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PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Second Reading briefing on the
Counter-Terrorism and Security Bill in the
House of Lords**

January 2015

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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Introduction

1. This is the seventh counter-terrorism Bill introduced in fourteen years, brought forward against the backdrop of the spread of ISIL in the power vacuum that has developed in Iraq and Syria. Parliament has been asked to approve the Bill – which contains many sweeping and unprecedented new powers for the authorities - on a fast-tracked timetable.

- Part 1 contains a new power for summary passport seizure at ports and borders and an Executive power to invalidate passports and prevent the return of British citizens outside of the jurisdiction;
- Part 2 contains reforms to the TPIMs regime and reintroduces an Executive power to internally exile individuals within the UK for up to two years;
- Part 3 extends the Home Secretary's indiscriminate power to require communications companies to retain additional communications data;
- Part 4 creates a new authority to carry scheme which will, for the first time, forbid airline carriers from taking British citizens and entire categories of nationality in and out of the country;
- Part 5 places a statutory duty on public authorities – including schools, universities, NHS trusts, nurseries and local councils - to prevent terrorism as part of their functions;
- A further significant reform has been included in Part 6 the Bill which amends the *Regulation of Investigatory Powers Act 2000* (RIPA) to allow for the warrantless interception of all post sent within the UK or to and from the UK.

2. Liberty believes that it is the vital task of Government, security and law enforcement agencies to protect life through targeted and effective surveillance, criminal investigations and prosecution. Sadly this Bill ignores reforms that could improve the effectiveness of investigations and prosecutions and continues the discredited trend of unnecessary and unjust blank cheque powers that have the potential to undermine long term security.

Powers to seize travel documents

3. Clause 1, Schedule 1 makes provision for the seizure and temporary retention of passports and travel tickets. Under paragraph 2, a police officer at a port in Great Britain or Northern Ireland would have the power to require a person to hand over travel documents; to search a person for travel documents; to inspect any travel document handed over or found; and, to retain travel documents.¹ This power would be exercisable if the officer has reasonable grounds to suspect that the person is there with the intention of leaving GB/UK for the purpose of involvement in terrorism-related activity outside the UK, or if the person has arrived in GB/NI with the intention of leaving the UK soon for that same purpose.² A police officer would also be able to direct a customs or immigration officer to exercise those powers.³ The police officer must then either ensure that the documents are returned or seek authorisation from a senior police officer to retain the documents.⁴ Authorisation need not be in writing and may be granted if there are reasonable grounds for the suspicion that the individual is leaving or soon will leave the UK for involvement in terrorism-related activity.⁵

4. If an authorisation is granted, the police officer would be able to retain the documents for 14 days while consideration is given to further action.⁶ After 72 hours of retention, a review of whether the authorisation was flawed would take place. The outcome of this review would be passed to the Chief Constable of the officer who requested the authorisation, who is entitled to take “whatever action seems appropriate”.⁷ At the end of 14 days, the documents may be further retained on application to a Magistrates Court, where an extension may be granted to take the total retention period up to thirty days.⁸ The judge must grant an extension if satisfied that those “*persons responsible for considering the possibility of taking additional disruptive action (and taking steps in relation to that) have been acting diligently and expeditiously in the investigation*”.⁹ The draft Code of Practice further makes clear that the court must not examine the merits of the exercise of power nor review the officer’s decision to exercise. The person concerned may make oral or written representations to the court and may be legally represented at the hearing,¹⁰ however the

¹ Schedule 1, paragraph 2(5)

² Schedule 1, paragraph 2(1) and 2(2)

³ Schedule 1, paragraph 2(3)

⁴ Schedule 1, paragraph 4(1)

⁵ Schedule 1, paragraph 4(7)

⁶ Schedule 1, paragraph 5(1).

⁷ Schedule 1, paragraph 6(4)

⁸ Schedule 1, paragraph 8(1)

⁹ Draft Code of Practice for Officers exercising functions under Schedule 1 of the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents.

¹⁰ Schedule 1, paragraph 9(1)

judge may exclude the person or their representative from any part of the hearing and on application from the senior police officer concerned order that information is withheld from the individual and their representative.¹¹

5. The power can be used multiple times against the same person but where the powers in Schedule 1 have been exercised against the same person on two or more occasions in the previous six months, the 14 day retention period will be reduced to five days.¹² It will be a criminal offence not to hand over travel documents or to obstruct or frustrate a search for travel documents.¹³ The power can be used against a UK national or a non-UK national¹⁴ and the Bill makes provision for the Home Secretary to provide those affected with food, accommodation and a defence to an immigration offence, presumably with foreign nationals in mind.¹⁵ There is also no age restriction on the power making it available for use against children, including foreign national children who may be traveling unaccompanied.

6. For the reasons herein, Liberty believes that this power should be removed from the Bill. The Government has failed to make a convincing case for summary passport seizure which has the potential to operate in a discriminatory and arbitrary manner akin to discredited stop and search. The interference with the rights of those subject to this power will be all the greater, given that it will prevent travel, potentially interfering with important aspects of private and family life. It will leave non-nationals particularly vulnerable, possibly destitute. In its place, Liberty proposes a provision which would remove the current bar on police bail following arrest on suspicion of terrorism, thereby allowing passport as a condition of police bail for those suspected of terrorism, but requiring the authorities to arrest and interview suspects first.

Discriminatory and ineffective

7. Stop and search powers have an uncomfortable history on the UK's statute books. Evidence overwhelmingly demonstrates that these type of powers are both framed and exercised in an overly-broad, discriminatory and ineffective manner. In its 2010 report into stop and search, the Equalities and Human Rights Commission recorded that "*since 1995, per head of population in England and Wales, recorded stops and searches of Asian people*

¹¹ Schedule 1, paragraph 10(2)

¹² Schedule 1, paragraph 13(1)

¹³ Schedule 1, paragraph 15

¹⁴ Schedule 1, paragraph 1(7)

¹⁵ Schedule 1, paragraph 14

have remained between 1.5 and 2.5 times the rate for White people, and for Black people always between 4 and 8 times the rate for White people.”¹⁶

8. Under the broad stop and search power formerly contained in section 44 of the *Terrorism Act 2000*, Black or Asian people were between five and seven times more likely to be stopped, and while this power was used to stop hundreds of thousands of people over its decade of existence, including journalists and peaceful protesters, none of them were ever convicted of a terrorism offence.¹⁷ The power was found to be unlawful by the Court of Human Rights, which found that section 44 breached the right to private life under Article 8 of the Convention and held that the potential for discriminatory use was “a very real consideration”.¹⁸ The power was subsequently repealed.

Arbitrary power

9. While the purported threshold for requesting papers or conducting a search will be “reasonable suspicion”, evidence demonstrates that in practice this offers little protection against arbitrary use of power. Stops under section 1 of the *Police and Criminal Evidence Act 1984* must be on the basis of reasonable suspicion, and yet HMIC recently recorded that in 27% of records they examined this standard was not met.¹⁹ In the immigration context in particular, dubious guidance states that “reasonable suspicion” can be inferred from what seems to be normal behaviour. At Chapter 31 of the Home Office Enforcement Instructions and Guidance, the Department sets out the grounds on which it believes that reasonable suspicion can be formulated:

“Reasonable suspicion that an individual may be an immigration offender could arise in numerous ways but an example might be where an individual attempts to avoid passing through or near a group of IOs who are clearly visible, wearing branded Home Office clothing, at a location which has been targeted based on intelligence suggesting that there is a high likelihood that immigration offenders will be found there. This behaviour could not necessarily be considered to be linked to, for example, evading payment of the train fare if IOs are wearing vests or other items of work wear which clearly show which agency they belong to. In such circumstances the IO could legitimately stop the

¹⁶ Equalities and Human Rights Commission, *Stop and Think: A critical review of stop and search powers in England and Wales*, page 9.

