House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill

Sixteenth Report of Session 2010–12

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. Oral evidence is published online at http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/.

Contents

Report

Summary

The Terrorism Prevention and Investigation Measures Bill ("TPIMs Bill") gives effect to the recommendation of the Government's Review of Counter-Terrorism and Security Powers that the current system of control orders should be repealed and replaced with a system of less restrictive and more focused measures. In March 2011 the current control order regime was renewed until the end of December this year. The Government wants TPIMs to be available by the time the control orders legislation lapses.

We and our predecessor Committee have consistently expressed serious concerns about the human rights compatibility of the control order regime. The TPIMs Bill does modify in some significant respects a number of aspects of control orders which have given rise to human rights compatibility concerns over the lifetime of that regime. For example, the threshold for imposing the measures will be raised from reasonable suspicion to reasonable belief; the measures will be subject to a maximum time limit of 2 years (unless there is fresh evidence of the individual's involvement in terrorism); the restrictions imposed will be less severe in a number of respects; and there is to be a renewed emphasis on investigation and prosecution

Although we have some significant human rights concerns about the proposed TPIMs regime, we welcome those aspects of the Bill which modify in significant ways aspects of the predecessor control order regime. In our view, these should make it less likely that the regime will be operated in a way which gives rise in practice to breaches of individuals' human rights.

We also believe that the overriding priority of public policy in this area should be the criminal prosecution of individuals who are suspected of involvement in terrorist activity. We are concerned by what appears to be a very significant fall in the number of successful prosecutions for terrorist offences over the last few years. Recognition of the difficulties of prosecuting some dangerous individuals does not in our view require acceptance of the need for a replacement regime which is essentially a watered down version of control orders. We continue to regard the admissibility of intercept as an important part of a package of measures that will lead to more successful prosecutions in relation to terrorism.

In his Report on the Government's Review of Counter-Terrorism Powers, Lord Macdonald of River Glaven argued that restrictions on the freedoms of terrorist suspects are only justifiable in constitutional and human rights terms if they are part of a continuing criminal investigation into their activities. He wants to see any replacement of control orders brought firmly back within the criminal justice system. We share Lord Macdonald's concerns about TPIMs not going far enough to bring the restrictions back into the domain of criminal due process.

We welcome the Government's restatement of its commitment to the priority of prosecution, but as the Bill currently stands it is clear that the overriding purpose of its provisions is prevention, not investigation and prosecution. We recommend amendments to the Bill to give effect to Lord Macdonald's alternative model, which would bring TPIMs

into the criminal justice process.

We recommend that an additional precondition of the imposition of TPIMs on an individual should be that the DPP (or relevant prosecuting authority) is satisfied that a criminal investigation into the individual's involvement in terrorism-related activity is justified, and that none of the specified terrorism prevention and investigation measures to be imposed on the individual will impede that investigation.

We further recommend that the Bill provide for judicial supervision in relation to the ongoing criminal investigation; and that some of the measures set out in the Bill should be subject to further restrictions to ensure that they do not impede or discourage evidence gathering with a view to conventional prosecution.

The Bill provides that TPIMs can be imposed only with the prior permission of the court and also provides for an automatic review hearing after TPIMs have been imposed. At both stages, however, the function of the court is narrowly defined in the Bill. We recommend that the court's function at the permission stage should be to determine whether the conditions for imposing TPIMs appear to be met, and at the review hearing to determine whether those conditions were and continue to be satisfied.

As with the control orders legislation, the Bill makes provision for both the Secretary of State and the High Court to make use of "closed evidence": evidence which is withheld from the individual and their legal adviser because its disclosure would be contrary to the public interest. In our view, however, the Bill does not make provision which takes proper account of the judgment of the House of Lords which held that, in order for control order proceedings to be fair, "the controlee must be given sufficient information about the allegations against him to give effective instructions in relation to those allegations". Therefore we recommend that the Bill be amended to *require* the Secretary of State, at the outset, to provide the individual who is the subject of the TPIMs notice with sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.

Unlike the control orders regime which it replaces, the TPIMs regime is not to be subject to annual renewal by Parliament. It is intended to be permanent. Although the TPIMs regime is less severe than the control orders regime, it remains an extraordinary departure from the ordinary principles of criminal due process, as Lord Macdonald's report makes clear. We therefore recommend that the Bill be amended to require annual renewal, and so ensure that there is an annual opportunity for Parliament to scrutinise and debate the continued necessity for such exceptional measures and the way in which they are working in practice.

We welcome the Government's decision to make its proposed draft legislation for "enhanced TPIMs" available to Parliament for pre-legislative scrutiny and look forward to scrutinising it for compatibility with human rights.

Government Bills

Bills drawn to the special attention of each House

1 Terrorism Prevention and Investigation Measures Bill

Date introduced to first House	23 May 2011
Date introduced to second House	
Current Bill Number	HC Bill 211
Previous Reports	None

Introduction

1.1 The Terrorism Prevention and Investigation Measures Bill ("TPIMs Bill") was introduced in the House of Commons on 23 May 2011. [1] The Bill gives effect to the recommendation of the Government's Review of Counter-Terrorism and Security Powers, published on 26 January 2011, that the current system of control orders should be repealed and replaced with a system of less restrictive and more focused "terrorism prevention and investigation measures", or "TPIMs".[2]

1.2 The Rt Hon Theresa May MP, Secretary of State for the Home Department, has certified that, in her view, the Bill is compatible with Convention rights. The Bill received its Second Reading on 7 June 2011. The Public Bill Committee completed its consideration of the Bill on 5 July.

1.3 We took oral evidence on the Government's Review of Counter-Terrorism and Security Powers from the Minister, then Baroness Neville-Jones, and Lord Macdonald of River Glaven QC, independent reviewer of the Review, on 8 February 2011.[3] That evidence included evidence about TPIMs. We also wrote to the Minister after the evidence session with a number of follow-up questions including some concerning the proposed TPIMs regime.[4] The Minister replied on 28 March 2011.[5]

1.4 In March 2011 the current control order regime was renewed until the end of December this year. The Government wants TPIMs to be available by the time the control orders legislation lapses. The Bill is therefore likely to proceed fairly rapidly through both Houses. In view of the oral evidence which we have already taken from both the Minister and Lord Macdonald, the exchange of correspondence with the Minister and the very full ECHR Memorandum provided by the Home Office (see below), we decided to proceed straight to a Report on the Bill, without first corresponding with the Minister, to ensure that our Report is available before the Bill's Report Stage in the Commons. We wrote to the

1 HC Bill 193.

2 Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations (Cm 8004, 26 January 2011).

3 Transcript of Oral Evidence, HC 797-i (available on JCHR website).

4 Ev 1

5 Ev 2

Government on 28 June giving it the opportunity to supplement the information already in the public domain.[6] The Minister replied on 6 July, saying that he did not think there was any further material that the Government could usefully provide.[7]

Information provided by the Department

1.5 The Home Office published a separate ECHR Memorandum containing its assessment of the compatibility of the Bill's provisions with the Convention Rights, which it made available on the Home Office's website on the day the Bill was published. The ECHR Memorandum contains a full and detailed analysis of the Bill's ECHR compatibility, and appears to be based on the ECHR Memorandum prepared for the Cabinet's Parliamentary Business and Legislation Committee ("PBL Committee"). This memorandum has been provided instead of the section in the Explanatory Notes to the Bill dealing with the ECHR. The relevant part of the Explanatory Notes to the Bill contains a link to the ECHR Memorandum on the Home Office website. The Home Office took the same approach in relation to the Protection of Freedoms Bill, on which we have yet to report.

1.6 **We welcome the Home Office's new practice of publishing full ECHR memoranda on its website at the same time as a Bill is published. It is the approach long called for by this Committee and its predecessors. It greatly assists us in our scrutiny of the Bill for human rights compatibility. We hope that it also assists the Department by enabling us to identify the really significant human rights issue raised by the Bill and so to ask fewer and much more focused questions. We commend the Home Office's approach to other Departments as an example of best practice.**

Improvements to the control order regime

1.7 We and our predecessor Committee have consistently expressed serious concerns about the human rights compatibility of the control order regime.[8] These have included concerns about the impact of control orders on the subject of the orders, their families and their communities, as well as concerns about the basic fairness of the legal process surrounding control orders, and in particular the failure of the statutory regime to ensure that there is sufficient disclosure to the individual of the gist of the information implicating them in involvement in terrorism.

1.8 Although much of the Bill re-enacts provisions of the Prevention of Terrorism Act 2005 which clause 1 repeals, the Bill does modify in some significant respects a number of aspects of control orders which have given rise to human rights compatibility concerns over the lifetime of that regime. For example, unlike the control orders regime, under TPIMs:

- the threshold for imposing the measures will be raised from reasonable suspicion to reasonable belief;

6 Ev 5

7 Ev 6

8 See most recently Eighth Report of 2010–11, *Renewal of Control Orders Legislation 2011*, HL Paper 106, HC 838

- the measures will be subject to a maximum time limit of 2 years (unless there is fresh evidence of the individual's involvement in terrorism);
- the restrictions imposed will be less severe in a number of respects, for example:
    a. individuals will not, for example, be required to "relocate", a form of internal exile described by the previous JCHR as "historically despotic" and by Lord Macdonald in his Report as "thoroughly offensive";
    b. 16 hour curfews will not be possible, although "overnight residence requirements" will;
    c. "derogating" measures (that is, measures which would amount to a deprivation of liberty and so require a derogation from Article 5 ECHR) will not be possible under the Bill;
    d. individuals will be free to work and study;
    e. they will have greater freedom of communication, association and movement;
- and there is to be a renewed emphasis on investigation and prosecution.

1.9 **We welcome the Government's stated aim of allowing individuals to lead as normal a life as is possible, consistent with protecting the public. Although we have some significant human rights concerns about the proposed TPIMs regime, which we set out in this Report, we welcome those aspects of the Bill which modify in significant ways aspects of the predecessor control order regime. In our view, these should make it less likely that the regime will be operated in a way which gives rise in practice to breaches of individuals' human rights.**

The priority of prosecution

1.10 **In our view, the overriding priority of public policy in this area should be the criminal prosecution of individuals who are suspected of involvement in terrorist activity.** This is because prosecution through the criminal courts serves the aims of both security and liberty: it protects the public from terrorism by ensuring that dangerous terrorists are imprisoned and it protects the liberty of individuals who might be wrongly suspected by ensuring that there is full due process before the individual is convicted. **In human rights terms, prosecution best serves the twin requirements of human rights law that (1) effective steps be taken to protect the public's right to life and bodily integrity against the threat of terrorist attack and (2) restrictions on the rights of individuals suspected of such threats are only imposed in accordance with proper legal process.**

1.11 We recognise the reality that criminal prosecution of terrorism suspects is sometimes difficult because the information about an individual's involvement often derives from intelligence information which cannot easily be turned into admissible evidence to support

a prosecution. We also recognise the reality that sometimes that information is such that it requires action to be taken to protect the public from the risk posed by that individual. However, **recognition of the difficulties of prosecuting some dangerous individuals does not in our view require acceptance of the need for a replacement regime which is essentially a watered down version of control orders.** In our scrutiny of this Bill, we have therefore concentrated our efforts on what we consider to be practical and workable ways of amending the Bill in order to realise in practice the Government's stated commitment to the absolute priority of prosecution.

1.12 In Lord Macdonald's Report on the Government's Review of Counter-Terrorism Powers, he pointed out that "the evidence obtained by the Review has plainly demonstrated that the present control order regime acts as an impediment to prosecution."[9] This is because controls are imposed that prevent those very activities that are apt to result in the discovery of evidence fit for prosecution, conviction and imprisonment. **Lord Macdonald recommended that powers created under any replacement regime should be judged against the criteria set by the Government's own Review: "to what extent are they likely to facilitate the gathering of evidence, and to what extent are they directed towards preventing any obstruction of due process?" We agree with this approach and have sought to follow it in our scrutiny of this Bill.** We consider below the extent to which the Bill itself satisfies the test identified by Lord Macdonald.

1.13 The context in which we make the recommendations in this Report is important. We are concerned by what appears to be a very significant fall in the number of successful prosecutions for terrorist offences over the last few years. In 2009–10, 12 people were prosecuted and 3 people were convicted in Great Britain under terrorism legislation, compared to 54 prosecuted and 32 convicted in 2006–07.[10] If, as the Government asserts, the threat level has remained constant during that time, there are serious questions to be asked about why there has been such a serious decline in the rate of successful prosecutions. We wrote to the Minister asking this question.[11] The Government, in response, recognises that the rate of successful prosecutions for terrorism offences has declined[12] but does not offer an explanation other than that "certain types of prosecution can be more difficult than others" and "when a number of such cases occur the conviction rates can also be affected, especially as the total number of prosecutions are low. This combination of circumstances increases the likelihood of fluctuations in conviction rates."

1.14 We also asked the Government how it proposes to increase the rate of successful prosecutions for terrorism offences. The Government replied that it will commence the post-charge questioning provisions in the Counter-Terrorism Act 2008 as an additional investigative tool, and is seeking to improve the use of the "assistance by offenders and defendants" provisions in the Serious Organised Crime and Policing Act 2005, by increasing awareness of those provisions amongst defendants and making it easier for defendants and prisoners to clarify the information they hold without fear of self-

9 *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cm 8003, 26 January 2011), p 9, para 2.

10 Home Office Statistical Bulletin 18/10, Operation of Police Powers under the Terrorism Act 2000 and subsequent legislation: Arrest, outcomes and stops and Searches. GB 2009/10 Table 1.8(a).

11 Ev 1

12 Ev 2

incrimination. The Government also hopes that the "increased focus on investigation in the TPIMs Bill, and the provision of additional resources to the police and Security Service, will lead to more evidence gathering about suspected terrorists and therefore more prosecutions.

1.15 **We note that the Government's response did not indicate any progress in relation to its ongoing review of the use of intercept as evidence. Neither we nor our predecessor Committee have ever regarded the admissibility of intercept as a "silver bullet" which will solve the problem to which control orders, and now TPIMs, are the response, but we do regard it as an important part of a package of measures that will lead to more successful prosecutions in relation to terrorism. We have written to the Government asking for an urgent update on progress on this issue. We hope to return to this issue following a briefing with the Minister and officials.**

(1) Restrictions as part of the criminal justice process

1.16 In his Report on the Government's Review of Counter-Terrorism Powers, Lord Macdonald argued that restrictions on the freedoms of terrorist suspects are only justifiable in constitutional and human rights terms if they are part of a continuing criminal investigation into their activities. In his view, the problem with control orders has been that the measures which are imposed on controllees make criminal investigation and prosecution more difficult (e.g by controlling their communications etc, from which evidence might be gathered). He wants to see any replacement of control orders brought firmly back within the criminal justice system. In his view, the primary aim of any replacement regime should be to encourage and facilitate the gathering of evidence, with a view to criminal prosecution and conviction. Any restrictions which make that object more difficult should not be permitted.

