THE GOVERNMENT REPLY TO THE
SIXTEENTH REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2010-12 HL PAPER 180, HC 1432

Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill

Presented to Parliament by the Secretary of State
For the Home Department
By Command of Her Majesty
September 2011

Cm 8167 £6.00

Any enquiries regarding this publication should be sent to us at: **public.enquiries@homeoffice.gsi.gov.uk**

This publication is available for download at www.official-documents.gov.uk

This document is also available from our website at: **http://www.homeoffice.gov.uk/.**

ISBN: 9780101816724

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID: 2450305 09/11 14625 19585

Printed on paper containing 75% recycled fibre content minimum.

GOVERNMENT RESPONSE TO THE REPORT BY THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

Introduction

We are grateful to the JCHR for its report on the Terrorism Prevention and Investigation Measures (TPIM) Bill.

We are glad that the Committee has welcomed the Government's decision to repeal control orders. As the Committee recognises, the regime that will be established by the TPIM Bill will be less intrusive and will 'modify in significant ways aspects of the predecessor control order regime'. The replacement system of TPIM notices contains a number of significant improvements over the old system of control orders that the Committee highlights, including: a higher threshold for imposing a TPIM notice; a two-year time limit for the notice without evidence of further involvement in terrorism-related activity; and the clearly defined, less intrusive and more focused restrictions that will be available.

The TPIM Bill is part of a wider package of work to tackle the threat from terrorism and should be seen in that context. A revised version of the UK's counter-terrorism strategy, CONTEST, was published on 12 July 2011. Our priority is always to prosecute people suspected of terrorism-related activity. CONTEST sets out the steps we will take to provide further scope for the collection of evidence to facilitate the prosecution of people suspected of terrorism-related activity, including:

- significantly increased funding for the police and Security Service to enhance their covert investigative capability, which will complement the TPIM Bill;
- the intention to implement post-charge questioning for terrorism-related offences; and
- continuing to look at a way of using intercept material as evidence in criminal prosecutions.

Where we cannot prosecute foreign nationals – or where they have been prosecuted, convicted and then released at the end of the custodial element of their sentence – we will seek deportation. The Government remains committed to strengthening its ability to deport foreign national terrorists in a manner that is consistent with our legal and human rights obligations.

The Government has made clear that TPIM notices themselves are preventative measures, designed to protect the public from suspected terrorists who pose a real threat but who – crucially – cannot be successfully prosecuted (or, in the case of foreign nationals, deported). They will be used as a last resort where the police and security and intelligence agencies have concluded, having consulted the Crown Prosecution Service on the prospects of prosecution, that other disruptive measures must be taken. In such circumstances, the TPIM Bill provides effective powers to protect the public.

We welcome the Committee's contribution to the debate on the TPIM Bill. But we do not accept a number of the JCHR's recommendations. In particular we do not agree

that an alternative system of restrictions linked to the existence of an ongoing criminal investigation – as proposed by Lord Macdonald – is appropriate or would protect the public in the circumstances in which TPIM notices will be used.

Information Provided by the Department

We welcome the Home Office's new practice of publishing full ECHR memoranda on its website at the same time as a Bill is published. It is the approach long called for by this Committee and its predecessors. It greatly assists us in our scrutiny of the Bill for human rights compatibility. We hope that it also assists the Department by enabling us to identify the really significant human rights issue raised by the Bill and so to ask fewer and much more focused questions. We commend the Home Office's approach to other Departments as an example of best practice. (Paragraph 1.6)

We are pleased to have been able to assist the Committee in this respect.

Improvements to the control order regime

We welcome the Government's stated aim of allowing individuals to lead as normal a life as is possible, consistent with protecting the public. Although we have some significant human rights concerns about the proposed TPIMs regime, which we set out in this Report, we welcome those aspects of the Bill which modify in significant ways aspects of the predecessor control order regime. In our view, these should make it less likely that the regime will be operated in a way which gives rise in practice to breaches of individuals' human rights. (Paragraph 1.9)

We welcome the Committee's support for the significant modifications that will be made by the TPIM regime – although we recognise that it remains concerned about the some elements of the new regime. It was a clear conclusion of the Government's Review of Counter-Terrorism and Security Powers that it would be possible to continue to protect the public through the use of a less intrusive and more focused system of preventative measures.