¹⁷ See <https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/stop-and-search/section-44-terrorism-act>

¹⁸ *Gillan v UK*, (Application no. 4158/05), European Court of Human Rights, paragraph 85

¹⁹ HMIC, *Stop and Search Powers: Are the police using them effectively and fairly?*, page 6.

*individual and ask consensual questions based on a reasonable suspicion that that person is an immigration offender.*²⁰

With such lax rules in place, everyone becomes a suspect. The explanatory notes state that border force and immigration officers will have a one off staff training course lasting 1-3 hours.

10. There is little indication that the random nature of stop and search, even with purported reasonable suspicion, yields effective results. Her Majesty's Inspectorate of Constabulary recorded that most years since 2001 there have been over one million people stopped and searched, with only 9% subsequently arrested.²¹ Where the sanction is removal of passport, this fail rate is surely far too high. In addition to risking injustice on the individuals concerned, this type of approach will also serve to perpetuate a climate of fear and suspicion rather than encourage good relations between different communities within British society. The Home Secretary recently recognised the hugely prejudicial nature of stop and search powers and has sought to scale back their use. She stated: *"Nobody wins when stop and search is misused. It can be an enormous waste of police time and damage the relationship between the public and police."*²² It appears odd, then, to legislate for this new stop and search type power when the problems it causes are clearly identified and it is contrary to the Home Secretary's stop and search policy away from the borders.

Weak safeguards and secret courts

11. The requirement that after 72 hours a senior police officer must conduct a review of the authorisation is not an effective safeguard. Travel will have already been prevented, possibly at huge cost to the individual concerned, and even if the review concludes that the authorisation should not have been granted, there is no requirement to return the passport to the individual concerned. This means that in the face of unlawful action by the police or immigration staff, there is no redress for the individual affected nor any way to guarantee that documents are returned with immediate effect. In addition, there is no limit on the amount of time the review may take.

²⁰ Home Office Enforcement Guidance and Instructions, paragraph 31.19.4.

²¹ Ibid, page 3.

²² See <https://www.gov.uk/government/news/stop-and-search-theresa-may-announces-reform-of-police-stop-and-search>

12. Even more worrying is the purported judicial involvement which extends closed material procedures to proceedings in the Magistrates court for the first time. In determining whether a passport seizure can be extended for a further 14 days, a Magistrate can be required to exclude the individual concerned or their legal representative from the hearing or prevent them from seeing any purported evidence. In any event, the protection offered by this judicial process is meaningless, the Magistrate is only asked to determine whether those deciding on further action are acting expeditiously and diligently. This is not something that can be effectively challenged by the other side, even less so when they are shut out of the hearing. This fig leaf of judicial involvement co-opts the Court into a fundamentally unfair process and undermines the important role our courts play in upholding justice. It will also continue the damaging spread of secrecy into the justice system.

Already existing power of arrest

13. Liberty recognises that there will be situations in which it is necessary to prevent a person from leaving the country. However the police already have a tried and tested way to prevent a whole range of suspects from leaving the country – the power of arrest. Under section 41 of the *Terrorism Act 2000* the police have the power to arrest without warrant someone *reasonably believed to be a terrorist*.²³ The broad definition of “*terrorist*” is contained in section 40 and section 1 of the Act. Arrest on suspicion of terrorism under section 41 triggers the potential for someone to be detained for up to 14 days pre-charge. In the ordinary course of things, the police have the power to release a suspect on conditional bail following arrest if there is insufficient evidence to charge. Police bail conditions can include passport surrender as well as a host of other restrictions including curfew, restrictions on contact, reporting requirements etc. However, currently, bail following arrest for an offence in the *Terrorism Act 2000* cannot be granted by police.

14. Liberty has long recommended that this bar on police bail in terrorism cases should be removed and it would be much simpler to include such a provision in this Bill rather than this convoluted passport detention scheme. This approach would deliver the same practical result as the Government seemingly wishes to achieve – preventing people suspected of terrorism leaving the country – but does so in a way that requires much greater discipline on

²³ In addition to the power of arrest, section 43 of the 2000 Act also provides a power of stop and search on reasonable suspicion of terrorism. Similarly, Schedule 7 of the Act, which applies at ports and borders, allows for an examining officer (constable, immigration officer or customs officer) to stop, question and detain someone for the purposes of determining whether they are a terrorist in circumstances where no individual suspicion exists.

the part of the authorities and provides better guarantees for keeping the rest of the population safe.

15. An amendment to replace the passport seizure power with a new power to allow for police bail in terrorism cases was tabled by Dr Caroline Lucas MP at Committee Stage of the Bill in the House of Commons and debated. However Home Office Minister, James Brokenshire MP, appeared to misunderstand the purpose and effect of the amendment – commenting only that the Government prefers a system of extended pre-charge detention for arrested terrorism suspects over a system of police bail. However, introducing police bail in terrorism cases would not override the extended pre-charge detention regime available for terrorism suspects under the 2000 Act. It would instead complement it: allowing conditional police bail, including passport surrender, to be imposed at whatever point a suspect may be released – if indeed they are at all – pre-charge. This was lost on the Minister who said only–

“To grant bail as the hon. Lady would want to, and at the stage she would want to when significant parts of an investigation are still ongoing, would increase the risk of potentially dangerous individuals being released before they have been sufficiently investigated. This is a risk the Government are not prepared to take.”²⁴

16. In mistakenly treating the police bail model as an alternative to extended pre-charge detention, the Minister points to the risks of terrorism suspects being left at large in the community. In so doing he argues against his own proposed passport seizure power which would leave suspects at large without even requiring their arrest. Using the power of arrest also sends a very clear message to those who may be considering leaving the country to participate in terrorism that such an action is exceptionally grave, criminal, and will be treated with the utmost seriousness. For some susceptible individuals on the fringes of extremist activity, this strong message may be sufficient to make them reconsider their plans. The message sent by passport confiscation is significantly weaker.

Temporary Exclusion from the United Kingdom

17. On 1st September the Prime Minister announced that the Government would bring forward a *“discretionary power to allow us to exclude British nationals from the UK.”*²⁵ Following widespread criticism of this proposal, the Government has since stressed that it

²⁴ Hansard, 15 Dec 2014: Column 1189.

²⁵ Hansard 1 Sep 2014: Column 26.

seeks only to “*control the return of a UK citizen*”.²⁶ The confused policy which has emerged in this Bill offers the worst of both worlds – granting the Executive an odious power of exile while not guaranteeing the “controlled return” of those made subject to Orders.