1.17 Lord Macdonald therefore proposed an alternative model to the TPIMs model recommended by the Government Review. This model would involve a new precondition to the availability of preventive measures against terrorism suspects: namely that, in the view of the Director of Public Prosecutions ("DPP"), a criminal investigation into that individual is justified. The Home Secretary's application to the High Court for permission to impose such measures would have to be accompanied by a certificate from the DPP to that effect. Thereafter, there would be an active, time-limited criminal investigation, and the restrictions would require justification as part of that investigation.

1.18 In the debate in the House of Lords following the ministerial statement on the Counter-Terrorism Review, Lord Macdonald asked Baroness Neville Jones to indicate "whether the Government will consider the proposal in my report that any regime of restrictions should be much more closely linked to a continuing criminal investigation so that the primacy of prosecution is protected and that prosecution is the prime aim of public policy in this area?" The Minister replied that the Government "share the view that it is important to increase the possibility [...] of bringing successful prosecution" but "draw back from the notion that one would not be able to introduce a measure of this kind in the absence of a close link to and a realistic prospect of being able to introduce a prosecution."

1.19 The TPIMs Bill, therefore, does not give effect to Lord Macdonald's alternative. The Home Secretary says that the restrictions imposed on a terrorism suspect *may* facilitate

further investigation as well as protect the public against the risk of terrorist attack.[13] It does not, however, make this a precondition. There is no mandatory connection in the Bill between restrictions on suspects and a criminal investigation.

1.20 Lord Macdonald expanded on the thinking behind his proposal and what it would mean in practice in the oral evidence he gave to us:[14]

> The fundamental objection to the control order system has been that it is divorced from criminal justice and restrictions are put on people's liberty without there having been any form of prosecution or conviction. It is appropriate to restrict people's liberties in circumstances where crime is being investigated or where there is a pending prosecution; the bail system is the most obvious example. Bail conditions can be imposed on individuals by the police either before charge or after charge and before trial. Those conditions can be stringent. They are acceptable because a due process criminal justice episode is under way.
>
> It seems to me that in circumstance where the Home Secretary is declaring to the High Court that she has reasonable grounds to believe that an individual is involved in terrorist activity, it would be utterly perverse if there were not to be a coterminous criminal investigation into that individual. Sometimes there is not, and I think that is a serious difficulty. If there was a continuing criminal investigation of that individual, then restrictions placed on them seem to me to become far more proportionate and more constitutional. They could then last for as long as the investigation lasted, or for two years.
>
> I think this is a sensible proposal that would have the support of a wide swathe of opinion. It would reflect the reality of the situation that there ought to be investigations and I think it would deal with many of the constitutional objections to control orders. It would also underline the absolute primacy of prosecution. One of the central problems with control orders is that people became warehoused out of the clutches of criminal justice. In that very real sense, people who may have been involved in serious and persistent terrorist activity escaped justice. People who are involved in serious and persistent terrorist activity should be prosecuted and put in prison. To link restrictions to a criminal investigation is more likely to achieve that effect.

1.21 **We share Lord Macdonald's concerns about TPIMs not going far enough to bring the restrictions back in to the domain of criminal due process. We welcome the Government's restatement of its commitment to the priority of prosecution, but as the Bill currently stands it is clear that the overriding purpose of its provisions is prevention, not investigation and prosecution**. Investigation of terrorism is very much a secondary purpose in the Bill as drafted. As Baroness Neville-Jones stated in her letter of 28 March, although there will be "an increased focus on investigation", "the purpose of TPIMs will be preventative." This was confirmed by the Minister in Public Bill Committee: "terrorism prevention and investigation measures are primarily disruptive and [...] primarily preventive, but [...] they sit within the context of investigation."[15] We also note

13 8 February 2011, Q9.

14 8 February 2011, Q2.

15 James Brokenshire MP, PBC 23 June 2011, col 109.

that in Public bill Committee a number of witnesse s, including the DP P, were sceptical about the prospects of p rosecutions being brought once TPIMs had been i mposed.[16] Lord Carlile went so far as to say that he had some difficulties with the concept of TPIMs as an investigative measure: "the investigation is over by the time the control order is made."

1.22 In Public Bill Committee, amendm ents were proposed to address this concern by replacing TPIMs with police bail, as advoca ted by Liberty. [17] T he amen dments wer e opposed on a number of grou nds, including concerns that a police bail mo del would leave too muc h di scretion i n the ha nds of the p olice a nd would in prac tice l ead to th e sev ere restrictions envisaged in the Bil l being imposed on individuals far more frequently. We see the force in the concerns about replacing TPIMs with police bail. We propose an alternative to TPIMs which is designed to give effect to Lord Macdonald's alternative model, bu t w hich re cognises t he wholly exceptional nature of the restr ictions envisaged and retains the central role of the Home Secretary, but ensures full judicial supervision of the imposition of such measures.

1.23 **We r ecommend t he f ollowing a mendments to the Bill to give effect to Lord Macdonald's alternative mode l, wh ich wo uld b ring TP IMs into t he criminal just ice process. Some suggest ed am endments to th e Bill which would give effect to thes e recommendations are appended to this Report at Annex 1.**

Additional precondition

1.24 **We recommend that an additional precondition of the imposition of TPIMs on an individual should be that the DPP (or relevant prosecuting authority) is satisfied that:**

a) **a crim inal investigat ion in to the individua l's in volvement in te rrorism-related activity is justified; and**

b) **none of the spec ified te rrorism preve ntion and investiga tion mea sures to b e imposed on the individual will impede that investigation**.

Purpose of TPIMs to include facilitating criminal investigation

1.25 We recommend that the phra se "facilitating the invest igation of th e individual's involvement in terrorism -related activity" be inserted into the Bill as one of the purposes for which TPIMs may be imposed on an individual.

Duration of TPIMS linked to active criminal investigation

1.26 **We recommend that**

a) **TPIMs should only last for as long as an active criminal investigation is continuing, or for a maximum period of two years, whichever is shorter;**

b) **that the Secretary of State should be required to revoke a TPIMs notice if notified by the DPP that a criminal investigation is no longer justified.**

16 Keir Starmer QC, PBC 21 June 2011 col. 13, Q39; Lord Carlile, ibid., Q 64; Lord Howard, *ibid*. Q71.

17 The amendments were proposed by Julian Huppert MP.

Role of the court in relation to the criminal investigation

1.27 **We recommend that the Bill provide for judicial supervision in relation to the ongoing criminal investigation, including consideration of reports on progress, analogous to the judicial role supervising court-imposed bail conditions.**

Measures should not impede investigation

1.28 **We recommend that some of the measures set out in Schedule 1, such as the measure concerning association and communication (paragraph 8), should be subject to further restrictions on their scope to ensure that they are strictly proportionate and do not impede or discourage evidence gathering with a view to conventional prosecution.**

(2) The role of the court

1.29 The Bill provides for a judicial role both in relation to the making and the reviewing of TPIMs. Except in urgent cases, the Secretary of State requires the prior permission of the High Court (or its equivalent) before making a TPIMs notice imposing measures on the individual concerned. [18] The court's function at this permission stage is to determine whether the Secretary of State's decisions (as to whether the conditions for imposing TPIMs are met) are "obviously flawed", [19] applying the principles applicable on an application for judicial review.[20]

1.30 The Bill also provides for an automatic review of the Secretary of State's decisions by the High Court or its equivalent.[21] The court's function at such a hearing is "to review the decisions of the Secretary of State that the relevant conditions were met and continue to be met",[22] applying the principles applicable on an application for judicial review. [23] The Government in its ECHR Memorandum argues that the provision for judicial involvement in the Bill provides the degree of court scrutiny that is required to satisfy Article 6 ECHR.[24]

1.31 We have considered why, if the intention of the legislative regime is to require the Secretary of State to obtain the court's "prior permission" for the imposing of TPIMs, the court's function at the permission stage should be confined to determining whether the Secretary of State's decisions (that the conditions are met) are "obviously flawed", applying the principles applicable on an application for judicial review. That is not usually the approach when a court's prior permission is required to authorise the taking of an intrusive step by the police or the executive: when considering whether to grant a warrant to enter or search property, for example, the court's function is usually to determine whether the necessary conditions for the granting of the warrant are satisfied. Any judicial role less than that cannot be characterised as a genuine requirement of prior judicial authorisation. **In our view, the court's function at the permission stage should be to determine whether**

18 Clauses 3(5) and 6.
19 Clause 6(3)(a).
20 Clause 6(6).
21 Clause 9.
22 Clause 9(1).
23 Clause 9(2).
24 ECHR Memorandum paras 24–28.

the conditions for imposing TPIMs appear to be met, which would be more in keeping with a requirement of prior judicial authorisation of an intrusive criminal justice measure.

1.32 A similar question arises about the Bill's definition of the court's function when reviewing the Secretary of State's decision after it has been made.[25] The Government accepts that the court must determine for itself whether there are reasonable grounds to believe that the individual is involved in terrorism-related activity[26] and must substantively review the necessity and proportionality of the individual measures.[27] As the Minister put it in Public Bill Committee, "the court looks carefully at the Home Secretary's decisions and considers how reasonable and proportionate they are."[28] **In our view, it would be more compatible with the criminal justice nature of the court's function to require the court simply to review whether the conditions for imposing TPIMs are satisfied, rather than merely review the decision "applying the principles applicable on an application for judicial review" as the Bill currently provides.**

(3) The right to a fair hearing

1.33 As with the control orders legislation, the Bill makes provision for both the Secretary of State and the High Court to make use of "closed evidence": evidence which is withheld from the individual and their legal adviser because its disclosure would be contrary to the public interest.[29] In this respect there is to be no change from the control orders regime. As the Government's ECHR Memorandum makes clear, the system for the use of closed evidence "will be the same as that currently used in control order [...] proceedings."[30]

1.34 The Government's Review of Counter-Terrorism and Security Powers did not consider the fairness of control order proceedings. The general question of the use of secret evidence is to be addressed in a Green Paper which the Government is due to publish in the autumn. Many of the human rights concerns which have been expressed about control orders, however, both by our predecessor Committee and by the courts, have concerned the unfairness which is caused by the legal regime governing the use of secret evidence in the Prevention of Terrorism Act 2005 and the rules of court made under that Act. Those provisions are now carried forward into the TPIMs regime.

1.35 The Government's ECHR Memorandum states that the TPIMs Bill makes provision which takes account of the various "read downs" of the control order legislation by the courts to ensure that it is interpreted compatibly with individuals' right to a fair hearing under Article 6 ECHR, and that the Government expects the TPIMs scheme to operate in practice in accordance with the control order case-law on Article 6.[31] The Bill does expressly provide that nothing in the rule-making provisions in the Bill, or in the rules of court made under them, "is to be read as requiring the relevant court to act in a manner inconsistent with Article 6 ECHR."[32] According to the Government's ECHR

25 Clause 9(2).
26 ECHR Memorandum para 26.
27 ECHR Memorandum paras 17(g) and 27.
28 James Brokenshire MP, PBC 23 June 2011, col 116.
29 Clause 18 and Schedule 4.
30 ECHR Memorandum, para 10.
31 ECHR Memorandum, para 41.
32 Schedule 4, para 5(1).

Memorandum, this reflects the "read down" required by the Court of Appeal in the case of *MB*.[33]

1.36 In our view, however, the Bill does not make provision which takes proper account of the judgment of the House of Lords in *AF (No. 3)*, which held that, in order for control order proceedings to be fair, "the controlee must be given sufficient information about the allegations against him to give effective instructions in relation to those allegations."[34] That decision of the House of Lords introduced a further "read down" of the control orders legislation, which was necessary in order to give effect to the judgment of the Grand Chamber of the European Court of Human Rights in *A v UK*.[35]

1.37 Following *AF (No. 3)* the Government argued that the requirement in that case, to disclose the gist of the allegations against the controlee, does not apply in so-called "light-touch" control order cases, in which the controlee is subject to less onerous restrictions than those imposed in *AF* itself. The Government lost that argument in the High Court[36] but is appealing to the Court of Appeal against that judgment. Notwithstanding the High Court's judgment, the Government appears to have drafted the TPIMs Bill on the assumption that its position about the reach of the judgment in *AF (No. 3)* is correct.

1.38 As presently drafted, the Bill provides that the court in TPIMs proceedings must merely "consider" requiring the Secretary of State to provide the individual concerned with a summary of material which the court has allowed not to be disclosed.[37] This arguably does not go far enough to give effect to the "read down" of the control order legislation by the House of Lords in *AF (No. 3)*. It leaves the court a discretion to decide whether or not to require the provision of a summary of the secret material to be provided to the person who is the subject of the TPIM notice.

1.39 We note that our concerns are shared by two special advocates who gave evidence to the Public Bill Committee. Angus McCullough QC pointed out that the Bill had not been drafted to recognise the state of the law as it has been declared by the House of Lords in *AF (No. 3)*, but had continued to use language that the courts have already held cannot be applied literally because in many cases it would lead to a breach of the right to a fair hearing in Article 6(1) ECHR.[38] He thought that the Bill should have been drafted to reflect the decision in *AF (No. 3)* with a view to requiring the Secretary of State to acknowledge the Article 6 duty at the outset of proceedings rather than simply leaving it for the court and the special advocate to address later. Judith Farbey QC also told the Public Bill Committee that there will be no greater guarantee under the Bill than under the current legislation that the TPIM notice will satisfy Article 6 in terms of the disclosure to the person affected.[39]

1.40 **We recommend that the Bill be amended to require the Secretary of State, at the outset, to provide the individual who is the subject of the TPIMs notice with sufficient**

33 ECHR Memorandum, paras 34–35.

34 *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28 at para 59.

35 [2009] ECHR 301.

36 *BC v Secretary of State for the Home Department; BB v Secretary of State for the Home Department [2009]* All ER (D) 140.

37 Schedule 4, para 4(1)(d).

38 PBC 21 June 2011, cols 30–31, Q89.

39 *Ibid.*

information about the allegations against him to enable him to give effective instructions in relation to those allegations.

