



House of Lords  
House of Commons

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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**Report**

**Session 2012–13**





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House of Commons

Joint Committee on the Draft  
Enhanced Terrorism Prevention  
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**Session 2012–13**

*Report, together with formal minutes*

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## Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill

The Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill was appointed by the House of Commons and the House of Lords on 3 July 2012 to examine the Draft Enhanced Terrorism Prevention and Investigation Measures Bill to report to both Houses by 23 November 2012. It has now completed its work

### Current membership

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### Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/terrorism-prevention-and-investigation-measures-bill/publications/>

### Committee staff

The current staff of the Committee are: Eliot Barrass (Commons Clerk), Dominique Gracia (Lords Clerk), Emma Fitzsimons (Legal Specialist), and Michelle Edney (Senior Committee Assistant).

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## Summary

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The draft Enhanced Terrorism Prevention and Investigation Measures Bill is intended to be introduced by the Government in response to “exceptional circumstances” which “cannot be managed by any other means”. It is complementary to, and if introduced will operate alongside, the existing TPIMs legislation (as set out in the Terrorism Prevention and Investigation Measures Act 2011). If approved by Parliament, this Bill will allow the Government to impose a series of restrictive measures, broadly similar to those available under the control order regime, on certain targeted individuals.

We recognise the need for these measures, but we cannot approve of them in their entirety nor the process by which they will be placed before both Houses for approval. We have concerns about both the lack of certainty over the circumstances in which these measures will be introduced and the ability of Parliament to scrutinise adequately whether these powers are necessary to meet the particular threat identified. We expect the Government to address our concerns before the Bill is introduced formally.

Despite the similarities between control order and ETPIMs powers, key differences exist in the procedures by which these draft measures can be applied. Given the Government’s stated liberal intentions, only the most extreme circumstances can justify the introduction of legislation that will bring in such stringent measures and even then their use must be strictly limited.

The “exceptional circumstances” in which this Bill will be introduced have not yet been defined, and while we accept that it would be impossible to define a hard and fast “trigger” for this legislation, the Government must set out, in response to this Report, clearly and unambiguously its understanding of the types of “exceptional circumstances” that would lead to the introduction of this Bill.

We have grave concerns over the use of “emergency legislation” both in principle and in this circumstance. We find it odd that these measures were not included as an order-making power in the original TPIMs Bill where they could be subjected to fuller scrutiny in the course of normal Parliamentary business. Should the ETPIMs Bill ever be brought forward and enacted, we advocate consolidation of the legislation at the earliest opportunity.

To meet our concerns of the need for informed scrutiny of this Bill, we recommend that, if in the Government’s opinion the powers granted to it under this draft Bill were needed, members of the Intelligence and Security Committee should be briefed on the nature of the threat and then asked to formally communicate to Parliament a recommendation on whether, in its opinion, the Government’s case for the need for the ETPIMs Bill had been made.

While we welcome the Government’s intention to elevate the legal threshold needed to be satisfied before these measures can be imposed on an individual, the evidence received by the Committee suggests that in reality this will make little practical difference to the courts. We have also heard that there is little distinction between a merits review and a judicial review in this area. We therefore ask the Government to consider the value of including the requirement for a merits review in the legislation. The Government should create a Review

group dedicated to monitoring their imposition and use. The increased stringency of the measures available to the Secretary of State under this legislation creates a need for higher levels of scrutiny of her decisions.

It is questionable whether the ETPIM orders will increase the chances of a successful prosecution. We believe that if there were to be some individuals placed under an ETPIM, there will almost certainly be some who will remain radicalised and potentially dangerous but against whom no new evidence of wrong-doing can be found. The Government has not yet explained how the threat posed by such individuals will be managed.

We acknowledge the inherent difficulty faced by the Government in ensuring that this legislation is compliant with human rights law. Any ETPIM will be a bespoke measure customised for each circumstance. Their legality in each case can only be proven via a legal challenge. However, the evidence we have received suggests that the Government is correct to proclaim these measures human rights compliant and we see no reason to contradict these statements. Regardless of the accuracy of the Government's argument we recommend that the Government change its position on "gisting" and commit to a de facto policy of providing at least the gist of every case against an individual.

# 1 Introduction

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1. The draft Enhanced Terrorism Prevention and Investigation Measures Bill (ETPIMs Bill) has its roots in the Government’s Review of Counter-Terrorism and Security Powers published in January 2011.<sup>1</sup> This Review recommended the repeal of the Prevention of Terrorism Act 2005 which had introduced the control order regime. The Government acted on this recommendation by introducing the Terrorism Prevention and Investigation Measures Bill (TPIMs Bill) in 2011, which was passed the same year. This Bill was scrutinised by our colleagues in both Houses at the time of its introduction.<sup>2</sup> Our work draws upon, but does not directly comment on, prior parliamentary scrutiny of the TPIMs Bill.

2. In addition to recommending the repeal of the control order regime, the Government’s Counter-Terrorism Review noted that “there may be exceptional circumstances where it could be necessary for the Government to seek parliamentary approval for additional restrictive measures.”<sup>3</sup> To meet this recommendation, the Government has prepared—but not introduced—the ETPIMs Bill. We were established as a Joint Committee of both Houses in order to provide pre-legislative scrutiny of the Bill so that, if in the Government’s view “exceptional circumstances” demanded its urgent introduction, Parliament would have had some opportunity to comment on the legislation and theoretically to allow expedited passage of this “emergency legislation”.

3. We were established following the passage of a motion in both the House of Commons and the House of Lords on 28 June. The motions of our establishment originally required us to conclude our work by no later than 9 November but in the light of the complex issues raised during our work, we requested, and received, a fortnight’s extension to our reporting deadline. This extension allowed us to take oral evidence from six panels of witnesses without compromising our consideration of this Report. We thank everyone who has contributed to our inquiry.

4. This Report can be broadly separated into two main sections. In the first we examine the policy background leading to the introduction of the Enhanced TPIMs Bill, the situations in which the Government would consider these measures necessary and the process by which this draft legislation would be formally considered by Parliament. In the second section we focus on the mechanics of the Bill as drafted and examine its effectiveness as a preventative counter-terrorism measure.

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1 Home Office, Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations, Cm8004, January 2011, see in particular page 36-43.

2 See for example Joint Committee on Human Rights First Report of Session 2010-12, Terrorism Prevention and Investigation Measures Bill, 1 July 2011, HL180/HC1432; House of Commons Public Bill Committee, Terrorism Prevention and Measures Bill 2010-11, PBC Bill 193.

3 Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations, page 43, paragraph 27.

## 2 What are ETPIMs?

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### Background to the draft legislation

5. The coalition Government has been described as adopting a “cautious rebalancing in favour of liberty” in its security policies.<sup>4</sup> This shift of emphasis has been manifested by several changes to the powers available to the police and security services, including:

- The repeal of Sections 44–46 of the Terrorism Act 2000, commonly known as “Section 44” powers. Section 44 powers enabled a police constable to stop and search any individual in a defined space “without reasonable suspicion” that the individual in question was engaged in, or carrying items that could be used in, terrorism;
- A reduction in the amount of time for which individuals could be held without charge from 28 to 14 days; and
- The repeal of control orders.

6. These were recommended in the Government’s Counter-Terrorism Review, which reported in January 2011.<sup>5</sup> The Review considered the best methods of managing the threat from individuals engaged in terrorism whom the Government could neither successfully prosecute nor deport. In recommending the repeal of control orders, it concluded:

The Government will move to a system which will protect the public but will be less intrusive, more clearly and tightly defined and more comparable to restrictions imposed under other powers in the civil justice system. There will be an end to the use of forced relocation and lengthy curfews that prevent individuals leading a normal daily life.<sup>6</sup>

7. The Government’s response to this conclusion was to introduce the Terrorism Prevention and Investigation Measures Bill in 2011. The Bill received Royal Assent on 14 December 2011 (TPIMs Act 2011), replacing control orders with TPIMs. TPIMs are broadly similar to control orders in that they are targeted measures aimed at restricting the actions of individuals, and they similarly operate outside of the criminal justice regime. However, TPIMs differ from the previous regime in several distinct ways:

- The TPIMs Act makes no allowance for relocation. Unlike control orders, *individuals under a TPIM cannot be forcibly relocated* to a Government-chosen residence in another part of the country;
- *TPIM powers are strictly limited* to those specified in Schedule 1 of the Act. Under control orders, the Secretary of State was empowered to take “all necessary measures” to protect the public;

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4 Q 2 [David Anderson QC], Q 134 [Helen Fenwick]

5 Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations, Cm8004, January 2011.

6 Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations, page 41.

- Unlike control orders, *TPIMs are time-limited*. An individual can only be subject to a TPIM for a 12 month period, renewable once (i.e. an individual can be subjected to a TPIM for 24 months in total); and
- *The burden of proof* needed before a TPIM can be placed on an individual is higher than under control orders. Control orders could be imposed on the grounds of “reasonable suspicion”, while TPIMs require “reasonable belief” of terrorism-related activity.

As a result, TPIMs have been described as a “significant rolling back of control orders”<sup>7</sup>

8. Since the Terrorism Prevention and Investigation Measures Act was passed, TPIMs have been used relatively sparingly. As of November 2012, nine individuals are subject to TPIMs; in comparison 52 people were subject to control orders between 2005 and 2011. Deputy Assistant Commissioner Stuart Osborne speaking on behalf of ACPO, told us that “given the resource currently available” and the changes made to policing, the police “are adequately managing the risk posed by people subject to TPIMs at the moment”.<sup>8</sup>

9. While the Government has introduced a greater degree of liberalism into its counter-terrorism policy, it has retained the right to reintroduce more stringent measures in situations it deems an emergency.<sup>9</sup> As a result of this position, and in response to the Counter-Terrorism Review’s conclusion that, “there may be exceptional circumstances where it could be necessary for the Government to seek parliamentary approval for additional restrictive measures”,<sup>10</sup> the Government has prepared—but not yet introduced—the ETPIMs Bill. This Bill, if approved by Parliament, would introduce an additional security measure which could be placed on individuals: the Enhanced TPIM (ETPIM).