18. Part 1, Chapter 2 of the Bill sets out a mechanism for executive imposed invalidation of the passports of those outside of the UK. Temporary Exclusion Orders (TEOs) would be imposed where the Home Secretary “reasonably suspects” an individual outside the UK is or has been involved in activity related to terrorism.²⁷ TEOs can be imposed on anybody with a right of abode in the UK, and they would invalidate a British passport. A TEO prevents an individual from returning to the UK unless he is deported by the State in which he is currently located, or he obtains a permit to return. TEOs last for renewable periods of 2 years. Although there is a requirement that individuals be notified of the imposition of a TEO, there is no detail about how notice of exile would be served and the practical reality of alerting an individual who may be in a country in the midst of internal armed conflict is not addressed. A permit to return (“a permit”) is required to re-enter the UK. Permits are issued by the Home Secretary. She would be required to issue one where an individual is subject to deportation, she may further issue one on her initiative where she considers that the urgency of the situation renders it expedient.²⁸ Otherwise an application for a permit must be made by the individual. The Secretary of State is only obliged to issue one if an individual attends a specified interview. The permit must make specific provision about the time, manner and place of return. Return must be facilitated within a “reasonable time” following an application.²⁹ The term “reasonable time” is left open to interpretation: there is no time limit. If an individual subject to a TEO is granted a permit, on returning to the UK the Secretary of State may place the individual, by notice, under obligations to report to a police station, attend appointments and give address details (“section 8 obligations”). It is an offence to attempt to re-enter the country in breach of a TEO (i.e. without a permit) or to breach any section 8 obligation.³⁰

19. For reasons explained herein, Liberty is wholly opposed to the TEO. We believe the measure will violate a fundamental common law right, is incompatible with the European Convention on Human Rights as incorporated by the *Human Rights Act 1998* (HRA), will undermine security and breach international law. We have therefore suggested its deletion

²⁶ Home Secretary, Speech on Counter-Terrorism, 24th November.

²⁷ Sub-clause 2(3). Terrorism-related activity is defined at sub-clause 11(4) as the commission, preparation or instigation of terrorist acts, conduct that facilitates or encourages such commission, preparation or instigation or conduct that provides support or assistance to somebody known or believed to be involved in the commission, preparation or instigation of terrorist acts.

²⁸ Sub-clause 6(2).

²⁹ Sub-clause 5(3).

³⁰ Sub-clause 9(1).

from the Bill and replacement with an alternative model of notification of return, tabled by the Labour front bench and Dr Caroline Lucas MP at Committee Stage in the Commons. Our suggested alternative would empower the Home Secretary to require carrier(s) to notify the authorities of named individuals' return travel, while not preventing individuals from returning to the UK. The result would ensure the British authorities have advance knowledge of suspects' travel plans so that arrangements can be made for police interview or arrest at the port or border immediately on their return to the UK. This would allow the UK to comply with its international obligations and mitigates the risk of British citizens being pushed further towards terror factions or detained and subjected to torture and inhumane and degrading treatment while trapped abroad.

20. It has been suggested that the TEO could be improved by making its imposition conditional on High Court approval and permitting the right of appeal. Co-opting the judiciary into an inherently unfair exile power will not deliver the safeguards required. While Executive-imposed sanctions are objectionable per se, involving the Court will not satisfy the substantive problem with the TEO; an exile power which risks making British citizens vulnerable to torture and inhumane and degrading treatment and other human rights abuses abroad. In addition, the practical ability of individuals to challenge the imposition of a TEO from outside the jurisdiction is highly dubious and the effectiveness of any challenge would be negligible given that 'evidence' disclosed in a closed material procedure is not grounded in verifiable fact – it can be based on unchallenged hearsay, conjecture and intelligence obtained by torture elsewhere in the world.

TEO is a "draconian and unusual power"

21. As former Attorney General, Dominic Grieve QC MP, pointed out during Second Reading *"it is a fundamental principle of the common law in this country than an individual, unconvicted – the presumption of innocence applies – should be free to reside in his own land. The principle of exile, as a judicial or even administrative tool, has not been tolerated in this country since the late 17th century...what is proposed, even if exclusion is on a temporary basis, is a draconian and unusual power being taken by the State. The point has been made that the proposal could be in breach of our international legal obligations by rendering a person stateless."*³¹ By contrast, the alternative notification model that we propose would not override the common law right to reside and does not pose any problem for our international law obligations.

³¹ Hansard, 2 Dec 2014: Col 228.

TEO will violate human rights

22. The Bill is silent on the fate of individuals in the period between the imposition of a TEO and the granting of a permit (assuming a permit is ultimately granted). Further the Government explicitly proposes to use the power against individuals located in jurisdictions widely known to practice the torture of terrorism suspects. Liberty considers it a very real possibility that those whose passports are invalidated and become caught up in the permit application process will be held in detention by a host state such as Turkey or Kenya. On 9th December during a joint press conference with the Turkish Prime Minister, Prime Minister David Cameron MP said *“we’re working as closely as we possibly can and the [Turkish] prime minister and I have agreed that we should exchange even more information, we should co-operate more in terms of intelligence, we should work hand in glove because the people who are travelling, whether from Britain or elsewhere, sometimes through Turkey, sometimes in other ways to Syria and Iraq, these are people who threaten us back at home so we should do everything that we can and we’ve had very productive discussions today”*.³² In its latest report on Turkey, the UN Committee Against Torture wrote:

*“The Committee is gravely concerned about numerous, ongoing and consistent allegations concerning the use of torture, particularly in unofficial places of detention including in police vehicles, on the street and outside police stations...”*³³

Of Kenya, the UN Committee Against Torture wrote:

*“the Committee notes with deep concern the numerous and consistent allegations of widespread use of torture and ill-treatment of suspects in police custody.”*³⁴

Those in the hands of the Turkish, Kenyan and many other “partner” agencies will be vulnerable to torture. The TEO policy carries clear echoes of the worst excesses of the War on Terror, by quietly bolstering alliances with regimes that routinely flout international law through torture and the inhumane and degrading treatment of detainees.

23. The prohibition on torture, inhuman and degrading treatment, as protected under the HRA is absolute. Just as the Government is prevented from deporting foreign nationals in circumstances where there is a real risk of torture, inhuman and degrading treatment; Executive invalidation of a passport which prevents a British citizen returning from a foreign country where they face a real risk of torture will breach the State’s human rights obligations.

³² David Cameron and Ahmet Davutoglu press conference in Turkey, 9 December 2014, available at - <https://www.gov.uk/government/speeches/david-cameron-and-ahmet-davutoglu-press-conference-in-turkey>

³³ UN Committee Against Torture Report, Forty-fifth session, 1–19 November 2010, paragraph 7.

³⁴ UN Committee Against Torture Report, Forty-first session, 3-21 November 2008, paragraph 13.

TEO undermines security

24. The TEO scheme involves a period of enforced residence in a foreign jurisdiction. This could be any country in the world and in the short to medium term the power is likely to be used against British citizens present in countries such as Turkey, Iraq, Kenya, Sudan, Somalia, Syria, Algeria, Mali, Nigeria. It is difficult to see how a proposal which temporarily traps an individual in a region where jihadi groups have a strong presence will further the core objective identified to the ISC by SIS of breaking the link between UK extremists and terror groups in foreign countries.³⁵ Those who are equivocal are more likely to be pushed towards terrorist factions by the imposition of Executive led punishments and enforced periods in close proximity to such groups. As Chris Bryant MP pointed out at Second Reading of the Bill *"[TEO's] would, in effect, result in the exile – albeit short-term and temporary – of British citizens, in many cases to other countries. All history suggests that such action further radicalises people and makes them more dangerous enemies to this country."*³⁶

25. If the ultimate objective of the Government is to exclude citizens it believes to be dangerous by reintroducing a form of medieval exile, the policy will not assist. A determined terrorist seeking to plot murder and mayhem is unlikely to be phased by the prospect of an interview prior to return to the UK. Provided he attends, the Home Secretary is obliged to issue a travel document. A stipulation that he return on a certain flight to a certain airport, will ensure that the Agencies and police know of the time, date and location of an individual's return should they wish to surveille, interview and arrest him, but the same outcome is achieved through placing a simple notification requirement on carriers via the NMRO scheme. Those who threaten our security do not respect national borders and violent crimes can be plotted, terrorist training gained, the aims of terrorist organisations furthered by an individual regardless of whether they have a valid British passport or Home Secretary authorisation to travel. Draconian immigration or travel measures will never provide an answer to sophisticated networks of ideologically driven criminality. While dangerous terrorists will remain a threat to this country wherever in the world they are, they are far more likely to be brought to justice if they are allowed to return.

