



Terrorism Prevention and Investigation Measures Bill

Briefing for House of Lords Report Stage

November 2011

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. In our briefing for Committee Stage, JUSTICE explains its underlying objection to both the control orders regime in the Prevention of Terrorism Act 2005 and the proposals for their replacement – TPIMs. In our view, TPIMs are little more than control orders by another name.¹
12. We agree with the Parliamentary Joint Committee on Human Rights 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.’² The Home Office’s Counter-Terrorism Review itself conceded that control orders ‘can mean that prosecution and conviction ... becomes less not more likely’,³ and that a system of TPIMs would not be ‘an adequate alternative to prosecution’.⁴ It nonetheless suggested that restrictions imposed under TPIMs ‘may facilitate further investigation’, but did not offer any evidence to support this supposition.⁵ In our view, the opposite is much more likely to be true: evidence-gathering is typically most effective when the suspect does not know that he is the subject of investigation (and this is why most surveillance is covert and presumably, the main reason why most terrorist suspects are not on control orders).
13. We consider that control orders are plainly unnecessary. It follows that TPIMs, a slightly weaker form of control orders, are as well. We welcome the repeal of the Prevention of Terrorism Act 2005 as a long-overdue measure. While we call on the House of Lords to resist the attempt in this Bill to recreate control orders in a slightly weaker form, we comment below on several key amendments to the Bill.

¹ For ease of reference, we set out our comparison of control orders and TPIMs in an Annex to this note. Our full Committee Stage briefing is available here: <http://www.justice.org.uk/resources.php/273/terrorism-prevention-and-investigative-measures-bill>

² Joint Committee on Human Rights, Legislative Scrutiny: Sixteenth Report (2010-2011), *Terrorism Prevention and Investigation Measures Bill*, para 1.10.

³ Home Office, *Review of Counter-Terrorism and Security Powers* (Cm 8004, January 2011), p37.

⁴ *Ibid.*, p41.

⁵ *Ibid.*

Sunset clause: annual renewal

17. We support the amendment tabled in the names of Lord Hunt of Kings Heath, Baroness Hayman and Lord Pannick designed to ensure that this legislation, like the control orders legislation before it, will lapse after a year, unless renewed by affirmative order of both Houses. This Bill provides for exceptional measures and they should be treated as such. Close annual supervision by Parliament is as necessary for TPIMs as control orders.

Judicial oversight and supervision

18. We welcome the series of amendments tabled by Lord Lloyd of Berwick and Lord Goodhart, a member and former chair of JUSTICE's council, designed to replace the Secretary of State as decision maker with the High Court. This would provide the important safeguard of an independent judicial decision-maker with full powers to make or refuse to make the order, rather than the limited power of review under clause 6. The amendments would also introduce a requirement for an early, on-notice hearing on the making of a TPIM order, where the order may be quashed, affirmed or varied after hearing representations from the person subject to its terms. At present, the Bill creates the power to impose TPIMs in the absence of, or without notification to, the individual and without his having the opportunity to make representations; such a power is the antithesis of fair procedure.

19. Lord Pannick has tabled an amendment which would ensure that, in undertaking a review hearing of a decision by the Secretary of State imposing TPIMs, there must be a full review of the decision on the merits. The Bill currently provides for this review to be on ordinary judicial review grounds. During debate on a similar amendment during Committee Stage, the Minister accepted that the Government intends the courts to apply the same "particularly intense" standard of review that is currently applied to the review of control orders.⁶ He made clear his view that the court would apply existing case-law to the test set out in the Bill, in order to ensure that no lesser standards would apply. We welcome the Minister's acceptance that a merits review should continue. We consider the Bill must be amended to make the role of the reviewing court clear beyond doubt.

⁶ HL Deb, 19 Oct 2011, Col 313.

Maximum duration of TPIMs

20. We also support the proposal by Lord Lloyd and Lord Goodhart that any TPIMs will remain in force for a maximum period of one year. This would require a fresh application to be made to the court after twelve months for approval. We consider that the severity of the restrictions available under TPIMs justifies a further examination by the court of whether the conditions are satisfied after twelve months has passed.

Right to disclosure of allegations: a statutory obligation to “gist”

21. We support the amendments tabled by Lord Pannick to Clause 8 and Schedule 4 of the Bill. These amendments are designed to give effect to the House of Lords judgment in *SSHD v AF*⁷ which, in the light of *A v UK*,⁸ specified that in order to comply with Article 6 European Convention on Human Rights, in control order proceedings, the individual the controlee must be given sufficient information about the allegations against him to give effective instructions in relation to those allegations. This obligation was also found to apply to ‘light-touch’ control orders, analogous to TPIMs, in the High Court in *BC v SSHD; BB v SSHD*⁹. This decision is currently subject to appeal; however, we believe that axiomatically, no procedure can be fair in which the individual does not have sufficient information about the allegations against him to enable him to give effective instructions to his lawyers. In the circumstances, the Bill should include specific reference to this aspect of the Article 6 obligations.