The TPIM Bill delivers on this commitment and will introduce a robust and powerful system that will protect the public whilst providing strengthened safeguards for the rights of the individual. These include in particular a higher threshold for imposing a TPIM notice; a two-year time limit for the notice without evidence of further involvement in terrorism-related activity; and – as the Committee notes – the more limited restrictions that will be available.

The priority of prosecution

In our view, the overriding priority of public policy in this area should be the criminal prosecution of individuals who are suspected of involvement in terrorist activity. (Paragraph 1.10)

In human rights terms, prosecution best serves the twin requirements of human rights law that (1) effective steps be taken to protect the public's right

to life and bodily integrity against the threat of terrorist attack and (2) restrictions on the rights of individuals suspected of such threats are only imposed in accordance with proper legal process. (Paragraph 1.10)

The Government agrees that the overriding priority when dealing with suspected terrorists should be investigation, prosecution and conviction. We have consistently stated that this is our approach, and we are undertaking a range of work – brought together by the updated CONTEST strategy that was published on 12 July 2011 – to strengthen opportunities for prosecution and conviction.

This includes in particular providing significantly increased funding for the police and Security Service to enhance their covert investigative capability. We are also intending to implement post-charge questioning for terrorism-related offences. And we are examining the balance of advantage, cost and risk of using intercept material as evidence in criminal prosecutions.

In the TPIM Bill our commitment to prosecution is properly reflected in clause 10, which deals with criminal investigations into terrorism-related activity. It requires prior consultation with the police before the imposition of a TPIM notice in relation to whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism. It also requires the police to secure that the investigation of the individual's conduct, with a view to a prosecution of the individual for an offence relating to terrorism, is kept under review while a TPIM notice is in force. And there is a new statutory duty on the police to report to the Home Secretary on this review.

Recognition of the difficulties of prosecuting some dangerous individuals does not in our view require acceptance of the need for a replacement regime which is essentially a watered down version of control orders. (Paragraph 1.11)

Lord Macdonald recommended that powers created under any replacement regime should be judged against the criteria set by the Government's own Review: "to what extent are they likely to facilitate the gathering of evidence, and to what extent are they directed towards preventing any obstruction of due process?" We agree with this approach and have sought to follow it in our scrutiny of this Bill. (Paragraph 1.12)

Prosecution is always the priority – and in many cases the Crown Prosecution Service is able to take forward a successful prosecution following an investigation. The police and Security Service do not take a casual or unenthusiastic approach to the gathering of evidence that could be used to prosecute, and do not abandon this process while there remains a realistic prospect of a prosecution. But it was a clear conclusion of the Review of Counter-Terrorism and Security Powers that, for the foreseeable future, there will continue to be a small number of people in this country who are assessed to pose a terrorism-related threat to the public but who can neither be prosecuted nor, in the case of foreign nationals, deported – despite the best efforts of the police and Security Service.

TPIM notices, like the control orders they will replace, are intended to be used in such cases – where there is no realistic prospect of a prosecution, and there is no imminent prospect that further investigation will yield evidence that could be used to prosecute. In such cases the Government is faced with a stark choice between taking no action at all – potentially leaving the public unprotected from a serious threat – and imposing preventative measures to protect the public. In such a case the purpose of the measures is not to facilitate the gathering of evidence – which process will already have been exhausted, although of course it will continue as far as is possible while restrictions are in force – but to protect the public and disrupt or prevent the individual's involvement in terrorism-related activity. Protecting the public is the primary duty of any Government, and it would not be responsible to ignore a known terrorist threat.

The Government does not agree with Lord Macdonald's suggestion that the replacement regime should be judged by the extent to which it facilitates the gathering of evidence. We recognise that protective measures can mean that prosecution becomes less likely, because the obligations imposed intentionally disrupt the ability to engage in terrorism-related activity, in order to protect the public. But the Review was clear that – while prosecution must remain our priority, and every effort should be made while restrictions are in place to gather evidence and prosecute – imposing restrictions for the purpose of public protection will sometimes be an imperfect but necessary step.

