



Terrorism Prevention and Investigation Measures Bill

Briefing for House of Commons Second Reading

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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. On 25 May, President Obama addressed both Houses of Parliament in Westminster Hall. In his speech, he extolled 'the English common law' for its contribution to the 'rights and liberties of man' and 'the rule of law'.¹ In particular, he quoted Winston Churchill's statement that 'Magna Carta, the Bill of Rights, Habeas Corpus, trial by jury find their most famous expression in the American Declaration of Independence'.²
3. Control orders are the antithesis of this tradition, and these ideals. As one former law lord put it, 'they are and always have been a blot on our jurisprudence'.³ 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.⁴
4. 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).
5. 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in January, we welcomed its announcement that controls orders under the Prevention of Terrorism Act 2005 would be repealed.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

¹ Westminster Hall, London, 25 May 2011.

² Westminster College, Fulton, Missouri, 5 March 1946: 'we must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence'.

³ Lord Lloyd of Berwick, Hansard, HL Debates, 3 March 2010, col 1528.

⁴ 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*.

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.

6. Sadly, the Bill's publication has only confirmed our earlier suspicion that TPIMs are little more than control orders by another name.

7. 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,⁵ and fresh orders may be made whenever the Home Secretary believes the person is engaged in 'new terrorism-related activity'.⁶ In this sense, TPIMs are – like control orders - 'renewable indefinitely'.⁷

8. 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.⁸

⁵ Clause 5.

⁶ Clauses 3(2) and 3(6).

⁷ See *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 per Lord Bingham at para 10.

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

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

- where a person sleeps;⁹
- association or communication with others;¹⁰
- possession or use of a mobile phone or computer;¹¹
- employment or studies;¹²
- whether a person may enter a specified area or place;¹³
- whether a person may travel overseas;¹⁴
- a person's ability to transfer property;¹⁵
- a person's use of or access to financial services;¹⁶

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

- report regularly to a police station;¹⁷
- wear an electronic tag;¹⁸
- have his photograph taken by police;¹⁹

⁹ Schedule 1, para 1.

¹⁰ Ibid, para 8.

¹¹ Ibid, para 7.

¹² Ibid, para 9.

¹³ Ibid, para 3.

¹⁴ Ibid, para 2.

¹⁵ Ibid, para 6.

¹⁶ Ibid, para 5.

¹⁷ Ibid, para 10.

¹⁸ Ibid, para 12.

¹⁹ Ibid, para 11.

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;²⁰
and
- have his fingerprints and DNA taken by police without consent.²¹

11. 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.

12. It would be a mistake, in any event, to suppose that what was objectionable about control orders was simply the sweeping restrictions that they imposed on a person's basic freedoms. Rather, the inherent vice of control orders is that 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. As Churchill once wrote:²²

The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him judgment by his peers for an indefinite period, is in the highest degree odious, and is the foundation of all totalitarian government...

13. The power of the Executive to impose various restrictions on a man for an effectively indefinite period without formulating any charge against him may be much less dramatic but is no less objectionable in principle. The vice of control orders is not improved by renaming them, nor introducing a watered-down version of them which involve slightly less stringent restrictions.

14. 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 (including the inevitable directions hearings and review hearings) will be any less than those associated with defending control

²⁰ Schedule 5.

²¹ Schedule 6.

²² Letter to Herbert Morrison, Home Secretary, dated 21 November 1943.

orders. Neither is there any evidence to suggest that they will be any more effective than control orders in preventing a determined terrorist from absconding. And, apart from relaxing some of the most stringent restrictions that may be imposed on suspects under the 2005 Act, there is no indication that TPIMs will do any more than control orders did to facilitate the effective investigation and prosecution of terrorism offences. As Lord Macdonald of River Glaven QC noted in his report that accompanied the Counter-Terrorism Review:²³

We may safely assume that if the *Operation Overt* (airline) plotters had, in the earliest stages of their conspiracy, been placed on control orders and subjected to the full gamut of conditions available under the present legislation, they would be living amongst us still, instead of sitting for very long years in the jail cells where they belong.

And:²⁴

The reality is that controlees become warehoused far beyond the harsh scrutiny of due process and, in consequence, some terrorist activity undoubtedly remains unpunished by the criminal law. This is a serious and continuing failure of public policy.

