

DRAFT ENHANCED TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

MEMORANDUM BY THE HOME OFFICE TO THE JCHR

Introduction and summary

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the draft Enhanced TPIM Bill, which has been published for pre-legislative scrutiny. The memorandum has been prepared by the Home Office for the JCHR in order to assist that Committee in its consideration of the draft Bill. The Department is satisfied that the Home Secretary can sign a statement of compatibility under section 19(1)(a) of the Human Rights Act 1998 on introduction of the Bill should such introduction be necessary.
2. This Bill has been prepared in draft as part of the implementation of the recommendations of the Government's review of counter-terrorism and security powers in relation to control orders¹. 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. The draft Bill makes provision for a regime which allows the Secretary of State to impose "enhanced TPIM notices" on individuals where the conditions specified in the Bill are met. The restrictions and requirements that would be available under enhanced TPIM notices are more stringent than those which will be available under the TPIM regime should the TPIM Bill currently before Parliament become law. There are greater safeguards however, in that in order to impose an enhanced TPIM notice, the Secretary of State must be satisfied on the balance of probabilities that the individual is or has been involved in terrorism-related activity (a higher threshold than the test for imposing a standard TPIM notice) and the legislation only remains in force for one year, unless renewed by affirmative order.
4. 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 TPIM Bill to apply. This includes provision in relation to rights of appeal and court review and provision requiring the Secretary of State to keep the necessity of the notice under review.
5. The case law on the key ECHR issues that have arisen under the control order regime is now fairly settled. The control order regime operates compatibly with

¹ *Review of Counter-Terrorism and Security Powers Review Findings and Recommendations (Cm 8004)*, published on 26 January 2011.

Convention rights and the Government considers that so too will the enhanced TPIM regime.

6. Given the substantial overlap between the regimes for TPIM notices and enhanced TPIM notices (evidenced by the application of the majority of the TPIM Bill to the Enhanced TPIM Bill), this memorandum deals only with those provisions in the Bill which give rise to ECHR issues over and above those dealt with in the memorandum to the TPIM Bill. It cross-references the latter memorandum where the same issues arise and have already been considered in full in that memorandum.

Provision in relation to enhanced TPIMs

7. The draft Bill contains a power for the Secretary of State to impose an enhanced TPIM notice on an individual if the following conditions are met:
 - (a) The Secretary of State is satisfied on the balance of probabilities that the individual is or has been involved in terrorism-related activity (“condition A”);
 - (b) Some or all of that activity is “new terrorism-related activity” (“condition B”);
 - (c) The Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for enhanced measures to be imposed on the individual (“condition C”);
 - (d) The Secretary of State reasonably considers that (i) it is necessary, for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity, for each of the specified measures to be imposed on the individual; and (ii) some or all of the measures are measures which may not be imposed under a standard TPIM notice (“condition D”);
 - (e) The court has given permission for the measures to be imposed, or the Secretary of State reasonably considers that the urgency of the case requires measures to be imposed without such prior permission (in which case the imposition of the measures is referred to the court within 7 days for confirmation) (“condition E”).
8. The Bill sets out the types of measures that may be imposed under an enhanced TPIM notice. Details of what the Secretary of State may impose are contained in Schedule 1 to the Bill. Many of the measures are the same as for a standard TPIM notice. The different measures that may be imposed are as follows:
 - (a) A requirement (under paragraph 1 of Schedule 1) for the individual to reside at a specified residence, which may be in any part of the United Kingdom the Secretary of State considers appropriate and may be provided by or on behalf of the Secretary of State. This allows relocation to another part of the United Kingdom without the individual’s consent. (The corresponding power under the standard TPIM Bill only allows the Secretary of State to require the individual to reside in premises other than their own residence where those

premises are (a) in the locality in which the individual currently resides or has a connection with, or in the absence of such a locality, any locality the Secretary of State considers appropriate, or (b) in a locality agreed by the Secretary of State and the individual.)

