



Home Office

# TRIENNIAL REVIEW OF THE TECHNICAL ADVISORY BOARD

# Summary

1. The review forms part of a programme, overseen by the Cabinet Office, under which all departments are required to review their Non-Departmental Public Bodies on a regular basis. This review started on 16 April 2012 following its announcement by way of a Written Answer on 27 March. In view of the small size of the TAB and its advisory status, it was decided that the exercise could be carried out by a single reviewer. I have conducted conversations with a small sample of the Board's members: specifically one of the six representatives of communication service providers who sit on the Board and one of the six representatives of government departments who (together with the Chairman) make up the rest of its membership. I also met the Board's Chairman and its Secretary (who is also the departmental sponsor).

## Summary of Conclusions

2. During the course of the review, there was some questioning of the categorisation of the TAB as an NDPB. This issue has been reviewed in conjunction with the Cabinet Office and it has been concluded that although it has some features which are not typical of NDPBs, that is the most appropriate category for it to be placed in.
3. Despite the fact that the TAB has not so far been called upon to perform its advisory function, this function needs to continue and an NDPB is the most appropriate (indeed almost certainly the only) form in which it can carry out its role effectively. Broadly the current governance arrangements appear in line with good corporate governance principles.

## Review Stage 1 – Functions

4. The primary function of the Board is to advise the Home Secretary on whether obligations imposed on communications service providers (CSPs) under the terms of the Regulation of Investigatory Powers Act 2000 (RIPA) are reasonable. The Act provides the Secretary of State with the powers to place obligations upon CSPs to maintain a permanent interception capability in order to safeguard national security and help fight organised crime. The Board is established under s13 of that Act, and the size and composition of its membership is prescribed by the Regulation of Investigatory Powers (Technical Advisory Board) Order 2001. Its role is to advise the Home Secretary when government cannot reach a satisfactory agreement with an operator in the provision of interception facilities. During its existence to date, the Board has not been called upon to exercise its advisory function, but has maintained its capability to do so if called upon.
5. Section 13 of the Act and a relevant extract from the Order defining its composition are set out in the Annex to this report. In summary, TAB is made up of an Independent Chair and:
  - (a) persons holding an office, rank or position with either—
    - (i) a person on whom obligations may be imposed under section 12 of the 2000 Act, or
    - (ii) a body representing the interests of such persons, and
  - (b) persons holding an office, rank or position with either—
    - (i) a person by or on whose behalf applications for interception warrants may be made, or
    - (ii) a body representing the interests of such persons.

For the board to function, there must be six members from each of a and b above.

6. In considering the case for the TAB to be classified as an NDPB, its constitution and function were looked against the criteria which define the most obvious alternative category for it: a Stakeholder Group. The TAB does meet some of those criteria:
  - It hears the views and concerns of specific sectors, industries and communities;
  - Members are representatives of organisations,
  - They are unpaid
  - The lifespan is not limited to 2 years
  - The TAB does not employ its own staff but is supported by Civil Servants.

However, a key feature of a NDPB that differentiates it from a Stakeholder Group is that it provides Ministers with independent, expert advice. In the case of TAB, this is provided to the Minister by the Chair – who is independent of the bodies from whom other members of the Committee are drawn. The Chair therefore makes use of the expertise of the other members but applies an independent perspective to the advice he or she offers. Also, while members are representatives of organisations, they are appointed because of what they can offer as individuals. The 6 industry representatives are selected from the 8 intercepting agencies and multiple CSPs, meaning appointments are on merit rather than to represent a particular agency or CSP; indeed an agency or CSP could provide more than one member to the TAB. The appointment arrangements are set out in paragraph 30 below.

## Views of Respondents on the role and constitution of the TAB

7. Each of the stakeholders consulted took the view that the Board potentially fulfils a valuable function and that the fact it has yet to be called upon cannot be taken as indicating that it is surplus to requirements. There is a recognition that CSPs operate in a field in which technological advances mean that obligations placed upon them under section 12 of RIPA are tending to become more complex and difficult to define. Consequently there are good reasons for believing that a CSP may decide to challenge the content of a s12 notice. Although untested as a provider of advice in those circumstances, the TAB is seen as having within its membership the balance of views and range of expertise and understanding that would be required.
8. Stakeholders also think that the fact that the TAB exists makes it less likely that s12 Notices will be in a form which leads to an appeal being lodged; in other words the fact that it has not been called into action is a signal of its success.
9. If the TAB did not exist, companies which felt that s12 notices served on them were unreasonable could (in the absence of such a specific statutory body) seek judicial review of the decision. However, some smaller companies subject to s12 obligations might feel they could not afford to do invoke the law in that way. Appealing to the TAB would be much less costly.