## Enhanced TPIMs

10. ETPIMs are distinct from TPIMs. An individual cannot be subject to both a standard and an Enhanced TPIM simultaneously and the conditions that must be met before the Government can impose an Enhanced TPIM are more stringent than under the current regime. There is much correlation between the operation and policing of TPIMs and ETPIMs (as there is between TPIMs and the former control orders),<sup>11</sup> but ETPIMs are generally tougher, both in terms of the restrictions to liberty an individual under an ETPIM would face, and in the threshold the Government must meet before an ETPIM can be imposed on an individual. ETPIMs differ from standard TPIMs in the following ways:

- *A strengthening of the legal test* to be met before imposition from “reasonable belief” under a TPIM to “balance of probabilities” under an ETPIM;

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7 Q 3 [David Anderson QC]

8 Q 39

9 The police maintain “no suspicion stop and search powers” under Section 47A of the Terrorism Act, which requires a higher threshold of risk assessment to be met. The Government has further prepared draft legislation reintroducing pre-charge detention of up to 28 days if this were deemed necessary.

10 Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations, page 43, paragraph 27.

11 Q 35 [Stuart Osborne]

- Under an ETPIM, the Secretary of State could impose *a curfew for up to 16 hours* on an individual. Under the existing TPIM Act an individual can only be compelled to reside overnight at a specified residence;
- ETPIMs allow a complete—as opposed to partial—*ban on electronic communication devices*;
- Individuals under an ETPIM can be *prohibited from entering a defined area* and from associating with any individual without the Secretary of State’s prior permission; and
- The draft ETPIMs Bill would allow the Secretary of State to require an individual to reside at any residence specified by the Government (*i.e. relocation*), unlike the existing TPIMs Act, which makes no such allowance.

11. David Anderson QC, the Independent Reviewer of Terrorism Legislation, suggested that, while the proposed differences between TPIMs and ETPIMs might seem minor and technical, their net result was two quite separate regimes:

Putting it very broadly, TPIMs are a significant rolling back of control orders [but] as I understand the purpose of the ETPIM, it is to allow Parliament to reintroduce restrictions which look very like the old control orders. There are a few differences, but not very many.<sup>12</sup>

Sophie Farthing of Liberty agreed, calling the Government’s changes “tweaks around the edges” which did not address her previous concerns about the control orders regime.<sup>13</sup> However, while noting the similarity of their potential effects on an individual, David Anderson went on to note some important, largely procedural, differences that would exist between the control order and the proposed ETPIM regime. These included the required legal test, the finite schedule of powers available under an ETPIM as opposed to the illustrative list provided in the control order regime, and the two-year time-limit that ETPIMs share with the standard TPIMs. Nevertheless, he concluded that “in most respects” the ETPIMs Bill appeared to “replicate what was possible and generally imposed under control orders”.<sup>14</sup>

12. DAC Osborne similarly told us that, while the TPIMs Act is relatively liberal, Enhanced TPIMs would represent a return to the old control order regime in terms of the operational response required of the police. Therefore, the introduction of ETPIMs would demand “practical, tactical policing” that was “very similar to how we would have dealt with control orders”.<sup>15</sup>

13. The Minister, James Brokenshire MP, disagreed with this analysis of the similarities between the old control orders regime and the proposed ETPIMs measures. He highlighted the differences in the process by which ETPIMs would be placed on an individual as a key distinction between the two regimes:

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12 Q 3

13 Q 170

14 Q 5

15 Q 40, Q 68 and Q 35

There are important differences in the standards that would legally have to be satisfied in the utilisation of powers under the enhanced Bill and more specificity on what it can be used for—in other words, the schedule of powers that could be adopted. Therefore, in terms of that balance of liberty and collective security, there are important differences that reside here and it is not just trying to repackage or simply to present it in a different way.<sup>16</sup>

He therefore argued that despite the superficial similarity of their effects on the “controlee”, ETPIMs remained a more “liberal” measure than their predecessor.<sup>17</sup>

14. The Minister’s assessment that the differences in legal standards required represented a substantial change from the previous regime had been questioned earlier in our inquiry. Lord Carlile of Berriew QC, a former Independent Reviewer of Terrorism Legislation, disagreed with the Minister that the heightened standard for ETPIMs—which is “two notches”<sup>18</sup> above that required under the control orders regime—represented a real difference in how the legislation would work in practice. He argued instead that judges would not “confirm a control order or condition unless they believed that, on the balance of probabilities, it was justified” and therefore any change was one of theory, not practice.<sup>19</sup> On the other hand, DAC Stuart Osborne told us that the heightened legal test for TPIMs had led to real changes how the police worked; an inability to meet the changed legal threshold has meant that the police have held back from requesting a TPIM. Some individuals who might previously have been under a control order were not covered by the new regime’s higher threshold.<sup>20</sup>

**15. There are strong similarities between the ETPIMs regime and its predecessor, control orders, not least in the measures which both regimes allow to be imposed against an individual. However, despite these common factors it would be incorrect to argue that Enhanced TPIMs represent a return to control orders. Key differences exist in the procedures by which these draft measures can be applied and these differences give ETPIMs a somewhat more liberal character than control orders.**

**16. While we note the differences between ETPIMs and control orders, we similarly note differences between Enhanced TPIMs and the existing standard TPIM regime. Given the Government’s stated liberal intentions, only the most extreme circumstances can justify the introduction of legislation that will bring in such stringent measures and even then their use must be strictly limited.**

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16 Q 209

17 Q 209

18 Q 90

19 Q 112

20 Q 86-87

### 3 When will ETPIMs be introduced?

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17. This draft Bill could be introduced by the Government at any time to grant the Home Secretary additional powers to deal with “exceptional circumstances”. ETPIMs, if passed, would act as a separate, parallel regime from TPIMs. The Terrorism Prevention and Investigation Measures Act is time-limited to five years (i.e. it will expire in 2016). By contrast, the powers set out in the ETPIMs Bill would last for 12 months from their approval, renewable once.<sup>21</sup> As such, even if this Bill were approved by Parliament, this legislation would only be a temporary measure, granting the Government additional powers for a limited period.

18. At the end of the initial 12 months Parliament will need to formally approve the extension of the Secretary of State’s powers for a further 12 months. This will be done by a statutory order to be agreed by both Houses. The Bill can only be extended in this fashion once; after 24 months, if these powers were still deemed necessary, fresh primary legislation would need to be approved by Parliament. If Parliament did not re-approve the use of these measures—by order after 12 months or a fresh Act after 24 months—then those subject to ETPIM notices will be affected. Subject to a 28-day transition period, ETPIMs will be removed from an individual. Once 28 days have elapsed from the end of the initial 12 or 24 months, the ETPIM notice would be treated as it had been revoked by the Secretary of State.<sup>22</sup>

#### External events

19. The introduction of the ETPIMs legislation before Parliament will be triggered by external events rather than taking place in the normal course of Government business. The explanatory notes to the ETPIMs Bill state that ETPIMs are expected to be used only in the event of “a very serious terrorist attack that cannot be managed by other means”. The Counter-Terrorism Review that recommended the introduction of ETPIMs (and TPIMs) said ETPIMs should only be instituted in “exceptional circumstances” that required “additional restrictive measures”.

20. We asked our witnesses what this threshold might mean in practice. David Anderson conceded that it might be impossible to ever give a complete definition of the “exceptional circumstances” needed before the Bill was introduced, and that ultimately the decision to approve such legislation would come down to a political judgment.<sup>23</sup> He speculated that a general rising of the overall threat level would be insufficient but that “exceptional circumstances” might include a specific case where the threat posed by individuals was such that “TPIMs would not be adequate to do the job” or the further powers that the ETPIMs Bill would grant the Government—particularly relocation powers—were absolutely necessary.<sup>24</sup> Lord Carlile made a similar point in more graphic terms, suggesting that ETPIMs might be necessary when, at the end of a period under standard TPIM

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21 Clause 9(1)

22 Clause 10

23 Q 9 and Q 12

24 Q 14-15

restrictions, an individual remained “so driven by what they do and are so highly respected in their very small community that they remain as potential terrorists”, or:

[I]f a multiple threat appeared that was placing great pressure on the authorities from a policing and control viewpoint—for example, a large cell or a cell that appeared to have extremely dangerous weaponry beyond what we have seen so far.<sup>25</sup>

21. The above descriptions of “exceptional circumstances”, suggesting as they do a particular event that demanded targeted measures by the Government, was somewhat contradicted by Stuart Osborne speaking on behalf of the Association of Chief Police Officers. DAC Osborne suggested that ETPIMs could be introduced in response to a more general rising of the threat level that could be triggered by either an increase in the danger posed by terrorists or a reduction in police resources. He stated that while the resourcing level of the police was currently adequate, he viewed the ETPIM as “a plan B” and:

It is always good to have a plan B, but given the resource currently available to us and the way in which we have changed our working, we are adequately managing the risk posed by people subject to TPIMs at the moment. Should the risk change considerably, or should the resource drop off for some reason, then it is useful to have something to fall back on that allows us to manage the risk to the same degree.<sup>26</sup>

22. We sought clarity from the Government that the trigger for the introduction of the Bill would be a particular threat caused by a particular individual or group rather than a general reduction in police resources or rising of the overall terror threat. The Minister told us that the Government had protected counter-terrorism and police spending and that it would “always make sure that there are sufficient resources to assure national security”, as such the situation speculated upon by DAC Osborne was unlikely to occur.<sup>27</sup> He was also clear that an increase in the general threat level to critical would not “automatically mean that we would be looking to draw upon an ETPIMs regime”. Instead, he identified “multiple attacks” or a “really exceptional incident” as possible triggers for the ETPIMs Bill to be introduced.<sup>28</sup>

**23. We appreciate the confirmation by the Minister that Enhanced TPIMs are not viewed by the Government as an alternative to adequate police resources; we agree with him that ETPIMs are measures to be introduced in exceptional, unanticipated circumstances and should remain as such. However, in other statements he was vague as to the circumstances in which the ETPIMs Bill might be introduced for Parliament to consider. We accept that it would be impossible to define a hard and fast “trigger” for this legislation, but we recommend that, in its response to this Report, the Government set out as clearly and unambiguously as possible its understanding of the types of “exceptional circumstances” that would lead to the introduction of this Bill.**

24. To avoid the possibility of Parliament being forced to consider legislation in the “exceptional circumstances” envisaged by the Government it has been suggested by some that the Government instead rely on the Civil Contingencies Act 2004 (CCA 2004). The

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25 Q 97

26 Q 36-39

27 Q 222, Q 223

28 Q 225

CCA 2004 already allows the Secretary of State additional powers in “exceptional circumstances”. However, Lord Carlile told us that the CCA 2004 was “an entirely inappropriate vehicle for this kind of limitation” because it would put “too much power into the hands of Ministers”.<sup>29</sup> David Anderson agreed that there were “difficulties” with using the CCA 2004 and also highlighted the “far broader” discretion it would offer the Secretary of State.<sup>30</sup>

**25. The Civil Contingencies Act 2004 would be an inappropriate mechanism by which to introduce the powers currently set out in the ETPIMs Bill, and would be contrary to the Government’s aim of introducing more liberal policies which clarify and hence constrain the Secretary of State’s powers as far as possible.**

### Parliamentary scrutiny of the ETPIMs Bill

26. The Minister’s explanation of the circumstances in which ETPIMs legislation might be introduced to Parliament—in response to some sort of multiple terrorist attack—highlighted two worrying issues about how Parliament would scrutinise the Bill upon introduction.