TEO violates international law

26. A policy which prevents British citizens from returning to this country, for any period, risks abrogating the UK's legal obligations and making British citizens de facto stateless. As

³⁵ Intelligence and Security Committee of Parliament, *'Report on the intelligence relating to the murder of Fusilier Lee Rigby'*, para 61.

³⁶ Hansard, 2 Dec 2014: Column 210.

ISC member, Sir Menzies Campbell MP, highlighted at Second Reading *“I confess that I am by no means convinced of the legality of what is being suggested under TEOs...what is the position of someone who declines to accept conditions of return and who is not subject to deportation by the country in which they temporarily find themselves? Are they not de facto stateless in such circumstances?”*³⁷ Indeed, during the period between passport invalidation and the conditional return date, the individual is – for all practical purposes – stripped of citizenship. By contrast, the notification model evades the risk of breaching international law by ensuring that those named in an Order are permitted to return home, and if necessary, face justice here.

A TEO may prevent “controlled return”

27. At Second Reading the Home Secretary frequently sought to stress that the TEO simply ensures *“we would be aware of [an individual’s] return, be able to manage that return and, as I have indicated, take appropriate action when they return to the UK”*.³⁸ However a TEO does not simply control the manner of return. Instead it may prevent an individual’s return altogether, either through choice or circumstance. “Controlled return” will not be possible for those who may be practically unable to apply for a permit, such as those without sufficient money or means; those being controlled by another; or those resident in a failed or failing State. A permit may further be refused to a person who fails to attend an interview, whether by accident or design. In all these circumstances a TEO may result in the authorities’ loss of intelligence about suspects’ whereabouts and their ‘control’ of the situation. By contrast, the notification model would ensure that individuals arrive back in the UK at a time, date and location of which the authorities have knowledge, giving law enforcement much better capacity to assess and ‘control’ any threat posed.

28. The Home Secretary attended the Commons Committee Stage to debate the TEO but she failed to answer the many criticisms of her proposal and the problems identified here have not been refuted by the Government. If anything, the Home Secretary’s comments at Committee served to increase concerns that the TEO scheme will expose individuals to mistreatment or torture. When asked about the capacity of the TEO to make people vulnerable to rights abuses she said only that *“consular facilities would be available to them”* and later explained that *“if an individual subject to an order attempts to travel to the UK, we will work closely with the host country and consider appropriate action”*. The Home Secretary also repeatedly made the statement that *“British nationals...have the right – which their*

³⁷ Hansard, 2 Dec 2014: Column 211.

³⁸ Hansard, 2 Dec 2014: Column 211.

*citizenship guarantees – to return to the UK.*³⁹ It is bizarre and misleading for the Home Secretary to repeatedly assert the right to return in defence of a scheme that will create a potentially fatal obstacle to its effective exercise.

Terrorism Prevention and Investigation Measures (TPIMs)

29. Part 2 covers reforms to the TPIMs regime and introduces some new and some old measures. The controversial legislation, due to expire in 2016, already allows the Home Secretary to impose a wide range of punitive restrictions on individuals, entirely outside of the criminal justice system, on the basis of reasonable belief of their involvement in terrorism-related activity. These include overnight curfews, exclusion from certain places or buildings, restrictions on travel, meetings, work, study, contact with others, use of phones, computers etc, access to financial services, daily reporting at a police station and GPS monitoring.

30. Clause 12 amends the ‘overnight residence measure’ and would allow the Home Secretary to require individuals to live in a residence and locality in the UK that she considers appropriate.⁴⁰ This power will allow individuals to be removed from their family and community and placed in effective isolation in a town or city that they may have never been to. It was a feature of the old Control Order regime and, for obvious reasons, was its most punishing and unjust measure. In a number of cases before the regime’s demise, the courts quashed control orders or found them to be unlawful on the basis that internal exile, in conjunction with other restrictions imposed, amounted to a violation of Article 5 of the European Convention on Human Rights (ECHR) as incorporated by the *Human Rights Act 1998* (HRA). In the leading Supreme Court case on the issue in 2010, a control order imposing a 150 mile relocation requirement and a 16 hour curfew was ruled unlawful as a result of the detainee’s dramatically reduced contact with family and severe social isolation. This judgment confirmed that the decision as to whether an order is lawful will turn on the impact of the overall package of measures on a detainee.⁴¹ In another relocation case that reached the High Court in 2010, the Court upheld an appeal against an order that also

³⁹ Counter-terrorism and Security Bill, Committee Stage Debate, Hansard, 15 December 2014 at column 1206 by the Home Secretary.

⁴⁰ Under the Bill’s provisions, if an individual has a residence at the time when the TPIM is served then the Home Secretary cannot move them further than 200 miles from their residence without the individual’s agreement. It is unclear when an individual will be deemed to have their own residence – whether they have to own their own property or whether a tenancy counts.

⁴¹ AP [2010] UKSC 24.

included a 150 mile relocation requirement and had the effect of separating a man from his wife and two children.⁴² In this case Mr Justice Mitting further ruled, on the basis of evidence provided by the detainee's wife, that the threat he posed would actually be reduced if he were able to remain with his family. Re-introduction of the relocation requirement will undoubtedly result in more unjust, counterproductive and unlawful orders being imposed. The security risk of leaving those suspected of terrorist intent in the community and antagonising and punishing them with enforced separation from their families is clear. Renewed legal challenges to the system of internal exile will come at considerable cost to the public purse.⁴³ Following a judgment of the Court of Appeal in 2010, it is also possible that those whose orders are quashed may be able to claim compensation.⁴⁴

31. Clause 13 extends "travel measures". These can currently be imposed by the Home Secretary to prevent people leaving the UK, Great Britain or Northern Ireland but clause 13(5) amends this to include "*any area within the UK that includes the place where the individual will be living*". This power will prevent individuals from leaving their immediate locality – the geographical extent of the power is left undefined. Clause 13 further removes the defence of 'reasonable excuse' for those who breach TPIMs by leaving the UK and increases the maximum sentence for breach to 10 years imprisonment. Criminalisation of those that breach an Executive imposed civil sanction turns our justice system on its head. This was recognised by the jury who heard the criminal case brought against Cerie Bullivant, prosecuted for seven control order breaches after he went on the run.⁴⁵ The jury acquitted him on all charges. A ten year prison sentence is longer than those routinely handed down to serious violent offenders. It will be available for those who may never have been arrested, let alone convicted for a terrorism offence.

⁴² CA v Secretary of State for the Home Department [2010] EWHC 2278.

⁴³ The Joint Committee on Human Rights reported in 2010 that approximately £13m was spent on control orders between 2006 and 2009 *excluding the cost of policing, court hearings, legal representation of controlled persons and other administrative costs*. See Joint Committee of Human Rights Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010. Ninth Report of Session 2009-2010 (HL Paper 64; HC 395) (26 February 2010) (TSO: London). Accessed at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf>.