1.41 **We also recommend that the Bill be amended to make two other improvements recommended by our predecessor Committee to improve the fairness of control order proceedings in which secret evidence is relied on: first, imposing a statutory obligation on the Home Secretary to give reasons for imposing TPIMs; and, second, providing for the possibility of special advocates taking instructions from the individuals whose interests they represent after having seen the closed material, with the permission of the judge.**[40]

(4) Retention and use of biometric material taken from TPIMs subjects

1.42 The Bill provides for fingerprints, samples and DNA profiles taken from TPIMs subjects to be retained and used for specified purposes. In Scotland, such biometric information may only be used in the interests of national security or for the purposes of a terrorist investigation. In England, Wales and Northern Ireland, however, such material may also be used for purposes related to the prevention, detection, investigation or prosecution of crime or for identification of a deceased person or the individual subject to the TPIM notice. We are not clear why the provision for the use of such material is broader in England, Wales and Northern Ireland than it is in Scotland. We propose to return to this issue in our report on the Protection of Freedoms Bill.

(5) Annual review and renewal by Parliament

1.43 Unlike the control orders regime which it replaces, the TPIMs regime is not to be subject to annual renewal by Parliament. It is intended to be permanent. There will not therefore necessarily be the same opportunity for an annual or otherwise regular debate in Parliament to assess the continued justification of the regime in light of the evidence of its practical operation.

1.44 The control orders regime was renewed every year for six years. Notwithstanding the fact that renewal was agreed to on each occasion, this was a very important safeguard. On each of these occasions we and our predecessor Committee reported in detail on the renewal and Parliament had a full debate about the need for renewal, informed by the reports both of this Committee and the Government's reviewer of terrorism legislation who also reported annually on the operation of the regime.

1.45 **We remain disappointed by the Government's reluctance to expose its proposed replacement regime to the rigours of formal and regular post-legislative scrutiny which annual renewal entails.**[41] **Although the TPIMs regime is less severe than the control orders regime, it remains an extraordinary departure from the ordinary principles of criminal due process, as Lord Macdonald's report makes clear. We recommend that the Bill be amended to require annual renewal, and so ensure that there is an annual**

40 See Thirtieth Report of Session 2007–08, *Counter-Terrorism Policy and Human Rights (Thirteenth Report): The Counter-Terrorism Bill*, para 131.

41 Report on Renewal of Control Orders 2011, above n. 8, para. 28.

opportunity for Parliament to scrutinise and debate the continued necessity for such exceptional measures and the way in which they are working in practice.

(6) Pre-legislative scrutiny of draft emergency legislation for "enhanced TPIMs"

1.46 In our Report on this year's renewal of the control orders regime we recommended that the Government's proposed draft emergency legislation authorising more restrictive measures than those which will be available under the TPIMs regime (so-called "enhanced TPIMs") should be published and made available to Parliament for pre-legislative scrutiny by us and other interested committees.[42]

1.47 We are pleased that the Government, in its response to our Report on the renewal of control orders, accepted this recommendation and decided that there should be pre-legislative scrutiny of the Government's proposed draft legislation providing for "enhanced TPIMs" in an emergency.[43] Whether the pre-legislative scrutiny will be conducted by an existing Committee or an ad hoc committee has yet to be decided.

1.48 **We welcome the Government's decision to make its draft legislation for "enhanced TPIMs" available for pre-legislative scrutiny. We look forward to an opportunity to contribute to that scrutiny by examining the human rights compatibility of the draft legislation.**

42 Report on Renewal of Control Orders 2011, above n.8, para. 31.

43 *The Government Response to the Eighth Report from the Joint Committee on Human Rights Session 2010–11, HL Paper 106, HC 838, Renewal of Control Orders Legislation 2011*, (Cm 8096, June 2011).

Annex: Possible amendments to give effect to Lord Macdonald's alternative model

(NB. The substantive parts of the amendments are shown in bold)

A new precondition

Clause 2(1), Page 1, Line 8, leave out 'E' and insert 'F'

Clause 3, Page 1, Line 15, in clause heading leave out 'E' and insert 'F'

Clause 3, Page 2, Line 11, after sub-clause (4) insert new sub-clause:

'(4A) Condition E is that the relevant prosecuting authority is satisfied that:

(a) a criminal investigation into the individual's involvement in terrorism-related activity is justified; and

(b) none of the specified terrorism prevention and investigation measures to be imposed on the individual will impede that investigation.'

Clause 3(5), Page 2, Line 12, leave out 'E' and insert 'F'

Purpose of TPIMs to include facilitating criminal investigation

Clause 3(4), Page 2, Line 8, after 'with' insert '(a)' and in line 7 after 'activity,' insert '**and/or**

(b) facilitating criminal investigation of that involvement'

Duration of TPIMs linked to active criminal investigation

Clause 5, page 3, Line 3, leave out 'for the period of one year' and insert '**for the duration of the criminal investigation into the individual's involvement in terrorism-related activity, or for the period of one year, whichever is the earlier.**'

Clause 13, Page 7, Line 34, after sub-clause (1) insert '(1A) **The Secretary of State shall revoke a TPIM notice if notified by the relevant prosecuting authority that a criminal investigation into the individual's involvement in terrorism-related activity is no longer justified.**'

Role of the court in relation to the criminal investigation

Clause 8, Page 4, Line 31, after sub-clause (6) insert '(6A) **Directions under subsection (5) must provide for information to be provided to the court at the review hearing concerning the progress of the criminal investigation into the individual's involvement in terrorism-related activity.**'

Clause 9, Page 5, Line 22, in sub-clause (8)(c) leave out 'and'

Clause 9, Page 5, Line 23, in sub-clause (8)(d) after 'D' insert '; **and (e) condition E.**'

Association and communication measures

Schedule 1 paragraph 8, Page 21, Line17, in sub-paragraph (1) leave out 'other persons' and insert '**specified persons of a description to which this paragraph applies**.'

Schedule 1 paragraph 8, Page 21, Line 18, after sub-paragraph (1) insert new sub-paragraph '(1A) **This paragraph applies to any person**

(a) who has been convicted of a terrorist or terrorism-related offence; or

(b) who the Secretary of State reasonably believes is, or has been, involved in terrorism-related activity.'

Schedule 1 paragraph 8, Page 21, Line 20, in sub-paragraph (2)(a) before 'specified' insert 'such'

Schedule 1 paragraph 8, Page 21, Line 21, in sub-paragraph (2)(a) leave out 'or specified descriptions of persons'

Schedule 1 paragraph 8, Page 21, Line 24, in sub-paragraph (2)(b) before 'persons' leave out 'other' and insert 'such specified'

Schedule 1 paragraph 8, Page 21, Line 27, in sub-paragraph (2)(c) before 'persons' leave out 'other' and insert 'such specified'

Conclusions and recommendations

Information provided by the Department

1. We welcome the Home Office's new practice of publishing full ECHR memoranda on its website at the same time as a Bill is published. It is the approach long called for by this Committee and its predecessors. It greatly assists us in our scrutiny of the Bill for human rights compatibility. We hope that it also assists the Department by enabling us to identify the really significant human rights issue raised by the Bill and so to ask fewer and much more focused questions. We commend the Home Office's approach to other Departments as an example of best practice. (Paragraph 1.6)

Improvements to the control order regime

2. We welcome the Government's stated aim of allowing individuals to lead as normal a life as is possible, consistent with protecting the public. Although we have some significant human rights concerns about the proposed TPIMs regime, which we set out in this Report, we welcome those aspects of the Bill which modify in significant ways aspects of the predecessor control order regime. In our view, these should make it less likely that the regime will be operated in a way which gives rise in practice to breaches of individuals' human rights. (Paragraph 1.9)

The priority of prosecution

3. In our view, the overriding priority of public policy in this area should be the criminal prosecution of individuals who are suspected of involvement in terrorist activity. (Paragraph 1.10)

4. In human rights terms, prosecution best serves the twin requirements of human rights law that (1) effective steps be taken to protect the public's right to life and bodily integrity against the threat of terrorist attack and (2) restrictions on the rights of individuals suspected of such threats are only imposed in accordance with proper legal process. (Paragraph 1.10)

5. Recognition of the difficulties of prosecuting some dangerous individuals does not in our view require acceptance of the need for a replacement regime which is essentially a watered down version of control orders. (Paragraph 1.11)

6. Lord Macdonald recommended that powers created under any replacement regime should be judged against the criteria set by the Government's own Review: "to what extent are they likely to facilitate the gathering of evidence, and to what extent are they directed towards preventing any obstruction of due process?" We agree with this approach and have sought to follow it in our scrutiny of this Bill. (Paragraph 1.12)

7. We note that the Government's response did not indicate any progress in relation to its ongoing review of the use of intercept as evidence. Neither we nor our predecessor Committee have ever regarded the admissibility of intercept as a "silver

bullet" which will solve the problem to which control orders, and now TPIMs, are the response, but we do regard it as an important part of a package of measures that will lead to more successful prosecutions in relation to terrorism. We have written to the Government asking for an urgent update on progress on this issue. We hope to return to this issue following a briefing with the Minister and officials. (Paragraph 1.15)

(1) Restrictions as part of the criminal justice process

8. We share Lord Macdonald's concerns about TPIMs not going far enough to bring the restrictions back into the domain of criminal due process. We welcome the Government's restatement of its commitment to the priority of prosecution, but as the Bill currently stands it is clear that the overriding purpose of its provisions is prevention, not investigation and prosecution (Paragraph 1.21)

9. We recommend the following amendments to the Bill to give effect to Lord Macdonald's alternative model, which would bring TPIMs into the criminal justice process. Some suggested amendments to the Bill which would give effect to these recommendations are appended to this Report at Annex 1. (Paragraph 1.23)

10. We recommend that an additional precondition of the imposition of TPIMs on an individual should be that the DPP (or relevant prosecuting authority) is satisfied that:

a) a criminal investigation into the individual's involvement in terrorism-related activity is justified; and

b) none of the specified terrorism prevention and investigation measures to be imposed on the individual will impede that investigation. (Paragraph 1.24)

11. We recommend that

a) TPIMs should only last for as long as an active criminal investigation is continuing, or for a maximum period of two years, whichever is shorter;

b) that the Secretary of State should be required to revoke a TPIMs notice if notified by the DPP that a criminal investigation is no longer justified. (Paragraph 1.26)

12. We recommend that the Bill provide for judicial supervision in relation to the ongoing criminal investigation, including consideration of reports on progress, analogous to the judicial role supervising court-imposed bail conditions. (Paragraph 1.27)

13. We recommend that some of the measures set out in Schedule 1, such as the measure concerning association and communication (paragraph 8), should be subject to further restrictions on their scope to ensure that they are strictly proportionate and do not impede or discourage evidence gathering with a view to conventional prosecution. (Paragraph 1.28)

(2) The role of the court

14. In our view, the court's function at the permission stage should be to determine whether the conditions for imposing TPIMs appear to be met, which would be more in keeping with a requirement of prior judicial authorisation of an intrusive criminal justice measure. (Paragraph 1.31)

15. In our view, it would be more compatible with the criminal justice nature of the court's function to require the court simply to review whether the conditions for imposing TPIMs are satisfied, rather than merely review the decision "applying the principles applicable on an application for judicial review" as the Bill currently provides. (Paragraph 1.32)

(3) The right to a fair hearing

16. We recommend that the Bill be amended to require the Secretary of State, at the outset, to provide the individual who is the subject of the TPIMs notice with sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. (Paragraph 1.40)

17. We also recommend that the Bill be amended to make two other improvements recommended by our predecessor Committee to improve the fairness of control order proceedings in which secret evidence is relied on: first, imposing a statutory obligation on the Home Secretary to give reasons for imposing TPIMs; and, second, providing for the possibility of special advocates taking instructions from the individuals whose interests they represent after having seen the closed material, with the permission of the judge. (Paragraph 1.41)

(5) Annual review and renewal by Parliament

18. We remain disappointed by the Government's reluctance to expose its proposed replacement regime to the rigours of formal and regular post-legislative scrutiny which annual renewal entails. (Paragraph 1.45)

19. Although the TPIMs regime is less severe than the control orders regime, it remains an extraordinary departure from the ordinary principles of criminal due process, as Lord Macdonald's report makes clear. We recommend that the Bill be amended to require annual renewal, and so ensure that there is an annual opportunity for Parliament to scrutinise and debate the continued necessity for such exceptional measures and the way in which they are working in practice. (Paragraph 1.45)

(6) Pre-legislative scrutiny of draft emergency legislation for "enhances TPIMs"

20. We welcome the Government's decision to make its draft legislation for "enhanced TPIMs" available for pre-legislative scrutiny. We look forward to an opportunity to contribute to that scrutiny by examining the human rights compatibility of the draft legislation. (Paragraph 1.48)

Formal Minutes

Monday 11 July 2011

Members present:

Dr Hywel Francis MP, in the Chair

Lord Bowness	Mike Crockart
Baroness Campbell of Surbiton	Mr Dominic Raab
Lord Dubs	Mr Richard Shepherd
Lord Lester	
Baroness Stowell of Beeston	

Draft Report, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill*, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.48 read and agreed to.

Summary and Annex agreed to.

Resolved, That the Report be the Sixteenth Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that Lord Bowness make the Report to the House of Lords.

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

Written evidence reported and ordered to be published on 15 March, 29 March and 14 June was ordered to be reported to the House.

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[Adjourned till Tuesday 12 July at 2.00 pm

Declaration of Lords Interests

Lord Lester of Herne Hill

Category 10: Non-financial interests (e)
Member, Expert Counsel Panel, Liberty
Member of Council, JUSTICE

A full list of members' interests can be found in the Register of Lords' Interests:
http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm

List of written evidence

Written Evidence

1. Letter from the Chair, to Baroness Neville-Jones, Minister of State for Security, 10 March 2011

Thank you for giving evidence to my Committee on this subject last month. I am writing to follow up some of the answers that you gave on that occasion and, as I indicated at the end of that session, to raise a number of further questions which there was not time to cover in oral evidence.

The priority of prosecution

In your evidence you said (Q36) that in the new TPIMs regime "there is a quite different emphasis within the regime on the importance of creating circumstances, as far as we can, in which successful investigation can continue." However, apart from referring to the deliberate inclusion of "investigation" in the title of the proposed measures (Q33) and to there being a continuing review of the possibilities of prosecution (Q 42), you did not elaborate on how this different emphasis on investigation and prosecution will be brought about.

Q1: Can you describe in detail what will be in the TPIMs regime that is not in the current control order regime which will ensure that there is more emphasis on investigation with a view to successful prosecution?

Pre-legislative scrutiny of draft emergency legislation

In your evidence you said (Q56) that you would take away the Committee's point about the importance of Parliament having a proper opportunity to subject to pre-legislative scrutiny the proposed draft emergency legislation authorising more restrictive measures than TPIMs.

