



## **Terrorism Prevention and Investigation Measures Bill**

### **Briefing for House of Lords Committee Stage**

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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. Control orders for terror suspects, as one former law lord put it, 'they are and always have been a blot on our jurisprudence'.<sup>1</sup> They involve severe restrictions being imposed on individuals for a potentially indefinite period, not because they have been charged with or convicted of a criminal offence, but rather because a senior government minister suspects that they are engaged in terrorism. Nor does a person subject to a control order have a right to know the evidence against him. At best, he is entitled to a summary of the key allegations in his case, with the actual material in most cases remaining secret from him and his lawyers.<sup>2</sup>
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. Control orders are neither. Not only do they involve an unacceptable departure from the core values of our criminal justice system, but they have also had a high failure rate (with more than 1 in every 7 suspects absconding) and been hugely expensive to administer (costing more than £10 million within the first three years of operation). It was recently announced that three subjects of control orders were charged with breaching their restrictions between 11 June and 10 September of this year.<sup>3</sup>
4. When the Home Secretary announced the findings of the government's Counter-Terrorism Review in January, we welcomed its announcement that controls orders under the Prevention of Terrorism Act 2005 would be repealed. At the same time, however, we warned that the replacement outlined by the review - Terrorism Prevention and Investigative Measures (TPIMs) – seemed equally likely to prove incompatible with our common law tradition and basic human rights.

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<sup>1</sup> Lord Lloyd of Berwick, Hansard, HL Debates, 3 March 2010, col 1528.

<sup>2</sup> See e.g. *A and others v UK* [2009] 49 EHRR 29, para 220; *Secretary of State for the Home Department v AF and others* [2009] UKHL 28; and JUSTICE's 2009 report *Secret Evidence*.

<sup>3</sup> BBC News, "Three terror suspects breach control orders – Theresa May", 11 October 2011.

5. Sadly, the Bill's publication has only confirmed our earlier suspicion that TPIMs are little more than control orders by another name.
6. 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,<sup>4</sup> and fresh orders may be made whenever the Home Secretary believes the person is engaged in 'new terrorism-related activity'.<sup>5</sup> In this sense, TPIMs are – like control orders - 'renewable indefinitely'.<sup>6</sup>
7. 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

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<sup>4</sup> Clause 5.

<sup>5</sup> Clauses 3(2) and 3(6).

<sup>6</sup> See *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 per Lord Bingham at para 10.

- will inevitably involve further litigation, including directions hearings, review hearings, and applications to vary, all at massive cost to the public.<sup>7</sup>

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

- where a person sleeps;<sup>8</sup>
- association or communication with others;<sup>9</sup>
- possession or use of a mobile phone or computer;<sup>10</sup>
- employment or studies;<sup>11</sup>
- whether a person may enter a specified area or place;<sup>12</sup>
- whether a person may travel overseas;<sup>13</sup>
- a person's ability to transfer property;<sup>14</sup>
- a person's use of or access to financial services;<sup>15</sup>

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

- report regularly to a police station;<sup>16</sup>
- wear an electronic tag;<sup>17</sup>

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<sup>7</sup> See e.g. Daily Mail, 'Taxpayers' £8m legal bill for terror suspect control orders' by James Slack, 2 February 2010.

<sup>8</sup> Schedule 1, para 1.

<sup>9</sup> Ibid, para 8.

<sup>10</sup> Ibid, para 7.

<sup>11</sup> Ibid, para 9.

<sup>12</sup> Ibid, para 3.

<sup>13</sup> Ibid, para 2.

<sup>14</sup> Ibid, para 6.

<sup>15</sup> Ibid, para 5.

- have his photograph taken by police;<sup>18</sup>

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;<sup>19</sup> and
- have his fingerprints and DNA taken by police without consent.<sup>20</sup>

10. 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,<sup>21</sup> 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.

11. Nor do we think that TPIMs overcome any of the other objections to the control order regime. Certainly they do not appear to be any more cost-efficient to administer or enforce, and there is no reason to think that the legal costs of TPIMs litigation will be

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<sup>16</sup> Ibid, para 10.