#### *The use of emergency legislation*

27. Emergency legislation is rare, but in 2011 our colleagues on the Joint Committee set up to scrutinise the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, performed scrutiny on another piece of so-called “emergency legislation”. We note their work, not least as it considered in depth the viability and utility of the Government introducing Bills in this fashion. In their Report they concluded that “the parliamentary scrutiny of primary legislation” introduced in this fashion “would be so circumscribed by the difficulties of explaining the reasons for introducing it” that it would leave the “process of justifying the legislation almost impossible for the Secretary of State and totally unsatisfactory and ineffective for Members of both Houses of Parliament”.<sup>31</sup>

28. The same issues apply in the case of this Bill and we accordingly explored this question with our witnesses, some of whom raised additional problems with the use of emergency legislation in this particular context. Sophie Farthing of Liberty highlighted the risk that retaining a draft Bill in this way might lead to the temptation to introduce the legislation in situations other than those for which it was intended:

I understand that, with this Bill, the Shadow Minister for Crime and Security requested that it be brought into force for the Olympics, which from the explanatory memorandum wasn’t the reason the Bill was drafted.<sup>32</sup>

29. David Anderson also remarked upon the risk, previously highlighted by the Joint Committee on the Draft Detention Bills, that Parliament would be unable to debate the Bill

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29 Q 115

30 Q 13

31 Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills Committee (2010-12): Draft Detention of Terrorist Suspects (Temporary Extension) Bills Report (HL Paper 161, HC Paper 893), para. 94.

32 Q 177

adequately without impinging upon active cases, although he acknowledged that this risk was less “acute” than in the case of the Draft Detention of Terrorist Suspects (Temporary Extension) Bill.<sup>33</sup> In his evidence to us, the Minister argued that the process of using emergency legislation was in some ways presentational and highlighted that the measures were exceptional and only to be used in extremis. He told us that the Government had judged “that having a process where you have emergency legislation to utilise ... is right so that it underlines how exceptional and extraordinary that [situation] is.”<sup>34</sup>

**30. There are many occasions in which Parliament is asked to legislate without access to the information necessary to make a fully informed decision. It is a problem faced by Government and Legislatures across the world when legislating in response to national security threats, and we fully sympathise with the Government’s position. However, we do not think that this situation is improved by the use of so-called emergency legislation.**

**31. We can find no compelling reason for the decision to introduce these measures as a separate Bill at some unspecified time in unspecified circumstances. We find it odd that these measures were not included as an order-making power in the original TPIMs Bill where they could be subjected to fuller scrutiny in the course of normal Parliamentary business. The delegation of power to the Government does not demand its use, and the Minister’s argument that the limited scrutiny that emergency legislation of this sort can offer is the only way to do justice to the “exceptionality” of these powers was unconvincing. The Government’s position that it will introduce this legislation at some future date in response to some unspecified emergency is an unfortunate and unwelcome decision.**

**32. While we do not approve of the use of emergency legislation in principle, given the situation now created by the Government it seems to us preferable that the ETPIMs Bill—if deemed necessary—be brought forward as emergency legislation, rather than through an amendment to the TPIMs Act. Nevertheless, the Government should take all possible measures to ensure that this undesirable process is not repeated. The scrutiny of emergency legislation is fraught with difficulty and we deprecate the introduction of Government measures in this fashion. Should the ETPIMs Bill ever be brought forward and enacted, we would further advocate consolidation of the legislation at the earliest opportunity.**

### ***Parliamentary access to intelligence***

33. Separate from the inherent challenges faced by Parliament when scrutinising “emergency legislation”, there are further particular difficulties associated with this Bill. If this Bill is only to be introduced in response to the immediate and pressing threats described above then it is almost certain that a large part of the Government’s case for the legislation will rest on privileged intelligence information not publically available and unavailable to Members of Parliament.

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33 Q 16

34 Q 215

34. This problem was identified by David Anderson who noted “difficulties in Parliament being asked to decide on something when very few Members will have seen the national security-sensitive information that prompted the request.”<sup>35</sup> As a partial remedy to this problem, he suggested a system whereby the Intelligence and Security Committee (ISC) or a similar grouping of senior Members from both Houses was briefed in detail on the intelligence data—presumably suggesting the danger of the “exceptional circumstances” described above—which had led to the Government deciding to introduce the Bill. This would allow Parliament a greater insight into the Government’s reasons for proposing the introduction of these Enhanced powers and allow for better scrutiny of the Government’s position.<sup>36</sup>

35. We put this suggestion to Lord Carlile, who disagreed with the proposition on two grounds. First, he disputed that there was a problem to be addressed. He stated that no matter the system put in place, ultimately Parliament would have to take the Government at its word that the proposed measures were necessary. While accepting that the result would “hardly be scrutiny by Parliament”, he was unsure of an alternative.<sup>37</sup> Further, he noted extreme unease on the part of the security services to the briefing of Members outside of the usual practice of briefing the relevant Opposition spokesmen on Privy Council terms. He highlighted that with the most sensitive information—Strap 3A—access is limited to very a select few and, while Members of Parliament could be potentially be briefed on such matters:

Those MPs and Peers generally have staff working for them. However well trusted the main individuals are, there is very little control in this building over the security of staff. We do not directly develop those staff; we don’t even “SC” clear staff working for us in this building, so there is a degree of nervousness there.<sup>38</sup>

36. Nevertheless, the Minister cautiously welcomed the idea that selective briefings might be used, encompassing members of the Opposition who are Privy Councillors or members of the ISC, in order to “aid and assist in the scrutiny of emergency legislation”.<sup>39</sup> He said that doing so might offer “a sense of some of the issues” underlying the legislation being introduced, but ultimately this would be “exceptional”, and he was consequently unwilling to formulate a standard mechanism to inform Members of Parliament of the need for this legislation.<sup>40</sup>

**37. Should this legislation ever be introduced to Parliament there is a very real danger that Members will be placed in the invidious situation of approving these measures without being told the majority of the case for them. We are aware that it would be impossible to brief all Members of both Houses on the situation triggering the introduction of this Bill, but we recommend that the Government takes steps to formalise a mechanism whereby a select group of properly vetted Members can be briefed in advance on the nature of the particular threat that necessitates the**

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35 Q 16

36 Q 16

37 Q 100

38 Q 99

39 Q 226

40 Q 227

introduction of these measures. It would be highly regrettable if a failure to have in place a clear process for briefing the right people at the right time were to lead to further weakening of possible future scrutiny, especially given stated concerns about the ability of Parliament to fully scrutinise the Bill should it ever come before the House.

38. We note that the Intelligence and Security Committee is a body that would be able to speak with some authority on the need for this legislation. We recommend that, if in the Government's opinion the powers granted to it under this draft Bill were needed, members of the ISC should be briefed on the nature of the threat and then asked to formally communicate to Parliament a recommendation on whether, in its opinion, the Government's case for the need for the ETPIMs Bill has been made.

## 4 How ETPIMs will work

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39. Previously in this Report we have analysed the circumstances in which this legislation will be introduced before Parliament. The rest of this Report will examine what happens after an ETPIM is imposed on an individual and starts from the premise that Parliament has passed the Bill.

### The conditions to be met before an ETPIM is imposed

40. In the event that the draft Bill is introduced, the Secretary of State may seek to impose an ETPIM notice upon an individual by way of application to the High Court.<sup>41</sup> The function of the High Court at this stage will be limited to whether or not the decision of the Secretary of State is flawed.<sup>42</sup> This function—the *permission stage*—is separate from, and much less arduous than, the *automatic review*, discussed below.

41. Clause 2 of the draft Bill specifies the five conditions the Secretary of State must satisfy before imposing an ETPIM, all of which must be met. The draft Bill states that the Secretary of State must be satisfied on the balance of probabilities that the individual is, or has been, involved in terrorism-related activity, and that some or all of this activity is new. The Secretary of State must also reasonably consider it necessary to impose an ETPIM, and that the threat posed cannot be dealt with by a standard TPIM. If all these thresholds are met and approved by the court an ETPIM, comprising a combination of the restrictions set out in Schedule 1 of the Bill, can be imposed on an individual for a period of 12 months, renewable once.<sup>43</sup>

42. It is important to note that, one of the conditions to be met by the Home Secretary – the requirement that some of the terrorism-related activity is new – does not mean ‘new’ in the conventional sense. Clause 2(6) sets out the statutory definition of the term “new” and David Anderson told us how this definition would operate in practice:

“New” is of course a defined term in the Bill, just as it is under the TPIM Act itself. Under clause 2(6), new terrorism-related activity, in circumstances where no enhanced TPIM notice has ever been in force, can mean “terrorism-related activity occurring at any time (whether before or after the coming into force of this Act)”. The adjective “new” might seem a little strange in that context, but if there has been an enhanced TPIM notice relating to that individual, it means that terrorism-related activity counts for the purposes of an ETPIM only if it occurs after that notice came into force. The adjective “new” is perhaps of more relevance in circumstances where

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41 Clause 3 of the draft Bill provides that certain provisions from the TPIM Act 2011 apply to the ETPIMs regime. As a result, the same court processes apply to the ETPIMs regime as do to the existing TPIMs.

42 If the court determines that the Secretary of State’s decision is obviously flawed in relation to Conditions A, B or C, the court would have to refuse permission to issue the notice. If, however, the court considered that the Secretary of State’s decision was flawed in relation to Condition D, then the court may give directions to the Secretary of State to vary the notice.