Q2: Can you confirm that Parliament will be given the same opportunity for pre-legislative scrutiny of the proposed draft emergency legislation extending TPIMs as it is being given in relation to the draft emergency legislation extending pre-charge detention? If not, what is the Government's justification for treating these two pieces of draft emergency legislation differently?

Publication of summary of consultation responses

You offered (Qs 68-9) to see if the Government could produce some kind of summary of the views of the CPS, the police, the security and intelligence agencies and other Government Departments in the Review of Counter-Terrorism and Security Powers.

Q3: Can you confirm that the Government will be publishing a summary of the responses to the consultation that have not so far been published?

Intercept as evidence

You also agreed (Q66) to see what you are able to do about making more information available about the conclusion of the review of control orders that using intercept evidence would not have made any practical difference to the possibility of a criminal prosecution.

Q4: Are you in a position to provide us with further information about the review of control order cases which concluded that the use of intercept as evidence would not have made prosecution more likely in any of the cases studied?

Threat level

Both the Director General of the Security Service and the Director of MI6 have recently given public speeches about the threat to national security but no more information has been made available to Parliament. The Review proceeds from an assertion about the current threat level.

Q5: What plans do you have to make available to Parliament more information about the scale and nature of the threats to national security to enable Parliament to make a meaningful assessment of the continued necessity and proportionality of various counter-terrorism powers?

Definition of terrorism

Q6: Has the Government considered whether the definition of terrorism in s. 1 Terrorism Act 2000 is too broad?

Freedom of speech

Q7: What assessment has the Government carried out of the continued necessity for speech offences such as the glorification of terrorism?

Q8: Does the Government consider justifiable counter-terrorism measures against speech which promotes hatred but falls short of incitement to violence?

Deportations of terrorism suspects

Q9: Can you give us an idea of the scale of the problem concerning terrorism suspects who are not UK nationals? How many terrorism suspects does the Government want to be able to deport but currently cannot? How many such suspects are in immigration detention or on Immigration Act bail?

Q10: How many non-UK nationals have been prosecuted for terrorism related offences in each of the last 3 years?

Q11: Is the Government looking at ways of prosecuting non-national terrorism suspects as an alternative to deporting them where deportation is not possible?

Human Rights and the National Security Strategy

Q12: The Government's National Security Strategy recognises the interdependence of national security and human rights and states that the Government's outlook will be underpinned by a firm commitment to human rights, justice and the rule of law.

Q13: What are the mechanisms for giving operational effect to this commitment?

Q14: How is expert advice on human rights systematically made available to the National Security Council and the Joint Committee on National Security Strategy?

Democratic oversight

Q15: The Government acknowledges the importance of appropriate democratic oversight of its National Security Strategy and of the balances struck between security and freedom in countering terrorism.

Q16: What proposals does the Government have to increase the democratic accountability of the intelligence and security services?

Prosecution

Q17: Although the threat level has apparently remained constant, the rate of successful prosecution has declined.

Q18: What accounts for the decline in the rate of successful prosecutions for terrorism offences?

Q19: How does the Government propose to increase the rate of successful prosecutions?

Q20: Can you give more detail of the work that is being done to maximise the intelligence and evidence dividend from terrorism suspects and prisoners?

Q21: What consideration has the Government given to the scope for greater use of plea-bargaining to increase the conviction rate for terrorism offences?

It would be helpful if we could receive your reply by noon on the 24th March 2011. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

I look forward to hearing from you.

2. Letter to the Chair, from Baroness Neville-Jones, Minister of State for Security, 28 March 2011

Thank you for your letter of 10 March 2011 which set out a series of questions following up my giving evidence to your Committee last month. Answers are provided to each question in turn below.

The priority of prosecution

Q1 Can you describe in detail what will be in the TPIMs regime that is not in the current control order regime which will ensure that there is more emphasis on investigation with a view to successful prosecution?

As I made clear to the Committee in my evidence on 8 February, the purpose of terrorism prevention and investigation measures (TPIMs) will be preventative. They are intended to protect the public from a small number of people who are assessed to pose a terrorism-related risk to the public, but who we can neither prosecute nor (in the case of foreign nationals) deport.

Notwithstanding the preventative nature of the measures, however, there will be an increased focus on investigation. The police will be under a duty to keep under review each individual subject to a TPIM with a view to his prosecution for a terrorism-related offence. And they will be under a duty to report regularly to the Secretary of State on this ongoing review. Further, the new regime will be complemented by the provision of additional resources to the police and Security Service. This will increase their capability to investigate suspected terrorists, including those subject to TPIMs, to gather evidence where it is available and to pursue prosecution where possible.

The findings and recommendations of the control order part of the counter-terrorism and security powers review, published on 26 January, emphasised that whilst restrictions are in place every effort will continue to be made to collect evidence sufficient to prosecute. Prosecution of suspected terrorists is always the Government's preferred approach.

Pre-legislative scrutiny of draft emergency legislation

Q2 Can you confirm that Parliament will be given the same opportunity for prelegislative scrutiny of draft emergency legislation extending TPIMs as it is being given in relation to the draft emergency legislation extending pre-charge detention? If not, what is the Government's justification for treating these two pieces of draft legislation differently?

On 8 February I undertook to consider further the Committee's suggestion that the draft emergency legislation for enhanced TPIMs should be subject to pre-legislative scrutiny, in addition to discussion on Privy Council terms with the Opposition. The Government has considered this carefully. The process of drafting the TPIMs legislation is currently underway, and once drafted it will be subject to close scrutiny in both Houses. We intend to consider the necessity of pre-legislative scrutiny of the enhanced TPIMs legislation in light of the passage of the TPIMs legislation through Parliament, and the issues coming out of those debates.

Publication of summary of consultation responses

Q3 Can you confirm that the Government will be publishing a summary of the responses to the consultation that have not so far been published?

I undertook to consider providing a summary of the responses from the police, CPS, intelligence agencies and other Government departments to the consultation on the review

of counter-terrorism and security powers. A summary is attached to this letter. It covers the police, CPS and security and intelligence agencies views. It does not provide individual Departments' views given the Government's response to the review reflected the collective agreement of Departments.

Intercept as evidence

Q4 Are you in a position to provide us with further information about the review of control order cases which concluded that the use of intercept as evidence would not have made prosecution more likely in any of the cases studied?

You asked for further detail of the review by independent counsel into the impact the introduction of intercept as evidence in criminal proceedings would have had on nine control order cases. The report of that review is classified, as it is based on and references sensitive intelligence material, and the Committee will understand that I am not able to share the report itself or the detail of the cases examined in it. However there is some further information about the report and its conclusions which is already in the public domain. As I expect you will be aware, the Privy Council Review of Intercept as Evidence, published on 30 January 2008 (Cm 7324), contained the following material at paragraph 58:

"We have also seen a recent review of nine current or former Control Order cases, conducted by independent senior criminal Counsel *** for the Home Office. It concluded that the ability to use intercepted material in evidence would not have enabled a criminal prosecution to be brought in any of the cases studied—in other words, it would not have made any practical difference. In four cases, Counsel concluded that such intercepted material as exists, even if it had been admissible (including the assumption that it could be made to meet evidential standards), would not have been of evidential value in terms of bringing criminal charges against the individuals in question. In the other five cases, although Counsel assessed that there was intercepted material capable of providing evidence of the commission of offences relating to encouraging, inciting or facilitating acts of terrorism (as opposed to the direct commission of terrorist or other offences), he stated that "it is clear to me that in reality no prosecution would in fact have been brought against these five men". This was because deploying the crucial pieces of intercepted material as evidence would have caused wider damage to UK national security (through, for instance, exposing other ongoing investigations of activity posing a greater threat to the public, or revealing sensitive counterterrorism capabilities to Would-be terrorists) greater than the potential gains offered by prosecution in these cases."

I am not able to go further.

Q5 What plans do you have to make available to Parliament more information about the scale and nature of the threats to national security to enable Parliament to make a meaningful assessment of the continued necessity and proportionality of various counter-terrorism powers?

We are committed to providing Parliament will as much information about the scale and nature of the threat. I and Ministerial colleagues regularly inform Parliament of scale and

nature of the terrorism threat. Changes to the terrorist threat level are notified to Parliament as soon as is operationally possible.

Definition of terrorism/Freedom of speech

Q6 Has the Government considered whether the definition of terrorism is section 1 Terrorism Act 2000 is too broad?

Q7 What assessment has the Government carried out of the continued necessity for speech offences such as glorification of terrorism?

The Government's review of counter-terrorism and security powers rightly focussed on the most sensitive and controversial powers. We are taking immediate steps to seek to implement the findings from that review—most notably in the Protection of Freedoms Bill. We have made clear, though, that the principles of the review will continue to guide the Government's approach to counter-terrorism to ensure that, in protecting the public, the Government does not undermine the very civil liberties it is seeking to protect. This includes, of course, ensuring that freedom of speech is protected.

As the Committee will be aware, the definition of terrorism was reviewed by the previous Independent Reviewer of Terrorism Legislation, Lord Carlile of Berriew QC, in 2007 who concluded it was "practical and effective". His review led to the definition being amended to include the use of threat to advance a racial cause.

The Government considers the offence of encouragement of terrorism by statements to be important in tackling the problem of radicalisation. We are undertaking a review of Prevent, the Government's wider strategy to deal with this issue.

Q8 Does the Government consider justifiable counter terrorism measures against speech which promotes hatred but falls short of terrorism?

Measures to deal with groups that espouse or incite violence or hatred were considered as part of the Government's review of counter-terrorism and security powers, the findings of which were announced to Parliament on 26 January. The review found that it would be disproportionate to widen counter terrorism legislation to deal with such groups as there would be unintended consequences for the basic principles of freedom of expression. There is, however, wider Government work to tackle extremist views. As part of their approach to promoting integration and participation, the Department for Communities and Local Government will be taking forward work in this area.

Deportation of terrorism suspects

Q11 Is the Government looking at ways of prosecuting non-national terrorism suspects as an alternative to deporting them where deportation is not possible?

It is always the Government's preference to prosecute individuals involved in terrorism, regardless of their nationality. It is only when prosecution is not possible that we attempt to deport those individuals who are foreign nationals. Prosecution is not, therefore, an

alternative to deportation when deportation is not possible; it is our preference, and the course of action that is explored before deportation is considered.

Q9 Can you give us an idea of the scale of the problem concerning terrorism suspects who are not UK nationals? How many terrorism suspects does the Government want to be able to deport but currently cannot? How many such suspects are in immigration detention or on Immigration Act bail?

As the Home Secretary informed you in her letter of 7 December 2010, we do not keep statistics on the number of individuals we might want to deport for reasons of involvement in terrorism but cannot (usually due to human rights concerns). There are a broad range of cases that may fall for consideration for removal due to suspected involvement in terrorist activity. These are dealt with across the UK Border Agency (UKBA)—for instance suspicions may arise during an asylum interview, a case may be provided to UKBA by an external Agency, or an individual may be removed following conviction for an offence committed in the UK. It would require the manual review of a large number of case files to identify those cases where we have decided that deportation would not be possible. Currently, we are seeking assurances to enable the deportation of 14 individuals. Of these, 4 are in immigration detention and 9 are on immigration bail. One has discretionary leave to remain in the UK.

Q10 How many non-UK nationals have been prosecuted for terrorism-related offences in each of the last 3 years?

We do not collect data on the nationality of individuals that have been prosecuted for terrorism related offences. However, a snapshot of the (self declared) nationality of terrorist and extremist prisoners (i.e. convicted individuals) in Great Britain as at 31 March 2010 shows that 76% were recorded as UK nationals; as at 31 Mar 2009, 76% of terrorist/extremist prisoners were recorded as UK nationals; and as at 31 Mar 2008, 62% were so recorded.

Human Rights and the National Security Strategy

Q12 The Government's National Security Strategy recognises the interdependence of national security and human rights and states that the Government's outlook will be underpinned by a firm commitment to human rights, justice and the rule of law.

Q13 What are the mechanisms for giving operational effect to this commitment?

Q14 How is expert advice on human rights systematically made available to the National Security Council and the Joint Committee on the National Security Strategy?

The Government is committed to upholding the fundamental principles of human rights, justice and the rule of law in its approach to national security. The new National Security Strategy is about protecting our people, their rights and liberties, in a way that recognises that security and liberty are complementary and mutually supportive.

To that end, the relevant human rights dimensions raised by a particular national security issues are brought out in the strategy and policy papers prepared by officials for both the

PM chaired National Security Council and the supporting senior officials group led by the National Security Adviser, Sir Peter Ricketts.

In addition both the Secretary of State for Justice, who has lead responsibility, for human rights issues within the Cabinet, and the Attorney General, who is the Government's chief legal adviser, attend meetings of the National Security Council where legal or policy issues relating to human rights might arise, to ensure that those aspects are properly considered. This is replicated at senior official level with both the Ministry of Justice and the head of the Cabinet Office's Constitution Secretariat represented on the National Security Adviser's cross-Government officials group.

Recent examples of relevant discussions include the development of a Government Green Paper which will seek views on a range of proposals designed to enable the courts and other oversight bodies to scrutinise actions in pursuit of national security effectively without compromising security.

The provision of expert advice on human rights to the Joint Committee on the National Security Strategy is primarily a matter for the Committee itself and Parliament, but of course the Government is happy to give evidence on National Security Strategy and human rights.

Democratic oversight

Q15 The Government acknowledges the importance of appropriate democratic oversight of its national security Strategy and of the balances struck between security and freedom in countering terrorism.

The Government is committed to appropriate oversight of its counter terrorism and national security work and is actively taking steps through the development of a Green Paper that the Prime Minister announced on 6 July 2010. The Green Paper will set out proposals for how sensitive information is to be treated in the full range of civil judicial proceedings and will examine the existing oversight arrangements for our security and intelligence agencies.

Q16 What proposals does the Government have to increase the democratic accountability of the intelligence and security services?

As noted above, a range of proposals to review and improve the effectiveness of current arrangements for oversight of the work of the intelligence and security agencies are currently under consideration as part of the Green Paper. We will be consulting extensively on the Green Paper in the coming months. As the Committee will be aware, the Intelligence and Security Committee is also looking at ways to enhance the role it plays in democratic oversight and the Committee's proposals will be considered as part of the Green Paper.

Prosecution

Q17 Although the threat level has apparently remained constant, the rate of successful prosecution has declined.

Q18 What accounts for the decline in the rate of successfully prosecutions for terrorism offences?

