House of Lords
House of Commons

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

Draft Enhanced Terrorism Prevention and Investigation Measures Bill

Session 2012–13

Oral Evidence

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

The Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill was appointed by the House of Commons on 28 June 2012 and by the House of Lords on 3 July 2012 to examine the Draft Enhanced Terrorism Prevention and Investigation Measures Bill and report to both Houses by 23 November 2012.

Membership

HOUSE OF LORDS

Baroness Doocey (Liberal Democrat)
Baroness Gibson of Market Rasen (Labour)
Lord Jay of Ewelme (Crossbench)
Lord King of Bridgewater (Conservative)
Baroness Neville-Jones (Conservative)
Lord Plant of Highfield (Labour)

HOUSE OF COMMONS

Mr Bob Ainsworth MP (Chair) (Labour)
Nicola Blackwood MP (Conservative)
Mike Crockart MP (Liberal Democrats)
Chris Evans MP (Labour/co-op)
Rebecca Harris MP (Conservative)
Jesse Norman MP (Conservative)

Witnesses

Wednesday 11 July 2012

David Anderson QC, Independent Reviewer of Terrorism Legislation

Wednesday 17 October 2012

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

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

Wednesday 24 October 2012

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

Sophie Farthing, Policy Officer, Liberty

Wednesday 31 October 2012

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

Oral Evidence

David Anderson QC, Independent Reviewer of Terrorism Legislation, examined.

Q1 Chairman: Good morning. Thank you very much for giving evidence to the Committee. This is a Joint Committee of the House of Lords and the House of Commons. Some of us have been engaged with the issue of TPIMs in the past, if not enhanced TPIMs yet; some of us have not. We thought it would be good if, before the recess, we could take some evidence from yourself to get our minds working on the issues that you have been grappling with. I think you wanted to make a brief opening statement to the Committee, Mr Anderson.

David Anderson: I will make it very brief. I wanted to draw the Committee's attention to two of my own reports, both laid before Parliament this year, that may be relevant to the Committee's deliberations. The first is my report on control orders. Although it is entitled "Control Orders in 2011", it is intended as an epitaph for the system. It gives as much detail as I felt I could about the operation of control orders over the six years that they were in force. In chapter 6 I ask, and try to answer some questions such as, were control orders effective; were they enforceable; were they counter-productive; were they fair; and indeed, what is to be expected of TPIMs? I touch on the subject of ETPIMs, though not in a great deal of detail, in chapter 5 of the report.

The second is my report on the Terrorism Acts in 2011, published on 27 June this year. That report summarises the development of counter-terrorism law generally over the past few years, as well as the operational background, before reviewing the operation of two Acts with which the Committee will be familiar, but with which it is perhaps not so directly concerned on this occasion: the Terrorism Act 2000 and the Terrorism Act 2006.

Q2 Chairman: Thank you very much for that. We have a number of questions, which we are going to try to get through in the next hour, if we can. We will see how we go. Notwithstanding the reports which you pointed out to us, could you describe your view on the Government's counter-terrorism policy since 2005? Give us a general view of the need for it and its effectiveness.

David Anderson: I can certainly do that. I shall try not to stray into the political debate, which is no part of my function. My job is to inform it as well as I can on the basis of the things I am allowed to read and the people I am allowed to speak to in doing the job. Very roughly, looking back 12 years, you see the Terrorism Act 2000, intended as a complete code of counter-terrorism law, very carefully thought about before it was introduced.But of course 9/11 and subsequently the London bombings put paid to any suggestion that it might be complete. In 2001, you had the introduction of indefinite detention in Belmarsh of foreign nationals who were suspected of terrorism. That was struck down by the courts in 2004, and so in 2005 you had control orders under the Prevention of Terrorism Act 2005, which is the origin of TPIMs. You had further Acts passed in 2006 and 2008.

The period since the election of 2010, as I read it, has seen a cautious rebalancing in favour of liberty. Whether that reflects political change or simply a perception of reduced risk I don't know and it is not for me to say, but the principal manifestations of this have been, first, the repeal of the old section 44 no suspicion stop and search power; secondly, the reduction from 28 to 14 days of the maximum period for which somebody can be held before charge; and thirdly, of course, the replacement of control orders by TPIMs, which I see as significantly less onerous than control orders were. Perhaps prudently, in light of the fact that one never knows how things are going to develop, in each of those three cases, an emergency power effectively has been retained. In the case of section 44, it is section 47A. It is another no reasonable suspicion stop and search power, but the conditions for using it are very tight—so tight that it has never been used in about 16 months. In the case of 14 days,

there is a draft Bill analogous to this one that would allow Parliament to put it back up to 28 days, if it thought it appropriate. Then in relation to TPIMs, we have the Bill that this Committee is concerned with.

Q3 Chairman: TPIMs are obviously rowing back, as you said, from the control order regime towards liberty. What about the need for enhanced TPIMs? How do you see that balance between protection on one side and civil liberties on the other?

David Anderson: Putting it very broadly, TPIMs are a significant rolling back of control orders. There are a number of differences. One of the most important ones is the two-year limit, which means that you cannot be parked on a TPIM indefinitely—and some people were on control orders for very long periods, in excess of three and four years. The TPIM has a two-year limit unless new evidence comes to light. You have the end of relocation, and you also have certain rights that you did not have under control orders: the right to a landline; the right to a mobile telephone line; and the right to a computer with internet access. All these things exist under TPIMs. As I understand the purpose of the ETPIM, it is to allow Parliament to reintroduce restrictions which look very like the old control orders. There are a few differences, but not very many. As I see it, that is the scheme of the draft Bill.

Q4 Chairman: You have no concerns about it, or do you?

David Anderson: You will see from my report what I thought about control orders. I think they make anybody uneasy because, although the whole process is highly judicialised, they are, at the end of the day, an Executive measure and require the Home Secretary to have no more than a reasonable belief—for TPIM, that is—that someone has been involved in terrorism. That is an improvement on reasonable suspicion, which was the old law under control orders, but once again you have reasonable belief in relation to TPIMs. ETPIMs in one interesting respect could be described as a more liberal measure than the TPIM, in that the threshold for them is balance of probabilities. Although I assume you are going to think of voting on the ETPIM Bill only if things get worse than they are at the moment, there will be no question of imposing an ETPIM on anybody unless the Home Secretary is persuaded, on the balance of probabilities, that they have been involved in terrorism, which to my mind makes them more tolerable. It also begs the question as to why a similar balance of probabilities test could not be applied in relation to TPIMs, and indeed other Executive orders, such as proscription orders and asset-freezing orders, but I suspect that is a different question, which I will certainly be returning to in future reports.

Q5 Mike Crockart: Do you think that enhanced TPIMs do represent a return to the control order regime, or is the system being proposed here a far better one than what existed for the six years of the control orders?

David Anderson: There are differences. The first one is the balance of probabilities test, which is certainly a move in the liberal direction. The second difference is that there is a finite range of restrictions under an ETPIM, whereas with control orders there was no finite list—there were illustrative orders that could be made—but there is a cap placed on those. The third thing, which I suppose is also in the liberal direction compared with control orders, is the two-year duration of an ETPIM. That can be piled on top of any period you have already served on a TPIM. You cannot be under both of them at once, but you could, at least notionally, come off a two-year TPIM and, if the ETPIM Bill became law, could go on to a two-year ETPIM as well, but there is still a time limit on it.

The only other substantive difference I can see from control orders—I may have missed something—relates to travel abroad. Under a control order, there could be an absolute prohibition on travel abroad. I think I am right in saying that, under the ETPIM Bill, the most that could be required is that the Secretary of State give permission before travel abroad be allowed, but in most respects the

intention of the drafters of the Bill appears to have been to replicate what was possible and generally imposed under control orders.

Q6 Mike Crockart: But to do so under a much closer regime and with a higher evidential hurdle to get over.

David Anderson: Yes. The balance of probabilities is certainly different from reasonable belief, though how many cases would turn out differently in practice because of that change in test I don't know. There is a precedent for balance of probabilities even in control orders, because if you look back to the 2005 Act and the old provision for a derogating control order, the equivalent emergency provision for a control order that would have required us to derogate from the European convention similarly required the balance of probabilities. In the end none was ever made, thank goodness, but it is a precedent for what you now see in the ETPIM Bill.

Q7 Mike Crockart: Can I ask one very specific question which is to do with the conditions put in place? One of the conditions is that some or all of the terrorism-related activity is new. I am interested to hear your feelings about the way that that is framed.

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

Q8 Mike Crockart: Finally, do you think that this achieves its intended purpose?

David Anderson: I think it does. When I looked at control orders, I concluded that the whole subject has been intensely litigated for years on end, and features of the Act as it was originally framed that appeared objectionable were worried away at by the courts, both in this country and in Strasbourg, until you got to a system that was—I think everyone would accept—Convention-compliant, at least in principle, though of course there might be individual control orders that overstep the boundaries. I find it difficult to get too upset about the ETPIM Bill because, really, it simply reintroduces the law as it was. One assumes that it will be reintroduced only in extreme circumstances, so it is no longer the norm, and there are additional safeguards, in particular the higher trigger point—the balance of probabilities—and the two-year limit. In a sense, it seems very familiar to something that has been litigated with great intensity for years on end and that operates, dare I say it, perhaps not with complete fairness but about as fairly as a measure of this kind could operate.

Q9 Nicola Blackwood: One of the concerns expressed in the process of the various committees and debates on the TPIMs Bill is the one you just raised, which is that ETPIMs will be brought into force only in extreme circumstances, one assumes, and no one is quite sure in what circumstances it would come into force. The trigger mechanism is "exceptional circumstances where a serious terrorist risk that cannot be managed by other means". Do you think that is sufficiently defined in the draft Bill, and is it an appropriate standard, in your opinion?

David Anderson: I suppose it is for Parliament to decide in what circumstances it wishes to introduce this Bill. Certainly, in the counter-terrorism review and in the explanatory notes to the Bill one sees set out the concept of a "very serious terrorist risk that cannot be managed by other means".

Whether one seeks to be any more prescriptive is quite difficult, because there are perhaps a number of possible occasions on which Parliament might want to think about a Bill like this.

Q10 Nicola Blackwood: Do you think that the trigger mechanism should be put on a statutory footing, for example?

David Anderson: As I understand it, there is not really a trigger mechanism. There is under sections 26 and 27 of the TPIM Act, but that relates only to the position when action is thought to be needed when Parliament has been dissolved. As you know, it gives a short-term power to introduce a measure until Parliament can come and debate it. Although it says in the explanatory notes, as it said in the review of counter-terrorism powers, that these measures would be required only in the event of a very serious terrorist risk—it may be that the Home Secretary would feel bound by that, if she wished to introduce this Bill to Parliament—I would have thought that ultimately it is for Parliament to decide, as it always is, whether or not it wants to enact this legislation. It is difficult to see how a future Parliament could be fettered by some statutory or non-statutory test that might seek to determine when it could or could not adopt primary legislation.

Q11 Nicola Blackwood: Yes, but there has to be some form of standard system by which you can be assured that it will be applied in a rigorous manner each time it is brought forward.

David Anderson: Yes, but if something really terrible happened—I don't suggest for a moment this is remotely realistic—but if there was some dreadful series of bombings and massacres in all our major cities at the same time, Parliament would retain, as I see it, complete discretion to act as it wished. When people were getting very worried in the 1880s about the Fenian outrages, the Explosive Substances Act had all three readings in both Houses and was passed by Parliament in a single night. No one could ever take away Parliament's power to act in that way.

As I understand the purpose of a draft Bill such as this, it is to increase the chances that Parliament will act in a moderate and proportionate way by preparing for it in advance something that looks as though it has been carefully thought about and is likely to be a proportionate response even to a serious situation. It does not seem to me that one could or should seek to prohibit Parliament from reacting as it thinks fit.

Q12 Nicola Blackwood: You are happy with the definition as it stands with no additional measures introduced in the draft Bill?

David Anderson: It seems to me that it has political force. What is perhaps important about it is "cannot be managed by other means". Both my predecessor Lord Carlile and I have been very firm in our reports on control orders, and now TPIMs, that they should be a last resort, and all the more should enhanced TPIMs be a last resort, not only in the individual case but also as a generality. It seems to me that that important point is put across, but that ultimately it is going to be a political test. If all of this had been done by a power vested in the Secretary of State to issue an order introducing ETPIMs, of course you could limit the circumstances in which the order could be introduced by statutory wording, but that is not how Parliament has decided to do it; it is to be for primary legislation, and Parliament cannot be fettered in terms of what it says in primary legislation.

Q13 Nicola Blackwood: You don't think that this problem could have been addressed by measures under the Civil Contingencies Act 2004?

David Anderson: It is an interesting idea. I don't know whether you will be taking evidence from my special adviser, Professor Clive Walker, who probably knows more about counter-terrorism law than anybody else in this country, but I know that he is a proponent of this idea, which is why I would be reluctant even to attempt to shoot it down. But I think there are difficulties with the Civil Contingencies Act. The same point was considered in the context of the 14/28 days debate. I think

that you may have been on the Joint Committee that considered that. You will remember the debate about that involving Liberty, Lord Pannick and others. Although it is true that there is a power to take necessary measures in the event of an emergency, under the Civil Contingencies Act, the point could be made that, although there are controls on the exercise of that power, the discretion left to the Secretary of State would be far broader than this Bill. Here you have something that has been very carefully thought out, and will have been very carefully debated by this Committee, and that gives people a pretty good idea of what to expect. One would imagine there had better be some pretty good reasons if Parliament is going to seek to amend this Bill when it comes to it. The Civil Contingencies Act is perhaps a broader canvas and is designed for really serious emergencies, and consequently the power granted to Ministers is extremely broad.

Q14 Baroness Neville-Jones: I would like to pursue the exceptional circumstances criterion a little further. It is quite vague. What is one meant to understand by it? Could you give us a real-life illustration of the sort of circumstances in which you think this power might apply? For instance, do you think it applies in circumstances where the alert state has gone to critical, in which case it is a general condition, or does it apply where you have a peculiarly dangerous individual who, for certain reasons—lack of evidence, say—you are not able to deal with in other ways, or is it a combination? What would Parliament think it was trying to deal with in these so-called exceptional circumstances where, I have to say, it is very difficult to have proportionate legislation—but that is a separate issue?

David Anderson: I suspect that Baroness Neville-Jones is very much better qualified to answer that question than I am, but, bearing in mind that one already has available the weapon of TPIMs, attempting to be logical about it, I suppose the circumstances in which the ETPIM Bill would be absolutely necessary and other means, including TPIMs, would not be adequate to do the job, would be if you had possibly very dangerous people, or people who are assessed to be very dangerous, coming to the end of a two-year TPIM that could not be rolled over year on year, as was the case with an old control order, and the view was taken that these people absolutely could not be prosecuted or deported, but surveillance would not be adequate to keep the public safe from them. I suppose that would be one such situation. I quite accept it is a little difficult for Parliament to be told very much about that or express any view on the details of the case. Looking at it logically, I suppose the other situation in which the ETPIM Bill, rather than other things, might be thought to be necessary would be one in which a restriction not available under the TPIM Act might be considered absolutely essential, possibly in the case of a geographically very concentrated cell. Relocation, as I found in my report, although in many ways a repugnant notion, was undoubtedly useful in some cases.

Q15 Baroness Neville-Jones: The circumstances here in your view are more attached to the nature of the individuals than the nature of the general situation.

David Anderson: I am not sure it would be enough just to say, "The situation has moved to critical and we need all the powers we have." You would also have to show, quite rightly, that this specific Bill, which is a very limited extension of a power we already have, is necessary. In order to find that to be the case, you would have to be satisfied that the TPIM Act is not enough. It is not just a question of finding someone you cannot prosecute and putting him on a TPIM. If you can do that, this Bill is not necessary. It is either because the TPIM has run out or because, for some reason, a TPIM is considered not to be strong enough. Relocation is perhaps the most obvious way in which that might arise, although there are other differences as well.

Baroness Neville-Jones: That is helpful, thank you.

Q16 Baroness Doocey: Do you believe that emergency legislation is the appropriate mechanism for enactment of the draft Bill?

David Anderson: We went through this question in the debate on 14/28 days. In that context, it arose perhaps even more acutely. There, one had a situation where perhaps there was a particular plot and the police and Crown Prosecution Service were saying there was no way they would be able to reach a charging decision within 14 days. It seems to me very difficult to imagine that Parliament would be sufficiently informed to make the decision as to whether 14 days should be extended to 28 in that case. For that reason, what I suggested before that Committee—and so I think did the Committee itself in its recommendations—was that there should be a ministerial power, granted by Parliament and renewable every year, exercisable only with the consent of the Attorney-General, and to which strong statutory conditions could be attached in the way that one cannot attach them to primary legislation, whereby the Secretary of State herself, with the knowledge she had of the case, could have introduced 28 days. But the Government went the other way. It accepted my point in relation to the need for an order-making power during the period when Parliament was dissolved, as it has done in this case, but in other circumstances it wanted to liberalise and to leave the decision to primary legislation.

Rehearsing the arguments again in this context, the case for doing it by statutory order is probably weaker because the debate in Parliament won't depend so much on charging decisions in relation to individuals who are likely to go on trial. One of the difficulties of a parliamentary debate over extending 14 to 28 days is that, if people get a sniff of the individuals it relates to, their counsel will stand up at trial and say they cannot possibly have a fair trial, and their case has been prejudiced by Parliament having openly debated how dangerous they are, whereas here one does not have that concern, at least not in quite such an acute way. This is perhaps a stronger case for emergency primary legislation, although I accept that there are difficulties in Parliament being asked to decide on something when very few Members will have seen the national security-sensitive information that prompted the request. It may be—there are people on the Committee with a great deal of experience of this—that there would be ways somehow of achieving that. Whether one would try to do it through, say, the Intelligence and Security Committee or selective briefings to particular Members of Parliament I don't know, but it seems to me it could be done, and the requirement of parliamentary assent is at least a further safeguard against these powers being put to the wrong uses.

Q17 Baroness Doocey: Can I continue on that line about what Parliament will or will not know? Given that a lot of the evidence is going to be from the security services and therefore, by definition, won't be able to be made public because of security concerns, how will Parliament know that the threshold for enactment is met? Does the draft Bill adequately allow for proper, real parliamentary scrutiny?

David Anderson: It is hard. There are various ways of trying to deal with this. I believe that in the Australian Parliament, there is a provision for involving its equivalent of the ISC and briefing it on some of these matters, and therefore enabling at least an element of Parliament to be satisfied in the way the Executive plainly are.

Q18 Baroness Neville-Jones: Would you regard that as desirable?

David Anderson: I can see that from your point of view it would be desirable. Why should you take it on trust? To the extent that the information could be safely shared outside the Executive and security services, plainly it should be.

Q19 Baroness Doocey: It seems to me to be very difficult for Parliament to take a decision without having the information on which to base that decision.

David Anderson: Yes. There are other situations in which this difficulty comes up; it is not unique to this Bill. One example would be if the Home Secretary wants to proscribe an organisation. This is very topical: it has happened recently, but I am not talking about that individual case. If she

wants to do that, she has to put an order before Parliament, and it can be debated. You might say, "What's the sense in that debate?" because Parliament won't have seen all the detailed evidence that the Home Secretary, and indeed that I have seen, about that organisation. It does not seem to me that the scrutiny is worthless, however. For example, asset freezes—this is a Treasury rather than Home Office matter—have to be annually renewed. You see that every year, or most years at any rate, some of these candidates are not put forward for renewal, presumably because the Minister has taken the view, "I really don't think we've got the evidence on this one, and I don't want to submit it to Parliament in circumstances where I cannot assure Parliament that the test is satisfied." One could also provide for a parliamentary debate after the event. Perhaps a Minister, with his or her eye on legacy or posterity, might pause to think before introducing this Bill for the wrong reasons if she knew that, at some stage, Parliament would have a chance to debate whether or not it was rightly introduced.

Q20 Lord King of Bridgwater: As a survivor of the 90-day debate in the House of Lords—one or two of us thought that was not frankly a good idea and managed to change it—it does seem to me to be extremely difficult, and I remember that was opposed. Those who had been involved with the agencies fought quite strongly for the 90 days, quite interestingly, without anybody being at all clear why it was necessary, or what evidence there was that it would have helped in any particular respect. Can I come back to the fundamental point? I find the whole enhanced Bill procedure a very odd way to go about it. It is really a failure properly to draft the original Bill. Should this not have been an order-making power in the Bill, with exceptional order-making treatment; in other words, not an hour and a half in each House but a proper and full-time debate? It is very unattractive to have a whole Bill rushed through in what are believed to be emergency circumstances. It is then available for full debate, amendment and everything else, but a desperate Home Secretary manages to persuade people that every single clause should go through on the nod. It seems to me to be a very unattractive way to do it. What is your general view on that approach to legislation?

David Anderson: That was precisely the line I took before the Joint Committee on 28/14 days. I and the Joint Committee were knocked backed on that one. I think the reasons are slightly less compelling in this case, because one does not have the additional point that one might be prejudicing criminal proceedings, but I certainly see the logic of what Lord King puts to me. It is not my function to stray into the political debate. I can see there may well have been good reasons for wishing to underline that these additional—

Q21 Lord King of Bridgwater: Given that we may see this situation in the future, is this a good model to follow? I regard it as a lapse in the original drafting of the Bill.

David Anderson: Technically, it could perfectly easily be done as you suggest; there would be no difficulty about that at all. I assume that the reason why Parliament was asked to pronounce on this by way of primary legislation is that, in particular perhaps in relation to relocation, it is thought to be a very extreme measure, and it is a big thing to give the Executive the power to require people to move from one part of the country to the other without the sanction of Parliament in primary legislation. I assume—if one is looking for a reason—that it was done in this way to mark the seriousness of that.

Q22 Chris Evans: From what I see, the ban on intercept evidence drives at the heart of TPIMs. You said when you reviewed the control orders that you would like to see terrorist suspects tried in a criminal court. You also talked about resolution of the issues surrounding the repeal of section 17 of the Regulation of Investigatory Powers Act 2000 "with a view to rendering intercept evidence admissible in criminal proceedings if it is feasible to do so." In what circumstances do you see that being feasible? Do you support the repeal of section 17?

David Anderson: I do. I think all right-minded people would like to see intercept evidence admissible in our courts, if that could possibly be achieved. Since it is achieved in every other common law jurisdiction other than Ireland, it is hard to believe that it could not be achieved here. As you know, there is a very long and fraught history, which some round the table have themselves lived with for much longer than I have. The commission currently looking at the issue is about the seventh or eighth to have looked at it in the last 15 years. My understanding is that it is not so much that it could not be done as that there would be very significant consequences if it were done, not least for the resources of the intelligence agencies. It is partly because we have these very extensive disclosure obligations in criminal law which mean that you disclose not only what the prosecution relies on but anything else that could conceivably be relevant. It is said that changes would be required to the way that evidence is currently gathered and stored, and that with the provision for translation and so on, this would add greatly to the budget.

I recommended in my control order report that every effort should be made to render intercept evidence admissible. Would it be the silver bullet that makes TPIMs unnecessary? My feeling, I am afraid, is that it would not, because there are reasons other than the admissibility of intercept evidence why people cannot be put on trial. Remember, as I said in my control order report—I must get the figure right, because I am not sure it had been published anywhere else first—that there were quite a number of cases in which control orders were imposed upon people who had already been acquitted of criminal offences, as well as control orders imposed upon people who had previously been convicted of criminal offences. I think it was five that had been imposed on people who were acquitted or had charges against them dropped, but that is in my report. You will be aware that when the Chilcot committee looked at this in 2008—I believe Baroness Neville-Jones herself gave evidence on this to the Joint Committee on Human Rights—it requested an opinion from senior Old Bailey counsel. I have read the opinion, although it is not in the public domain. They showed nine cases in which intercept evidence played a part. They said, "Can you advise on whether, if the section was repealed and intercept evidence was admissible, the result would have been positive in terms of convictions?" His advice was that in none of the nine cases would it have made a difference, in four or five of them, I think four, because the intercept evidence could not have been put forward in a way that would have persuaded the jury, and in the other cases—this is very significant—because, even if it had been admissible, there is no way that the prosecution would have allowed it into open court.

We try people in criminal courts in public, and criminal defendants are entitled to know all the evidence against them. Nobody suggests that that should change; it is certainly not something the Justice and Security Bill would change, if that became law. For as long as that is the case, there will always be national security-sensitive information that cannot be shown to the defendant, whether or not it is admissible. Perhaps it will reveal the existence of another operation—perhaps a more serious one—that is going on; or reveal the identity of a human source whose safety could be compromised; or reveal the existence of a technique that perhaps not everybody knows about. In a way, it is because we have open justice in criminal proceedings—thank goodness we do—that not every case will be capable of being prosecuted. That is why we have this rather unhappy, but in a very few cases necessary, expedient of a TPIM which is there to deal with those cases that one would very much like to prosecute but cannot.