15. We also agree with Lord Macdonald's proposed test for analysing any replacement powers:²⁵

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?*

16. The Home Office's Counter-Terrorism Review itself conceded that control orders 'can mean that prosecution and conviction ... becomes less not more likely',²⁶ and that TPIMs was not

²³ Cmnd 8003, January 2011, p9.

²⁴ Ibid, p10.

²⁵ Ibid, pp9-10. Emphasis added.

²⁶ Home Office, *Review of Counter-Terrorism and Security Powers* (Cm 8004, January 2011), p37.

'an adequate alternative to prosecution'.²⁷ It nonetheless suggested that restrictions imposed under TPIMs 'may facilitate further investigation', but did not offer any evidence to support this supposition.²⁸ 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). By contrast, a suspect who *knows* that he is the subject of an active police investigation is much less likely to engage in the kinds of activities that are likely to produce admissible evidence against him, as will any of his associates, and so forth. (Indeed, it is reasonable to suppose that this is the main reason that most terrorist suspects are not on control orders). Simply renaming control orders 'investigative measures' will not make the task of evidence-gathering any more effective, or the prospects of a successful prosecution any more likely.

17. It is obvious, too, that TPIMs will not be deployed against every suspect who otherwise meets the criteria. This includes suspects whom the Home Secretary reasonably believes are involved in terrorism, who currently cannot be prosecuted, but who cannot be made subject to a control order or a TPIM because:

- the key allegations against them cannot be disclosed without damaging national security;
- the intelligence services have assessed that the subject's knowledge of an active investigation would irreparably damage intelligence-gathering;

To this, TPIMs will add a further category of suspects who cannot be made subject to a TPIM because they were previously the subject of a TPIM for two years but their involvement in terrorism is continuing rather than 'new' within the meaning of clauses 3(2) and 3(6).

18. 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*. It is not only likely that such cases will arise. We know they have already arisen. As Lord Lloyd of Berwick pointed out in a previous debate on control orders in March last year:²⁹

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

²⁷ Ibid, p41.

²⁸ Ibid.

²⁹ Hansard, HL Debates, 3 March 2010, col 1528.

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.

19. We agree that control orders are plainly unnecessary. It follows that TPIMs, a slightly weaker form of control orders, are as well. We very much welcome the repeal of the 2005 Act but call on Parliament to resist the government's attempt to continue the operation of the control order regime, albeit slightly watered-down and under another name.

Clause 1 – Abolition of control orders

20. We welcome the repeal of the Prevention of Terrorism Act 2005 as a long-overdue measure. As we make clear below, however, it is apparent that most of the key provisions of the 2005 Act have simply been recast by the Bill in a slightly different format. Regardless of the view one takes of the merits of the 2005 Act, we doubt that repealing it only to reenact virtually all of its substance is a very sensible use of parliamentary time.

Clause 2 – Imposition of terrorism prevention and investigation measures

Clause 3 – Conditions A to E

21. Clauses 2 and 3 set out the power of the Secretary of State to make a TPIM notice imposing various restrictions and requirements on a suspect. The conditions in clause 3 are:

- the Home Secretary's reasonable belief that the individual is or has been involved in 'terrorism related activity' (Condition A);
- that 'some or all' of the relevant activity is 'new terrorism related activity' (Condition B);
- that the Home Secretary reasonably considers the TPIM necessary to protect the public (Condition C);
- that the Home Secretary reasonably considers that the particular restrictions in the TPIM are necessary to prevent the individual from being involved in terrorism (Condition D);