We note that the Government's response did not indicate any progress in relation to its ongoing review of the use of intercept as evidence. Neither we nor our predecessor Committee have ever regarded the admissibility of intercept as a "silver bullet" which will solve the problem to which control orders, and now TPIMs, are the response, but we do regard it as an important part of a package of measures that will lead to more successful prosecutions in relation to terrorism. We have written to the Government asking for an urgent update on progress on this issue. We hope to return to this issue following a briefing with the Minister and officials. (Paragraph 1.15)

We agree with the JCHR that the introduction of intercept as evidence would not remove the need for control orders or TPIM notices. But we also agree that it could help more successful prosecutions for terrorism-related and other serious crime offences. For this to be case, the intercept as evidence regime that was implemented would need to ensure continued fairness at trial while also being operationally practicable, so as to continue to protect the public and national security.

The coalition agreement therefore commits the Government to 'seek to find a practical way to allow the use of intercept evidence in court.' The issues are both complex and difficult and we will ensure that balance of advantage, cost and risk of possible approaches are assessed robustly and fairly. The Parliamentary Under Secretary for Crime and Security, James Brokenshire, wrote to the Chair of the Committee on 6 July confirming a previous offer of an informal briefing by officials on this work.

Restrictions as part of the criminal justice process

We share Lord Macdonald's concerns about TPIMs not going far enough to bring the restrictions back into the domain of criminal due process. We welcome the Government's restatement of its commitment to the priority of prosecution, but as the Bill currently stands it is clear that the overriding purpose of its provisions is prevention, not investigation and prosecution (Paragraph 1.21)

We recommend the following amendments to the Bill to give effect to Lord Macdonald's alternative model, which would bring TPIMs into the criminal justice process. Some suggested amendments to the Bill which would give effect to these recommendations are appended to this Report at Annex 1. (Paragraph 1.23)

We recommend that an additional precondition of the imposition of TPIMs on an individual should be that the DPP (or relevant prosecuting authority) is satisfied that:

a) a criminal investigation into the individual's involvement in terrorism-related activity is justified; and

b) none of the specified terrorism prevention and investigation measures to be imposed on the individual will impede that investigation. (Paragraph 1.24)

We recommend that:

a) TPIMs should only last for as long as an active criminal investigation is continuing, or for a maximum period of two years, whichever is shorter;

b) that the Secretary of State should be required to revoke a TPIMs notice if notified by the DPP that a criminal investigation is no longer justified. (Paragraph 1.26)

We recommend that the Bill provide for judicial supervision in relation to the ongoing criminal investigation, including consideration of reports on progress, analogous to the judicial role supervising court-imposed bail conditions. (Paragraph 1.27)

We recommend that some of the measures set out in Schedule 1, such as the measure concerning association and communication (paragraph 8), should be subject to further restrictions on their scope to ensure that they are strictly proportionate and do not impede or discourage evidence gathering with a view to conventional prosecution. (Paragraph 1.28)

Given our absolute commitment to the priority of prosecuting suspected terrorists we have given careful consideration to proposals put forward to implement TPIM notices as a part of the criminal justice process, rather than as a civil preventative measure. This includes both Lord Macdonald's proposals, which the JCHR supports, and proposals that have been made for imposing restrictions under police bail. As the

JCHR notes, amendments that would replace TPIM notices with a system of police bail were debated at Public Bill Committee and received no support. There are fundamental problems with the link to a criminal investigation and the move away from a civil, preventative measure.

We have concluded that there are a number of difficulties with an approach that would link the imposition of restrictions to an ongoing criminal investigation, and that cumulatively these are insurmountable. We do not consider that such a system could be used to protect the public in the circumstances in which TPIM notices will be used.

As a point of principle, the Government does not agree with the assertion that preventative restrictions should not be imposed in the absence of an ongoing criminal investigation. There is a well-established principle across our legal system of imposing restrictions – in order to protect the public from criminal behaviour – on individuals who have not necessarily been convicted and who are not subject to any other ongoing criminal justice process. There are a range of other civil powers that can be used in relation to terrorists including, for example, asset freezing and immigration powers such as deportation, exclusion and deprivation of citizenship. And preventative civil measures are not limited to national security – other examples include serious crime prevention orders, anti-social behaviour orders (and their replacement criminal behaviour orders), football banning orders, risk of sexual harm orders and domestic violence protection orders/notices.