43 See paragraphs 17-18 on what happens if the ETPIM legislation rather than the individual Order is not renewed after 12 months.

someone has already been under an ETPIM than when they go straight into an ETPIM for the first time.<sup>44</sup>

43. As such if an individual has served one period on an ETPIM and the Government seeks to restrict his activities for a longer period beyond the 24 month limit. (i.e. the Government seeks to impose a new ETPIM on an individual) then “new” evidence is required, distinct from that used to justify the earlier ETPIM.<sup>45</sup> We note later the practical effects of this definition.

### The New Threshold: Balance of Probabilities

44. Only if the Government is confident that the conditions set out in Clause 2 of the draft Bill have been met can the Secretary of State apply to the courts for an ETPIM notice against a named individual. The Government has claimed that a key difference between the ETPIMs and control order regime is that courts must be satisfied that the Secretary of State is confident that the conditions have been met on the “balance of probabilities”. Under control orders, the Secretary of State merely had to have a “reasonable suspicion” that the individual was engaged in terrorist activity.<sup>46</sup>

45. We asked our witnesses to consider whether or not this new threshold—on the balance of probabilities—was in practical terms, different from the requirement of reasonable belief for TPIMs, and reasonable suspicion for control orders. We also asked witnesses to consider if this was an appropriate standard for measures such as ETPIMs.

46. DAC Osborne told us what this standard meant in practical terms, and confirmed that in his opinion this new standard represented a higher hurdle for the Secretary of State:

... Quite simply, based on evidence, it is more probable that this is the case than it is not the case, whereas previously it was on a suspicion, which was someone’s point of view. For TPIMs, it is about reasonable belief, which means that somebody must believe it and not just suspect it. The next stage, on the balance of probability, is that it must be more likely than not. Each of those is a progressive hurdle in terms of the amount of evidence and certainty that is needed.<sup>47</sup>

David Anderson told us that the more onerous test was to be welcomed, but that it raised further questions as to whether or not it should be applied for other measures, like TPIMs:

... there will be no question of imposing an ETPIM on anybody unless the Home Secretary is persuaded, on the balance of probabilities, that they have been involved in terrorism, which to my mind makes them more tolerable. It also begs the question as to why a similar balance of probabilities test could not be applied in relation to TPIMs, and indeed other Executive orders, such as proscription orders and asset-freezing orders.<sup>48</sup>

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44 Q 7

45 The same conditions apply if the Government wishes to move an individual from a “standard” to Enhanced TPIM.

46 A standard TPIM requires the Home Secretary to have proved “reasonable belief”.

47 Q 77

48 Q 4

47. However, we also heard contradictory evidence which suggested that while this change was to be welcomed it would have little practical impact. Lord Carlile took the view that judges were already applying more rigorous standards for control orders:

Intellectually, raising the standard of proof by two notches to the balance of probabilities is undoubtedly more demanding. However, I have read every control orders case, and I do not believe that there is a single case in fact in which the judicial decision has not been made on the balance of probabilities. Putting it another way, judges have a bit of difficulty dealing with lower standards than the balance of probabilities. Therefore, as a safety position for themselves—in my view, rightly—they have not confirmed a control order or condition unless they believed that, on the balance of probabilities, it was justified. However, I absolutely applaud including it in statutory provisions; even it is no more than a recognition of the realistic position.<sup>49</sup>

Professor Helen Fenwick was similarly sceptical as to whether a change in the legal threshold to be met before the Secretary of State could impose these measures would amount to much of a change in real terms. She drew parallels with the change between control orders and TPIMs which had not translated into practical differences in the decision-making process:

In reality, will it make any difference? I don't think the change from reasonable suspicion to reasonable belief makes much difference, no. In fact, it is obvious it does not because all the TPIMs were imposed on the basis of reasonable belief and they had previously been imposed on the basis of reasonable suspicion.<sup>50</sup>

48. Given the evidence that this change is more a recognition of reality than a practical shift in the thresholds to be met before an ETPIM can be introduced, we pushed the Minister for his views. He rejected the assessment that the new threshold would mean little change in practice and stressed that it was a significant safeguard in the legislation:

Under the control orders regime the standard of proof there was “reasonable suspicion” ... To take the legal approach on that, “reasonable suspicion” is a state of mind by which a certain person thinks that something may have been the case, whereas “on the balance of probabilities” you have to be satisfied that something is more probable than not. Whilst these are, on one level, quite technical legal issues, they are important in giving assurance on how particular provisions would be used ...<sup>51</sup>

49. The Minister emphasised that whilst there may be some similarities between the ETPIMs and control order regimes—most notably in the range of measures which can be applied to individuals in both regimes—the new test that the Secretary of State is satisfied *on the balance of probabilities* is an important change and would ensure that the courts will have to go even further in showing that the measures are in fact justified.<sup>52</sup>

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49 Q 112

50 Q 153

51 Q 210

52 Q 261

50. While we welcome the decision to elevate the legal threshold from one of reasonable suspicion to a balance of probabilities, we note the evidence we have received that in practice, the courts generally already operated a more robust standard than was called for in statute in determining whether the conditions were satisfied for a control order. Caution must therefore be used in attributing too much value to this change. Nonetheless, we agree with the decision to require the Secretary of State to be satisfied on the balance of probabilities before imposing an ETPIM. These are exceptional measures for exceptional circumstances and the decision to impose formally this higher threshold before they can be met—even if this only regularises current practice—is the correct one.

## The Role of the Courts

51. As under existing TPIMs, the imposition of an Enhanced TPIM notice immediately triggers an automatic review hearing of the Secretary of State’s decision to impose the notice.<sup>53</sup> The review will solely determine whether the relevant conditions as set out in Clause 2 were met at the time of notice, and continue to be met, applying the principles applicable on an application for judicial review. At this stage, the court has the power to quash the ETPIM notice completely, quash certain measures within it (for example, a requirement to not communicate with certain persons) or to direct the Secretary of State in relation to revocation of the notice or variation of the measures specified.

52. This process was criticised during the passage of the Terrorism Prevention and Investigation Measures Act 2011, and given the more stringent restrictions that could be imposed under an ETPIM we sought further evidence on what should be the appropriate standard of judicial scrutiny. JUSTICE emphasised the need for a more rigorous standard of judicial scrutiny, calling for a full merits review of the Secretary of State’s decision. In particular, JUSTICE drew a distinction between judicial scrutiny and supervision, claiming that the Bill as drafted affords the judiciary only a limited supervisory role and recommending that the Bill be amended to provide for full and effective judicial control from the outset of the ETPIM process.<sup>54</sup>

53. We tested this view with our other witnesses, asking if there was anything to be gained from more rigorous judicial scrutiny. As with the changes to the legal threshold, it was suggested that any change would be one of theory rather than practice. Professor Fenwick took the view that where “the process is tested against the ECHR articles, then in effect, the review is a merits review in any event.”<sup>55</sup> Lord Carlile echoed this position, noting that the distinction between judicial review and full merits review is “a distinction without a difference.”<sup>56</sup>

54. Having heard divergent views as to whether there is in fact any difference between the two standards, and whether a full merits review of the decision to impose an ETPIM was therefore desirable, we put the question to the Minister. The Minister rejected the case for a full merits review, on the basis that the ETPIMs regime was already a structured process,

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53 Section 9 of the TPIM Act 2011 applies to the draft Bill, by virtue of Clause 3 of the draft ETPIMs Bill.

54 Written Evidence received from Justice

55 Q 164

56 Q 117

with clear oversight by the Secretary of State.<sup>57</sup> The Minister also stated that as the TPIM measures has been deemed compliant with the UK's ECHR obligations he was confident that there was no need to revise the standard of review conducted by the court: an individual subject to an ETPIM or TPIM should be able to have a fair hearing under the current regime and no change was therefore needed.<sup>58</sup>

55. We were not satisfied with this answer, and again pressed the Minister on this point, in particular noting that if the Government was indeed satisfied that there was in fact robust scrutiny already of each case, then it would have nothing to lose from a full merits review. Furthermore, we highlighted that a full merits review would actually assist the Government, as it would provide further safeguards and curb expensive litigation, as each case would be fully and adequately tested in the first instance. The Minister again rejected the proposal, stating his preference that the Home Secretary retain the power to make judgments on the appropriate restrictions to be placed on each individual and commenting:

When we look at the legal process, there is a great and detailed examination of the security case that has been relied upon by the Home Secretary in seeking to use one of these measures. In both open and closed session, there is a great deal of analysis and consideration of the merits in that way within the principles of judicial review as framed within the legislation. I certainly would not want to give the impression, because I genuinely don't think it is the case, that there is not detailed examination of the merits that underpin the relevant measure being taken.<sup>59</sup>

**56. Given the potential seriousness of the Government's decision to impose an ETPIM measure on an individual we are not satisfied by the Minister's case for retaining the current level of judicial scrutiny at the 'on the principles of judicial review' standard. There should be a full merits review of each ETPIM notice. Formally amending the legislation to allow a full merits review would represent, more than anything else, a recognition of existing practice. We recommend that the Government amend its draft Bill to ensure a full merits review by the courts of each decision to impose an ETPIM.**

## Review mechanisms

57. Enhanced TPIMs are, by definition, an extension of the standard TPIMs regime. As with TPIMs, there are other safeguards which would play an important role in ensuring accountability and thorough review of their use. Both the Independent Reviewer of Terrorism Legislation and the TPIM Review Group (TRG) play a role in the oversight of the use of TPIMs. We explored whether it would be appropriate to extend such systems to the proposed ETPIMs.