⁴⁴ AN & Others [2010] EWCA Civ 869.

⁴⁵ Cerie Bullivant has written and spoken of his experiences as a contolee. See Annexure Two of Liberty's submission to the Home Office Counter Terror Review, From War to Law, available at <https://www.liberty-human-rights.org.uk/sites/default/files/from-war-to-law-final-pdf-with-bookmarks.pdf>. See also "*Like Mohammed Ahmed Mohamed, I went on the run as a 'terrorist'*", 8 November 2013, <http://www.theguardian.com/commentisfree/2013/nov/08/mohammed-ahmed-mohmed-on-the-run-security-services>.

32. Clause 14 adds a “weapons and explosives measure” which empowers the Home Secretary to prohibit a TPIM subject from making an application to police for a firearms certificate and possessing offensive weapons, imitation firearms and explosives. It is entirely sensible that people the authorities suspect of involvement in terrorism do not have access to firearms but it is also a revealing indictment of the internal chaos of the regime and lack of monitoring that the Home Secretary fears a firearms certificate may be granted by police. Clause 15 adds an “appointments measure” to the range of TPIMs restrictions available. The Home Secretary will have the power to require that an individual attends appointments with specified persons and complies with her “reasonable directions” relating to matters that are the subject of the appointment.

33. Clause 16 raises the threshold for imposing a TPIM from “reasonably believes” to “is satisfied on the balance of probabilities” of past or current involvement in terrorism-related activity. This is a minor concession. The explanatory notes state that the Government considers that the balance of probabilities threshold has been met in all TPIMs cases to date. However, the secrecy that engulfs the system means that wherever the threshold is set, the ‘evidence’ justifying imposition is not subject to effective challenge and there is no requirement for it to be grounded in verifiable fact – it can be based on unchallenged hearsay, conjecture and intelligence obtained by torture elsewhere in the world.

34. On any objective assessment control orders and TPIMs have failed as a public policy measure. Far from being a ‘temporary but necessary’ central plank of our counter-terror strategy, the measures have been circumvented by some and have acted as a visible symbol of injustice and cause of resentment for others. They have been relatively little used as a result of human rights rulings in the courts and they have never led to a terrorism-related prosecution. In January this year the JCHR said “*we are left with the impression that in practice TPIMs may be withering on the vine as a counter-terrorism tool of practical utility*” and recommended that the next Government urgently review the powers to allow “*Parliament to make a fully informed decision about the continued necessity of the powers at that time*”.

Unsafe

35. TPIMs undermine security by acting as an impediment to prosecution. In 2010/2011 former DPP, Lord Macdonald QC oversaw the Home Office review of counter-terrorism and security powers and concluded -

“The evidence obtained by the Review has plainly demonstrated that the present control order regime acts as an impediment to prosecution. It places those suspected of involvement in terrorist activity squarely in an evidence limbo: current control powers can relocate suspects and place them under curfews for up to 16 hours a day, they can forbid suspects from meeting and speaking with other named individuals, from travelling to particular places, and from using telephones and the internet. In other words, controls may be imposed that precisely prevent those very activities that are apt to result in the discovery of evidence fit for prosecution, conviction and imprisonment.”⁴⁶

He further reported -

“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.”⁴⁷

It was claimed that TPIMs would better reconcile the public policy aim of prosecution with preventative detention. However the JCHR reported earlier this year that it *“failed to find any evidence that TPIMs have led in practice to any more criminal prosecutions for terrorism suspects.”⁴⁸* In their view TPIMs are not investigatory in meaningful any sense and they recommended that their name should be changed as the *“epithet ‘TPIMS’ is a misnomer”*.

Creating conditions for alienation resentment, and radicalisation

36. TPIMs can have a devastating impact on those subject to them and their families and can undermine long-term security by alienating communities and the next generation. The JCHR has highlighted evidence provided by Cage Advocacy on the impact of TPIMs. In particular that detainees and their families were reporting a heightened sense of hopelessness, isolation and worthlessness; poor communication between government agencies made prolonged unemployment amongst detainees inevitable; police heavy handed responses to unintentional technical breaches re-traumatised family members; measures were having a profoundly detrimental impact on detainees and families mental health including severe depression, anxiety and trauma and seriously damaging relationships. The JCHR was particularly concerned about *“the significant impact of TPIMs*

⁴⁶ Review of Counter-terrorism & Security Powers, A Report by Lord Macdonald of River Glaven, QC, January 2011, page 9, available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97971/report-by-lord-mcdonald.pdf.

⁴⁷ Ibid.

⁴⁸ Ibid at footnote 47.

*upon [family members] and the risk of creating new generation susceptible to the influence of extremist narratives.*⁴⁹

37. As well as impacting family members, TPIMs are made against those that pose no direct threat to the British public, exacerbating the potential for increased alienation and radicalisation. Following the TPIM absconds in 2012 and 2013 the Home Secretary made clear in her respective statements just how loosely the measures are applied. Parliament was told that the first abscondee was “*not considered to represent a direct threat to the British public. The TPIM notice in this case was intended primarily to prevent fundraising and overseas travel*”⁵⁰ and in relation to the second abscondee that “*the police and security service have confirmed that they do not believe [he] poses a direct threat to the public in the UK. The reason he was out on a TPIM in the first place was to prevent his travelling to support terrorism overseas*”.⁵¹

Data Retention

38. Part 3 of the Bill amends the *Data Retention and Investigatory Powers Act 2014* agreed between the leaders of the three main parties in July and pushed through Parliament in under a week. It amends section 2(1) of the Act to extend the Home Secretary’s blanket power to require communications companies retain communications data held for billing purposes for 12 months and gives her the power to require retention of “*relevant internet data*”. Relevant internet data is defined as data which “*relates to an internet service or an internet communications service, may be used to identify or assist in identifying, which internet protocol address or other identifier belongs to the sender or recipient of a communication and is not data which (i) maybe used to identify an internet communications service to which a communication is transmitted through an internet access service for the purpose of obtaining access to or running a computer file or program and (ii) is generated or processed by a public telecommunications operator in the process of supplying the internet access service to the sender of the communication*”. This power is being claimed to help link the unique attributes of an IP address to the person or device using it at any given time. The definition given to “*internet data*” includes data required to identify the sender or recipient (which could include identification and storage of email addresses; port numbers; usernames); the time and duration of communications; the type, method or pattern of a communication; the telecommunications system used or the location of such a

⁴⁹ Ibid, para 78.

⁵⁰ HC Deb 8 Jan 2013 col 161

⁵¹ HC Deb 4 Nov 2013 col 23.

telecommunications system. We understand that the definition specifically excludes the retention of web logs (e.g. the specific internet pages that individuals are viewing). Part 3 is due to expire at the end of 2016 at the same time as the DRIPA.

