



THE GOVERNMENT RESPONSE TO THE TENTH REPORT OF SESSION 2013-14
FROM THE JOINT COMMITTEE ON HUMAN RIGHTS HL PAPER 113 / HC 1014:

Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011

Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty

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We are concerned by the Government's degree of engagement with the work of the Independent Reviewer. We find the Government's response to the Independent Reviewer's detailed and considered First Report on TPIMs to be perfunctory and unhelpful. Independent review is not an end in itself but a means by which Parliament and others can ensure that their scrutiny of Government is informed by expert advice. Its worth depends on the Government responding promptly and fully to the recommendations which such expert review produces. We urge the Government to engage more transparently and substantively with the Independent Reviewer's recommendations, including those in his forthcoming Report about TPIMs in 2013, by explaining in more detail to Parliament precisely what is proposed in response to each recommendation. (Paragraph 24)

The Government recognises the important function fulfilled by the Independent Reviewer of Terrorism Legislation and that this role is a key part of the accountability on the operation of the Terrorism Prevention and Investigation Measures Act 2011, as well as for the Terrorism Act 2000, Part 1 of the Terrorism Act 2006 and the Terrorist Asset-Freezing etc Act 2010. The Government has a constructive relationship with the Independent Reviewer, who holds regular discussions with both Ministers and officials.

For the TPIM Act, the role of the Independent Reviewer is fulfilled in a range of ways, culminating in the publication of an annual report that explains how the Act has operated during the previous year. As part of this function, the Independent Reviewer has access to relevant material, which is sometimes highly sensitive. The Independent Reviewer also attends formal TPIM Review Groups, along with meetings with Ministers and briefings from officials on both a formal and ad hoc basis. This helps to inform the content of the Independent Reviewer's annual report.

The Independent Reviewer's annual report was published on 19 March 2013. The Government Response was published on 16 May 2013, following careful consideration of the report and its recommendations. The Government acted on a number of the Independent Reviewer's recommendations, for example the suggestion that the Probation Service be involved with the exit strategies for TPIM subjects.

The Independent Reviewer is one way that Government increases its accountability to Parliament on TPIMs. We also publish a quarterly Written Ministerial Statement (WMS) that provides Parliament with details of the operation of the TPIM Act during the previous three months. Outside the quarterly WMS cycle, the Home Secretary has promptly informed Parliament on issues related to TPIMs, including through oral statements. In addition, the Security Minister wrote to the Joint Committee on Human Rights following the call for evidence and gave oral evidence to the Committee.

Our inquiry has failed to find any evidence that TPIMs have led in practice to any more criminal prosecutions of terrorism suspects. This confirms the concerns we expressed in our scrutiny Reports on the Bill that the replacement for control orders were not “investigative” in any meaningful sense. In our view it is time to recognise that the epithet “TPIMs” is a misnomer, because they are not investigative in nature. TPIMs should be referred to as Terrorism Prevention Orders, or something similar, to reflect the reality that their sole purpose is preventive, not investigative. (Paragraph 35)

Being on a TPIM notice does not preclude a subject from continuing to be investigated and prosecuted, whether for acts undertaken before a TPIM notice was imposed or acts committed while a TPIM notice is in force. Each TPIM subject is assigned a Senior Investigating Police Officer, and the possibility of a criminal prosecution is kept under regular review for all TPIM subjects and this will continue to be the case.

Section 10 of the TPIM Act places a statutory duty on the Secretary of State to consult the chief officer of the appropriate police force on whether there is evidence available that could realistically be used for the purposes of prosecuting an individual for a terrorism offence before a TPIM notice can be imposed. The chief officer in turn must have consulted the Crown Prosecution Service. Only if there is no realistic prospect of a prosecution will a TPIM notice be imposed. This demonstrates the Government’s commitment to the prosecution of terrorists where there is sufficient admissible evidence to do so.

As the Committee recognises, a TPIM notice also explicitly has a significant preventative element. The police and Security Service believe TPIMs have been effective in disrupting the individuals and their networks.