There are also a number of significant practical difficulties with the proposals. As we have made clear above, TPIM notices are preventative measures designed to protect the public from suspected terrorists who pose a real threat but who – crucially – cannot be prosecuted successfully. They will be used as a last resort in circumstances where the police and security and intelligence agencies have concluded, having consulted the Crown Prosecution Service on the prospects of prosecution, that other disruptive measures must be taken. They will not normally be used in cases where there is an ongoing criminal investigation where the assessment is that it may be possible to gather sufficient admissible evidence, as opposed to intelligence, to allow a prosecution. Indeed we do not believe that such restrictions are necessary or appropriate in this type of case other than in circumstances where there is an urgent public protection requirement. (Where possible the individual under investigation will ultimately be arrested, detained if necessary under the Terrorism Act 2000, and charged if the evidential and public interest tests in the Code for Crown Prosecutors are satisfied.) But under Lord Macdonald's proposals, restrictions could only be imposed where there is such an ongoing criminal investigation.

Since the restrictions could not be used in cases where it is not possible to prosecute – but there nonetheless remains a real threat to the public – the proposals would not protect the public in these circumstances, and would fail to address the gap that TPIM notices are designed to fill. The JCHR itself recognises at paragraph 1.11 'the reality that sometimes that information [intelligence that is not admissible as criminal evidence] is such that it requires action to be taken to protect the public from the risk posed by that individual'.

Cases in which there may be a need to protect the public, but there may not be a realistic prospect of prosecution, include for example:

- Where there is a strong intelligence case to indicate a threat to the public, but exhaustive investigation has not yielded sufficient admissible evidence that could be used to prosecute – and it is assessed that further investigation is unlikely to yield this either.
- Cases where there has just been an unsuccessful prosecution, but where there nonetheless remains a real terrorism-related threat.
- Cases where we wish to remove a foreign national from the country – who may have been subject to lengthy unsuccessful deportation proceedings – but cannot because there are ECHR concerns relating to safety on return.

More fundamentally, it is unclear how the proposals of Lord Macdonald or the JCHR would aid prosecution. This is because the effect of the proposals is that measures would be imposed during an investigation rather than at its end. In contrast, current investigations are mostly run covertly. We do not consider that the restrictions themselves, or declaring the existence of a previously covert investigation before it had been concluded that prosecution was not possible, would do anything to facilitate the discovery of admissible evidence in circumstances where covert investigation has not uncovered sufficient evidence to prosecute. Indeed, it is likely to make the subject of the investigation more guarded in his activities. The chances of gathering admissible evidence that might lead to a prosecution are clearly higher if the individual does not know he is under investigation. We consider that the proposals thus both reduce the likelihood of successful prosecutions and – as a result of the more limited obligations it is suggested should be imposed on the individuals – increase the risk to the public.

In such cases our view is that preventative measures can be appropriate in their own right, where this is necessary to protect the public.

The role of the court

In our view, the court's function at the permission stage should be to determine whether the conditions for imposing TPIMs appear to be met, which would be more in keeping with a requirement of prior judicial authorisation of an intrusive criminal justice measure. (Paragraph 1.31)

In our view, it would be more compatible with the criminal justice nature of the court's function to require the court simply to review whether the conditions for imposing TPIMs are satisfied, rather than merely review the decision "applying the principles applicable on an application for judicial review" as the Bill currently provides. (Paragraph 1.32)

The Government has been clear that full judicial oversight of the process of imposing measures must be a key feature of the new regime. The involvement of the courts is an important safeguard for the rights of the individual and the Bill takes a comprehensive, multi-layered approach to this. We broadly agree with the JCHR's assessment of what the overall role of the court should be, but we do not agree that

changes to the Bill are needed to achieve this. The Bill as currently drafted will deliver what the Committee recommends.

At the permission stage the test applied by the court is whether the Secretary of State's decisions that the conditions for imposing TPIM notices are met were 'obviously flawed'. This is the test the courts have applied when considering applications for permission to impose a control order and the courts are now well practiced in applying that test. If the court considers that the Secretary of State's decisions relating to the imposition of the TPIM notice were obviously flawed, then it will not grant permission to impose the notice or some of the particular measures imposed under the notice.