39. It is unclear from the broad drafting of the provisions and the pithy explanatory notes whether this power would permit full deep packet inspection (i.e. interception) of all UK communications in order to identify and retain the identifying data sought. If it does, the power in the Bill will be a lot closer to the Snoopers' Charter legislation previously rejected by Parliament following pre-legislative scrutiny in 2013.⁵²

40. What is clear is that the approach taken in the legislation mirrors the blanket powers sought under DRIPA which replicated powers previously ruled unlawful by the European Court of Justice in the Digital Rights Ireland case in April this year.⁵³ The Court held that indiscriminate powers to require the retention of the communications data of the entire population amounted to a violation of privacy rights. The Court set out criteria for compliance with fundamental rights standards and made clear that such powers needed to be linked to suspicion of serious criminality and subject to geographical and time limits. DRIPA is currently being challenged by way of a judicial review claim brought by MPs David Davis and Tom Watson.⁵⁴

41. Part 3 will, for the first time, allow the State to require British communications service providers to retain communications information on the British population that they don't already retain for billing purposes, just in case that information is in future useful for law enforcement. This is a major step change in relationship between the individual and the State. It is an abdication of constitutional responsibility for the Executive to seek to rush through further surveillance legislation without a proper explanation of the terms and definitions used, the technical capacity it will create and its practical impact.

Authority to carry

⁵² Report of the Draft Communications Data Bill Committee, 12 December 2012, available at - <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtdraftcomuni/79/7902.htm>.

⁵³ *Digital Rights Ireland (C-293/12) and Seitlinger and Others (C-594/12)*

⁵⁴ Liberty represents MPs David Davis and Tom Watson in legal challenge to Government's "emergency" surveillance law, available at - <https://www.liberty-human-rights.org.uk/news/press-releases/liberty-represents-mps-david-davis-and-tom-watson-legal-challenge-government%E2%80%99s->

42. Part 4 of the Bill repeals existing powers permitting the creation of authority to carry scheme set out in the *Nationality, Immigration and Asylum Act 2002*. Replacement provision allows for the creation of authority to carry schemes which apply in relation to both inbound and outbound flights and to British citizens as well as foreign nationals. As under the old scheme, the Secretary of State can prescribe that all carriers, or certain categories of carrier, must seek her permission before carrying all passengers or a sub-class defined on grounds such as nationality.⁵⁵ In a departure from the old scheme the new provision allows the Home Secretary to earmark whole categories of passenger for refusal of authority-to-carry where “necessary in the public interest”.⁵⁶ Clause 18(5) further requires the Home Secretary to detail how requests for authority are made by carriers and answered by the Secretary of State, this may include a requirement to provide information at a specified time prior to an individual’s travel and to require carriers to provide or receive information in a particular manner or form.⁵⁷ The information that may be required under an authority-to-carry scheme includes all passenger information held by carriers (e.g. names, travel information, payment details, meal requirements) lists of passengers travelling and information relating to the journey itself. Provision is made for information to be supplied to the Home Secretary, an immigration officer or the police.⁵⁸

43. The detail of the scheme or schemes the Secretary of State may seek to create is left to secondary legislation. Carriers who convey without seeking authority (where required) or who convey an individual after authority has been denied face civil penalties to be set out in regulations.

44. Liberty does not object to a system which requires carriers to notify the authorities in this country when named suspects seek passage to or from the UK, we further do not object to a requirement that this happen prior to travel. Intelligence gathering in a world where travel is easy and terrorist groups operate in sophisticated international networks, knowledge of the movements of suspect is a vital piece of the intelligence picture, which requires the co-operation of carriers. We are deeply concerned, however, about measures which involve casting suspicion on entire classes of people on the basis of features such as nationality, or potentially religion. This is not targeted surveillance of suspect individuals: it is crude stereotyping. It is particularly concerning to see a provision which allows the Home Secretary to

⁵⁵ Sub-clause 18(2)(b).

⁵⁶ Sub-clause 18(2)(c).

⁵⁷ Sub-clause 18(5).

⁵⁸ In accordance with powers set out at sub-clause 18(6).

designate whole categories of individual as “*categories in respect of whom authority may be refused*”.⁵⁹ It is hard to see how this policy could be operated without serious discriminatory impact, creating feelings of marginalisation and alienation amongst targeted communities.

45. For the same reasons that Liberty objects to TEOs which prevent, at least temporary, re-entry into the country, we have serious concerns about authority-to-carry schemes in so far as they prevent travel temporarily or permanently (where authority is refused). For those individuals genuinely suspected of seeking to travel abroad to engage in terrorist activity, the appropriate response is not passport seizure, nor is it requiring a carrier to refuse passage. The only effective response is notification by carriers that an individual seeks to travel, to facilitating ongoing surveillance and investigation or arrest. Forcing a hostile individual to remain in this country, but refusing to deal with him through the criminal justice system is obviously dangerous. Similarly trapping a dangerous British citizen outside of the UK will not neutralise their criminal intent. Simply preventing travel is not the answer. The system as described is likely to be operated in a lax and ill-targeted way, catching and arbitrarily punishing many innocent people on grounds as crude as nationality. For the genuinely dangerous, the most that will be achieved is temporary frustration: the underlying threat will remain.

Risk of Being Drawn Into Terrorism

46. The Bill creates a statutory terrorism prevention duty for a whole range of public bodies. Clause 21 establishes a duty on a specified authority to “*have due regard to the need to prevent people from being drawn into terrorism*” in the exercise of its functions. Schedule 3 lists the authorities to which this applies, which includes local councils, prison governors, universities, schools, nursery schools, NHS Trusts, chief constables, etc. The Home Secretary can add to this list via Regulations but certain bodies are precluded from having this duty namely the security services and the Ministry of Defence. The duty also does not apply to the “exercise of a judicial function”. Specified authorities must have regard to published guidance (and any revised guidance) issued by the Home Secretary about the exercise of their duty. If satisfied that a particular organisation has failed to discharge its duty, Ministers may give directions to the authority to enforce the performance of that duty. The Home Secretary can apply to the courts to have a direction enforced by a mandatory order.

⁵⁹ Sub-clause 18(2)(c).

47. Liberty believes that prevention is an incredibly important part of counter-terrorism work. However - chief constables and prison governors aside - we do not believe that placing a broad and vague statutory obligation on public bodies to this end will achieve results. The ISC report into the murderous attack on Fusilier Lee Rigby concluded that Government's Prevent programme is not working. The increase in the threat from terrorism over the past 13 years suggests the same. The Communities and Local Government Committee concluded in their inquiry into *Prevent* in 2010 that the proliferation of the counter-terror agenda had created a climate in which members of the Muslim community feel labelled as potential terrorists in all aspects of their life in the community.⁶⁰ It is odd therefore that instead of reviewing the programme the Government instead seeks to put it on a statutory footing.

48. The statutory obligation will create a bureaucratic nightmare for hundreds of public bodies now required to have counter-terrorism prevention policies regardless of their suitability or relevance to law enforcement. The clause contains no detail on the content of the duty which will presumably be set by Government via guidance and later, directions. Based on the operation of *Prevent* to date, it is conceivable that it will be regarded as placing reporting and surveillance obligations on organisations. Further, granting Ministers the power to issue directions to nurseries, schools, universities or NHS Trusts they believe have failed, opens the door for unprecedented direct political involvement in the running and operation of these institutions. The directions that could be given are unlimited in scope and could presumably include anything from which student groups should be allowed to exist at a University campus to which external speakers can and cannot be invited. It is unclear what guidance and directions could possibly be given to nurseries.

