THE GOVERNMENT RESPONSE TO THE
REPORT FROM THE JOINT COMMITTEE ON THE
DRAFT ENHANCED TERRORISM PREVENTION
AND INVESTIGATION MEASURES BILL
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Draft Enhanced Terrorism Prevention and Investigation Measures Bill

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The Government Response to the Report from the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill

1. The Government would like to thank the Committee for conducting such a measured inquiry into the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (Draft ETPIM Bill). It welcomes the Committee's conclusion that the enhanced measures are a suitable response to the challenge they seek to tackle, and that there are no simple solutions to address the ongoing terrorist threat posed by those who cannot be prosecuted or deported.

Exceptional circumstances and Parliamentary scrutiny

2. The Committee has rightfully recognised that the ETPIM Bill would only be introduced in exceptional and unanticipated circumstances, but has asked for a clearer definition of what these might be. As the Parliamentary Under Secretary for Security set out in his evidence to the Committee, it is not possible to give an exhaustive summary of these, but exceptional circumstances could be defined as a situation where the country faced a serious terrorist threat that the Government, on the advice of the police and the Security Service, judged could not be managed by any other means.

3. This might include a situation where there was credible reporting pointing to a series of concurrent, imminent attack plots, or the period immediately following a major terrorist incident where we faced the prospect of further attacks. A decision to enact the ETPIM legislation is unlikely to be triggered solely by a change to the overall terrorism threat level in the absence of other factors.

4. Turning to Parliamentary scrutiny, the Committee has correctly observed that it would be difficult (in fact probably unwise) for the Home Secretary to share detail of sensitive security material with Parliament to facilitate debate on the Bill's passage.

5. The Government understands the basis for the Committee's recommendation that during any debate of the ETPIM Bill the Intelligence and Security Committee (ISC) should be given a confidential briefing and then inform Parliament whether the Committee was satisfied that there were appropriate grounds to enact the Bill. However, the Government has concerns that this proposal may not be feasible in certain emergency situations. The Government would like, therefore, to discuss with the ISC how they might be duly briefed. The most suitable approach may be for the Home Secretary to provide more detailed, confidential briefings to appropriately cleared Members of either House which would allow them to participate in the Parliamentary debate on the passage of the Bill, and provide an assurance to other Members that the circumstances sufficient to justify the introduction of the additional measures had indeed arisen.

6. The Government also notes that Parliament would have a further opportunity to consider the continued need for the legislation if we decided that the powers in the ETPIM Bill needed to be renewed after twelve months. Similar briefings to some Members could be provided again at that point.

Consolidation of ETPIMs within the TPIM legislation

7. The Government also notes the Committee's conclusion that it does not approve of the use of emergency legislation in principle, and its recommendation that should it ever be needed the ETPIM Bill should be brought forward in its current form and then subsequently consolidated with the TPIM Act 2011.

8. The Government agrees that emergency legislation provides challenges in terms of allowing proper Parliamentary scrutiny, which is why we published the Bill in draft form over a year ago to allow consideration of the principles of the approach and the detail of the proposed measures. But the Government does not agree that it is appropriate to consolidate the ETPIM Bill with the TPIM Act, as we believe these more stringent powers should only be on the statute book in exceptional circumstances. There is also a potential difficulty around the process for renewing the legislation, with the ETPIM regime subject to annual review and the TPIM Act subject to review every five years. The Government would, however, be happy to review this position when the TPIM Act is renewed, based on the position at that time.

Civil Contingencies Act

9. The Government agrees with the Committee's conclusion that the Civil Contingencies Act 2004 does not offer an appropriate alternative to the ETPIM Bill.

Legal threshold and judicial scrutiny

10. The Government welcomes the Committee's conclusion that it would be appropriate to raise the legal threshold for imposing an ETPIM notice from reasonable belief – as with the current TPIM notice requirement – to the balance of probabilities.

11. The Government does not, however, agree that the higher threshold reflects current practice. The Committee heard evidence from the Parliamentary Under Secretary for Security that the new threshold would represent an important difference from the current regime, and DAC Osborne was clear that, in his view, the threshold would represent a higher hurdle for the Secretary of State to clear.

12. The Government also does not agree with the Committee's recommendation that each TPIM notice should be subject to a full merits review. The draft ETPIM Bill sets out that the function of the Court at an ETPIM review hearing would be to review, in accordance with general judicial review principles, the decisions of the Secretary of State in determining that the statutory tests were met when the ETPIM notice was imposed, and that they continue to be met. As with the current TPIM regime, the judge would also consider the necessity and proportionality of each measure imposed under the ETPIM notice, and its compliance with the European Convention on Human Rights. The judge would be able to quash the notice; quash one or more of the measures in the notice; or give directions for the revocation of the notice or for the variation of the measures it imposes. This is the same process for the review of a TPIM notice, under section 9 of the TPIM Act, and has proved an effective form of intense and detailed independent scrutiny.

13. The Government also disagrees with the argument made by the Committee that a full merits review process would be less expensive because it would curb litigation – the implication being that fewer cases would be appealed to the higher courts. The reality is that individuals would have the same rights of appeal as currently exist: that is, where they could demonstrate that it is arguable that there has been an error of law.