## Other factors bearing on the TAB's continuing existence

10. The views of stakeholders have an important bearing on decisions about the need for an NDPB to continue in existence, but are not the only critical factor. In the case of the TAB, the review has concluded that the following points also lend weight to the case for retention:
  - The costs of the TAB are minimal – only a little more than £400 in the most recent financial year – and if they increase significantly it will be because the Board has confirmed the case for its existence by being called on for advice.
  - It is a statutory body and the time and costs involved in further legislation would be incurred to remove the need for it from the statute book.
  - The Government intends that, if relevant measures in the recently-published draft Communications Data Bill are enacted, the role of the Board should be extended so that it can consider, and advise the Secretary of State on, representations by a CSP about requirements placed on it under the Act.

## Delivery Models

11. Triennial reviews are required to consider potential alternative delivery structures for the functions provided by the relevant body. While taking account of the full range of organisational structures suggested by the Cabinet Office guidance, the review was able to conclude quickly that most of these would be inappropriate for the functions of the TAB.
12. The Board has a potentially important, but quite narrow, role requiring a specific area of expertise on the part of its members and a balance of interests between the CSPs and the intercepting agencies. The representatives of the communications companies are full-time employees of their companies. The members representing the agencies are nominated by those agencies and are Government employees (and because of the nature of their full-time roles, their identity is treated as classified and not placed in the

public domain). No member of the TAB other than the Chair receives remuneration relating to any work they undertake on behalf of the Board although they may claim expenses.

13. It would not be appropriate for a body with such characteristics to be established in most of the alternative delivery modes prescribed in triennial review guidance, such as local government, private or third sector. Nor would its constitutions as an executive agency be appropriate as it is an advisory, not an executive, body.
14. As regards options offered by merger, since the TAB secretariat is located within the Home Office, the benefits available from the utilisation of corporate systems (for finance, recruitment etc) provided by a larger body have already been taken up. The TAB itself must have the element of independence that is afforded by NDPB status and which also reflects the fact that its members are all employees of other organizations. Thus, even if a body existed with similar functions to the TAB (and none actually does) it would be totally impracticable for the TAB to merge with it, just as it is impracticable for it to merge with the Home Office itself.

## The Three Tests

15. One of the requirements of the Triennial Review process is an assessment of the role of the TAB in line with the Government's "Three Tests":
  - Is this a technical function (which needs external expertise to deliver)?
  - Is this a function which needs to be, and be seen to be, delivered with absolute impartiality (such as certain regulatory or funding regulations)?
  - Is this a function which needs to be delivered independently of Ministers to establish facts and/or figures with integrity?

### **Is the body needed to perform a technical function?**

16. Yes, in the broad sense of "technical" as meaning a requirement to possess a special skill or area of knowledge. The TAB is composed of individuals with a range of types of knowledge which are not widely held, including the technical capacity of agencies to carry out interception, and the needs of Government agencies for access to particular information in order to maintain surveillance in the interests of national security.

### **Does the existing body need to be politically impartial?**

17. Yes, although its ability to enable appropriate advice to be provided for Ministers is equally dependent not on having a balance of interests represented across its membership. The Chair ultimately has the responsibility for providing independent advice.

### **Does the existing body need to act independently to establish facts?**

18. Yes. As indicated in paragraph 33, introducing independence to the advisory function is primarily the responsibility of the Chair, but members of the Board are expected to provide accurate and reliable factual input on which the advice can be based.

## Conclusion

19. The Board should remain in existence against the time when its services are needed, and as a reassurance to the industry that an appeal against an unreasonable exercise of legislative powers can receive independent consideration.. There is no other body with which it could sensibly be merged and there would be no financial benefit from doing so. The need for independence means that bringing it within the Home Office is not an option, and no other mode of delivery for its functions would be appropriate given its unusual constitution.