The terrorism threat level is not necessarily best assessed by the number of terrorism cases prosecuted . The first is based on intelligence; the second on admissible evidence.

I recognise that the rate of successful prosecutions for terrorism offences has declined but it is important to see this in context. As the Committee will appreciate, certain types of prosecution can be more difficult than others . When a number of such cases occur, the conviction rates can also be affected especially as the total numbers of prosecutions are low. This combination of circumstances increases the likelihood of fluctuations in conviction rates.

Q19 How does the Government propose to increase the rate of successful prosecutions?

As I made clear when I gave evidence to the Committee on 8 February, and reflecting the Home Secretary's statement on 26 January, the Government believes that the best place for a terrorist is in a prison cell. We continue to work with the CPS and police to ensure that they have the necessary powers and resources to protect the public from the ongoing real and serious threat from terrorism. The work on post-charge questioning and obtaining more intelligence and evidence from terrorism suspects and prisoners (see questions 20 and 21 below), as well as the increased investigative focus (with a view to prosecution) in TPIMs (see question 1), support these efforts.

Q20 Can you give more detail of the work that is being done to maximise the intelligence and evidence dividend from terrorism suspects and prisoners?

We will commence the post-charge questioning provisions in the Counter-Terrorism Act 2008 as an additional investigative tool. This could help in individual prosecutions and may encourage terrorist suspects to assist investigators either by turning "Queen's Evidence" or by providing intelligence.

We are also seeking to improve the use of the 'assistance by offenders and defendants' provisions set out in Sections 71–74 of the Serious Organised Crime and Policing Act (SOCPA) 2005. We intend to make it easier for defendants to enter into the SOCPA process by making it easier for them and prisoners to clarify the information they hold without fear of self incrimination and by increasing awareness of the SOCPA provisions amongst defendants.

Q21 What consideration has the Government given to the scope for greater use of plea bargaining to increase the conviction rate for terrorism offences?

The Government have looked at the use of "plea bargaining" to increase conviction rates for terrorism. "Plea bargaining" is used in countries such as the US which has a significantly different justice system to the UK. In the US criminal justice system, sentences are decided on the basis of a complex matrix. In the UK the judiciary enjoy significantly greater discretion in sentencing decisions, which are based on sentencing guidelines which the judge applies to the particular details of individual cases. In addition, in the US system,

prosecutors have the power to influence sentences and will negotiate with the defendant to settle the case. The agreement is usually reached before the trial and significantly reduces the judge's discretion in sentencing. In the UK, on the other hand, prosecutors do not plead for special sentences and judges have far greater discretion over sentencing. In the case of R v Dougall [2010] EW CA Crim 1048, the judgment emphasised that the choice of the sentence is a matter for the court alone, not for agreement between the prosecution and defence. We do not, therefore, intend to replicate a US style system of "plea bargaining" in the UK.

As I already mentioned we are seeking to improve the use of the 'assistance by offenders and defendants' provisions set out in Sections 71–74 of the Serious Organised Crime and Policing Act (SOCPA) 2005 but this will be different from the US-style "plea bargaining" given our different judicial systems.

28 March 2011

3. Letter to the Committee Chair, from James Brokenshire MP, Parliamentary Under Secretary for Crime and Security, Home Office, 24 May 2011

As you may be aware the Terrorism Prevention and Investigation Measures Bill (TPIM) was introduced and published yesterday. It will receive its Second Reading on 7 June.

I know that the control order powers contained in the Prevention of Terrorism Act 2005 have been of longstanding interest to the JCHR—and that the Committee expressed considerable interest in the likely provisions in the TPIM Bill when Baroness Neville-Jens gave evidence to about the CT Review in February.

I attach a copy of the ECHR memorandum for the Bill which I am sure your Committee will wish to consider. I am sure you will let us know if you have any particular issues that you would like to follow up.

24 May 2011

4. ECHR Memorandum submitted by the Home Office, 24 May 2011

Terrorism Prevention and Investigation Measures (TPIM) Bill

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the TPIM Bill. The memorandum has been prepared by the Home Office. The Home Secretary has signed a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

2. This Bill repeals the Prevention of Terrorism Act 2005 ("the PTA") which provides for the control order regime and replaces that regime with terrorism prevention and

investigation measures (TPIMs). The restrictions that may be placed on individuals under the new system are less stringent than those available under control orders. The new system also has a greater range of safeguards, including a time limit and a higher threshold for imposing the restrictions. The control order regime operated compatibly with the ECHR. The TPIM regime, with its greater safeguards, will also be compatible with the ECHR and indeed TPIMs will be less intrusive on the human rights of the individuals subject to them than control orders are.

3. This memorandum deals only with those clauses of, and Schedules to, the Bill which may give rise to ECHR issues.

Provision in relation to TPIMs

4. The Bill contains a power for the Secretary of State to impose TPIMs on an individual (by means of a TPIM notice) if the following conditions are met:

a) The Secretary of State reasonably believes that the individual is or has been involved in terrorism-related activity (as defined in clause 4) ("condition A");

b) Some or all of that activity is "new terrorism-related activity" ("condition B");

c) The Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for TPIMs to be imposed on the individual ("condition C");

d) 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, for each of the specified measures to be imposed on the individual ("condition D");

e) The court has given permission for the TPIMs to be imposed, or the Secretary of State reasonably considers that the urgency of the case requires TPIMs to be imposed without such prior permission (in which case the TPIM is referred to the court within 7 days for confirmation) ("condition E").

5. The Bill sets out the types of measures that may be imposed under a TPIM notice. Details of the measures Secretary of State may impose are contained in Schedule 1. These measures fall under the following headings:

a) A requirement for the individual to remain overnight in the specified residence (including a residence provided to the individual by the Secretary of State in an appropriate locality) or restrictions on the individual's movements overnight.

b) A restriction on the individual travelling outside the UK (or outside Northern Ireland or the mainland).

c) A restriction on entering a specified area or place.

d) A requirement to comply with directions concerning the individual's movements for a maximum of 24 hours.

e) A restriction on the use of or access to specified financial services.

f) A restriction on the transfer of property and a requirement to disclose information about specified property.

g) A restriction on the possession or use of electronic communications devices including in relation to devices of others within the residence.

h) A restriction on association or communication with other persons.

i) A requirement in relation to work or studies.

j) A requirement to report to a police station.

k) A requirement for the individual to allow photographs to be taken.

l) A requirement to co-operate with arrangements to allow the individual's movements, communications or other activities to be monitored.

6. A TPIM notice lasts for one year but may be extended for one further year.

7. No new TPIM notice may be imposed on the individual after that time unless the Secretary of State reasonably believes that the individual has engaged in further terrorism-related activity since the imposition of the notice (clause 3(2) and (6) and clause 5).

8. Under clause 9 of the Bill, the High Court, or in Scotland, the Court of Session [1] automatically reviews the TPIM notice following the service of such a notice. The Court must review whether the conditions A to D were met when the TPIM notice was imposed—and continue to be met at the time of the hearing.

9. The individual has the right to request the variation or revocation of the TPIM notice and the Secretary of State has the power to revoke the notice, to vary the notice, to extend it (once, as mentioned above) or to revive a notice following its revocation or expiry (for the unexpired portion of the year for which it was originally made) (clauses 12 and 13). The Secretary of State may also make a new TPIM notice following the quashing of a TPIM notice or a direction by the court to revoke the notice—but only for the period of time for which the quashed or revoked notice would have lasted. The individual has a right of appeal against any of the decisions of the Secretary of State in relation to these matters. The individual also has the right of appeal against any decision on a request for permission made in connection with a measure in a TPIM notice (clause 16).

10. The Secretary of State, when making her decisions, and the High Court, in conducting its review of those decisions during the automatic review hearing or on an appeal, may make use of closed evidence (that is, evidence which is withheld from the individual and their legal adviser because its disclosure would be contrary to the public interest). The procedure for the use of closed evidence, including the appointment of a special advocate to act in the individual's interests in relation to such proceedings will be contained in Rules of Court made under Schedule 4 to the Bill. This system will be the same as that currently used in control order and Special Immigration Appeals Commission proceedings.

1 The rest of this memorandum refers to the "High Court"—but this should be read as referring to the Court of Session where the hearing is in Scotland.

11 . Th ere are various powers of search and en try in Sc hedule 5 whic h sup port the TP IM regime. There are al so powers to take fi ngerprints an d non-i ntimate samples from individuals subject to a TPIM notice and to retain that data (and DNA profiles derived from such samples) in Schedule 6 to the Bill.

12. Breach of a mea sure in a TPIM notice, without reasonable excuse, is a criminal offence, carrying a maximum penalty of 5 years' imprisonment (clause 21).

The measures

13. The measures that may be imposed on an individual under a TPIM notice will engage Convention rights. The measures include:

a) restrictions on m ovement (a requi rement to remai n in th e residenc e overnig ht; a requirement to reside i n acc ommodation provi ded by the Secretary of State i n an agreed area or in the individual 's local area (or in the absence of such an area, in an appropriate area); restrictio ns on the individua l's movements outs ide the residence overnight; exclusions from specified areas; foreign trav el restrictions; a requirem ent to comply with directions lasting up to 24 hours given by a co nstable). These restriction s engage article 8 (right to resp ect for private and family lif e), article 11 (freedom of assembly and association) and possibly art icle 9 (freedom of thou ght, conscience and religion) (an excluded place may include a mosque.)

b) restrictions on communications and association (limitations on th e possession and use of elec tronic comm unications devices, inclu ding r estrictions in r elation t o de vices belonging to others in the residence; prohibitions from contacting specified individuals or descriptions of individuals without permission; notification requirements in relation to contacting other indi viduals; limitations or notification require ments in relation to areas of work and stud y). These restrictions will engage articles 8, 10 (freedom of expression) and 11 and possibly article 1 of the first protocol (protection of property).

c) restrictions on dea ling with m oney a nd othe r property (li mitations on use of fi nancial services; requirement to obtain permission for transfers of property). These restrictions may eng age article 8 and (i n re lation to the l oss of an y i nterest on savings by a requirement that the individual maintain only one bank account or the loss of a job in a prohibited area of work, such as public transport) article 1 of the first protocol.

d) requirements relating to mon itoring (a requirement to fu rnish in formation about property; a requ irement to wear an electronic tag; requirements to r eport to the police and electronic monitoring company; a requ irement to allow a photograph to b e taken by the police). These will engage article 8.

14. The Convention rights mentioned above are all qualified ri ghts. Interference with those rights is permissible provided that it is (a) in accordance with the law; (b) in pursuance of a legitimate aim; and (c) proportionate.

15. The interferences will be in accordance with the law because there will be clear provision in primary legi slation about the circumstances in which TPIMs may be imposed on an i ndividual and ab out wh at type of measures may b e imposed. These provi sions are

formulated with sufficient precision to enable a person to know in what circumstances and to what extent the powers can be exercised. The terms of the measures themselves will be drafted clearly in the TPIM notice.

16. The interferences with Convention rights caused by the measures will be in pursuit of a legitimate aim. A TPIM notice may only be imposed where the Secretary of State reasonably considers it is necessary in connection with the protection of the public from a risk of terrorism and she must also reasonably consider that each measure is necessary for the prevention or restriction of the individual's involvement in terrorism-related activity. These purposes pursue the legitimate aims of national security, public safety, the prevention of crime and the protection of rights and freedoms of others. In relation to any interference with rights under article 1 of protocol 1, this will (for the same reasons) be in the public interest and subject to conditions provided for by law and by the general principles of international law.

17. The interferences with these rights will also be proportionate. There are numerous safeguards in place to ensure that TPIMs will only be imposed where, and to the extent, that they are necessary and proportionate and to ensure that the individual's rights are protected. There are a greater, and more robust, range of safeguards than those in the control order regime, and none of the provisions in section 1 of the PTA concerning the types of obligations that may be imposed under a control order have been found to be incompatible with Convention rights. The measures that may be imposed in a TPIM notice are proportionate because of the following safeguards and limitations:

a) The High Court must give permission before the Secretary of State imposes TPIMs (other than in urgent cases, when the Secretary of State must refer the TPIM notice to the High Court within 7 days of serving it).

b) The Secretary of State may only impose TPIMs where she reasonably believes that the individual is or has been engaged in terrorism-related activity (this is a higher threshold than that under the control order regime, which requires that the Secretary of State reasonably suspects the individual's involvement in such activity).

c) The Secretary of State may only impose those measures on the individual she reasonably considers are "necessary" for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity. "Necessity" is a high test and the mischief against which the restrictions are aimed is so serious that interferences with qualified Convention rights caused by the measures in a TPIM notice may be justified (depending of course on the circumstances of the individual case).

d) The Secretary of State may only impose measures from a finite list of types of measure set out in Schedule 1. That Schedule provides details of the types of provision that may in particular be provided in the TPIM notice. For example, in relation to the electronic communications device measure, although restrictions may be placed on the individual's use and possession of such devices, provision is made (paragraph 7(3) of Schedule 1) that the Secretary of State must allow the individual to possess and use at least one mobile and one landline phone and one computer which connects to the

internet. Similarly, although a overnight residence requirement may be imposed, paragraph 1 (8) provides that the requirement must allow the individual to request permission to stay outside the residence on particular nights. (In a control order, the Secretary of State may impose any obligation she considers necessary for purposes connected to preventing or restricting the individual's involvement in terrorism-related activity, and the legislation includes a non-exhaustive list of examples of such obligations. The Bill therefore provides the Secretary of State with a much narrower discretion as to the obligations that she may impose.)

e) The Secretary of State is obliged under section 6 of the Human Rights Act 1998 to act compatibly with the Convention rights of the individuals she proposes to, and does, make subject to a TPIM notice. She must therefore only impose provisions in a TPIM notice which are proportionate to the terrorism-related risk posed by the individual in the particular circumstances of the case. Very careful consideration will be given to the impact of each of the measures in a TPIM notice, both individually and collectively, on the individual and their family before the Secretary of State imposes the TPIM notice and throughout the period it remains in force, and account will be taken of any representations made on behalf of the individual.

f) Before imposing a TPIM notice, the Secretary of State must consult with the police (who must consult with the relevant prosecuting authority) as to the prospects of prosecuting the individual for a terrorism-related offence. Prosecution through the criminal courts remains the Government's priority for persons believed to have engaged in terrorism and this is reflected in clause 10 of the Bill.

g) The High Court substantively reviews the Secretary of State's decisions in imposing the TPIM notice, including the necessity and proportionality of each of the measures in that notice (clause 9). This High Court review takes place automatically, without the individual having to initiate those proceedings. Under the control order regime, the courts have repeatedly made it clear that they will consider the proportionality of the obligations imposed under a control order—and the courts will do the same in relation to the proportionality of the measures imposed in a TPIM notice. For example, in the case of *BH v Secretary of State for the Home Department* [2009] EWHC 3319 (Admin) Mitting J considered the factors which led the Secretary of State to conclude that the Secretary of State's relocation of BH under his control order to another part of the country was necessary and commented that he "would, but for the factors considered below, have unhesitatingly upheld it". However, he went on to confirm that, because the article 8 rights of the individual and his family were engaged, he "must consider the proportionality" of the measure. He considered the matter was finely balanced but he rehearsed BH's family circumstances and concluded that "applying *Wednesbury* principles, I would not hold [the relocation] to be flawed; but applying the more intensive review required by the proportionality test, I am satisfied that it would be disproportionate on the basis of current information to remove BH to Leicester."[2] The courts will therefore make their own decision on the proportionality of measures in a

2 It should be noted that a TPIM notice, unlike a control order, may not make provision for the relocation of an individual to another part of the country.

