These notes refer to the Terrorism Prevention and Investigation Measures Act 2011 (c.23), which received Royal Assent on 14 December 2011

TERRORISM PREVENTION AND INVESTIGATION MEASURES ACT 2011

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Terrorism Prevention and Investigation Measures Act 2011 ("the Act"), which received Royal Assent on 14 December 2011. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

BACKGROUND

The Prevention of Terrorism Act 2005

3. In 2001, the UK derogated from Article 5 (right to liberty) of the European Convention on Human Rights (ECHR) and introduced the provisions in Part 4 of the Anti-terrorism Crime and Security Act 2001. These powers allowed the detention pending deportation of foreign nationals, even if removal was not currently possible, if the Secretary of State reasonably believed that the person's presence in the UK was a risk to national security, and reasonably suspected that the person was involved with international terrorism linked with Al Qaeda. In December 2004, the House of Lords acting in its judicial capacity quashed the derogation order made under the Human Rights Act 1998 and concluded that Part 4 of the 2001 Act was incompatible with Articles 5 and 14 (prohibition of discrimination) of the ECHR.

4. Consequently, in the Prevention of Terrorism Act 2005 ("the 2005 Act"), the Government repealed Part 4 of the 2001 Act and replaced it with a system of control orders to manage the risk to the public posed by suspected terrorists (regardless of nationality). The 2005 Act provided the Secretary of State with powers to make a non-derogating control order against a person the Secretary of State had reasonable grounds for suspecting was or had been involved in terrorism-related activity, where the Secretary of State considered it necessary for purposes connected with protecting the public from a risk of terrorism. A control order placed obligations upon the individual designed to prevent or restrict his or her involvement in terrorism-related activity.

5. The 2005 Act also contained a power for the court – on application by the Secretary of State – to make a derogating control order against a person. A derogating control order was one that imposed obligations that amounted to a deprivation of liberty within the

meaning of Article 5 of the ECHR. An example of such a control order would have been one that imposed a 24 hour curfew – i.e. house arrest. By way of contrast, a non-derogating control order was one in which the obligations imposed did not amount to such a deprivation of liberty. Before the Government could have imposed a derogating control order, it would have needed to derogate to the extent strictly necessary from Article 5. No derogation from Article 5 was ever made in relation to control orders; only non-derogating control orders were ever made. A reference to a control order in the rest of this document is therefore a reference to a non-derogating control order.

Control order-related provisions in the Counter-Terrorism Act 2008 and the Crime and Security Act 2010

6. Subsequent legislation made further provision relating to control orders.

Provision relating to fingerprints and non-intimate samples

7. Sections 10-13 of the Counter-Terrorism Act 2008 ("the 2008 Act") made specific provision for the routine taking, use, storage and retention of fingerprints and non-intimate samples of individuals subject to a control order. In broad terms, these sections provided equivalent powers, procedures and safeguards as apply generally to fingerprints and samples taken from individuals on arrest (in line with the relevant existing legislation in the constituent countries of the UK).

8. The 2008 Act powers relating to the fingerprints and samples of controlled individuals were never commenced as a result of the judgment of the European Court of Human Rights (ECtHR) in *S and Marper v United Kingdom [2008] ECHR 1581 (S and Marper)* that the 'blanket and indiscriminate' indefinite retention of such data where there had been no conviction was in breach of Article 8 ECHR (right to respect for private and family life). Under the Crime and Security Act 2010 ("the 2010 Act") the then Government therefore introduced different retention periods for various categories of material, one of which was biometric material taken from a person subject to a control order, and also introduced provisions allowing the retention of such material beyond the prescribed periods where necessary for national security purposes. These provisions of the 2010 Act were also never commenced (see below paragraph on the Coalition Government's position on the retention of DNA). Both sets of provisions are repealed by the Act.

Provision relating to powers of entry and search

9. Section 78 of the Counter-Terrorism Act 2008 amended the 2005 Act to add sections 7A, 7B and 7C to the 2005 Act, which comprised powers for a constable to enter and search premises relating to controlled individuals in specified circumstances for specified purposes. These powers were commenced but are repealed by the Act. (Previously, the 2005 Act provided only limited specific powers of entry and search for the police, relating to service of the control order. It also made explicit provision that an obligation could be imposed on a controlled person requiring him or her to allow the police access to his or her premises and to allow searches of his or her premises for compliance purposes.)

10. The 2005 Act did not make express provision that the Secretary of State may impose an obligation on the individual to submit to a search of his or her person. However, given that it provided that the list of types of obligations it included in section 1 was indicative rather than exhaustive, control order obligations used to refer to searches of the individual as well as the premises. But in July 2009, the Court of Appeal in the case of *Secretary of State for the*

Home Department v GG [2009] EWCA Civ 786 held that the 2005 Act did not provide the power to impose an obligation in a control order to submit to a personal search. In November 2009, the High Court in the case of *BH v Secretary of State for the Home Department [2009] EWHC 2938 (Admin)* found that a requirement for a controlled person to submit to a personal search prior to being escorted by the police outside the controlled person's boundary, as a condition of the temporary relaxation of the controlled individual's boundary, had no statutory authority and was unenforceable.

11. Consequently, section 56 of the 2010 Act further amended the 2005 Act by adding new sections 7D and 7E to the 2005 Act, which introduced new powers allowing a constable, for specified purposes, to conduct a search of a person subject to a control order and to seize and retain articles found. These powers were not commenced, pending the outcome of the Coalition Government's review of control orders (see below) and are repealed by the Act.

Other provision

12. Sections 79-81 of the 2008 Act contained technical amendments to the 2005 Act that did not substantively affect the implementation of control orders. These sections were commenced but are repealed by the Act.

Coalition Government's review of Counter-Terrorism and Security Powers

13. The Coalition's Programme for Government, launched by the Prime Minister and Deputy Prime Minister on 20 May 2010, stated that the Government would "urgently review control orders as part of a wider review of counter-terrorist legislation, measures and programmes". The Programme for Government can be found at:

http://webarchive.nationalarchives.gov.uk/20100526084809/http://programmeforgovernment.hmg.gov.uk

14. On 13 July 2010 the Home Secretary made a statement to the House of Commons confirming that such a review was underway. And on 26 January 2011 the Government published its *Review of Counter-Terrorism and Security Powers Review Findings and Recommendations (Cm 8004).*

15. The review findings and recommendations included a commitment to repeal the 2005 Act and introduce a new system of terrorism prevention and investigation measures (TPIM). These would be a civil preventative measure intended to protect the public from the risk posed by persons believed to be involved in terrorism who can be neither prosecuted nor, in the case of foreign nationals, deported, by imposing restrictions intended to prevent or disrupt their engagement in terrorism-related activity. The regime would be capable of imposing less intrusive restrictions than those available under control orders, and there would be increased safeguards for the civil liberties of those subject to the measures. There would be no provision in the replacement system for derogation from the ECHR. The Act makes provision for these recommendations.

16. The review also concluded that, in the event of a very serious terrorist risk that cannot be managed by any other means, more stringent measures may be required to protect the public than those available under the Act. The Government therefore committed to preparing draft emergency legislation for introduction should such circumstances arise. The draft Enhanced Terrorism Prevention and Investigation Measures Bill ("ETPIM Bill") and

accompanying Explanatory Notes have separately been published for pre-legislative scrutiny. They can be found at:

http://www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill/

Coalition Government's position on the retention of DNA

17. Following the May 2010 general election, the Coalition Government decided not to commence the sections of the 2010 Act that made provision for retention periods for DNA material and fingerprints taken under various powers. The Government decided instead to adopt the "protections of the Scottish model" in relation to the general rules on destruction and retention of such material. It also decided to introduce further rules in relation to material retained on national security grounds (so that it would be possible to retain such material for a longer period, where necessary). The Protection of Freedoms Bill that is currently before Parliament contains provisions for the retention of material generally and for the purposes of national security, but not in relation to individuals subject to a control order (or, generally, to terrorism prevention and investigation measures). However, further provisions in that Bill establish an independent Commissioner for the Retention and Use of Biometric Material, and the Commissioner will have oversight of material taken under the Act and retained on national security grounds beyond the time by which it would otherwise be required to be destroyed.