58. The TPIM Review Group is similar to the previous Control Order Review Group (CORG). As with CORG, the objective of the TPIM Review Group is to bring together the departments and agencies involved in making, maintaining and monitoring TPIM notices on a quarterly basis, to keep all cases under frequent, formal and audited review. Lord

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57 Q 246

58 Q 246

59 Q 247-248

Carlile, in his former role as the Independent Reviewer of Terrorism Legislation, was an *ex officio* member of the CORG told us that he was satisfied that it had become a rigorous body: “it considered facts, and cases were explored slowly and methodically.”<sup>60</sup> He was confident it was a genuine review of each case and had recommended the loosening of some restrictions faced by those under a control order.<sup>61</sup>

59. We asked the Minister by what review mechanisms he had proposed to monitor the use of ETPIMs. He confirmed that he would expect the same regime to operate for ETPIMs as for TPIMs.<sup>62</sup> In particular, the Minister singled out the quarterly review by the TRG as an important safeguard, ensuring examination and continued assessment of whether an ETPIM is appropriate.<sup>63</sup> Given the increased severity of ETPIMs, we then asked him whether or not a further level of review would be appropriate, we asked the Minister to consider whether these warranted the introduction of a further review mechanism. The Minister informed us that no decision had yet been taken but there may be scope for a greater level of review:

We have to be satisfied that the relevant use of the powers contemplated under the ETPIMs regime continues to be appropriate to satisfy our obligations under the legislation itself. I am simply pointing to the fact that having a quarterly review mechanism provides a means of ensuring that the relevant agencies and those involved are able to have that regular review, analysis and assessment of an individual who may be subject to the relevant powers contained within the Bill to ensure that they remain appropriate. I am simply saying that it is a mechanism that is there but, equally, recognising that, as they are more stringent and greater than under the TPIMs legislation, in satisfying that test of necessity, clearly that has to be taken into consideration.<sup>64</sup>

**60. It is logical to have a formal review group—established on the same basis as the CORG—to oversee the operation of the Enhanced TPIM measures. However, we ask the Government to consider whether the existing TPIM Review Group is the appropriate review group for ETPIMs cases, given that the measures which could be imposed under an ETPIM are more stringent and the power available to the Government is broader in scope. A separate ETPIMs Review Group (if necessary containing the same members as the TPIM Review Group but meeting with greater powers of recommendation) may be the most appropriate body to review the ongoing necessity of individual ETPIM notices.**

## **The measures available to the Secretary of State**

61. We noted earlier that among the differences between control orders and ETPIMs, a crucial distinction relates to the nature of the measures available. With control orders, the Secretary of State was free to impose any obligation on an individual, provided it was necessary and proportionate to disrupt terrorism-related activity and, while the Prevention

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60 Q 119

61 Q 119

62 Q 207

63 Q 244

64 Q 245

of Terrorism Act 2005 included a list of the types of measures available, these were for illustrative purposes only. By contrast, under the draft Bill, the Secretary of State will only be able to impose those measures specified in Schedule 1. As this represents a significant departure from the previous regime, we sought evidence as to whether or not ETPIMs would be comprehensive in meeting the threat presented by terrorism.

62. ETPIMs were welcomed by DAC Stuart Osborne as an effective tool in counter-terror preventative policing in as much as it returned to the police the powers they had available under the control order regime: “essentially we go back to the old control order regime ... the old regime was bedded in, and it worked very well”.<sup>65</sup> In particular, relocation was singled out by DAC Osborne as a particularly effective aspect of the control order regime, which will be usefully resurrected with this draft Bill:

... it is easier to police generally in some locations in others. It is to do with associations and demographics, and with the ease of operations. Surveillance in some areas is far easier than in others. All those things come into play.<sup>66</sup>

This evaluation of relocation was shared by David Anderson. He told us that while relocation may be in many ways a repugnant notion, it was undoubtedly a useful tool in some cases.<sup>67</sup>

63. DAC Stuart Osborne noted, however, that the shift from control orders to TPIMs and the consequent reduction in measures available to the police powers had meant a “rowing back”, in terms of providing greater liberty to those individuals affected by such measures, but at an increased cost to the public purse. He accepted that increased resources had been provided to manage the increased risk and that these resources had enabled the police to manage this risk chiefly through increased use of surveillance.<sup>68</sup>

**64. The shift from control orders to TPIMs is a welcome step in terms of rebalancing liberty against security but this rebalancing has come at an increased cost to the taxpayer. We believe that this financial cost is justified to ensure that measures like ETPIMs remain the exception and not the norm.**

### **An alternative model: police bail**

65. There was considerable debate during the passage of the Terrorism Prevention and Investigation Measures Act 2011, on whether there could be any alternative to preventative measures like TPIMs and Enhanced TPIMs. Sophie Farthing informed us that Liberty remained committed to the “police bail” model, as first suggested by Lord Macdonald of River Glaven<sup>69</sup> during the TPIM debate.

66. The police bail model would impose restrictive measures on individuals, but would remain tied to the criminal justice system. As such the system would be more open and more focused on prosecutions. Ms Farthing explained:

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65 Q 40

66 Q 42

67 Q 14

68 See: Q 86

69 Former Independent Reviewer of Terrorism Legislation, and Director of Public Prosecutions 2003-08.

...the benefit of it is that you are really tied to prosecution. It is the police who are making those decisions and therefore the aim will be to prosecute the person. That is why we think it is a better system. It goes back to our original premise that the safest public policy is to have prosecutions of people who we are told are very dangerous. Therefore it is much better for the system to be tied in with the police and prosecutorial services rather than warehoused with no particular end result.<sup>70</sup>

**67. We are not presently convinced of the feasibility of police bail as an alternative to ETPIMs. Although we note the case for a more open system, tied visibly to criminal justice, we have doubts as to how this alternative model would work in practice. For these reasons, we take the view that there is not presently any alternative to the sort of measures laid out in this draft Bill and on the statute book as under the TPIM Act 2011.**

## 5 Are ETPIMs the best solution?

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68. There was agreement among most of our witnesses that there was a need for the Government to introduce some sort of control mechanism to manage the risk posed by those it was unable to deport or safely prosecute. Lord Carlile stated that “having ETPIMs in reserve ... is clearly necessary”<sup>71</sup> and DAC Osborne told us that ETPIMs could have great benefits from a police and public safety perspective: “the advantage of TPIMs and controlling measures means that people are taken away from the radicalising environment that was causing the major problem”.<sup>72</sup> However, the need for some form of measure—and our acceptance of this premise—does not obscure the particular faults or areas of uncertainty in the legislation put forward by the Government for scrutiny. We address these matters in this Chapter.

### Prosecution and ETPIMs

69. 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. ETPIMs could therefore be viewed, in part, as an interim measure, containing the threat posed before a successful prosecution can be brought. The Minister told us that prosecution is the Government’s “absolute preference”.<sup>73</sup> However, doubts were raised over whether the ETPIM would encourage prosecutions or whether, in reality, an ETPIM worked against the chance of prosecution and therefore against the Government’s preference. Witnesses also raised a linked concern about the temporary nature of ETPIMs and the seeming lack of “endgame” apparent in the Government’s strategy.

70. DAC Osborne, despite his approval of ETPIMs as a preventative measure and recognition of their possible role in de-radicalisation, acknowledged that the imposition of an ETPIM would rarely lead to a successful prosecution as they would restrict the possibility of committing any activity which could lead to a prosecution:

Control orders, TPIMs and enhanced TPIMs, and the way that they are policed, all affect the behaviour of the individuals that are subject to them. Once you have told the person that they are on a TPIM, they will know that they are being monitored, watched and surveilled. Compliance under TPIMs, as with control orders, has generally been very good.<sup>74</sup>

Similarly, Lord Carlile noted that the imposition of an ETPIM would reduce the likelihood of a successful prosecution at a later date:

It is absolutely beyond doubt that they inhibit investigation because the person is subject to controls, although they may occasionally assist investigation if somebody

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71 Q 91

72 Q 71

73 Q 263 [James Brokenshire MP]

74 Q 60

chooses by subterfuge to continue his or her relationship with former associates. The investigation bit of the TPIM seems to me to be pretty near an illusion.<sup>75</sup>

Sophie Farthing explicitly called ETPIMs “a stopper on gathering evidence for prosecution”.<sup>76</sup>

71. As well as restricting activities that could be used as part of a successful prosecution, it was further noted by our witnesses that the “Investigation” element of the ETPIMs legislation was very much secondary to the “Prevention” element. David Anderson commented, “certainly, the “I” in “TPIM” suggests that that is partly how they are intended; they are not just to prevent but to investigate. I am afraid I am not terribly optimistic about that” and noted that this was a long-standing problem: no-one had been prosecuted for terrorist activity after the imposition of a control order.<sup>77</sup> Professor Helen Fenwick suggested that while theoretically there was a slightly greater chance of the prosecution of an individual under an ETPIM than under a control order—as the suspect would be less isolated and would have greater access to electronic communication devices—on the whole the investigative element of ETPIMs was lacking. She told us:

The link with prosecution could have been made stronger in the TPIMs and ETPIMs legislation. It has been made a little bit stronger. Section 10 of the TPIMs Act is a little bit stronger in terms of the duty placed on the Home Secretary to consult with chief constables about the possibility of prosecution. It is a bit stronger than section 8 of the Prevention of Terrorism Act 2005, but it is not all that strong. ... I would make that investigative element even stronger than it is at present. It is not stronger for ETPIMs than TPIMs, and I think it should be.<sup>78</sup>

72. Under the previous preventative measure regime, control orders, it could be argued that a reduced likelihood of a successful prosecution at a later date was a secondary concern. While the Government may have wished to prosecute, failure to do so would not endanger public safety; individuals on a control order could be placed under restrictions indefinitely and the risk posed by them could be managed accordingly. However, unlike control orders, ETPIMs and TPIMs are time-limited measures. There is therefore a much greater imperative for prosecution.

73. Under the TPIM/ETPIM regime the maximum period for which a terrorist suspect could have their actions restricted would be four years. In order to impose an ETPIM on an individual, the Home Secretary must be satisfied that the individual is involved in terrorism-related activity and that some or all of the activity is new.<sup>79</sup> It follows that once an individual has been placed under an ETPIM, at the end of a maximum period of two years no further restrictive measures may be applied against them without evidence of any “new” activity. The likelihood of an individual committing any new terrorism-related activity while under an ETPIM is substantially reduced by the restrictions placed upon them. This raises a threat to public safety. The behaviour of an individual subject to an ETPIM notice

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75 Q 108

76 Q 199

77 Q 26

78 Q 166

79 Clause 2(6) of the Bill. Similar restrictions apply when moving a suspect from a “standard” to “Enhanced” TPIM, i.e. some “new” evidence that would justify the increased measures.

will be constrained both by the terms of that notice and the awareness that he will be under increased police surveillance. It is unlikely that such an individual will have the motive or opportunity to commit any new incriminating activity. As such, it is possible that under this legislation, at the end of a maximum two-year period, an allegedly dangerous, radicalised individual will be released without direct restrictions on their behaviour.