We agree with the Independent Reviewer that the very nature of TPIMs carries an inherent risk of the subject absconding, and that the reaction to such incidents must not be allowed to undermine the general principle that, in order to be proportionate, restrictions on each TPIM subject must be individually tailored to the risk that they are assessed to present. (Paragraph 39)

We accept that, under the Act as passed, TPIMs can be lawfully imposed on an individual if the Secretary of State reasonably considers it to be necessary “for purposes connected with protecting the public from a risk of terrorism”. The Home Secretary’s statements, however, that the two TPIMs subjects who have absconded do not pose a direct threat to the public in the UK serve as a stark reminder of the breadth of that statutory power. If the sole purpose of a TPIM is to prevent travel to support terrorism overseas, it must at least be questionable whether the full range of restrictions available in a TPIM are justified, rather than specific measures to prevent travel such as notification requirements or surrendering a passport. The Minister’s repeated references in his oral evidence to the need to provide “assurance” and “comfort” to the public that the Government is meeting its responsibilities in relation to national security raise similar concerns about the strict necessity for TPIMs in all cases. (Paragraph 47)

As the Committee notes, two TPIM subjects, Ibrahim Magag and Mohammed Ahmed Mohamed, have absconded from their TPIM notices and in both cases they were not assessed to pose a direct threat to the UK. Magag chose not to have either his control order or his TPIM notice reviewed. Both Mohamed's control order and TPIM notice were reviewed by the court, and the orders and the full range of measures within them were upheld by the court. The court's decision was made in full knowledge of the national security case.

In each instance where a TPIM notice is imposed, it takes into account both what is necessary to protect the British public and what is needed to prevent the subject from undertaking terrorism related activity – whether in the UK or abroad. In some cases, where the activity is not likely to take place in the UK, the individual will not necessarily pose a direct threat to the public in the UK. Alternatively, an individual might pose more of a threat if having travelled abroad they return to the UK with new skills, training and terrorist contacts. The Government condemns terrorism wherever it occurs and it is right that we should use the measures available to disrupt terrorism overseas as well as in the UK.

We accept that, in principle, the risk of absconding is likely to be higher when a TPIM subject remains in the midst of their local community and network, and we acknowledge the fact that, under the control order regime, no relocated individuals absconded. However, we do not consider this to be sufficient to demonstrate that the lack of a power to relocate terrorism suspects leads to such a threat to public safety as to justify re-introduction of the power. Nor have we seen any direct evidence that the absence of a power to relocate TPIM subjects appears to have significantly limited their effectiveness in practice. We remain of the view that a power to relocate an individual away from their community and their family by way of a civil order, entirely outside the criminal justice system, is too intrusive and potentially damaging to family life to be justifiable, and we note that this also appears to be the view of the Independent Reviewer. (Paragraph 55)

The Government notes the Committee's view on relocation, a power which is not available under the TPIM Act. The Government agrees that the power to relocate does not, of itself, prevent someone from absconding.

The Government relies heavily on the TPIM Quarterly Review Group as an effective mechanism for picking up any disproportionate impact of TPIMs on their subjects and their families and responding accordingly. However, there is little or no evidence in the public domain to support the Government's assertion about the effectiveness of the Quarterly Review Groups in this respect, and we note that the Independent Reviewer has raised some concerns about the proportionality of certain restrictions, such as reporting requirements and restrictions on association, notwithstanding the Quarterly Review Group meetings. We recommend that the Government give further consideration to specific ways in which the impact on TPIMs subjects and their families can be mitigated, in the light of all relevant existing and any future recommendations of the Independent Reviewer. (Paragraph 63)

The TPIM Act was introduced following careful consideration of the range of powers necessary to protect the public from terrorism. Unlike the Prevention of Terrorism Act 2005 which introduced control orders, the TPIM Act 2011 specifies the range of measures that are available as part of a TPIM notice. In each case, a TPIM notice and the measures within it may only be imposed where the Secretary of State reasonably considers that it is necessary for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity.

There are a number of safeguards built into the Act. These include an automatic review of the decisions of the Secretary of State, including that the relevant conditions to impose a TPIM notice were met and continue to be met. A TPIM subject may also appeal against the Secretary of State's decisions in relation to the TPIM notice, including its extension or revival. A TPIM subject may also appeal against the measures themselves, including if the Secretary of State has varied a measure without consent, or against the Secretary of State's decision to refuse to vary a measure where the subject has applied for a variation. The Secretary of State also has a duty to keep under review that the TPIM notice remains necessary in order to protect the public from terrorism and to prevent the individual's involvement in terrorism related activity. It is therefore open to the scrutiny of the court whether each of the measures is necessary and proportionate.

The TPIM Review Group plays an important part in fulfilling the statutory requirement for the Secretary of State to keep under review the on-going necessity of each TPIM notice. It brings together key partners in order to discuss in-depth each TPIM subject and the measures in place against them, including considering highly sensitive information. As part of the review of each subject, specific consideration is given to the impact on their family. The Independent Reviewer regularly attends TPIM Review Group meetings.