SUMMARY

18. The Act consists of 31 sections and eight schedules.

Sections 1-4 and Schedule 1: New regime to protect the public from terrorism

19. Sections 1-4 of the Act repeal the 2005 Act and provide that the Secretary of State may impose measures on an individual by serving a notice (a "TPIM notice") on him or her if certain conditions are met. These include in particular a higher threshold for the imposition of a TPIM notice (reasonable belief that the individual is or has been involved in terrorism-related activity) than existed in relation to control orders (reasonable suspicion of involvement in such activity).

20. Schedule 1 sets out the types of measures that may be imposed. Only measures described in Schedule 1 may be imposed. This gives the Secretary of State more tightly prescribed powers than the 2005 Act, which provided a non-exhaustive list of the obligations that could be imposed under control orders but allowed the Secretary of State to impose any obligation considered necessary to prevent or restrict an individual's involvement in terrorism-related activity.

Section 5: Two year limit on imposition of measures without new terrorism-related activity

21. Control orders remained in force for 12 months unless renewed. The 2005 Act did not specify a limit to the number of times that a control order could be renewed, although the statutory test for renewing the control order had to be met in order for it to remain in force – and whether the test was met was considered by the High Court on appeal from the individual.

22. A conclusion of the control orders review was that measures imposed under the replacement system should be subject to a two-year time limit, beyond which they could not remain in force without evidence of further engagement in terrorism-related activity. This section gives effect to that time limit.

Sections 6-9 and Schedule 2: Court scrutiny of imposition of measures

23. Sections 6-9 and Schedule 2 provide that, before imposing measures on an individual, the Secretary of State must seek the court's permission to do so – except in cases of urgency, where the notice must be immediately referred to the court for confirmation. If the court gives permission, or confirms measures imposed urgently, it must give directions for a full review hearing at which the court will review the Secretary of State's decisions in relation to imposing the measures. This replicates the position in relation to control orders under the 2005 Act. The commentary on sections includes an explanation of the applicable case law.

24. The relevant court in England and Wales is the High Court; in Scotland the Outer House of the Court of Session; in Northern Ireland the High Court in Northern Ireland (see section 30(1)).

Section 10: Consultation requirements

25. Section 10 makes provision relating to the duties of the Secretary of State and the police in relation to the prospects for prosecuting an individual subject to, or proposed to be made subject to, a TPIM notice for a terrorism-related offence. The section maintains all the requirements contained in the 2005 Act. In addition, the Coalition Government's review of control orders concluded that these requirements should include a statutory duty on the chief officer to report back to the Secretary of State on the ongoing review of the investigation of the individual's conduct. Section 10 delivers this.

Section 11: Review of ongoing necessity

26. Section 11 places a statutory duty on the Secretary of State to keep the necessity of the measures under review while they remain in force.

Sections 12-15 and Schedule 3: Changes concerning TPIM notices

27. These sections make provision – equivalent to that in the 2005 Act in relation to control orders – for a person subject to the new measures to apply to the Secretary of State for the revocation of the notice or the variation of the measures imposed by it. There is further provision for the Secretary of State to revoke a TPIM notice or to vary the measures specified in it (including where necessary without the individual's consent). The sections also make provision for the Secretary of State to revive a TPIM notice where he or she has previously revoked it or allowed it to expire. And the sections also make provision in relation to the quashing of a TPIM notice or directions by the court in relation to TPIM notices and the Secretary of State's powers to impose a replacement notice in those circumstances.

Sections 16-18 and Schedule 4: Appeals and court proceedings

28. In addition to the mandatory court review of the imposition of a TPIM notice, sections 16 to 18 provide that a person subject to measures may appeal against the extension or revival of a notice; a variation of a measure specified in a notice without consent; and the Secretary of State's refusal of an application to revoke a notice, to vary a specified measure or to grant permission in relation to a specified measure. This provides similar rights of appeal to those that existed in relation to control orders.

Sections 19-22: Other safeguards

29. Sections 19 and 20 place requirements – equivalent to those contained in the 2005 Act in relation to control orders – on the Secretary of State to report to Parliament on a quarterly basis on the exercise of his or her powers, and to appoint a person to review the operation of the Act annually. And sections 21 and 22 provide for the operative powers of the Act to expire after five years unless renewed by order. The powers may also be repealed by order.

Section 23: Offence

30. Section 23 creates an offence of contravening a measure in a TPIM notice without reasonable excuse. This effectively recreates the main offence of the 2005 Act of contravening an obligation imposed under a control order (including the same maximum penalty).

Section 24 and Schedule 5: Powers of entry, seizure, search and retention

31. Schedule 5 introduces specific powers of entry, seizure, search and retention in relation to the measures.

Section 25 and Schedule 6: Fingerprints and non-intimate samples

32. Schedule 6 makes provision for the taking and retention of fingerprints and samples from individuals subject to the measures. These broadly reflect the uncommenced 2008 Act and 2010 Act provisions relating to control orders, but with a shorter retention period.

Sections 26 – 27: Temporary enhanced TPIM order

33. Sections 26 and 27 provide a power for the Secretary of State to introduce by order powers to impose enhanced TPIM notices. The provision that may be made by such an order would essentially correspond to that set out in the draft ETPIM Bill. This power may only be used between the dissolution of a Parliament and the first Queen's Speech of the next Parliament when the case is urgent.

Sections 28 –31 and Schedules 7 and 8: Final provisions

34. Section 28 makes provision in relation to the service of TPIM notices and related notices. Sections 29-31 make general provisions concerning financial matters, interpretation, the title of the Act and its extent.

TERRITORIAL EXTENT

35. The Act's provisions extend to England, Wales, Scotland and Northern Ireland. In relation to Wales and Northern Ireland the Act addresses reserved or excepted matters only.

36. Certain of the Act's provisions fall within the terms of the Sewel Convention. In particular, Schedule 5 provides constables with the power to seize evidence of any offence (not just reserved offences) and Schedule 6 allows for the use of biometric material taken under the Schedule for devolved purposes (such as the prevention and detection of any crime) as well as for reserved purposes. The temporary order-making power under section 26 could also be used to make provision relating to matters that are devolved in Scotland. The Scottish Parliament gave consent for the provisions in the Act that trigger the Sewel Convention on 17 November 2011. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

37. In relation to Wales, the provisions of the Act do not relate to devolved matters or confer functions on the Welsh Ministers.

38. No provisions of the Act relate to devolved matters in Northern Ireland, or confer functions on the Northern Ireland Ministers.

COMMENTARY ON SECTIONS

Section 1: Abolition of control orders

39. Section 1 repeals the 2005 Act. It needs to be read in conjunction with section 29 and Schedule 8, which make transitional provision relating to the repeal of that Act.

Section 2: Imposition of terrorism prevention and investigation measures and Schedule 1

40. *Subsection (1)* creates a power for the Secretary of State to issue a notice (a "TPIM notice") imposing specified terrorism prevention and investigation measures on a person if certain conditions are met. The conditions are those specified in section 3. *Subsection (2)* provides that the measures that may be imposed are those set out in Schedule 1 to the Act. And *subsection (3)* provides that where Part 1 of Schedule 1 refers to something – for example a requirement – being "specified" this means that it is specified in the TPIM notice.

Schedule 1, Part 1: Measures

41. Schedule 1 sets out an exhaustive list of the types of measures which may be imposed on an individual under this Act. The Secretary of State may impose any or all of the measures that he or she reasonably considers necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity. There could therefore, in practice, be a considerable variation in the number and severity of measures that are imposed on different individuals according to the terrorism-related risk that they are assessed to present.

42. *Paragraph 1* allows the Secretary of State to require the individual to reside at or within a specified residence – either his or her own residence or a residence provided by the Secretary of State – and to remain there for a specified period or periods overnight. Under this measure the individual could be required to remain wholly within the residence during the specified overnight period (that is, the individual would be required to remain behind his or her front door) or the individual might also be permitted access to any gardens or communal areas within the outer boundary of the property. The hours between which the individual must remain overnight at or within the residence must be specified by the Secretary of State in the TPIM notice. The term "overnight" is not defined in the Act, but as a matter of public law the period would need to fall between hours which a reasonable person would consider "overnight". This contrasts with the position under control orders, where current case law allows for the imposition of a curfew of up to 16 hours' duration per day.[1]

43. The Secretary of State may also require the individual to give notice of the identity of others who live at the specified residence – including if another person moves in to the individual's residence. In relation to this, the individual would have to comply with the

[1] See in particular *Secretary of State for the Home Department JJ & Others [2007] UKHL 45* and *Secretary of State for the Home Department v AP [2010] UKSC 24*

requirements in relation to giving notice in paragraph 14 of Schedule 1.