Temporary ‘enhanced TPIM orders’

Leave out clause 26

24. The powers under clause 26 would allow the Secretary of State to impose more extensive restrictions on individuals – analogous to those currently available under control orders – in the period between the dissolution of Parliament and the Queen’s

⁷ (*No 3*) [2009] UKHL 28

⁸ [2009] ECHR 301

⁹ [2009] All ER (D) 140.

Speech. These powers are, as we have outlined, unnecessary, and have scope seriously to interfere with fundamental rights. We, therefore, strongly recommend the removal of this clause. The inclusion of the requirement that the Secretary of State must be satisfied on the balance of probabilities of the individual's involvement in terrorism-related activity is not a genuine safeguard; standards of proof provide a safeguard when they are applied openly by an independent judicial decision-maker and relate to evidence rather than intelligence material.

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Annex: TPIMS: Control Orders by another name?

3. Like control orders, they involve:

- a wide variety of possible restrictions being imposed on a person who has not been charged or convicted of a criminal offence,
- but whom the Home Secretary believes is involved in terrorism, one of the most serious types of criminal activity imaginable;
- yet the individual subject to the order is not entitled to see the evidence against him, but only a summary of the key allegations.
- although TPIMS orders have an initial term of 12 months, they may be extended for a further year,¹⁰ and fresh orders may be made whenever the Home Secretary believes the person is engaged in 'new terrorism-related activity'.¹¹ In this sense, TPIMS are – like control orders - 'renewable indefinitely'.¹²

4. And, like control orders, TPIMS:

- will be time-consuming for the police and the security service to administer and enforce;
- are nevertheless highly unlikely to prevent a committed terrorist from absconding;
- notwithstanding their new name and shift in emphasis, are likely to inhibit the effective investigation and prosecution of terrorism offences; and
- will inevitably involve further litigation, including directions hearings, review hearings, and applications to vary, all at massive cost to the public.¹³

¹⁰ Clause 5.

¹¹ Clauses 3(2) and 3(6).

¹² See *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 per Lord Bingham at para 10.

¹³ See e.g. Daily Mail, 'Taxpayers' £8m legal bill for terror suspect control orders' by James Slack, 2 February 2010.

5. Like control orders, a TPIMs order may include restrictions on:

- where a person sleeps;¹⁴
- association or communication with others;¹⁵
- possession or use of a mobile phone or computer;¹⁶
- employment or studies;¹⁷
- whether a person may enter a specified area or place;¹⁸
- whether a person may travel overseas;¹⁹
- a person's ability to transfer property;²⁰
- a person's use of or access to financial services;²¹

6. Like control orders, a TPIMs order may also involve the requirement on a person to:

- report regularly to a police station;²²
- wear an electronic tag;²³
- have his photograph taken by police;²⁴

¹⁴ Schedule 1, para 1.

¹⁵ Ibid, para 8.

¹⁶ Ibid, para 7.

¹⁷ Ibid, para 9.

¹⁸ Ibid, para 3.

¹⁹ Ibid, para 2.

²⁰ Ibid, para 6.

²¹ Ibid, para 5.

²² Ibid, para 10.

²³ Ibid, para 12.

And, as with control orders, a person under a TPIMs order may have:

- his residence, person and property searched by police in a variety of circumstances;²⁵ and
- have his fingerprints and DNA taken by police without consent.²⁶

7. It is fair to say that the range of possible restrictions under Schedule 1 of the Bill are less sweeping than those available under the 2005 Act. However, the restrictions are still likely to have a significant impact on a person's liberty, freedom of movement, private and family life, property rights, freedom of expression and association with others. In addition, like control orders, they purport to deal with the threat of terrorism by (i) imposing restrictions on people who have not been charged with or convicted of a criminal offence; (ii) those restrictions are imposed not on the basis of admissible evidence in open court but on the basis of the Home Secretary's assessment of intelligence material that is not disclosed to the defendant or his lawyers; and (iii) the restrictions are likely to remain in force, by one means or another, for as long as the Home Secretary suspects that the person is involved in terrorism. The remaining limited distinctions, for example in relation to maximum curfew hours and relocation, will be further eroded by the Draft Enhanced Terrorism Prevention and Investigation Measures Bill,²⁷ if it becomes law. The publication of the Draft Bill further underlines the government's intention that control orders should remain, in all but name.

²⁴ Ibid, para 11.

²⁵ Schedule 5.

²⁶ Schedule 6.

²⁷ Cmnd 8166, Home Office, September 2011.