Q23 Lord King of Bridgwater: Can I ask for one clarification? Referring to the business of intercept evidence, you said just now there had been a number of attempts to deal with it and a number of committees had considered it. Where are we at the moment? Who headed the last one?

David Anderson: It is a couple of months since I was briefed on this. There is a committee sitting, which I believe—

Q24 Lord King of Bridgwater: That is what I am after. Is it still sitting?

David Anderson: I believe it is to report, most probably, in the autumn, but I may be unauthorised and also inaccurate in saying that. Work is certainly well advanced.

Lord King of Bridgwater: Chaired by?

Baroness Neville-Jones: Chilcot.

Q25 Chairman: In terms of the public diet on this issue, this is repeatedly pushed. You see people giving soundbites in front of television cameras who would oppose the enhanced TPIM regime that is being proposed, and opposed control orders, saying yes of course we should be prosecuting these people, and that is often a proxy for, "Why don't you just use intercepted evidence and stop mucking about?" That is what is being fed to the British public repeatedly. Most people say, "Why not?" Now, you are saying that you don't believe that intercepted evidence is the silver bullet, or gets us out of that bind.

David Anderson: That is right. I would certainly like to see it admissible, and I have recommended, as everybody else has who has looked at it, that it should be done if at all possible. One way of testing the opinion I put forward is to look at what happens in countries where intercept evidence is admissible. To take three examples, you could look at Australia, Canada and the United States. One thing I have tried to do in my report is take a comparative look at control orders. There is something very similar on the statute book in Australia, although I think it has been used only twice. In Canada, they have something called peace bonds which again are not dissimilar in the way they operate. In the United States where, as in those two other countries, intercept evidence is admissible, the whole notion of putting a terrorist on trial in the normal criminal justice system is highly divisive; indeed, at the moment it just is not happening. People stay in detention or they are being tried in military commissions. I don't think it is a uniquely British disease. We have a pretty good record of putting our terrorists on trial, including our most serious ones. If you look at the 21/7 bombers and the airline liquid bomb plot people, it took three trials to dispose of their cases, but we do have quite a proud record of doing that. If you contrast that with Khalid Sheikh Mohammed sitting in Guantanamo, it gives you some sense of it. It may not be perfect, but we have tried and convicted a lot of terrorists, and it is a positive thing about our system that a total of only 52 people were ever under control orders. We have a total of only nine now under TPIMs. Everyone very much hopes—I will be watching very closely to try to ensure—that those numbers remain absolutely as small as they possibly can.

Q26 Rebecca Harris: One of the objections to control orders was the argument that they just meant that the security services were basically parking people and not bringing them to trial and justice. It was argued that TPIMs would enhance the effort towards investigation. Can you comment on that? Will ETPIMs further frustrate that desire to bring people to open court?

David Anderson: This goes to the question of whether TPIMs, or indeed ETPIMs, are an aid to a criminal investigation. Certainly, the "I" in "TPIM" suggests that is partly how they are intended; they are not just to prevent but to investigate. I am afraid I am not terribly optimistic about that, any more than I think the current DPP was in evidence that he gave to theTPIM Bill Committee. His predecessor takes another view, which one treats with great respect. If you look at the attempts to charge and convict people with criminal offences who were on control orders—the figures are set out in my report—I think I am right in saying that no one who was under a control order was ever subsequently convicted of a terrorist offence. One person was put on trial, but that alleged terrorist offence predated the control order and therefore was not the product of information gathering during the control order. In any event, it ended in an acquittal. If people know they are under the sort of extreme control that both a control order and a TPIM represent, it would perhaps be surprising if they were to allow evidence to be picked up that would allow them to be prosecuted. That seems to be what the last five or six years bears out.

The two-year limit might have benefits in another sense, however, in that, as you rightly say, people cannot be parked on TPIMs as they could be parked on control orders, and it may just have the effect of focusing minds on what they call the exit strategy. The knowledge that that period is running out certainly should sharpen the incentive for criminal investigation, to the extent that that is possible, but it may also sharpen the emphasis on other options: finding the person employment, and other possible strategies for de-radicalisation. That is something I am looking at at the moment in the context of the TPIM review group, in which everybody's case is reviewed on a quarterly basis.

Q27 Rebecca Harris: It is very interesting that other options have been considered. This is a Catch-22, isn't it, because once you are under these controls you are not able to go out and commit further acts, meet contacts and that kind of thing for evidence-gathering purposes, as you might be if you were under bail conditions. The reason is that you are considered too dangerous a threat to risk allowing you out, and for the purposes of public safety, you are under a TPIM or ETPIM. The question is, in the long term, do you feel that the use of enhanced TPIMs is a good way to ensure public safety?

David Anderson: An ETPIM could certainly extend the two-year period by a further two years, if the timing of the ETPIM happened to be right, but it would not extend it beyond that unless there was further evidence. It is a balance that Parliament has decided to strike, or would decide to strike if it passed this Bill. Plainly, we would all be safer if people whom the Home Secretary considered to be undesirable could be locked up for ever, but a lot of people would consider that that is not the sort of society they would want to live in. It is a balance that Parliament has to strike.

Q28 Rebecca Harris: To what extent do you see this draft Bill simply as an interim measure that the Government are grabbing at while they try to resolve the long-term problem of how to deal with difficult terrorist suspects that we can neither prosecute nor deport?

David Anderson: I don't want to try to characterise it in those terms. I think that everyone here is grappling in good faith with a really difficult problem. Everyone would like to use the criminal justice system in every case or to deport, although all nine currently under TPIMs are British nationals and so could not be deported in any event. I think that everyone who has looked at it concludes that the criminal justice system is not going to do the job in every case. The question is, if you are to have a power of restraint, what safeguards do you place on it? It is as long as a piece of string. Everyone will have their own idea as to where the compromise should be struck. I am not going to criticise those who have sought to strike it in this way.

Q29 Baroness Neville-Jones: If I may, I shall make an observation on what you said about investigation, which is quite a difficult issue. It was often said, and continues to be said, that somebody who knows that they are under surveillance is unlikely to wilfully break the law or infringe. In fact, this just happened. A chap who was picked up rather near the Olympic site will be prosecuted for the breach of his TPIM terms. It seems to me—I don't know whether you would agree with this—that there is a very fine line to be drawn between surveillance and investigation. It is not entirely to be ruled out that the surveillance terms that accompany TPIMs can in fact aid in investigation of both current activity and the origins of the circumstances in which the measure had to be brought into effect. What do you feel about that? I think everybody acknowledges it is a difficult issue, but I think it is not a wholly improper part of the terms.

David Anderson: If I may say so, you raise a point that I should have referred to in a previous answer. Although there is no success in prosecuting people for substantive terrorist offences independent of the control order itself, there have, as you say, been prosecutions of people who have breached the terms of their control order. There may be allegations—at the moment, they are just that—that people have breached terms of TPIMs as well. Even there, it must be said, the track record

is not great. I record in my report that over the lifetime of control orders, 14 controlled persons were prosecuted for breaching their control order obligations. The outcomes were, two convictions, resulting in sentences of 20 weeks and 15 months respectively; two acquittals; one person absconded prior to trial; one left the UK voluntarily; in six cases no evidence was offered, as it was considered no longer in the public interest; and three still await trial.

Baroness Neville-Jones: It's a mixed bag.

David Anderson: So although that can happen, the history suggests not a huge success rate and not very long sentences, although one is aware that some of those breaches are much more trivial than some of the allegations that you might be referring to.

Q30 Lord Plant of Highfield: Could I probe for a moment or two your view about the compatibility of the draft Bill with the ECHR, particularly articles 5 and 6? As you know, the Home Office claims that the draft Bill is compatible with article 5. It seems to me crucial that it is, because the whole point of this is that it is going to be an emergency measure, if and when it is brought in, and if the courts, in pretty short order, find that it is incompatible with article 5, it will blow a bit of a hole in the legislation. Given that ETPIMs are, in some ways, rather like derogating control orders—a point I think that you made earlier—do you think the Home Office claim is robust, and if not, shouldn't there be a kind of draft derogation as well as a draft Bill?

David Anderson: I never like taking Home Office claims at face value, but I do think that on this one it is right. I can say that with some confidence, because of the great volume of litigation on control orders, and in particular their compatibility with both article 5 and article 6. One saw that in the years after 2005. It is true that enhanced TPIMs will be like derogating control orders in one respect, which is the balance of probabilities test—in a sense, that is one of the more liberal aspects of the ETPIM—but they are much more like non-derogating common or garden control orders in every other respect. We had a lot of litigation about what length of curfew was compatible with article 5, and eventually the courts said that 18 hours was too long, and the maximum thereafter was 16 hours. That seems to have satisfied article 5, and Strasbourg has been turning down attempts to litigate that one further.

Similarly, with article 6, as you will, know, there was a lot of litigation about how much information the person under a control order had to be shown. In the end, the Strasbourg court ruled in a Belmarsh case—the House of Lords repeated it in a control order case—that they must be given sufficient information to allow them effectively to instruct their special advocate. A lot of people predicted the demise of the system at that stage, but it survived. Two or three control orders had to be discharged because the Government were not prepared to give them that amount of information—they thought it would compromise national security—but in other respects the system continued to function, and function compatibly with article 6.

It seems to me it has been so intensively litigated that one can say with some degree of certainty that, although of course an individual TPIM or ETPIM might overstep the mark and be disproportionate in the burdens it places on a particular individual, the system itself is ECHR-compliant. I think they are right to say that they could attach a certificate of compliance to the Bill if it is ever introduced to Parliament.

Q31 Lord Plant of Highfield: But what about the last point about the individuals versus the generality of the system? In the Guzzardi case, I understood the judgment to be that the court had to concentrate entirely on the circumstances of the individual, not whether the regime in general was proportionate to some socially desired end.

David Anderson: If you look at the judgment in the Gillan case on section 44—no suspicion stop and search—although the court in Strasbourg was looking at a particular case, it was difficult reading the judgment to come to any conclusion other than that section 44 had to be amended if it

was going to satisfy the Strasbourg court. With control orders, you have clearance for the system as a whole. If you take the example of relocation, all these cases are heard in court. There is an automatic appeal whenever a TPIM is applied for, or a control order was applied for. Of the 52 who were subjected to control orders, 23 were also subject to relocation, and in the great majority of those cases, the court was asked to look at whether the relocation was proportionate, justified and consistent with human rights, and it said yes, it was. In four cases it struck down the relocation, in three of them because it held that in those particular circumstances it was disproportionate. It does not mean that the Act is contrary to the Convention. What it does mean is that people who apply it have to be pretty careful that they don't overstep the mark in the individual case.

Q32 Nicola Blackwood: Can we go back for a moment to the points about investigation and surveillance raised by Baroness Neville-Jones? Somewhere in the corridor along here is another Joint Committee considering the Data Communications Bill. What impact do you think that might have on the ability of investigating officers to investigate individuals with TPIM or ETPIM orders?

David Anderson: It is a very interesting question, which I must admit I have not thought about at all.

Nicola Blackwood: Oh, I'm sorry.

David Anderson: Not at all—the apologies are all on my side. I don't think I would want to venture a view off the cuff. Perhaps it would help, but I suspect that, once again, it would not be a silver bullet.

Q33 Nicola Blackwood: Will you think about it a little and get back to us?

David Anderson: Indeed.

Chairman: Can I thank you very much? You have been a superb witness. You have helped us at the start of our deliberations to get our head round these issues and sent us off into recess potentially a little wiser than we otherwise would have been. I think I echo the views of the whole Committee in thanking you for your time and your evidence.

David Anderson: Thank you very much.

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

Q34 Chairman: Good morning, Deputy Assistant Commissioner Osborne. Thank you verymuch for agreeing to give evidence to the Committee. This is a Joint Committee of the House of Commons and the House of Lords looking at the proposed enhanced TPIMs set-up. The police have now had something less than a year to look at the TPIMs regime. Will you tell the Committee your view of it within that time frame, what experience you have had of it, and how effective you think it has been?

Stuart Osborne: Yes, of course. It is 10 months since the Act changed from control orders across to TPIMs. We have seen various changes, in terms of where people can live, the amount of time that they need to spend in their residences, association and the areas in which they are allowed to move, and the number of people that they are allowed to communicate with under that direction.

In line with the changes from control orders to TPIMs there was a substantial amount of funding for policing and the Security Service. That allowed us to change our methods of working and the techniques that we were using, and how we were engaging with people who were subject to TPIMs. Whilst it is still early days and the legislation still needs to bed in, we have not encountered any problems that we were not anticipating. We gave the message that we were going to try to make sure that there was no overall increase in risk, and that is the position at this time.

Q35 Chairman: There were seven years of the control order regime. What were the challenges facing the committee over that period, and what has been the change in methodology and the ability to operate?

Stuart Osborne: The control orders regime was far more strict in limiting the ability of the individual to do things. Overnight curfews or residence orders were a lot longer, and there were areas that the individuals had to remain in and not move out of, whereas the new TPIMs just cover areas that they are not allowed to move into. Previously, they were not allowed to have communications, but they now have communications.

That all means that the task of managing and policing individuals on TPIMs has become more demanding, but, because of the uplift in asset and the way in which we have changed our way of working, we have not seen any noticeable difference in compliance with the issues. We robustly police TPIMs in the same way as we did control orders, so as soon as we detect any breach we go and speak to the individuals and, if necessary, put papers to the CPS.

Q36 Chairman: The burden of your evidence is that it is more expensive but not less safe.

Stuart Osborne: That is where we are at the moment, yes. Control orders were a very cost-effective way of managing those individuals. What we have is an effective way of managing those individuals but using more resource and at greater cost.

Q37 Chairman: Is there an order of magnitude that you could give to the Committee in terms of the increase in costs? Is it substantial?

Stuart Osborne: It's in the tens of millions, but I think that those figures have previously been published.

Q38 Chairman: But you are satisfied that there has not been an increase in the risk as a result of the change of regime.

Stuart Osborne: We have been able to mitigate that risk by the appropriate use of the new resources that we have. At the moment, the risk level is the same as it was before we moved across from control orders to the current situation.

Q39 Baroness Doocey: Does the existence of the Bill suggest that the existing TPIMs legislation is too weak to address the terror threat and, if so, why?

Stuart Osborne: No, I am not sure that it does. The emergency TPIMs is a plan B. It is always good to have a plan B, but given the resource currently available to us and the way in which we have changed our working, we are adequately managing the risk posed by people subject to TPIMs at the moment. Should the risk change considerably, or should the resource drop off for some reason, then it is useful to have something to fall back on that allows us to manage the risk to the same degree. Although it is not necessary to implement a plan B under the current circumstances, it is always good to have something to fall back on at some time, and making preparations in advance is always a good thing.

Q40 Baroness Doocey: Are any powers missing from it, or are you completely happy with what is proposed?

Stuart Osborne: Essentially, we go back to the old control order regime. The old regime was bedded in, and it worked very effectively. If we move to the new arrangement with our current resources, we will be able to manage the situation. I do not want to predict the future—I don't know what the future is going to hold—but from what I have seen I would not seek to add anything else.

Q41 Baroness Doocey: Has managing the risks without relocation powers been an issue?

Stuart Osborne: It has been more demanding. Certain areas throughout the country, especially in London, are more demanding to police than others. Whether that is due to community-police relations, demographics or the way the buildings are situated, it creates additional challenges. When we were able to choose the location where people were going to reside, the environments were more suitable for our policing needs than for the needs of the individuals living there. There is a balance between liberty and the ability to control individuals. As I said, with new techniques and new technology we have managed to overcome many of those problems.

Q42 Baroness Doocey: Finally, is it easier to police people in a particular location—in one location rather than another?

Stuart Osborne: Yes. It is easier to police generally in some locations than in others. It is to do with associations and demographics, and with the ease of operations. Surveillance in some areas is far easier than in others. All those things come into play. It is about having a whole package of the most appropriate resources and techniques that we can apply.

Q43 Mike Crockart: You said that it could be more a matter of a drop-off in resources that prompted the use of the arrangements rather than exceptional circumstances, which is what is said by the Government. You say that you don't want to predict the future, but I am going to ask you to do so. In what circumstances would you require the types of additional powers that are included in the Bill?

Stuart Osborne: On a daily basis, I have to manage three things. The first is public safety, which is the most important. The next is gathering evidence to obtain some form of prosecution, if possible, against individuals, or to gain intelligence that will allow committees to make decisions about TPIMs. The last one is about public confidence and the liberty of the individual. That triptych is quite difficult to manage. If you get the balance wrong in one area, there will be a problem.

To manage the risk that these people create at the moment, the resourcing is right. The threat that they pose is manageable without resourcing, and there is not a need for it. Should the terrorist

threat rise to an unacceptable level, should there be more people requiring to be subject to TPIM legislation or should the resources not move to match that requirement, then to maintain public safety we would need to look at alternative measures that would help redress the balance.

Q44 Mike Crockart: We asked the Independent Reviewer of Terrorism the same question, and basically he said that, if you had very dangerous people coming to the end of a two-year TPIM that could not be rolled over year on year, so that might be the circumstance when an ETPIM might be required. Is that your understanding as well?

Stuart Osborne: If you have the timing right, then it is possible that an ETPIM could be used to roll over somebody to keep them on a TPIM. The role of policing is really to look at the legislation, to robustly police it and to bring any breaches to the notice of the Crown Prosecution Service to see whether they are worthy of prosecution and to uphold the law. When that measure is imposed is a matter for the Home Secretary and Parliament. Every time we go for a TPIM or a TPIM change of legislation, we put together a package of intelligence and evidence that we present to the Home Secretary; that ultimately goes before a court, and a decision is made whether or not it will happen. I would not want to second-guess how Parliament would like to implement any legislation.

Q45 Mike Crockart: We are talking about extra powers. Do you think that what is envisaged in the Bill gives you the powers that you will need to deal with the exceptional circumstances, or will other powers be needed?

Stuart Osborne: This is a balance between civil liberties and the ability to police the threat and risk. The new powers essentially replicate what was previously in a control order, but you need a higher burden or standard of proof; it is judged on the balance of probabilities rather than reasonable belief, which is what happened before. As it stands at the moment, with the resources that we have and how we police these things, I think that an increased risk could be managed by an enhanced TPIMs regime.

Q46 Lord Jay of Ewelme: You said earlier that emergency TPIMs were effectively the same as control orders. Do you see the TPIMs plus ETPIMs as being in effect the restitution of the control order regime?

Stuart Osborne: Yes, I do. It essentially brings back the same elements of the control order, but there is greater oversight in relation to the point upon which it will be enacted. The measures are very similar.

Q47 Lord Jay of Ewelme: Once ETPIMs were in force, would you feel that you were in the same sort of regime as you had been under control orders?

Stuart Osborne: We would, but it is quite important to point out that, for people on a TPIM or a control order, each case is assessed individually. It is not a blanket thing that applies to any individual. Some individuals may have restrictions on them that are designed to stop them travelling. There may be other individuals with restrictions on them that prevent them from communicating with certain groups of the community. Each one is a bespoke measure. The fact that you have moved to an ETPIM for one person does not necessarily mean that the same set of rigorous regimes would be imposed on another, if that makes sense. Every one is bespoke, matching the need to balance probability with necessity.

Q48 Lord Jay of Ewelme: Thank you for that. May I come back to the earlier question of relocation? I never fully understood it. You said that the advantage of relocation was that you could put people into areas that were more suitable for policing needs but you had overcome the difficulties of not exercising that option by the use of new technology.

Stuart Osborne: Yes.

Q49 Lord Jay of Ewelme: Would you say a little more about the suitability of policing needs and what technology you are using in order to overcome that difficulty?

Stuart Osborne: In terms of the suitability of policing needs, there are areas in the country where policing is seen as being difficult within communities, and excessive policing can affect community tensions. All people on control orders have the right to remain anonymous, so increased police activity in those areas can seem odd to the communities, but it may not seem odd in other areas of the community where policing is more readily seen.

In terms of the technology and the different techniques that we use, I would not want to go into great detail, but we have enhanced tagging technology. Every TPIM subject has a tag, and with that enhanced technology we have a great ability to understand what their movements are.

Q50 Lord Jay of Ewelme: Does the second outweigh the first? In other words, because of the new technology do you feel that there is no real need for relocation despite its theoretical advantages?

Stuart Osborne: The control order was a very cost-effective way of managing people on TPIMs or control orders. With the absence of that relocation, with the new technology, the enhanced resources and the new way that we are working, then, overall, the balance is about the same in terms of managing the risk, but obviously the liberty of the individuals has increased.

Q51 Nicola Blackwood: Would you say a little about your evaluation mechanism for the TPIMs regime? You said that you evaluate risks in order to understand how to manage them and, therefore, you understand the kind of resources that you need. I am trying to understand how sensitive that evaluation mechanism is and whether it is sensitive enough to trigger the need to move to ETPIMs at a necessary moment when those resources or the security risks are not being managed properly by the mitigating measures that you have in place. Would you explain that to the Committee?

Stuart Osborne: Each individual on one of the TPIMs orders has an allocated senior investigating officer who looks at them and monitors their behaviour on that to assess whether there is any evidence to allow us to prosecute, because a prosecution would always be the favoured option. If there isn't, we have another team that looks at the behaviour of those individuals and the various conditions that they have to make sure they are complying with them, which is a very good indication of their demeanour in relation to those activities. Then there is a very close working relationship with the Security Service to look at the intelligence side to help add to the picture.

In addition, every quarter there is a review of every person on TPIMs. That looks at their behaviour, the background picture and any other intelligence that allows the Home Secretary to make a determination on whether they should remain on the TPIMs or whether the conditions need to be changed. There have been several occasions when we have actually asked for more conditions to be placed on individuals to keep up with their activities and make sure that we are managing that risk.

Q52 Nicola Blackwood: Do you think that the operational mechanisms are fairly robust?

Stuart Osborne: Yes. The operational mechanisms on policing are very robust and all TPIMs orders are robustly policed. As soon as there is a breach, it is investigated and the matter is reported directly to the CPS, so there is continuity and join-up around all the people involved in it.

Q53 Nicola Blackwood: How do you feel about ETPIMs as a legislative response at the point at which that operational mechanism decides that you need further measures in response to the risk that you have identified?

Stuart Osborne: It will work in exactly the same way as it does now. If we feel that there is a need to put extra measures on an individual, we make an evidential and intelligence case for it. That then goes before the Home Secretary to see whether an improved measure could be put in place. If those measures were not sufficient to manage the risk that the individual caused, we would put a case together that would go before the Home Secretary to make a decision on whether enhanced TPIMs needed to be used and whether it was a matter that should be brought before Parliament. Our role would be very much that of making the case.

Q54 Nicola Blackwood: As I understand it, it takes about 12 months to train an officer to work the TPIMs system and so on. If a Bill was introduced to bring in ETPIMs, how would the training work? Would officers be ready in time? Would they have to be trained from scratch, or would you have a host of officers sitting there waiting, already trained and in place?

Stuart Osborne: For a surveillance officer to be selected to go through the various vetting categories, to be trained and be fully capable and competent in the field takes about 12 months. I mentioned that when I last came before the Committee. We now have all those additional assets and resources in place, so they are fully trained up.

If we went to a TPIMs or an enhanced TPIMs, it would mean that those people were deployed for potentially less time. If you move the location of the individuals away from where they are meeting regularly with those we are concerned with, it would mean that they would be easier to control. If you went to ETPIMs, instead of having 10 hours' curfew, you would move back to 16 hours; that would mean that they would not be out of their homes as much, so you would not need that resource. You balance one against the other.

Q55 Nicola Blackwood: How much additional training would be required for an officer to be able to implement an ETPIM measure?

Stuart Osborne: Minimal training; it would be an update in relation to the legislation and the details that each individual TPIMs subject was on. It would not need any other technical training above the 12 months.

Q56 Nicola Blackwood: What additional resources would be required, in terms of funding from the Home Office? You have already said that additional resources were required for TPIMs. Would it be less resource because controls were cheaper, or would it be more resource?

Stuart Osborne: It depends on how many people were on the ETPIMs. It would depend on where they were living and on the risk that each individual one posed. At the moment, I would say that we would not be looking to come back to the Government to ask for any more resource or more funding. We are well equipped to deal with what we have, and, if we move to the ETPIMs as a plan B, we would initially have to use the resource that we have. We are fairly confident that we could manage that in the first instance.

Q57 Lord Plant of Highfield: You have said once or twice that prosecution is the preferred option. In the light of that, what is your view of whether or not intercept evidence should be admissible?