44. *Subparagraphs (7), (8)* and *(9)* provide that, where the Secretary of State imposes a requirement to remain at or within the specified residence for specified hours overnight, he or she must include provision allowing the individual to seek permission to be away from the residence on occasion during that period. If granted, such permission can be made subject to conditions (in accordance with paragraph 13(7) of Schedule 1). Such conditions may include that the individual stay at or within agreed premises (if the individual has requested an overnight stay at premises other than the specified residence) and that the individual remain at or within such premises between specified hours overnight. Such permission may also include other conditions restricting the individual's movements while away from the specified residence. This provision could be used, for example, to allow the individual to stay overnight with a friend or relative (subject to conditions imposing, for example, alternative monitoring or reporting requirements). It could also be used, for example, to allow the individual to attend a particular event on a particular occasion (when he or she would normally be required to remain at or within the residence for that part of the evening), provided the individual only attends that event and abides by certain other conditions (such as restrictions on the company the individual keeps and the route they take to attend the event).

45. Where the Secretary of State provides a residence, this must be in the same locality as the individual's own residence if he or she has one, or if the individual has no such residence, a locality to which he or she has a connection, or if the individual has no such connection (for example if he or she has just entered the country and has no family in the UK), a locality which the Secretary of State considers appropriate. Alternatively, the Secretary of State may agree an alternative locality with the individual. The Secretary of State may require the individual to comply with specified terms of occupancy for such a residence. The Coalition Government's review of control orders concluded that, under the Act, it should not be possible to relocate an individual to another part of the country without the individual's consent. The provision in *subparagraphs (3), (4)* and *(5)* implements this.

46. *Paragraph 2* allows the Secretary of State to impose restrictions on an individual leaving the United Kingdom, or Great Britain if that is the individual's place of residence, or Northern Ireland if that is his or her place of residence. The restrictions imposed may include a requirement not to leave the specified area without receiving permission from or, as the case may be, giving notice to the Secretary of State, and a prohibition on the individual possessing passports or international travel tickets without permission from the Secretary of State.

47. *Paragraph 3* allows the Secretary of State to impose restrictions on an individual entering specified areas or places (for example particular streets, localities or towns where it is believed his or her extremist contacts live or associate) or types of areas or places (for example internet cafés or airports). This contrasts to the position under the 2005 Act, where it was possible to impose geographical boundaries on controlled individuals, limiting their movements to within a defined area at any time. The Secretary of State may require the individual to obtain permission or, as the case may be, give notice before entering a specified area or place and may impose conditions in relation to the individual's access to such an area or place. For example, the Secretary of State may require the individual to be escorted by a constable or other person while they are in the specified area or place.

48. *Paragraph 4* allows the Secretary of State to provide that the individual must comply with directions in relation to his or her movements given by a constable. The direction must be given for the purpose of (a) securing the individual's compliance with other specified measures (for example requiring the individual to be escorted to his or her specified residence for the purposes of fitting him or her with an electronic tag – in accordance with a requirement imposed under *paragraph 12*) or (b) where the individual is being escorted by a constable as part of a condition imposed under this Act. Directions given under a movement directions measure may last for as long as the constable considers necessary up to a maximum of 24 hours.

49. *Paragraph 5* allows the Secretary of State to provide for restrictions on the individual's access to financial services. The Secretary of State may, in particular, require an individual to hold no more than one nominated financial account without the permission of the Secretary of State and to comply with conditions associated with that nominated account (for example, a requirement to provide copies of account statements and related documents). The nominated account must be at a bank (the definition of which in *subparagraph (4)* includes a building society) in the United Kingdom. The Secretary of State may also require the individual not to hold more than a specified amount of cash, which for this purpose includes a range of financial instruments as well as notes and coins.

50. *Paragraph 6* allows the Secretary of State to impose a measure relating to the individual's property under which the Secretary of State may, for example, place restrictions on an individual's ability to transfer money or other property outside the United Kingdom without permission or, as the case may be, without giving notice. The Secretary of State may impose conditions in relation to the transfer of property to or by the individual. The Secretary of State may also require the individual to disclose the details of any property of a specific description in which he or she has an interest or over which he or she may exercise any right. The definition of "property" for the purposes of this provision allows the imposition of a requirement to notify the Secretary of State in advance of the individual, for example, hiring a car.

51. *Paragraph 7* allows the Secretary of State to impose a measure in relation to electronic communications devices under which the Secretary of State may, in particular, prohibit (subject to *subparagraph (3)*) an individual from possessing or using electronic communications devices without permission, and impose conditions on the possession or use of any permitted devices. The Secretary of State may also impose requirements on the individual in relation to other persons' possession or use of devices within the individual's residence. 'Electronic communications devices' are explained in *subparagraphs (5)* and *(6)* and include computers, telephones, any device which is capable of transmitting, receiving, or storing electronic information and any related devices and their components. A non-exhaustive list of examples of the type of conditions that may be specified is found in *subparagraph (4)*. This includes a requirement to allow specified descriptions of people (for example constables) access to the residence for the purpose of monitoring any devices.

52. Where the Secretary of State imposes an electronic communications device measure it must, as a minimum, allow the individual to possess and use a fixed line telephone, a computer with internet access via a fixed line and a mobile phone which does not provide access to the internet (*subparagraph (3)*). There was no minimum level of permitted access to communications devices under the 2005 Act.

53. *Paragraph 8* allows the Secretary of State to impose restrictions on the individual's association or communication with other persons, under which the Secretary of State may, in particular, impose a requirement not to associate or communicate with specified persons or persons of specified descriptions (for example persons living outside the UK) without the permission of the Secretary of State. The Secretary of State may for example impose a requirement that the individual may not associate with a list of named individuals (without permission), and that if they wish to associate with others, they must first give notice to the Secretary of State. Permission to associate or communicate with a specified person may be subject to conditions (see *subparagraph (2)(c)* and *paragraph 13(7)*), for example that the individual is escorted by a constable or someone else. This measure relates to association or communication by any means and whether directly or indirectly. If, on being notified that the individual wishes to associate with a named person, the Secretary of State believes that prohibiting such association is necessary to prevent or restrict the individual's involvement in terrorism-related activity, the Secretary of State may vary the measure to provide that person as a specified person with whom the individual may not associate without permission (see section 12(1) which allows for the variation of measures by the Secretary of State).

54. *Paragraph 9* allows the Secretary of State to impose restrictions on the individual's work or studies under which, in particular, an individual could be prohibited from undertaking certain specified types of work or studies without the permission of the Secretary of State (for example work in public transport or studies in chemical engineering). The individual could be required to give notice to the Secretary of State before undertaking any other work or studies and to comply with conditions in connection with any work or studies. This measure relates to any business or occupation (paid or unpaid) and any course of education or training. Again, if on being notified that the individual intends to commence employment of a particular nature, the Secretary of State considers it necessary to prohibit such employment, he or she may vary the TPIM notice accordingly under section 12(1).

55. *Paragraph 10* allows the Secretary of State to require an individual to report to a particular police station at a time and in a manner notified to him or her in writing, and to comply with directions given by a constable in relation to that reporting.

56. *Paragraph 11* provides for a measure under which the Secretary of State may require an individual to have his or her photograph taken.

57. *Paragraph 12* allows the Secretary of State to require an individual to cooperate with specified arrangements for enabling his or her movements, communications and other activities to be monitored. This may include a requirement to wear, use or maintain for example an electronic tag and associated apparatus, to comply with associated directions and to grant access to the residence for these purposes.

Schedule 1, Part 2: Permission and notices

58. Several of the measures described in Part 1 of Schedule 1 include requirements for an individual subject to a TPIM notice not to do certain things without the permission of the Secretary of State. *Paragraph 13* provides that the Secretary of State may by notice specify, in relation to each measure, the information that the individual must supply when applying for permission and the time by which the application must be made. Where the Secretary of State receives an application for permission, the Secretary of State may by notice request further information and need not consider the application further until the information

requested is provided in accordance with the notice. The Secretary of State may grant permission by giving notice to the individual. Permission may be granted subject to conditions set out in the notice; for example a condition that certain information is provided or that the individual is escorted by a constable or other restrictions on movements are complied with.