ETPIM Review

14. The Government agrees that there should be a formal review group to consider the ongoing necessity for any ETPIM notice and to review the necessity and proportionality of the measures imposed, given the latest intelligence and other assessments. The current TPIM Review Group provides this function for those currently subject to a TPIM notice and ensures that all the departments and agencies responsible for making, maintaining and monitoring TPIM notices are brought together for a formal discussion of each individual on a quarterly basis. We consider that this process would be sufficiently flexible to scrutinise and make recommendations about those subject to ETPIM notices, but will keep this position under review should the ETPIM Bill be enacted.

Prosecution and investigation

15. The Government disagrees with the Committee's assertion that 'part of the rationale behind preventative measures such as control orders or TPIMs is that the Government is unable to prosecute an individual because it is unwilling to make the evidence needed for a successful prosecution public.' It is for the Crown Prosecution Service, in consultation with the police, to decide whether to bring a prosecution, not the Government. We, however, maintain our consistently stated position that prosecution and conviction will always be the best option for dealing with terrorists.

16. There is a requirement in the TPIM Act – and the draft ETPIM Bill – for the Home Office to consult the police before imposing a TPIM notice on whether there is sufficient evidence available that could realistically be used to prosecute the individual involved for a terrorism offence. The police are also required to review this position – and the TPIM Review Group discusses this – to ensure that the TPIM notice is still necessary and to confirm that there is no realistic prospect of bringing a successful prosecution.

17. The Committee noted that substantial extra resources were made available for the police and the Security Service when control orders were replaced with the TPIM regime. This has resulted in an increased overall capability for the police and the Security Service, and demonstrates a commitment to continue to investigate and prosecute individuals wherever possible.

Managing the ending of a TPIM or ETPIM notice

18. The Government agrees that the exit strategy for each individual is an important part of the TPIM and potential ETPIM regimes. The possibility of prosecution or deportation is considered throughout the life of a TPIM notice. Where viable exit strategies do not exist, but the individual continues to pose a terrorism-related threat, the security services and police will manage this through other arrangements.

19. We firmly believe that an individual who has not necessarily been convicted of a terrorism-related offence should not be subject to the restrictions imposed by a TPIM or potential ETPIM notice indefinitely. However, if the individual re-engages in terrorism-related activity, it is open to the Home Secretary to consider whether to impose a fresh TPIM or, in exceptional circumstances, an ETPIM notice. It would also be possible to consider imposing a TPIM notice on an individual following the end of an ETPIM notice, if the Home Secretary believed that this was necessary and proportionate and that all the conditions of the TPIM Act were met.

Intercept as evidence

20. The Government notes the Committee's assessment that the availability of intercept evidence in criminal proceedings would not be a "silver bullet" solving the Government's problem of how to manage the threat posed by terrorist suspects that it is otherwise unable to deport or prosecute, nor could itself act as an alternative to ETPIM notices. The lawful interception of communications plays a critical role in tackling serious crime and protecting the British public, including by supporting investigations that secure the successful prosecution of terrorists and other serious criminals.

21. As the Committee gathered from its evidence sessions, the Government is conducting an extensive and detailed review to assess the likely balance of advantage, cost and risk of implementation of legally viable intercept as evidence models compared to the present 'intelligence only' approach as set out under the Regulation of Investigatory Powers Act 2000. This is a broader remit than previous reviews, and avoids wasting effort on approaches that are either not legally viable or are being artificially constrained by existing interception practice. Instead it ensures a fair and comprehensive assessment of the pros and cons of intercept as evidence. This work continues under the guidance of the cross-party group of Privy Councillors.

Human rights obligations

22. The Government welcomes the Committee's observation that the evidence they have received confirms the Government is correct to assert that the proposed ETPIM regime would be compliant with the European Convention on Human Rights.

23. The Government also understands why the Committee feels strongly that an individual subject to an ETPIM notice should be told the case against him, but we do not agree that a commitment to this effect should be included in the Bill. The starting point for each notice is that the Government will disclose as much of the case

against an individual as possible, subject to legitimate public interest concerns. Although the Secretary of State must have in mind the disclosure obligations when deciding whether to impose a TPIM notice, it is not possible to know from the start precisely the disclosure that will be required by the courts.

24. Under the ETPIM process – as under the current TPIM regime – the court would consider what disclosure is to be made in an individual case, having considered submissions from the both the Secretary of State and the appointed Special Advocate and, where the individual has filed evidence, in light of the individual's answers to the allegations against him. This process takes place in advance of the full review hearing, but the court would continue to keep the requirements of *AF (No. 3)* under review until the proceedings have been determined.

25. On the matter of communications between the individual and the Special Advocate (which is separate to the "gisting" issue), we believe that there are very valid reasons for restricting the communication that may take place after service of closed material. The purpose of the restriction is to guard against inadvertent disclosure of sensitive material which could damage national security. This is why the restriction only takes effect after the Special Advocate takes receipt of the closed material. There are no restrictions on the written instructions that the Special Advocate can receive from the individual subject to a TPIM notice throughout the process. We would like to reiterate the Home Secretary's commitment in her response to the Independent Reviewer's Final Report on Control Orders[1] to ensure that the Special Advocate system operates as effectively as possible, and that unnecessary delays are avoided.

[1] The Government Response to the Report by David Anderson QC Seventh Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, September 2012

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