Introduction

This Memorandum outlines the provisions in the Terrorism Prevention and Investigation Measures (TPIM) Bill which confer powers to make delegated legislation, and explains why these powers have been taken and the nature of, and reason for, the procedure selected for exercising those powers.

The TPIM Bill will repeal the Prevention of Terrorism Act 2005 and introduce a new regime that will be less intrusive in relation to the preventive measures that can be imposed on an individual. The Bill implements the recommendations on control orders of the Review of Counter-terrorism and Security Powers announced on 26 January 2011.

In particular the Bill sets out: the provisions for imposing TPIM notices, including the conditions that must be satisfied; establishes a two year limit for TPIM notices in the absence of new terrorism-related activity; sets out detailed provisions in relation to court scrutiny of the measures (including automatic review of the decision by the Secretary of State to impose a TPIM notice); requirements in relation to consulting the police and relevant prosecuting authority; detailed provisions in relation to the measures that may be imposed on an individual; provision about the variation, revocation or revival of TPIM notices; provisions for appeals and court proceedings; provisions relating to the quashing of a TPIM notice or measures in it; requirements in relation to reporting on the exercise of the powers and operation of the Act; and provisions in relation to fingerprints and other samples, powers of entry and search and the creation of a criminal offence.

Clause 18 and Schedule 4: Power to make Rules of Court for regulating the proceedings relating to TPIMs

Power conferred on: (a) for initial exercise of the power in England, Wales and Northern Ireland: Lord Chancellor  
(b) otherwise in England, Wales and Northern Ireland: Civil Procedure Rule Committee (England and Wales)  
Northern Ireland Supreme Court Rule Committee  
(Northern Ireland)  
(c) Court of Session (Scotland)

Power exercised by:  
(a) and (b): Statutory Instrument  
(c): Scottish statutory instrument (Scotland)

Parliamentary Procedure: (a) initial exercise of the power in England, Wales and Northern Ireland: affirmative resolution (approval by both Houses within 40 days of making)

---

1 Review of Counter-Terrorism and Security Powers Review Findings and Recommendations (Cm 8004), published on 26 January 2011.
1. Schedule 4 to the Bill (given effect to by clause 18) provides a rule-making power in relation to TPIM proceedings (the definition of which is found in clause 18) and appeals from such proceedings to the Court of Appeal or (in Scotland) the Inner House of the Court of Session.

2. It is appropriate to take this power because Rules of Court may make provision at a level of detail which is not appropriate to include in primary legislation. In addition, should procedural changes be required in the regulation of TPIM proceedings, Rules may be amended, subject to the relevant procedural safeguards, more easily and quickly than primary legislation.

3. Paragraph 2(1) of Schedule 4 provides that the person making the Rules must have regard to the need to secure that decisions are properly reviewed. It also provides that regard must be had to the need to secure that disclosures of information are not made where they would be contrary to the public interest. However, the latter provision, together with the rest of the provisions in paragraphs 2 to 4 which relate to closed proceedings in which evidence may be withheld from the individual and their legal adviser, is subject to paragraph 5 of Schedule 4. This incorporates the “read down” under section 3 of the Human Rights Act 1998 made by the House of Lords in Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF [2007] UKHL 46 and provides that nothing in those paragraphs or in the Rules made under them is to be read as requiring the court to act in a manner inconsistent with Convention rights (which includes in particular the article 6 right to a fair hearing).

4. Paragraph 2(2) of Schedule 4 provides an illustrative list of the matters about which the Rules may make provision. This includes the mode and burden of proof, the conducting of the proceedings in the absence of the individual and his legal advisers and the function of special advocates. Paragraphs 3 and 4 limit the scope of the Rule-making power by providing that various matters relating to disclosure must be secured by the Rules. These include the disclosure the Secretary of State is required to make and the procedure to be followed when the Secretary of State applies to the court to withhold material in the public interest (including provision about the gisting of such material).

5. Paragraph 6 of Schedule 4 provides that the Rules may provide for the court to make an anonymity order in respect of an individual in the context of TPIM proceedings.

