

**ENHANCED TERRORISM PREVENTION AND INVESTIGATION
MEASURES BILL**

DELEGATED POWERS

Memorandum by the Home Office

Introduction

1. This memorandum outlines the provisions in the draft Enhanced Terrorism Prevention and Investigation Measures Bill which confer powers to make delegated legislation. It explains why those powers have been taken and the nature of, and reason for, the procedure selected. This memorandum has been prepared now because it is likely that the Enhanced Terrorism Prevention and Investigation Measures Bill, if ever required, would need to be introduced to Parliament as emergency legislation. The purpose of this memorandum is therefore to enable the issues relating to delegated powers to be considered as part of the pre-legislative scrutiny of the Bill.
2. This Bill has been prepared in draft further to the recommendations on control orders contained in the Government's Review of Counter-terrorism and Security Powers. The recommendation was to repeal control orders and introduce a less intrusive and more focused regime of terrorism prevention and investigation measures (TPIMs). But the review also concluded that there may be exceptional circumstances where more stringent measures are required to protect the public than those available under the TPIM Bill. The Government therefore committed to preparing draft emergency legislation for introduction if such circumstances arose.
3. This Bill makes provision for the imposition of such measures by means of an "enhanced TPIM notice", provided specified conditions are met. The regime for enhanced TPIM notices is very similar to that for standard TPIM notices and so the Bill makes provision for the majority of the (standard) TPIM Bill to apply. This includes provision in relation to the meaning of terrorism-related activity, the two year time limit for TPIM notices (in the absence of further terrorism-related activity), the procedure for imposing an enhanced TPIM notice (including the need to seek the prior permission of the court or to adopt the urgency procedure), for varying it, reviewing its necessity, revoking or reviving it, the individual's rights of appeal, the function of the court and procedures for judicial supervision (including the automatic review of the decision to impose the notice, appeal hearings and closed material procedures), and the supporting powers of entry and search. The powers relating to the taking and retention of biometric material from individuals subject to a standard TPIM notice are also applied but are modified slightly, to

ensure that the provisions work in a context where an individual may (at different times) be subject to both a standard and an enhanced TPIM notice. The Bill also makes provision for a criminal offence for breach of an enhanced TPIM notice and for requirements relating to reporting and review of the powers in the Bill. The powers in the Bill will lapse after 12 months, unless renewed or repealed by order. In this event, any enhanced TPIM notices in force will cease to have effect (subject to a transitional period of 28 days).

4. To avoid confusion between references to the two Bills, the (standard) TPIM Bill will be referred to in the rest of this memorandum as the “2011 Act”.

Clause 3 and Paragraph 8 of Schedule 2: Power to use rule-making power to modify rules of court relating to standard TPIM notices

- Power conferred on:*
- (a) for initial exercise of the power in England, Wales and Northern Ireland: Lord Chancellor
 - (b) otherwise in England, Wales and in Northern Ireland:
Civil Procedure Rule Committee (England and Wales)
Northern Ireland Supreme Court Rule Committee (Northern Ireland)
 - (c) in Scotland: Court of Session (Scotland)
- Power exercised by:*
- (a) and (b): Statutory Instrument
 - (c): Scottish statutory instrument
- Parliamentary Procedure:*
- (a) initial exercise of the power in England, Wales and Northern Ireland: affirmative resolution (approval by both Houses within 40 days of making)
 - (b) in England, Wales and Northern Ireland: negative resolution
 - (c) in Scotland: instrument is laid before the Scottish Parliament.

5. Clause 3 of the Bill applies Schedule 4 to the 2011 Act (which provides a rule-making power for proceedings relating to TPIM proceedings), and the Rules of Court made under that Schedule, to the Bill. This means that the Rules of Court which will be made under Schedule 4 to the 2011 Act, providing for a closed material procedure to apply in (standard) TPIM proceedings, will apply equally to enhanced TPIM proceedings. So where, for example, the court is conducting its full review of the decision to impose an enhanced TPIM notice (under section 9 of the 2011 Act as applied to the Bill), the court will follow the Rules of Court (as applied) to manage the closed evidence procedures associated with that hearing.
6. The rule-making power in Schedule 4 to the 2011 Act provides that the Rules of Court must have regard to (a) the need to secure that decisions relating to TPIMs are properly reviewed and (b) the need to secure that disclosures of information are not made where they would be contrary to the public interest. There is also provision that nothing in the Schedule or the Rules is to be read

as requiring the court to act in a manner inconsistent with Article 6 of the Human Rights Convention (the right to a fair hearing). The Rules of Court may also make provision in relation to anonymity orders. The power is subject to the same Parliamentary procedure as outlined above and described further in paragraphs 10 to 12 below. (See the memorandum to the Delegated Powers and Regulatory Reform Committee for the 2011 Act for further details of this power).