TPIM notice, following the law as set down by Lord Steyn in paragraph 27 of *R (Daly) v SSHD* [2001] 2 AC 532:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decision. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence ex p. Smith* [1996] QB 517, 54 is not necessarily appropriate to the protection of human rights [...].
>
> In other words the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."

h) The range of measures which may be imposed on an individual under a TPIM notice are more limited than those available under a control order. For example, a requirement to remain in the residence is limited to an overnight period under a TPIM notice (as opposed to up to 16 hours under a control order);[3] a TPIM notice does not allow the Secretary of State to relocate the individual to another part of the country without their consent (whereas a control order does); and unlike a control order, a TPIM notice may not completely prohibit the individual's access to the internet or other communications devices and a TPIM notice may not confine an individual to a particular geographical boundary (other than an overnight)—it may only restrict the individual's access to specified areas or places.

i) A TPIM notice may require the individual to live in accommodation provided by the Secretary of State (paragraph 1 of Schedule 1) but such accommodation must be either in a locality agreed by the individual or in an "appropriate locality"—that is a locality where the individual resides or has a connection, or if the individual has no such residence or connection, in a locality the Secretary of State considers appropriate. The restriction that the accommodation must be in an "appropriate locality" prevents the Secretary of State from forcibly relocating the individual away from their home area in the way that is allowed by a control order. The purpose of this provision is to allow the Secretary of State to house a homeless individual for the duration of the TPIM notice or to move an individual into accommodation which is suitable for the purposes of monitoring and enforcing the TPIMs—but not away from their home area or area they wish to live. Under the control order regime, relocation to accommodation provided by the Secretary of State in another part of the country has been upheld by the court on several occasions as proportionate to the risk posed by the individual (see for example *BX v Secretary of State for the Home Department* [2010] EWHC 990 (Admin). The interference with article 8 rights by a requirement to move to other accommodation within the same area under the Bill is therefore proportionate (although, as with any

3 There is case law relating to control orders to the effect that a curfew of up to 16 hours may not constitute a deprivation of liberty—see paragraphs 21 to 23 below.

other measure, whether it is proportionate in any particular case will of course depend on the circumstances).

j) A TPIM notice only lasts for 12 months. The Secretary of State may extend the notice—once only—for a further period of 12 months (clause 5). A further TPIM notice may only be made against an individual who has been subject to such a notice for a 2 year period if the Secretary of State reasonably believes that the individual has engaged in further terrorism-related activity since the imposition of the original TPIM notice. (This is in contrast to the control order regime, under which there is no statutory limitation on the number of times the Secretary of State may renew a control order.)

k) The Secretary of State may "revive" a TPIM notice that has been revoked but only for the unexpired portion of the 12 months for which it was originally to remain in force (clause 13) and the individual has the right of appeal against such a revival (clause 16).

l) The Secretary of State may also make a new TPIM notice following a quashing of, or court direction to revoke, a TPIM notice—but again, the new notice may only last for the period for which the overturned notice would otherwise have remained in force. This provision is to allow the Secretary of State to take appropriate action to protect the public should the original TPIM notice have been overturned on a technicality. The permission of the court will be required before any new measures may be so imposed.

m) The individual has the right to request a variation to the measures in the TPIM notice or to request that the notice is revoked at any time (clauses 12 and 13).

n) The Secretary of State may revoke the notice at any time (clause 13).

o) The individual has the right of appeal to the High Court against a decision by the Home Secretary (i) to extend or revive a TPIM notice (ii) to vary that notice without the individual's consent (iii) to refuse a request by the individual to vary the notice (iv) to refuse a request to revoke the notice (v) to refuse permission to do something which requires the Secretary of State's permission under the terms of the measures in the notice (clause 16).

p) Following the automatic court review of the TPIM notice or any appeal, the court has the power to quash the TPIM notice or any measure in that notice or to direct the Secretary of State to revoke or vary the notice.

q) The Secretary of State is required to keep the necessity of the TPIM notice and each of the measures in it under review while the notice remains in force (clause 11).

r) The Secretary of State and the individual will have the option of applying to the court for an anonymity order to protect the identity of the individual subject to the TPIM notice—in particular to protect the individual's article 8 (or article 2 or 3) rights.

s) The Secretary of State will report to Parliament every 3 months on the exercise of the powers in the TPIM legislation (clause 19).

t) An independent reviewer will review the operation of the TPIM legislation and report annually on the outcome of that review: the Secretary of State will publish this report (clause 20).

18. Accordingly, the Government considers that the provisions in the Bill allowing TPIMs (as defined in Schedule 1) to be imposed on an individual are compatible with Convention rights.

Article 5

Overnight residence requirement

19. Paragraph 1 of Schedule 1 to the Bill provides that a TPIM notice may include a requirement under which the individual may be required to remain in their residence for a specified number of hours overnight.

20. The limitation on this residence requirement (the period of confinement must be "overnight" only) is such that it is unlikely to engage article 5 of the ECHR in view of the case law in relation to control order curfews.

21. Section 1 of the PTA allows the Secretary of State to impose an obligation on an individual under a control order to remain in their residence, provided the obligations in that order are not incompatible with the individual's right to liberty under article 5.[4] In *Secretary of State for the Home Department v JJ & Others [2007] UKHL* 45, the House of Lords found that curfews of 18 hours (or more) amounted to a deprivation of liberty. And, as none of the exceptions to the right of liberty specified in article 5 (a) to (f) apply, such curfews constitute a breach of article 5. In *Secretary of State for the Home Department v E & Another [2007] UKHL 47* and *Secretary of State for the Home Department v MB & AF [2007] UKHL 46*, the House of Lords found that control order curfews of 12 and 14 hours do not deprive an individual of their liberty.

22. In assessing what constitutes a deprivation of liberty, what must be focused on is the extent to which the individual is "actually confined"—that is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, particularly those which contribute to the social isolation of the individual, are however to be taken into account. But such "other restrictions (important as they may be in some cases) are ancillary" and "[can] not of themselves effect a deprivation of liberty if the core element of confinement [...] is insufficiently stringent".[5] This assessment of the position was reaffirmed in the Supreme Court judgment in *AP v Secretary of State for the Home Department* [2010] UKSC 24.[6] Lord Bingham in that case also said that in his view "for a control order with a 16-hour curfew (a fortiori one with a 14-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living.[7]

4 The references in this memorandum are to non-derogating control orders - that is control orders made by the Secretary of State and orders which may not impose obligations that are incompatible with article 5. The PTA also allows for the imposition of derogating control orders, by the court following application by the Secretary of State—which orders impose obligations which are incompatible with article 5 (see section1(2) of the PTA).

5 Paragraph 11 of the *ME* and *AF* judgment.

6 Paragraph 1.

7 Paragraph 4.

23. Under a TPIM notice, an overnight residence requirement will fall well short of the "grey area" [8] that has been identified in the control order context—a confinement of between 14 and 16 hours—where consideration of the other restrictions imposed on the individual are to be taken into account in (and indeed will be key to) assessing whether there is a deprivation of liberty. As noted above, the House of Lords has found that a 12 hour curfew does not constitute a deprivation of liberty. Further, the other restrictions that may be imposed under a TPIM notice are also less stringent than those available under the control order regime: A TPIM notice may not impose such severe restrictions on association or communications and may not impose a geographical boundary within which the individual must remain during non-confinement hours. And so again, even taking into account consideration of the other restrictions that may be imposed on the individual in addition to the "core element of confinement", a TPIM notice would not constitute a deprivation of liberty.

Article 6

Degree of scrutiny by the court

24. Clauses 9 and 16 provide for the review by the High Court of the Secretary of State's decisions in relation to imposing TPIMs and the various appeal rights of the individual. The review which is conducted in accordance with clause 9 takes place automatically (without the individual having to initiate the proceedings). The court is to review the decisions of the Secretary of State in deciding that the conditions were met to impose TPIMs and to maintain TPIMs against the individual at the date of the hearing. Such TPIM proceedings will engage the civil limb of article 6.[9] The protection afforded by article 6 in the context of control orders has been extensively considered by the courts.

25. Section 3(10) of the PTA provides that the court is to consider whether any of the Secretary of State's decisions in relation to making the control order "was flawed". In *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, the Court of Appeal read down this provision in accordance with section 3 of the Human Rights Act 1998, with the effect that High Court reviews of control orders must consider whether the Secretary of State's decisions "are flawed".[10] The Court of Appeal also confirmed very recently in *BM v SSHD* [2011] EWCA Civ 366 that the court must consider whether the statutory tests for making a control order are met at the time of the hearing as well as at the time the control order was made. This "read down" is reflected in clause 9(1) of the Bill, which provides that the court is to review the decisions of the Secretary of State that the relevant conditions for imposing TPIMs "were met and continue to be met"—and clause 16 makes corresponding provision about the function of the court in relation to appeal hearings. Clause 11 also provides that the Secretary of State must keep the necessity of both the notice and its constituent measures under review throughout the duration of the notice.

8 Paragraph 2 of *AP*.

9 The House of Lords decided unanimously in the case of *Secretary of State for the Home Department v MB*; *Secretary of State for the Home Department v AF* [2007] UKHL 46 that proceedings in relation to a non-derogating control order are civil proceedings and do not constitute the determination of a criminal charge.

10 Paragraphs 40 to 46.

26. The Court of Appeal in MB also laid down the standard of review that the court is to apply in control order cases. Section 3(11) of the PTA (review of control order) provides that the court is to apply the principles applicable on judicial review. There is similar provision in clauses 9 (review) and 16 (appeals) of the Bill. The standard applicable on judicial review in the context of control orders—and the same will apply in the context of TPIMs - is that laid down in *MB*. In that case, the Court found that the first part of the test (whether there are reasonable grounds for suspicion—or belief in the case of TPIMs—in relation to the individual's involvement in terrorism-related activity) is an objective question of fact.[11] The court must therefore itself decide whether the facts relied upon by the Secretary of State amount to reasonable grounds for believing that the individual is or has been involved in terrorism-related activity.

27. In relation to the court's review of the necessity of the control order and its constituent obligations, the Court of Appeal held as follows—and this will apply equally in High Court reviews of TPIMs:

> "Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism-related activities of which he is suspected. They may also depend upon the resources available to the Secretary of State and the demands on those resources. They may depend on arrangements that are in place, or that can be put in place, for surveillance.
>
> The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State. That it is appropriate to accord such deference in matters relating to state security has long been recognised, both by the courts of this country and by the Strasbourg court, see for instance: *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; *Ireland v United Kingdom* (1978) 2 EHRR25.
>
> Notwithstanding such deference there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so. The exercise has something in common with the familiar one of fixing conditions of bail. Some obligations may be particularly onerous or intrusive and, in such cases, the court should explore alternative means of achieving the same result."[12]

28. Therefore, while paying a degree of deference to the Secretary of State on her decisions on the necessity for the TPIM notice and for its constituent measures, the High Court will

11 Paragraph 60.

12 Paragraphs 63 to 65.

subject each of these decisions to "intense scrutiny" and this will provide the degree of scrutiny commensurate with article 6.

Closed evidence

29. Paragraphs 1 to 5 of Schedule 4 to the Bill (given effect to by clause 18) makes provision for the making of Rules of Court which may provide for the withholding of evidence from the individual and their legal representative where disclosure of that evidence would be contrary to the public interest (including because it would be contrary to the interests of national security). The Rule-making authority is to have regard to the need to ensure that decisions are properly reviewed, but also that disclosures of information are not made where they would be contrary to the public interest. The Secretary of State is to be required to disclose all relevant material, but may apply to the court (on an *ex parte* basis) for permission not to do so—and the court must give permission where it considers that the disclosure would be contrary to the public interest, but must consider requiring the Secretary of State to provide a gist of such material to the individual. If the Secretary of State elects not to disclose material he does not have permission to withhold or not to disclose a gist where required to do so, the court may give directions withdrawing from its consideration the matter to which the material was relevant, or otherwise secure that the Secretary of State does not rely on that material. Paragraph 10 of Schedule 4 makes provision for the appointment of a special advocate to act in the interests of the individual in relation to the closed proceedings.

30. Paragraph 5 of Schedule 4 provides that nothing in these paragraphs dealing with the Rule-making power nor in the Rules made under them is to be read as requiring the court to act in a manner inconsistent with article 6 of the Convention.

31. This system of closed proceedings, with the use of special advocates (which is also available in relation to, inter alia, hearings before SIAC, the Proscribed Organisations Appeal Commission and in control order cases) has been considered on a number of occasions by the courts, both domestically and in Strasbourg.

32. Article 6(1) of the ECHR provides that "everyone is entitled to a fair and public hearing [...] Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the [...] protection of the private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

33. The press and public may be excluded from the "closed" part of TPIM proceedings—as indeed may the individual and their legal representative. This is done to the extent strictly necessary in the interests of national security or public order, as the information dealt with during such closed sessions is information which the court permitted the Secretary of State not to disclose because it is necessary to withhold it in the public interest—often because it would be contrary to the interests of national security to disclose it. The information withheld from disclosure may, for example, be the names of covert human intelligence sources (or "agents")—whose lives could be put at risk if their identity is revealed. Or it

could be covert intelligence-gathering techniques, the disclosure of which could compromise wider national security interests.