6. The initial exercise of the Rule-making power in England, Wales and Northern Ireland is to be by the Lord Chancellor rather than by the usual Rule-making body for Rules of Court, namely the Civil Procedure Rules Committee (in England and Wales) and the Northern Ireland Supreme Court Rules Committee (in Northern Ireland). This is because the Rules need to be in force at the same time as the Bill comes into force – that is the day after Royal Assent. This is so that the Rules are available for TPIM proceedings as soon as they arise, which is likely to be immediately because TPIM
proceedings include proceedings in which the Secretary of State applies for permission to impose a TPIM notice on an individual. It would be very difficult for the Rules Committees to make the Rules on the initial exercise of the powers to meet this timetable and it is considered that the Lord Chancellor is best placed to make the Rules initially.

7. Before making the Rules, the Lord Chancellor is required to consult with the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland as appropriate. And after the Rules are made they must be laid before Parliament and approved by resolution of both Houses within 40 days (not counting time during which Parliament is adjourned for more than 4 days or is dissolved or prorogued), failing which the Rules will cease to have effect. The Government considers that this affirmative procedure provides the appropriate level of Parliamentary scrutiny of the Rules, while allowing the Rules to be made and come into force swiftly.

8. After the initial exercise of the powers, should the Rules need amendment, the usual rule-making procedure in the Civil Procedure Act 1997 (for England and Wales) and in the Judicature (Northern Ireland) Act 1978 (for Northern Ireland) will be followed. This is the negative resolution procedure, but the Rules will be made by the relevant Rules Committee and following the usual consultation requirements.

9. In Scotland, the Court of Session will make the Rules in the usual way. The Court of Session is able to make the Rules swiftly and so the issue above as to timing does not apply. Although the Rules are not subject to formal Parliamentary approval in Scotland, they are subject to Parliamentary scrutiny.

10. There is precedent for the Rule-making power in Schedule 4 to the Bill – both in terms of the substance of the Rules to be made under it and in terms of the Parliamentary procedure for making them. This is found in the Schedule to the Prevention of Terrorism Act 2005 (in relation to control orders), in Part 6 of the Counter-Terrorism Act 2008 (in relation to financial restriction proceedings) and in Part 1 of the Terrorist Asset Freezing Etc. Act 2010 (in relation to asset freezing proceedings). For England and Wales and Northern Ireland, the Rules that will be made under the power in the Bill will be largely modelled on those in Part 76 of the Civil Procedure Rules 1998 – made under the Schedule to the Prevention of Terrorism Act 2005. In so far as those Rules relate to closed proceedings, there is additional precedent for such proceedings, for example in the context of the Special Immigration Appeals Commission proceedings and Proscribed Organisations Appeal Commission proceedings. Similarly, for Scotland, the Rules will largely modelled on those for control order proceedings in Scotland.

**Clause 21: Power to repeal, renew or revive for a further 5 years by order the operative provisions of the Bill**

*Power conferred on:* Secretary of State

*Power exercised by:* Statutory Instrument

*Parliamentary Procedure:* Affirmative resolution (including urgency procedure – approval by both Houses within 40 days of making)
11. This clause was introduced by way of government amendment at Report stage in the Commons as a concession.

12. The Bill as introduced was to be permanent legislation. This was considered appropriate as the Bill followed the Government’s Review on Counter-Terrorism and Security Powers, which had examined in detail the need for preventative measures to protect the public from a risk of terrorism and had concluded that there was “a continuing need to control the activities of suspected terrorists who can neither be successfully prosecuted nor deported”. However, in the debate at 2nd Reading and during consideration of the Bill in Commons Committee, a number of contributors argued that some form of regular renewal of the legislation by Parliament was required. This was to reflect the unusual nature of the legislation and to ensure that operation of the legislation was kept under review by Parliament. In light of this, the Government brought forward an amendment at Report stage inserting new clauses 21 and 22 into the Bill.

13. Clause 21(1) makes a sunsetting provision for the operative clauses in the Bill (“the TPIM powers”), providing they will expire 5 years after coming into force. The TPIM powers are the Secretary of State’s powers to impose a TPIM notice or to vary a TPIM notice without consent or to extend or revive a TPIM notice. The effect of the expiry of these powers is set out in clause 22 – the principal effect being that any TPIM notice is to be treated as if it is revoked (subject to remaining in force for a transitional period of 28 days unless previously quashed or revoked).