Stuart Osborne: Intercept evidence could be very useful in prosecution cases. That is not just for counter-terrorism but for law enforcement in general. However, it can't be looked at as an individual solo piece of work because, along with using intercept evidence, we have some huge issues around disclosure, with the way it is currently set up and the amount of time that would be needed for translation, gathering and making that information available to the defence and then for it to be transcribed. As things currently stand, it would probably be prohibitive to use intercept as evidence at this particular time, but there are parts of it that could be very useful. It should be looked at as part of

an overall package to make sure that undue burden was not placed on the people having to look at it and place it before a court.

Q58 Lord Plant of Highfield: In terms of something like translation, if you are putting a dossier to the Home Secretary based upon evidence that the police or the Security Service, or both, have collected, presumably there is quite a lot of material that has already been translated for the Home Secretary to make a judgment.

Stuart Osborne: Yes, there would be, but in terms of disclosure, the defence would be quite entitled to ask for all details of all telephone conversations that have ever been had while the monitoring went on. There may be 10 minutes' worth of evidential material that could necessitate years of transcription of previous telephone calls to make sure that there was nothing that the defence could rely on to build their case. It is complex and difficult. Intercept could be useful, but it needs to be looked at along with disclosure and the whole package.

Q59 Lord Plant of Highfield: It is certainly your view that to move to intercept evidence and disclosure would not of itself remove the need for the TPIM and ETPIM regimes.

Stuart Osborne: Even if we had intercept evidence, it forms a very small part quite often of any individual case or prosecution. It is part of a jigsaw puzzle that goes to make up the case, both for a prosecution and, if it was the case, even for any application for a TPIMs to be made.

Q60 Lord Plant of Highfield: There is the argument that the enhanced TPIMs may well be desirable from the security point of view but that they are quite likely to constrain investigation. Is that your view as well?

Stuart Osborne: Control orders, TPIMs and enhanced TPIMs, and the way that they are policed, all affect the behaviour of the individuals that are subject to them. Once you have told the person that they are on a TPIM, they will know that they are being monitored, watched and surveilled. Compliance under TPIMs, as with control orders, has generally been very good. The new techniques that we are using, and the robust policing of TPIMs, means that compliance is almost excellent.

A number of conditions can be placed on an individual. If you multiply that by the number of individuals and the number of days, then the number of breaches is minuscule. Some breaches are often for understandable reasons such as people's trains may be late and they may be delayed. The compliance is very good with TPIMs as it stands.

Q61 Baroness Gibson of Market Rasen: I am a little bothered still about the question that Nicola asked on funding and resources. In your last answers, from a layperson's point of view, it seems that you will need much more funding and resources than is indicated at present, but you seem to be quite happy about that.

Stuart Osborne: Control orders really restricted the ability of an individual to move outside a particular area, to be outside their home at particular times and placed greater restraints on how they were to communicate. Therefore, it needed less asset. Moving to TPIMs gave greater ability for an individual to move out, greater civil liberty for that individual, but in order to maintain and monitor that to ensure that there was no increased risk needed an extra resource. I am saying that, if we went back to something more like a control order, the argument for that resource drops away somewhat. However, by going to ETPIMs the risk would increase. The balance of the resources that we currently have and the increased risk of going to the ETPIMs is about right at the moment.

Q62 Baroness Gibson of Market Rasen: Do you see this Bill as a finite Bill or do you see it as an interim measure for the Government so that they may bring in other measures later on?

Stuart Osborne: I think legislation is a matter for the Government. Policing will purely enforce that and bring any matters to the notice of the CPS and the courts.

Q63 Baroness Neville-Jones: I am right in saying, am I not, that as part of the package for TPIMs the police were given an extra £50 million to cover the absurd and acknowledged extra burden of increased surveillance?

Stuart Osborne: I think total package was £50 million; not all of that went to policing.[1]

Q64 Baroness Neville-Jones: It would be helpful to the Committee to know what the funding package was and how it was distributed.

I revert to the issue raised by Lord Jay about control orders as compared with TPIMs. You appear to assent to the proposition that enhanced TPIMs would effectively constitute a reversion to the control order regime. Would you not agree that having to meet the balance of probabilities to have an order put in place is a considerably higher threshold than reasonable suspicion?

Stuart Osborne: Yes, absolutely.

Q65 Baroness Neville-Jones: There is a real difference between them.

Stuart Osborne: There is a real difference in terms of governance and accountability. It has already changed. Reasonable suspicion was for control orders; reasonable belief was for TPIMs, and the balance of probabilities is even more enhanced again for ETPIMs.

Q66 Baroness Neville-Jones: It is a very high threshold indeed.

Stuart Osborne: It is a lot higher than it was for control orders.

Q67 Baroness Neville-Jones: Is it also not the case that there is a time limit on TPIMs, even in the circumstances of an enhanced TPIM? It is not something like a control order, where you can roll it over.

Stuart Osborne: That is correct.

Q68 Baroness Neville-Jones: This is important. Actually I don't believe it is the case that it is the effective restitution of control orders. There are real differences.

Stuart Osborne: There are differences, but, in terms of the practical, tactical policing of the requirements, they look very similar to how we would have dealt with control orders.

Q69 Baroness Neville-Jones: I see. In terms of the tasks that you would face for surveillance and compliance, would you say that there is real similarity?

Stuart Osborne: There is real similarity, but I totally accept that the threshold that would need to be met before a person was placed on one—

Q70 Baroness Neville-Jones: And indeed the terms.

Stuart Osborne: —and the terms are different.

Q71 Baroness Neville-Jones: What is your view of the effect of the limitation? In discussion, in the end, those who put forward this proposition felt that, after four or five years, somebody who had been engaged in terrorism would not be very useful to their handlers and therefore the risk was acceptable. What is the view that you take of the residual risk that there might still be after the end of what would now be the finite limit of enhanced TPIMs?

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[1] Supplementary clarification received from DAC Osborne after evidence session—Baroness Neville-Jones offered £50m figure, Stuart Osborne stated that policing received less than that. This figure is not ratified or confirmed at this time.

Stuart Osborne: I think that there will be a whole range. The advantage of TPIMs and controlling measures means that people are taken away from the radicalising environment that was causing the major problem. If they are away from that environment and getting help or advice in one way or another, then that is good. If they are removed from that, they have time to think for themselves and can make their own way in the future.

However, I am absolutely sure that there will be a continuum of people, from those who reject terrorism at one end to those who are still very keen to follow it up at the other end. It is a matter of how those people are monitored in society, how they look for assistance from their families or friends, and what other people can do to assist in that—I don't want to use the word "rehabilitation"—movement from one form of belief to a more non-aggressive form.

Q72 Baroness Neville-Jones: I suppose if they committed a new offence, the thing could start again.

Stuart Osborne: Absolutely. If there is evidence that people have re-engaged in terrorist activity within those periods, there is the possibility to bring back another TPIM.

Q73 Jesse Norman: How many people have been prosecuted under TPIMs?

Stuart Osborne: There have been no successful prosecutions for terrorism of people subject to TPIMs. There have been two cases where people have been charged with breaches of TPIMs and not terrorism offences, and neither of those has been successful.

Q74 Jesse Norman: What are the comparable figures for control orders?

Stuart Osborne: I'm afraid I don't have those details with me. I will have to make those available to you.

Q75 Jesse Norman: I would be grateful; thank you. Has anyone absconded from a TPIM?

Stuart Osborne: No. There have been no absconsions since 2007, and that was under the control order regime.

Q76 Jesse Norman: There were some under control orders, weren't there? How many were there?

Stuart Osborne: I think there were seven absconds prior to 2007.

Q77 Jesse Norman: Brilliant; thanks. What does the balance of probabilities actually amount to? Would you give us an example, without too much detail, of the kind of way in which a judgment might be made on the balance of probabilities?

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

Q78 Jesse Norman: There is a body of information that has been assessed and tested, as it were, on the basis of which judgment is reached.

Stuart Osborne: Yes. The balance of probabilities is used in all civil courts for making a determination as to which way a case will go, so it is to an evidential standard.

Q79 Jesse Norman: Obviously, this is in an administrative context.

Stuart Osborne: Yes. In terms of what balance of probabilities means, it is not a hunch or something that you believe in. It is something where there is evidence and you can say it is more likely.

Q80 Jesse Norman: It would not be evidence because it was not public. It would be information.

Is there a danger of mission creep here—that is to say, a piece of draft legislation gets brought in, perhaps in unusual circumstances, which becomes the basis for it? Obviously, there have been other cases in which legislation has been introduced or used for purposes that were not originally intended.

Stuart Osborne: The constraints that I have read about it are quite clear, although Lord Carlile might wish to comment later. I very much view this as a plan B for TPIMs. As I said before, it is always good to have a plan B for anything.

Q81 Jesse Norman: Thank you. I have a final question. Is it a concern to you that there is a lack of judicial control over the process?

Stuart Osborne: No. There is far from a lack of judicial control over the process. Before a TPIM can be implemented, it goes before the court. People have the ability to appeal to the court to review a TPIM or any part of one. I think the judicial oversight for TPIMs is very good.

Q82 Jesse Norman: And on ETPIMs.

Stuart Osborne: It has not been enacted yet.

Q83 Jesse Norman: But the same would be true.

Stuart Osborne: I would imagine the same would be exactly true, yes.

Q84 Chairman: You indicated earlier that the real difference from your perspective was one of cost, that there was no safety sacrificed in the move from control orders to the TPIMs regime and that the ETPIMs regime would kick in in certain circumstances. Surely, the difference in the threshold of proof required must lead to some increase in risk. That is not to say that it's not justified and it's not a move to rebalance liberty against safety, but, if you have to meet the balance of probabilities as against reasonable suspicion, there must be circumstances when, to a degree, we have increased the risk surely.

Stuart Osborne: Perhaps I didn't make myself very clear. The original control order was so tight that when we moved to TPIMs, the risk, in my opinion, increased. To manage that risk—

Q85 Chairman: The threshold was lower for a control order.

Stuart Osborne: The threshold was lower, but the people that were on those regimes and on TPIMs regimes, overall, created a level of risk. That level of overall risk was managed on control orders, but, when it moved to TPIMs and there were greater civil liberties, it meant that I needed more resources to manage it in a way that I could maintain that same level of risk. That is where the additional cost came in.

I am saying that, if the threshold goes up for an increased risk under an enhanced TPIM, and those enhanced measures came in, those measures in themselves help to manage that risk. With the additional resource that I now have, and the different ways that we will need to work in deploying that resource at the moment—I am not forecasting the future—the balance is probably about right in terms of the resource that I have to manage the increase in risk against the increase in prohibition that will be placed on people in those circumstances.

Q86 Chairman: I am just trying to understand what you are saying. Are you saying that there may be some people for whom you would be able to get a control order but not necessarily a TPIM and therefore your surveillance costs to cover the risks presented by those people are considerable?

Stuart Osborne: Yes.

Q87 Chairman: They are not covered by the new regime because the threshold is higher.

Stuart Osborne: Yes. I am not saying that I would not ask for more resources in future, but at the moment, with what I see in front of me, I think that the balance is right.

Q88 Baroness Doocey: You said that there have been no successful prosecutions for terrorism under TPIMs. Do you believe that would still be the case if you had been able to use intercept evidence?

Stuart Osborne: Yes, I do. TPIMs, control orders and ETPIMs are robustly policed, so the first notice that you get that somebody is engaging in activity is normally a breach of the order that they are on. Therefore, the path that you go down is to prosecute somebody for a breach of the TPIM order. So it is very difficult for people to engage in acts of terrorism while they are on these orders.

Q89 Baroness Neville-Jones: Do you have to continue your investigatory activities?

Stuart Osborne: Yes.

Chairman: Colleagues, we have another witness. I am sure that we could all carry on asking questions of DAC Osborne, but thank you very much for your evidence and your assistance, which has been most useful to the Committee. Thank you.

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

Q90 Chairman: Lord Carlile, thank you very much for coming here to give us the benefit of your considerable experience in this area. Can I ask for your views? The generality of what is being presented is that this new TPIMs regime, even with the ETPIMs back-up policy, is a shift back towards liberty as against safety. Do you recognise that? Do you agree with it?

Lord Carlile of Berriew: Certainly TPIMs involve less potential control over the individual than control orders. At least as an intellectual proposition, raising the standard of proof by two notches also enhances, hypothetically, the liberty of the individual.

I must say, Chairman, that I regard enhanced TPIMs as a clumsy legislative construct, which empirical legislative analysis would never have justified and can never justify. My own view is that the provisions in the draft ETPIMs Bill ought still to be in the main legislation and that this construct was taken to meet political needs rather than the merits of the case.

Q91 Chairman: Is that because you think it is going to be extremely difficult to handle the situation when ETPIMs become necessary?

Lord Carlile of Berriew: The present Home Secretary, particularly this week, has shown a very deft hand in dealing with Parliament, and I suspect that she would get through the difficulties that would arise, but there would be difficulties because of the need for parliamentary debate if ETPIMs are introduced.

One is bound to ask what the Minister can say if ETPIMs are introduced in a parliamentary debate. Parliamentary debates in your House, if I may say so, Sir, can be quite tendentious. They can be led by the strongly held but sometimes incorrect opinions of Back Benchers, who may have been heavily lobbied by constituents who have a direct personal interest in what is happening. If a Minister fails to answer a pertinent question asked from the Back Benches it can look very evasive, though there may be good reasons for the evasion. I am saying this with respect, in the presence of a former and highly regarded Security Minister, but I see this as quite a difficulty. Nevertheless, it is my view that having ETPIMs in reserve, even by this construct, is clearly necessary.

Q92 Chairman: That was my question. I wonder if you can just expand upon it. The move back towards liberty received considerable support. You have a lot of experience, some of which you can't share with us, of some of these individual cases. Where do you think the balance is now? Do you think that it is in the right place, or do you think, with the level of risk that you perceive and the experience that you have had, that we are in the wrong place?

Lord Carlile of Berriew: My 100% frank answer, Sir, is that we are in the same place as we were before this legislation was introduced. Whether we are in the right place or not is an impossible question to answer, because it is a moving picture all the time. The reason why we have, for example, an Independent Reviewer of Terrorism Legislation is so that there is an outside observer– my successor is doing this outstandingly– to ensure that the balance, as it moves, remains a balance even if it is in a different place. I hope that that answers your question.

Q93 Chairman: Yes. Hence your comments about the clumsy legislative mechanism of the ETPIMs.

Lord Carlile of Berriew: Yes.

Q94 Chris Evans: I am quite interested in your role as the former Independent Reviewer of Terrorism Legislation. You talked about ETPIMs being clumsy, and also we have heard earlier that

there have been no absconsions or convictions under TPIMs. What would you like to see in its place instead?

Lord Carlile of Berriew: What I would like to see in its place instead is roughly the regime that we had before the law was amended. I recognise, of course, the importance of the two points made earlier by Baroness Neville-Jones when she was asking questions of Mr Osborne, and they have made a difference. I think that they are important points, but, subject to those two points, I would like to see these provisions in one Act of Parliament. I would go further, and I have said this repeatedly in reports. I am astonished that we have not put in a single consolidated Act of Parliament all counter-terrorism legislation.

An awful lot of people are working in this field now. I am president of something called the Security Institute, a private-sector organisation with its own registration body, of which I am also the chairman. They need to understand in the private sector counter-terrorism law because they are working in that field, but they find it difficult to discover the answers to questions about the law because the law is in so many places.

Q95 Chris Evans: Why do you think that single Act has not come forward? Is it because of political expediency?

Lord Carlile of Berriew: Governments are understandably nervous of placing consolidation Bills before Parliament. It gives Members of both Houses– probably the House of Lords is a greater culprit in this context– the opportunity to put down endless amendments and have tiresome debates on issues that the Government feel have already been determined. It is a pragmatic decision.

I don't know whether the Committee will be calling Professor Clive Walker to give evidence, but we rely more and more on textbooks written by such people, as they try to bring all the law together in one place. It is very good for legal practice.

Q96 Rebecca Harris: You say that you would like to put everything in one piece of legislation, but that is not what we are looking at now; we really want your views on what is in this—whether you would add to what is already in the draft Bill or detract from it.

Lord Carlile of Berriew: The draft Bill is pretty sound. I know that there are questions such as those asked by Lord Plant on intercept evidence and whether that would have an effect, and I do have some views on that, but the enhanced TPIMs Bill is sound in that it places a time limit on the legislation, it has to be considered regularly by Parliament, and it enhances the scrutiny of cases.

Q97 Lord Jay of Ewelme: You may not want to look forward, but do you expect ETPIMs actually to come into effect? Would you say a little about the circumstances in which you think the Government might decide that the time has come to introduce the EPTIMs Bill?

Lord Carlile of Berriew: I can give you two examples, but there may be others. The first has already been given to the Committee by David Anderson, and I agree with him, on the end of a TPIM. I listened carefully to the exchange earlier. I have been to see controlees, as they then were, in their homes on a small number of occasions and talked to them, at least as I believed, in private. My view is that, although some of them might be completely reformed characters or completely useless as terrorists at the end of a TPIM or control order, there are others– I think of Abu Hamza's preaching– who are so driven by what they do and are so highly respected in their very small community that they remain as potential terrorists.

The other example is if a multiple threat appeared that was placing great pressure on the authorities from a policing and control viewpoint– for example, a large cell or a cell that appeared to have extremely dangerous weaponry beyond what we have seen so far. Then I can see the need for the

urgent enactment of this draft legislation so that a lid could be placed on the activity of the people concerned. It takes a long time sometimes to prove a case in a prosecution– if you can.

Q98 Lord Jay of Ewelme: In that second case, let us assume that such a multiple threat has been identified by the Government and they wish therefore to introduce ETPIMs. How long would it take to be introduced? Could it happen overnight? How long does the process take?

Lord Carlile of Berriew: You will have to ask Baroness Neville-Jones, but I would hope that it could happen in about 10 minutes. If appropriate and credible information, properly analysed by officials and Ministers, came to the attention of the authorities, I would expect the urgency provision to be taken immediately. After all, the Government's first responsibility is to protect the public. Ministers do make mistakes, but, if they have made a mistake in good faith, they can be confident that they would be allowed to get away with it if they were protecting public safety.

Q99 Baroness Doocey: You said earlier that it might be difficult for the Home Secretary to be as open with Parliament as she might like because of the constraints that would be on her. David Anderson suggested that perhaps one way round this might be for a few Members to be briefed. Could you comment on that? How would this work? I have a difficulty in understanding how Members could go through the Lobby on the basis that someone had said, "Don't worry. This is fine because I know what it's all about. However, I can't tell you."

Q100 I wonder whether a Committee that was security briefed, who could look at this in depth and examine it, might not be a better option? Would you like to comment on that?

Lord Carlile of Berriew: First, it happens anyway. If a statement is to be made on a major security-related matter, the relevant Opposition spokespersons would be briefed on Privy Council terms. I know of instances when that has happened.

Secondly, it creates great difficulties if other people are to be briefed. The security services are extremely nervous, and I understand why, about briefing a group of MPs or a group of Peers about matters that may be top secret– STRAP 3A, for example, which is limited to a number of office-holders. Those MPs and Peers generally have staff working for them. However well trusted the main individuals are, there is very little control in this building over the security of staff. We do not impose developed vetting on those staff; we don't even "SC" clear staff working for us in this building, so there is a degree of nervousness there.

There are discussions going on in Parliament at the moment about reform of the ISC. It may be that something can be done through the ISC, or whatever might replace it, to ensure that it too could be briefed– I believe that they are all Privy Councillors anyway– on the equivalent of Privy Council terms, but it presents some difficulties. The reality is that the Home Secretary is going to have to stand there and say, "I can say so much, but no more. Trust me; or don't trust me, if you dare."

Q101 Baroness Doocey: That is hardly scrutiny by Parliament, is it?

Lord Carlile of Berriew: Quite. That is the difficulty; I agree.

Q102 Nicola Blackwood: Putting aside your apparent lack of confidence in the ability of the Commons to scrutinise—

Lord Carlile of Berriew: Of which I have been a Member.

Q103 Nicola Blackwood: Exactly—of which you have been a Member, so it is rather sad, I must say, as is the fact that you don't think they can understand national security.

May I ask you, as a member of the Bar as well, whether you think that the new regime will spawn as much litigation as the control orders regime because that was also very costly to the Government? Given that the new regime, we have just heard, is more expensive, do you think that it will be a different issue, given the different levels of compatibility with the ECHR, given your legal head?

Lord Carlile of Berriew: Knowing the ingenuity of my learned friends and those who instruct us, I doubt if the new regime will spawn fewer cases. I am afraid that that is a realistic appraisal, subject only to one proviso.

I have followed in detail since 2005 all the judicial decisions in relation to control orders, although I don't see closed judgments any more so I can't follow them so closely now. The attitude and understanding of the judiciary to these cases has changed over the last six years. If I use the term "robust", I mean it in its most literal sense and not as a judgment. Judges are much more robust about national security because they understand it far more. There was certainly a lack of understanding by judges to begin with about what national security was, because most of them had absolutely no experience of it. A limited cadre of judges deals with these cases now, and that has led to desirable consistency.

Q104 Nicola Blackwood: What is your view about the proposals to introduce CMPs into the civil courts?

Lord Carlile of Berriew: I am in favour of the introduction of CMPs into the civil courts. There is, in the civil courts, the same need to protect national security as in the criminal courts. I don't really understand the argument that suggests that public interest immunity is a fairer procedure, because public interest immunity– I have been in cases where PII applications have been made– involve one side only going before the judge. CMPs involve the insertion of special advocates. Despite what the special advocates have said, they have occasionally been fabulously successful and generally very effective.

Q105 Nicola Blackwood: In that case, how do you respond to the concerns raised by the special advocates about the working of CMPs in some of the other courts?

Lord Carlile of Berriew: I think the special advocates have seriously undersold themselves and the effect of what they have done. That is a view shared by a number of other people. In my view, the special advocate regime has been successful. That is one of the reasons why I am, in my capacity as a barrister, occasionally asked to give advice to foreign Governments on how they can engage the special advocate regime, or something like it, to deal with civil liberties issues in their own countries.

Q106 Baroness Neville-Jones: Stuart Osborne was asked about the use of intercept evidence. What is your view on this, as to both its possibility and whether it would be helpful?

Lord Carlile of Berriew: Mr Osborne rightly said that intercept evidence would be useful in relation to serious crime in general if it was introduced. The FBI uses it to great effect, as do other police agencies around the world. For example, in sting operations in drug or money laundering cases, the use of intercept is often the starting point in an investigation.

I do not think that the use of intercept evidence would significantly reduce the number of people subject to TPIMs. I specifically looked into the issue as Independent Reviewer of Terrorism Legislation, and I was able to identify one case out of over 50 control orders that had been made in which intercept evidence might have led to a prosecution rather than a control order. When I started to deal with that in detail with the Home Office, I was persuaded that in fact it would not have made any difference in that case. It would not make a significant difference.

It is very important when we are dealing with intercept evidence to ensure that it is well understood, when comparing our regime with, say, the continental law jurisdictions, that we are absolutely not comparing like with like. It is a misleading comparison. For example, in France the juge d'instruction, a hybrid between a judge and a prosecutor, when investigating a terrorism case, can look at national security evidence and forget about it– or not forget about it, as the case may be– but he or she is under no obligation whatever to disclose to the defence the fact that national security material has been looked at.

In every country where intercept evidence is allowed, there is some kind of exception for material that might damage national security if it came into the public domain. In contradistinction to those jurisdictions, we have the most open disclosure regime in the world, particularly in criminal cases, so I understand the problem that the Intercept Chilcot Committee has had to deal with in this context and the difficulty of finding an answer.

Having said that, when I was Independent Reviewer, now probably four years ago, I presented the Home Office with a templates through which I thought intercept evidence could be introduced in some cases. They were certainly very interested in it, and I am aware that a great deal of work has been going on, which still continues. However, in my view they have been hamstrung by over-defensive external legal advice relating mainly to the European convention on human rights. I believe that we could have a limited system for intercept evidence that would be effective in some terrorism cases.

Q107 Baroness Neville-Jones: Would you enlarge briefly on the nature of the regime that you suggest?

Lord Carlile of Berriew: Very briefly, yes. I have witnessed intercept taking place. I have seen all the technical gizmos, the kit that can be used for surveillance, and I completely understand that there is no way of retaining every piece of information so that it can meet criminal disclosure standards.

My suggestion was what I called a box. The Director of Public Prosecutions– it could be the Attorney-General, but I prefer someone completely neutral– could certify a case at a certain stage into a box. Once it was in the box, everybody– Mr Osborne, the Security Service and the CPS– would know that from that moment criminal disclosure would apply to that case and that everything would have to be recorded and retained from that time onwards. Within such a box– I imagine that there might be half a dozen cases a year– one could use intercept evidence without difficulty. It is a very simple system.