59. Several of the measures described in Part 1 include requirements for an individual not to do certain things without first giving notice to the Secretary of State, known for this purpose as a 'Part 1 notice'. *Paragraph 14* provides that the Secretary of State may by notice specify, in relation to each measure, the information that the individual must supply in a Part 1 notice and the time by which the Part 1 notice must be given. Where the Secretary of State receives a Part 1 notice, the Secretary of State may by notice request further information. The individual will not have complied with the requirement to give a Part 1 notice until the Secretary of State has notified him or her that the Part 1 notice has been received and that no further information is required.

60. *Paragraph 15* provides that the Secretary of State may vary or revoke a notice he or she gives under this Schedule – for example the Secretary of State may vary the conditions attached to a permission.

Section 3: Conditions A to E

61. *Subsections (1)* to *(5)* of this section set out the conditions on which the power to impose measures on an individual is dependent. Condition A (*subsection (1)*) specifies that the Secretary of State must reasonably believe that the individual is or has been involved in terrorism-related activity. This is a higher test than that for making a control order under section 2(1)(a) of the 2005 Act, which required the Secretary of State to have "reasonable grounds for suspecting" involvement in terrorism-related activity.

62. Condition B (*subsection (2)*) requires that some or all of the relevant activity (on the basis of which the test in condition A is satisfied) must be new terrorism-related activity. *Subsection (6)* defines "new terrorism-related activity" in a number of ways depending on the circumstances of the case.

63. Condition B, when read together with *subsection (6)* and section 5 (which specifies that a TPIM notice may only be extended once – so that it lasts up to a maximum of two years), has the effect of ensuring that, if a person has already been subject to a TPIM notice for a total of two years, a further TPIM notice can be imposed on that person only if he or she has re-engaged in further terrorism-related activity since the TPIM notice that marked the start of that two year period. (The two year period is not necessarily consecutive – as the TPIM notice may for example have been revoked and then revived at a later date; time only counts towards the two year period if the individual is subject to measures imposed by the TPIM notice during that time. See section 5 and its interaction with sections 13 and 14, and below.)

64. Conditions C (*subsection (3)*) and D (*subsection (4)*) set out the two limbs of the necessity test for imposing measures on a person. The Secretary of State must reasonably consider it necessary for purposes connected with protecting the public from a risk of terrorism to impose measures on the individual. The Secretary of State must also consider it necessary, for purposes connected with preventing or restricting the individual's involvement

in terrorism-related activity, to impose the specific measures contained in the TPIM notice on the individual.

65. Condition E (*subsection (5)*) requires the Secretary of State to have obtained the court's permission under section 6 before imposing measures (*subsection (5)(a)*) or to reasonably consider that there is a need for measures to be imposed urgently, without first obtaining permission (*subsection (5)(b)*). In such a case of urgency, the Secretary of State must refer the case to the court immediately after imposing the measures – see section 7 and Schedule 2.

Section 4: Involvement in terrorism-related activity

66. The Act refers to "involvement in terrorism-related activity" and similar phrases in a number of places. The meaning of this phrase is set out in *subsection (1)* of this section. *Subsection (2)* provides that relevant activity occurring before the commencement of this Act falls within the definition at *subsection (1).* The Secretary of State may therefore rely on activity which took place before the coming into force of the Act in imposing measures on an individual.

Section 5: Two year limit for TPIM notices.

67. This section makes provision for when a TPIM notice comes into force, how long it will remain in force and for how long it can be extended. *Subsection (1)(b)* specifies that a TPIM notice remains in force for a year, and *subsection (1)(a)* that the year begins from the date on which it is served or from a later date which may be specified in the notice. The purpose of *subsection (1)(a)* is to ensure that the one year period does not begin before the measures imposed by the notice have effect on the individual. An example might be a case in which a TPIM notice is prepared in contingency, or for other reasons in advance of its service, or in which it is served in advance of the time when it is intended to come into force. An example of when a TPIM notice might be prepared (and permission sought) on a contingency basis is a case where the individual who would be subject to the TPIM notice is overseas but is expected to travel to the UK, and the Secretary of State considers it necessary to prepare a TPIM notice to be served immediately on his or her arrival in the UK (but is not sure exactly when that will be).

68. *Subsections (2)* and *(3)* provide that the Secretary of State may, after a TPIM notice has been in force for a year, extend it for a further year (but may only do so once). The notice may only be extended if the Secretary of State continues to: reasonably believe that the individual is or has been involved in terrorism-related activity (condition A); and reasonably consider both that it is necessary to impose measures on the individual (condition C) and that it is necessary to impose the measures specified in the TPIM notice (condition D).

69. *Subsection (4)* provides that the operation of the two-year time limit is subject, in particular, to the exceptions and provisions in sections 13 and 14. As noted above, this section also interacts with condition B in section 3.

Section 6: Prior permission of the court

70. This section sets out the function (*subsection (3)*) and powers (*subsections (7), (8)* and *(9)*) of the court on an application by the Secretary of State to obtain permission from the court before imposing measures on an individual as required under condition E of section 3.

71. *Subsection (4)* provides that the court may consider the Secretary of State's application without the individual on whom the measures would be imposed being aware of the application or having the opportunity to make representations. This is intended to avoid giving an individual advance warning of the Secretary of State's intention to impose a TPIM notice on him or her, and to avoid a risk of the individual absconding before the measures can be imposed. The individual will subsequently have the opportunity to make representations about the imposition of the measures: section 8 requires the court, if it gives permission, also to give directions for a full, substantive review of the imposition of measures on the individual and section 9 makes provision for that review.

72. *Subsection (6)* provides that the court must apply the principles applicable on an application for judicial review.

73. *Subsections (7), (8)* and *(9)* provide for the powers of the court in various scenarios. The court may not give permission if it finds that the Secretary of State's decisions that conditions A (involvement in terrorism-related activity), B (the relevant activity is new terrorism-related activity) or C (necessity of measures) are met were obviously flawed. If the court finds that the Secretary of State's decision that condition D (necessity of specific measures in the TPIM notice) is met was obviously flawed – that is, that although the decision to impose measures was not obviously flawed, the decision to impose one or more of the specific measures was obviously flawed – the court is not required to refuse permission altogether. In this case, the court may instead give directions to the Secretary of State in relation to the measures to be imposed (this would allow the court to give guidance about the considerations which the Secretary of State must take into account when deciding which measures to impose), whilst otherwise granting permission.

Section 7 and Schedule 2: Urgent cases: reference to the court etc

74. This section gives effect to Schedule 2. Schedule 2 makes provision relating to a case in which the Secretary of State imposes measures on an individual without first obtaining the permission of the court (in accordance with condition E (section 3(5)(b)). Schedule 2 places a duty on the Secretary of State to include a statement in the TPIM notice confirming his or her reasonable belief as to the urgency of the case, and immediately to refer the case to the court after the imposition of measures on the individual. The court's consideration of the case must begin within seven days of service of the TPIM notice.

75. The Schedule makes provision for the function and powers of the court on these proceedings. The function of the court is to consider whether the relevant decisions (as set out in *paragraph (6)(2)*) of the Secretary of State were obviously flawed, including the decision that the urgency condition was met. The court must quash the TPIM notice if it determines that certain of the Secretary of State's decisions were obviously flawed. If it determines that the specified measures are obviously flawed, but otherwise the TPIM notice was properly imposed, it must quash those measures and otherwise confirm the TPIM notice. *Paragraph 4(4)* provides that, if the court decides that the Secretary of State's decision that the urgency condition is met was obviously flawed, it must make a declaration to that effect (as well as quashing or confirming the TPIM notice in accordance with the other provisions of that paragraph).

Section 8: Directions hearing

76. *Subsections (1)* and *(2)* of this section provide that, on giving the Secretary of State permission to impose measures (or – in an urgent case – on confirming measures already imposed), the court must give directions for a directions hearing. Those directions must not be served on the individual in a case where permission has been granted (rather than the urgency procedure used) until the TPIM notice has been served (*subsection (3)*). This is because permission may be granted to the Secretary of State in the absence of the individual, so as not to alert that individual to the imminent imposition of measures on him or her, and the service of the directions should only follow the service of the notice (which may take place some time after permission is granted) for the same reason. At the directions hearing, directions must be given for a further hearing (a "review hearing") to be held for the court to review the imposition of the measures as soon as practicable (*subsections (4)* and *(5)*). (Section 9 makes provision in relation to this review hearing.) S*ubsections (2)* and *(6)* ensure that the individual has the opportunity to make representations at a directions hearing, which is to be held, unless the court directs otherwise, within seven days of the TPIM notice being served (or, in a case using the urgency procedure, within seven days of the court confirming the notice).