14. However, it is considered that there should be an opportunity for the TPIM powers to be renewed (so that they do not expire after 5 years), in the event that those powers continue to be considered necessary for public protection at that time. Clause 21(2)(c) therefore makes provision that the Secretary of State may, by order, renew the TPIM powers for a further period of up to five years. And further orders continuing the relevant provisions in the Bill in force for periods of up to 5 years at a time may be made. Clause 21(2)(a) also provides the Secretary of State with the power to repeal the relevant provisions in the Bill by order at any time. This will allow her to remove the TPIM powers from the statute book in the event that they are no longer considered necessary, and to do so swiftly (in advance of any suitable vehicle for primary legislation or the expiry of the TPIM powers in accordance with this clause). Clause 21(2)(b) provides that the Secretary of State may at any time revive the TPIM powers in the Bill for a period of up to 5 years (should those powers have previously expired in accordance with the expiry provisions in this clause).

15. It is considered that the provision that the Bill should sunset after 5 years or be renewed or revived for a further period of up to 5 years (rather than say, one year) is appropriate in view of the conclusion reached in the Counter-Terrorism Review noted above that there will remain the need for these preventative powers “for the foreseeable future”. In light of this conclusion, and the lengthy and detailed review process which led to it – and the fact that Parliament is being given the opportunity to consider and scrutinise the TPIM Bill fully during its passage – it is considered

---

2 In contrast to the Prevention of Terrorism Act 2005, which provides for annual renewal, the TPIM Bill is not subject to an accelerated Parliamentary timetable.
unnecessary for the continuation of the need for the powers to be considered by Parliament annually. Rather, a period of 5 years is considered appropriate as this will enable each new Parliament (and the Government in place at the time) to consider the issue afresh. The period of 5 years corresponds with the fixed period for which a Parliament will last should the Fixed Term Parliaments Bill become law. The order making power provided by clause 21(2)(a), mentioned above, will mean that the powers can be repealed at any time during such a five year period if this is considered appropriate.

16. Parliament will of course have the opportunity to be informed about and to debate the operation of the TPIM regime between these 5 yearly intervals. For example, the Secretary of State is required to report quarterly to Parliament on the exercise of her powers under the Bill (see clause 19); the Secretary of State is required to lay before Parliament a copy of the independent reviewer’s annual report on the operation of the Bill (see clause 20); Parliamentary questions about the TPIM regime may be asked; and the Bill will be subject to post-legislative scrutiny 3 to 5 years after commencement, which requires the Home Office to submit a memorandum reviewing the Act to the Home Affairs Select Committee.

17. Before making an order under clause 21, the Secretary of State must consult the persons mentioned in clause 21(3) (the independent reviewer appointed to review the operation of the 2011 Act and the Bill, the Intelligence Services Commissioner and the Director-General of the Security Service).

18. The order-making power is subject to the affirmative resolution procedure (clause 21(4)). Parliament should have the opportunity to debate fully the question of continuing in force, or reviving (for up to 5 years), or repealing the powers in the TPIM Bill and so this is the appropriate Parliamentary procedure.

19. The order may also be made subject to the urgency procedure (clause 21(5) to (6)). This allows the Secretary of State to make an order under clause 21 where that order contains a declaration by the Secretary of State that the order needs, by reason of urgency, to be made without the prior approval by resolution of each House. In that event, the order must be laid before Parliament after being made and if not approved by a resolution of each House within 40 days of being made (not counting time during which Parliament is adjourned for more than 4 days or is dissolved or prorogued), the order ceases to have effect at the end of that period.

20. It is considered necessary for the Secretary of State to have the power to make an order under clause 21 in this way in case the powers need renewal or revival and it is not possible, by reason of urgency, to secure Parliamentary time for the debates and resolutions in advance. This might happen for example if the Secretary of State had decided not to seek to make an order renewing the powers because the national security situation had improved sufficiently to safely allow the powers to expire. But then the terrorist threat suddenly increased again very shortly before the powers were due to expire. In such circumstances, the need for the powers to continue in force, without the advance approval of Parliament (which there would be no time to seek) is likely to be urgent.
21. Clause 21(7) provides that if an order made under the urgency procedure is not approved within the 40 days of being made, this does not affect anything done in reliance on the order or prevent a new order being made. This is a standard provision found elsewhere in legislation where the urgency procedure is provided for. See for example section 123(6)(b) of the Terrorism Act 2000 and section 13(7) of the Prevention of Terrorism Act 2005 (“the PTA”).