## Stage 2 – Control and Governance

20. The Board's Terms of Reference and Code of Practice are set out in documents published on a section of the Home Office website devoted to the Board. The review also looked at the terms and conditions set out in appointment letters to industry members of the Committee.
21. While it is obviously as important for the TAB to observe high standards of governance, control and propriety just as any other public body, the review has had to take account of the limited relevance of some of the tests of governance normally applied given that the Chair is the only member of the Board receiving remuneration directly related to his work on its behalf and half of its members are co-opted public officials. Further, the fact that the Board has never so far been called upon to carry out its main function of providing advice to the Secretary of State means limits the evidence available about how control and governance operate in practice.
22. This section of the review therefore focuses on those aspects which are relevant in the context of the Board's remit and constitution. The headings are based on the six broad principles set out in Cabinet Office guidance.

## Accountability

**Principle: The Minister is ultimately accountable to Parliament and the public for the overall performance, and continued existence, of the public body.**

23. The Terms of Reference and Code of Practice appear to provide adequately for the Minister to show accountability for the TAB to Parliament and others. Despite the absence of requirements for its advice, the TAB has regularly published annual reports.
24. The Home Secretary appoints the Chair and has the right to terminate the appointment. The Chair of the Board has been in place since 2004 and is on his third term. Under the public appointment rules issued and overseen by the Commissioner for Public Appointments, there is no limit on the number of reappointments of one individual, subject to satisfactory performance and an overall time limit of 10 years on the term of office. The period of Mr Walker's latest reappointment, running to the end of 2014, will take his term to the allowable limit of 10 years.
25. The Chair said that he has not at any stage met Home Office Ministers despite this being one of the principles of good corporate governance for NDPBs. It would be understandable in the light of the Board having no appeals to consider if such meetings would be infrequent, but it is surprising in the light of nearly 8 years of tenure that no meeting has occurred.

**Recommendation:** An opportunity for such a meeting should be found in the near future.

## Role of the Home Office as sponsor Department

### Principles:

**The departmental board ensures that there are appropriate governance arrangements in place with the public body.**

**There is a sponsor team within the department that provides appropriate oversight and scrutiny of, and support and assistance to, the public body.**

26. As the TAB is a very small advisory body yet to be called on to give advice in practice, it would not be expected to have come to the attention of the departmental Board on more than a passing basis, leaving oversight largely to the departmental sponsor. Discussions with the Chair and with the sponsoring team (part of the Office of Security and Counter-Terrorism in the Home Office) indicate that in practice the latter maintain an appropriate level of oversight. However, the Terms of Reference and Code of Practice for the TAB do not explicitly set out responsibilities to be discharged by the Home Office as sponsor. Although such duties can be exercised with a light touch for as long as the TAB is not called upon for advice, the absence of obligations on the sponsor is in contrast to the governance documents for other advisory bodies. It also means that there is not an explicit requirement on the department to keep the performance of the TAB under regular review.

**Recommendation:** At next review (likely to be necessary soon assuming the Communications Data Bill is enacted) the Terms of Reference should be expanded to include sponsor's obligations, based on Cabinet Office guidance. This should include a requirement to review the performance of the TAB annually, although the scope to carry out such a review will be limited unless and until its main advisory function is called upon.

27. The review has found that the sponsoring team is generally maintaining appropriate contact with the Chair, taking account of the Board's low level of activity. The Chair mentioned that the policy background against which the Committee operates can be difficult to keep up with for someone in his position needing to retain independence from government and industry interests. However, that requirement does not seem such as to preclude the holding of occasional briefing sessions, and it was pleasing to learn that the Chair had recently been briefed by the Home office on the proposals for the CD Bill.

**Recommendation:** Opportunities should continue to be found for occasional briefing sessions for the Chair from Home Office officials.

## Role of the Chair

**Principle: The Chair is responsible for leadership of the board and for ensuring its overall effectiveness.**

28. The roles of the Home Office and the Minister in appointing the chair have already been referred to. The appointment process is designed to be compliant with the Office of the Commissioner for Public Appointments (OCPA) and has taken account of the guidance on the appointment process in the Commissioner's Code of Practice.

