or an airport, unable to leave the UK (and perhaps unable to enter the UK if they are in transit) may leave them at a risk of destitution without support (engaging the duties of the UK under Articles 3 and 8 ECHR). However, Parliament is provided with no further information on how the individual is to be treated after his documents have been seized or how those individuals might secure redress and compensation in circumstances where the powers are exercised improperly.

c. Police must have "reasonable grounds" to suspect that an individual is planning to travel for the purposes of "terrorism-related activity" before these powers become available. This standard of proof appears to be the primary safeguard against abuse. However, if reasonable, intelligence-led, grounds exist to suspect an individual at the point where they have turned up at a point of departure, shouldn't steps have already been taken to restrain their activities, perhaps through the imposition of a TPIM Order, including a relevant travel restriction?

d. If a lower, flexible or less rigorous standard of suspicion is applied in practice – one suggestion has been made that heading to the Middle East with camping gear might be sufficient grounds to suspect someone of terrorism-related activity – there is a real risk of this power being applied arbitrarily and with discriminatory effect. The impact of Schedule 7 of the Terrorism Act 2000 – which applies a no-suspicion standard - has been applied most consistently against a small group of minorities, with criticism surrounding arbitrary application at ports and airports by officers and customs officials widespread.[3]

e. Yet, there is no provision for substantive review of the decision to seize, beyond an internal police review. The outcome of the internal review need

[3] See for example, the report by the EHRC published in December 2013 on its use and the Government response: http://www.bbc.co.uk/news/uk-politics-25714613. When these powers were amended in the Anti-Social Behaviour Crime and Policing Act 2014, concern was expressed about the arbitrary application of Schedule 7 in Parliament.

not even be documented ('need not be in writing'). Even after 14 days, a magistrate has no power to consider whether the seizure is lawful, only whether the inquiries for which the documents are held are being pursued diligently. In practice, there will be limited opportunities for an independent check on the grounds which trigger the exercise of the seizure power.

f. The only means to challenge the legality of a seizure will be by way of judicial review. Access to judicial review is increasingly difficult, with limitations on access to legal aid and new proposals to further curtail the jurisdiction of the court in the Criminal Justice and Courts Bill. In any event, after-the-event review is unlikely to provide significant redress to an individual subject to an on-the-spot bar on travel. That this safeguard is likely to be of little value in practice, suggests that, if the power is justifiable, that it must be drawn narrowly, targeted appropriately and duly circumscribed to protect against injustice. On the contrary, the gateway proposed in the Bill is broad with few safeguards against abuse.

Temporary Exclusion Orders (Chapter 2)

16. Chapter 2 of the Bill creates a procedure whereby any individual outside the United Kingdom, including a British citizen, may be subject to a Temporary Exclusion Order (TEO) barring their entry into the UK except subject to conditions set by the Secretary of State. Any TEO may last for up to 2 years and can be renewed, seemingly without limit.[4] When a TEO is in place, an individual may only return to the UK if granted a "Permit to Return" (PTR) after making an application to the Secretary of State. A PTR will only be issued if the individual concerned returns to the UK under its terms, which may include conditions under the direction of the Secretary of State. Those conditions may mirror some of the TPIM conditions including reporting to a police station, compulsory attendance at interview and keeping the police informed of your place of residence at all times.

17. These proposals were originally trailed in August this year as a commitment to bar individuals from the UK fighting in Syria from returning to the UK.[5] This prospect of

[4] See Clause 3(8).

[5] http://www.dailymail.co.uk/news/article-2737724/Terror-attack-UK-highly-likely-warns-Home-Secretary-Theresa-May-threat-level-raised-severe.html

effective exile is now termed "controlled return". It has been suggested that in the interim, the Government may have taken advice and considered that exile of British citizens overseas may violate our international law obligations, or at least damage our international relations with third countries. These proposals will only apply to individuals who have a right to abode, including British citizens. Cancelling a passport or other right to return while someone is outside the country will have a serious impact on their individual rights in practice. The extent of that impact will depend on the individual circumstances of any case, but Article 8 and the right to private and family life will clearly be engaged. In some serious circumstances, Article 3 ECHR may also apply. Notably, if individuals are in countries where a regime is known or suspected to use torture, targeting them as a known terror suspect and/or as an individual with a desire to return to the UK.[6]