49. Liberty believes that Prevent is misconceived in its core remit. As a strategy supposedly aimed at preventing radicalisation and bringing those at the margins back into mainstream society, we have seen first-hand how its operation has been counterproductive. One of the most problematic elements of the programme has been the clumsy way in which counter-terror prevention has been incorporated into public service institutions causing a combination of offence, mistrust, division and further alienation. Another key problem with Prevent has been the way in which it has mixed community outreach with surveillance. The Institute for Race Relations has highlighted the use of Prevent funding for a youth centre aimed at Muslims in a town in the North of England with the appearance of a straightforward

⁶⁰ House of Commons Community and Local Government Committee 'Preventing Violent Extremism: Sixth Report of Session 2009-2010.

recreational facility. It became apparent however that the inclusion of free IT facilities provided an opportunity for monitoring the web use of young people and one of the stated rationales for the centre was “intelligence gathering”.⁶¹ Project Champion, which saw a CCTV ring of steel placed around a Muslim community in Birmingham, is another example of duplicitous State intervention. In the external report on the doomed venture, the Chief Constable of Thames Valley, Sara Thornton, confirmed that the project was falsely sold to the Muslim community as a general crime prevention measure when it was purely a counter-terrorism surveillance exercise.⁶² She further concluded that community trust and confidence was undermined as a result. Formalising the supposed counter-terror prevention work of myriad public bodies will likely increase the incidence and perception of discriminatory and offensive stereotyping. Instead the Government should focus on projects to support vulnerable young people excluded from mainstream society and provide funds for credible grassroots organisations with a proven track record for effective youth work.

50. Clauses 28-33 would require local authorities to set up Local Panels to assess and prepare support plans for identified individuals. Chief constables can refer individuals to the Panel if there are reasonable grounds to believe the individual is “vulnerable to being drawn into terrorism”. “Support” is provided if consent to the plan is given by the individual (if over 18) or by their parents (if the individual is under 18). The panel must have regard to Home Secretary guidance. Membership of the Panel includes local authorities, police and anyone else the local authority considers appropriate. Where the panel is unable to reach a unanimous decision it must make decisions by majority vote. Partners of Local Panels are under a duty to co-operate with Panels. Partners can include Ministers, Government departments, other local authorities and police forces; prison/YOI/STC secure college governors, universities, sixth form colleges; schools; nurseries; children’s homes; fostering agencies; NHS Trusts and clinical commissioning groups etc.

51. These clauses purport to put “Channel” on a statutory footing. However while the Bill puts local panels on a statutory footing, Liberty understands that another aspect of Channel is to encourage teachers, healthcare staff and others involved in the delivery of public services to report their students and patients to the police. Liberty has been contacted over the years by professionals concerned at the guidance issued to them by the Home Office. Past guidance has included broad categories of suggested “vulnerabilities” that care givers

⁶¹ Arun Kundnani, *Spooked: How not to Prevent Violent Extremism*, Institute of Race Relations, October 2009, p 28.

⁶² Thames Valley Police’s Project Champion Review: http://www.west-midlands.police.uk/latest-news/docs/Champion_Review_FINAL_30_09_10.pdf. See in particular the foreword to the report.

are asked to look out as signs of radicalisation. These can include someone's religion, foreign policy views, a distrust of civil society and 'mental health'. While everyone in society has moral and ethical obligations to report suspected criminality, requiring teachers and others in sensitive positions of trust to report those with dissenting views risks undermining professional obligations of confidentiality, sowing mistrust and pushing those with grievances further underground. Liberty is concerned that the general duty to prevent people from being drawn into terrorism in clause 21 of the Bill may be used as a basis to require reporting from teachers and others.

Insurance against payments made in response to terrorist demands

52. It is an offence under section 17 of the *Terrorism Act 2000* for a person to enter into or become concerned in an arrangement as a result of which money or other property is made available to another person when the money is then to be used for the purposes of terrorism. Clause 34 adds section 17 A to the Terrorism Act, creating two criminal offences for insurers who pay out on contracts for money which has been used by an insured person to pay a ransom.

Power to examine goods

53. Clause 35 and Schedule 5 make amendments to paragraph 9, Schedule 7 of the *Terrorism Act 2000*. Paragraph 9, Schedule 7 permits the examination of goods for the purpose of determining whether they have been used in the commission, preparation or instigation of acts of terrorism. There is no requirement for this examination to be on the basis of any suspicion.⁶³

54. Schedule 5 would make a number of changes to the operation of this power. First, it would increase the categories of good which can be subject to the power, extending it to include items travelling from one place in the UK to another.⁶⁴ Second, it increases the number of places where a search of goods may take place - such as storage facilities and premises owned by shipping or air companies – and gives the Secretary of State power to designate other premises where searches may take place in future.⁶⁵ Third, it then exempts any of these searches from requiring a warrant under the *Regulation of Investigatory Powers*

⁶³ Terrorism Act, Schedule 7, Paragraph 2(9)

⁶⁴ Schedule 5, paragraph 1(2)

⁶⁵ Schedule 5, paragraph 1(2)

*Act 2000*⁶⁶ and changes the *Postal Services Act 2000* to state that mail may be intercepted under this power.⁶⁷

55. This would mean that the State would have power to search all letters moving in or out of the country or between different parts of the country without requiring a warrant giving them permission to do so. This is a mass violation of the right to respect for private life and correspondence, as enshrined in Article 8 of the ECHR. There are a number of serious problems with the RIPA regime, however one of the last remaining safeguards for surveillance contained in the system of warrants would be circumvented by this power. Earlier in the year Members of Parliament from all sides of the House acknowledged that the regime for interception of communications is in need of reform. With cross-party agreement, Parliament set up in statute an inquiry into interception and communications data legislation, and this review is currently being conducted by the Government Reviewer of Terrorism, David Anderson QC.⁶⁸ It is astonishing that the Government now seeks to pre-empt the conclusions of that review and to legislate for greater powers to read the letters of everyone in the country, without suspicion and without any specific authorisation. Not content with the blanket power for the secret services to mass intercept all external emails, phone calls, messages and webchats without parliamentary approval via its TEMPORA programme, it now asks Parliament to sanction a blanket power to read all of our letters, birthday cards, bills and bank statements too.

Clause 36: Privacy and Civil Liberties Board

56. Clause 36 would allow the Secretary of State to establish via statutory instrument a body to give advice and assistance to the Reviewer of Terrorism Legislation. It is stipulated that such a body would be chaired by the Reviewer of Terrorism and would be known as the Privacy and Civil Liberties Board. All other details – such as membership, appointment, reporting and powers or limitations of the Board - would be set out in regulations.

57. In the absence of any information concerning the Board and the work that it would be entitled to do, it is very difficult to comment on whether this will be an effective innovation. We note that the Government originally announced that the Board would replace the Reviewer of Terrorism. It appears that the Reviewer has now been retained in post, and will

⁶⁶ Schedule 5, paragraph 2

⁶⁷ Schedule 5, paragraph 3

⁶⁸ Data Retention and Investigatory Powers Act 2014, section 7(1)

now chair this Board instead. Liberty has expressed significant concerns in the past over the mission creep of the Reviewer role. Statutorily authorised to report on the operation of counter-terrorism legislation, the role has expanded to one of commenting on proposed policy and legislation and providing commentary in the media. The role is commonly referred to as the “Independent Reviewer” yet it is a job appointed and renewed by the Home Secretary and funded by Government.⁶⁹ We expect that, like many of the post facto oversight mechanisms in place, the Privacy & Civil Liberties Board will lack the independence, expertise and transparency necessary to act as an effective check. In the surveillance sphere, prior judicial authorisation of interception and requests for communications data is the only effective and truly independent form of oversight.