Q108 Baroness Neville-Jones: Would that post-box situation be conducted by the Security Service or by the police and would that make a difference?

Lord Carlile of Berriew: I don't know that it makes much difference. I still have an ongoing official role in Northern Ireland, where the police and the Security Service work more or less seamlessly together. My belief, having been to many counter-terrorism units around the country, is that the same does happen in relation to terrorism in England and Wales– and, indeed, in Scotland.

Of course, it is enhanced by the multidisciplinary nature of JTAC. I wouldn't like to give an answer to the question because I don't think it makes much difference really.

Baroness Neville-Jones knows the secret world better than anyone in this room, I know, and I am sure that she would accept that the security services and the police come from different viewpoints and have different training. However, they work together far better in this country than in almost any other country that I have visited. In many countries, there are intense rivalries between the police and the various security services.

Q109 Baroness Neville-Jones: Might I ask one more question, Chairman? How much of a flaw in the TPIMs regime is the rather scant likelihood of investigation—the "I" bit—actually taking place during the time of an order? How much of a defect is that?

Lord Carlile of Berriew: As the Committee knows, when a TPIM is made, the relevant police chief has to certify by letter that a prosecution cannot be brought. When I was Independent Reviewer, I absolutely insisted on these letters being based on analysis rather than just being routine, because at the beginning they were rather routine.

I didn't really agree with Lord Macdonald, who suggested in his report that these measures should and could be a useful tool in investigation. It is absolutely beyond doubt that they inhibit investigation because the person is subject to controls, although they may occasionally assist investigation if somebody chooses by subterfuge to continue his or her relationship with former associates. The investigation bit of the TPIM seems to me to be pretty near an illusion.

Q110 Mike Crockart: Given the evidence of DAC Osborne that risk, in his view, is broadly equal under TPIMs as it was under control orders, given his extra resources, I am interested to find out what your objection is to the new regime other than the added complexity and distribution of the legislation.

Lord Carlile of Berriew: I always try to differentiate between risk and threat, because they are rather different. I certainly think that the threat is the same as it was. Indeed, although the control authorities, as they are sometimes called, have been very effective, the threat from terrorism, particularly violent Islamism, is roughly the same as it was five years ago. It is very difficult to draw a distinction between now and five years ago.

The risk is much more difficult to assess. I believe that the risk– I do not want to exaggerate this– is somewhat increased by the absence of an ability readily to relocate a person. It is logical that freedom of movement enables them to move around the country and meet and communicate with a wider range of people. For example, if somebody is a motivator of violent Islamists, their freedom to move around the country may allow them to motivate more than would otherwise be the case.

The most basic required reading to illustrate how this can occur is Ed Husain's book "The Islamist", which everyone in this field should read. It shows how ubiquitous motivational influence can be among students. I can see a strong argument for ordering relocation to a particular place of somebody who is seen as a strong motivator of terrorists. I hope that that answers your question.

Q111 Mike Crockart: It does, but, surely, if behaviour is not changed by the imposition of the TPIM, the added ability of investigative measures does kick in, allowing a case more easily to be built.

Lord Carlile of Berriew: Certainly no new investigative measures are being taken now that were not being taken before, subject only to any developments that there may be with technology.

Q112 Mike Crockart: You were clear about the ability of MPs to be affected by constituents, which of course is part of the democratic process. DAC Osborne's judgment was that it is very much a cost-effective and economic analysis of risk or threat versus cost. As politicians, we have to take on views about the balance of liberty versus security. Surely, that is what gives us the system that we have rather than the system that we had.

Lord Carlile of Berriew: I absolutely agree with the first part of that question. As to whether the system that we have now has improved the balance between liberty and security, I have very severe doubts. We are roughly in the same position as we were before. The police are spending an extra however many millions it is– the figure of £50 million overall was mentioned– to achieve the same end.

Putting it very simply, if we had something like a squad of royal protection officers with every suspected terrorist for 24 hours a day, then at vast cost we could prevent people from being terrorists. You recede from that obviously ludicrous position to a balance. It is a political decision in the end. I believe that roughly the same is being achieved now.

Q113 Mike Crockart: Surely, the major difference is the balance of proof that is required for the orders.

Lord Carlile of Berriew: This is a very interesting question, and I hoped that someone might ask it. Yes, of course, intellectually, raising the standard of proof by two notches to the balance of probabilities is undoubtedly more demanding. However, I have read every control orders case, and I do not believe that there is a single case in fact in which the judicial decision has not been made on the balance of probabilities.

Putting it another way, judges have a bit of difficulty dealing with lower standards than the balance of probabilities. Therefore, as a safety position for themselves– in my view, rightly– they have not confirmed a control order or condition unless they believed that, on the balance of probabilities, it was justified. However, I absolutely applaud including it in statutory provisions, even it is no more than a recognition of the realistic position.

Q114 Lord Plant of Highfield: May we focus for a minute or two on compatibility with the European convention? It is obviously not going to be all that helpful if the courts, in fairly short order, find ETPIMs are incompatible with the convention.

The Government have made a declaration of compatibility. I wonder how robust that is in relation to article 5 on the right to liberty and article 6 on the right to a fair hearing. In the Guzzardi case, the right to liberty was linked to the idea of the ability to lead a normal life, and a deprivation of liberty was a kind of illegitimate constraint on that ability. In the case of a fair hearing, the issue is really about what is disclosed to someone on a control order, an ETPIM or whatever, to enable that person to instruct a special advocate on his or her behalf– the so-called gist argument. These are the two areas of weakness in relation to the ECHR, and I wonder what your views are on both articles and how they are reflected in the ETPIMs Bill.

Lord Carlile of Berriew: So far as the first part of your question is concerned, in my view the ETPIMs Bill is compatible with the European convention. The Home Office, as I understand it, took external as well as internal advice. I believe that the law officers– we have had the same Attorney-General since the beginning of this Government– are satisfied that there is compatibility.

So far as the second part of your question is concerned, this is all about disclosure and gisting. The previous Government did not understand at first– it was not their fault; they were brought to this by painful litigation– but the Government now understand that one cannot justify a measure of this kind unless there can be a fair hearing. A fair hearing involves at the least a satisfactory measure of

gisting so that the individual concerned understands sufficiently the nature of the case being brought against him– it has been him in every instance so far, I believe. I believe that there is no substantial and subsisting challenge under the European convention to a control orders case in that context. If there was, it probably wouldn't be decided for another five years anyway because of the disgraceful backlog in the European Court of Human Rights. But I think that those issues are now satisfactorily covered.

May I add one gloss and a very small correction? You talked about the instructions that the individual is able to give to the special advocate. We have a problem because individuals do not give instructions to the special advocate. The biggest improvement that we could make to the special advocate system would be to enable special advocates to take instructions more readily– it is theoretically possible– and to be encouraged to take instructions from the individuals whose interests they represent. The security services are unjustifiably nervous of such instructions being taken, given that all special advocates are developed vetted anyway and presumably have STRAP training too.

Q115 Lord Plant of Highfield: I very much appreciate your answer, but, for the sake of completeness, on the issue of the right to liberty, do you think that the residence possibilities in the ETPIMs Bill would be likely—you have said not, but I wonder why you think that they would not contravene the ECHR, using the Guzzardi case criteria?

Lord Carlile of Berriew: This has been tested in relation to UK domestic cases. As I said earlier, I have visited controlees in the place where they were required to reside. The evidence on the ground does not in any sense justify the use of the term "house arrest", which is all too easily bandied about. They were not subject to house arrest. They had limitations on where they could live and some of their activities, but the limitations placed on TPIMs and former controlee individuals are in many cases less than the highest bail conditions imposed by magistrates courts every day up and down the country.

Q116 Jesse Norman: Lord Carlile, would you comment on the Civil Contingencies Act? Is it an appropriate alternative to any form of EPTIM?

Lord Carlile of Berriew: No, and I think, if I may say so, that that argument has basically disappeared off the radar. The Civil Contingencies Act was, in my view, an entirely inappropriate vehicle for this kind of limitation. It involved notions such as states of emergency. I am looking round for some of the older Members here, but I think that there may have been a state of emergency connected with the miners' strike or something of that kind, or the three-day week, but we just don't do it here. The Civil Contingencies Act puts far too much power into the hands of Ministers, and it also enables people to be interviewed in conditions that have absolutely no legal integrity whatsoever.

Q117 Jesse Norman: I just wanted to clear that up, and you have done so very helpfully. Thank you.

You talked about the judiciary being robust. Did you mean robust as in less deferential to the Government, or did you mean it the other way?

Lord Carlile of Berriew: I don't think I mean either or it may be both. It may be both. I had a Latin teacher who used to teach us to say, "The answer is no in the sense of yes."

Q118 Jesse Norman: Up to a point.

Lord Carlile of Berriew: Up to a point, yes. My view is that judges have been, if you like to use the word, more deferential to understand the role of Ministers as they have grown to understand it.

For example, they know that the Minister of State responsible for national security is extremely well briefed– one would hope so– at any given time. Judges have to give some credence to that knowledge. On the other hand, judges who have sat on quite a lot of these cases, whether in SIAC or in control order cases, have a real understanding of the weaknesses in security evidence, because it is not evidence in the conventional sense. It is intelligence, which is of a very different kind. Judges, on the whole, have been able to steer their way with great care between the role of Ministers as they now understand it and the weaknesses in information provided as a result of intelligence. By and large, they get it right.

Q119 Jesse Norman: In your view it is not true to say that there is much, if any, evidence of their being co-opted by becoming closer to the processes involved.

Lord Carlile of Berriew: Absolutely not. Indeed, the way in which such training as there is is deployed to the senior judiciary is designed to insulate the judges from any element of co-option. Also, the cadre of judges that deal with this changes from time to time. For example, some are promoted to the Court of Appeal. Although there is consistency, it is a consistency that is developing but it involves new blood from time to time.

Q120 Jesse Norman: You said that you had met controlees at different points in your former role. Is there any process of evaluation of these controlees that allows a formal, official determination of the kinds of judgments that you have reached informally?

Lord Carlile of Berriew: I am out of date, and I cannot give you any operational information of anything that happened after January 2011 save in the context of Northern Ireland, which is not relevant for these purposes. However, in my time there was something called the Control Order Review Group or CORG, for short. It is known publicly partly because I referred to it in reports.

I attended the CORG when I wished to. In a CORG meeting, which was chaired by a reasonably senior official, there were present representatives of all the relevant services, including the community police officer who had to deal on an ongoing basis with the family and the individual. In CORG there is a regular evaluation– a re-evaluation, indeed– of every case. I was satisfied that CORG certainly became rigorous. It considered facts, and the cases were got through quite slowly. Certainly in my time as Independent Reviewer, what I saw of the Control Order Review Group was that it was a genuine review.

Q121 Jesse Norman: At that time, could a decision have been taken by the group that strongly merited a continuation of the regime or that did not warrant it and, therefore, that the order should possibly be lifted?

Lord Carlile of Berriew: The group didn't make any decisions, but it would make recommendations to Ministers. I am certainly satisfied that, as a result of the views of the Control Order Review Group, changes were made. I can't put my hand on my heart and say that a control order was removed– it may have been– but changes were certainly made to the conditions that people faced and were subject to.

Q122 Jesse Norman: In either direction—tougher or less tough.

Lord Carlile of Berriew: I can't think of an instance when they were made tougher. That was not the premise. I can think of instances in which breaches were occurring on a regular basis. It is not attractive taking breaches before juries. The way to avoid prosecution for a breach is to plead not guilty at the first opportunity, because juries are reluctant to convict someone for returning 10

minutes late on 15 occasions, although there may be significance in their returning late. The Control Order Review Group played a real part, in my time anyway, in removing some aspects of controls.

Q123 Lord Jay of Ewelme: I have a small question on intercept evidence. Leaving aside the rather fascinating question of the mechanism by which intercept evidence might be used, I want to be clear whether you expect there to be at least some terrorist cases in which the use of intercept evidence would be a material advantage in a court case.

Lord Carlile of Berriew: Yes. The reason is that terrorists are remarkably like other criminals and would be likely to fall into the same traps as other criminals. Some terrorists are very counter-intuitive and would not fall into traps. I have heard of cases in which two suspected terrorists had a conversation prone on a grassy lawn in a park, head to head. They plainly are not going to fall for these kinds of traps, but some would. Certainly, there are likely to be some terrorist cases.

Q124 Nicola Blackwood: I want to go back to a comment you made to Lord Plant about special advocates being able to take instruction from the defendant. Did you mean before or after the special advocates had had access to the evidence that had national security implications?

Lord Carlile of Berriew: That is a very sound question and the answer is both. Before the special advocates have access to the secret material, there will be general issues that they want to raise. After they have had access to the special material, then very much so.

I would repeat what I just said to Lord Jay. Terrorist cases and terrorists are no different from other criminals. Much turns on issues of fact. "Where were you at 3 pm on 17 October 2012?" If the individual is saying, "I was in Blackpool", but there is evidence in the secret material that he was in Barry, then it makes a degree of sense for the special advocate to say to him, "I just want to take instructions in this matter. Were you really in Blackpool? Do you not think you might have been somewhere else?"

Q125 Nicola Blackwood: But without revealing the source.

Lord Carlile of Berriew: With discretion, yes.

Q126 Nicola Blackwood: You can trust a special advocate not to do that.

Lord Carlile of Berriew: Yes.

Q127 Nicola Blackwood: One concern about the proposals in the Justice and Security Bill is that, at the moment, the Government would have the option of asking for PII and non-disclosure or for CMP and disclosure. The concern or the conspiracy theory, perhaps, is that, if the evidence supported the Government's case, they would apply for CMP disclosure of that evidence, but, if the evidence did not support the Government's case, they would apply for PII and non-disclosure. How do you respond to that?

Lord Carlile of Berriew: I entered that wild place, the House of Commons, in 1983, so I have been knocking around political life in and around here for 30-odd years. During that period, we have not had a malign Attorney-General from any party, and we have not had a malign Solicitor-General from any party. I believe that we are entitled to make certain assumptions in our unwritten constitution. All is lost if we suddenly find that we have a malign Government. They will be found out.

Q128 Nicola Blackwood: I am not sure that that was the basis of my question. The basis of my question is that the fact that that is possible undermines public confidence in the system. The possibility that the defendant could apply for CMP, if they so wanted, which would be very unlikely,

would perhaps balance out the opportunity and therefore would increase public confidence in the system. What is your view on that?

Lord Carlile of Berriew: I am all in favour of it. The defendant should be able to apply for CMP if he or she wishes. I can't see a problem about that.

Q129 Nicola Blackwood: My next question applies to the Bill that we are considering today. We have received some evidence of concerns about judicial oversight of the Bill. At the moment, the judicial oversight process only requires the court to consider whether the Secretary of State's decision was flawed under a supervisory judicial review process and it calls instead for a full merits review. What would your opinion be of that?

Lord Carlile of Berriew: I think, in the real world, it is a distinction without a difference in these cases; I really do. I have experience of judicial review, including sitting as a deputy High Court judge dealing with judicial review. There is hardly a judicial review that reaches a full hearing in which there is not an examination in some way of the merits. If you look at control orders cases, there has been the most exhaustive examination of the merits in every case. The same applies to SIAC cases.

Q130 Nicola Blackwood: In your view, the judicial oversight within the ETPIMs Bill is absolutely sufficient and robust.

Lord Carlile of Berriew: I think it has been of very good quality.

Q131 Nicola Blackwood: But within the proposed legislation.

Lord Carlile of Berriew: Yes; I think it is sufficient.

Q132 Chairman: Lord Carlile, may we return to your comments at the very start about the ETPIMs regime and the way in which it would be brought into force? You said some things about the House of Commons that may appear to have been disparaging; we are not used to that as politicians. Surely the point that you were making was that you thought it was extremely problematic for the relevant information to be shared with the House of Commons in order for that to be a real process. Is that right and can you expand upon it if it is?

Lord Carlile of Berriew: It is right, but it can be achieved, particularly if discipline is exercised from the Chair and if Ministers are solid in understanding what they can or cannot say. My only concern is that, if a constituent of mine from, say, Llanfair Caereinion had come to me and said, "My uncle has been made the subject of an ETPIM, and the facts are absolutely outrageous", I might have felt it to be my duty to raise some of the facts during the debate.

Let's be realistic. Some MPs are more fiery than others in how they raise matters. It may be to their credit that they are, but it can confuse the issue and lead to a misleading sense of balance. It is always difficult for a Minister to say, "Terribly sorry, but I can't say anything at all" against somebody who is putting purported facts.

Q133 Chairman: That particular case happens on a regular basis. Ministers are obliged from time to time not to reveal the full truth or all their knowledge for a variety of reasons. I thought that you were saying something bigger than that. I thought that you were making a very real criticism of the ETPIMs proposal, saying that it will be enormously difficult to do this. I am now a little more reassured by what you say. Do you believe that it is a regime that will work, that it can be brought in and taken through the House of Commons in the kind of circumstances that would arise, and that sufficient information could be shared with Members of Parliament to enable them to take an informed decision?

Lord Carlile of Berriew: I may have over-advocated my view, for which I apologise, if necessary. I would not have been starting from here. As I said in the debates in the Lords, I would have left the control orders regime largely in place, subject to the changes that Baroness Neville-Jones referred to earlier, but I think it would be a mistake to abandon this draft legislation. With deft and careful handling and a degree of courage, ETPIMs could be introduced and probably should be introduced in circumstances that I can envisage arising.

Chairman: Lord Carlile, thank you very much for your time and your evidence. Thank you.

Professor Helen Fenwick, Durham Law School, Durham University, and Professor Anthony Glees, University of Buckingham, examined.

Q133 Chairman: Good morning, Professor Fenwick and Professor Glees. Thank you very much for agreeing to give evidence to the Committee and welcome. I would put the ball in the park, so to speak, by asking your opinion about what has been said is the main shift in the proposed policy both of TPIMs and ETPIMs, and that is a cautious rebalancing of the situation in favour of liberty. That has been said by David Anderson QC among others. Would you both agree that that is true? Give us your views of the differences between this regime, including ETPIMs, and the control order regime that it preceded.

Professor Glees: Thank you, sir. Could I begin by saying that I am slightly deaf, alas, at the age of 64 years old. I am not sufficiently deaf to need a hearing aid, but I wondered if the loudspeakers were on because I couldn't hear you.

Q134 Chairman: I am sorry; I don't usually get told off for being too soft. I do apologise. The Government and Mr Anderson have said that the new TPIMs regime, supplemented potentially by ETPIMs, is a cautious rebalancing in favour of liberty; this is the justification for it. Do you agree with that and what is your view of the new regime as against the old control order regime?

Professor Glees: Thank you. Do you want me to start?

Chairman: Either one of you.

Professor Fenwick: I am happy to kick off, if you are happy with that.

Professor Glees: I defer to my colleague.

Professor Fenwick: Yes, I think the current TPIMs regime is a cautious rebalancing in favour of liberty as opposed to control orders, but, because TPIMs, like control orders, create concerns about liberty, they also create a paradox. In other words, the concerns about liberty lead the Government—and of course this is what we see in TPIMs—to try to create the kind of rebalancing that you have just mentioned, but at the same time as creating that rebalancing the whole point of TPIMs may begin to be undermined to an extent. In other words, the liberty and security objectives of TPIMs, like the liberty and security objectives of control orders, may be in tension.

Professor Glees: I disagree with that. I am a professor and I don't have access to secret sources. My research is based on what I read and what people are kind enough to tell me. I have read the very interesting proceedings of this Committee that your office has kindly put at my disposal.

As far as I can tell, the new measures are more or less a reversion to the old control orders. I realise that Baroness Pauline Neville-Jones has made a couple of points and I understand exactly what she is saying. The fundamental issue and the philosophy here is what I would like to begin by stressing. I do not believe that civil liberties and liberty generally are undermined by effective, proportionate and accountable intelligence-led security policy. I think that's a complete nonsense.

Liberty is undermined only when the targets of that policy are not properly identified. The primary duty of the state, as this Home Secretary, previous Home Secretaries and others have said, is to generate national security. There will be a very small number of people whom it is impossible to bring to court and to prosecute who are nevertheless capable of doing extremely dangerous and indeed murderous things in this country. It is right that they be under control. One only needs to look at the newspapers—and I realise the trial is ongoing so I can't comment on all of it—to see that some of the people have already pleaded to terrorism offences.

This is a constant threat that we face in this country. As I say, liberty is not undermined when the right people are targeted for the right reasons. I have been very upset, I have to say, and I think the Government are giving out very unclear and confused messages over our national security at the moment. This seems to me to be another example.

I heard the Home Secretary when she first announced the changes to the control orders. I have read what Lord Macdonald has written, as this Committee undoubtedly will have. He talked about an unmistakable rebalancing of public policy in favour of liberty, the implication being that control orders are an obstacle to liberty. Our country is not an oppressive country. It is a strong democracy. It is precisely for that reason that terrorism is a real threat because these people know that they will never change what goes on in this country through legal democratic means. So I simply don't accept my distinguished colleague's line on civil liberties.

Q135 Chairman: Thank you; that is very clear, Professor. Is it your position, Professor Fenwick, that there is not the need for additional powers beyond those that were outlined in the original TPIMs Bill in 2011 and would you therefore not see the need for the enhanced TPIMs proposals that this Committee is looking at?

Professor Fenwick: There may be a need for enhanced TPIMs in fact if we accept the principle that there are at present some suspects that we are not going to prosecute or we can't prosecute and can't deport, although we are more concerned with the former. If that is assumed at the moment, then on that basis there may be a need for enhanced TPIMs because certain of the powers that enhanced TPIMs provide are not available under TPIMs—in particular relocation. I know David Anderson considers that relocation was quite a significant power under control orders that isn't replicated obviously under TPIMs, and therefore obviously there is a case for saying that, if it did have an impact in disrupting terrorists' networks, then there may be a reason for including it. It does appear that there is an argument anyway that it could be a disproportionate response to the risk in question.

There is also the point that a TPIMs notice will run out after two years. A TPIM is a temporary solution and it is not entirely clear what the exit strategy is. Obviously there are exit strategies from a TPIM, but, if it turns out that there are people in about a year's time who have been on control orders and are now on TPIMs, what exactly is going to be done with those people unless a solution has been found by that time to the problem of prosecuting them?

Q136 Mike Crockart: I want to move to the effectiveness of control orders first. Does each of you believe that control orders were an effective response to the threat that was posed? In particular, do you think the replacement—the TPIMs—was a move forward or a step back?

Professor Fenwick: The evidence is that control orders were effective in the short term. As an immediate problem, the evidence, as I said before, is that these people can't be prosecuted and it is very difficult to prosecute them. In that case, the evidence from Lord Carlile and from David Anderson is that they did seem to have efficacy. Obviously they have seen evidence that I have not seen. On that basis I would accept that they did have efficacy in a short-term sense in dealing with the problem.

But they did not have efficacy in a long-term sense in that they seemed to divorce the process from that of prosecution. The fundamental solution, up to a point anyway, is prosecution and not a control order or a TPIM. Therefore, if they don't lead to prosecution for separate terrorism offences—and they don't appear to have done—then they are not effective in that sense. I see some reason why a TPIM might be a little bit more effective in that sense. Yes, they are effective in the short term, but there are problems in the long term.

Q137 Mike Crockart: That was going to be my next question. Do you think that the new TPIMs are more effective? Do they give the prospect of more effective investigation and prosecution? We have heard evidence that there is a balance and we are managing it in a slightly different way, but in actual fact it doesn't give the prospect of investigation.

Professor Fenwick: There is very slightly more chance of prosecution, I think. I am not entirely sure that it is really going to work out in practice, but that might be because the suspect is less

isolated than under a control order. As you know, there is provision for a suspect to have at least some means of electronic communication, which might not be the case under a control order. Therefore, they are less isolated as to who they might want to get in touch with. The two-year time limit might also create more of an imperative. It might concentrate minds more on the question of, "Is there evidence for a prosecution?"

Professor Glees: The answer to your first question is that one has to be guided by the experts in the field. It is very clear, as my colleague says, from what Lord Carlile and Deputy Assistant Commissioner Stuart Osborne have told you that, yes, they are effective, although I have to say that both these gentlemen suggested that the "E" aspect of this—the enhanced aspect—was a return, effectively, to control orders, with some differences.

As far as electronic communications and so on are concerned, the fact is that now you could argue that there is no point in preventing people subject to control orders from engaging in electronic communication with other people. In fact, there might even be a positive advantage to our intelligence community if they did so.