7. Paragraph 8 of Schedule 2 to the Bill provides that the order-making power under Schedule 4 to the 2011 Act, as applied, may be used to modify the Rules of Court relating to standard TPIM proceedings, in their application to enhanced TPIM proceedings. This power is required in the event that technical differences are identified in the procedures to be applied between the two regimes, and that modifications to the rules are therefore needed in their application to enhanced TPIM proceedings to ensure that those proceedings can be operated effectively.
8. The Rules may only be modified in a way which falls within the constraints of the order-making power in Schedule 4 to the 2011 Act (as described in its associated memorandum). And so the power in the Bill is a very limited additional power, purely to allow for any differences between the procedures as they operate between the two regimes to be catered for without having to re-draft and re-make the entirety of the Rules.
9. As with the rule-making power under Schedule 4 to the TPIM Bill, the first time the power is exercised (in England, Wales or Northern Ireland), the Rules will be made by the Lord Chancellor, and after that the rules will be made (or amended) by the usual rule-making bodies, namely the Civil Procedure Rules Committee (in England and Wales) and the Northern Ireland Supreme Court Rules Committee (in Northern Ireland). The reason for the initial exercise of the power to be conferred on the Lord Chancellor is the need for the Rules to be modified swiftly: It may be that, during the experience of the standard TPIM regime, a need is identified for modifications to the Rules as they would apply in relation to the enhanced TPIM regime (in the event it is enacted). And in that event, the modifications should come into force at the same time as the Enhanced TPIM Bill comes into force (the day after Royal Assent – see clause 12) so the regime can operate properly from the outset.
10. Before making the Rules, the Lord Chancellor is required to consult with the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland as appropriate. And after the Rules are made they must be laid before Parliament and approved by resolution of both Houses within 40 days (not counting time during which Parliament is adjourned for more than 4 days or dissolved or prorogued), failing which they will cease to have effect. The Government considers that this affirmative procedure provides the appropriate level of Parliamentary scrutiny of the Rules, while allowing the Rules to be made and come into force swiftly.
11. After the initial exercise of the powers, should the Rules need amendment, the usual rule-making procedure in the Civil Procedure Act 1997 will be followed.

This is the negative resolution procedure, but the Rules will be made by the Rules committee and following the usual consultation requirements.

12. In Scotland, the Court of Session will make the Rules in the usual way. The Court of Session is able to make the Rules swiftly and so the issue above as to timing does not apply. Although the Rules are not subject to formal Parliamentary approval in Scotland, they are subject to Parliamentary scrutiny.

Clause 3 and Paragraph 9 of Schedule 2: Power to make modifications by order to enactments for the purposes of the Bill

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: Negative resolution

13. Paragraph 9 of Schedule 2 (given effect to by clause 3) provides an order-making power allowing the Secretary of State to modify an enactment or disapply from the Bill an enactment which would otherwise apply, if the Secretary of State considers it necessary or expedient for the purposes of the Bill.
14. As noted above, the majority of the structure of the enhanced TPIM regime is achieved by way of applying provisions of the 2011 Act to this Bill. Clause 3 of, and Schedule 2 to, the Bill make detailed provision in relation to the application to this Bill of (a) the TPIM Bill and (b) other enactments which relate to the TPIM Bill or TPIM notices. This includes provision about how various expressions used in the 2011 Act are to be interpreted in an applied enactment when read in the context of the Enhanced TPIM Bill (see paragraphs 4 and 5 of Schedule 2). So, for example, where an applied enactment refers to “TPIM proceedings”, this is to be interpreted as including reference to enhanced TPIM proceedings (as well as standard TPIM proceedings) while the Bill is in force. This is relevant, for example, in Schedule 1 to the Senior Courts Act 1981, which provides that “TPIM proceedings” are to be allocated to the Queen’s Bench Division. The provision in paragraph 5 of Schedule 2 to the Bill ensures that enhanced TPIM proceedings will also be allocated to the Queen’s Bench Division.
15. Paragraph 6 of Schedule 2 makes provision in relation to how cross-references to various provisions of the 2011 Act (which are found in that Act itself) are to be read as applied to the Bill – modifying such cross-references to refer to the corresponding provisions of the Bill. Paragraph 7 of Schedule 2 makes provision for the modification of the provisions of Schedule 6 to the 2011 Act (relating to the retention of biometric material taken from individuals subject to TPIM notices) in relation to the enhanced TPIM regime – to ensure that the provisions work in a context where an individual may (at different times) be subject to both a standard and an enhanced TPIM notice.

16. These provisions relating to applied enactments are highly technical in nature. It is possible that in future, if and when the enhanced TPIM regime is in force, a need is identified either to modify in relation to the enhanced TPIM regime or to disapply, applied enactments, including relevant enactments passed after the Bill comes into force – to ensure that the enhanced TPIM regime operates as intended.
17. The power in paragraph 9 of Schedule 2 to the Bill has been taken and is intended to be used to make only such modifications or disapplications as are consequential or technical in nature – along the lines of the provision in paragraphs 4 to 7 of Schedule 2 to the Bill. Given the technical nature of the provision to be made under this order-making power, it is considered that the negative resolution procedure is appropriate.