Section 9: Review hearing

77. *Subsection (1)* provides that the function of the court is to review the decisions of the Secretary of State that the relevant conditions for imposing measures on an individual (defined by *subsection (8)* as *conditions A, B, C* and *D* as set out in section 3) were met, and continue to be met.

78. This review must apply the principles applicable on an application for judicial review (*subsection (2)*).

79. The courts take the view that judicial review is a flexible tool that allows differing degrees of intensity of scrutiny, depending on circumstances and the impact of the decision in question on the individual concerned.[2] Control order case law provides for a particularly high level of scrutiny. In relation to the full substantive review of each control order, the Court of Appeal has ruled (*Secretary of State for the Home Department v MB [2006] EWCA Civ 1140*) that the High Court must make a finding of fact as to whether the "reasonable suspicion" limb of the statutory test for imposing a control order is met and must apply "intense scrutiny" to the Secretary of State's decisions on the necessity of each of the obligations imposed under the control order while paying a degree of deference to the

[2] In *BSkyB and other v Competition Commission and BERR [2010] EWCA Civ 2,* Lord Justice Lloyd stated that 'It is well established that the courts apply judicial review principles in different ways according to the matter under consideration, and that there are some cases in which the courts apply a greater intensity of review than in others. The main examples of this approach are cases concerned with fundamental human rights under the ECHR.' See also paragraph 48 of *Secretary of State for the Home Department v MB [2006] EWCA Civ 1140*, where Lord Philips CJ stated 'So far as procedure is concerned, a court conducting a judicial review has all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses, to enable it to substitute its own judgment for that of the decision maker, if that is what Article 6 requires. An example of the exercise of such powers is *R (Wilkinson) v Broadmoor Special Hospital Authority & Ors* [2001] EWCA Civ 1545, [2002] 1 WLR 419. Section 3 of the HRA requires that section 3(10) and section 11(2) of the PTA be interpreted, if possible, in a manner that enables the court to carry out a review of the Secretary of State's decision that complies with the requirements of Article 6. So far as the standard of review is concerned, we can see no difficulty in so reading those sections as to produce this result, whatever those requirements may be.'

Secretary of State's decisions. The Court of Appeal also read down (interpreted) the 2005 Act under section 3 of the Human Rights Act 1998 to render it compatible with Article 6 of the ECHR (right to a fair trial) to make clear that the court must consider the necessity of the order at the time of the hearing as well as at the time the Secretary of State made the decision to impose it. The fact that the court's review must cover both these times was reaffirmed in *BM v Secretary of State for the Home Department [2011] EWCA Civ 366*.

80. The Coalition Government's review of control orders concluded that this level of judicial oversight, including the enhanced level of scrutiny provided by case law, should apply to the replacement system. The Government considers that section 9 together with reliance on existing case law concerning the level of scrutiny applicable for this type of judicial review implements this.

81. *Subsections (3)* and *(4)* specify that the court must discontinue the proceedings if the individual requests this (for example if he or she does not wish to contest the case against him or her); and that it may discontinue the proceedings in any other circumstances, but in such other circumstances both the Secretary of State and the individual subject to the measures must first have the opportunity to make representations.

82. *Subsections (5), (6)* and *(7)* set out the powers of the court on the review. The court may quash the TPIM notice itself; quash particular measures specified in the TPIM notice; or, give directions to the Secretary of State for the revocation of the TPIM notice or in relation to the variation of any of the measures. If the court does not exercise its power to quash the TPIM notice or to direct its revocation, it must decide that the notice should continue in force (whether or not it quashes – or makes directions concerning the variation of – any measure imposed under it).

Section 10: Criminal investigations into terrorism-related activity

83. *Subsections (1), (2)* and *(3)* set out a requirement on the Secretary of State to consult the chief officer of the police force which is investigating or would investigate any offence relating to terrorism suspected to have been committed by the individual, on whether there is evidence that could realistically be used to prosecute the individual. The Secretary of State must do so before imposing a TPIM notice in an urgent case or before seeking the court's permission to do so in all other cases.

84. *Subsections (5), (6)* and *(7)* place duties on the relevant chief officer of police ('police force' and 'chief officer of police' are defined in *subsection (10)*). On being consulted by the Secretary of State under *subsection (1)*, the chief officer is under a statutory duty to consult the relevant prosecuting authority (for example in England and Wales the Director of Public Prosecutions – in other words the Crown Prosecution Service). The chief officer must also keep the investigation of the individual's conduct under review, with a view to bringing a prosecution for a terrorism-related offence and must report on this to the Secretary of State while the TPIM notice remains in force. In relation to this continuing duty of review, the chief officer must consult the relevant prosecuting authority as appropriate.

Section 11: Review of ongoing necessity

85. The Court of Appeal held in *Secretary of State for the Home Department v MB [2006] EWCA Civ 1140*, in the context of control orders, that "it is the duty of the Secretary of State to keep the decision to impose the control order under review, so that the restrictions

that it imposes, whether on civil rights or Convention rights, are no greater than necessary". As noted above, it consequently read down the 2005 Act to this effect.

86. This section reflects this requirement under case law on the face of the legislation, placing a duty on the Secretary of State to keep under review the necessity of a TPIM notice, and the measures imposed under it, while the notice is in force.

Section 12: Variation of measures

87. This section makes provision for the measures imposed under a TPIM notice to be varied in a number of different circumstances. *Subsection (2)* provides that the individual subject to the TPIM notice may apply – in writing *(subsection (4)* – to the Secretary of State for any measure imposed under his or her TPIM notice to be varied. The Secretary of State is under a duty to consider any such application (*subsection (3)*). But *subsections (5)* and *(6)* provide that the Secretary of State may request further information in connection with the application, which must be provided within a specified period of time. The Secretary of State will not be required to consider the application further unless and until that information is received.

88. There is also power under *subsection (1)* for the Secretary of State to vary the measures imposed at any time and whether or not the individual has made an application for a variation under *subsection (2)*. This includes the power to vary the measures without the consent of the individual if the Secretary of State reasonably considers that variation to be necessary for the purposes of preventing or restricting the individual's involvement in terrorism-related activity.

89. *Subsections (9)* and *(10)* provide that the Secretary of State may exercise these powers to vary measures in relation to a TPIM notice that has expired without being renewed, or that has been revoked, before that notice is revived under section 13. These subsections also provide that in such circumstances the consideration of the necessity of the measures (by both the Secretary of State and the court) relates to the revived notice as varied. In short, these provisions allow the Secretary of State, when reviving a TPIM notice under section 13, to vary the measures specified in that notice from those that were contained in it prior to its expiry or revocation.

Section 13: Revocation and revival of TPIM notices

90. *Subsection (3)* provides an individual subject to a TPIM notice with the right to request that the Secretary of State revokes that notice, and the Secretary of State is under a duty to consider that request *(subsection (4)*). *Subsection (1)* provides the power for the Secretary of State to revoke a TPIM notice at any time by serving a revocation notice (whether or not in response to a request by the individual (*subsection (5)*). The Secretary of State may exercise this power where the Secretary of State considers that it is no longer necessary for the TPIM notice and the measures imposed under it to remain in force.

91. In some such cases, although the measures may no longer be necessary at the time that the TPIM notice is revoked (for example because the individual has been detained in prison), they may subsequently become necessary again (when the same individual is released from prison, perhaps following an unsuccessful prosecution for a criminal offence). *Subsection (6)(b)* therefore provides a power for the Secretary of State to revive a previously revoked notice, where he or she continues to reasonably believe that the individual is or has

been involved in terrorism-related activity (condition A) and where he or she reasonably considers that both the TPIM notice (condition C) and the measures specified in it (condition D) are necessary. *Subsection (7)* specifies that the Secretary of State can do this whether or not the TPIM notice has been extended for a second year under section 5, or has previously been revoked and revived.

92. An exception to this power is provided by *subsection (8)*, which specifies that the Secretary of State may not revive a TPIM notice that has been revoked on the direction of the court. But see section 14, which allows for the imposing of a new TPIM notice in such cases (which requires the permission of the court in addition to the other conditions for imposing measures to be met).

93. *Subsection (6)(a)* also provides a power for the Secretary of State to revive a notice – for a period of a year – that has previously expired without being extended (after being in force for one of the two years permitted by section 5 without evidence of new terrorism-related activity).