We agree with the Independent Reviewer that serious restrictions on liberty, imposed outside of the criminal justice system, cannot be indefinite. As we explained in our scrutiny Reports on the Bill, the introduction of a statutory time limit on the duration of TPIMs fulfils a requirement of human rights law. The expiry of the current TPIMs should not, in our view, be an occasion to re open a human rights compatibility issue on which we believe Parliament took the correct decision in 2011. (Paragraph 73)

The Government notes the committee's views on the statutory time limit and agrees that it is not appropriate to place people on restrictions such as TPIM notices indefinitely.

We understand that the Government's internal report will include sensitive material which it is not in the public interest to disclose, but it is undesirable that to date there is nothing in the public domain about even the substance of the findings of that review. We recommend that the Government provide an "open" version of the outcome of its internal investigation and review, to enable public and parliamentary debate about and scrutiny of the circumstances of the absconding of two TPIM subjects. (Paragraph 42)

The police investigations remain ongoing into the absconds of TPIM subjects Ibrahim Magag and Mohammed Ahmed Mohamed. It would not be appropriate to provide further details on the cases or on the reviews into the circumstances of the absconds while those investigations are ongoing.

Following the Magag abscond, we shared the findings of the internal review with the Independent Reviewer, who mentioned the review in his annual report and stated that it had been thorough. In addition, the Government has confirmed that all of the actions from the Magag abscond review have been acted upon. We will share the findings of the review into the Mohamed abscond with the Independent Reviewer.

We recommend that the breadth of the vaguely worded power to impose TPIMs, “for purposes connected with protecting the public from a risk of terrorism”, be kept under careful review by the Independent Reviewer. (Paragraph 47)

The Government notes this recommendation, which is for the Independent Reviewer.

It would be premature for us to comment on the human rights compatibility of a policy proposal which has yet to be formulated and presented to Parliament, but in view of the clear obligations in international law not to render a person stateless, we intend to subject any such proposal to the most rigorous scrutiny were it to be brought forward. (Paragraph 49)

The Government notes the Committee’s intention in regard to this matter.

We agree with the Independent Reviewer’s recommendation that the special advocates’ longstanding concerns about closed material procedures in control order and TPIM proceedings be considered in a judicially-chaired forum. We recommend that such a process be initiated in relation to TPIM proceedings in the High Court, drawing on the positive experience of the process already conducted by Mr Justice Irwin in relation to SIAC. (Paragraph 68)

TPIM subjects’ interests are represented in the ‘closed’ element of a hearing by a Special Advocate. The Special Advocate’s role is to ensure that the maximum amount of material is disclosed in open court, and then to scrutinise and challenge the remaining sensitive material which is heard in closed. Judges are under a duty to put as much of their reasoning into open as possible, including statements of legal principle that are most likely to have cross-case relevance. Special Advocates can and have successfully argued at these hearings that closed material should be disclosed to TPIM subjects.

The Government notes this recommendation and continues to keep the Independent Reviewer’s recommendation under review. Currently, Special Advocates can provide their comments to the Government at any time. We do not consider that a separate forum is required at this time

We agree that the Home Secretary should provide Parliament and its committees with as much detailed information as possible about the current threat from terrorism to enable them to make an informed assessment of both

the necessity for and the adequacy of the current legal framework. Indeed, we support the Independent Reviewer's call for the Joint Terrorism Analysis Centre to provide a regular, publicly accessible report about the threat from terrorism, to assist Parliament to scrutinise the necessity and proportionality of particular counterterrorism measures such as TPIMs. We call on the Government to reconsider its rejection of the Independent Reviewer's recommendation in light of the concerns expressed about Parliament's practical ability to scrutinise the adequacy of our legal framework in the wake of the Edward Snowden disclosures. (Paragraph 75)

However, we do not believe it should be the role of any parliamentary committee, including statutorily created committees such as the Intelligence and Security Committee, to make recommendations about whether particular individuals should be subject to restrictions on their liberty. That is an operational matter for the police and the security services, subject to independent judicial oversight. Parliamentary committees, such as ours, are concerned with the adequacy of the legal framework to deal with the threat. (Paragraph 76)

The Government considers that there is an appropriate level of information available to the public through the GOV.UK and Security Service websites, along with the annual report on the UK's counter-terrorism strategy (CONTEST). This information includes the published threat levels for the International Counter-Terrorist Threat, the Northern Ireland Related Terrorist Threat in Great Britain and the Northern Ireland Related Terrorist Threat in Northern Ireland. We will continue to keep under review whether any additional open reports are required.