- (b) A requirement (under paragraph 1) that the individual remains in their residence for a specified period or periods of the day. In imposing such a requirement, the Secretary of State must include provision allowing the individual to be away from the specified residence during the specified period if she grants the individual permission to do so. Such permission may be subject to conditions, including restrictions on the individual's movements during that period or a curfew should the individual be permitted to stay at other premises. (The corresponding power in the standard TPIM Bill only allows the Secretary of State to require the individual to remain in their residence for a specified period or periods "overnight").
- (c) A restriction (under paragraph 4) on the individual leaving a specified area of the United Kingdom (colloquially known as imposing a "geographical boundary" on the individual, which is a specified area around the individual's residence which the individual must not leave without the permission of the Secretary of State).
- (d) A restriction (under paragraph 8) on the possession or use of electronic communications devices which may amount to a total prohibition on such possession or use without the prior permission of the Secretary of State. (The corresponding power under the standard TPIM Bill provides that a specified minimum level of such possession and use must be allowed).
- (e) A restriction (under paragraph 9) on association or communication with other persons, which can include a requirement not to so associate or communicate without the prior permission of the Secretary of State. In imposing such a measure however, the Secretary of State must allow the individual to associate or communicate with specified individuals, or descriptions of individuals, or in specified circumstances, without seeking permission. (The corresponding power under the standard TPIM Bill provides that prior permission is required only in relation to a number of specified individuals or individuals of a specified description – for example individuals who are outside the United Kingdom).

9. As with standard TPIM notices, an enhanced TPIM notice lasts for one year but may be extended for one further year. An enhanced TPIM notice may be imposed beyond this time limit only if the individual has engaged in further terrorism-related activity following the imposition of the notice. These time limits however are subject to the legislation remaining in force. The Bill provides that its operative powers remain in force for a period of one year, unless they are renewed for a further period of up to a year by affirmative order or unless repealed before that time (clause 9). If the relevant provisions of the Bill expire or are repealed, any enhanced TPIM notice in force at that time may continue in force for a transitional period of up to 28 days, following which the notice ceases to have effect (clause 10).

10. The procedures for, and the regime around, enhanced TPIM notices are the same as those in relation to standard TPIM notices. 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 evidence procedures), and the supporting powers of entry and search. This is reflected in clause 3 of the Bill which applies the majority of the provisions of the standard TPIM Bill to this Bill. 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.
11. The power to impose an enhanced TPIM notice is not affected by the individual having been subject to a standard TPIM notice or vice versa (clause 4). An enhanced TPIM notice may therefore be imposed on an individual who, when the Bill comes into force, is subject to a standard TPIM notice. In such a case, the standard TPIM notice must be revoked before an enhanced notice may be imposed. An individual may be subject to each type of notice for two years (in the absence of further terrorism-related activity) – provided of course (in relation to the enhanced TPIM notice) the Enhanced TPIM Bill remains in force for that period of time.
12. As with the standard TPIM Bill, contravention without reasonable excuse of a measure in an enhanced TPIM notice is to be a criminal offence, punishable with a maximum sentence of 5 years' imprisonment (clause 7).

The enhanced measures

13. Paragraphs 13 to 18 of the ECHR memorandum to the JCHR on the TPIM Bill set out the Government's analysis of the ECHR rights and issues that are engaged by the measures that may be imposed under a TPIM notice – including how the safeguards in the Bill will ensure that interferences with those rights are justified, necessary and proportionate in individual cases. It is of particular note that:
 - (a) The types of measures that may be imposed are clearly delineated in the Bill, and the measures themselves will be clearly set out in the TPIM notice itself. The measures will therefore be “in accordance with the law”.
 - (b) The Secretary of State must consider that each measure she imposes is “necessary” for preventing or restricting the individual's involvement in terrorism in the particular circumstances of the individual's case and must keep the necessity of the measures, both collectively and individually, under review throughout the duration of the notice. The

Secretary of State is obliged to act in accordance with Convention rights by virtue of section 6 of the Human Rights Act 1998.

- (c) There is judicial supervision of enhanced TPIM notices throughout, including the initial permission stage, the automatic court review of the imposition of the notice and numerous appeal rights for the individual. The case law relating to control orders means that the courts will apply an exacting standard of review, including “intense scrutiny”² of the necessity for each of the measures imposed.
14. The analysis in the paragraphs of the memorandum to the TPIM Bill mentioned above also applies in relation to the measures which may be imposed under an enhanced TPIM notice. However, under the enhanced scheme, various more restrictive measures are available, as described in paragraph 8 of this memorandum, and these require further analysis, set out below. But in broad terms, the Government’s assessment remains that sufficient safeguards are in place to ensure that individuals’ ECHR rights are only interfered with to the extent necessary and proportionate in the circumstances of each individual case. And so the enhanced measures will only be imposed and maintained where the facts and circumstances of the case justify them.