The fundamental point that I come back to again and again is that there will always be some people at the moment, unfortunately, who will think of committing acts of terrorism. Because terrorism is not like differences of party politics, whether or not you are a member of Liberty, and is not like a college debating society, we have to allow those people who are charged to deliver security to all of us to intervene at an earlier stage. That may mean that prosecution becomes impossible or at any rate very difficult. It doesn't follow that, because prosecution is difficult, these people aren't planning acts of terrorism. Reading the newspapers, I think our Security Service and our counter-terrorism police, since 2005, have done a very good job and I am very satisfied with that.

There is one other thing that I think my colleague could have said and didn't say about this, which is the prevention aspect of this. I hope there will be a time when these last resort laws will no longer be needed. If you can keep people from committing acts of terrorism—it is, after all, part of Government policy to prevent terrorism in the first place—and, if it prevents terrorist cells from being formed and terrorists being developed because they know they are subject to a control order, I think that is a positive thing. I simply don't have a problem with that.

Q138 Mike Crockart: I turn now to the differential impact of counter-terrorism measures. You talked about ensuring that the right people were targeted for the right reasons. Do you think there is a risk that, due to the differential impact of counter-terrorism measures on Muslim communities in the UK, ETPIMs might be counter-productive?

Professor Glees: I know that Professor Fenwick takes the view that Muslim communities feel unfairly targeted. My colleague Dr Julian Richards and I have undertaken research in the Aylesbury Vale district, funded by the Prevent programme. What we found was a much more variegated picture. For one thing, I don't want you to assume that a Muslim mother or father has a different view towards the national security of the United Kingdom from the view of any non-Muslim in this country.

Secondly, we found there was some evidence that, where the police were involved and where community policing was portrayed as spying on Muslim communities, that was certainly something that was not liked, although we spoke to people who said they could absolutely see the point behind it.

However, when it came to the counter-terrorist police and the activities of the Security Service in delivering national security, there was no such anxiety at all. It was almost as if the people we spoke to from the Muslim community in that area were perfectly happy, as one would hope, to have a Security Service working closely with the counter-terrorist police to keep an eye on people that the communities themselves thought were a threat.

There is another problem about this. If Government, which have a duty to give us as much security as they can, should say, "We can't do a particular measure because there are communities in this country that will object to that specific measure", you then effectively appease those who mean to

do this country harm. If the Government think the policy is right, then they have to pursue the right policy in the right way towards the right target, and they have to explain it.

Part and parcel of this is that not only does the police and counter-terrorist police activity need to be accountable but also our secret agencies need to be accountable. There is a package here. Again, I am on record as having said that the role of the intelligence and security community in making sure there is proportionality is absolutely key. At the moment we have an intelligence and security community that is virtually silent. There are many things that need to be looked at.

Professor Fenwick: If I can just put the record straight, I don't in fact think that in a monolithic way any kind of counter-terror measure, such as control orders, would necessarily call forth an adverse response in Muslim communities.

What I have done is conducted research for the Equality and Human Rights Commission in various areas, including London, in the UK in Muslim communities, though not just with Muslims. I am not going to go into all the research now, but what we found is that, if communities considered, as, say, under section 44, which is now of course repealed—the stop and search measure without suspicion—that the community as a whole was being targeted, then there tends to be an adverse reaction and a lot of people were affected.

As far as control orders were concerned, and this is in answer to your original question, there was much less feeling because obviously only individual suspects were affected. It wasn't a perception that whole communities were affected. Therefore, I think it is fair to say in relation to ETPIMs that they may have an effect in creating—and I use a term used by Gareth Peirce—a narrative of injustice, in the sense that of course they are executive interference without a criminal trial. That doesn't aid in giving Britain the moral high ground. As I say, to an extent it could be part of a narrative of radicalisation. In terms of counter-terror measures generally, I don't think ETPIMs will have an immense impact. It is not comparable to section 44.

Q139 Lord King: If you look at internment without trial, that is exactly the point, isn't it? That was a blanket measure. Nobody knew who half the people were that had been picked up. They may have been people that the RUC just didn't particularly like. They thought that most nationalists were pretty dubious anyway and it was a pretty wide sweep. Of course that was enormously counter-productive. That makes your point about proportionality and what Professor Glees said about the accuracy of the people that you involve. It is not just Muslim parents that don't always know what their children are up to. Gary McKinnon's parents did not have a clue what he was doing upstairs on his computers. You need to keep them on side when a responsible element from the Muslim community is critical.

Professor Glees: If I may say so, your question is an extremely good one. It could lead one into a very long discourse about internment. It is certainly possible to view these measures, whether enhanced or not or control orders, as a more sophisticated form of internment. Those who study the history of Britain in the second world war period will understand that internment—"collaring the lot", as one of Churchill's Ministers described the internment of enemy aliens during the beginning of the second world war—is a very rough form of providing security where vast numbers of entirely innocent people were deprived of their liberty.

Luckily, today, we are able to do these things in a more clinical and surgical way. The number of people subject to these orders, as you know better than I, is extremely small. As far as internment in Northern Ireland is concerned—

Lord King: I don't want to talk about that.

Chairman: Don't go there.

Q140 Lord King: I got the impression that you thought I was recommending it.

Professor Glees: I am aware of the argument but I don't think this is the same.

Q141 Lord Jay: I want to come back for a moment to the question of the balance between prevention and prosecution. It is a question for Professor Glees. You said that you didn't really see any particular difficulty, if people were effectively prevented from terrorist activities, if they weren't prosecuted. But what happens at the end of the period then? They have been kept under wraps, as it were, but have probably been doing some pretty nasty things meantime. Then the period comes to an end. If there has not been some means of prosecuting them at that point, how do you continue? That was my question.

Professor Glees: Again, if I may say so, sir, it is a very good question. I found myself agreeing with what Deputy Assistant Commissioner Osborne said when he talked, at one end, about having people who reject terrorism and, at the other end, having people who are still very keen to follow it. He also talked about the radicalising environment that exists. It is my view that this country faces an objective situation where there is a radicalising environment. We have seen this radicalising environment in various places, which we could all name. They are mosques, universities, colleges, prisons and so forth.

If you are going to have a broad spectrum of Muslims in that situation, the vast majority of whom totally reject terrorism but a few who won't and who can't be prosecuted, it is to be hoped that by realising that the state is not absent but present they will turn from terrorism.

Q142 Lord Jay: So you hope that just the fact of the preventive measures would in itself cause them to change their behaviour.

Professor Glees: I think it is possible. I am a professor; I believe in educating people. I believe that people can be—

Q143 Lord Jay: But some of these people are not readily going to be educated, are they? Some of them are driven.

Professor Glees: Some people certainly won't. These are the people whom it is proportionate and correct to subject to "control orders", whether enhanced, unenhanced or of whatever kind. We simply haven't done enough research to be certain that we know how radicalisation takes place, who is the target and whether we are dealing with young people—particularly young men—who may well grow out of it. People my age will have seen the student revolutionaries of the 1960s. They turn into "Christopher Hitchenses" sometimes, so I am not at all depressed about the prospect that, if people know the state is present and not absent, they will not do things that they might think they would do if they could get away with it.

Q144 Lord Jay: Professor Fenwick, do you have any views on this?

Professor Fenwick: Yes. As you said, the point is that, if you have someone who has already been on a control order for a period of time—which obviously is the case with the people on the TPIMs—and they have been on the TPIMs for two years, they might possibly just sit on that TPIMs and not engage in any terrorism-related activity, which is not very surprising, but still remain radicalised. There isn't a lot of evidence of de-radicalisation due to the impact of a control order or a TPIM. Therefore, at the end of that time, the question would be: what could happen?

In actual fact, they presumably couldn't go on to an ETPIM because they had already been on a TPIM and there was no new terrorism-related activity. There is a requirement, as you know, for ETPIMs to be applied, that there has to be new terrorism-related activity if they have already been on a TPIM. That is the terminology used in the ETPIMs Bill. So there is a problem.

What can be done about the problem? Obviously it is very difficult. As you know, there are all sorts of very broad offences in the Terrorism Act 2000, as amended. We have the offence of preparation for terrorism and glorification, and we have all sorts of proscription- related offences. It is

possible that some of these suspects could be prosecuted successfully for some of these offences. For example, the Communications Data Bill may enable that to occur, perhaps. There could be greater data sharing between certain EU states, for example. There is a range of possibilities. Another is where technology can be used. It is more sophisticated, but the means of capturing and the uses of technology are also becoming more sophisticated. It is possible that greater efforts could be made to prosecute some of these suspects.

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

From a security point of view I suppose one could argue whether it is correct to place an ETPIM on a TPIM suspect, if that is what is going to happen, on the basis of new terrorism-related activity because there does seem to me to be a gap in the legislation.

Q145 Nicola Blackwood: I have a separate question for each member of the panel arising from your comments already. The first one is to Professor Glees. I would encourage you to read the Home Affairs Select Committee's report on Roots of Radicalisation, which points to the role that grudges play in radicalisation amongst the Muslim community but also the far right within the community, who are a rising threat.

You mentioned early on in your comments your objection to the change in the control order regime. You made a comment about the acceptability of such a regime on the basis of it being effective, proportionate and accountable.

My question is, comparing the control order regime with the current TPIMs and ETPIMs regime, what is more effective, proportionate and accountable between the two forms of legislation, given that DAC Osborne, David Anderson, Lord Carlile and the Home Office have all given evidence saying that the current regime is effective, proportionate and accountable? Why would you object on those grounds? If you could answer briefly, that would be great.

Professor Fenwick, you object to the current regime on the basis that you think the offenders should be prosecuted. We have received evidence that it is not possible to prosecute, and therefore how could you leave these offenders within the community given the risks that they present? What would be your alternative? Those are my questions.

Professor Fenwick: If, literally, there isn't a prospect of prosecution of people who, on Security Service advice, are dangerous, why not consider seeking a derogation from article 5 and look for a more severe form of intervention? That would be openly saying to Parliament, "We can't sustain article 5 at the moment"—i.e. the right to liberty—"because these people are so particularly dangerous." If these people are very dangerous, one might ask why they are being confined, given an overnight residence order, being fairly frequently moved around and so on.

Q146 Nicola Blackwood: Forgive me for interrupting, but in order to achieve derogation would you not need to convince the ECHR that there was a state of emergency?

Professor Fenwick: Yes, you would, but you would also have to convince the domestic courts that there was a state of emergency. As you know, in the A and others case they were convinced there was a state of emergency. Of course that was in 2004, but nevertheless it is arguable that the state of emergency—

Q147 Nicola Blackwood: In your professional opinion would that be a sustainable option?

Professor Fenwick: Yes. I think it would be a sustainable option to say, "There is a state of emergency requiring …" The state of emergency point was found in A and others to be largely a political judgment. The question in that case was, "What measures are needed to meet the exigencies

of the emergency?" That is the issue. What went wrong there was not just that detention without trial was used but that it was used on a discriminatory basis. It was only used against non-nationals. In other words, if we could cope with British nationals who were involved in terrorism by using another panoply of measures in the Terrorism Act 2000, why couldn't we cope with non-nationals also posing a threat? Why do we have to have detention without trial for non-nationals? That was what the House of Lords thought was wrong.

Q148 Nicola Blackwood: That doesn't offend your sense of liberty against security; it's just the derogation issue.

Professor Fenwick: At the very least, what would be happening is this. A derogation is not a measure that one would enter into lightly, and Parliament would have to accept the derogation, but at least it is openly saying it to Parliament. Parliament would have to say, and so would the judges, that, yes, there is a state of emergency at the moment, meaning that we have to suspend our acceptance of article 5. I would prefer to take that course rather than use control orders and then use TPIMs, and I suspect what is going to have to happen is something like super TPIMs and maybe even the Civil Contingencies Act; I don't know.

The point I am making is that at the moment we have legislation in front of us that, in terms of the current suspects, only lasts for about another year and a half. What is going to happen after that?

Professor Glees: On your first point I am well aware of Keith Vaz's Committee and what they reported on radicalisation. If you read that report carefully, you will see that it is very confused. The executive summary completely contradicts the evidence that was adduced in that report. I don't think it is particularly useful. If one were to undertake research—I think one should and I am trying to convince the Home Office that it is serious, lasting research into radicalisation—one would have to commission extensive polling.

Q149 Nicola Blackwood: I believe that was the finding of the report, which I sat on.

Professor Glees: I am glad to argue the point with you but I don't agree that the report gave a clear picture. Only extensive polling would help us to understand radicalisation fully and properly in this country.

As far as your question of effectiveness is concerned, I would say again that I defer entirely to the judgment of Lord Carlile. I also think that what Stuart Osborne said made a great deal of sense to me. Effectively, we are still in the same place. Whatever the law may be called, we are still effectively in the same place and there are some people who cannot be prosecuted but who could be a serious threat to our national security. Some form of control orders is needed.

I am a professor; I am not a politician. I think I understand a little bit about political expediency. As I say, I come back to the point. The Home Secretary is giving off extremely confusing messages about where we are.

Q150 Nicola Blackwood: I was asking about the legislation and whether you thought it was effective rather than about the messaging.

Professor Glees: I do think it is effective. We are talking about a small number of people. The view of those who have access to information that I don't have is that they are effective. I would go with them.

Q151 Nicola Blackwood: So you think that the TPIMs and ETPIMs will be as effective as the control order regime.

Professor Glees: As I understand it, they will be as effective but at greater cost financially. Your Committee heard that this so-called rebalancing of national security and liberty actually boiled

down to £50 million and a more complicated regime for the police. That in itself is more complicated and they have to deal with it. I didn't detect any complaint in what you were told by the Deputy Assistant Commissioner. The problem for Liberty and for libertarians is with the whole concept and philosophy of control orders. I kind of understand it, but I think they are totally wrong.

Q152 Jesse Norman: Professor Fenwick, do you think there is adequate judicial involvement and oversight over the TPIMs and ETPIMs regime?

Professor Fenwick: It has improved because of the case of AF (No 3), as you know, in 2009. At the moment there has to be disclosure to the suspect of the gist of the case against them, but that is all. So the detail remains in the closed material. The other point you could make about judicial involvement is the slight rise to reasonable belief from reasonable suspicion. If ETPIMs are introduced on the balance of probabilities, the proof has to be a bit higher. That will be looked at in a court as to whether—

Q153 Jesse Norman: Does that really amount to anything in court?

Professor Fenwick: In reality, will it make any difference? I don't think the change from reasonable suspicion to reasonable belief makes much difference, no. In fact, it is obvious it does not because all the TPIMs were imposed on the basis of reasonable belief and they had previously been imposed on the basis of reasonable suspicion. On the balance of probabilities, it might make a small amount of difference.

In terms of the disclosure issue, as I say, the judicial involvement is obviously limited and nothing close to what it would be in a criminal trial in the amount of evidence that has to be disclosed. The proof that the state has to provide in order to support a TPIM or an ETPIM is much less than the proof the state would have to provide to support a criminal conviction. The judicial involvement is fairly limited and most of the material involved is closed material. That is problematic, yes.

Q154 Jesse Norman: Professor Glees, do you want to add anything to that?

Professor Glees: As far as I understood it, but I would defer to the judgment of my colleague as a professor of law and I am not, the distinction was between reasonable suspicion then and balance of probabilities now. It is like the argument over extradition to the United States of America. They have different ways of looking, but basically they are making the same point.

Q155 Jesse Norman: I want to go back to the question of what happens at the end of a TPIM. Professor Fenwick, you have said that there is a potential problem at that point because they are very often doing a level of supervision and surveillance unlikely to create new terrorism offences and, therefore, the grounds for an ETPIM may simply not be there. Even if there were grounds, there might be in practice an actual requirement to give the person a period of freedom before imposing an ETPIM.

Professor Fenwick: Obviously an ETPIM could be imposed immediately. This depends on whether or not the Bill is introduced, but, making the assumption that the Bill is introduced and passed in Parliament, that presupposes some sort of threat that Parliament has to be cognisant of. In any event, making that assumption, supposing there is evidence that the person might have engaged in some new terrorism-related activity during the period of time they were on the TPIM, then the ETPIM can be imposed, and new suspects can immediately be placed on an ETPIM on the basis of so-called new terrorism-related activity. I don't know why the word "new" is used. That is simply irrelevant and should be removed.

In the first case, where you have a suspect subject to a TPIM and it comes to the end of the TPIM, which is going to happen in about a year and a half with some suspects, and there is no

terrorism-related activity that can be pinpointed that occurred during the period of time of the TPIM, then they cannot be subjected to an ETPIM. I don't know what the strategy is after that.

Q156 Jesse Norman: So they then either go free or get prosecuted.
Professor Fenwick: Yes.

Q157 Jesse Norman: If they get prosecuted, why weren't they being prosecuted earlier? That is the question.
Professor Fenwick: Indeed, exactly.

Q158 Jesse Norman: Do you think the proliferation of new offences in fact makes it easier for them to be prosecuted and that actually what is happening is that people are moving too quickly to TPIMs?
Professor Fenwick: Do you mean that they could be prosecuted but they are not being?

Q159 Jesse Norman: They could be but they are not being; they are being put on TPIMs first.
Professor Fenwick: Yes, I do actually think that was the case in some circumstances—in other words, in relation to some suspects. Of course you would have to look at the case of each suspect in order to come to an evaluation about that, but nevertheless it is the case that sometimes it is easier to impose a control order and now a TPIM for obvious reasons. As I said, the evidence required to sustain a TPIM or an ETPIM is obviously lower. The burden on the state in order to gather the evidence is less than to gather the evidence for a conviction.

Q160 Jesse Norman: Following on from that, how do we ensure in practice that the process picks up the person at the right moment? If you pick them up too early, you have missed the opportunity to get the full surveillance value. If you pick them up too late, then they may have done something horrible.
Professor Fenwick: Yes, especially in terms of suicide bombing. That was the reason why the glorification offence was introduced and also, particularly, the early preparatory offence in the 2006 Terrorism Act. There is not much point in trying to prosecute a suicide bomber after the event obviously—although that is not quite as ridiculous as it sounds because you can have conspirators, failed suicide bombings and so on—but nevertheless you don't want to take that risk. You don't want to take the risk of going too close to the point at which the suicide bomber might strike. Clearly it has to be early preparation. Lord Carlile sponsored that offence deliberately in order to try to avoid the use of control orders.

Q161 Jesse Norman: I have a final question. ETPIMs, as many have told us, are now really rather close to control orders given the locality change. Can you envisage a successful legal challenge to ETPIMs, given that there was one against control orders?
Professor Fenwick: Could there be one? I would say yes. It is probably unlikely that the whole regime of ETPIMs would be viewed as contrary to articles 5 or 6, partly because of the use of section 3 of the Human Rights Act. The decisions we have already have seen have meant that in the Supreme Court the whole system has not been declared incompatible with articles 5 or 6. However, the problem with ETPIMs and TPIMs is the grey area—in other words, the possibility in one particular case, which of course encourages litigation which is expensive, that articles 5 or 6 could be breached because of lack of disclosure. That is what we saw with control orders. I think we could readily see that with ETPIMs. A particular ETPIM could breach article 5.

The Supreme Court decision in AP, which is the leading decision, found that, if you had 16 hours' house detention and then you had other stringent requirements, in particular relocation, on top

of that, relating to the particular personal circumstances of the subject of the ETPIM, then you could have a breach of article 5.

The other problem that I think the Government's ECHR memo fails to address is the problem that the control order regime has not been tested at Strasbourg. Therefore it does not have a clean bill of health at Strasbourg. In a sense it has a clean bill of health domestically but not at Strasbourg. We could see a control orders case coincidentally winding its way to Strasbourg and derailing the ETPIMs regime.

Q162 Jesse Norman: That is extremely helpful; thank you. I want to pick up on one little thing you said. I think you said that section 3 of the Human Rights Act had the effect of shielding the regime slightly. Could you elaborate as to why that might be? Obviously a lot of people regard the Human Rights Act as cutting the other way.

Professor Fenwick: In a sense, yes. Using section 3 of the Human Rights Act, the House of Lords found in AF (No 3) that they could read in the requirement that the disclosure to the controlee should accord with article 6—in other words, read the words into the statute to raise the disclosure requirement from what had already occurred. In that sense it shielded it from a section 4 declaration of incompatibility but, on the other hand, of course changed the requirements from those that Parliament had had in mind originally.

Q163 Jesse Norman: Thank you. Professor Glees, did you want to comment on any of that?

Professor Glees: I can't usefully; I am not a professor of law. All I would say is that, when you talked about the whole raft of measures that Governments have introduced over the past 10 years, whether those measures might not be good grounds for prosecutions of people who were otherwise put on to TPIMs or ETPIMs, I think you make a very strong point. I can see that, because of the skewing of this debate, somehow civil liberties are undermined if people are prosecuted for inciting others to commit acts of terrorism. People might be reluctant to do that.

From my perspective, this is about the real world of policy. It is about giving agencies of the state considerable powers over the lives of a very small group of people. It should be proportionate. It should be done to the right people in the right way and the people who do it should be properly accountable. I don't know about Strasbourg, but, as far as I can see, the Human Rights Act certainly wouldn't be compatible, even though Gareth Peirce and Liberty—who of course have opposed a lot of these measures over the years as interfering with human rights—might take a different view.

Q164 Lord Plant: I have a supplementary question to Mr Norman's question on the issue of judicial oversight of all of this. This was a very big issue in the debates on the Terrorism Act 2005 or 2006, whenever it was, particularly in the House of Lords. I would be interested to know what your view is of Lord Carlile's position. Last week he said that you can have a review on judicial review terms, which is essentially procedural, or you could have a review on the merits, which is, as it were, not part of the present proposals, but the difference really doesn't matter because most procedural judicial reviews turn into merits reviews. I just wonder whether you would agree with him on that.

Professor Fenwick: If the process is being tested against the ECHR articles, then, in effect, the review is a merits review in any event. Obviously the two articles in question are articles 5 and 6. Particular control orders have been looked at in relation to article 5. As you know, the Supreme Court in AP found there was a breach of article 5. The same thing has happened with article 6. Of course article 6 is a procedural article, but nevertheless it is a form of merits review to say that this court hearing fell short of the demands of article 6. The standards must be raised via section 3 of the Human Rights Act, as I said before. In a sense the review turns into a merits review.

Q165 Baroness Neville-Jones: I want to ask the witnesses what they think of the technique of back-pocket legislation. It comes into operation as needed.

Professor Fenwick: I find it rather strange. The TPIMs Act was passed. I would have thought it was possible that the ETPIM measures could simply have been introduced in that Act. They could have empowered the Secretary of State under certain conditions to bring them into force. I am not necessarily saying that the ETPIMs should have been introduced at the same time as TPIMs, but I don't really see why Parliament didn't get a full chance, and presumably isn't going to get a full chance, to debate the ETPIMs Bill. I am not very impressed by this method. I think it minimises parliamentary scrutiny.

Professor Glees: I would repeat that the Home Secretary is giving out very confusing messages about this. I understand that we have a coalition Government, but I defer, for the third time, I think, to the judgment of the Deputy Assistant Commissioner and Lord Carlile. We are basically skating round the same position.

Q166 Chairman: I have one final question, Professor Fenwick. You said that you thought that prosecution was possible in a number of these cases or a lot of these cases. I wonder if you could just tell us why you think that is so in a little more detail. What is the basis for that belief?

Professor Fenwick: When you read the SIAC reports—they are not always publicly available—and, for example, the case of E, which occurred some time ago, as far as I know E has never been prosecuted, but reading the report it was quite hard to understand why that person had not been prosecuted rather than being placed on a control order. That is one example. There seemed to be evidence from abroad—from Spain in fact—that could have been used in a prosecution in the UK. It was not apparent to me.

A further point I would make is that TPIMs, as you know, are called investigative measures. Control orders of course were not. The investigative aspect has supposedly been emphasised. The link with prosecution could have been made stronger in the TPIMs and ETPIMs legislation. It has been made a little bit stronger. Section 10 of the TPIMs Act is a little bit stronger in terms of the duty placed on the Home Secretary to consult with chief constables about the possibility of prosecution. It is a bit stronger than section 8 of the Prevention of Terrorism Act 2005, but it is not all that strong. It seems to me that it would be possible to create a stronger review perhaps using the Control Order Review Group—I assume it is now the TPIM Review Group—but in any event having a duty to say specifically why in any one case at a particular time there can't be a prosecution. I would make that investigative element even stronger than it is at present. It is not stronger for ETPIMs than TPIMs, and I think it should be.

Baroness Neville-Jones: Chairman, may I say, though the witness might not be aware of it, that there were reasons why, in the case she cited, the evidence from Spain was not usable?

Chairman: Professor Fenwick and Professor Glees, thank you for your time and your input. It is much appreciated.

Sophie Farthing, Policy Officer, Liberty, examined.

Q133 Chairman: Good morning. Thank you very much for giving evidence. You will have noticed, Ms Farthing, that you are on your own.

Sophie Farthing: I have; I was aware.