<sup>17</sup> Ibid, para 12.

<sup>18</sup> Ibid, para 11.

<sup>19</sup> Schedule 5.

<sup>20</sup> Schedule 6.

<sup>21</sup> Cmnd 8166, Home Office, September 2011.

any less than those associated with defending control orders, nor that they will be any more effective in preventing a determined terrorist from absconding.

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.’<sup>22</sup> The Home Office’s Counter-Terrorism Review itself conceded that control orders ‘can mean that prosecution and conviction ... becomes less not more likely’,<sup>23</sup> and that a system of TPIMs would not be ‘an adequate alternative to prosecution’.<sup>24</sup> It nonetheless suggested that restrictions imposed under TPIMs ‘may facilitate further investigation’, but did not offer any evidence to support this supposition.<sup>25</sup> 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 acknowledge that there will be terror suspects for whom arrest and charge is not immediately advisable, either because of the importance of an ongoing investigation/intelligence-gathering that would be damaged by alerting the suspect; because of the risks to an informant or of triggering a terrorist incident; or because of a current lack of admissible evidence – in particular, where the incriminating material is the result of intercept.
  
14. For this reason we have long advocated the admissibility of intercept evidence in criminal cases, while recognising that it will not provide sufficient basis for prosecution in every case.<sup>26</sup> In other cases, however, unless and until a suspect can be arrested and charged the public should be protected by the use of surveillance with the intention of gathering evidence sufficient to arrest and charge, in addition to preventing terrorist offences and gathering intelligence. Bearing in mind that only 11

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<sup>22</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Sixteenth Report (2010-2011), Terrorism Prevention and Investigation Measures Bill*, para 1.10.

<sup>23</sup> Home Office, *Review of Counter-Terrorism and Security Powers* (Cm 8004, January 2011), p37.

<sup>24</sup> *Ibid.*, p41.

<sup>25</sup> *Ibid.*

<sup>26</sup> See for example, our 2006 report *Intercept Evidence: Lifting the Ban*.

individuals are currently subject to the expensive control order regime, the costs of this should not be prohibitive.<sup>27</sup>

15. Further, in relation to the first two categories of individual identified in para 14 above, a control order or TPIM could not be used, for the same reason as prevents their arrest and charge. In addition, the Bill would prevent the use of TPIMs to suspects who were previously the subject of a TPIM for two years but whose involvement in terrorism is continuing rather than 'new' within the meaning of clauses 3(2) and 3(6).
16. In other words, there will always be the possibility of suspects whom the Home Secretary reasonably believes are involved in terrorism, who cannot be prosecuted *but who also – for one of the three reasons identified above – cannot be made subject to a control order or a TPIM*. Such cases have already arisen. As Lord Lloyd of Berwick pointed out in a previous debate on control orders in March last year:<sup>28</sup>

*AF's control order was revoked in August 2009. Since then, he has been a free man. Yet a year ago on 5 March the noble Lord, Lord West [the Home Office minister] described him as 'highly dangerous' .... Yet AF, that highly dangerous man, is now free, without the dire consequences which were then predicted. What is the explanation for that? The answer can be only this: the Home Office has indeed found some other means of dealing with him .... If using a control order was not necessary in the case of AF, why should we accept that it is necessary in the case of the other 11 individuals who are subject to control orders? The answer is, of course, that it is not necessary. We know now that other means can be found to contain the risk posed by these few remaining wretched individuals. If that is so, it is high time that we brought control orders to an end.*

We agree 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. We call on the House of Lords, however, to resist the attempt in this Bill to recreate control orders in a slightly weaker form.

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<sup>27</sup> See BBC News, n3 above.

<sup>28</sup> Hansard, HL Debates, 3 March 2010, col 1528.

## **Suggested amendments**

17. Other than in relation to the repeal of the Prevention of Terrorism Act 2005, we oppose the Bill in its entirety. However, we suggest amendments here that would ameliorate aspects of the Bill in the event that it is passed.