General assessment of the enhanced measures

15. It is to be noted that there are similarities between the proposed enhanced measures and non-derogating control orders under the Prevention of Terrorism Act 2005. Obligations under the control order regime have been subject to scrutiny by the High Court, and in many cases also by the appeal courts. The enabling powers in the legislation have not been found to be incompatible with ECHR rights. In a number of cases, obligations imposed in individual cases have been found to be incompatible. However, the Government considers the risk of this happening under the enhanced TPIM regime is lower now that it has the benefit of the experience of the control order regime; the case law in that context provides guidance as to the limits of the measures that may be imposed and the factors the Secretary of State must take into account. In particular, in relation to curfews imposed under preventative measures, and their compatibility with article 5 of the ECHR (right to liberty), the case law is now fairly settled. It is clear that curfews of 18 hours (or more) constitute an unlawful deprivation of liberty; and it is clear that the Secretary of State is obliged to take into account all the personal circumstances of the individual and their family (including their own choices and frailties) along with the impact of the whole package of measures imposed, when considering imposing a curfew of 14 to 16 hours (see further on article 5 below). The Secretary of State is also of course obliged to take into account the personal circumstances of the individual in relation to imposing measures generally (not just in the context of considering article 5 issues). If the Secretary of State imposes a measure which the court finds does breach the individual’s Convention rights – including if the court disagrees with the Secretary of State’s assessment on the proportionality of the measure – the court has the power under the Bill to quash the measure or the entire notice.

² *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 paragraphs 63 to 65.

16. When compared with the control order regime, the enhanced TPIM regime incorporates 2 additional safeguards which are relevant in ECHR terms. These are that:

(a) Before imposing the enhanced measures, the Secretary of State must be “satisfied on the balance of probabilities” that the individual is or has been involved in terrorism-related activity. This is a higher test than that for the imposition of a control order (where the test for making an order is that the Secretary of State must only “reasonably suspect” that this is the case). This higher test therefore provides a safeguard in that it is only in cases where it is more likely than not that the individual is or has been involved in terrorism-related activity that the enhanced measures may be imposed³.

(b) The types of measure that may be imposed under the enhanced TPIM regime are clearly set out in Schedule 1 to the draft Enhanced TPIM Bill. The enabling powers under the Prevention of Terrorism Act 2005 are much wider – allowing the Secretary of State to impose any obligations she considers necessary and providing only an illustrative list of the types of obligation that this may include.

17. There is also an additional safeguard to those noted in the memorandum to the JCHR on the TPIM Bill in that, in accordance with clause 9 of the draft Bill, the operative provisions of the Enhanced TPIM Bill only remain in force for one year, unless they are renewed by order made by the affirmative resolution procedure. Those provisions may also be repealed by order at any time. When the Enhanced TPIM Bill expires or is repealed, any enhanced TPIM notices may remain in force for a transitional period of 28 days only, after which they cease to have effect (see clause 10). The control order provisions also require annual renewal (see section 13 of the Prevention of Terrorism Act 2005), but if the powers in the Enhanced TPIM Bill are repealed or expire, they, unlike the control order powers, cannot be revived – primary legislation would need to be passed again to re-introduce such powers.

18. In the event that the Enhanced TPIM Bill was renewed by order beyond the first 12 months, it is possible that an individual could be subject to a standard TPIM notice and an enhanced TPIM notice for a cumulative period of 4 years (or longer if the individual engaged in further terrorism-related activity after being made subject to the measures). This is because there is a 2 year time limit in relation to each type of notice (in the absence of further terrorism-related activity). Although this period is longer than the 2 year time limit for which an individual may be subject to measures under the TPIM Bill (if the Enhanced TPIM Bill never comes into force), this is considered justified. This is because the Enhanced TPIM Bill is only to be introduced where there is a serious terrorism-related risk and the powers in it are considered necessary to protect the public. A person may only be

³ This test is also higher than that in the standard TPIM regime, under which the Secretary of State must “reasonably believe” the individual is or has been involved in terrorism-related activity.

made subject to an enhanced TPIM notice where the “necessity” tests laid down in clause 2 of the Bill are met – and the Secretary of State’s assessment that these tests are met is subject to intense review by the courts. The necessity tests must also be met in relation to a standard TPIM notice, as provided in clause 3 of the TPIM Bill. Under the control order regime, a non-derogating control order is not subject to any statutory time limit⁴. This absence of a statutory time limit in the Prevention of Terrorism Act 2005 has never been found to be incompatible with Convention rights. The period for which an individual may remain subject to measures however, under either Bill, is limited not only by the combined time limits, totalling four years, but also by the provision requiring that each notice is, and remains, necessary for purposes connected with protecting the public from a risk of terrorism. So the maximum of four years would only apply if the Secretary of State considered – and the courts agreed – that the TPIM notice and enhanced TPIM notice were necessary throughout that period to protect the public from a risk of terrorism.