18. We regret that the Government's Human Rights Memorandum insists that as the individual concerned will be out of the country; neither the HRA 1998 nor the UK's obligations under the ECHR will apply. We consider that this analysis is seriously flawed. During debate on the Immigration Bill and removal of citizenship outside the UK, the JCHR succinctly explained why the removal of citizenship, and in this case, the making of a TEO is an exercise of legal jurisdiction over an individual, which engages our obligations under the ECHR:

> *The Government's invocation of the Court's case law concerning the extra-territorial application of the Convention overlooks the important fact that the very act of depriving a naturalised citizen of their citizenship is itself an exercise of jurisdiction over that individual. Professor Goodwin Gill, in his memorandum, describes it as "wishful legal thinking to suppose that a person's ECHR rights can be annihilated simply by depriving that person of citizenship while he or she is abroad [...] the act of deprivation only has meaning if it is directed at someone who is within the jurisdiction of the State. A citizen is manifestly someone subject to and within the jurisdiction of the State, and the purported act of deprivation is intended precisely to affect his or her rights.*[7]

[6] The evidence considered by the Intelligence and Security Committee on the knowledge and understanding of the UK about the treatment of Michael Adebolayo (one of the killers of the Fusilier Rigby) while in detention in Kenya provides an illustrative example. See ISC Report, paragraph 466.

[7] Para 44 – 46. http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/142.pdf

19. Again, Parliament must first ask whether these measures will be effective to serve the aim of enhancing our national security and preventing terrorist activity. If we suspect that an individual is concerned in illegal activity and is a danger to the interests of the UK; shouldn't the first priority be to secure his return, arrest and prosecution? Internationally other countries are grappling with the intelligence implications of individuals who seek to return after fighting in Syria and Iraq. The approach of the Danish Government to return has been widely reported, focusing on return as an opportunity for rehabilitation and reintegration, with associated intelligence benefits.[8] We understand that this programme integrates the consideration of whether an individual should be charged with a criminal offence in connection with their activities overseas. Parliamentarians may wish to ask the Government if they have considered how likely it will be that, given the choice, individuals will submit to conditions on return or instead choose to remain outside the country and at large, perhaps becoming further integrated within any network they may have in the host country, and beyond the view of our intelligence services?

20. There are a number of detailed questions which Parliament may wish to consider at Committee, to which we will return in greater detail:

    a. To make a TEO, the Secretary of State must "reasonably suspect" that an individual is involved in terrorism-related activity outside the United Kingdom. This replicates the test originally applied to control orders, replaced by the test now applicable to TPIMs ("reasonably believes"). A test far below the ordinary civil standard of proof, which this Bill will apply to TPIMs. Parliamentarians may wish to ask why this standard is proposed, given that a TEO will give an individual an option of freedom in exile or return to submit to some of the conditions which may be imposed under a TPIM Order.
    b. This is likely, in practice to be a purely administrative exercise. There is no express provision for review or judicial oversight. Judicial review is available, but likely to be difficult to access. Legal aid is unlikely to be available and in any event, the individual will be out of the country and his opportunity to take advice and instruct representatives limited. In any event, the Justice and Security Act 2013 will permit the operation of a closed material process in any challenge, with the result that the individual concerned may never fully understand the reasons for the Secretary of State's suspicion

[8] See, for example, http://www.independent.co.uk/news/world/europe/denmark-offers-rehabilitation--not-punishment--to-returning-jihadis-9893218.html

c. The Bill provides that any individual will be given leave to enter on expulsion or deportation. This appears to have been included in order to meet serious concerns about how this policy might engage the responsibilities of the UK to third states in international law. If an individual has been admitted on a UK passport, it is generally accepted that a third state can expect that the UK will accept their return. Parliamentarians may wish to consider how likely it is that, if a TEO is made, the grounds for the suspicion of the Secretary of State may give rise to grounds for deportation or expulsion in the third state? If another country were to choose to prevent its seemingly dangerous individuals from leaving Britain, how might the Secretary of State react? This issue perhaps illustrates why Parliamentarians might wish to subject the underlying rationale for this proposal and its compatibility with a counter-terrorism policy with prosecution at its heart. If we have reliable intelligence to support the making of a TEO, is it appropriate to risk "exporting" that risk? If we encourage other states to take a similar approach; will it lead to states operating a rolling exchange of risk, with exclusions and deportations from the UK being sought in response to other states' controls on return?