94. The TPIM notice may be revived at any time after its expiry or its revocation.

95. *Subsection (9)* makes provision for the duration of a revived TPIM notice. The purpose of this provision is to ensure that the overall two year time limit to the period an individual can be subject to a TPIM notice (without further evidence of involvement in terrorism-related activity) is not exceeded. The 'counting' of the two year period for which an individual can be subject to a TPIM notice stops at the point at which the notice expires without extension or is revoked. If the TPIM notice is subsequently revived at any time, the 'counting' starts again at that point – the two years continues to run from the time the revived notice comes into force. On service of a revived TPIM notice, the individual will be informed of the period for which he or she will remain subject to that notice (see section 28).

Section 14: Replacement of TPIM notice that is quashed etc

96. Section 14 makes provision for circumstances in which a TPIM notice is quashed or directed to be revoked as a result of court proceedings. Such a decision by the court may be as a result of technical deficiencies in the Secretary of State's use of his or her powers. In these circumstances, the Secretary of State may impose a replacement TPIM notice, subject to certain provisions that ensure the replacement notice interacts in the same way as did the quashed or revoked notice ("the original notice") with the provisions relating to time limits and new terrorism-related activity.

97. *Subsections (2)* and *(3)* have the effect that the replacement TPIM notice may only be in force for the same period of time as the original notice would have been; including that the replacement notice may not be extended if the original notice had already been extended (and therefore could not have been further extended because of the two-year time limit provided by section 5).

98. Similarly, *subsections (4)* and *(5)* provide that the quashing or revocation of the TPIM notice, and its subsequent revival, does not alter the status of activity that was new terrorism-related activity in relation to the original notice. Reasonable belief of terrorism-related activity post-dating the imposition of the original notice is not therefore required in order to impose a replacement notice. And if terrorism-related activity occurs after the imposition of

the original notice, that may be relied on as "new" activity, allowing for the imposition of a further TPIM notice at the end of the replacement notice.

99. *Subsection (6)* has the effect that if there is evidence that the individual engaged in further terrorism-related activity since the imposition of the overturned TPIM notice, the Secretary of State may (instead of being bound by the rules set out above) impose a new TPIM notice which triggers a new two year time limit. The reason for this is that the policy throughout the Act is that terrorism-related activity which occurs since the imposition of measures on an individual allows the Secretary of State to impose measures on that individual beyond the two year time limit.

Section 15 and Schedule 3: Other provisions relating to the quashing of TPIM notice etc

100. Section 15 makes various provisions in relation to a case in which the courts quash a TPIM notice or a measure imposed under a TPIM notice, or the extension or revival of a TPIM notice.

101. *Subsection (1)* provides a power for the courts to stay such a decision until a specified time or pending the outcome of an appeal against the decision. This provision is required because in the normal course of events, a quashing would take immediate effect. *Subsection (2)* provides that the court's decision does not affect the Secretary of State's power subsequently to impose measures on the same individual, or to do so on the basis of terrorism-related activity previously relied on to exercise such powers.

102. *Subsection (3)* provides that Schedule 3 has effect. Schedule 3 provides that an individual subject to a TPIM notice, who is convicted of an offence under section 23 (contravention without reasonable excuse of any measure specified in the TPIM notice), has a right of appeal against that conviction if the TPIM notice (or the measure to which the conviction related) is subsequently quashed. The court must allow such an appeal.

Section 16: Appeals

103. Section 16 sets out the rights of appeal of a person subject to a TPIM notice, and the function of the court in relation to such appeals. (These appeal rights are in addition to the provision under section 9 for an automatic review by the court of the imposition of measures). Rights of appeal exist against a decision of the Secretary of State to extend or revive a TPIM notice or to vary measures specified in a TPIM notice without the individual's consent. There are also rights of appeal against any decision by the Secretary of State in relation to the individual's application for the revocation or variation of the TPIM notice or for permission in relation to a measure specified in the TPIM notice.

104. *Subsection (7)* sets out that the only powers available to the court on an appeal falling under this section are to quash the extension or revival of the TPIM notice; quash measures specified in the TPIM notice; give directions to the Secretary of State for the revocation of the TPIM notice or in relation to the variation of the measures specified in the TPIM notice; and to give directions to the Secretary of State in relation to permission (for the purposes of a measure specified in the TPIM notice) or conditions to which such permission is subject. If the court does not exercise any of these powers it must dismiss the appeal (*subsection (8)*).

105. This review must apply the principles applicable on an application for judicial review (*subsection (6)* – see the commentary on section 9 for the applicable case law in relation to the standard of review).

Section 17: Jurisdiction in relation to decisions under this Act

106. Section 17 provides that decisions in relation to this Act may only be questioned – including for the purposes of section 7 of the Human Rights Act 1998 where it is claimed that such a decision breaches a right under the ECHR – in proceedings in the court as defined by section 30(1), or on appeal from such proceedings.

Section 18 and Schedule 4: Proceedings relating to measures

107. Section 18 makes further provision for court proceedings in relation to decisions taken under this Act.

108. *Subsection (1)* provides that an appeal may only be brought from a determination in TPIM proceedings on a point of law. The effect of *subsection (2)* is that an individual subject to a TPIM notice (or any person other than the Secretary of State) may not bring an appeal on a determination of the court in relation to an application by the Secretary of State for permission to impose a TPIM notice or a reference to the court under the urgency procedure.

109. *Subsection (3)* gives effect to Schedule 4. This Schedule makes provision relating to TPIM proceedings including a power to make rules of court and certain requirements that specified matters must be secured by the rules that are made.

110. In practice, as with control orders, the court proceedings in TPIM cases will have both 'open' and 'closed' elements. The individual concerned and his or her chosen legal representatives can be present at the open hearings, and see all the open material used in those hearings. He or she cannot be present at the closed parts of the proceedings, or see the closed material. Closed material is sensitive material that it would not be in the public interest to disclose to the individual concerned (for example because disclosure is contrary to the interests of national security, the international relations of the United Kingdom or the detection and prevention of crime).

111. After service of a TPIM notice, the individual will be provided with the open case against him or her. The open case must contain as much material as possible, subject only to legitimate public interest concerns. *Paragraph 10* of Schedule 4 provides for the appointment of a special advocate in relation to any closed proceedings. A special advocate attends all parts of the proceedings (both open and closed) and, like the judge, sees all the material – including the closed material not disclosed to the individual. The role of the special advocate is to act in the individual's interests in relation to the closed material and closed hearings. Part of the function of special advocates is to ensure that the closed material is subject to independent scrutiny and adversarial challenge – including making submissions (in closed session) on whether or not the closed material should in fact be disclosed to the individual.

112. In particular, the Schedule makes provision that rules must secure that, with the permission of the court, the Secretary of State may not disclose certain material other than to the court and a special advocate where this would be contrary to the public interest. It also makes provision in relation to the summarising of sensitive material. The rules may provide for the court to make an anonymity order in relation to an individual subject to a TPIM

notice.

113. *Paragraph 5* of Schedule 4 provides that nothing in this provision, or in Rules of Court made under it, is to be interpreted as requiring the court to act in a way inconsistent with Article 6 of the ECHR. In other words, the individual's Article 6 right to a fair hearing takes precedence over anything in the legislation – in particular the provision about withholding information from the individual. This provision reflects the House of Lords' judgment in *Secretary of State for the Home Department v MB & AF [2007] UKHL 46 ("MB & AF").* In that judgment, the Law Lords found that in rare cases the provisions of the 2005 Act might lead to a breach of Article 6 (civil) but concluded that it was possible to read down the provisions so they could be operated compatibly with Article 6 in all cases. They therefore read down the provisions under the 2005 Act requiring the court to withhold closed material from the controlled person, such that material must only be withheld if it was compatible with Article 6 to do so. The wording in paragraph 5 gives effect to the read down in *MB & AF*.

114. Subsequent to the *MB & AF* judgment, the Law Lords handed down a further judgment (*Secretary of State for the Home Department v AF and others [2009] UKHL 28 ("AF (No. 3)"*) on the compatibility of control order proceedings in Article 6, which took into account the (then) recent ECtHR decision in *A & Others v United Kingdom [2009] ECHR 301*. In brief, the *AF (No. 3)* judgment held that, in relation to the control order proceedings before the Law Lords, the controlled person must be given sufficient information about the allegations against him or her to enable him or her to give effective instructions to the special advocate in relation to those allegations. The disclosure obligations required by the judgment in *AF (No. 3)* will be applied as appropriate by the courts in TPIM proceedings.

Section 19: Reports on exercise of powers under Act

115. This section places a duty on the Secretary of State to report to Parliament on a quarterly basis on the exercise of certain powers under this Act.