The work of the UK's intelligence agencies is carried out in accordance with a strict legal and policy framework that ensures their activities are authorised, necessary and proportionate, and that there is rigorous oversight, including from Secretaries of State, the Interception of Communications Commissioner, the Intelligence Services Commissioner, and the Intelligence and Security Committee of Parliament (the ISC). Last year, the Justice and Security Act 2013 transformed the ISC – increasing its powers, remit and resources and making the intelligence agencies more accountable to Parliament. These reforms followed public consultation on the best way to modernise judicial, independent and parliamentary scrutiny of the intelligence agencies while allowing them to get on with keeping us safe.

Since then, the new ISC has held its first public evidence session with the Heads of the UK's intelligence agencies, which has done much to increase public visibility and understanding of the serious national security threats facing the UK. In addition, following allegations concerning UK intelligence activity in light of media reporting on Snowden, in October the new ISC announced that it would be investigating the legal framework governing the intelligence agencies' ability to intercept private communications and the appropriate balance between individual rights and the collective need for security. The Government welcomes this and will participate fully with the ISC's review.

The Government agrees with the Committee's view at paragraph 76 that it is an operational matter for the police and Security Service to identify whether individuals

should be considered for measures such as a TPIM notice in order to manage the threat they pose to the public.

In view of understandable public anxiety about the threat to public safety following the imminent expiry of TPIMs, we recommend that the Government put more information into the public domain about the types of work it has carried out with TPIMs subjects with a view to minimising the risk that they may be tempted to engage in terrorism-related activity when their TPIM expires. We invite the Government to provide us with a further memorandum, setting out in more detail the work which the Government has been doing in this respect, and in particular explaining how the Government's work on TPIM exit strategies relates to other initiatives, including the Troubled Families programme and the taskforce established by the Prime Minister to look again at the Government's strategy on extremism and radicalisation in the wake of the murder of Lee Rigby in Woolwich. (Paragraph 79)

The police, Security Service and Home Office have developed comprehensive and detailed plans to manage former TPIM subjects. Those plans include consideration by the police of Prevent interventions related to the individual, their family and local places they might attend to limit the impact of radicalisation. They also include identifying stabilising factors to assist TPIM subjects to move away from extremism, such as employment and education.

As detailed in the Independent Reviewer of Terrorism Legislation's annual report published in March 2013, we also engaged probation to work with TPIM subjects during the final months of their TPIM notices.

We will keep under review what further information we can provide to the Committee, other Parliamentary committees and to Parliament more widely. However, we do not comment on individual cases, which as the Committee will be aware, include sensitive information that it would be inappropriate to provide in public.

At the conclusion of our review we are left with the distinct impression that, in practice, TPIMs may be withering on the vine as a counter-terrorism tool of practical utility. No new TPIM has been imposed since October 2012. Soon there will only be one TPIM in force. It remains to be seen whether any new TPIMs will be imposed in the foreseeable future. (Paragraph 80)

The Independent Reviewer recently commented that he believes TPIMs should be kept on the statute book and that there were likely to be people in the future who would be put on TPIMs. The Government believes that TPIMs are an important tool which should continue to be available to the police and Security Service should they be necessary to protect national security. However, they are only one tool in the considerable armoury of powers available to the police and Security Service to disrupt terrorist activity.

The Act includes a five year renewal requirement and we note the Government's intention to carry out a review of TPIMs as part of a broader review of counterterrorism powers. We recommend that such a wider review be an urgent priority of the new Government in the next Parliament, and

conducted sufficiently in advance of the five year renewal date for Parliament to be able to make a fully informed decision about the continued necessity of the powers at that time. (Paragraph 82)

We do not feel that we are sufficiently informed about the threat picture, however, to be able to conclude with confidence that the power to impose some form of civil restriction orders such as TPIMs is no longer required, or to recommend that the Secretary of State should exercise the power the Act gives her to repeal it if it is no longer necessary. (Paragraph 81)

The Government has no current plans to carry out a formal review of the range of counter terrorism powers, following the review that took place in 2010. However, the Government keeps all counter-terrorism powers under continuous scrutiny. The Government notes the Committee's recommendations in this area and will keep under review the on-going necessity for the powers available under the TPIM Act. The Government will also ensure that the statutory duty under Section 21(3) of the TPIM Act to consult the Independent Review of Terrorism Legislation, the Intelligence Services Commissioner and the Director General of the Security Service before making an order to extend the Secretary of State's TPIM powers for a further five year is carried out in good time. The Government also notes that Section 21(4) of the TPIM Act requires that the order extending the Secretary of State's powers must be laid before Parliament and must be approved by a resolution of each house.

Currently, the Government believes that TPIMs should remain part of our armoury of disruptions against terrorist where the police and Security Service consider them to be necessary and proportionate for the protection of national security. The Government therefore does not believe that the powers contained in the TPIMs Act should be repealed.

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