34. The majority of the Court of Appeal in *MB* and *AF* found that despite the review process for control orders involving the use of closed proceedings, "it should usually be possible to accord the controlled person 'a substantial measure of procedural justice'".[13] It found that what was fair was essentially a matter for the judge, taking account of all the circumstances of the case, including what steps had been taken to provide the details of the allegations to the individual or summaries of the closed material. The majority found that although these protections and the special advocate procedure were highly likely to safeguard the individual from significant injustice, they could not be guaranteed to do so in every case. The majority decided that the relevant provisions of the PTA and the Rules[14] made under it (requiring the court to give permission for the withholding of evidence) should be "read down" in accordance with section 3 of the Human Rights Act 1998 as if the words " except where to do so would be incompatible with the right of the controlled person to a fair trial"[15] were added.

35. This "read down" is reflected in paragraph 5 of Schedule 4 to the Bill. The result is that although TPIM proceedings may make use of closed evidence, where the court concludes that there is material that it is necessary to disclose in order to meet the requirements of a fair trial—even where its disclosure is contrary to the public interest—that material must, in short, (at the Secretary of State's discretion) either be disclosed or withdrawn from the case.

36. The House of Lords again considered the issue of the compatibility of control order proceedings with article 6 of the ECHR in the case of *Secretary of State for the Home Department v AF and another* [2009] UK HL 28 ("AF (no.3)"). The House maintained the "read down" it made in MB and AF but also introduced a further important development, taking account of the judgment in the European Court of Human Rights in *A & Others v United Kingdom* [2009] ECHR 301. On that basis, the House held that in order for control order proceedings to be fair:

> "the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be".[16]

37. There is ongoing litigation about the reach of the judgment in *AF (no.3)*, including whether those disclosure requirements apply in "light touch" control order cases, where the

13 Paragraph 66.

14 Part 76 of the Civil Procedure Rules 1998.

15 Paragraph 72.

16 Paragraph 59.

orders impose only restrictions on travel and reporting obligations (in contrast to the stringent restrictions on liberty imposed by the control orders considered in the *AF (no.3)* case).[17]

38. In each TPIM case, the court will determine the level of disclosure required to comply with the individual's right to a fair hearing in accordance with article 6 and, subject to the outcome of the litigation referred to above, this decision will be made in accordance with the test set down in *AF (no.3)*. The individual will therefore be given sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations. A TPIM notice will not be able to be sustained on the basis of a case which is solely or decisively "closed".

39. Where in any case the Secretary of State is not able to make sufficient disclosure to comply with article 6, the appropriate remedy will be for the court to quash the TPIM notice. This was the Court of Appeal's finding in relation to control orders in *AN v Secretary of State for the Home Department; Secretary of State for the Home Department v AE and another* [2010] EWCA Civ 869. The same will apply in relation to TPIMs. And the Court of Appeal in that case also found that:

> "it is unlawful for the Secretary of State to begin to move towards the making of a control order if, in order to justify it, he would need to rely on material which he is not willing to disclose to the extent required by *AF(No.3)*".[18]

40. The Secretary of State, in determining whether to impose TPIMs, must therefore make her decision "conscientiously, with her disclosure obligations in mind".[19]

Article 6: summary

41. The courts have therefore considered the compatibility of the control order regime with article 6 in detail. They have "read down" the control order legislation to ensure that it is interpreted compatibility with individuals' article 6 rights and have laid down rules in relation to the level of disclosure that is required to comply with article 6—and the outcome (quashing) should that level of disclosure not be made. The TPIM Bill makes provision which takes account of these "read downs" and the Government expects the scheme to operate in practice in accordance with the control order caselaw on article 6.

42. Accordingly, the Government considers that the provisions in the Bill relating to court review, appeals and the use of closed proceedings are compatible with article 6.

Powers of Entry, Search, Seizure and Retention

43. Schedule 5 to the Bill (given effect to by section 22) confers powers of entry and search, together with associated powers of seizure and retention, in connection the enforcement of TPIM notices. These are powers to:

17 The Secretary of State is appealing the High Court's judgment in *BC v SSHD*; *BB v SSHD* [2009] All ER (D) 140 (Nov).

18 Paragraph 31.

19 Paragraph 55 of *BX v SSHD* [2010] EWCA Civ 481.

a) enter premises where the individual is believed to be and search those premises for the individual for the purpose of serving on that individual a TPIM notice (or an extension of that notice, a revival notice or a notice varying the TPIM notice without consent) (paragraph 5 of Schedule 5).

b) Search the individual or enter and search premises on the service of a TPIM notice for the purpose of ascertaining whether there is anything present which contravenes the TPIM notice (paragraph 6).

c) Enter and search premises if a constable reasonably suspects that an individual has absconded from a TPIM notice in order to determine whether that individual has absconded and if so for anything to assist in the pursuit and arrest of that person (paragraph 7).

d) Apply for a warrant to search the individual or premises for the purpose of determining whether the individual is complying with the. TPIM notice (paragraphs 8 & 9).

e) Search the individual for the purpose of ascertaining whether the individual is in possession of anything that could be used to threaten or harm any person (paragraph 10).

f) Associated powers of seizure and powers of retention (paragraphs 11 and 12). Paragraph 12 also allows for the seizure and retention of anything which the individual has surrendered pursuant to a monitoring requirement attached to an electronic communications device measure (see paragraph 7 (4)(e) of Schedule 1) if it is suspected to constitute or contain evidence of an offence.

Article 8

44. Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8(2) provides that there is to be no interference with that right other than is in accordance with the law and is necessary in a democratic society in pursuit of one of the legitimate aims listed in article 8(2). Article 8(1) is prima facie engaged in cases of search and seizure. The Government considers however that any interference with that right will be justified under article 8(2).

45. The provisions will be 'in accordance with the law' because they will be contained in primary legislation and formulated with sufficient precision to enable a person to know in what circumstance the powers can be exercised.

46. The powers also pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at ensuring that TPIM notices (the purpose of which are related to the prevention of terrorism) are properly enforced, including uncovering evidence of any breach of a TPIM notice would facilitate a criminal prosecution.

47. The powers are also necessary in a democratic society, that is they are proportionate to the aim pursued and meet a pressing social need. The powers in Schedule 5 may only be exercised in defined circumstances and are no more than necessary for achieving the legitimate aims mentioned above for the following reasons:

a) The powers may only be exercised by a constable.

b) The power in paragraph 5 may only be exercised where the constable reasonably believes the person is in the premises and only for the purpose of effecting service of a TPIM notice (or other specified notice)—which must be served on the individual in person to be effective (see clause 24(2) and (3)).

c) The powers in paragraph 6 are only exercisable on the service of a TPIM notice and the purpose is limited to ascertaining whether there is anything on the individual or in premises that contravenes the TPIM notice. This power is to ensure that anything the individual is prohibited from possessing under the TPIM notice is not kept in contravention of that notice following service.

d) Other than on service of the TPIM notice, any searches of the individual or premises conducted for compliance purposes must be conducted under a warrant applied for under paragraphs 8 & 9 of Schedule 5. A judicial authority (who is a public authority for the purposes of section 6 of the Human Rights Act and must therefore act compatibly with Convention rights) may only grant such a warrant if satisfied that the warrant is necessary for the purpose of determining whether an individual is complying with their TPIM notice.

e) The statutory safeguards contained in sections 15 and 16 of PACE (and equivalent provisions under the PACE (NI) Order 1989 with respect to Northern Ireland) apply to any warrant issued under paragraph 8 to search premises and similar safeguards are provided in paragraph 9 of Schedule 5 in respect of any warrant so issued to search the individual. These include time limits within which the warrant must be executed, provision that the search must be carried out at a reasonable hour unless that would frustrate the purpose of the search, provision about information to be supplied to the individual prior to conducting the search and provision about endorsement of the warrant.

f) Under paragraph 7 of Schedule 5, premises may only be entered and searched if the constable has reasonable grounds to suspect that an individual has absconded from a TPIM notice. And the purpose of the search is limited to determining whether the individual has absconded and if so whether there is anything which may assist in the pursuit and arrest of that individual.

g) The power under paragraph 10 of Schedule 5 is limited to searching the individual for the purpose of ascertaining whether the individual is in possession of anything that could be used to threaten or harm any person.

h) A constable may only use reasonable force where it is necessary in the exercise of these powers (paragraph 4 of Schedule 5).

i) PACE Codes of Practice A and B (and equivalent Codes for Northern Ireland) will be amended to include reference to the new powers—so all the relevant protections in those Codes (for example in relation to recordkeeping and proportionate exercise of the powers) will apply.

48. It is therefore the Government's view that Schedule 5 to the Bill is compatible with Article 8.

Article 1 of the First Protocol

49. Article 1, Protocol 1 will be engaged where these new powers are used to seize property.

50. Property seized under the new powers may be retained only for as long as is necessary (paragraph 11 of Schedule 5) and so the ECHR consideration relates to the control of use of property under Article 1, Protocol 1. The test for justification of a control of use of property has three limbs. The first is that the control must be in accordance with the law. The second is that the control must be for the general interest (or for the securing of the payment of taxes or other contributions or penalties). The third limb is that the measure must be proportionate to the aim pursued.

51 . The powers of seizure in this paragraph will be in accordance with the law because they are to be contained in primary legislation and are formulated with sufficient precision to enable a person to know in what circumstance they can be exercised. The seizures will be in the general interest because the powers are to seize anything which (a) contravenes a TPIM notice, (b) would assist in detecting the location of an individual who had absconded or (c) may threaten or harm any person (corresponding to the search power) or (d) (in England, Wales or Northern Ireland) which constitutes evidence of any offence.[20] The powers are therefore (a) aimed at the prevention or detection of crime (in particular the breach of a TPIM notice) (b) in the interests of national security and public safety, and (c) in association with criminal proceedings, since the material seized could be used to prosecute an offence.

52. The powers of seizure are proportionate because:

a) The articles seized could otherwise be used for the purposes of terrorism related activity (which the measures in the TPIM notice are designed to prevent or restrict).

b) The seizure could result in evidence (that would otherwise be missed or subsequently destroyed) being available for use in a criminal prosecution for an offence.

c) Anything seized may only be retained for so long as is necessary in all the circumstances.

d) The PACE and PACE NI Codes of Practice will be amended to extend to these powers. The Codes make provision additional safeguards, including for records to be made of any articles seized and for such records to be provided to the persons from whom the articles were seized.

e) The other safeguards referred to above apply.

53. It is therefore the Government's view that Schedule 5 to the Bill is compatible with Article 1, Protocol 1.

20 The Government is in discussion with the Scottish Government in relation to making provision for Scotland on the seizure of evidence relating to offences.

Anonymity Orders

54. Paragraph 6 of Schedule 4 to the Bill makes provision that Rules of Court made under that Schedule may provide for the making of an anonymity order by the court in respect of an individual who is subject to a TPIM notice or against whom the Secretary of State proposes to impose a TPIM notice.

55. An anonymity order is an order under which the court imposes such prohibition or restriction as it thinks fit on the disclosure of the identity of the individual or of any information that would tend to identify the individual. Such an order does not prevent the reporting of open court judgments in relation to the individual but the judgment would refer to that individual by court-given initials rather than by name.

Articles 2 and 3

56. Article 2(1) provides that everyone's right to life shall be protected by law. Article 3 provides that no one shall be subject to torture or to inhuman or degrading treatment or punishment.

57. The Supreme Court in *Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury* [2010] UKSC 1 recognised that States are obliged by articles 2 and 3 to have a structure of laws in place which help to protect people from assaults or attacks on their lives, not only from emanations of the State but by other individuals. "Therefore, the power of a court to make an anonymity order to protect a [...] party from a threat of violence arising out of its proceedings can be seen as part of that structure. And in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield."[21]

58. There may be cases where the individual subject to the TPIM notice has legitimate concerns about their safety should their identity as a person subject to such a notice become public. Indeed in the case of *Secretary of State for the Home Department v AP (no.2)* [2010] UKSC 26 the Supreme Court upheld the anonymity order in respect of a person formerly subject to a control order, having found that there was "at least a risk that AP's convention rights would be infringed" [22] if his identity was revealed. This was against the background of evidence to the effect there might be racist and other extremist abuse and physical violence against that individual.

59. The availability of an anonymity order is a way in which the article 2 or 3 rights of an individual subject to a TPIM notice may be protected in appropriate circumstances.

Article 8

60. It was also recognized by the Supreme Court in Application by Guardian News that giving the court the power to make anonymity orders is also one of the ways that the UK fulfils its positive obligation under article 8 of the ECHR to secure that individuals (including the press) respect an individual's private and family life (see *Von Hannover v*

21 See paragraph 27.

22 See paragraph 14.

Germany Application No. 58320/00). An individual subject to a TPIM notice may consider that publication of their identity as a person who is reasonably believed to be or have been involved in terrorism-related activity would be an undue intrusion on their right to respect for their private and family life. For example, they may consider that disclosure of their identity may cause serious damage to their reputation and may lead to a loss of contact for themselves and their immediate family with the local community who may fear to associate with them.

61. The availability of an anonymity order is a way in which the article 8 rights of an individual subject to a TPIM notice may be protected in appropriate circumstances.

Article 10

62. Article 10(1) provides that everyone has the right to freedom of expression. Article 10(2) provides that " the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such [...] conditions, restrictions [...] as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of the rights of others [...] ".

63. In *Application by Guardian News*, the Supreme Court noted that although article 10(1) does not mention the press, it is settled that the press and journalists enjoy the rights which it confers.[23] In that case, members of the press were prevented from reporting the name of the individuals subject to the asset freezes they were challenging in legal proceedings and complained that this restriction interfered with their right to freedom of expression.

64. It is clear that an anonymity order will interfere with the article 10(1) rights of the press to report proceedings in the manner that they might wish—namely to use the real name of the individual subject to a TPIM notice in the context of reporting on TPIM proceedings. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed (*Campbell v MGN Ltd* [2004] 2 AC 257 paragraph 59) and Lord Rodgers noted in paragraph 63 of the *Application by Guardian News* judgment that "stories about particular individuals are simply much more attractive than stories about unidentified persons". The court also noted that the purpose of the freezing order—and the same holds true for the purpose of a TPIM notice—is public. It is to do with preventing terrorism. And so the press may be restricted from reporting a complete account of an important public matter.

65. The article 10 rights of the press can however, as noted above, be subject (under article 10(2) to restrictions that are prescribed by law and necessary in a democratic society "for the protection of the reputation or rights of others". The "rights of others" include their rights under article 8—which (as mentioned above) are also engaged by the issue of publication of the identity of the individual. Making provision for an anonymity order to be made is therefore justified in accordance with article 10(2) because the article 8 (or

23 Paragraph 33.

indeed 2 or 3) rights of the individual may justify such an order being made, depending on the facts of the case.