At this stage the material before the court will include the proposed TPIM notice; a witness statement from the Secretary of State setting out the necessity and proportionality of the proposed measures and the matters that have been taken into account in determining them; and a classified statement from the Security Service setting out the intelligence case, and providing an assessment of the risk posed by the individual and the need for a TPIM notice in order to manage that risk. This is the same information the Secretary of State will have considered in deciding to impose the TPIM notice.

The permission hearing is a preliminary hearing that in essence ensures that the Secretary of State is not using her powers in an obviously inappropriate way. But it is not the same as the in depth, substantive review of the Secretary of State's decisions. It is not appropriate – or indeed possible – for the court to undertake the full review at this early stage. For example, for obvious reasons, the hearing will take place on an ex parte basis, to ensure the individual is not given advance warning that he is to be made subject to a TPIM notice. So it is not possible for the courts to hear and consider full evidence to decide determinatively whether the conditions have been met.

This takes place later: once measures have been imposed, the court sets a date for an automatic full review by the High Court to take place as soon as possible. The Bill makes clear that the function of the court at that stage is to review the decisions of the Secretary of State that the conditions for imposing a TPIM notice were met at the time she made the decision, and that they continue to be met at the time of the review.

The Bill requires the courts to apply the principles applicable on an application for judicial review. The courts take the view that judicial review is a flexible tool that allows differing degrees of intensity of scrutiny, depending on circumstances and the impact of the decision in question on the individual concerned.[1] Control order case

[1] In *BSkyB and other v Competition Commission and BERR [2010] EWCA Civ 2*, Lord Justice Lloyd stated that 'It is well established that the courts apply judicial review principles in different ways according to the matter under consideration, and that there are some cases in which the courts apply a greater intensity of review than in others. The main examples of this approach are cases concerned with fundamental human rights under the ECHR.' He noted the distinction made by Lord Justice Carnwath in *OFT v IBA [2004] EWCA Civ 142* between 'a "low intensity" of review, applied to cases involving issues "depending essentially on political judgment", such as matters of national economic policy, where the court would not intervene outside of "the extremes of bad faith, improper motive or manifest absurdity" and, at the other end of the spectrum, decisions infringing fundamental rights where unreasonableness is not equated with "absurdity" or "perversity", and a "lower" threshold of

law[2] – which will apply to terrorism prevention and investigation measures where the courts consider it relevant – provides for a particularly high level of scrutiny. We have no reason to doubt this will continue under the TPIM system and consider that continued reliance on case law is the best way to deliver it.

The right to a fair hearing

We recommend that the Bill be amended to require the Secretary of State, at the outset, to provide the individual who is the subject of the TPIMs notice with sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. (Paragraph 1.40)

On 6 July 2010, the Prime Minister announced a forthcoming Justice and Security Green Paper on the use of sensitive material in judicial proceedings; it will be published later this year. This will aim to develop a framework for ensuring full judicial and non-judicial scrutiny of intelligence and wider national security activities in line with the Government's commitment to individual rights, the rule of law and to protecting properly national security. It will include consideration of the implications of the judgments in *Secretary of State for the Home Department v AF & Others [2009] UKHL 28 (AF (No. 3))* and *Home Office v Tariq [2011] UKSC 35* (and the judgment in *Al Rawi and Others v The Security Service and Others [2011] UKSC 34*) for a broad range of contexts.

However, the right to a fair trial of individuals subject to a TPIM notice is already fully protected by the provisions contained in the TPIM Bill and the application of existing case law as appropriate by the courts. Paragraph 5 of Schedule 4 to the Bill reflects the read down of the Prevention of Terrorism Act 2005 (2005 Act; control orders legislation) effected by the Law Lords' October 2007 judgment in *MB*. As the Committee knows, the Law Lords read into that legislation, which obliged the courts to secure the withholding of material from the individual where disclosure would be contrary to the public interest, the words 'except where to do so would be incompatible with the right of the controlled person to a fair trial'. This has been reflected in the provision in paragraph 5 of Schedule 4 to the TPIM Bill, which provides that nothing in the rule-making power relating to closed proceedings or the rules of court made under it is to be read as requiring the court to act in a manner inconsistent with Article 6 of the Human Rights Convention.