74. Some of our witnesses doubted that this was a problem. It was argued that the presence of a time-limit would focus minds and create an imperative towards prosecution that was lacking when, as under control orders, suspects could be indefinitely “warehoused”. Sophie Farthing, while doubting that ETPIMs would help in practice, averred that this was the intention behind the Bill.<sup>80</sup> Professor Glees was even more confident of the effectiveness of these measures. He suggested that ETPIMs could operate as a short, sharp shock and—by removing individuals from radical environments and highlighting the presence of the state authorities—effectively de-radicalise the recipients. While he conceded that this would not be the case in every circumstance, and different solutions would be required for some individuals, others subject to an ETPIM may well voluntarily de-radicalise as they mature and are taken away from that environment, in the manner of student radicals in the past.<sup>81</sup>

75. Other witnesses doubted whether, even if the time-limit focused prosecution efforts, this would make a substantial difference to the likelihood of a successful prosecution of an individual who has been subject to an ETPIM. David Anderson noted that past experience suggested that it is unlikely that prosecutions would “automatically” follow at the end of the two-year period:

If people know they are under the sort of extreme control that both a control order and a TPIM represent, it would perhaps be surprising if they were to allow evidence to be picked up that would allow them to be prosecuted. That seems to be what the last five or six years bears out.<sup>82</sup>

Professor Fenwick agreed and suggested that the combined effect of the restriction on activity and the two-year time period of an ETPIM sharply reduced their investigative value. Instead, she questioned why, if the intention behind time-limiting the measures was to focus efforts on prosecution, and not to encourage the development of more evidence, ETPIMs (or TPIMs) were needed at all. She argued that with the proliferation of offences it would be possible in the majority of cases to prosecute suspects for some offence immediately and that this might be a simpler way of “buying time” for the police and prosecution:

If the idea of the two-year limit is to create a greater imperative to prosecute them towards the end of the two years rather than just parking them indefinitely on a control order, then that begs the question why, therefore, that imperative could not arise in any event and they could be prosecuted. I do think it is a problem.<sup>83</sup>

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80 Q 199

81 Q 141-143

82 Q 26

83 Q 144

She further suggested that the Government had yet to articulate a strategy for the management of individuals who were coming to the end of a standard TPIM period and had (possibly) committed no new offence.<sup>84</sup>

76. The Minister stressed that there was no blanket measure that the Government could implement to manage the risk posed by those individuals whose ETPIM had expired and have no new evidence of wrong-doing against their name. Instead, such decisions would need to be taken on a case-by-case basis. He highlighted that the Government possessed many options for managing the risk posed by individuals who have been controlled via an ETPIM, and speculated that in some cases individuals would be de-radicalised by their experience and therefore pose less of a threat. In other cases, the threat could be managed by greater amounts of surveillance and, for foreign nationals, Deportation with Assurances could be used more widely. Finally, he suggested that technological developments allowing the use of intercept evidence may also make prosecution a more common option for the Government to manage the threat of individuals at the end of an ETPIM period.<sup>85</sup>

77. Nevertheless the Minister was cautious not to place too much weight on these options. He insisted that ETPIMs were ultimately a preventative rather than investigative measure and their use carried an acceptance that the likelihood of a subsequent prosecution, successful or otherwise, would fall. Further, he confirmed the Government's position that "there will always be a need for some form of preventative measure like TPIMs".<sup>86</sup>

**78. Time-limiting ETPIMs and as a result focusing the prosecution efforts of the security services, police and the CPS by giving them a deadline to work against, undoubtedly brings both costs and benefits. It is correct to note that restricting the movement and potential associations of a terrorist suspect for a period of up to two years could in many cases lead to a diminution of the individual's value to terrorist organisations and assist in a process of "natural" de-radicalisation. As an interim measure to facilitate and encourage this process the ETPIM has merit. We further welcome the Government's decision to time-limit these measures in so far as this creates an imperative towards prosecution that was lacking under the previous control order regime.**

**79. While a proportion of the threat posed by dangerous, radicalised individuals could be contained for a two-year period under an ETPIM, it is equally true to say a residual element of risk will remain. We believe that if there were to be some individuals placed under an ETPIM, there will almost certainly be some who will remain radicalised and potentially dangerous but against whom no new evidence of wrong-doing can be found. Under the legislation as drafted such individuals will effectively be allowed to go free at the end of their two year ETPIM period without restriction on their movement or activity. The Government has not yet explained how the threat posed by such individuals will be managed. We recommend that they do so in response to this Report.**

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84 Q 155

85 Q 232-237

86 Q 232-237

## Intercept evidence

80. Enhanced and standard TPIMs, along with the earlier control orders, are a response to the difficulties posed by terror suspects who the Government can neither deport nor safely prosecute. Prosecution in these cases is complicated as the evidence upon which the Government relies to make its case is often unable to be released because of security concerns or is the product of intercepted communications and is therefore inadmissible in court.

81. As a general rule, UK law prohibits the evidential use of material gathered via the interception of electronic communications (intercept evidence). This prohibition is derived from section 17 of the Regulation of Investigatory Powers Act (RIPA 2000) which prevents use of intercept as evidence in UK courts. The inability of the prosecution to admit intercept material as evidence is partly a result of the UK's status as a legal outlier. It is both the only common law country which does not allow the use of intercept evidence in a court of law and one of very few countries bound by the European Convention on Human Rights which possesses an adversarial legal system.

82. Despite these legal objections it is argued that the admission of intercept material as evidence would reduce or even remove the need for controlling measures such as ETPIMs by increasing the evidence base available and therefore the chance of successful prosecution of terrorist suspects. Both the current and previous Governments have worked to introduce intercept evidence into criminal proceedings. The previous Government commissioned numerous reviews into the subject, most notably the Privy Council Review of intercept as evidence 2008 (also known as the Chilcot Review).<sup>87</sup> The Chilcot Review concluded that in principle a system which allowed the use of intercept could and should be developed while noting the difficulties such a system would cause. Intercept would require the preservation, monitoring and transcription of “an enormous amount of intercept product which might be relevant to future criminal cases” and would create “a risk of disclosure of intercept capabilities and techniques, including those of the intelligence agencies.” Further, the Review noted the difficulty that any such system would have to be compliant with the European Convention on Human Rights.<sup>88</sup> The present Government has built on this work and has worked to develop a system that would meet the operational difficulties set out in the Chilcot Review while minimising, or avoiding, the problems highlighted.

83. That intercept evidence would be useful as a tool to increase the number of prosecutions of terror suspects cannot be doubted. David Anderson told us that “I think all right-minded people would like to see intercept evidence admissible in our courts, if that could possibly be achieved”<sup>89</sup> and Lord Carlile speculated that “a limited system for intercept evidence ... would be effective in some terrorism cases” largely because, “terrorists are remarkably like other criminals and would be likely to fall into the same traps as other

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87 Privy Council Review of intercept as evidence - report to the Prime Minister and the Home Secretary, 30 January 2008, Cm 7324.

88 Particular doubts were raised over whether any system in the UK would be compliant with Article 6 ECHR (the right to a fair trial).

89 Q 22

criminals”.<sup>90</sup> DAC Osborne confirmed to us that from a policing perspective “intercept evidence could be very useful in prosecution cases” as part of wide package of measures.<sup>91</sup>

84. However, despite the enthusiasm shown by our witnesses for the development of a system to allow the admission of intercept material, there was a clear sense that intercept is not, and should not be seen as, a “silver bullet”, and that making it admissible as evidence in court would not remove the need for controlling measures such as ETPIMs. The Minister stressed to us that regardless of developments around the admission of intercept “we judge that there will always be a need for some form of preventative measure like TPIMs.”<sup>92</sup> This belief was substantiated by the evidence we received from two Independent Reviewers of Terrorism Legislation who had seen sensitive information unavailable to us in our work. They noted that only in a very small number of cases would the admission of intercept material as evidence make the difference in a decision whether or not to prosecute. While any such figures are imprecise and present only a snapshot of the potential effect of the admission of intercept material, they indicate a clear trend. Lord Carlile told us that of 50 control orders cases he had looked at, only in one would intercept evidence “have led to a prosecution rather than a control order.”<sup>93</sup> David Anderson noted a similar trend. He told us of confidential legal advice submitted by a former Old Bailey Counsel who had analysed nine cases in which intercept evidence played a part:

They said, “Can you advise on whether, if the section [17 of RIPA] was repealed and intercept evidence was admissible, the result would have been positive in terms of convictions?” [His response] was that in none of the nine cases would it have made a difference, in four or five of them, I think four, because the intercept evidence could not have been put forward in a way that would have persuaded the jury, and in the other cases—this is very significant—because, even if it had been admissible, there is no way that the prosecution would have allowed it into open court.<sup>94</sup>

**85. It is not our intention to pass comment on the admissibility of intercept material as evidence. To make such a recommendation would be beyond the scope of this Committee and our work. We are very aware of the difficulties this problem raises and the ongoing efforts of the Government to tackle these. Nevertheless, we echo the comments of our witnesses that intercept evidence is not a “silver bullet”. The admissibility of intercept evidence would not, in itself, solve the Government’s problem of how to manage the threat posed by terrorist suspects it was unable to deport or safely prosecute. Regardless of its inherent merits, intercept evidence would rarely be the decisive factor in a decision to prosecute instead of imposing a measure like an ETPIM. As a result, while we are clear that intercept evidence could be useful as a tool to increase the number of prosecutions of terror suspects, we accept that the admissibility of intercept material as evidence could not itself act as an alternative to ETPIMs.**

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90 Q 105 and Q 122

91 Q 57

92 Q 236

93 Q 105

94 Q 22

## Parliamentary scrutiny of the ETPIMs Bill

86. The most frequent complaint made against control orders, the predecessor to TPIMs, was that they infringed human rights, particularly Articles 5 (the right to liberty) and 6 (the right to a fair hearing) of the European Convention on Human Rights (ECHR). The same concerns have been expressed about the operation of ETPIMs.

### Article 5 ECHR

87. Article 5 guarantees “the right to liberty and security of person” at all times except in six specified situations.<sup>95</sup> Governments have the power to derogate from Article 5 in times of national emergency, but this option has not been taken in relation to the Terrorism Prevention and Investigation Measures Act 2011 or this draft Bill. It follows that the Government must ensure that ETPIMs are compliant with the UK’s obligations under Article 5 of the ECHR.