22. Clause 22 of the Bill makes transitional and saving provision for cases where the TPIM powers expire or are repealed in accordance with this clause. In brief, any enhanced TPIM notices in force immediately before expiry or repeal continue in force for a transitional period of 28 days only (unless quashed or revoked before that time) and then cease to have effect. (Variations which relax or remove measures in the TPIM notice, or which are made by agreement with the individual, may be made during the 28 day transitional period.) Key TPIM proceedings, including the automatic court review, appeal hearings and claims for damages, may continue notwithstanding the expiry or repeal (as a safeguard to the individual).

23. There is direct precedent for the order-making power in clause 21, including the associated Parliamentary procedure. This is found in section 13 of the Prevention of Terrorism Act 2005, which provides the power to repeal or renew or revive for 12 months the control order powers in that Act. The only substantive difference between that power and the power in the Bill is that the control order powers may only be renewed or revived for a period of up to one year. The power to renew or revive the TPIM powers allows those powers to remain in force for up to 5 years. This is considered appropriate however, in view of the different legislative histories of the Prevention of Terrorism Act 2005, which was taken through Parliament as emergency legislation, and the TPIM Bill, which has been introduced following a thorough review of the powers and which is receiving full legislative scrutiny during its passage.

Clause 26: Temporary power for imposition of enhanced terrorism prevention and investigation measures

*Power conferred on:* Secretary of State  

*Power exercised by:* Statutory Instrument  

*Parliamentary Procedure:* None

24. Clause 26 was introduced by Government amendment at Commons Report stage, following debates on this point at Second Reading and Committee stages.

25. Clause 26 makes provision for the Secretary of State, if she considers it necessary by reason of urgency, to make an order introducing a regime which allows for the imposition, by notice, of enhanced measures on individuals whom the Secretary of State is satisfied, on the balance of probabilities, are or have been involved in terrorism-related activity. Such an order may only be made during the limited period between when Parliament is dissolved and the first Queen’s Speech of the new Parliament after a general election.
26. This order-making power is required in the event the enhanced TPIM regime needs to be introduced urgently during such a period – because at such a time it is not possible to pass primary legislation (because Parliament does not exist during dissolution and substantive public business such as the passing of primary legislation cannot take place until after the Queen’s Speech).

27. As mentioned above, the Government’s Review of Counter-Terrorism and Security Powers recommend the repeal of the control order regime and the introduction of a less intrusive and more focused regime of terrorism prevention and investigation measures (TPIMs). But the review also concluded that there may be exceptional circumstances where more stringent measures are required to protect the public than those available under the TPIM Bill. The Government therefore committed to preparing draft emergency legislation for introduction if such circumstances arose. Such draft emergency legislation has been published and is currently subject to pre-legislative scrutiny.

28. The draft Bill is available on the Home Office website. It makes provision for a regime which allows the Secretary of State to impose “enhanced TPIM notices” on individuals where the conditions specified in the Bill are met. The restrictions that would be available under enhanced TPIM notices are more stringent than those which will be available under the TPIM regime should the TPIM Bill become law. However, an enhanced TPIM notice may only be imposed in cases where the Secretary of State is satisfied on the balance of probabilities that the individual is or has been involved in terrorism-related activity (a higher threshold than the test for imposing a standard TPIM notice).

29. Aside from these differences, the regime for enhanced TPIM notices provided for in the draft Bill is very similar to that for standard TPIM notices and so the Bill makes provision for the majority of the TPIM Bill to apply (see clause 3 of that draft Bill).