TPIMs Revisited (Part 2)

21. The Bill implements two recommendations of the Independent Reviewer of Terrorism for amendments to TPIMs. Firstly, the Bill will reintroduce draconian geographical restrictions more familiar under control orders. Clause 12 will permit the Secretary of State to relocate anyone subject to a TPIM Order by compulsion within the UK up to 200 miles from their ordinary residence (relocation may be further away, by agreement).

22. The imposition of internal exile through relocation was accepted as one of the most draconian aspects of the control order regime. By way of summary, the Joint Committee on Human Rights explained:

> *The impact of such relocations on the controlled person's families was described as "extraordinary". The female partners of controlees, we heard, "are treated with complete contempt", told that they can either stay where they are or move to the new location and find a new job. Children are uprooted from the schools they have been attending and forced to relocate in order to be with their family. Moreover, such treatment was having a disproportionate impact on the Muslim community which the Government says it is seeking to reassure: Gareth Peirce said "this may affect only a*

small group of people but in terms of its contribution to what one might call the folklore of injustice it is colossal".[9]

23. Police and security services have argued for the reintroduction of relocation since the introduction of TPIMs. Notably, in their review of the TPIMs mechanism, published in January 2014, the JCHR asked the Independent Reviewer whether the reintroduction of relocation could be justified:

> *The Independent Reviewer was not, however, in favour of relocation being re-introduced: "one can see the utility of something without requiring that it be retained." He had found in his report on TPIMs that relocation was effective in preventing people from associating, but also that it was one of the most resented aspects of control orders and was considered to have the most damaging effect on family life. The Independent Reviewer therefore concluded that "Parliament took a perfectly proper decision by deciding to remove relocation", especially in view of the additional money made available to the agencies for increased surveillance, which enabled them to say that overall there was no substantial increase in the risk to the public.* [10]

24. At that time, considered in the same report, the Minister stressed that the powers available under TPIMs were adequate to protect public safety and the reintroduction of a power to relocate was not considered necessary.

25. Yet, in March 2014, The Independent Reviewer changed his stance. He explains that his new position is based on similar representations by the police and security services that the Orders would be less costly to monitor and enforce and that it would make it more difficult for individuals to abscond:

> *A power to relocate subjects away from their home areas would be of real practical assistance to the police and MI5 in distancing subjects from their associates and reducing the risk of abscond. It would also facilitate monitoring, save money and could help restore faith in a TPIM regime that has withered on the vine.*[11]

26. In his March 2014 Report, the Independent Reviewer gives two broad justifications for his original view that geographical restrictions (perhaps short of relocation) might be

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[9] Para 41. http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf

[10] Para 53. http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/113/113.pdf

[11] https://terrorismlegislationreviewer.independent.gov.uk/

appropriate. Firstly, additional funds which had been made available had not prevented individuals from absconding. Secondly, these absconds were damaging the reputation of the police and security services and undermining the confidence of the public in our counter-terrorism capabilities. After further consideration, the Reviewer concludes that despite "tens of millions" of additional funds dedicated to surveillance, the police and security agencies had been unable to prevent individuals from absconding and had had no new investigative benefits. Without access to further information about precisely how much money has been deployed – and with what result – it is extremely difficult for Parliamentarians to scrutinise this assessment. However, given the limited number of individuals subject to a TPIMs order, the conditions to which they are subject and the surveillance powers open to the police; Parliament may wish to ask for more detailed information on the gaps in surveillance capacity which may have been identified.

27. In terms of reputational damage to the security services and public confidence, the Independent Reviewer explained:

> *"In psychological terms, the notion that dangerous terrorists cannot be controlled gives succour to them and diminishes public reassurance in the ability of the authorities to protect them. In policy terms, it is likely to fuel demands for TPIMs to be replaced by more extreme and less rights-compliant measures. Such a course would not only be undesirable on civil liberties grounds but would play directly into the grievance agenda of terrorists and their sympathisers"*