Q134 Chairman: Your colleague from JUSTICE who was going to give evidence is ill. We tried desperately to get somebody else to fill her shoes but we were not able to do so. If I could say to you, JUSTICE and anybody else who is listening, the only thing we can do in these circumstances is to reiterate the fact that we are open to written evidence. Should you choose to give us that, we will obviously give it consideration and comment on any of the evidence that we have been receiving. Thank you very much for coming here.

Sophie Farthing: Thank you, Chairman.

Q135 Chairman: I will start off our proceedings by giving you an opportunity to say orally what your views are of the ETPIMs Bill.

Sophie Farthing: As is known to the Committee, Liberty has expressed a lot of concern about the ETPIMs Bill and the TPIMs Act as it was going through. In terms of the TPIMs Act, Liberty's key concern is that it was not a sufficient replacement for the control orders policy, which we saw as considerably flawed. Our main concern with the TPIMs Act, and it applies to the ETPIMs Bill as well, is that it remains a measure outside the criminal justice system. We have made a lot of arguments about control orders, and our main concern is, consistently, that this is a measure that imposes criminal punishment but within the civil justice system. That is our key concern. I am afraid that is the crux of my evidence and I am sure I will come back to that point. That is one point that we do labour.

Looking at the ETPIMs Bill, we certainly welcome the Committee being set up. We were very happy that there was some scrutiny being put into what is a side procedure. We think it is a very difficult job to look at an ETPIMs Bill divorced from the context in which it might be introduced because we don't know when it will be introduced.

We have concerns that the measures that are proposed in the ETPIMs Bill—the relocation, the tagging, the curfews and some of the worst aspects of the control orders, which we were happy to see go in the TPIMs Act— are re-emerging in the ETPIMs Bill.

We have two concerns. It remains outside the criminal justice system and they are very serious restrictions on someone's life. These restrictions in particular are the ones that, in the opinion of certainly Lord Macdonald, who oversaw the Counter-terrorism Review, would be an impediment to prosecution. That is where we are with the measures that are proposed.

We are also concerned about the process and the terms of the draft Bill that are being considered. There are things like the absence of triggers and thresholds, which I am sure we will get to. But as a broad overview we have a lot of concerns.

Q136 Chairman: Notwithstanding your strong objections to the measures, would you accept that the new regime—the TPIMs supported by the ETPIMs regime—is a cautious move in the direction of liberty as against the old control order regime that preceded it?

Sophie Farthing: I'm afraid not. The position that we have taken is that there have been tweaks round the edges, moving from reasonable suspicion to reasonable belief for example, but the fundamental crux of the ETPIMs/TPIMs regime remains that it is outside the criminal justice system. From our perspective, in terms of it being a public policy and in talking about public safety, the safest option is criminal prosecution. Because we don't have that in the TPIMs Act or the ETPIMs Bill, we remain of the position that we have not moved towards a more libertarian-type measure.

It is in stark contrast to other things that the Government have introduced since they came to power, such as reducing pre-charge detention, looking at section 44. They were measures we welcomed hugely. The control order replacement was the place where we were most disappointed by the Coalition Government's response to all the counter-terror measures. You can certainly draw a distinction between the different approaches that have been taken.

Q137 Chairman: What is the alternative? You have said prosecution. Is it your position that it is prosecution or nothing and that if you are not able to prosecute people they should be free to go about their business? What is the alternative to a measure like this?

Sophie Farthing: We recognise that there is an issue being addressed here. It is a difficult issue and there are no simple answers. Certainly we have pushed for prosecution and we are not alone in that. I can look to Lord Macdonald, who has said it all over the record. I can look to Baroness Manningham-Buller's reflections last year, where she spoke about the importance of prosecution and said that the safest measure in a democracy is to prosecute people within the rule of law. We do stick to that, first and foremost.

Having said that, certainly when the TPIMs Bill was going through, we were trying - and we do try to be pragmatic at Liberty, we don't draw a line in the sand because we recognise that there is an issue that is trying to be addressed. Accordingly one option that we put forward was the police bail model—police bail being the very stringent conditions that police can impose on someone who is a suspect before there is sufficient evidence for them to be charged. That was an option that Lord Macdonald supported. It is not a soft-touch option by any means, but the benefit is that it is tied to the criminal justice system. Because we see the main problem as this measure being entirely outside the criminal justice system—civilly imposed measures with criminal punishment consequences— so that is where we would like to see it go, back into that criminal justice sphere.

I don't think it is a question of "You must prosecute or not", but that should be the goal. The problem with the TPIMs Act and the ETPIMs Bill is that there are measures being imposed on individuals that are an impediment to prosecution. That is accepted. If you look at relocation under the ETPIMs Bill, that is the clear impediment to gathering evidence in order to prosecute. That is where our concerns lie and that is where we try to look at other models. I should say, of course, that police bail can't currently be imposed on terror suspects. It can be imposed on suspected murderers and people who are suspected of sexual assault but not terror suspects. We have suggested that that ban be lifted and the police bail model be looked at in order to bring this measure back into the criminal justice system for people - who we are told are dangerous suspects – in order to deal with them in the safest way possible.

Q138 Mike Crockart: When campaigning against TPIMs you branded the proposed and now present regime as unsafe and unfair. You have been fairly clear about the unfair aspect already, but perhaps you could expand on what makes it unsafe and whether those criticisms also extend to ETPIMs.

Sophie Farthing: To answer your last question first, yes, we do treat the TPIMs and the ETPIMs the same. Again, our position is that they are unsafe because there is no endgame with a TPIM or an ETPIM. Measures are being imposed that stop prosecution. There now is a finite time for a TPIM - so then there is the issue of what we do with people who we are told are dangerous and are at the end of their time on an ETPIM or were on a control order. That was one reason why we said that, if these people aren't so dangerous, then public policy and public safety is best served by a criminal prosecution.

One thing that we mentioned in our evidence was the number of people who did abscond on control orders. I think there were seven in the end under the control order regime. Liberty had personal experience of that at our 2009 conference. We had over 500 members of the public; we had

Nick Clegg, Jack Straw and Assistant Commissioner John Yates present. A man stood up halfway through the day a couple of rows back. He was on a control order and had been in Belmarsh. He was making a lot of complaints about that. That is one personal experience we had of someone who we have been told is particularly dangerous but freely able to come to a public meeting. We were very concerned about how the policy was operating as well as our overall concerns that it was not fulfilling the aim of public safety, which is a perfectly legitimate aim that everyone is aiming for.

Q139 Mike Crockart: That leads into my surprise that you don't feel that the change to TPIMs was an improvement at all. We heard from DAC Osborne about the significant additional surveillance costs associated with the move to TPIMs, which presumably would have stopped the example that you were talking about from happening because that person would have been being watched much more closely. In your opinion, are those costs justified, given that individual controlees have a greater degree of liberty under the TPIMs regime? Is that not a movement forward that you would welcome?

Sophie Farthing: If increased surveillance means increased chances of prosecution, then absolutely, we think that is a justifiable cost. I don't think anyone would argue with that. The problem is that the TPIM remains a punishment without the person who is being subject to the measure, and inevitably their family members who are also suffering because of the measures that are imposed, ever knowing the details of the case against them. It is the unfairness that we always go back to. Even though there have been tweaks, we only see them as tweaks around the edges.

We are happy to hear there is increased surveillance. We don't know about the cost. That is one thing that we have never been able to ascertain because it has remained private. The Joint Committee on Human Rights hasn't been able to ascertain it either. If there are increased costs of surveillance brought about by this system because of the tweaks round the edges, then that is something we can welcome. There are benefits to increased surveillance as well.

Q140 Mike Crockart: I turn to the perceived discriminatory element of TPIMs in terms of different groups. We have just heard evidence that, if you look at stop and search powers where it is a general use that was discriminatory, that has a poor effect, but, where it is on particular individuals, then that discriminatory effect is not perceived as so widespread. Would you agree with that or do you think that the regime unfairly targets particular racial groups?

Sophie Farthing: I would hope that it doesn't. It is inevitable given the type of terrorist threat that is being concentrated. In the context of all the counter-terror legislation, it is inevitably Muslim communities that will be stigmatised by these particular policies. There is obviously an issue there and it is having a discriminatory impact, because we don't know who has been subject to TPIMs but we have known of people who have been placed on control orders, and they are predominantly young Muslim men. If I were to guess what the evidence you mentioned before was referring to, I think it is right to look at the overall impact of what is perceived to be discriminatory. It will only be discriminatory if it is taking particular racial or religious features into account; in a way that is inevitable because of the way that counter terror is focused at the moment.

It is certainly right to look at the negative impacts that it is having on those communities. We have conducted focus groups in the past to look at that. There was a very in-depth study conducted last year commissioned by the Equality and Human Rights Commission, which looked at the impact of these very broad counter-terror powers. It found negative impact in those communities in terms of policing. Schedule 7 was linked back to difficulties in policing.

Q141 Mike Crockart: But those were particularly in relation to the broad powers in section 44, whereas it was exactly that study that found the powers in relation to individuals were much more acceptable because they weren't thought to be broad, all-encompassing powers.

Sophie Farthing: Sorry, what was your question in relation to that?

Q142 Mike Crockart: It was the fact that the disquiet being caused in communities was more in relation to other powers than control orders, TPIMs and ETPIMs.

Sophie Farthing: I understand that that was the impact of the research. I don't really have an answer to that as such. We see them as targeting a particular group of people. They still remain unfair, even if it is not having a wider impact within the community. We still think there is a problem with the order more broadly for particular people in a stigmatised group.

Q143 Baroness Doocey: ETPIMs was only going to be introduced with the approval of Parliament. Given that there is not going to be very much time, by definition, for scrutiny and it is going to be extremely difficult for the Home Secretary to be able to share with Parliament the reasons that it is needed, do you have any recommendations for improving the process of scrutiny?

Sophie Farthing: It is difficult to recommend anything in relation to the points that you raise. There is obviously a threshold trigger missing from the Bill. It is entirely unclear when it could be introduced. We entirely agree with the points that you raise. It is going to be very difficult for a Home Secretary to come to Parliament and ask for the bill to be rushed through. I imagine Parliament will be asked to rush something through on faith because the nature of the reasons why the Home Secretary is asking for the Bill to be rushed through won't be the kind of thing she would openly disclose. So we are very concerned with this type of legislation.

If there is the case, heaven forbid, where there is an emergency situation, then we would look to have some kind of definition as in the Civil Contingencies Act. We are not sure why that Act is not considered or why that it is being bypassed in these emergency draft Bills that are being held on a "just in case" basis. I am concerned with the way that this Bill—and we had of course the extended pre-charge draft Bill ready and waiting as well—might be introduced for reasons for which it was not originally drafted. I understand that, with this Bill, the Shadow Minister for Crime and Security requested that it be brought into force for the Olympics, which from the explanatory memorandum wasn't the reason the Bill was drafted.

Having a stand-alone Bill for an emergency is problematic. It is difficult to say what safeguards could be introduced. Our opinion is that the safeguard should be primary legislation like the Civil Contingencies Act, which in part incorporates Article 15 of the Convention derogation process. The Civil Contingencies Bill is a breathtakingly wide Bill, but there are benefits to it in that there are regulations that can be brought into force to deal with the emergency and they have a 30-day expiry that can be renewed. There are safeguards within that Act which are not present in this Bill. The bottom line is that primary legislation for an emergency has been developed in the Civil Contingencies Act; we think the problem with this kind of Bill, as good as the scrutiny of this Committee undoubtedly will be, it will sidestep the full parliamentary process.

Q144 Baroness Doocey: How would you react to a suggestion that perhaps the Bill should go to a small security-cleared Committee first, who would make recommendations to Parliament, or that some members ought to be briefed, which we have heard in previous evidence?

Sophie Farthing: I would probably have to put more thought into it. The more scrutiny the better is the bottom line. The benefit of a full parliamentary process and not the type that you have described is that a lot is ironed out that gets missed in legislation that is rushed through. It is never going to be satisfactory. I would certainly be willing to have a think about the suggestions that have been raised and write to the Committee. Off the top of my head, the bottom line is that there should be as much scrutiny as possible for something as serious as this.

Q145 Baroness Neville-Jones: I would like to revert to something that a witness said earlier on about preferring to see looser police bail. Could you outline for us how you would see that working in circumstances where there is quite likely to be a problem—in fact almost certainly there is going to be a problem—of admissibility of evidence that impedes prosecution?

Sophie Farthing: Of intercept evidence or any evidence?

Q146 Baroness Neville-Jones: The reasons for which a control order is merely based on intelligence or maybe a TPIM also.

Sophie Farthing: We certainly think that intercept evidence should be made admissible to make prosecution easier. That is our point. When we made the suggestion for the police bail, we didn't really receive a response to that effect to dispel why the police bail wouldn't work. There are obviously reasons why prosecutions cannot go ahead at the moment, which is why we have had a lot of these measures justified, and the main is intercept evidence being inadmissible. We still think the police bail model is worth looking at. We still think it is worth this measure going back into the criminal justice system.

Accepting what you say that some prosecutions can't go ahead, then we think we need to look at the reasons why that is. Intercept is one reason. The TPIMs Act itself has prosecution built into it. There are statutory aims for it to be a measure that leads to prosecution. I am not sure why that is in there if that is not going to be possible. The police bail model is a very strict regime. It is not a soft-touch option and it is not something we suggest lightly because it does allow for evidence to be gathered.

One thing to keep in mind and one thing that we go back to is that successful prosecutions for terrorist offences do go forward. We have a lot of terrorist offences on the statute book. If we can go back to the prosecution in relation to the liquid bomb plot, which we will all be familiar with and which was successfully prosecuted, Lord Macdonald has now said that it could not have been successfully prosecuted or the prosecution would have been damaged had they all been on control orders, and then they would have been out living amongst us rather than in jail where they should be.

I certainly take your point that this is a difficult issue that is trying to be addressed. I would urge the Committee, and we have certainly continually tried to urge the Government, to look at reasons why prosecutions can't go ahead and to look at the admissibility of intercept.

Q147 Baroness Neville-Jones: Doesn't it depend on the individual circumstances of the particular case? In the liquid bomb plot, the conspirators had done things of a kind where there was evidence that could be brought to court and a successful prosecution resulted, but there are cases where this is not the real-life situation. My concern is that you will simply be accused of abuse of the police bail system instead of it being a solution to the problem.

Sophie Farthing: I don't quite see where the abuse of the police bail criticism would come in. There are safeguards that you can put around the police bail system to make sure it isn't abused. We certainly wouldn't want to see abuse happen. That is one of the problems with this regime. It is very secret and we have to take a lot at face value. We can only come back and say there must be something against these people that it is possible to be brought about in evidence and, if not, we need to look at why that is. We have a world-class CPS. We have a policing system that is revered throughout the world. What you are hitting on and what we entirely agree with is that, in the TPIMs Act, we have two systems that are butting against each other, which are the intelligence services and the police.

It depends on what we want to do as a society and whether we want criminal prosecution for these people or whether we want to resort to these measures that are civilly imposed and therefore are unsatisfactory, in our opinion.

Baroness Neville-Jones: I am sure everybody would agree that prosecution is obviously the preferable outcome if you can achieve it.

Q148 Rebecca Harris: I do not quite know how the bail system works, but is there not a risk, if you are bailed, that it is indefinite, essentially?

Sophie Farthing: I apologise, I should have looked at the Bill on police bail that was put through that did put limitations on the length of police bail. I can certainly write to the Committee with a greater explanation. That was the Police (Detention and Bail) Act, which went through very quickly after a court case last year. There should be some limitations on the length of police bail because, of course, you wouldn't want another control orders system that could go on indefinitely.

One thing we would say about police bail and why we advocate it is that the conditions can be very stringent. It can be taking passports and tagging. It can be tougher.

Q149 Rebecca Harris: Some of them can be more stringent than what was in the original TPIMs Bill.

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

Q150 Lord Plant: Earlier on, and in a sense implicitly just now, you have linked the idea of using the criminal law to approach this problem with that of the idea of the rule of law and that this is really the only way to have a regime compatible with the rule of law. I just wonder whether you think, given what is in the Bill, that judicial oversight is sufficiently strong. That might be one way of at least making the regime more compatible with the idea of the rule of law, even though obviously these cases that would fall under this Bill are not to be criminally prosecuted.

What about the role of judges in the regime as it is envisaged? In particular, would you agree with Lord Carlile's statement to us last week—and this was a very big issue in the 2005 debates in Parliament—that a judicial review that essentially is about procedures and so forth is almost bound to turn into a merits review? If you do agree with him, why do you think the emphasis in the Bill is on judicial review rather than a merits review? Wouldn't it just be better, if it is all going to boil down to the same thing anyway, to have proper judicial oversight including a merits review set out clearly in the Bill?

Sophie Farthing: Yes, we certainly agree with your latter statement. Obviously we think the best judicial safeguards are in the criminal justice system for someone who is suspected of a terrorist offence, but we think in the TPIMs Act it is a system of judicial oversight and not judicial scrutiny. I hesitate to say that any judicial safeguards are going to make this Bill right. You can make something look like a trial but it is not actually a trial. One concern we did raise about the TPIMs Act—and we would raise about the EPTIMs Bill because it is the same process—is that it should be a judicial decision at the very least that involves a merits review.

We obviously have concerns about other aspects of the process, which is of course the closed material procedure that is involved. That is something to be borne in mind as well when considering how you could make this Bill more palatable.

Q151 Lord Plant: Given that the judicial review, as it is called, would have to look at the control order in relation to, say, articles 5 and 6 of the European Convention and so on, it is bound to get into the merits of it, isn't it? It can't be just procedural, can it?

Sophie Farthing: Yes; I would suspect you are right on that.

Q152 Nicola Blackwood: I want to ask you a little bit more about the bail responses that you have given. If an individual was on bail, would that case not be subject to all of the case law existing about abuse of the bail process and would there not be a risk about the abuse of bail process issues that we have heard about?

Sophie Farthing: Yes. The Police (Detention and Bail) Act was brought in to deal with the issues that arose out of that judgment. I apologise to the Committee that I don't have all the details of the Act in mind because I was focusing on this Bill. When we put the police bail option forward you could look at putting safeguards in place. The Act came through and we were supportive of the Police (Detention and Bail) Act, which did go through in a rush to deal with the judgment.

Q153 Nicola Blackwood: But that is one judgment. The point is that there is a significant body of case law that hedges around what kind of levels of bail are acceptable and so on, which means that a terror suspect would then fall within those boundaries. They would be quite different because control orders and ETPIMs have different levels of evidence associated with them for different levels of control associated with them. I wonder whether that would match against the evidence and control levels within the bail system. Have you done an analysis of that?

Sophie Farthing: Not that much analysis. When we discussed the police bail option we did set out how it would work. I can forward that to the Committee because we did quite a few tables and explanations of how that could work. You could build in safeguards because there are those concerns about the police bail process. It would require primary legislation. We just think it is worth looking at another model that is a criminal justice model and that one seems like the obvious one, even though there are concerns. You could consider it like a least worst option, if you like. We certainly think that anything is better if it is in the criminal justice system.

Q154 Nicola Blackwood: We have just received evidence from Professor Fenwick, who is opposed to both the control order regime and the TPIMs and ETPIMs regime. Her preferred option as a civil libertarian would be for the UK to derogate from article 5 and bring in an even more stringent regime for individuals in this instance. What would be your view of that particular proposal?

Sophie Farthing: I would have to reflect on that and read more about the parameters of what she is suggesting.

Q155 Nicola Blackwood: It is only for those individuals who could not be prosecuted in any way because there was no evidence.

Sophie Farthing: We certainly would not advocate a derogation from article 5. I would probably prefer to look at what the model is. It does raise alarm bells. Even if you go back to the public safety arguments, you are still warehousing people. It is not the way that our democracy has ever worked. It is not the way that we have dealt with other forms of terrorism in the past. It is slightly concerning, but I am very happy to look at her evidence and come back with further detail.

Q156 Nicola Blackwood: We have also been looking a little bit at the Special Advocate system in the CMP, which would obviously be part of the system of approving an ETPIM. We received evidence from Lord Carlile about his view that the CMP system works effectively, but we are also aware that in the context of the Justice and Security Bill there has been some concern raised by the Special Advocates themselves that the system is not working effectively. Could you give your view about that?

Could you also respond to the evidence that Lord Carlile gave that he is of the opinion that it would be perfectly workable for Special Advocates to take instruction and communicate with defendants before and after viewing secret material?

Sophie Farthing: Certainly on the latter point, to start off with, that would be better. One of the main concerns we have about the Special Advocate system—and the Special Advocates themselves have said this—is that they have an impossible job in what they are trying to do. Dinah Rose is a former Special Advocate, she said it is like taking blind shots in the dark and not knowing where your target is. That is how she has described the role of being a Special Advocate. We have a lot of concerns about the closed material procedure going through in the Justice and Security Bill. It is something that we object to entirely because we think it is an unfair system.

We think the unfairness is all in the closed material procedure measure. It came from a particular SIAC context. It is now in the control order and in the TPIMs regime. It is now being proposed to be rolled out across the civil justice system under the Justice and Security Bill. The closed court procedure and the use of Special Advocates is an unfair regime.

When we say "unfair", I appreciate the article 6 arguments that are made about the Bill, but we would certainly urge the Committee to look at all the common law principles that have been part of our justice system for hundreds of years and are being overridden by this system. It is the right to know the full case against you and the equality of arms; there are the open justice principles. Lord Carlile has made a suggestion there that would certainly assist, but I do not think it is going to right all the arguments that are made by Special Advocates themselves against that procedure.

Q157 Nicola Blackwood: Do you think that the draft Bill before us would be improved if it was made plain in the text that the ruling in AF (No 3) applied to all ETPIMs and TPIMs cases?

Sophie Farthing: Can you remind me of what that is?

Q158 Nicola Blackwood: I think it is that the defendant is given at least the gist of the case against them. It is not in the plain text of the Bill at the moment.

Sophie Farthing: Of course; any information would be better than none at all. We certainly don't think that the gist is as effective as knowing the details of the case against you. Gisting, again, is a least worst option, but that kind of clarity in the Bill would always be welcome.

Q159 Nicola Blackwood: Is it the view of Liberty at the moment that ETPIMs will be able to withstand legal challenge in domestic and European courts?

Sophie Farthing: I have read the Home Office memorandum to the JCHR on this. It is very difficult to say, particularly when you are looking at relocation - it is going to depend on all the conditions. It might withstand challenge, but it certainly might not because of the way that the courts in this country have approached that question about whether there is a contextual deprivation of liberty, in particular with relocation. That is going to be a particular concern under this Bill.

The other thing I would say is that there are holes that you can pick in the Home Office analysis, which I don't do lightly of course, but they point for example to judicial safeguards quite a bit throughout their memorandum, which says that the Bill would be compliant with the Convention. They talk about intense judicial scrutiny, which we don't think by any means is intense. There are serious concerns with that analysis. I don't think you could answer the question now, particularly because we are considering the Bill that is entirely divorced from its context. If you are talking about what is going to be proportionate and disproportionate, it is impossible to say now whether the Bill is going to be compliant, not knowing what we are actually talking about.

Again, I would go back to going beyond articles 5 and 6. The jurisprudence that has developed around those articles also had to relate to a lot of inquisitorial systems. There are limitations to that jurisprudence. We don't think that question of compliance is the bottom line. Again, if you look again at the CMP procedure and the Special Advocate procedure under the Bill, as I have discussed and won't repeat, there are common law concerns about that. I certainly wouldn't be prepared to say that,

yes, it is compliant and I don't think anyone could until you know. At the moment this Bill is in a vacuum.

Q160 Jesse Norman: You have talked about police bail as a possible alternative. How much work has Liberty actually done to flesh that out?

Sophie Farthing: We have done enough to draft amendments to the TPIMs Act when it was going through. We certainly spoke to Lord Macdonald about it, who gave evidence to the Public Bill Committee that that would be an option that he would consider.

Q161 Jesse Norman: But you have written a policy paper on it or someone at Liberty has.

Sophie Farthing: There is certainly information that we can forward to the Committee that sets out how it could have worked within the TPIMs Act.

Q162 Jesse Norman: If we have not seen that, it would be very valuable. One really does need an alternative to get a proper perspective on what we have at the moment. Would that be okay?

Sophie Farthing: Yes; I can send all the details.

Q163 Jesse Norman: In response to a question from Mr Crockart, you said that the finite time of TPIMs posed a problem to the issue of safety. I don't understand why that should be the case. Why isn't a finite time a good thing from Liberty's point of view?

Sophie Farthing: I guess I was saying that in the context of the criminal prosecution argument. The reason why we say that is because you are warehousing people. You are imposing measures that are an impediment to prosecution. We don't see them as a very effective measure for people who we are told are particularly dangerous. Of course, going back to the libertarian arguments and the legal arguments, it is proper that there should be a finite time. One of our main complaints about the control order regime was that it was indefinite. It was virtual house arrest.