30. If circumstances which necessitate the introduction of the enhanced TPIM regime occur during a period of dissolution or before the Queen’s Speech following such a period, it will not be possible for the Government to bring forward the draft Bill (to be taken through Parliament as emergency legislation) as it would during any other period. The order-making power contained in clause 26 is therefore needed to enable the introduction of the enhanced TPIM regime during this limited period – and when the case is urgent.

31. The power in clause 26 is circumscribed not only in terms of the circumstances in which it may be exercised (as set out above) but also in terms of the provision that may be made in the order. Clause 26(2) provides that the order is one to make provision for, or in connection with, enabling the Secretary of State to impose enhanced TPIM notices. Clause 26(3) to (10) then constrains this power to circumscribe the provision that may be made which, in brief, is intended to be very similar to the provision found in the draft Enhanced TPIM Bill. So clause 26(2) and (6)(a) contain a key safeguard intended for the enhanced TPIM regime, namely that the Secretary of State may only impose an enhanced TPIM notice if she is satisfied on the balance of probabilities that the individual is or has been involved in terrorism-related activity. Clause 26(3) sets out the other key feature of the enhanced TPIM regime – namely what the “enhanced measures” are. These correspond with those in
the draft Enhanced TPIM Bill and are set out in detail in this provision. These measures include (in brief) (a) a requirement on the individual to reside at a specified residence in the United Kingdom, (b) a requirement not to allow others to reside there without the Secretary of State’s permission, (c) a requirement to remain at the specified residence between specified hours (d) a geographical boundary; (e) a prohibition on access to electronic communications devices without the permission of the Secretary of State and (f) a prohibition (with exceptions) on association with others without the permission of the Secretary of State.

32. Clause 26(4) provides that the regime for enhanced TPIM notices must correspond to the regime for standard TPIM notices (as set out in the “relevant provisions” of the TPIM Bill) except insofar as subsections (5) to (10) require or permit differences. Clause 26(11) allows the order to make provision applying any enactment – this is intended to allow the order to make provision similar to that in clause 3 of and Schedule 2 to the Enhanced TPIM Bill applying the “relevant provisions” of the TPIM Bill as appropriate.

33. The “relevant provisions” of the TPIM Bill which are to be reflected in the order made under clause 26 include those which make provision in relation to the imposition of TPIM notices, the meaning of terrorism-related activity, the provisions relating to court scrutiny of TPIM notices (including the necessity to obtain the prior permission of the court before imposing measures, or to use the urgency procedure, and the automatic substantive court review of the imposition of measures), the consultation requirements relating to the police and prosecuting authorities, the obligation on the Secretary of State to keep the necessity of the measures under review, the provisions relating to variations, revocation and revival of TPIM notices, provisions and protections relating to the quashing of TPIM notices, provisions relating to appeals and court proceedings (including the use of closed procedures), provisions relating to the review of and reporting on TPIM powers, provisions relating to the offence of contravening measures in a TPIM notice and provisions relating to powers of entry, search, seizure and retention and powers relating to the taking and retention of biometric material relating to persons subject to TPIM notices. (See definition of “relevant provisions” in clause 27(5)).

34. Clause 26(5) makes provision for the order to set out how the enhanced TPIM regime is to interact with the standard TPIM regime. It provides that the order must secure that standard measures and enhanced measures are to be imposed by separate notices and that at any one time an individual may not be subject to both. It also allows the order to provide that the use of the powers under one regime does not affect the use of the powers under the other. Similar provision is found in clause 4 of the draft Enhanced TPIM Bill.

35. Clause 26(7) makes provision in relation to the duration of any enhanced TPIM notice imposed under an order made under this clause. Clause 5(1) of the TPIM Bill provides that a (standard) TPIM notice remains in force for one year (unless extended for a further year). Clause 26(7) provides that an enhanced TPIM notice may only remain in force for as long as the temporary enhanced TPIM notice remains in force (that is, for a maximum of 90 days – clause 27(1) but see also paragraphs 37 and 38 below).
36. Clause 26(9) allows consequential changes to be made. This would, for example, allow references to “TPIM notices” in any enactments to be read as including reference to “enhanced TPIM notices”. Again, such consequential provision and modifications are found in the draft Enhanced TPIM Bill. Clause 26(9) also allows for appropriate variations to be made from provisions in the TPIM Bill, for example in relation to the provision for the requirements on the review of and reporting on the operation of the powers, which will need to be different to take account of the shorter period for which those powers will remain in force under the order.