The Law Lords in *AF (No. 3)* confirmed the read down specified in *MB* and laid down what was required by Article 6 in the context of the stringent control orders before them.

---

unreasonableness is used, namely whether a reasonable decision-maker, on the material before it, could conclude that the relevant interference was justifiable.'

[2] In relation to the full substantive review of each control order, the Court of Appeal ruled in *Secretary of State for the Home Department v MB [2006] EWCA Civ 1140* that the High Court must make a finding of fact as to whether the 'reasonable suspicion' limb of the statutory test for imposing a control order – replaced with the higher test of 'reasonable belief' for TPIM notices – is met. That is, the court will make its own decision as to whether the facts relied on by the Secretary of State amount to reasonable grounds to believe that the individual is or has been involved in terrorism-related activity. The Court of Appeal also made clear that the High Court must apply "intense scrutiny" to the Secretary of State's decisions on the necessity of each of the obligations imposed under the control order, while paying a degree of deference to the Secretary of State's decisions. The Court of Appeal also read down the Prevention of Terrorism Act 2005 under section 3 of the Human Rights Act 1998, to make clear that the court must consider the necessity of the control order at the time of the hearing as well as at the time the Secretary of State made the decision to impose it.

There is therefore an important technical difference between the judgments in *MB* and *AF (No. 3)*. The *MB* judgment uses the Human Rights Act 1998 to read down legislation in a way that is compatible with Article 6 – effectively amending the legislation by reading in different or additional wording. In contrast, *AF (No. 3)* provides guidance on the nature of Article 6 – that is, what is required under Article 6 in control order proceedings – without requiring any further read down of the control order legislation. *AF (No. 3)* thus concerns an autonomous concept in the European Convention on Human Rights – the nature of Article 6. The courts continue to interpret what it means, so that interpretation of what is required by Article 6 in this context may change over time. Defining the right to a fair trial on the face of the TPIM Bill would therefore risk making the Bill out of date in the future.

In any event, the Government believes that the provisions included in the Bill, including paragraph 5 of Schedule 4 to the Bill, and the application as appropriate of the relevant case law, including *AF (No. 3)*, will ensure that TPIM proceedings must operate in a way that is compatible with Article 6. In particular, the courts will continue, as they currently do in control order cases, to rule on the amount of disclosure that is required in individual cases to meet the requirements of a fair trial in accordance with Article 6. Further legislative provision on this in the TPIM Bill is not necessary.

We also recommend that the Bill be amended to make two other improvements recommended by our predecessor Committee to improve the fairness of control order proceedings in which secret evidence is relied on: first, imposing a statutory obligation on the Home Secretary to give reasons for imposing TPIMs; and, second, providing for the possibility of special advocates taking instructions from the individuals whose interests they represent after having seen the closed material, with the permission of the judge. (Paragraph 1.41)

In relation to the first recommendation, we consider that such a statutory obligation is unnecessary. In *AF (No.3)*, the Law Lords ruled that, for the stringent control orders before them, controlled individuals must be given sufficient information about the case against them to enable them to give effective instructions to the special advocate. This in effect means that the individual must be given a gist of the key allegations against them – in other words, the reasons for the imposition of the order. And it is the courts who must decide if the information disclosed to them meets the *AF (No.3)* standard.

In relation to the second of these two recommendations, as the Committee is of course aware, this is a matter of longstanding debate. The JCHR's predecessor Committee included this recommendation in previous reports. As the previous Government explained in its responses to those reports, there is in fact no such absolute prohibition on communication between the special advocate and the individual after service of the closed material in judicial proceedings that rely on the use of special advocates, including control order proceedings – and TPIM notice proceedings.

The special advocate can receive written instructions from the individual after he has seen the closed material, and can also communicate with the individual after he has

seen the material, provided it is with the permission of the Court. The special advocate must notify the Secretary of State when seeking permission, giving the Secretary of State time to object to the communication if she thinks it necessary in the public interest, although the final decision is that of the court. In a number of cases the special advocate has obtained permission to communicate legal points and factual matters to the controlled person, and to take instructions from them on specific issues.