28. Clearly a failure to secure the adequate surveillance of a handful of individuals believed to pose a danger to public safety, despite the investment of an additional "tens of millions" of pounds might, in itself, pose a reputational damage to the police and security services. Parliament may wish to ask for further information about why the steps taken by the security services were considered adequate by Government in late 2013 and inadequate by mid-2014. Parliament must closely consider whether the introduction of greater, more draconian powers would be an appropriate response to this failing. Similarly, whether the reintroduction of relocation is necessary in order to avoid the introduction of more "extreme and less rights-compliant" measures. This argument seems self-perpetuating and inconsistent with the human-rights based approach which the HRA 1998 and the UK's international human rights obligations require. While the UK clearly has an obligation to protect the community from terrorist attacks, compulsory powers to meet that legitimate aim must be justified by reference to their effectiveness, necessity and proportionality not in fear that agencies or public clamour might support

more draconian alternatives without action. Alternatives to rehabilitate the reputation of the police, the security services and our counter-terrorism policy should instead, start with a renewed focus on effective investigation and prosecution of criminal offences.

29. The Independent Reviewer has stressed that, in his view, there is nothing in the TPIMs mechanism which will support investigation and prosecution.[12] We agree with the assessment of Lord MacDonald QC (conducting his Home Office Commissioned Review of Counter-Terrorism Policy):

> *Any replacement scheme for control orders should have as a primary aim to encourage and to facilitate the gathering of evidence, and to diminish any obstruction of justice, leading to prosecution and conviction. Current powers that fail this test should be amended so that they comply with it or, if their inability to comply is intrinsic to their nature, they should be abolished. It follows that powers created under any new scheme must also be judged against the criteria set by the Review itself: to what extent are they likely to facilitate the gathering of evidence, and to what extent are they directed towards preventing any obstruction of that process.*

30. Criticism of the TPIMs regime by the police and security services does not support the case for the reintroduction of more draconian restrictions, but highlights the ineffectiveness of this kind of administrative order as an alternative to criminal investigation and prosecution, compatible with the core values of our justice system.

31. Secondly, the standard of proof for the making of a TPIM Order now becomes the ordinary civil standard (Clause 16). The current standard requires that the Secretary of State must "reasonably believe" that an individual has been involved in terrorism-related activity. The Bill will require that the Secretary of State is satisfied on the balance of probabilities. This responds to the recommendation of the Independent Reviewer of Counter Terrorism Legislation that this change would be appropriate, reasoning that a change would be unlikely to make any difference in practice, but that the shift would allow the Government to say openly that the court had reviewed the evidence and

[12] Evidence to the JCHR, 26 November 2014, Q4: "I think the clue is in the name: prevention and investigation. It always seems to me that if it succeeds in one, it is not going to succeed in the other. If terrorism-related activity is not happening while somebody is on a TPIM—perhaps because the TPIM has prevented it—there is going to be nothing to investigate. That pretty much seems to have been the universal experience so far."

concluded on the evidence that the individual was more likely than not to be involved in terrorism.[13]

32. Both TPIMs and its predecessor control orders are the antithesis of common law fairness. As one former law lord described the control order regime, 'they are and always have been a blot on our jurisprudence'.[14] They involve severe restrictions being imposed on individuals, who have never been charged with or convicted of a criminal offence. The more draconian the controls, the greater the case must be for the higher criminal standard of proof to apply. The application of this new minimum standard – whether it makes any difference in practice or not - must be understood in the context of the wider limits on due process applied in the context of the TPIM regime. Individuals subject to a TPIM Order are unlikely to understand fully the evidence to support the case against them beyond a summary provided in the open consideration of their case. Only a Special Advocate who generally cannot communicate with them after they have seen the most sensitive evidence said to support the Secretary of State's case may test whether the appropriate standard has been met. JUSTICE remains concerned that this process – despite this change – remains far from fair. The operation of the TPIMs regime neither supports investigation or prosecution, an original goal of its introduction after the Government's counter-terrorism review. The operation of TPIMs affirms our belief that as a repackaged version of control orders, it remains an ineffective and draconian diversion from prosecution of criminal behaviour.