37. Clause 26(10) provides that the order may make such transitional and savings provision as appropriate in relation to the expiry or repeal of the order, including provision enabling an enhanced TPIM notice made under the order to remain in force for a transitional period of up to 28 days (again, reflecting the transitional provision in the draft Enhanced TPIM Bill – see clause 10 of that Bill).

38. Any transitional provision made under an order may not need to be relied on in practice. If the circumstances which necessitated the introduction of the enhanced TPIM powers by order still exist after the Queen’s Speech, it is likely that the Government will introduce the Enhanced TPIM Bill as emergency legislation as soon as Parliamentary business resumes (and before the 90 days for which the order remains in force expires). In this event, the Bill will repeal the order and will make transitional provision in relation to enhanced TPIM notices imposed under the order (see clause 12 of the Enhanced TPIM Bill – which, in particular, provides that any enhanced TPIM notice imposed under a temporary enhanced TPIM order is to be treated as if imposed under the Bill. This includes provision that such an enhanced TPIM notice is to remain in force for a period of a year, rather than just for the duration of the temporary enhanced TPIM notice – as notices imposed under the draft Bill will remain in force for a year.) However, transitional and savings provision will need to be made in the order to cover the eventuality that the Enhanced TPIM Bill is not passed (in order to allow 28 days for other measures to be put in place following the expiry of the order and to make provision in relation to the continuation of enhanced TPIM proceedings following that expiry).

39. Clause 26(11) makes provision to ensure the Secretary of State may exercise her powers to make the provision described above in particular forms. In particular, clause 26(11)(b) allows her to make provision applying any enactment (with or without modifications) – which is the main way by which the draft Enhanced TPIM Bill is drafted, to ensure that the enhanced TPIM regime corresponds to the standard TPIM regime as intended (see clause 3 and Schedule 2 to that draft Bill). Clause 26(11)(a) allows the Secretary of State to amend any enactment. This may be necessary, for example, to allow the Secretary of State to make the equivalent consequential provision to that made in paragraph 7 of Schedule 2 to the draft Enhanced TPIM Bill (in relation to how the provision on retention of biometric material in Schedule 6 to this Bill is to apply when a person is subject, at different times, to both a standard and an enhanced TPIM notice). Clause 26(11)(c) allows for sub-delegation, including allowing the order to make provision for secondary legislation to make technical amendments in the operation of the enhanced TPIM
regime (this would correspond to the order-making powers in paragraphs 8 and 9 of Schedule 2 to the Enhanced TPIM Bill).  

40. Clause 27(1) provides that the temporary enhanced TPIM order will (except for transitional or saving provision) cease to have effect 90 days after the order is made (or at such earlier time as is provided in the order).

41. Clause 27(2) provides the Secretary of State with the power to repeal an order made under this power at any time. This power allows the Secretary of State to repeal the order whether or not Parliament has resumed business again following the general election and whether or not the revocation is urgent.

42. An order made under clause 26 must be laid before Parliament as soon as practicable after it is made (clause 27(3)). If the order is made during a period of dissolution, this requirement in practice means that the order must be laid as soon as possible after the Queen’s Speech. Other than being laid before Parliament, the order is subject to no Parliamentary procedure. This is because:

(a) The order may only be made during a period when Parliament is not available to consider legislation (by either the affirmative or negative resolution procedure).

(b) The order only remains in force for a period of 90 days at most, and may be repealed by order before its expiry.

(c) Parliament will have the opportunity to debate the principles relating to, and the detail of the provision for, enhanced TPIM notices, and whether it is appropriate to continue that regime, in the context of the emergency legislation that the government is likely to bring forward immediately following the resumption of business following the general election.

(d) The provision to be made in the order will have already been debated both in the context of this Bill and in the context of the parallel provision in the draft Enhanced TPIM Bill (on which the order will be modelled) – which will have undergone pre-legislative scrutiny.

Home Office  
September 2011

---

3 As to which, see the memorandum on the delegated powers contained in the draft Enhanced TPIM Bill, on the Home Office website.