29. In the absence as yet of a requirement on the TAB to provide advice, evidence is limited regarding the Chair's role in practice, but the Board's Terms of Reference place appropriate requirements on him. This includes a key role for Chair in making appointments to the Board, and he assured me that this is the case, and indeed has



been one of his main activities in the role to date. The Chair has also produced the Board's annual reports on a consistent basis as required by the Terms of Reference.

30. The Board has not been wholly inactive in the absence of formal requests for advice, and met in most years to review current issues and recent developments. In the course of the conversations held during the review, there was mention of going a step further and assessing the Board's readiness to be called into action by asking it to act out a test scenario. Despite some support in principle for this idea, the Chair told me that at present there is no firm plan to put it into practice. There does seem to be a degree of uncertainty about how the Board would act in practice in the event of an appeal being received by the Home Secretary, and there seems merit in identifying and explore issues likely to arise from an appeal before the Board has to respond to one in reality.

**Recommendation:** The Chair should engage with the sponsorship team to plan for a test scenario to be designed and acted out.

## Role of TAB Members

**Principle: Board members should provide independent, expert advice.**

31. The statutory requirements which apply to the appointment of Board members are set out in paragraph 5 above, from which it is clear that (contrary to the normal principles governing membership of advisory NDPBs), members do represent the interests of the organizations which employ them,. The purpose of the legislation is to establish arrangements under which advice can be based on the members' expertise, but offered to Ministers by a Chair who is independent of the interests represented by the other members. A balanced approach is facilitated by the requirement for equality between the number of members from intercepting organisations and from agencies seeking the issue of warrants.
32. Another factor in assessing the appropriateness of the constraints on TAB members' appointments and activities is the fact that, other than the Chair, they receive no remuneration for their contribution to the TAB. Their letters of appointment make clear that they are statutory office holders, not employees of the Crown.
33. These features of TAB membership, differing from what is more typically required of members of advisory NDPBs, mean that a number of the usual tests of members' independence (diversity of background, transparency of remuneration etc) cannot sensibly be applied to the TAB. The TAB's Code of Practice does apply a requirement that members' interests which might be perceived as affecting their judgment should be declared (the implications of this are considered further below under "Conduct and Behaviour").
34. Appointments to the TAB are made as follows:

**Agency:** the department notifies the Intercept Management Group (IMG), which consists of members of the intercepting agencies, that a vacancy will arise on the panel. The IMG is asked to consider whether there is anyone within their own agencies that is suitable and willing to fill the post(s). At the next meeting, there is a discussion amongst members on candidates. Suitable candidates will then go to the Home Secretary for consideration and appointment. OCPA have classified these as "nominated appointments".

**Industry:** the department writes to CSPs of a reasonable size informing them of TAB, their role and asking if anyone within the organisation that is suitable would like to apply.

Applications are sifted and interviews conducted in accordance with the OCPA Code – these appointments are regulated by OCPA.

## Communications

**Principle: The Public Body should be open, transparent, accountable and responsive.**

35. The nature of the issues with which the TAB is involved means that its activities cannot be subject to the full range of openness and transparency expectations that exist for most advisory bodies. The TAB does, however, produce an annual report on its activities which is available through the website, as are the Board's Terms of Reference and the Code of Practice. The names of the Chair and the industry members are published, but names of the agency representatives are not public information.
36. The Tab's Code of Practice requires members to take a balanced approach to the management of information, requiring it to observe a need for prompt responses to public requests for information, but also to take responsibility for the security and protection of any sensitive or protectively marked information, documents and assets to which they gain access in the course of exercising their TAB functions. In practice these requirements have been little-tested, and will not be so until the TAB has handled an actual request for advice under the Act.