Extending the effect of the DRIP Act (Part 3)

33. Clause 17 of the Bill proposes amendments to the Data Retention and Investigatory Powers Act 2014 (DRIPA) which would require internet service providers to collect and retain additional data about their users, including communications data and/or other relevant data which can be used to identify the user of a particular IP address any particular time. It is unclear from the definition on the face of the Bill or the Explanatory Notes how this data will be collected; whether it is possible without deep packet inspection which might amount to the wholesale interception of all communications for the purposes of culling the information required by this statutory direction. The Bill

[13] 2013 Report, see para 6.17. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298487/Un_Act_Independent_Review_print_ready.pdf That the courts may apply the civil standard in practice in any event, is considered by the Report of the Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, at paras 44 -50 http://www.publications.parliament.uk/pa/jt201213/jtselect/jtdraftterror/70/7007.htm#a8

[14] Lord Lloyd of Berwick, Hansard, HL Deb, 3 March 2010, col 1528.

purports to exclude data which would allow for the identification of services used by a particular user (i.e. web logs).

34. The case for police and security agencies to be able to more easily reconcile IP addresses (which can be used by multiple users) and an individual device or account was one of the key justifications for the proposals in the much criticised Draft Communications Data Bill. Without a clearer understanding of the Government's intention, it would appear that the Government is trying to introduce some of the core aspects of that Bill through the use of fast-track legislation.In both our response to the Draft Communications Data Bill[15] and in *Freedom from Suspicion: Surveillance Reform for a Digital Age* (2011), we raised serious concerns that the Regulation of Investigatory Powers Act 2000 (RIPA) and the surveillance framework on which DRIPA is patched were outdated and inadequate to protect the individual's right to respect for privacy.[16]

35. Parliament was invited to enact DRIPA in response to the decision of the Court of Justice of the European Union in the *Digital Rights Ireland* case.[17] In that case, the Court found that the provision for blanket data retention in the Data Retention Directive was disproportionate and incompatible with the protections for privacy provided by the Charter of Fundamental Rights of the European Union (Articles 7 and 8, which reflect the privacy guarantees in Article 8 ECHR, protected by the HRA 1998). In keeping with earlier case-law, the CJEU indicated that in order to be proportionate, a data retention scheme must be targeted, including geographically, over time and by reference to the prevention and detection of serious crime. JUSTICE, and others who briefed on the Bill, expressed concern that DRIPA itself – by enacting another broad, untargeted data retention scheme, was likely to be incompatible with both the Charter and the ECHR. It is extraordinary that the Government's Human Rights Memorandum makes no reference to this jurisprudence.

36. We regret that in both DRIPA and in these proposals, the Government appears to be using would-be emergency or fast-track legislation to expand existing surveillance powers without any change to the underlying and inadequate framework for oversight

[15] http://www.justice.org.uk/resources.php/330/draft-communications-data-bill

[16] http://www.justice.org.uk/data/files/resources/305/JUSTICE-Freedom-from-Suspicion-Surveillance-Reform-for-a-Digital-Age.pdf

[17] Joined cases C-293/12 and C-594/12 Seitlinger, 8 April 2014, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=242041

and supervision, nor respect for the basic safeguards required by the UK's commitments under both the CFREU and the ECHR. By effectively ignoring the *Digital Rights Ireland* decision, what message do we send about our respect for the rule of law?

37. By pressing ahead with blanket duties on providers, with no greater protection for individual rights, the Government is creating a legal framework which is bound to result in lengthy litigation and which is likely to fail. While the sunset clause necessitated by the lapse of DRIPA is welcome – and we appreciate the acknowledgement made by all three political parties that RIPA is ready for review – the introduction of these powers piecemeal and without adequate safeguards is unlikely to foster public confidence in the surveillance operations of the police and security services.

Oversight, counter-terrorism and individual rights (Clause 36)

38. Clause 36 of the Bill provides for the creation of a Privacy and Civil Liberties Board by the Secretary of State, to "provide advice and assistance" to the Independent Reviewer of Counter-Terrorism legislation. This proposal was first mooted in connection with the introduction of DRIPA as a concession that greater oversight of public decision making on surveillance was necessary. JUSTICE considers that there is nothing on the face of the Bill which would suggest that this Board will help increase public confidence in the accountability of public decision making on counter-terrorism or surveillance. Not least:

    a. **Will it be independent?** The detail of the Board's membership and its terms of engagement is left to delegated legislation. In itself, this raises questions about the structural independence of the Board from Government.