Q164 Jesse Norman: So it isn't a problem for you, all things considered, that TPIMs or ETPIMs are finite; in fact it is a benefit versus what they replaced.

Sophie Farthing: It is certainly a benefit particularly for the individuals involved.

Q165 Jesse Norman: Isn't it also an incentive on the police to seek a prosecution in the first instance because they know that a TPIM or ETPIM will be finite?

Sophie Farthing: Absolutely. We would hope that that is the case and that the particular duties that are incorporated into the Act will help. Our concern is that the particular measures that are being imposed, particularly under the ETPIMs Bill, put a stopper on gathering evidence for prosecution.

Q166 Jesse Norman: I understand; thank you. This is not a point about Liberty as such, but, going back to the moment where the control order suspect turned up in your conference in 2009, presumably that wasn't a problem from your point of view. You felt that he should have been able to do that.

Sophie Farthing: Yes. We use that example to point out that we are told these people are very dangerous. If they are very dangerous terror suspects, we were very surprised that someone was able to turn up at a public gathering.

Q167 Jesse Norman: The argument is that the regime is not adequately sensitive to whether people are dangerous or not. If this person was dangerous, they should have been held at home or

prosecuted and incarcerated in some way, and, if they weren't dangerous, they should have been let out, and the system needs to be more sensitive to which they were.

Sophie Farthing: Exactly. Our point is that this regime doesn't effectively deal with people who we are told are dangerous. If they are not dangerous, then they should not be under a control order or TPIM.

Q168 Jesse Norman: But it might be a consequence of your view that the approach became more oppressive than the current one because a decision had to be taken as to whether someone was a danger or not and it was decided that the balance was going to be on their being dangerous. Isn't the grey area in some respects friendly to Liberty?

Sophie Farthing: That might be a consequence. We would hope that the more sensible and logical consequence is that we use the criminal prosecution system that we have. We are all safer if all terrorist activity is prosecuted. We have a situation now where some is and some isn't. We don't think that is a benefit for public safety.

Q169 Jesse Norman: But do you actually have any evidence that prosecutions aren't being brought which could be brought?

Sophie Farthing: I think you would have to go back through the reviews. I don't recall any prosecutions being made after a control order. We don't have any evidence because this whole regime is shrouded in secrecy. We will have to await the Independent Reviewer's next report to answer that question. I am sure someone will know when it is next coming.

Q170 Jesse Norman: Your argument is that you don't have any evidence because the system has essentially precluded evidence from coming forward.

Sophie Farthing: Yes. We know of ones that have been quashed, for example.

Jesse Norman: That is interesting; thank you.

Q171 Chairman: I have one question. You obviously prefer—and this is your position—prosecution to these kinds of regimes. You have said that you support the use of intercept as evidence and you believe that that would make prosecutions more possible.

We received evidence from Lord Carlile that during the control order regime he had looked at all of the cases and believed at first glance that in one case prosecution would have been possible with the use of intercept evidence, but then on further examination not even that one would have been possible.

What is it that makes you think that the use of intercept evidence is some kind of a key to unlocking the ability to prosecute these cases?

Sophie Farthing: I guess the best response is because we are often told, and justifications are put forward for these measures like foreign internment and control orders, they are needed because intercept is inadmissible. That is the first point. We don't have the access that Lord Carlile has obviously, so I can't respond in terms of what he said. I would simply draw your attention to the Independent Reviewer's evidence that he gave you last week or before the summer recess, as I am sure you are aware. I think he said that right-minded people would like to see intercept admissible and we would certainly like to join them.

We are only making suggestions. Intercept is something that successive Governments have looked at. It is something that is admissible across the common law world, which is the reason that we say it should be looked at. We have a situation here where we are told that one of the factors is that intercept is inadmissible. We therefore say, like so many Governments, that it should be looked at and it should be worked out how it could be made admissible.

Q172 Chairman: Miss Farthing, thank you very much. You will recall that a number of people have made requests during your evidence for bits of information. If you could provide us with that, it would be most useful.

Sophie Farthing: We will do so. Thank you very much.

Chairman: Thank you very much.

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

Q207 Chairman: Good morning, Minister. Welcome to our little gathering. Thank you for coming and thank you for being a few minutes early so that we can maximise the use of our time this morning.

James Brokenshire: Thank you for the invitation.

Q207 Chairman: I will kick off our proceedings by giving you the opportunity to tell us what the purpose and need is for the ETPIMs proposal.

James Brokenshire: I suppose it is worth setting out the background to the emergency Bill. In large measure, that related back to the Counter-Terrorism Review of our legislation, which led to various changes to the counter-terrorism laws that have been implemented. The key part of this is that, for the foreseeable future, our assessment is that there will be a small number of people who pose a real threat to our security but whom we cannot prosecute or, in the case of foreign nationals, deport.

What the Counter-Terrorism Review proposed was effectively a change to the previous regime. We had had control orders, but it was felt that they were not fit for purpose looking forward in terms of their implications and, therefore, a revised approach would be taken, which led to the creation of the Terrorist Prevention and Investigation Measures Act. But it was felt that in exceptional circumstances—and I am sure that is something we can explore in further detail—additional powers would be needed to deal with the risk, and exceptional risk, that may exist to be able to deal with a security situation at that time.

Therefore, we had the creation of the TPIMs Act, which is now on the statute book and operating, but knowing that there might in exceptional circumstances be the need for certain reserved powers that we judge should not be available on the statute book per se, recognising the implications of powers such as relocation, to have a draft Bill available that had been subject to appropriate scrutiny such that, if Parliament felt it was necessary to draw upon that, then there was a draft Bill that was available that could be used.

Q208 Chairman: We have received evidence that effectively suggests that what is now proposed is, in substance in any case, very little different from the control orders regime. Convince us if you can that this is not about political presentation because of things that were said in opposition and that there is a real, substantial difference between what is being proposed now and the old control orders regime that was deemed to be unacceptable from a civil liberties' point of view?

James Brokenshire: It is about the distinction that is drawn between the measures that are available under the TPIMs Act, and you will have taken evidence from other witnesses, who have identified issues such as relocation, the issue of people being confined to a particular area and certain other restrictions on things like communications, which we judged were not appropriate to have automatically available. Therefore, the TPIMs Act did not contain those provisions. I think that that was the right balance to strike.

Also, I would like to underline to this Committee that our priority is to prosecute suspected terrorists if we are able to, and it is only a question of having to rely on what is a preventative measure if that is not possible. Certainly, the priority of the Government is to be able to prosecute.

With the enhanced measures, there is a higher standard of proof that would be required in terms of the utilisation of those powers that could be available if Parliament was minded to pass a Bill. In essence, it is about ensuring that we have a sense of what is appropriate for managing risk.

The Counter-Terrorism Review looked at a range of different measures. It said that what was needed moving forward was a revised approach, which is why we legislated in the way that we did, but

in exceptional circumstances certain reserve powers may be needed to deal with that exceptional situation where other measures could not be used to manage that.

There are important differences in the standards that would legally have to be satisfied in the utilisation of powers under the enhanced Bill and more specificity on what it can be used for—in other words, the schedule of powers that could be adopted. Therefore, in terms of that balance of liberty and collective security, there are important differences that reside here and it is not just trying to repackage or simply to present it in a different way. It is about that better sense of balance that we see on the proposals that we have here, recognising that the TPIMs Act itself is a balance between additional financial and funding support for the security services and the police, as well as the legislative measures that we now have on the statute book.

Q209 Chairman: You talk about the higher standard of evidence. We have had some evidence that, while that is welcome on the face of the Bill, in practice it won't make any difference at all to that which was operational under the control orders regime. Would you accept that that is so?

James Brokenshire: I don't accept that argument. Under the control orders regime the standard of proof there was "reasonable suspicion". We get into the legals and what the distinction is between "reasonable suspicion" and "on the balance of probabilities", which is the standard applied under the enhanced TPIMs Bill.

To take the legal approach on that, "reasonable suspicion" is a state of mind by which a certain person thinks that something may have been the case, whereas "on the balance of probabilities" you have to be satisfied that something is more probable than not. Whilst these are, on one level, quite technical legal issues, they are important in giving assurance on how particular provisions would be used as well as balancing that against the requirements of necessity, which are very much underpinned within the original TPIMs Act and the draft Bill that this Committee is scrutinising.

Q210 Chairman: We heard from Deputy Assistant Commissioner Osborne that the move from control orders to TPIMs came at a great cost. I believe it was an additional cost of £50 million. Seeing as we now have a proposition for reserve legislation that takes us back a fair way towards control orders, to what degree is there a change that justifies that additional public expenditure of £50 million, which is not to be sniffed at?

James Brokenshire: There are separate issues here. Unfortunately I can't confirm the funding for various different reasons in what was provided to the police and the security services surrounding the original TPIMs Bill and, now, the legislation that has been enacted.

It is a sense of the investment that that funding has provided in terms of greater investigatory capability and other capabilities more generally across the patch in terms of managing risk and not necessarily looking at it specifically in relation to individuals who may be subject to a TPIM. It is important that we have, as I say, rebalanced. The Counter-Terrorism Review was a careful analysis of all of our counter-terrorism legislation on whether it struck the right balance between individual liberty and collective security. Our judgment is that this does, that it is a package, as it were, between legislation and capability that has been provided to the police and security services and that that does give a better structure.

When we turn to the enhanced TPIMs—obviously there are specific exceptional measures that are contained within the original Act to cover a period where Parliament has been dissolved between general elections, which is a very narrow window that has been provided there, and also the draft Bill that we are now looking at—that is very much the real exception. We felt that, because of the nature of the restrictions that could be applied under the enhanced provisions, it was not right in some way to have that ordinarily available, by order-making power on the statute book, simply because of the exceptional nature of those restrictions, and that risk could be appropriately managed

within the TPIMs regime and with the additional capabilities available to the police and the security services to manage risk. It is that judgment that we have come to.

Q211 Baroness Neville-Jones: Perhaps I can continue on that point, Mr Brokenshire. I would like to talk to you about the use of the term "exceptional circumstances", which you were just getting on to. I was not quite clear on what you just said, so could you outline again in what sort of circumstances you envisage the Bill being introduced? There may be a variety, but one of the puzzles for the Committee is when the introduction of this legislation would be appropriate.

James Brokenshire: You will be familiar with the fact that the Counter-Terrorism Review said it was for exceptional circumstances where other means were not available to manage that. When I was debating the Bill itself on the Floor of the House, I was quite clear that I did not want to circumscribe, second-guess or go through a long list of hypothetical circumstances. Ultimately it will be for Parliament to decide what is exceptional because, in essence, it will be Parliament that would be required to pass the draft legislation and put it on to the statute book.

Q212 Baroness Neville-Jones: In what sort of circumstances would the Government approach Parliament?

James Brokenshire: There are a couple of examples that I gave just to be able to assist, which was if there was credible reporting pointing to a series of concurrent attack plots, all of which appeared imminent, or in the wake of a major terrorist attack and potentially with the prospect of further attacks to follow. It captures that sense of the exceptional circumstances that we were envisaging that might exist and which would justify, in managing risk, the adoption of the powers that are contemplated within the enhanced TPIMs Bill.

Q213 Baroness Neville-Jones: So you are suggesting that a major terrorist situation is the sort of circumstance.

James Brokenshire: It is that sort of issue that we had contemplated. I suppose the ultimate check and balance—

Q214 Baroness Neville-Jones: Would that be likely to come out of the blue? Wouldn't the states of alert have gone up in the meantime or wouldn't you have had warning that there was increased risk? Why is it a good idea to have an emergency procedure, when it should be possible to anticipate beforehand that you have increased risk?

James Brokenshire: I suppose it is examining what increased risk is and therefore whether the resources available to the Security Service and the police to manage that risk are sufficient at that time. That is why I point to that part of the analysis that I have set out. It has to be exceptional. That is why we judge that having a process where you have emergency legislation to utilise that is right so that it underlines how exceptional and extraordinary that is to be able to draw upon that. I don't think it is simply a question of saying that the alert status may have gone to critical and that, therefore, automatically means you would seek to utilise the provisions that are contemplated within the draft Bill. I don't think it is quite as simple as that. It is looking at quite significant exceptional circumstances, which mean that a judgment is taken that it is appropriate to draw upon the powers that are set out.

Q215 Lord King: I apologise that I couldn't be here at the start. If I am raising a point that you have already covered, I apologise. This arrangement does seem very odd because it is almost an entirely presentational point that you are making. It seems to make it more dramatic by having it as a separate Bill than having an order-making power in a previous Bill. That is a point that I fail to understand. It seems to me that you can dramatise an order-making power suitably in an appropriate

way. You are talking here presumably about having a separate emergency Bill and a recall of Parliament if it is in a recess. Is that right?

James Brokenshire: Yes.

Q216 Lord King: So you have a recall of Parliament and all the confusion and difficulties for what may be a situation that may not be very easy to describe publicly why you are doing it, for security or intelligence reasons. Is that right?

James Brokenshire: The point you make cuts to the centre of this. This is certainly not about seeking a mechanism to dramatise—far from it. It is rather the fact that we believe that the additional powers that are contemplated are so stringent that they should not routinely be available on the statute book. It is the same approach that we took on the 14 to 28 days and the utilisation of those powers. Our judgment is that there needs to be that separation, recognising the significance of the measures that are contemplated. It is finding an appropriate means to show that these measures should not be routinely available by simply an order-making power and that there needed to be a separation, which is why the structure was created in the way that it was.

Q217 Lord King: "Dramatise" may not be the right word, but you are desirous, as I understand it, to show that this is taken very seriously. This enhanced power is not something that you would normally ever wish to be part of our normal legislation, but, because of the seriousness of the situation, it is necessary in a particular situation to introduce this enhanced power. It seems to me perfectly possible to do that under an order-making power if you circumscribed it in the right way and had requirements to make it an exceptional use of an order-making power. We have too much legislation. We have too many separate Bills around. It seems to me that this is real clutter to have this hanging around when it should have been put in the original Bill.

James Brokenshire: We take a different view. Because of the stringent nature of those powers, we did not feel that having an order-making mechanism with whatever caveats might be attached to it in terms of its utilisation was the appropriate way forward. We do see this as exceptional. This is certainly not the norm. Allowing whatever mechanism might be appropriate within an existing Bill might create the impression that it could be used other than in exceptional circumstances. It is that difference of view, I suppose, that we take on how to characterise and how to make certain things potentially available, and therefore to have a draft Bill that has been subject to pre-legislative scrutiny and that allows a number of these important issues to be considered and debated to give reassurance to Parliament on a number of those issues we judged was the appropriate way to deal with that. That was the judgment that we took.

Q218 Baroness Neville-Jones: Mr Brokenshire, are you saying that this is the best method to do this or are you saying it is the best method that could be devised in the circumstances?

James Brokenshire: I think it is the best method that can be devised. That is how I would characterise it. Nothing is absolutely perfect, but our judgment is that this provides a very clear mechanism to be able to utilise enhanced powers if the Government judges that exceptional circumstances exist, to be able to introduce a Bill through emergency procedures, as would probably be appropriate, and that that provides a clear mechanism to deal with it. We judge that that is a better mechanism than having an order-making power within an existing Bill. It is that.

Q219 Baroness Neville-Jones: So you would accept that there is room for judgment in this area about what is the appropriate method.

James Brokenshire: There is a clear judgment that the Government have taken through the Counter-Terrorism Review and obviously the structure that has been adopted here. We believe that it is the appropriate way to deal with what are very stringent powers and powers that we think should

only be dealt with in exceptional circumstances to manage risk where that can't be managed in another way. There are many other ways in which risk can be managed through the work of the police and the Security Service. It is viewing it in that continuum as to how to deal with risk, but clearly our priority is national security and ensuring that the country is effectively protected. We hold that duty very seriously, as you would expect us to.

Q220 Baroness Neville-Jones: I have one last point. It has been suggested to us by the police witness we heard, DAC Osborne, that, if there were a reduction or a drop-off in police resources, then that could have justified the introduction of ETPIMs. Do you agree with that?

James Brokenshire: I don't see it in a binary way. It depends on—

Q221 Baroness Neville-Jones: Is there likely to be a drop-off in those resources?

James Brokenshire: We are very clear from the decisions that we have already taken around counter-terrorism and policing spend that that has been protected. Clearly, yes, we will always look for ways in which counter-terrorism policing can be made more efficient and more effective, but we are very clear that national security is the priority of the Government. I rather characterise it as a question of looking at what the risk situation is or what the exceptional circumstances are that might trigger this, rather than characterising it perhaps in the way that has been said as, "Well, we need to look at resources." I really don't see it that way round.

Q222 Baroness Neville-Jones: For you it is a situation that arises, not the absence of resources to meet that situation,

James Brokenshire: Clearly on the resources issue, we will always make sure that there are sufficient resources to assure national security.

Q223 Baroness Neville-Jones: Even on a tight policing budget.

James Brokenshire: What I am saying is that there are clearly ways in which we can look for efficiencies in making sure that counter-terrorism policing is dealt with in an effective way. That is a responsible and reasonable thing for Government to do. Ultimately, as Government, we seek to assure the public and Parliament that national security is being protected. That is our clear focus.

Q224 Baroness Doocey: DAC Osborne told us that he believed that ETPIMs could be triggered if the national security threat level was increased. If I understand correctly what you have just said, you are suggesting it would need to be more than that. Is my understanding correct?

James Brokenshire: I wouldn't see it simply that, if JTAC, who independently set the threat level, were to raise a threat level to critical—in other words that an attack is imminent—that would necessarily automatically mean that we would be looking to draw upon an ETPIMs regime at that point. It depends on the nature of what that threat is. If it were to be multiple attacks and there was a really exceptional incident then it could do, but if it was something that was different from that it might not do. That is what I am saying. Ultimately it is the exceptional nature of the power and whether there are other means to deal with a particular risk or threat that emerges. I would characterise them that way rather than some binary approach saying, "The threat level has gone up and therefore we look to this." It is more complex than that.

Baroness Doocey: Yes; I was just checking because that is not what he said. Thank you.

Q225 Nicola Blackwood: Minister, I wonder if you could just respond to some evidence that we received from David Anderson. We were discussing exactly this point with him. He accepted the fact that there would be difficulties for Parliament in debating this when they wouldn't have been able to see most of the national security-related evidence that prompted the request. He suggested that,

possibly, an option would be to brief some particular Members of Parliament with selective briefings—possibly the Intelligence and Security Committee, who are obviously being considered for some levels of reform and especially for oversight. What is your response to that proposal?

James Brokenshire: I read David's evidence with interest on that point. We recognise that Parliament would need to be careful in the scrutiny of legislation. We believe that both Houses are capable of doing that. If we were to examine the suggestion that David was making, if there was more sensitive information that we were unable, for national security issues, to share more widely and that there be selective briefings, whether that be to opposition members who are Privy Councillors or to members of the ISC, that might be something that would be appropriate in order to share what details we can within that context to aid and assist in the scrutiny of emergency legislation that might be forthcoming.

Q226 Nicola Blackwood: How do you think those proposals are going to be developed? Would it be alongside the Justice and Security Bill?

James Brokenshire: No. It is more a practical situation rather than a formal legislative situation, if you see what I mean, on being able to talk on Privy Council terms to parliamentarians should the need arise. We don't want to contemplate that the situation might arise, but in that exceptional situation we could speak to certain Members of the opposition on Privy Council terms or to other key parliamentarians to give a sense of some of the issues that might be behind the need for introducing the legislation. But, ultimately, it is exceptional. Rather than seeking to provide a formulaic approach, it would be more a case of seeing what the situation was at that time and seeing what was appropriate in those individual circumstances.

Q227 Baroness Doocey: You have mentioned on a number of occasions appropriate parliamentary scrutiny, but we have heard in evidence from a number of witnesses that what is likely to happen is that the Home Secretary would have to come to the House and say, "There are major problems. I can't discuss them for obvious reasons. You have got to trust me." Do you consider that to be appropriate parliamentary scrutiny, because you keep using those words?

James Brokenshire: I certainly view this process as part of that. As you will know, Baroness Doocey, if we have legislation, then part of that is the detailed examination of particular clauses and particular provisions. It was why, when we published the draft Bill, we wanted it to be scrutinised by a Joint Committee, which is why I am delighted to be here and answering your questions because, of itself, it gives reassurance to Parliament as to the examination of draft legislation that might be available to be introduced.

On the issue of it being triggered and consideration of the circumstances at that point in time, it is fair to say that Parliament has in the past debated sensitive issues. It has debated, for example, the response or aftermath to a serious terrorist incident in this country without prejudicing subsequent trials that might take place. It is entirely possible that Parliament would be able to scrutinise this legislation in that way such that it could determine whether this should be put on to the statute book and, therefore, for Government to have available the enhanced measures.

Q228 Baroness Doocey: Perhaps I haven't made myself clear. I suspect that we have different views on the word "scrutinise". In my view, you scrutinise something by looking at it in detail and determining whether or not it is necessary to enact it. I can't see from the words you keep using that it would be possible to make it appropriate to parliamentary scrutiny. What you would in effect be saying is that you have to take it on trust. The suggestion that a couple of key people would be "in the know" is, in my view, probably the worst of all worlds because you would have people saying, "This is a good idea but I can't tell you why." Following on from what Nicola said, how would you react to the

idea of having a proper scrutiny done by a group of security-cleared people like Privy Councillors prior to an enactment of it?

James Brokenshire: The challenge around this is that, if this is for use in an emergency situation and we are seeking to introduce the draft Bill quickly, then that has a limit on time in terms of the time for Parliament to be able to reach a view. Why I have not gone down the route of trying to give lots of hypothetical examples is because I suspect that Parliament would of itself have a clear impression of what the individual circumstances of a situation would be for the utilisation of such powers. Therefore, to characterise it by simply saying that you would have a small number of people who would be "in the know", I suspect that wouldn't be the dynamic. I suspect that you would have a serious situation that would be obvious to public and Parliament, and therefore Government coming forward and seeking to introduce emergency legislation as contemplated by the draft Bill would be understood. That is why it is important that we seek to hypothesise, but ultimately the Government would be coming forward with legislation to say, "We need these enhanced powers." I suspect it would be against a backdrop that would be pretty clear.

Baroness Doocey: I understand that, but you certainly haven't convinced me that that would be appropriate parliamentary scrutiny.

Q229 Baroness Gibson: Can you tell us why the Government decided to impose a two-year limit on the prevention and investigation measures?

James Brokenshire: This was something that we debated in detail during the Bill itself. Ultimately, it is to ensure that there is a sense of not parking or warehousing individuals within a particular regime. We felt that two years—and it is effectively a one-year period plus a further review and examination as to whether to extend that to two years—was appropriate in mitigating and managing risk and that that provided time to examine other alternatives. That might be someone, therefore, coming off it because you then reduce, as we have seen with the previous regime, the measures to allow people to get back into work or to go into education and therefore move away from a radicalised situation, or whether that may lead ultimately, because there is evidence that is there, to prosecution or deportation. So we judged that the two-year period was appropriate.

Q230 Baroness Gibson: It has been suggested to us that the two-year limit might focus police efforts on prosecution. How do you feel about that?

James Brokenshire: The TPIM is a preventative measure. Therefore, there is a difficult judgment that always has to be taken in respect of the utilisation of a measure like this. It is whether to allow a situation to evolve would produce more evidence that might lead to someone coming to court, as we would prefer, or whether the risk is such that we believe that in order to manage risk a preventative order of this kind should be used.

There are safeguards that are provided in the TPIMs Act through various sections on the relevant chief officer of police giving assurances on the realistic prospect of prosecution in respect of an individual and also to make sure that that is kept under review. In using this power, and knowing that you are seeking to disrupt, that of itself may make a prosecution more difficult because it is effective and disrupts the activity. Equally, where there is evidence that is there, you can use that for prosecution and keep that under careful review and analysis.

Q231 Baroness Doocey: So you think those safeguards will ensure that the individuals involved can eventually be prosecuted.

James Brokenshire: It is not a question, if someone comes off a TPIM, that they will automatically be prosecuted. That may be one situation if there is evidence that is there, but, if there was evidence that was there before the introduction of TPIMs, then I would like to see that person prosecuted rather than anything else. That is why the safeguards are framed in the way that they are

within section 10 of the TPIMs Act itself. It is always keeping these issues under review, but someone at the end of a TPIM may, as we have seen with some controlees, disengage from activity. Therefore, that may not mean that you will see that person prosecuted because the person has moved away and is not involved with the terrorist-related activity that we were concerned about to trigger the TPIM in the first place.

Q232 Baroness Doocey: When people come off the ETPIMs and when the orders have run their course, there could be different things that happen to the person involved.