Article 5

19. In terms of the specific enhanced measures, article 5 may be engaged by the requirement that the individual remain in their residence for a specified period or periods during the day. A similar requirement may be imposed under a non-derogating control order and such requirements in that context have been reviewed extensively by the courts in terms of their compatibility with article 5 of the ECHR (right to liberty).
20. In *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45, the House of Lords found that curfews of 18 hours (or more) amounted to a deprivation of liberty. And, as none of the exceptions to the right of liberty specified in article 5 (a) to (f) apply, such curfews constitute a breach of article 5. In *Secretary of State for the Home Department v E & Another* [2007] UKHL 47 and *Secretary of State for the Home Department v MB & AF* [2007] UKHL 46, the House of Lords found that control order curfews of 12 and 14 hours do not deprive an individual of their liberty.
21. In assessing what constitutes a deprivation of liberty, what must be focused on is the extent to which the individual is “actually confined” – that is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, particularly those which contribute to the social isolation of the individual, are however to be taken into account. But such “other restrictions (important as they may be in some cases) are ancillary” and “[can] not of themselves effect a deprivation of liberty if the core element of confinement... is insufficiently stringent”⁵. This assessment of the position was reaffirmed in the Supreme Court judgment in *AP v Secretary of State for the Home Department* [2010] UKSC 24⁶. Lord Bingham in that case also said that in his view “for a control order with a 16-hour curfew (*a fortiori* one with a 14-hour curfew) to be

⁴ A non-derogating control order has effect for 12 months but may be renewed for further periods of 12 months and there is no statutory limit on the number of renewals that may be made – see clause 2 of the Prevention of Terrorism Act 2005.

⁵ paragraph 11 of the *MB and AF* judgment.

⁶ Paragraph 1.

struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living”⁷.

22. The courts have therefore described a “grey area” of cases involving curfews of between 14 and 16 hours, where the determination of whether there has been a deprivation of liberty involves consideration of factors other than the curfew period itself, including the other restrictions within the package of measures. It is clear therefore that requirements imposed under paragraph 1 of Schedule 1 to the Bill, enabling the Secretary of State to impose a requirement on the individual to remain in their residence for a specified period during the day, may engage article 5 where that period amounts to 14 or more hours. (The Secretary of State will not be able to specify a period of 18 or more hours as this would constitute a deprivation of liberty). Where the Secretary of State considers it necessary to impose a curfew of 14 to 16 hours, she will need to consider very carefully whether this would amount to a deprivation of liberty in the circumstances of the case. In making this assessment, she will need to consider the draft package of measures in the enhanced TPIM notice as a whole – in particular the measures which impact on the individual’s sense of social isolation. These would, in particular, include a requirement that the individual reside in a property away from their home area, restrictions on association and communication and any geographical boundary. The Secretary of State will need to take into account the personal circumstances of the individual and their family, including (in accordance with the Supreme Court judgment in *AP*) any relevant personal frailties and choices such as a key family member’s difficulties in travelling to visit the individual away from their home area (unless the family’s conduct is unreasonable⁸).
23. The principle of imposing a curfew on an individual under civil preventative measures does not infringe article 5 and there are protections in place to ensure that measures do not individually or cumulatively amount to a deprivation of liberty. In particular, there is a duty on the Secretary of State (under section 6 of the Human Rights Act 1998) to act compatibly with the Convention rights in determining the length of the curfew and any other measures to be imposed under an enhanced TPIM notice – taking into account the relevant case law. Further, she may not impose measures unless they are “necessary” (clause 2) and she is obliged to keep the necessity of the enhanced TPIM notice and each measure under review (see clause 11 of the TPIM Bill as applied by clause 3 of the draft Bill). If however in any individual case the measures imposed are found to amount to a deprivation of liberty, the courts will quash the offending measures or the entire TPIM notice in accordance with their powers under the Bill (see in particular clause 9 of the TPIM Bill as applied by clause 3 of the draft Bill).
24. The Government therefore considers that the provisions in the draft Bill allowing for the imposition of a period of confinement to the residence (paragraph 1 of Schedule 1 to the Bill), together with the provisions allowing for other restrictions on the individual, are compatible with article 5.

⁷ Paragraph 4.

⁸ Paragraphs 15 and 29.