    b. **Will it add any value?** The purpose of the Board is entirely left to secondary legislation, with "the particular things that the Board may or must do" being determined later by the Secretary of State. The Independent Reviewer, in his evidence to the JCHR on 26 November 2014, questioned the purpose and usefulness of a new Board to provide "advice and assistance". While he considered that he needed substantive support to undertake his work – in the form of a qualified "junior" to assist – he was concerned that this mechanism seemed designed to create a new bureaucracy whereby he might be provided with advice that he already obtained informally or which might constrain how he might consider advice more broadly.

c. **Will it support or change the function of the Independent Reviewer?** The Explanatory Notes accompanying the Bill envisage the appointment of 3 – 5 members of the Board and 2 supporting staff. The Bill provides for the Independent Reviewer to chair the Board, but the Explanatory Notes explain that while the Independent Reviewer would Chair the Board, the Government envisages that the "statutory responsibilities currently undertaken by the Independent Reviewer …could be undertaken, in practice, by three separate individuals". This illustrates the lack of definition with which these proposals have been formulated. If all three members of the Board are to exercise the functions of the Reviewer, will they have the same privileges? (We don't know, as their powers will be determined in secondary legislation) Is the Board to advise and assist the Independent Reviewer, or provide an entirely new mechanism by which his existing functions are discharged?

39. The Independent Reviewer performs an important statutory function in connection with legislation which contains some of the most draconian powers exercised by the administration within the UK. Parliamentarians must press Ministers on precisely how this proposed new Board will relate to the work of the Independent Reviewer. It is regrettable that this new mechanism appears, at public cost, to create a new level of bureaucracy with little corresponding benefit to accountability, transparency and effective oversight. It would be deeply worrying if it were to operate to undermine the function of the existing framework by interfering with the work of the Independent Reviewer or watering down his effectiveness in practice.

40. The mechanism for the oversight of decisions on surveillance which impact upon privacy and civil liberties – provided for in the Regulation of Investigatory Powers Act 2000 ("RIPA") – is not fit for purpose. It lacks transparency and is incapable of providing effective oversight in practice. In *Freedom from Surveillance,* JUSTICE concluded that wholesale reform of the RIPA oversight model was essential to the effective operation of a surveillance fit for a digital age.

41. This new promise to create another level of bureaucracy with seemingly little purpose will not address that problem. Instead, Parliamentarians are once again asked to expand the compulsory powers engaged in surveillance without sufficient consideration of the law which protects individual privacy and without consideration of the need for effective and accountable mechanisms for oversight.

Preventing extremism, curtailing freedom? (Part 5)

42. Clause 21 would create an ill-defined duty on listed public authorities to "have due regard to" the need to "prevent people from being drawn into terrorism" in performing its public functions. The Secretary of State will have the power to amend the list of authorities covered, in secondary legislation. Certain authorities are excluded, notably Parliament and the General Synod of the Church of England. Clause 24 provides for the Secretary of State to provide guidance on the duty. Clause 25 gives the Secretary of State the power to issue Directions to authorities to enforce compliance with the duty. Clause 26 stresses that the duty in this part creates no private law rights for individuals.

43. JUSTICE shares the concerns expressed by others that the creation of powers for the Secretary of State to direct that individual public authorities take steps to prevent "people from being drawn into terrorism" may have a damaging impact on the exercise of individual rights in practice, for example, encouraging institutions to take an overly restrictive approach to support for the freedom of expression or the freedom of association of their members, students, employees or service users. That this power has the potential to be applied in a way which discriminates against groups on the basis of race or religion is clear.

44. That Parliament is asked by Government to create this wide-ranging power principally as a creature of delegated legislation is of particular concern. Importantly, the public authorities concerned will also be subject to the express terms of the Human Rights Act 1998 and the specific and general public equality duties in the Equality Act 2010, set in clear statutory terms by Parliament. The Government has failed, in the Bill, or any of its accompanying material, to explain how public authorities will be supported to reconcile the application of this new duty with its existing obligations designed to ensure that the performance of all public functions respect equality and other human rights in practice.[18]

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[18] The Human Rights Memorandum considers the data processing provisions in the detail of these provisions, and their compatibility with Article 8 ECHR, but does not consider the wider practical impact of these measures in practice. See paras 61 -62. http://www.parliament.uk/documents/joint-committees/human-rights/ECHR_Memo_Counter_terrorism_Bill.pdf