Section 20: Reviews of operation of Act

116. This section places a duty on the Secretary of State to appoint an "independent reviewer" to prepare an annual report on the operation of this Act, and to lay that report before Parliament.

Section 21: Expiry and repeal of TPIM powers

117. Section 21 provides that the Secretary of State's TPIM powers expire after five years, unless renewed by order subject to the affirmative resolution procedure. The Secretary of State's TPIM powers, as specified in *subsection (8)*, are the powers under the Act to impose, extend, vary or revive a TPIM notice. The powers may be renewed for no longer than a further five years at a time, and the Secretary of State may also by order repeal them, or revive them after they have been allowed to expire. *Subsections (5)* and *(6)* provide that such an order need not be made subject to the normal affirmative resolution procedure in a case where the Secretary of State declares that this is necessary by reasons of urgency. The order must instead be laid before Parliament after being made, and must be approved by resolution of each House within 40 days, failing which it will cease to have effect. The 40 day period does not include days when Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

118. *Subsection (3)* provides that before making any order under this section the Secretary of State must consult: the independent reviewer of the Act (see section 20); the Intelligence Services Commissioner; and the Director-General of the Security Service.

Section 22: Section 21: supplementary provision

119. Section 22 makes transitional and saving provisions in relation to TPIM proceedings, and TPIM notices currently in force, when the Secretary of State's TPIM powers expire or are repealed pursuant to section 21. These broadly mirror the provisions in Schedule 8 in relation to control orders that were in force under the 2005 Act when that Act was repealed, with the exception that the transitional period under this section is 28 days rather than 42 days.

Section 23: Offence

120. Section 23 provides for an offence of contravening, without reasonable excuse, any measure specified in a TPIM notice. *Subsection (2)* makes it clear that in cases where the Secretary of State grants permission under Schedule 1 for the individual to do something which the TPIM notice prohibits that individual from doing without such permission, if the individual does that thing other than in accordance with the terms of the permission, this will amount to a contravention of the relevant measure. Therefore if the individual, without reasonable excuse, fails to adhere to the terms of the permission, including complying with any conditions attached to the permission, that will constitute an offence. The individual will also commit an offence if he or she is required by a measure in a TPIM notice to give notice to the Secretary of State before doing something and the individual does that thing without receiving confirmation from the Secretary of State that sufficient notice has been given (see *paragraph 14(5)* of Schedule 1).

121. The maximum penalties for the offence are, on conviction on indictment: five years' imprisonment; or a fine (of up to £5000 in England, Wales and Northern Ireland and £10000 in Scotland); or both. And on summary conviction: six months' imprisonment (in Northern Ireland); 12 months' imprisonment (in Scotland); and in England and Wales six months' imprisonment prior to commencement of section 154(1) of the Criminal Justice Act 2003 ("the 2003 Act"), and 12 months' imprisonment after that section has been commenced; or a fine (of up to £5000 in England, Wales and Northern Ireland and £10000 in Scotland); or both. Section 154(1) of the 2003 Act has the effect of increasing the maximum sentence available on summary conviction in England and Wales from six months to 12 months' imprisonment. The differences in maximum penalty on summary conviction arise because the section reflects the normal position in each jurisdiction within the United Kingdom in relation to summary offences.

Section 24 and Schedule 5: Powers of entry

122. Section 24 gives effect to Schedule 5. The Schedule provides for powers of entry, search, seizure and retention in a number of scenarios relating to TPIM notices. These include, without a warrant: entry and search of premises to locate an individual for the purpose of serving a TPIM notice (or other specified notices) on that individual; search of an individual or premises at the time of serving a TPIM notice for the purpose of discovering anything that might breach any measure specified in the TPIM notice; search of premises on suspicion that an individual subject to a TPIM notice has absconded; and search of an individual subject to a TPIM notice for public safety purposes. And, with a warrant: search of an individual or premises for purposes of determining whether the individual is complying

with the measures specified in the TPIM notice.

Section 25 and Schedule 6: Fingerprints and samples

123. This section gives effect to Schedule 6. Schedule 6 makes provision for the taking and retention of biometric material from individuals subject to a TPIM notice.

124. *Paragraph 1* makes provision for England, Wales and Northern Ireland relating to the taking of fingerprints and non-intimate samples from individuals subject to a TPIM notice.

125. "Fingerprints" and "non-intimate samples" have the same meaning as that given in section 65 of the Police and Criminal Evidence Act 1984 ("PACE") (see *paragraph 14*). That is, "fingerprints" include palm prints and "non-intimate samples" means a sample of hair other than pubic hair; a sample taken from a nail or from under a nail; a swab taken from any part of a person's body including the mouth but not any other body orifice; saliva and a footprint or a similar impression of any part of a person's body other than a part of his or her hand.

126. *Paragraph 2* provides that a constable in England, Wales and Northern Ireland may only take the fingerprints or samples from an individual once under the same TPIM notice, unless there is a technical deficiency with material taken previously taken under the same notice.

127. *Paragraph 3* provides a constable in England, Wales and Northern Ireland with powers to require a person who is subject to a TPIM notice to attend a police station (on notice) for the purposes of having his or her fingerprints and/or non-intimate samples taken. In the event that such a request is not complied with, the person may be arrested without a warrant. This is in line with the general provision allowing constables to require specified individuals to attend a police station for the purposes contained in Schedule 2A to PACE, which was inserted by section 6 of the 2010 Act.

128. *Paragraph 4* makes provision for Scotland relating to the taking of relevant physical data and samples from an individual subject to a TPIM notice. In line with current procedures in Scotland, constables would need authorisation from an officer of the rank of inspector or above to take certain types of non-intimate samples (non-pubic hair or nail samples and external body fluid samples) from individuals subject to a TPIM notice. A constable does not require such authorisation to take fingerprints, palm prints, other external body prints and saliva samples. In contrast, current procedures in England, Wales and Northern Ireland allow constables to take fingerprints and all non-intimate samples when individuals are arrested under PACE or the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE NI") without such authorisation. The differences in the approach in Scotland – and the differing definitions of the material to be taken – arise because the provisions in this Schedule are intended to be in line with existing police procedures and legislation in each country.

129. *Paragraph 5* provides a power to check the biometric material of an individual subject to a TPIM notice against other such material held under a variety of powers. These reflect the equivalent provision contained in the Protection of Freedoms Bill currently before Parliament that allows for the checking of biometric material taken under Schedule 8 to the Terrorism Act 2000 ("the 2000 Act") against other specified material.

130. *Paragraphs 6* to *12* make provision relating to the destruction and retention of material taken from individuals subject to a TPIM notice by virtue of the powers conferred on constables in the previous paragraphs. Where an individual has no relevant previous convictions, fingerprints and DNA profiles may only be kept for six months after the TPIM notice ceases to be in force. This is subject to the provision that, in the event that the TPIM notice is quashed, the material may be retained until there is no further possibility of an appeal against the quashing. In addition, should the TPIM notice be revived or a new TPIM notice imposed during the six month period following the cessation of the TPIM notice that was in force when the material was taken, or within or immediately after the end of the period during which any appeal may be made, the material may be retained for a further six months after the revived or subsequent TPIM notice ceases to be in force (or until there is no further possibility of an appeal against any quashing of that TPIM notice).

131. As provided in the Protection of Freedoms Bill for material for example taken under PACE or that is subject to the 2000 Act or the 2008 Act, the material need not be destroyed if a chief officer of police (or chief constable in Scotland or Northern Ireland) determines that it is necessary to retain that material for purposes of national security. In such circumstances it may be retained for up to two years; it is open to that chief officer to renew a national security determination in respect of the same material to extend further the retention period by up to two years at a time. The independent Commissioner for the Retention and Use of Biometric Material (provided for under the Protection of Freedoms Bill) will keep under review such national security determinations and the uses to which material so retained is put.

132. *Paragraph 13* covers the uses to which material taken and retained under the previous paragraphs can be put. These are the same as those set out in relation to material taken under PACE, PACE NI, the 2000 Act and the 2008 Act.

Section 26: Temporary power for imposition of enhanced measures

133. The Government has published the draft ETPIM Bill, with the intention that this would be introduced as emergency legislation if necessary in the future. It would introduce a system of enhanced TPIM notices, in parallel to the system of TPIM notices provided by this Act, with the key difference being that more stringent restrictions could be imposed on individuals subject to an enhanced TPIM notice where necessary and proportionate to protect the public. There would also be a higher test for imposing such a notice – the Secretary of State must be satisfied 'on the balance of probabilities' that the individual is or has been involved in terrorism-related activity (whereas he or she must reasonably believe this to be the case in order to impose a standard TPIM notice).