- that either (i) the court has permitted the making of the order or (ii) the Home Secretary reasonably believes it is necessary to make the order without permission as a matter of urgency.
22. This largely restates the grounds for making a non-derogating control order under sections 1 and 2 of the 2005 Act. The two main differences are (a) the requirement of ‘reasonable suspicion’ under the 2005 Act has been replaced with ‘reasonable belief’ and (b) the requirement of ‘new’ terrorism-related activity as a means to prevent a control order being repeatedly extended, year after year.
23. First, although we welcome the requirement of ‘reasonable belief’ as a higher standard than ‘reasonable suspicion’, we note that this is still much lower than the civil standard of the balance of probabilities (‘more likely than not’) or the criminal standard (‘beyond reasonable doubt’). In any event, tightening the relevant standard required of the Home Secretary to make an order is by itself insufficient to overcome the core objections of principle to the use of either control orders or TPIMs.
24. Secondly, although we welcome the introduction of Condition B as an attempt to restrict control orders or TPIMs being repeatedly renewed year after year, we doubt that this will prove much of a check in practice. In the event that a TPIM reaches its maximum limit of 2 years, it will always be open to the Home Secretary to make a fresh TPIM so long as she has reasonable grounds to believe that the suspect has engaged in ‘new’ terrorism-related activity since the last order came into force. In particular, clause 15(6) allows the Home Secretary to make a fresh TPIM where she reasonably believes the suspect has engaged in further terrorism-related activity, for a further two years.
25. Given that (i) reasonable belief is a relatively low standard (ii) the definition of ‘terrorism-related activity’ is a broad one (see clause 4 below), and includes such attenuated actions as ‘encouraging’ or ‘facilitating’ the ‘instigation ... of an act of terrorism’, and (iii) a suspect has virtually no opportunity to rebut the Home Secretary’s reasonable belief in any event, we doubt that Condition B will prevent TPIMs from being made repeatedly against the same suspects for as long as the power exists to do so.
26. Conversely, condition B highlights the perverse prospect that the Home Secretary may reasonably believe that a suspect poses a continuing threat to national security despite not having engaged in terrorism since the last TPIM was made. As we noted above, the Bill makes no provision for such cases, just as it makes no provision for suspects who cannot be subject to TPIMs because the key allegations against them cannot be disclosed for national security reasons. Indeed, there will always be the possibility of suspects who pose a greater risk than any person currently subject to a control order, but against whom a TPIM

nonetheless cannot be made. The only way to deal with these categories of suspects, it seems to us, is by way of surveillance and evidence-gathering with a view to their eventual prosecution. In our view, however, this should not be regarded as a residual category or eventuality. Instead, it should be the way that *all* such suspects are dealt with, rather than resorting to measures such as TPIMs that offend the values of our criminal justice system.

Clause 4 – Involvement in terrorism-related activity

27. The definition of 'terrorism-related activity' is the same as that under section 1(9) of the 2005 Act, as amended by section 79 of the Counter-Terrorism Act 2008. We note that any activity covered by clause 4 is also covered by a wide range of criminal offences, including those provided by terrorism legislation. This only serves to underline how control orders, and now TPIMs, are essentially seeking to address the most serious kinds of criminal activity by way of a series of civil restrictions.

Clause 5 – Two year limit for TPIM notices

28. Like section 2(4)(a) of the 2005 Act, clause 5(1)(b) of the Bill provides a one year limit for a TPIMs order, but which may be extended for a further by notice for further year by Secretary of State (clause 5(2)), if conditions A C and D are met. The further limitation on extending TPIMs past two years is discussed above. Clause 16(1) provides defendants with a right of appeal against extension of a TPIMs order by the Home Secretary.

Clause 6-9 – Prior permission of the court; Urgent references to the court etc; Directions hearings; and Review hearings

Clause 16 – Appeals

29. Under both the 2005 Act and the Bill, the Home Secretary must normally seek the permission of the court to make an order. The relevant test for permission ('obviously flawed') and the standard of review are the effectively the same in both the Bill and the 2005 Act, c.f. section 3(2) and clause 6(3)(a); section 3(11) and clause 6(6).

30. Clause 7 and Schedule 2 provide the Home Secretary with the power to make an interim order as a matter of urgency , on effectively the same terms as that provided for the urgent making of a nonderogating control order under sections 3(1)(b) and 3(3) of the 2005 Act.

31. The scheme of directions hearings, review hearings and appeals is again largely the same as that provided by sections 3(2), 3(10) and 10 of the 2005 Act.