Clause 9: Power to repeal or renew for a further year by order the operative provisions in the Bill

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercised by:</i>	<i>Statutory Instrument</i>
<i>Parliamentary Procedure:</i>	<i>Affirmative resolution (including urgency procedure – approval by both Houses within 40 days of making)</i>

18. As noted above, this Bill has been drafted for introduction in the event of a serious terrorist threat which necessitates the availability of the powers contained in it. The likelihood is that the Bill will therefore need to be introduced as emergency legislation. And it is to be temporary legislation and only remain in force as long as necessary. Clause 9(1) therefore makes a sunset provision for the operative clauses in the Bill (“the enhanced TPIM powers”), providing that they will expire 12 months after coming into force. The enhanced TPIM powers are the Secretary of State’s powers to impose an enhanced TPIM notice, or to vary such a notice without consent or to extend or revive an enhanced TPIM notice. The effect of the expiry of these powers is set out in clause 10 – the principal effect being that any enhanced TPIM notice is to be treated as if it is revoked (subject to remaining in force for a transitional period of 28 days unless previously quashed or revoked).
19. However, it is considered that there should be an opportunity for the enhanced TPIM powers to be renewed (so that they do not expire after 12 months), in the event that those powers continue to be considered necessary for public protection at that time. Clause 9(2)(b) therefore makes provision that the Secretary of State may, by order, renew the enhanced TPIM powers for a further period of up to one year. And further orders continuing the relevant provisions in the Bill in force for periods of up to a year at a time may be made. Clause 9(2)(a) also provides the Secretary of State with the power to repeal the relevant provisions in the Bill by order at any time. This will allow her to remove the enhanced TPIM powers from the statute book in the event that they are no longer considered necessary and to do so swiftly (in advance

of any suitable vehicle for primary legislation or the expiry of the enhanced TPIM powers in accordance with this clause).

20. Once the provisions have expired or been repealed in accordance with clause 9, there is no power to revive those provisions by order. Therefore, should enhanced TPIM notices be considered necessary once again at any time after the powers in the Bill have expired or been repealed, further primary legislation will be required.
21. Before making an order under clause 9, the Secretary of State must consult the persons mentioned in clause 9(3) (the independent reviewer appointed to review the operation of the 2011 Act and the Bill, the Intelligence Services Commissioner and the Director-General of the Security Service).
22. The order-making power is subject to the affirmative resolution procedure (clause 9(4)). Parliament should have the opportunity to debate fully the question of extending in force (for any period of up to a year), or repealing, the powers in the Enhanced TPIM Bill and so this is the appropriate Parliamentary procedure.
23. The order may also be made subject to the urgency procedure (clause 9(5) to (6)). This allows the Secretary of State to make an order under clause 9 where that order contains a declaration by the Secretary of State that the order needs, by reason of urgency, to be made without the prior approval by resolution of each House. In that event, the order must be laid before Parliament after being made and if not approved by a resolution of each House within 40 days of being made (not counting time during which Parliament is adjourned for more than 4 days or is dissolved or prorogued), the order ceases to have effect at the end of that period.
24. It is considered necessary for the Secretary of State to have the power to make an order under clause 9 in this way in case the enhanced TPIM powers need renewal and it is not possible, by reason of urgency, to secure Parliamentary time for the debates and resolutions in advance of their expiry. This might happen for example if the Secretary of State had decided not to seek to make an order renewing the powers because the national security situation had improved sufficiently to safely allow the powers to expire. But then the terrorist threat suddenly increased again very shortly before the powers were due to expire. In such circumstances, the need for the powers to continue in force, without the advance approval of Parliament (which there would be no time to seek) is likely to be urgent.
25. Clause 9(7) provides that if an order made under the urgency procedure is not approved within the 40 days of being made, this does not affect anything done in reliance on the order or prevent a new order being made. This is a standard provision found elsewhere in legislation where the urgency procedure is provided for. See for example section 123(6)(b) of the Terrorism Act 2000 and section 13(7) of the Prevention of Terrorism Act 2005 (“the PTA”).

26. Clause 10 to the Bill makes transitional and saving provision for cases where the enhanced TPIM powers expire or are repealed in accordance with this clause. In brief, any enhanced TPIM notices in force immediately before expiry of repeal continue in force for a transitional period of 28 days only (unless quashed or revoked before that time) and then cease to have effect. (Variations which relax or remove measures in the TPIM notice, or which are made by agreement with the individual, may be made during the 28 day transitional period.) Key TPIM proceedings, including the automatic court review, appeal hearings and claims for damages, may continue notwithstanding the expiry or repeal (as a safeguard to the individual).

27. There is direct precedent for the order-making power in clause 9, including the associated Parliamentary procedure. This is found in section 13 of the PTA, which provides the power to repeal or renew for 12 months the control order powers in that Act. The only substantive difference between that power and the power in the Bill is that the power in section 13 of the PTA also includes a power to revive the control order powers by order (in the event they have expired without renewal under that section), which power is not included in clause 9 of the Bill.

Home Office

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