66. As well as the article 8 rights of the individual, there may be other justifications for making an anonymity order. These were recognised in *Times Newspapers Ltd v Secretary of State for the Home Department* [2008] EWHC 2455 (Admin) in the context of control orders, and endorsed by Lord Rodgers in paragraph 11 of AP:

> "There may be a risk of disorder in any given local community. The knowledge that the individual is subject to a control order may conversely make him attractive to extremists in the area where he lives. It may make provision of a range of services, including housing, to the individual or his family rather more difficult. If the individual believes that he faces these sorts of problems, he has a greater incentive to disappear [...] All of this can make monitoring and enforcement of the obligations more difficult, and increase significantly the call on the finite resources which the police or security service have to devote to monitoring these obligations".

67. The case law on anonymity in control order cases endorses the need for such an order to be made at the permission stage—that is before the restrictions are served on the individual—to enable the individual time to muster evidence to argue that their identity should continue to be protected. But the case law also says that the maintenance of an anonymity order must be reviewed at the first opportunity (see paragraph 7 of *Times Newspapers v Secretary of State for the Home Department and AY* [2008] EWHC 2455 (Admin) where Ouseley J outlined a number of compelling reasons why the Courts should grant anonymity at the ex parte permission stage; confirmed by Lord Rodger in *Secretary of State v AP (No.2)* [2010] UKSC 26 at paragraph 8).

68. Whether or not an anonymity order will be maintained in any TPIM case will involve a consideration of the circumstances of the case by the court—in particular whether articles 2 or 3 are engaged, but generally a balancing exercise between the competing rights of the individual and their family under article 8 (and a consideration of the other factors mentioned above) and the rights of the freedom of expression of the press under article 10. Although the Supreme Court in *Application by Guardian News* concluded on the facts of the case that the anonymity orders were not justified in light of the general public interest in identifying the individuals (as against the evidence in relation to the individuals' article 8 rights in that case), it made it clear that the availability of such orders was not incompatible with Convention rights—rather the exercise of the power involved a balancing by the court of competing rights and indeed, the Court noted that the protection of article 2, 3 and 8 rights positively demanded the availability of such an order.

69. The Government therefore considers that the provision for anonymity orders in paragraph 6 of Schedule 4 to the Bill is compatible with article 10 of the ECHR.

Fingerprints and Samples

70. Schedule 6 to the Bill (given effect to by clause 23) makes provision in relation to the taking of biometric material from individuals subject to a TPIM notice.

71. Paragraphs 1 and 4 confer on a constable the power to take fingerprints and non-intimate samples from individuals in England, Wales and Northern Ireland[24] and "relevant physical data" and samples from individuals in Scotland.[25]

72. Such material may be taken with or without consent and the individual may be required to attend a police station for the purpose. Prints, samples or information derived from samples may be checked against specified databases and information (paragraph 5). The purpose of this search is to check whether there is a match with the person's data on existing DNA and fingerprint databases. This may allow the police to confirm the person's identify and to determine whether the person has previously had their biometrics taken and whether those biometrics have been found at a previous crime scene.

73. Schedule 6 also makes provision in relation to the retention and destruction of such material (paragraphs 6 to 12) and about the uses to which retained material may be put (paragraph 13).

Article 8

74. The European Court of Human Rights found in *S and Marper v United Kingdom* (2008) 48 EHRR 1169 that the storage and retention of fingerprints and DNA samples and profiles constitutes an interference with an individual's right to a private life under article 8. The applicants in that case complained that their fingerprints, cellular samples and DNA profiles were retained after criminal proceedings against them had been discontinued or had ended in an acquittal. The ECtHR held that retention of such material pursued the legitimate aim of the detection and prevention of crime, but found that the "blanket and indiscriminate nature" of the retention powers in relation to suspected but not convicted persons constituted a disproportionate interference with their article 8 rights.

75. Persons subject to a TPIM notice are believed to be or have been involved in terrorism-related activity—but (like the applicants in *Marper*) have not (necessarily) been convicted of a criminal offence. Article 8 is clearly engaged by the provisions in Schedule 6. The taking and retention of the prints and DNA of individuals subject to a TPIM notice constitutes an interference with their right to private life which will only be lawful if it is in accordance with the law, in pursuit of a legitimate aim and is a proportionate means of achieving that aim. The Government is satisfied that the provisions are in accordance with the law because they are set out in detail in primary legislation; and that the purposes of the prevention and detection of crime[26] and the interests of national security are legitimate

24 "Fingerprints" and "non-intimate samples" have the meaning given to them in section 65 of PACE. That is, "fingerprints" include palm prints and "non-intimate samples" means a sample of hair other than pubic hair; a sample taken from a nail or from under the nail; a swab taken from any part of a person's body including the mouth but not any other body orifice; saliva and a footprint or a similar impression of any part of a person's body other than a part of his hand.

25 "Relevant physical data" has the meaning given by section 18(7A) of the Criminal Procedure (Sc) Act 1995, that is, any fingerprint, palm print, print or impression of an external part of the body or certain records of a person's skin on an external part of the body. A constable may, with the authority of an officer of a rank no lower than inspector, take from the person a sample of hair other than pubic hair; a sample of nail or from under the nail; from an external part of the body, a sample of blood or other body fluid, of body tissue or of other material. A constable, or at a constable's direction a police custody and security officer, may take from the inside of the person's mouth, a sample of saliva or other material.

26 *Marper* is authority for this.

aims in accordance with article 8(2). The Government is also satisfied that the provisions are proportionate for the following reasons:

a) The power can only be exercised in relation to a person who is subject to a TPIM notice—who is a person reasonably believed to be or have been involved in terrorism-related activity.

b) The power to take prints or non-intimate samples is only exercisable by a constable (or in Scotland, in the case of a swab from a person's mouth, at a constable's direction by a police custody and security officer and in the case of other samples, a constable on the authority of an inspector).

c) Before a constable in England, Wales or Northern Ireland takes the material, the individual must be informed of the reasons for the taking of the prints and non-intimate samples and the uses to which they may be put; and these matters must be recorded (paragraph 1(4) and (5) of Schedule 6). Where a person consents to the taking of the fingerprints and samples, that consent must be given in writing.

d) The powers are limited to prints and non-intimate samples—they do not allow for the taking of intimate samples.

e) It may be necessary to take the material from individuals subject to a TPIM notice so that the police can verify their identity, can conduct a search in relation to their material and can retain their data for crosschecking throughout the duration of the TPIM notice and for a circumscribed period afterwards.

f) The Government considers that the degree of interference with a person's privacy caused by a requirement to attend a police station and to provide prints and non-intimate samples is modest. By contrast, the potential benefits for the prevention and detection of crime and the protection of others and national security from verifying the identity of the individual and checking to see whether their biometric data can be matched against data taken from e.g. a crime scene are considerable.

g) Samples taken from individuals subject to a TPIM notice must be destroyed as soon as the DNA profile has been derived from it or, if sooner, within 6 months of the sample being taken (paragraph 12 of Schedule 6). The ECtHR in *Marper* held that the greatest interference with private life was caused by the retention of DNA samples—that is the actual biological material taken from individuals (albeit that DNA profiles also contain "substantial" amounts of unique personal data). The Government considers that paragraph 12 represents a significant protection against some of the concerns expressed in the *Marper* judgment about excessive retention of material (particularly at paragraphs 70 to 73 in relation to fears about the "conceivable use of cellular material in the future").

h) Prints, samples and DNA profiles may only be retained and used for limited purposes. In England, Wales and Northern Ireland, material may not be used other than in the interests of national security, for the purposes of a terrorist investigation, for purposes related to the prevention, detection, investigation or prosecution of crime or for identification of a deceased person or the individual subject to the TPIM notice. In Scotland, prints, samples and DNA profiles which are taken by a constable under the

powers in Schedule 6 may only be used in the interests of national security or for the purposes of a terrorist investigation.

i) The material must be destroyed if it appears to the chief officer of police that it was taken unlawfully (paragraph 6 of Schedule 6).

j) The material may only be retained for a period of 6 months from the date the TPIM notice ceases to be in force (or if a further TPIM notice is imposed during that period, for 6 months from the date that further notice ceases to be in force). If the TPIM notice is quashed, subject to a new notice being made, the material may only be retained until there is no further possibility of an appeal against the quashing (paragraph 8 of Schedule 6). The Government considers this limited retention period strikes an appropriate balance between respecting the right to privacy of the individual and preventing and detecting crime and protecting national security (including counter-terrorism). The retention period also compares favourably with the retention period under the "Scottish model" for retention which was commented on with approval in paragraphs 109 and 110 of *Marper* and by the Parliamentary Joint Committee on Human Rights in its 12th report of the 2009–10 session[27] and which is largely being adopted by the Government in this session's Protection of Freedoms Bill.[28]

k) Paragraph 9 of Schedule 6 provides that if, when the TPIM notice is imposed or before the expiry of the retention period, the person is convicted of a recordable offence (other than one exempt conviction) or, in Scotland an imprisonable offence, the material may be retained indefinitely. This replicates the policy under the Protection of Freedoms Bill[29] for the retention of material taken from convicted adults and is considered justified. The *Marper* judgment concerned the issue of retaining data from people who had not been convicted. The Government accepts that the retention of convicted people's data still needs to be justified as necessary in a democratic society, but it considers that this is supported by the substantial contribution which DNA records have made to law enforcement. In particular, it notes the decision of the ECtHR in *W v the Netherlands* [2009] ECHR 277, where a distinction was drawn between convicted and non-convicted people and where the ECtHR agreed with its previous decision in *Van der Velden v the Netherlands* (no.29514/05) that the interference caused by DNA retention was "relatively slight". Further, a central aspect of the ECtHR's reasoning in *Marper* does not apply to the case of convicted people: the fact of the conviction means that there is no risk of "stigmatisation",[30] which the ECtHR considered would arise if unconvicted people (who are entitled to the presumption of innocence) are treated in the same way as convicted people.

l) Paragraph 11 of Schedule 6 provides that, notwithstanding the retention periods set out above, material taken from a person subject to a TPIM notice may be retained for as long as a national security determination is made in relation to it by a chief officer of police. This is a determination, which may last for a renewable period of 2 years, that retention of the material is necessary for the purposes of national security. The

27 Paragraph 1.73.

28 Chapter 1 of Part 1. This provides (in brief) for the retention of material taken from persons charged with a qualifying offence (which includes terrorism offences) for 3 years and for the possibility of extending that period for a further 2 years on application to the court.

29 Clauses 5 and 6.

30 Paragraph 122.

Government considers it is essential that there should be a mechanism for retaining material beyond 6 months after the TPIM notice ceases to have effect, where this is necessary in the interests of national security. Where national security interests are engaged, it is impossible to prescribe in advance for how long it may be justifiable to retain DNA profiles and prints. National security and terrorism investigations are often prolonged, with the effect that a fixed retention period could have damaging consequences on the ability to investigate such threats. The *Marper* judgment does not specifically address the retention of material for national security purposes, although it does criticize the blanket and indefinite retention of biometric material for the purposes of preventing or detecting crime. It should be noted that paragraph 11 of Schedule 6 does not permit blanket retention in cases where data has been taken from an individual subject to a TPIM notice. Rather it requires the chief officer of police to positively consider and review the national security justification for the retention of each individual's material at regular intervals.

m) Further, every time a national security determination is made (or renewed) in relation to an individual subject to a TPIM notice, that determination (or renewal) will be reviewed by an Independent Commissioner (the Commissioner for the Retention and Use of Biometric Material). Importantly, the Commissioner will have the power to quash a national security determination if he considers that it should not have been made. The Commissioner is to be established under the Protection of Freedoms Bill to review the retention of material for national security purposes of material taken from persons other than those subject to a TPIM notice—and an amendment will be made to that Bill to extend the Commissioner's role to national security determinations made under this Bill.

n) Under the Protection of Freedoms Bill, the Secretary of State will be required to give guidance relating to the making or renewing of a national security determination. Such guidance will ensure that decisions are taken on a consistent basis. Before the guidance is brought into force the Secretary of State will consult with the Commissioner, and the guidance will then be required to be approved by both Houses. The Commissioner will be required to report annually to the Secretary of State regarding their functions, and the Secretary of State must then publish that report.[31]

76. The Government therefore considers that Schedule 6 to the Bill is compatible with article 8 of the ECHR.

24 May 2011

5. Letter from the Chair, to Rt Hon Theresa May MP, Home Secretary, 28 June 2011

The Joint Committee on Human Rights is scrutinising the Terrorism Prevention and Investigation Measures Bill for its compatibility with the UK's human rights obligations.

Your Department has published an ECHR Memorandum which helpfully provides a very full explanation of the Government's view that the Bill is compatible with the Convention.

31 See clauses 20 and 21 of the Protection of Freedoms Bill.

We took oral evidence from the then Minister of State for Security and Counter-Terrorism, the Rt Hon Baroness Neville-Jones, in February 2011 on the subject of the Government's Review of Counter-Terrorism Powers, including the proposal for TPIMs, and subsequently exchanged correspondence with her on the same subject.

In view of the large amount of explanatory material which is already in the public domain, the Committee does not propose to write to you with any specific questions about the Bill before reporting on it. However, I would like to give you the opportunity to supplement the information which has already been provided to the Committee about the human rights compatibility of the Bill if you wish to do so.

It would be helpful if we could receive any reply by 8 July 2011. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication. If a reply is received after that date I cannot guarantee that it will be taken into account in any Report by the Committee on the Bill.

I would also like to take this opportunity to renew the Committee's longstanding request for a briefing from your officials about the progress of the review of intercept as evidence. The TPIMs Bill brings the lack of progress on this issue into sharp focus and we would appreciate an update on the current status of the review and the likely timetable of any change in the current legal position.

I look forward to hearing from you.

28 June 2011

6. Letter to the Chair, from James Brokenshire MP, Parliamentary Under Secretary for Crime and Security, Home Office, 6 July 2011

Thank you for your letter of 28 June and the opportunity to provide further material on the compatibility of the Terrorism Prevention and Investigation Measures Bill with the UK's human rights obligations.

I am grateful for your acknowledgement that the material already provided gives a full explanation of the Government's position. Given this, I do not think there is any further material that we could usefully provide.

I am also, of course, happy for my officials to provide an informal briefing on the programme of work being undertaken on intercept as evidence. I understand that the Committee's Clerk and Parliamentary Branch here have been in preliminary contact regarding dates in the early autumn.

6 July 2011

List of Reports from the Committee during the current Parliament

Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432

List of Reports from the Committee during the last Session of Parliament

Session 2009–10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008–09	HL Paper 20/HC 185

Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008–09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008–09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee's First Report of Session 2009–10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111