134. It would not be possible to introduce the ETPIM Bill while Parliament is dissolved, and during the period between a new Parliament being appointed and the first Queen's Speech of that Parliament. Section 26 provides a power for the Secretary of State to make a "temporary enhanced TPIM order" during such a period if it is necessary by reason of urgency. (Section 27 provides that the Secretary of State must lay a copy of the order before each House of Parliament as soon as is practicable after making it, but the order is not subject to any further Parliamentary procedure. Such an order only remains in force for a period of 90 days.)

135. A temporary enhanced TPIM order would make provision equivalent to that contained in the ETPIM Bill, enabling the Secretary of State to impose (temporary) enhanced TPIM notices on the same basis as that set out in the draft ETPIM Bill. *Subsections (5)* to *(10)* set out the provisions and matters that must, and may, be secured by the order. These are the provisions that differentiate an enhanced TPIM notice from a standard TPM notice. *Subsection (4)* requires that, other than these matters, the provisions of the order must correspond to the relevant provisions of this Act. The result is that the power to make provision in the order is limited to making similar provision to that in the draft ETPIM Bill, including applying most of the provisions of this Act. See the explanatory notes to the draft ETPIM Bill for a description of the effect of the provisions that will be made.

136. The main difference to the provision in that draft Bill is that a temporary TPIM notice made under an order will only remain in force for as long as the order remains in force (that is, a notice will last for a maximum of 90 days). However, if the circumstances which necessitated the introduction of the enhanced TPIM powers by order still exist after the Queen's Speech, it is likely that the Government will introduce the ETPIM Bill as emergency legislation as soon as Parliamentary business resumes (and before the 90 days for which the order remains in force expires). In this event, the ETPIM Bill will repeal the order and will make transitional provision in relation to enhanced TPIM notices imposed under the order. Clause 12 of the draft ETPIM Bill provides that the exercise of any power under a temporary enhanced TPIM order is to be treated as the exercise of the corresponding power under the ETPIM Bill. And it includes provision that an enhanced TPIM notice imposed under the order is to continue in force as an enhanced TPIM notice and is to remain in force for a period of a year (less any period for which it was in force prior to commencement of the ETPIM Bill), rather than just for the duration of the temporary TPIM notice – as notices imposed under the draft ETPIM Bill will remain in force for a year.

137. The practical effect of *subsections (12)* and *(13)* is that the Secretary of State must obtain the consent of the Scottish Ministers before making provision under the temporary enhanced TPIM order for matters that are devolved in Scotland – but that requirement does not apply to such devolved matters contained in the Act (for which the consent of the Scottish Ministers and the Scottish Parliament has already been obtained).

Section 27: Section 26: supplementary provision

138. *Subsection (1)* provides that a temporary enhanced TPIM order will remain in force for 90 days (or a shorter period if specified in the order). While it is in force the Secretary of State may revoke some or all of its provisions (*subsection (2)*). If a temporary enhanced TPIM order is made and expires or is repealed, and the ETPIM Bill is subsequently passed, clause 12 of the ETPIM Bill will provide that any decisions or proceedings under the powers provided by the order are to be treated as decisions or proceedings under the relevant provision of the ETPIM Bill.

Section 28: Notices

139. Section 28 makes provision about the service of notices under the Act. In particular it provides that a confirmation notice must be served on an individual who is served with a TPIM notice, a revival notice or an extension notice, setting out the period for which (including dates) the individual will remain subject to the TPIM notice (unless the TPIM notice is quashed or revoked before its expiry). A TPIM notice, a revival notice or a notice of a variation without consent must be served in person on the individual for it to have effect.

This requirement is supported by the entry and search power in paragraph 5 of Schedule 5. The other notices listed in *subsection (4)* may be served on the individual via his or her solicitor.

Section 29, Schedules 7 and 8: Financial and supplemental provisions

140. *Subsection (1)* grants the Secretary of State authority to purchase services in relation to any form of monitoring in connection with measures specified in TPIM notices. This would include for example electronic monitoring of compliance with the overnight residence requirement provided for in Schedule 1.

141. *Subsection (3)* gives effect to Schedule 7 (minor and consequential amendments), and *subsection (4)* gives effect to Schedule 8 (transitional and saving provisions). *Paragraphs 1* and *9* of Schedule 8 provide for a transitional period of 42 days during which existing control orders will remain in force following commencement of this Act (unless quashed or revoked before the end of that period). *Paragraph 2* makes savings provisions. These have the effect that, for example, existing control orders may still be modified during the transitional period. *Paragraph 3* makes provision in relation to the continuation of control order proceedings after repeal of the 2005 Act. It provides that the repeal of that Act does not prevent the continuation or bringing of certain control order proceedings, but that (save for damages claims) those proceedings may only be for the purpose of determining whether quashing is appropriate. *Paragraph 4* has the effect that the Secretary of State may impose a TPIM notice on an individual who has previously been subject to a control order. *Paragraphs 5, 6* and *8* make transitional provision in relation to the Secretary of State's duty under the 2005 Act to report on control order powers and in relation to the independent reviewer's duties under the 2005 Act and section 20 of the Act. *Paragraph 7* provides that these savings provisions have effect notwithstanding the fact that, but for the Act, the control order powers would have expired after 31st December 2011 (the date up until which the control order powers were most recently renewed by virtue of the Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2011[3]).

Section 30: Interpretation etc

142. Section 30 sets out the meaning of various terms used throughout the Act and makes certain provisions for the application of other sections. In particular, *subsection (2)* has the effect that where a new TPIM notice is imposed on an individual who has already been subject to measures for two years, the Secretary of State may take into account evidence he or she relied on in relation to the imposition of the previous TPIM notice. But there would also need to be evidence of terrorism-related activity which post-dated the imposition of the earlier TPIM notice for the Secretary of State to have the power to impose the new notice (see *subsections (2)* and *(6)* of section 3).

143. *Subsection (3)* provides that where the definition of "new terrorism-related activity" in section 3(6) refers to a TPIM notice being in force in relation to an individual, a notice that is revived (under section 13(6)) is to be treated as the same TPIM notice as the notice previously revoked or expired. In other words, if a TPIM notice has been revived under section 13(6), when considering whether there is "new" terrorism-related activity which could found the imposition of measures on the individual beyond 2 years, that "new" activity

---

[3] S.I. 2011/716

must take place at some point after the original imposition of the measures (not necessarily after the revival of the measures).

Section 31: Short title, commencement and extent

144. Section 31 sets out the short title of the Act; that it comes into force on the day after the day on which it is passed; and that it extends to England, Wales, Scotland and Northern Ireland, and may by Order in Council be extended to the Isle of Man.

HANSARD REFERENCES

STAGE	*DATE*	*HANSARD REFERENCE*
	House of Commons	
Introduction	23 May 2011	Vol. 528, Col. 656
Second Reading	7 June 2011	Vol. 529, Cols. 69-130
Committee	21 June 2011	1st Sitting Cols. 1-28, 2nd Sitting Cols. 29-52
PBC (Bill 193) 2010-12	23 June 2011	3rd Sitting Cols. 53-78, 4th Sitting Cols. 79-118
	28 June 2011	5th Sitting Cols. 119-162, 6th Sitting Cols. 163-206
	30 June 2011	7th Sitting Cols. 207-230, 8th Sitting Cols. 231-260
	5 July 2011	9th Sitting Cols. 261-302, 10th Sitting Cols. 303-314
Report and Third Reading	5 September 2011	Vol. 532, Cols. 50-144
	House of Lords	
Introduction	6 September 2011	Vol. 730, Col. 122
Second Reading	5 October 2011	Vol. 730, Cols. 1133-1203
Committee	19 October 2011	Vol. 731, Cols. 290-351
	1 November 2011	Vol. 731, Cols. 1121-1133
Report	15 November 2011	Vol. 732, Cols. 581-639
Third Reading	23 November 2011	Vol. 732, Cols. 1059-1063
	House of Commons	
Consideration of Lords Amendments	29 November 2011	Vol. 536, Cols. 854-874
Royal Assent	14 December 2011	House of Commons Hansard Vol. 537, Col. 807
		House of Lords Hansard Vol. 733, Col. 1275