88. While they are confident that both TPIMs and Enhanced TPIMs are ECHR compliant, the Government has acknowledged that the compatibility of ETPIMs with Article 5 of the ECHR is a legal “grey area” which could be open to challenge.<sup>96</sup> We asked our witnesses whether they agreed with the Government’s assessment that the Bill complied with Article 5 of the ECHR. Both Lord Carlile and David Anderson agreed that the draft Bill complied with Article 5.<sup>97</sup> David Anderson noted that the many challenges against control orders on Article 5 grounds had given the Government clear guidance on the acceptable limits which can be placed on an individual’s liberty,<sup>98</sup> while Lord Carlile argued that “the limitations placed on TPIMs and former controllee individuals are in many cases less than the highest bail conditions imposed by magistrates courts every day up and down the country.”<sup>99</sup>

89. However, despite the general confidence of our witnesses, Professor Fenwick suggested that the Government’s position, while broadly accurate, carried a degree of risk and that there was a chance that a particularly stringent ETPIM could be found to be non-compliant with Article 5. She further questioned why the Government was willing to allow this “grey area” and the consequent risk of litigation at all. She argued that, while it would be unpalatable, it may be better to derogate from Article 5 and by so doing allow the Government to impose extremely stringent requirements against the most dangerous individuals instead of being held back by the need to comply with Article 5.

If, literally, there isn’t a prospect of prosecution of people who, on Security Service advice, are dangerous, why not consider seeking a derogation from Article 5 and look for a more severe form of intervention?<sup>100</sup>

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95 Sentence following conviction; breach of a court order; arrest on suspicion of crime; educational supervision of a minor; infection, disease of mental illness, unlawful entry or pending action to deport or extradite.

96 See: “Draft Enhanced Terrorism Prevention and Investigation Measures Bill”, Human Rights Memorandum by the Home Office to the Joint Committee on Human Rights, paragraph 22.

97 Q 113 and Q 30

98 Q 30

99 Q 114

100 Q 145

Professor Fenwick further argued that such a move would be more intellectually honest, would better highlight the severe danger posed by one or two individuals and would be a more open and honest assessment of the Government's intentions:

A derogation is not a measure that one would enter into lightly, and Parliament would have to accept the derogation, but at least it is openly saying it to Parliament. Parliament would have to say, and so would the judges, that, yes, there is a state of emergency at the moment, meaning that we have to suspend our acceptance of Article 5.<sup>101</sup>

### Article 6 ECHR

90. Article 6 of the European Convention of Human Rights guarantees an individual a right to a fair hearing. As with Article 5, control orders faced many legal challenges as to their compliance with Article 6. The issues raised in these cases apply equally to the operation of TPIMs and ETPIMs. Control orders, TPIMs and ETPIMs rely on the use of a closed material procedure. As a result, the suspect or "controlee" is unaware of the case against them and have been unable to give instruction to their Government-appointed and security-vetted Special Advocate.

91. These arrangements were challenged repeatedly under the control order regime and the rulings made will govern the legality of TPIMs and ETPIMs. In the *AF (No.3)* case<sup>102</sup> it was held that a controlee must be given "sufficient information about the allegations against him to give effective instructions in relation to those allegations" and as a result the controlee must be given the "gist of the case" against them for Article 6 compliance.

92. This Bill does not commit the Home Secretary to providing at least the gist of the case to all individuals under a TPIM or ETPIM. The Home Secretary will not provide a "gist" as of right but will consider so doing in response to a request from the court. Following any such request from the court, the Government will have discretion whether they provide the "gist" or drop the action against the individual (as was the case under control orders; two individuals were discharged from control orders after the Government refused on national security grounds to disclose the information required).

93. Providing at least a gist of the case against an individual is the key question in whether a legal process is Article 6 compliant. Lord Carlile noted that "a fair hearing involves at the least a satisfactory measure of gisting so that the individual concerned understands sufficiently the nature of the case being brought against him".<sup>103</sup> Sophie Farthing called "gisting" the "least worst option", which did not make the system any less "unfair" and still went against "common law principles that have been part of our justice system for hundreds of years and are being overridden by this system. It is the right to know the full case against you and the equality of arms."<sup>104</sup>

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101 Q 148

102 *Secretary of State for the Home Department v AF and another*, [2009] UKHL 28, [2010] 2 AC 269.

103 Q 113

104 Q 190-193

94. The Minister, on the other hand, assured us that the Government’s confidence in the compatibility of this legislation with the European Convention on Human Rights was drawn from the existing case law:

It is not simply [the Government] asserting it. We are asserting it on the basis of the case law that has been established through control orders but is directly informative in consideration of the TPIMs and ETPIMs legislation.<sup>105</sup>

He told us that since both control orders and TPIMs had already withstood legal challenge, he was confident that ETPIMs, with their more rigorous legal and judicial safeguards, would meet with similar judicial approval.<sup>106</sup>

95. However, despite asserting his confidence that the legal process found in the current ETPIMs legislation was Article 6 compliant, the Minister refused to confirm that the Government would follow the recommendation made by the Law Lords in the *AF (No.3)* case and provide all controlees with at least the gist of the case against them. The Minister stated that the Government’s view was that as *AF (No. 3)* referred to “a stringent control order” it did not place the Government under an obligation to provide a “gist” in all cases. Instead, he was confident that the current policy of providing gists only at the Home Secretary’s discretion or when ordered to by the courts would be Article 6 compliant and that no change in this policy was needed.<sup>107</sup>

96. We further considered the extent to which withholding from controlees information on the case against them undermined their capacity to give instruction to their Special Advocate. Such a system has been criticised by the Special Advocates themselves and by Lord Carlile, who told us:

The biggest improvement that we could make to the special advocate system would be to enable special advocates to take instructions more readily—it is theoretically possible—and to be encouraged to take instructions from the individuals whose interests they represent.<sup>108</sup>

Sophie Farthing agreed that increasing the degree to which suspects could give legal instruction would be an improvement on the current situation which she described in legal terms as “taking blind shots in the dark”.<sup>109</sup>

97. We asked the Minister to reverse the Government’s bias against “gisting” which prevents Special Advocates receiving instructions from their client. He refused to make such a commitment. He was concerned that even innocuous questions and banal, unmanaged, non-approved conversations between the Special Advocate and their client:

could reveal something of the nature of the closed case ... It is not to be obstructive. It is rather to recognise the very real challenges that we have on intelligence sources and how to facilitate communications in a way that does not contravene that. That is

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105 Q 241

106 Q 242

107 Q 249

108 Q 113

109 Q 190

why, if the Special Advocate wishes to make that communication, there is a clear process of doing that and some of those issues can be assessed and examined in that context.<sup>110</sup>

**98. Our colleagues elsewhere in Parliament have scrutinised the compatibility of these broad measures with the UK’s human rights obligations. It is not our intention to duplicate their work. We acknowledge the inherent difficulty faced by the Government in ensuring that this legislation is compliant with human rights law. Any ETPIM will be a bespoke measure customised for each circumstance. Their legality in each case can only be proven via a legal challenge. However, the evidence we have received suggests that the Government is correct to proclaim these measures human rights compliant and we see no reason to contradict these statements. Regardless of the accuracy of the Government’s position we recommend that the Government change its position on “gisting” and commit to a *de facto* position of providing at least the gist of every case against an individual. We do not understand why this is not the current policy and suggest that there are strong moral reasons to make such a change. Regardless of interpretations of the law, it is wrong that an individual could have no knowledge of the case against them and will be unable to instruct his Special Advocate accordingly. We note that if the underlying presumption was changed so that the gists were put forward, the Government would remain able to apply to the court to prevent publication if so doing would endanger national security, and we therefore urge the Government to reverse its current bias against gisting and work with the Special Advocates to devise a method by which this can be done.**

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110 Q 252, Q 254

## 6 Conclusion

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99. In an ideal world there would be no need for a controlling measure such as ETPIMs, the Government would face a simple binary choice to prosecute a dangerous individual or leave him at liberty. Sadly this situation does not exist and the Government must devise a system to tackle the ongoing terrorist threat from those individuals who cannot—for whatever reason—be deported or safely prosecuted. Almost by default such a system is sub-optimal solution, but sub-optimal does not mean inadequate. We accept that these measures are a suitable response to the challenge they seek to tackle.

100. While we give cautious approval to these measures we cannot approve of them in their entirety nor the process by which they will be placed before both Houses for approval. We have concerns about both the lack of certainty over the circumstances in which these measures will be introduced and the ability of Parliament to scrutinise adequately whether these powers are necessary to meet the particular threat identified. We expect the Government to address our concerns before the Bill is introduced formally.

# Conclusions and recommendations

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## What are ETPIMs

1. There are strong similarities between the ETPIMs regime and its predecessor, control orders, not least in the measures which both regimes allow to be imposed against an individual. However, despite these common factors it would be incorrect to argue that Enhanced TPIMs represent a return to control orders. Key differences exist in the procedures by which these draft measures can be applied and these differences give ETPIMs a somewhat more liberal character than control orders. (Paragraph 15)
2. While we note the differences between ETPIMs and control orders, we similarly note differences between Enhanced TPIMs and the existing standard TPIM regime. Given the Government's stated liberal intentions, only the most extreme circumstances can justify the introduction of legislation that will bring in such stringent measures and even then their use must be strictly limited. (Paragraph 16)

## When will ETPIMs be introduced?

3. We appreciate the confirmation by the Minister that Enhanced TPIMs are not viewed by the Government as an alternative to adequate police resources; we agree with him that ETPIMs are measures to be introduced in exceptional, unanticipated circumstances and should remain as such. However, in other statements he was vague as to the circumstances in which the ETPIMs Bill might be introduced for Parliament to consider. We accept that it would be impossible to define a hard and fast "trigger" for this legislation, but we recommend that, in its response to this Report, the Government set out as clearly and unambiguously as possible its understanding of the types of "exceptional circumstances" that would lead to the introduction of this Bill. (Paragraph 23)
4. The Civil Contingencies Act 2004 would be an inappropriate mechanism by which to introduce the powers currently set out in the ETPIMs Bill, and would be contrary to the Government's aim of introducing more liberal policies which clarify and hence constrain the Secretary of State's powers as far as possible. (Paragraph 25)
5. There are many occasions in which Parliament is asked to legislate without access to the information necessary to make a fully informed decision. It is a problem faced by Government and Legislatures across the world when legislating in response to national security threats, and we fully sympathise with the Government's position. However, we do not think that this situation is improved by the use of so-called emergency legislation. (Paragraph 30)
6. We can find no compelling reason for the decision to introduce these measures as a separate Bill at some unspecified time in unspecified circumstances. We find it odd that these measures were not included as an order-making power in the original TPIMs Bill where they could be subjected to fuller scrutiny in the course of normal Parliamentary business. The delegation of power to the Government does not

demand its use, and the Minister's argument that the limited scrutiny that emergency legislation of this sort can offer is the only way to do justice to the "exceptionality" of these powers was unconvincing. The Government's position that it will introduce this legislation at some future date in response to some unspecified emergency is an unfortunate and unwelcome decision. (Paragraph 31)