### **Judicial supervision**

Page 1, line 6 [*Clause 2*], leave out from “Secretary” to “notice)” and insert “High Court may, on the application of the Secretary of State,”

Page 1, line 16 [*Clause 3*], leave out from “Secretary” to “believes” and insert “court is satisfied”

Page 2, line 1 [*Clause 3*], leave out from “Secretary” to “reasonably” and insert “court”

Page 2, line 5 [*Clause 3*], leave out from “Secretary” to “reasonably” and insert “court”

Page 2, line 10 [*Clause 3*], leave out paragraph

Leave out clause 6

18. These amendments would replace the Secretary of State as decision maker with the High Court; the court would have to be satisfied of the person’s involvement in new terrorism-related activity to the civil standard (which would likely be the ‘heightened civil standard’ in such cases, similar to the standard applicable in criminal prosecutions). If Parliament wished to impose the ordinary civil standard (which we would not recommend) the words ‘on the balance of probabilities’ could be inserted into the clause as amended. The court would then make the remaining judgments required by the clause. 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 remove the power to make such an order in the absence of, or without notification to, the individual or without his having the opportunity to make representations; such a power is the antithesis of fair procedure.



## **Tightening the definition of ‘terrorism-related activity’**

Page 2 [*clause 4*], leave out lines 28 to 34 and insert:

- (b) conduct which is intended to encourage or assist conduct falling within paragraph (a);
  - (c) conduct which is intended to assist individuals known or believed by the individual concerned to be involved in conduct falling within paragraphs (a) or (b) evade lawful surveillance, investigation, or arrest.
19. The current definition of ‘terrorism-related activity’ is so broad that it could embrace many innocent activities including, for example, selling a terrorist ordinary household chemicals that, unknown to the seller, he intends to use for bomb-making; acting as the legal representative for a terror suspect; etc. The suggested amendment would restrict the definition to: the commission, preparation or instigation of acts of terrorism; conduct intended to encourage or assist the same; and conduct intended to help such individuals evade surveillance, investigation or arrest.

## **Maximum duration of TPIM**

Page 3 [*clause 5*], leave out lines 2 to 6

20. This amendment would remove the Secretary of State’s power to extend a TPIM notice by notice. It could be applied as well as, or in the absence of, the judicial supervision amendments above. If both sets of amendments were applied a fresh application would be made to the court after twelve months; otherwise fresh permission of the court under clause 6 would be required. 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

Page 4, line 26 [clause 8], at end insert –

“( ) Directions under subsection (5) must include a direction that the Secretary of State shall provide the individual on whom the measures are imposed with sufficient information about the allegations against him or her to enable him or her at the review hearing to give effective instructions to his or her representatives in relation to those allegations.”

Page 35, line 11 [*Sched 4, para 5*], at end insert—

*“(3) Notwithstanding anything to the contrary effect in paragraphs 2 to 4, rules of court must provide that the individual on whom the measures are imposed is entitled to be given sufficient information about the allegations against him or her to enable him or her at the review hearing to give effective instructions to his or her representatives in relation to those allegations.”*

21. These amendments are similar to those tabled by Lord Pannick on this topic; they are designed to give effect to the House of Lords judgment in *SSHD v AF (No 3)* [2009] UKHL 28 which, in the light of *A v UK* ([2009] ECHR 301, Grand Chamber) 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* [2009] All ER (D) 140. 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.

### **Revival of TPIM notice**

Page 8, line 8 [*clause 13*], after “D” insert “and E”

22. This amendment would require the court’s permission for a TPIM notice is revived, except in urgent cases.

### **Sunset clause**

Page 13, line 2 [*clause 21*], leave out “5 years” and insert “one year”

23. This amendment would provide for a sunset clause for the TPIMs Act after 12 months; renewal would after that time require a positive resolution of both Houses of Parliament.

### **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 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.

**JUSTICE**  
**October 2011**