James Brokenshire: Yes. There was a suggestion that in some way this regime would be utilised automatically at the end of the two-year period that someone was on a TPIM. Yes, as far as the legislation is drafted, they could run concurrently, but we believe that the terrorist-related threat posed by individuals who were previously subject to a TPIM may already have been addressed and dealt with or that there are other mechanisms through the police, security and intelligence agencies' activity that could manage risk on a case-by-case basis, as would be the case in terms of the normal activities of the police and the security services.

Q233 Mike Crockart: You seem to be suggesting that, if we get to the end of TPIMs, then, rather than there being some sort of automatic move to an ETPIM, if they are still felt to be a risk, the way to manage that continuing risk would be to have further police and Security Service resources targeted at that individual. Is that what you are saying?

James Brokenshire: Obviously you have to look at this on a case-by-case basis. If someone at the end of a TPIM continues to engage in terrorist-related activity, that would be new terrorist-related activity, which could then mean that a further TPIM could be obtained. If there was evidence, then that could lead to someone being prosecuted, or it could be that someone has simply disengaged, as we have seen in other circumstances. All I am saying is that there are different approaches that could be taken in respect of a particular individual on the basis of the assessed risk and on the basis of what is seen in respect of that person. I am just saying that it is a little bit more complex and more nuanced in terms of how you would seek to respond.

Q234 Mike Crockart: Moving on to somebody having been put on an ETPIM, we have heard some evidence that it is not really an effective long-term solution, in the way that control orders was never a long-term solution because there is no endgame. Do you think that ETPIMs represent an interim solution? If so, what is the Government's view of how we then make further moves towards prosecution, which is the ultimate endgame?

James Brokenshire: Clearly there are steps that we look at more generally—for example, if you have a foreign national, then extending deportation with assurance and seeing what more we can do with various diplomatic relationships to secure that. We have the Privy Council review on intercept as evidence, which I know that you have focused on in terms of some of the other questioning of other witnesses.

Yes, of course, there are other avenues that are being explored, but the point in relation to the TPIMs is that we do see this as very exceptional. The regime that we have created with the TPIMs, plus the additional resourcing for the police and Security Service, is appropriate to manage risk. I did note the comments that DAC Osborne provided in relation to the successful transition from one regime to the other.

Q235 Mike Crockart: But his view was very much about managing risk, the different ways of managing risk and the different costs associated with them. It was a very managerial approach. My question was really about the endgame. Where do we get rid of the risk wherever possible? You are outlining that there may be other ways to do it. There may be ways of deporting where possible and

there may be intercept evidence, but, ultimately, whilst the people engaged in activities like this may have been foreign nationals originally, that is not now principally the case; so deportation is not an option. The evidence that we have had so far about intercept evidence is that there are huge problems to be dealt with there and, therefore, that may not necessarily be the answer. Indeed, in the cases that we have had so far it would not have been.

James Brokenshire: It is important to recognise in this debate that we judge that there will always be a need for some form of preventative measure like TPIMs. There has been evidence to show that, even had intercept evidence been available in various cases, that would not necessarily have been appropriate. That was in some of the previous reviews around this that were undertaken by the Privy Council review team. Sadly, our judgment is that there will be a need for some preventative mechanism like TPIMs moving forward and that is why we legislated to put the Act on to the statute book in the way that we did, balanced with the overall resources that are available to the police and the security services.

If you are saying, "Do you see TPIMs or ETPIMs as some sort of interim measure?", then, sadly, I think it will be necessary to have some mechanism like this moving forward. Under the TPIMs Act itself we have said that there would effectively be a five-yearly review. We think it is appropriate for each Parliament to review counter-terrorism legislation per Parliament to see what the risk position looks like and what the whole situation vis-à-vis national security is at that point in time. It is looking at it in that broader sense rather than saying that TPIMs in some way is a short-term measure. It is a very essential preventative measure that would be required even if intercept evidence was there. We look forward to the Privy Council's review and their report on that. Even if that was there, the conclusion is that you would still need a TPIM.

Q236 Mike Crockart: Finally, I turn to look particularly at Northern Ireland because both TPIMs and ETPIMs would extend to Northern Ireland. To date, neither control orders nor TPIMs have been used in Northern Ireland, despite that being the place where we have seen more terrorist activity than any other part of the country. Why is it the case that neither control orders nor TPIMs have been used against Northern Irish-related terrorism?

James Brokenshire: Ultimately the Secretary of State—and in relation to Northern Ireland it would be the Secretary of State for Northern Ireland—is obviously guided by the professional advice from the Security Service and the police as to what is appropriate in their judgment in respect of an individual case. Yes, you are right that control orders and TPIMs are potentially available to Northern Ireland, but the clear judgment of those operationally on the ground is that they have not sought to utilise that to date. Clearly it would be open to them to make a different judgment in the future.

The situation in Northern Ireland is different from GB, inasmuch as a lot of the preventative work is devolved to the Northern Ireland Assembly. Therefore, it is a different situation. Ultimately, it is for Ministers, if a request comes from the Security Service and the police. That is the way it should be approached, rather than saying, "We haven't used this here." The measures are available on the statute book. It is for the Security Service and the police to judge, operationally and professionally, what is appropriate to deal with a particular risk environment. Clearly that, to date, is the judgment to which they have come.

Q237 Mike Crockart: In your view, if the risk level was judged as being significant and sufficient to justify a TPIM or ETPIM, then they should be used in Northern Ireland.

James Brokenshire: It is a question of what you need to deal with either a particular threat or a particular individual. That judgment comes from the police and Security Service. I don't think it would be for me to tell them that they should adopt a particular tactic or not. Rather it is for them to make that professional judgment.

Q238 Lord King: Don't underestimate the scar that internment without trial left in Northern Ireland. It is a particular sensitivity. Earlier evidence has been given to this Committee that it is not thought that control orders radicalised the Muslim population, who were particularly affected by it. Undoubtedly, in the case of internment without trial, it did have a very serious effect and nobody in Northern Ireland is going to look for a look-alike there in any quick order.

James Brokenshire: It is those issues and the judgment that has to be taken in respect of what is the most appropriate way to deal with the risk position that you see in a particular environment.

Q239 Baroness Neville-Jones: As an addendum to the discussion we have just been having, it is of course the case that the phenomenon of suicide bombing is not one that we have seen in Northern Ireland, which does affect the nature of the risk.

James Brokenshire: You are right in highlighting different risk in different environments and different situations and therefore what the most appropriate way is to deal with and manage that. I think that is a very important point.

Q240 Baroness Neville-Jones: I turn to the knotty question of human rights and safeguards. Could you outline for us the Government's reasoning in saying, as they do, that the regime complies with articles 5 and 6 of ECHR?

James Brokenshire: In large measure we draw upon the case law and the jurisprudence that has been established under the control orders regime, which has upheld that that regime did comply with both articles 5 and 6. There are leading judgments in relation to article 5, for example, in the case of AP *v* Secretary of State for the Home Department, which did consider this issue in detail as to the fact that the control orders regime did fit and meet the requirements of article 5. Our approach is that a TPIM is a preventative measure and is not a deprivation of liberty. The balance that is struck, for example, in that particular case of AP was that a 14 to 16-hour curfew could meet the requirements of article 5 when taking into consideration the other conditions imposed within it. We are confident that the regime under TPIMs and under ETPIMs would satisfy and meet the article 5 requirements.

In relation to article 6, again we are confident that the regime of TPIMs does satisfy article 6 based on the case law. Where there have been stringent control orders they need to ensure under the case of AF (No 3) that information is available to the individual to be able to provide instructions to Special Advocates. That case law is established and has been followed.

It is not simply us asserting it. We are asserting it on the basis of the case law that has been established through control orders but is directly informative in consideration of the TPIMs and ETPIMs legislation.

It is also important to highlight that under TPIMs a number of the individuals who have been put under TPIMs have had their cases considered by the courts and have had their TPIMs confirmed on those reviews.

Q241 Baroness Neville-Jones: If I may say so, it seems to me from what you are saying that in a pretty heavily litigated area, which this is, with the courts in a sense cutting back on some of the powers that have been used, within the area that the courts have accepted is reasonable you reckon that TPIMs squeeze into that.

James Brokenshire: We have seen that TPIMs have been upheld by the courts already. When you look at the previous control orders regime that was more stringent and did not have some of the important safeguards that are within the TPIMs regime, that was upheld as being compliant with articles 5 and 6. Therefore, it is on that basis that we are confident in asserting our position on human rights legislation.

Q242 Baroness Neville-Jones: If the Bill is passed, are the Government going to set up a review group, as they have done for TPIMs?

James Brokenshire: You rightly point to the TPIMs review group and the work of our Independent Reviewer, who publishes his annual report in respect of TPIMs. I would expect that same regime to operate in relation to ETPIMs.

Q243 Baroness Neville-Jones: So you would simply expect this piece of legislation to be dealt with without any extra review mechanism being set up for it.

James Brokenshire: The mechanism of the review group and of course the review that is adopted in respect of TPIMs is appropriate in relation to ETPIMs, given that again the Home Secretary would need to be satisfied as to the continuing necessity of the measures that are contemplated within the Bill. Therefore, I think it is important that there is that structure to have the examination and a continued assessment as to whether a TPIM or an ETPIM is appropriate. That provides that quarterly review structure with the relevant agencies being drawn together to provide that assurance.

Q244 Baroness Neville-Jones: I would observe that the powers that are going to be available against an individual are very considerably greater under the ETPIMs regime than under the TPIMs regime. That is one of the points of difference between the two.

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

Q245 Baroness Neville-Jones: One of the elements of evidence that we have heard is that there ought really to be a full merits review by the court rather than what is proposed, which is simply a review on the basis of judicial principles. Can you tell us why it is that the Government have ignored what have been quite repeated recommendations from bodies such as the Joint Committee on Human Rights as well as JUSTICE and Liberty?

James Brokenshire: If we look at the TPIMs Act itself before considering further in relation to ETPIMs, there is a very clear structure and regime that provides oversight and assurance both initially in terms of the decision that the Home Secretary takes in seeking permission of the court to impose a TPIMs notice and then subsequently the full review of the TPIM that has then been granted by the court on judicial review principles as set out in the TPIMs Act itself.

To follow on from the previous discussion, that is Human Rights Act compliant in our judgment and it has been upheld by the court. It complies with the principles of article 6. Therefore, I don't accept that in some way that does not provide a clear judicial mechanism of assessment of the orders that have been taken. The same arguments apply in relation to ETPIMs.

Q246 Baroness Neville-Jones: If one asked whether you might take away the thought that you might actually amend the Bill to provide for a full merits review, what would be your response?

James Brokenshire: We would not be minded to take that approach. There is always a balance to be struck about who is best placed to assess some of these issues of national security. I think successive Governments have taken the view that it is the Home Secretary who is best placed to make some of those judgments on, for example, what the appropriate restrictions or orders would be to seek

to manage risk in a particular given situation, but that does not mean that there should not be robust judicial scrutiny of those decisions. That is precisely what we have in the TPIMs Act of the initial trigger point on the Home Secretary seeking to apply to the court in respect of obtaining a TPIM and then the full review. I have to say that the Special Advocates do challenge it. This has been an area of law that has been very heavily litigated. It is subject to detailed examination and this does provide robust challenge around the use of these powers. It is looking at this, on the basis of the assurance, on the appropriate use of these orders. I think that the legislation does provide that.

Q247 Baroness Neville-Jones: It is a pity from the Government's point of view. I entirely accept that the Home Secretary is, in a sense, the guardian of security, but the courts are the guardians of conformity with the law. As you have repeatedly said, what we are trying to do is to get the right balance here. I would take the view that the court being enabled to make a full merits review would provide extra safeguards against continued litigation of a kind that is very tiresome for the Government and quite damaging to the standing of the legislation.

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

Baroness Neville-Jones: To conclude, I think if the Government are confident, as they appear to be, about the conformity of this legislation with ECHR, they would fear nothing from a full merits review. I would like you to take the idea away.

Chairman: We need to move on. You have asked the question a couple of times.

Q248 Nicola Blackwood: Minister, I take you back to your comments about AF (No 3) and conformity with that judgment and the legislation. As I understand it, immediately after AF (No 3) the Government argued that that only applied to really quite serious control orders and that light touch control order cases could bypass it. That was rejected in BC *v* Secretary of State for the Home Department and the correct view of AF (No 3) is that the gist of the case against the detainee must be put across in every single case.

Can you therefore explain to the Committee why the TPIMs Act and this draft Bill require the Secretary of State merely to consider providing the individual concerned with summary material that the court has not allowed to be disclosed rather than to have that requirement of AF (No 3) on the face of the Bill in so many words?

James Brokenshire: The AF (No 3) case did specifically relate to a "stringent control order" and therefore the jurisprudence is set and framed in that way. In the way in which the Secretary of State and the consideration of a measure proceed through the court, judgments have to be taken on the provision of gists to enable the individual who was subject to a TPIM to be able to instruct counsel appropriately.

That follows the line of jurisprudence and in some ways what is known as the iterative approach to disclosure that arises—that, having received a gist, if the relevant individual asks further questions or needs more information, that iterative approach might lead to further gisting. It is this approach that takes place through the process of the examination of a TPIM that does obviously reside here.

Our approach is clearly to ensure that what we do complies with the article 6 provisions as set out and as framed within the AF (No 3) case. I don't think what is set out under the legislation is at odds with that. In proceeding with different measures, and particularly those measures through the

courts and through the subsequent review that takes place in relation to all TPIMs, the Government and their legal advisers will be very mindful of the AF (No 3) case and the jurisprudence that does reside around this.

Q249 Nicola Blackwood: The clear intention is that all those who are intended to be subject to TPIMs, future TPIMs or ETPIMs will be given the gist of the case against them in line with not just AF (No 3) but also the subsequent case law relating to that.

James Brokenshire: We have to ensure that we are meeting our article 6 requirements and that we are clearly cognisant of the case law that has been developed around that. That is for the legal team that would be taking these cases forward and for the Special Advocates as well in their challenge within the review process to make a number of these points. That is why I think that Special Advocates do a very effective job within the closed material proceedings in terms of challenging which items should be in closed evidence and which should be in open evidence. That is very much a part of the process that does take place when these TPIMs are reviewed.

Q250 Nicola Blackwood: Is that a yes?

James Brokenshire: I am saying that certainly we comply with article 6 in the case law.

Q251 Nicola Blackwood: You brought up Special Advocates. We have had quite a lot of discussion with various different witnesses who have come before us about that system and their concerns. The Government feel that that does comply with article 6 and that has been tested in the Belmarsh case, but we have received evidence from Liberty and also from the Equalities and Human Rights Commission that they are concerned about this. The Special Advocates themselves have given evidence into the Justice and Security Bill that they find it very difficult to do their job and properly represent defendants because they feel that the system doesn't quite work at the moment.

We put this to Lord Carlile, who commented that he was of the opinion that it would be possible for Special Advocates to confer more with defendants before and after seeing secret material. What would be your view on that? Would you be willing to take that on board?

James Brokenshire: I have sat down with the Special Advocates and discussed a number of these items with them. I think our view is that there is a challenge on some of these issues on what is called administrative communication, which is some of the requests that are made. Some of these questions might appear innocuous but they could reveal something of the nature of the closed case. Therefore, what we have sought to do is identify how we can streamline processes for seeking approval and for questions or those sorts of requests to be made to assist the Special Advocates. Certainly I want to ensure that we continue our dialogue with them in looking at ways that we are able to assist them in conducting their duties. This issue of administrative communication is a sensitive and delicate one. We are certainly exploring whether the process could be speeded up and whether there are ways in which that can be assisted. I am very keen to maintain dialogue with the Special Advocates around this area.

Q252 Nicola Blackwood: But you don't think that you would accept the principle that Special Advocates could communicate with the defendant after viewing the secret material.

James Brokenshire: No. There does need to be an approval mechanism, given that either sensitive techniques or in some way links with an individual might not be recognised in terms of a request that might be made or by the Special Advocate's communication with the individual concerned. There are examples that have been given where that innocuous request might in some way indicate where evidence has come from.

Q253 Nicola Blackwood: The Special Advocate might not understand that they were giving it away.

James Brokenshire: That might be covert human intelligence sources and some of the complications that reside around this. It is not to be obstructive. It is rather to recognise the very real challenges that we have on intelligence sources and how to facilitate communications in a way that does not contravene that. That is why, if the Special Advocate wishes to make that communication, there is a clear process of doing that and some of those issues can be assessed and examined in that context. If it is capable of being facilitated it can be, but without threatening some of the very sensitive issues that necessarily reside around this area.

Q254 Nicola Blackwood: Are those proposals going to come out as part of the Justice and Security Bill?

James Brokenshire: There is certainly the ongoing discussion that I have with the Special Advocates. As you recognise, with the closed material proceedings that are part of the Justice and Security Bill, this is an area where we continue to have that dialogue with the Special Advocates.

Q255 Jesse Norman: Minister, we have heard evidence from Lord Carlile that, in the event that a decision is made to introduce ETPIMs, he thought that the Government could do that "in about 10 minutes". Do you agree with that?

James Brokenshire: No. If we have emergency legislation that is passed through both Houses, I wouldn't expect it to be 10 minutes. I noted Lord Carlile's comments in relation to scrutiny in the Commons. All I will say is that it certainly didn't feel like that on the scrutiny of the TPIMs Bill Committee itself, although we actually had a very good and robust consideration of the legislation with contributions on all sides. It was certainly not one of those Committees where people sat, said nothing and did their signing or whatever some people sometimes do in Bill Committees. It was a very clear and robust discussion that we had, with lots of challenge. I very much appreciated that.

Q256 Jesse Norman: For the avoidance of doubt, the procedure you have described is one by which the Bill is brought to Parliament, debated in the usual way and passed and brought into law that way.

James Brokenshire: Yes, it is. We have obviously seen emergency legislation before the House this week. It is that normal process that has been adopted in the past around emergency legislation that would have potential equal application to the ETPIMs draft Bill.

Q257 Jesse Norman: And you would expect a proper debate in Parliament.

James Brokenshire: Yes. There would be debate on the Floor of the House but, as I have already highlighted, recognising that there may be sensitivities. The House has shown that it is entirely capable of debating these sensitive issues in the past and I have every confidence that it would do so in the future.

Q258 Jesse Norman: When you have characterised the difference between control orders and ETPIMs, you have been doing it very much in relation to the standard of proof that would be applied in each case. Does that mean that, if the standard of proof weren't the one you have described, they would really be very similar to each other?

James Brokenshire: If I have given that characterisation, then I will seek to correct that. If I look at the differences, yes, there is a difference on legal test, but if we look at issues of duration, that is another important factor that resides around here with the initial 12 months for a TPIM or an ETPIM and then the need for a further review and a maximum period of two years. There was no maximum period that did reside in relation to a control order.

Equally, on the TPIMs regime, there are specific requirements that there is no power under TPIMs for relocation. Under TPIMs itself there is no geographical boundary as resided around the control order regime.

Q259 Jesse Norman: But that wouldn't apply to EPTIMs, would it?

James Brokenshire: On ETPIMs, yes, there are certain changes on things like geographical boundaries that are contemplated within the TPIMs legislation. On relocation, that is contemplated within the TPIMs legislation. It is precisely because of that that we thought it should be framed in that way and separated but recognising the legal test, the duration and the fact that actually this is framed very explicitly on what those restrictions are, whereas the control orders regime was much more open-ended.

Q260 Jesse Norman: We have had testimony from expert witnesses as well as from Lord Carlile and the Independent Reviewer that in fact the higher standard is already being observed and therefore the standard of proof itself is really immaterial. That would mean that the relocation rules for the ETPIMs would bring it really rather close to control orders from your perspective. Would that not be a fair characterisation?

James Brokenshire: The ETPIMs certainly have some provisions that were in the control orders regime in terms of the relocation provision, to give one example, but there is an important distinction on the standard of proof that needs to be shown. The court would examine even further on showing that measures were justified by adopting the balance of probabilities test.

Q261 Jesse Norman: That is helpful. You would essentially expect them to go another notch up from where they are.

James Brokenshire: I think it is an important notch-up, yes.

Q262 Jesse Norman: Obviously there have not been any prosecutions so far. Presumably the shorter period of time that you have put in place encourages prosecutions because of the possibility that someone can't just be left indefinitely detained. Are you hoping for more prosecutions? How can we be sure that you are giving us the energy that we know the Government want?

James Brokenshire: As I have already indicated, my absolute preference is to see people prosecuted rather than having to use a TPIM or an ETPIM. Equally, there has to be recognition that, when one of these measures is used, it has a disruptive effect and that that of itself may make it more challenging to secure a prosecution, but, absolutely, I always want to ensure that we are testing those boundaries.

When I look at the legislation, it does underline the reason why we wanted to see that framed in that way. There is the need for continued review of the situation with the prosecuting authorities in respect of a particular individual.

Q263 Jesse Norman: Thank you for that answer. My final question is this. When a TPIM comes to an end, if there has been no new offending, an ETPIM cannot be brought in. At that point someone who may have been radicalised—we don't know—then has to be released back into the community in the usual way, although subject potentially to intercept and surveillance. Is that right?

James Brokenshire: It is always a question of managing risk effectively. If the evidence is there, then the police and the prosecuting authorities will seek to use that. If there is new activity, then that of itself may trigger a new TPIM with a further two years.

Q264 Jesse Norman: But there won't be during the process. There have only been two prosecutions for breach of TPIMs.

James Brokenshire: There is a distinction to be drawn between the breach of a TPIM, which obviously has criminal penalties that are attached to that, as contrasted with new terrorist-related activity, which may then either be evidential, which means that you can seek a prosecution, or be such that you could then seek a further TPIM for a further two years. It is looking at the different mechanisms that are available if there is further terrorist-related activity that could justify prosecution or a further TPIM being granted. If there is not, then there would be appropriate management of that individual by the Security Service and the police, as they would do with other people.

Q265 Baroness Neville-Jones: I have one tiny point on the question of Special Advocates. Am I right in thinking that the current situation is that Special Advocates can communicate with a client at the beginning of proceedings but not subsequently?

James Brokenshire: Yes.

Q266 Baroness Neville-Jones: Are you saying that you are looking at a situation in which an approval mechanism might allow further communication later in the proceedings?

James Brokenshire: It is on some of these administrative communications that the Special Advocates have made points. We have discussed with them mechanisms where an administrative communication could seek approval—there is already a mechanism that they can seek approval to be able to communicate—and how that process might be improved in some way to be able to assist, recognising the very live point on them not compromising some of the material that is currently enclosed and giving that to the individual concerned.

Q267 Baroness Neville-Jones: So you are trying to find ways of increasing the level of communication.

James Brokenshire: We are very clearly trying to find practical ways to assist on this, but it is a delicate issue, as many people understand, as to how to facilitate what on the face of it might appear to be quite innocuous but is disclosing something that is quite sensitive. We are seeing if there are practical ways in which we can assist them.

Q268 Chairman: Minister, notwithstanding your review of intercept as evidence, there are those who suggest that none of these measures—TPIMs, ETPIMs and control orders before them—can be justified in our society and that the answer is always prosecution. There are those who then seek to enhance that by suggesting that if we have intercept as evidence we would be able to prosecute. We have heard that view as a Committee. We have also heard from Lord Carlile, who looked at this, that he did not believe that in the overwhelming majority of cases in any case intercept as evidence would have led to a prosecutable situation.

Is there anything that you can say to the Committee on that issue? I know you have a review, but is there anything you can say to the Committee on the issue of intercept as evidence and how it impacts on the need for ETPIMs?

James Brokenshire: We look back on the previous intercept as evidence reviews, clearly recognising some of the complexities attached to this on disclosure, legal compliance and on the practical impact that it may have on our intelligence communities. The Privy Council review—and this was what Lord Carlile referred back to—was the study of nine control orders. In each of those nine control orders, for different reasons, intercept as evidence would not automatically have led to a prosecution in those cases. David Anderson in his evidence, as well as the current Independent Reviewer, has again reaffirmed that it is not a silver bullet in seeking to deal with this very difficult issue.

It is something I said when the legislation was being taken through the House. Ultimately I wish that this legislation, whether it be TPIMs or ETPIMs, was not necessary. Sadly, the conclusion

that I came to, and continue to hold, is that it is necessary. Despite advances that may be made around prosecution options, there will be a small cadre of individuals where some preventative mechanism will be appropriate. I wish that were not the case, but, sadly, the judgment that I still hold is that it is.

Q269 Chairman: Minister, thank you for your evidence. That concludes the evidence-taking part of our proceedings. We will now seek to draw up our report to Parliament. Thank you very much.

James Brokenshire: Thank you very much and thank you to the Committee for all the work.

Chair: Thank you.