7. While we do not approve of the use of emergency legislation in principle, given the situation now created by the Government it seems to us preferable that the ETPIMs Bill—if deemed necessary—be brought forward as emergency legislation, rather than through an amendment to the TPIMs Act. Nevertheless, the Government should take all possible measures to ensure that this undesirable process is not repeated. The scrutiny of emergency legislation is fraught with difficulty and we deprecate the introduction of Government measures in this fashion. Should the ETPIMs Bill ever be brought forward and enacted, we would further advocate consolidation of the legislation at the earliest opportunity. (Paragraph 32)
8. Should this legislation ever be introduced to Parliament there is a very real danger that Members will be placed in the invidious situation of approving these measures without being told the majority of the case for them. We are aware that it would be impossible to brief all Members of both Houses on the situation triggering the introduction of this Bill, but we recommend that the Government takes steps to formalise a mechanism whereby a select group of properly vetted Members can be briefed in advance on the nature of the particular threat that necessitates the introduction of these measures. It would be highly regrettable if a failure to have in place a clear process for briefing the right people at the right time were to lead to further weakening of possible future scrutiny, especially given stated concerns about the ability of Parliament to fully scrutinise the Bill should it ever come before the House. (Paragraph 37)
9. We note that the Intelligence and Security Committee is a body that would be able to speak with some authority on the need for this legislation. We recommend that, if in the Government's opinion the powers granted to it under this draft Bill were needed, members of the ISC should be briefed on the nature of the threat and then asked to formally communicate to Parliament a recommendation on whether, in its opinion, the Government's case for the need for the ETPIMs Bill has been made. (Paragraph 38)

### **How will ETPIMs work**

10. While we welcome the decision to elevate the legal threshold from one of reasonable suspicion to a balance of probabilities, we note the evidence we have received that in practice, the courts generally already operated a more robust standard than was called for in statute in determining whether the conditions were satisfied for a control order. Caution must therefore be used in attributing too much value to this change. Nonetheless, we agree with the decision to require the Secretary of State to be satisfied on the balance of probabilities before imposing an ETPIM. These are exceptional measures for exceptional circumstances and the decision to impose formally this higher threshold before they can be met—even if this only regularises current practice—is the correct one. (Paragraph 50)

11. Given the potential seriousness of the Government's decision to impose an ETPIM measure on an individual we are not satisfied by the Minister's case for retaining the current level of judicial scrutiny at the 'on the principles of judicial review' standard. There should be a full merits review of each ETPIM notice. Formally amending the legislation to allow a full merits review would represent, more than anything else, a recognition of existing practice. We recommend that the Government amend its draft Bill to ensure a full merits review by the courts of each decision to impose an ETPIM. (Paragraph 56)
12. It is logical to have a formal review group—established on the same basis as the CORG—to oversee the operation of the Enhanced TPIM measures. However, we ask the Government to consider whether the existing TPIM Review Group is the appropriate review group for ETPIMs cases, given that the measures which could be imposed under an ETPIM are more stringent and the power available to the Government is broader in scope. A separate ETPIMs Review Group (if necessary containing the same members as the TPIM Review Group but meeting with greater powers of recommendation) may be the most appropriate body to review the ongoing necessity of individual ETPIM notices. (Paragraph 60)
13. The shift from control orders to TPIMs is a welcome step in terms of rebalancing liberty against security but this rebalancing has come at an increased cost to the taxpayer. We believe that this financial cost is justified to ensure that measures like ETPIMs remain the exception and not the norm. (Paragraph 64)
14. We are not presently convinced of the feasibility of police bail as an alternative to ETPIMs. Although we note the case for a more open system, tied visibly to criminal justice, we have doubts as to how this alternative model would work in practice. For these reasons, we take the view that there is not presently any alternative to the sort of measures laid out in this draft Bill and on the statute book as under the TPIM Act 2011. (Paragraph 67)

### **Are ETPIMs the best solution?**

15. Time-limiting ETPIMs and as a result focusing the prosecution efforts of the security services, police and the CPS by giving them a deadline to work against, undoubtedly brings both costs and benefits. It is correct to note that restricting the movement and potential associations of a terrorist suspect for a period of up to two years could in many cases lead to a diminution of the individual's value to terrorist organisations and assist in a process of "natural" de-radicalisation. As an interim measure to facilitate and encourage this process the ETPIM has merit. We further welcome the Government's decision to time-limit these measures in so far as this creates an imperative towards prosecution that was lacking under the previous control order regime. (Paragraph 78)
16. While a proportion of the threat posed by dangerous, radicalised individuals could be contained for a two-year period under an ETPIM, it is equally true to say a residual element of risk will remain. We believe that if there were to be some individuals placed under an ETPIM, there will almost certainly be some who will remain radicalised and potentially dangerous but against whom no new evidence of

wrong-doing can be found. Under the legislation as drafted such individuals will effectively be allowed to go free at the end of their two year ETPIM period without restriction on their movement or activity. The Government has not yet explained how the threat posed by such individuals will be managed. We recommend that they do so in response to this Report. (Paragraph 79)

17. It is not our intention to pass comment on the admissibility of intercept material as evidence. To make such a recommendation would be beyond the scope of this Committee and our work. We are very aware of the difficulties this problem raises and the ongoing efforts of the Government to tackle these. Nevertheless, we echo the comments of our witnesses that intercept evidence is not a “silver bullet”. The admissibility of intercept evidence would not, in itself, solve the Government’s problem of how to manage the threat posed by terrorist suspects it was unable to deport or safely prosecute. Regardless of its inherent merits, intercept evidence would rarely be the decisive factor in a decision to prosecute instead of imposing a measure like an ETPIM. As a result, while we are clear that intercept evidence could be useful as a tool to increase the number of prosecutions of terror suspects, we accept that the admissibility of intercept material as evidence could not itself act as an alternative to ETPIMs. (Paragraph 85)
18. Our colleagues elsewhere in Parliament have scrutinised the compatibility of these broad measures with the UK’s human rights obligations. It is not our intention to duplicate their work. We acknowledge the inherent difficulty faced by the Government in ensuring that this legislation is compliant with human rights law. Any ETPIM will be a bespoke measure customised for each circumstance. Their legality in each case can only be proven via a legal challenge. However, the evidence we have received suggests that the Government is correct to proclaim these measures human rights compliant and we see no reason to contradict these statements. Regardless of the accuracy of the Government’s position we recommend that the Government change its position on “gisting” and commit to a de facto position of providing at least the gist of every case against an individual. We do not understand why this is not the current policy and suggest that there are strong moral reasons to make such a change. Regardless of interpretations of the law, it is wrong that an individual could have no knowledge of the case against them and will be unable to instruct his Special Advocate accordingly. We note that if the underlying presumption was changed so that the gists were put forward, the Government would remain able to apply to the court to prevent publication if so doing would endanger national security, and we therefore urge the Government to reverse its current bias against gisting and work with the Special Advocates to devise a method by which this can be done. (Paragraph 98)

## Conclusion

19. In an ideal world there would be no need for a controlling measure such as ETPIMs, the Government would face a simple binary choice to prosecute a dangerous individual or leave him at liberty. Sadly this situation does not exist and the Government must devise a system to tackle the ongoing terrorist threat from those individuals who cannot—for whatever reason—be deported or safely prosecuted.

Almost by default such a system is sub-optimal solution, but sub-optimal does not mean inadequate. We accept that these measures are a suitable response to the challenge they seek to tackle. (Paragraph 99)

20. While we give cautious approval to these measures we cannot approve of them in their entirety nor the process by which they will be placed before both Houses for approval. We have concerns about both the lack of certainty over the circumstances in which these measures will be introduced and the ability of Parliament to scrutinise adequately whether these powers are necessary to meet the particular threat identified. We expect the Government to address our concerns before the Bill is introduced formally. (Paragraph 100)

# Formal Minutes

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**Wednesday 21 November 2012**

Members present:

Mr Bob Ainsworth MP, in the Chair

Baroness Doocey	Nicola Blackwood MP
Lord Jay of Ewelme	Mike Crockart MP
Lord King of Bridgwater	Chris Evans MP
Baroness Neville-Jones	Rebecca Harris MP
Lord Plant of Highfield	Jesse Norman MP

A draft report is presented by the Chairman.

The Joint Committee deliberate.

Paragraphs 1 to 100 are agreed to with amendments.

The Summary is agreed to with amendments.

The Committee agrees that the draft Report, as amended, be the Report of the Joint Committee.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No 134 of the House of Commons.

*Ordered*, That the Joint Committee be now adjourned.

# Witnesses

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## Wednesday 11 July 2012

David Anderson QC, Independent Reviewer of Terrorism Legislation

## Wednesday 17 October 2012

Deputy Assistant Commissioner Stuart Osborne, Head of Metropolitan Police Counter-Terrorism Command and ACPO Senior National Co-ordinator for Counter-Terrorism

Lord Carlile of Berriew CBE, QC, Former Independent Reviewer of Terrorism Legislation

## Wednesday 24 October 2012

Professor Helen Fenwick, Durham Law School, Durham University, and Professor Anthony Glee, University of Buckingham

## Wednesday 31 October 2012

James Brokenshire MP, Parliamentary Under-Secretary for Crime and Security

# List of written evidence

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- 1 JUSTICE
- 2 Equality and Human Rights Commission
- 3 Liberty

Written and oral evidence is published on the committee website

<http://www.parliament.uk/business/committees/committees-a-z/joint-select/terrorism-prevention-and-investigation-measures-bill/publications/>