Clause 10 – Criminal investigations into terrorism related activity

Clause 11 – Review of ongoing necessity

32. The duty imposed by clause 10 on the Home Secretary to consult with relevant chief police officers concerning the making of a TPIMs order to see if there is any ‘evidence available that could realistically be used’ to prosecute the suspect is very much the same as that imposed by section 8 of the 2005 Act in the case of control orders. The sole difference appears to an additional requirement under clause 10 on the chief police officer to report back to the Home Secretary. This duty is in any event an extremely limited one – as Baroness Hale noted in the House of Lords case of *Secretary of State for the Home Department v E and another*, section 8.³⁰

does *not* impose a duty upon the Secretary of State to consider whether there is a reasonable prospect of a successful prosecution; still less does it require her to have formed the view that there is no such prospect. All it does is require her to consult.

For his part, Lord Macdonald described the scrutiny provided by section 8 process as ‘frankly inadequate’ and, in any event, ‘a very different process from positively setting out to build criminal cases against’ those subject to a control order.³¹

33. Clause 11 imposes a new duty on the Home Secretary to keep under review whether conditions C and D are met in the case of each person subject to a TPIMs order. As the explanatory notes make clear, however, this does no more than express in statute what the courts have already required in control order cases since 2006.³² It therefore adds nothing to the existing control order framework.

Clause 12 – Variation of measures

Clause 13 – Revocation and revival of TPIMs measures

34. Section 7 of the 2005 Act gave the Home Secretary the power to revoke a control order, to relax or remove particular obligations under it, or (with the consent of a controllee) modify them. It also dealt with the right of a defendant to seek modification of conditions of a control

³⁰ [2007] UKHL 47 at para 27.

³¹ See n23 above, p10.

³² See n30 above, *ibid*: ‘Nor does section 8 impose an express duty upon the Secretary of State to keep the matter under review. But, as the Court of Appeal held in *Secretary of State for the Home Department v MB* ... para 44, it is implicit in the Act that the Secretary of State must keep the decision to impose a control order under review; and, as the Court of Appeal held in this case, that duty involves her, not only in consulting the police from time to time, but also in sharing such information as is available to her, but may not have reached the police, which is relevant to the prospects of a successful prosecution’.

order from the Home Secretary or, failing that, the court, and the power of the court to make such modifications.

35. Clause 12 deals with the Home Secretary's power to vary measures (including applications to vary), which is largely the same as the process under the section 7, save that it does not provide a process of applying to the court for variation (see section 7(4)). Appeals against variation are instead dealt with by clause 16(2) of the Bill, while appeals against the Home Secretary's refusal to vary or revoke an order are dealt with under clauses 16(3) and 16(4) respectively. Similarly, clause 13(1) gives the Home Secretary the power to revoke a TPIM at any time.

36. A new addition to the existing control order regime is, however, the power of the Home Secretary to revive a TPIM that has expired or been revoked 'if conditions A C and D are met' (clause 13(6)). Indeed, if not expired, it may be revoked and revived multiple times (clause 13(7)(a)), save that the Home Secretary cannot use this power to revive an order where directed by the court (clause 13(8)). A notice that has expired and is then revived has further effect for 1 year (clause 13(9)(b)(i)). A notice that has been revoked runs until it would have expired (clause 13(9)(b)(ii)). Clause 16(1) provides defendants with a right of appeal against revival of a TPIM.

Clause 14 – Replacement of TPIM order that is quashed etc

Clause 15 – Other provision relating to the quashing of TPIM notices etc

Schedule 3 – Appeals against convictions

37. Clause 14 provides the Home Secretary with the power to make a replacement TPIM notice. Replacement notices cannot be extended, if the notice they replace had already been extended. However clause 15(6) allows the Home Secretary to make a fresh TPIM where she reasonably believes the suspect has engaged in further terrorism-related activity, for a further two years.

Clause 17 – Jurisdiction in relation to decisions under this Act

Clause 18 – Proceedings relating to measures

Schedule 4 (proceedings relating to measures)

38. The procedure and jurisdiction provided by clauses 17 and 18 is the same that provided by section 11 of the 2005 Act in relation to control order proceedings. Schedule 4 similarly replicates the provisions to make rules of court for control order proceedings, as currently set out in Part 76 of the Civil Procedure Rules.

Clause 19 – Report on exercise of powers under Act

Clause 20 – Reviews of operation of Act

39. The provisions under clauses 19 and 20 for parliamentary reporting and independent statutory oversight are on the same terms as that provided by section 14 of the 2005 Act.

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