Alternative policies to the Counter-Terrorism & Security Bill

58. While there is no simple answer to the complex problem which international terrorism presents, there are alternatives to this Bill which would be far more effective in terms of countering the extremist narrative and securing effective surveillance, investigations and prosecutions.

Intercept in criminal proceedings

59. There is an urgent need to lift the bar on the admissibility of intercept evidence in criminal proceedings. Introducing prior judicial warranty for interception of communications to prevent abuse, and then removing the ban enshrined in section 17(1) RIPA would allow the security agencies and law enforcement to better use the surveillance information they generate to prosecute, convict and imprison those planning terror attacks. The bar is an anomaly and persists despite the fact that criminal prosecutions can rely on use of informers, product from bugging devices, foreign intercept. Pre-Snowden, GCHQ internally resisted efforts to make intercept product admissible on the basis that such a move would reveal the scale of its interception programmes and lead to a ‘damaging public debate’. Whistleblowing disclosures have now brought about the damaging public debate anyway. The Chilcot Review, the Home Affairs Select Committee, the Joint Committee on Human Rights, three former Directors of Public Prosecutions, a former Attorney General and the former director of M15, Dame Stella Rimington, have reached the conclusion that intercept can and should be

⁶⁹ See Prevention of Terrorism Act 2005, sections 14(2) and 14(7)

used. In the face of this diverse and unlikely coalition of supporters for a change in law, the Government's continued inaction on intercept evidence is untenable.⁷⁰

Introducing police bail – properly circumscribed – for terror offences

60. Many of the policy contortions of recent years, from control orders, through TPIMs, to the proposed passport seizure power appear to spring from an inability to impose pre-charge conditions on terror suspects as part of a criminal investigation. Liberty believes that the time has come to replace civil anti-terror orders and exceptional passport seizure with a properly circumscribed system of police bail. Under police bail, conditions could be imposed on terror suspects in cases where reasonable suspicion exists but there is insufficient evidence to charge. Curfews, requirements not to go to certain places or meet certain people are common conditions of police bail, permitted for all non-terror offences including serious offences such as murder and rape. A system of police bail conditions for terror offences could replicate many existing police bail conditions as well as some of the restrictions which currently feature in the TPIMs regime.

61. It is not necessarily objectionable, from a civil liberties perspective, to restrict the movements and activities of those who have not been charged. This is done by the police every day in the UK when they arrest and then release suspects on police bail, however police bail is currently prohibited in terrorism cases.⁷¹ The major problem with police bail as it stands is the lack of a statutory time limit – Liberty has recommended a six month limit in this regard⁷² and the Home Office is currently consulting on the introduction of statutory time limits. Subject to this caveat, a system of police bail is preferable to parallel systems of civil orders and ad-hoc powers for a number of important reasons. First it means restrictions are only imposed when police suspicion has reached the necessary threshold to justify arrest on suspicion of a criminal offence, restoring a vital constitutional protection for suspects. Second it would ensure that police and security services are working effectively together to surveil, investigate and gather evidence rather than impeding criminal investigations.

⁷⁰ The Government's most recent rejection of intercept as evidence is contained in Intercept as Evidence, December 2014, available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388111/InterceptAsEvidence.pdf.

⁷¹ Section 3A of the Bail Act 1976 allows for bail to be granted by a custody officer under Part 4 of the Police And Criminal Evidence (PACE) Act 1984; section 41 and Schedule 8 of the Terrorism Act 2000, provisions under which terrorist suspects are arrested and detained, do not fall within the detention provisions under Part 4 of the PACE Act and therefore police bail cannot be granted under section 3A of the Bail Act for individuals who have been detained under section 41.

⁷² Liberty's Response to the College of Policing Consultation on Pre-charge Bail, June 2014.

Finally, the vast sums of public money required to implement and defend the control order and TPIM regimes in the courts could be re-directed for more comprehensive surveillance of those suspected of involvement in terrorism.

Judge-led inquiry into allegations of UK complicity in rendition and torture

62. The Coalition repeatedly pledged to set up a judicial inquiry into allegations of UK complicity in torture and rendition. It has now handed the task to the Intelligence & Security Committee which in 2007 mistakenly cleared the Agencies of wrongdoing. Victims of rendition and torture understandably do not trust the Committee to investigate the claims. The limitations inherent in the ISC's mandate and powers, the fact that members are appointed by the Prime Minister and reports are subject to Government redaction are just some of the reasons why the current investigation does not come close to satisfying the obligation to conduct an independent, effective, thorough and impartial investigation into the serious human rights violations. In the wake of the US Senate Intelligence Committee report into CIA torture and rendition, the UK's intransigence is even more difficult to understand.

63. Meanwhile Government continues to fight successive torture and rendition actions on the basis that hearing the case would damage the special relationship the UK has with the USA. In recent months this argument has been rejected twice in the higher courts and at least two claims are now set to proceed. On 30th October 2014 the Court of Appeal ruled that the claim of former Libyan dissident Abdul Hakim Belhadj and his then pregnant wife, Fatima Bouchar, alleging that former Foreign Secretary Jack Straw and MI6 were complicit, along with the CIA, in his rendition from Hong Kong to Libya in 2004 should proceed. The Court noted that the claim concerned "*particularly grave violations of human rights*" and that there was a "*compelling public interest in the investigation by the English courts of these very grave allegations*".⁷³ Yunus Rahmatullah, a Pakistani national captured by British Forces in February 2004 and detained without charge or trial for 10 years during which period he claims he was tortured by both British and American troops, has also been told that his claim can proceed. Mr Justice Leggatt ruled that should the Court refuse to hear the case as the Government insisted it would be "*an abdication of its constitutional function*."⁷⁴

64. Until the issue of this country's involvement in rendition and torture is properly examined, it will continue to stain our reputation and alienate communities whose co-

⁷³ *Belhaj* [2014] EWCA Civ 1394, paragraph 117.

⁷⁴ *Rahmatullah* [2014] EWHC 3846 (QB), paragraph 169.

operation is much needed at this critical time. As Conservative MP, Andrew Tyrie, observed earlier this week:

“It is in the British national interest and in the interest of the security services, as well as of those who may have been maltreated, that we uncover the truth sooner rather than later. Only then can we draw a line under these allegations and rebuild trust.”⁷⁵

Conclusion

65. When the Coalition first came to power it bound itself together with the language of civil liberties. With this Bill the Government abrogates its fledgling commitment to ensure we do not abandon our values in the fight against terror. In confronting an ugly ideology that promotes arbitrary violence, the subjugation of women and tyranny, we would expect political leaders to robustly and actively promote democratic values such as the rule of law, human rights and equal treatment. Instead, the Bill plays into the hands of terrorists by allowing them to shape our laws in a way that undermines our principles. Exclusion orders, flight bans and passport seizures will do nothing to neutralise an organised terror threat which does not respect international borders. Ad-hoc police powers and ever more restrictive systems of civil orders will only deflect attention from arrests and prosecutions. Embroiling our teachers in terror-policing will alienate and marginalise, whilst more powers to monitor the nation’s online communication turn us into a nation of suspects. The Agencies by their nature will always ask for more powers, concerned as they are with a short term preventative agenda, not well-suited to the vital longer term goal of preventing radicalisation and prosecuting and convicting terrorists. It is the job of Government and Parliamentarians, charged with the long-term protection of national security, to interrogate their approach and tightly circumscribe the powers available.

Rachel Robinson

Sara Ogilvie

Isabella Sankey

⁷⁵ APPG on Rendition Press Release, 25th November 2014.