## Conduct and Behaviour

**Principle: Board members should work to the highest personal and professional standards. They should promote the values of the public body and of good governance through their conduct and behaviour.**

37. The Code of Practice governing the activities of the TAB and its members incorporates the Seven Principles of Public Life, and contains provisions which apply the Principles in practical ways to the conduct of members. Industry members' appointment letters draw their attention to the need to act in accordance with the Code and the Seven Principles.
38. The provisions in the Code of Practice provide the standard limitations on the scope for Board members to cast doubt on the integrity and independence of the TAB through their engagement in political activities.
39. The issue of members' interests has to be considered in the particular circumstances of the TAB, where appointed members not only represent the views of CSPs generally but are each the employee of a particular CSP. Such interests are readily discoverable and therefore in the open. The main purpose of a register of interests is therefore to record interests other than those arising from a member's attachment to a specific industry player. None have so far been declared.
40. The granting of TAB membership to CSP employees raises issues not normally arising in the case of advisory NDPBs, with one obvious question being whether a member would be permitted to participate in the consideration of an appeal lodged by his or her own employer. While on the face of it they should be excluded from such discussions, there is a case to the contrary based on the fact that the TAB is constituted so as to provide a balance of industry/agency views which would be disturbed by excluding one individual. Before the issue gets to be tested in a real case, it would seem sensible to design the test scenario recommended above so as to explore the way in which the discussions within TAB might develop where the appellant was the employer of one of the Board members.

**Recommendation:** One feature of the test scenario recommended above should be that the appeal has been lodged by an employer of one of the TAB members.

## Conclusions

41. The conclusion of this Review is that the TAB should continue as an advisory Non-Departmental Public Body to provide advice to Ministers on appeals under s12 of the Regulation of Investigatory Powers Act 2000. There is no alternative, plausible model for the functions to be carried out.
42. The Review found that the governance arrangements in place for the TAB were for the most part fit for purpose. Four suggestions are made for improvement:
  - The Chair has not so far met Ministers and an opportunity for such a meeting should be found in the near future.
  - At next review the Terms of Reference should be expanded to include sponsor's obligations, based on Cabinet Office guidance. This should include a requirement to review the performance of the TAB annually, although the scope to carry out such a review will be limited unless and until its main advisory function is called upon.
  - As the TAB has yet to be called on to provide advice on an appeal, the Chair should engage with the sponsorship team to plan for a test scenario to be designed and acted out.
  - One feature of the test scenario recommended above should be that the appeal has been lodged by an employer of one of the TAB members.

## ANNEX A

### Section 13 of the Regulation of Investigatory Powers Act 2000

13 Technical Advisory Board.

(1) There shall be a Technical Advisory Board consisting of such number of persons appointed by the Secretary of State as he may by order provide.

(2) The order providing for the membership of the Technical Advisory Board must also make provision which is calculated to ensure—

(a) that the membership of the Technical Advisory Board includes persons likely effectively to represent the interests of the persons on whom obligations may be imposed under section 12;

(b) that the membership of the Board includes persons likely effectively to represent the interests of the persons by or on whose behalf applications for interception warrants may be made;

(c) that such other persons (if any) as the Secretary of State thinks fit may be appointed to be members of the Board; and

(d) that the Board is so constituted as to produce a balance between the representation of the interests mentioned in paragraph (a) and the representation of those mentioned in paragraph (b).

(3) The Secretary of State shall not make an order under this section unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

### Extract from the Regulation of Investigatory Powers (Technical Advisory Board) Order 2001

#### Citation, commencement and interpretation

1.—(1) This Order may be cited as the Regulation of Investigatory Powers (Technical Advisory Board) Order 2001 and shall come into force on the day after the day on which it is made.

(2) In this Order, “the 2000 Act” means the Regulation of Investigatory Powers Act 2000.

#### Membership of the Board

2.—(1) The Technical Advisory Board established by section 13(1) of the 2000 Act shall consist of 13 persons.

(2) Of that number one person, who does not fall within paragraph (3), shall be appointed chairman.

(3) Of the remaining number—

(a) six shall be persons holding an office, rank or position with either—

(i) a person on whom obligations may be imposed under section 12 of the 2000 Act, or

(ii) a body representing the interests of such persons, and

(b) six shall be persons holding an office, rank or position with either—

(i) a person by or on whose behalf applications for interception warrants may be made, or

(ii) a body representing the interests of such persons.

Minister of State

Home Office  
2001

## ANNEX B

This review was carried out between April and August 2012 and led by Peter Murphy, a Senior Civil Servant in Her Majesty's Passport Office.

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