Articles 8, 10 and 11

25. The requirement to reside in a part of the United Kingdom that is not the individual's home area, the geographical boundary, the restrictions on electronic communications devices and on association and communication will engage articles 8, 10 and 11 (as well as being contributing factors to the assessment of whether there is a deprivation of liberty contrary to article 5).
26. As indicated in paragraphs 13 to 18 above, whether such interferences with qualified rights are justified in any particular case will depend on the circumstances of the case, but the Government is satisfied that there are sufficient safeguards in the draft Bill to ensure that necessity and proportionality are secured in each case. In addition, the Secretary of State is under a duty in accordance with section 6 of the Human Rights Act 1998 to act compatibly with the Convention rights when imposing and maintaining measures under an enhanced TPIM notice.
27. It is to be noted that the relocation of individuals to another part of the United Kingdom without consent under control order obligations has been reviewed by the courts on a number of occasions. The court has not always upheld the Secretary of State's decisions on relocation. For example, in the case of *BH v Secretary of State for the Home Department* [2009] EWHC 3319 (Admin), although Mitting J agreed with the Secretary of State's assessment that the relocation of BH under his control order to another part of the country was necessary, he went on to find that, on balance, it was disproportionate in light of BH's particular family circumstances. However, in many other cases, the court has upheld the Secretary of State's decision on relocation. For example, see *Secretary of State for the Home Department v BM* [2011] EWHC 1969 (Admin), *Secretary of State v BX* [2010] EWHC 1273 (Admin) and *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin). The principle of relocating an individual to a residence in another part of the United Kingdom under civil preventative measures, as well as numerous instances of the use of the power in individual cases, has therefore been upheld by the courts as compatible with Convention rights.
28. In reaching judgment on whether the imposition of each obligation in a control order is flawed, the Courts have applied the Court of Appeal's guidance in *MB*⁹ in affording a degree of deference to the Secretary of State on the basis that she is better placed than the court to decide the measures necessary to protect the public against activities of a terrorist suspect; but in also applying intense scrutiny to the necessity for each of the obligations and considering their proportionality. Many control order judgments, applying this principle, have upheld geographical boundaries and severe restrictions on association and communications and on access to communications devices as part of the package of obligations. For example, in the case of *Secretary of State for the Home Department v AR* [2009] EWHC 1736 (Admin) the Court found that the boundary was a significant part of the total package of obligations required to achieve the statutory purpose.

⁹ *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 paragraphs 61 to 65.

29. Taking account of the matters set out in paragraphs 13 to 18 of the memorandum to the TPIM Bill as well as the matters in the paragraphs above, the Government considers that the provisions allowing for the imposition of enhanced measures (under enhanced TPIM notices) are compatible with Convention rights.

Other provisions

Article 6

30. Paragraphs 24 to 42 of the memorandum to the TPIM Bill set out the Government's analysis of the article 6 issues in relation to that Bill. The same functions of the court and the same court procedures concerning the use of closed material provided in (and under) the TPIM Bill apply to the Enhanced TPIM Bill (see clause 3 and Schedule 2). We therefore refer to paragraphs 24 to 42 as mentioned above in relation to the enhanced TPIM regime.

31. For the reasons set out in those paragraphs, the Government considers that the provisions in the Bill relating to court review, appeals and the use of closed proceedings are compatible with article 6.

Other ECHR issues

32. The Enhanced TPIM Bill also applies the provisions in the TPIM Bill relating to powers of entry, search, seizure and retention, anonymity orders and the powers to take and retain biometric material from individuals subject to measures (see clause 3 of and Schedule 2 to the Bill). The ECHR analysis relating to these provisions as they apply to the enhanced TPIM regime is therefore identical to that contained in paragraphs 43 to 76 of the memorandum to the TPIM Bill (which relate to these matters).

33. Paragraph 7 of Schedule 2 to the Bill however modifies the application of Schedule 6 to the TPIM Bill (fingerprints and samples) to take account of the fact that a person may be subject to both a standard TPIM notice and an enhanced TPIM notice (at different times). The retention period for biometric material taken from such an individual is therefore adjusted so that such material may be retained for a period of 6 months after the person ceases to be subject to measures (whether imposed under an enhanced or a standard TPIM notice), or until there is no further possibility of an appeal against a quashing decision and the quashed notice is not replaced.

34. It is considered justified and proportionate to retain the biometric material for the period for which the individual is subject to measures under either scheme and for the limited period of 6 months afterwards, for the reasons set out in the memorandum to the TPIM Bill. And the Government therefore considers that the above mentioned provisions are compatible with the Convention rights.