The rule is in place to protect against damage to the public interest caused by inadvertent disclosure of closed material. The Government nonetheless recognises it raises difficult and complex issues. The Government has undertaken to consider the key concerns that have been expressed about the operation of the special advocate system in the Justice and Security Green Paper.

Retention and use of biometric material taken from TPIMs subjects.

The Bill provides for fingerprints, samples and DNA profiles taken from TPIMs subjects to be retained and used for specified purposes. In Scotland, such biometric information may only be used in the interests of national security or for the purposes of a terrorist investigation. In England, Wales and Northern Ireland, however, such material may also be used for purposes related to the prevention, detection, investigation or prosecution of crime or for identification of a deceased person or the individual subject to the TPIM notice. We are not clear why the provision for the use of such material is broader in England, Wales and Northern Ireland than it is in Scotland. We propose to return to this issue in our report on the Protection of Freedoms Bill. (Paragraph 1.42)

Although the TPIM Bill primarily deals with reserved matters, and as such applies to Scotland, the uses to which biometric material taken under Schedule 6 could be put include devolved matters. For example, material taken under Schedule 6 can be used for devolved purposes such as the prevention or detection of any crime, as well as national security or terrorism investigations.

When the Bill was introduced the Scottish Government had not had an opportunity to decide whether these provisions (and other provisions touching on devolved matters) should extend to Scotland. The Scottish Government has since decided that they should – and that a legislative consent motion will therefore be tabled. Accordingly, Government amendments to the TPIM Bill extending the provisions to Scotland were agreed on 5 July 2011. Clause 27 of the Bill now omits what was subsection (4), which disapplied certain provisions from Scotland; a consequential change was also made to subsection (3).

Annual review and renewal by Parliament

We remain disappointed by the Government's reluctance to expose its proposed replacement regime to the rigours of formal and regular post-legislative scrutiny which annual renewal entails. (Paragraph 1.45)

Although the TPIMs regime is less severe than the control orders regime, it remains an extraordinary departure from the ordinary principles of criminal due process, as Lord Macdonald's report makes clear. We recommend that the Bill be amended to require annual renewal, and so ensure that there is an annual opportunity for Parliament to scrutinise and debate the continued necessity for such exceptional measures and the way in which they are working in practice. (Paragraph 1.45)

The threat from international terrorism is serious and is likely to be sustained. The Review of Counter-Terrorism and Security Powers concluded that for the foreseeable future there will be a need to protect the public from the risk posed by the small number of people who pose a real threat to our security but who cannot be prosecuted or, in the case of foreign nationals, deported.

The package of measures contained in the TPIM Bill is the result of a lengthy and considered Review, and will be subject to full Parliamentary scrutiny during its passage. We believe it makes significant improvements to the control orders system, and is a good framework that ought to be able to operate on an ongoing, stable basis. A key difference between this Bill and the 2005 Act is the Parliamentary process involved. The 2005 Act was taken through under heavily accelerated procedures – making annual renewal an appropriate safeguard. That will not be the case with this Bill.

However, we recognise the concerns that have been expressed about this issue both by the JCHR and during Commons 2nd reading and Committee stages of the Bill. The Government has therefore tabled an amendment to the Bill which will require the legislation to be renewed by Parliament (by affirmative order) every five years. This will provide each new Parliament with an opportunity to review the operation of the legislation and to debate whether it remains necessary.

Pre-legislative scrutiny of draft emergency legislation for "enhanced TPIMs"

We welcome the Government's decision to make its draft legislation for "enhanced TPIMs" available for pre-legislative scrutiny. We look forward to an opportunity to contribute to that scrutiny by examining the human rights compatibility of the draft legislation. (Paragraph 1.48)

The Government has published the draft emergency legislation as soon as was practicable, and in time for pre-legislative scrutiny to have been completed before the TPIM Bill comes into force. We note the JCHR's intention to consider the emergency bill.

Published by TSO (The Stationery Office) and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Order through the Parliamentary Hotline Lo-Call 0845 7 023474
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone: 0870 240 3701

The Parliamentary Bookshop
12 Bridge Street, Parliament Square
London SW1A 2JX
Telephone orders/General enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: bookshop@parliament.uk
Internet: http://www.bookshop.parliament.uk

TSO@Blackwell and other Accredited Agents

ISBN 978-0-10-181672-4