

## **DELEGATED POWERS AND REGULATORY REFORM COMMITTEE**

### **TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL**

#### **Memorandum by the Home Office**

##### **Introduction**

This Memorandum outlines the only provision in the Terrorism Prevention and Investigation Measures (TPIM) Bill which confers a power to make delegated legislation, and explains why the power has been taken and the nature of, and reason for, the procedure selected for exercising that power.

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

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

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

*Power conferred on:* (a) for Initial exercise of the power in England, Wales and Northern Ireland: Lord Chancellor  
(b) in all other cases:  
Civil Procedure Rule Committee (England and Wales)  
Lord President (Scotland)  
Northern Ireland Supreme Court Rule Committee  
(Northern Ireland)

*Power exercised by:* Statutory Instrument

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

1. Schedule 4 to the Bill (given effect to by clause 18) provides a rule-making power in relation to TPIM proceedings (the definition of which is found in clause 18) and appeals from such proceedings to the Court of Appeal or (in Scotland) the Inner House of the Court of Session.
2. It is appropriate to take this power because Rules of Court may make provision at a level of detail which is not appropriate to include in primary legislation. In addition, should procedural changes be required in the regulation of TPIM proceedings, Rules may be amended, subject to the relevant procedural safeguards, more easily and quickly than primary legislation.
3. Paragraph 2(1) of Schedule 4 provides that the person making the Rules must have regard to the need to secure that decisions are properly reviewed. It also provides that regard must be had to the need to secure that disclosures of information are not made where they would be contrary to the public interest. However, the latter provision, together with the rest of the provisions in paragraphs 2 to 4 which relate to closed proceedings in which evidence may be withheld from the individual and their legal adviser, is subject to

paragraph 5 of Schedule 4. This incorporates the “read down” under section 3 of the Human Rights Act 1998 made by the House of Lords in *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46 and provides that nothing in those paragraphs or in the Rules made under them is to be read as requiring the court to act in a manner inconsistent with Convention rights (which includes in particular the article 6 right to a fair hearing).

4. Paragraph 2(2) of Schedule 4 provides an illustrative list of the matters about which the Rules may make provision. This includes the mode and burden of proof, the conducting of the proceedings in the absence of the individual and his legal advisers and the function of special advocates. Paragraphs 3 and 4 limit the scope of the Rule-making power by providing that various matters relating to disclosure must be secured by the Rules. These include the disclosure the Secretary of State is required to make and the procedure to be followed when the Secretary of State applies to the court to withhold material in the public interest (including provision about the gisting of such material).
5. Paragraph 6 of Schedule 4 provides that the Rules may provide for the court to make an anonymity order in respect of an individual in the context of TPIM proceedings.
6. The initial exercise of the Rule-making power in England, Wales and Northern Ireland is to be by the Lord Chancellor rather than by the usual Rule-making body for Rules of Court, namely the Civil Procedure Rules Committee (in England and Wales) and the Northern Ireland Supreme Court Rules Committee (in Northern Ireland). This is because the Rules need to be in force at the same time as the Bill comes into force – that is the day after Royal Assent. This is so that the Rules are available for TPIM proceedings as soon as they arise, which is likely to be immediately because TPIM proceedings include proceedings in which the Secretary of State applies for permission to impose a TPIM notice on an individual. It would be very difficult for the Rules Committees to make the Rules on the initial exercise of the powers to meet

this timetable and it is considered that the Lord Chancellor is best placed to make the Rules initially.

7. Before making the Rules, the Lord Chancellor is required to consult with the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland as appropriate. And after the Rules are made they must be laid before Parliament and approved by resolution of both Houses within 40 days (not counting time during which Parliament is adjourned for more than 4 days or is dissolved or prorogued), failing which the Rules will cease to have effect. The Government considers that this affirmative procedure provides the appropriate level of Parliamentary scrutiny of the Rules, while allowing the Rules to be made and come into force swiftly.
8. After the initial exercise of the powers, should the Rules need amendment, the usual rule-making procedure in the Civil Procedure Act 1997 (for England and Wales) and in the Judicature (Northern Ireland) Act 1978 (for Northern Ireland) will be followed. This is the negative resolution procedure, but the Rules will be made by the relevant Rules Committee and following the usual consultation requirements.
9. In Scotland, the Lord President will make the Rules in the usual way. The Lord President is able to make the Rules swiftly and so the issue above as to timing does not apply. Although the Rules are not subject to formal Parliamentary approval in Scotland, they are subject to Parliamentary scrutiny.
10. There is precedent for the Rule-making power in Schedule 4 to the Bill – both in terms of the substance of the Rules to be made under it and in terms of the Parliamentary procedure for making them. This is found in the Schedule to the Prevention of Terrorism Act 2005 (in relation to control orders), in Part 6 of the Counter-Terrorism Act 2008 (in relation to financial restriction proceedings) and in Part 1 of the Terrorist Asset Freezing Etc. Act 2010 (in relation to asset freezing proceedings). The Rules that will be made under the power in the Bill will be largely modelled on those in Part 76 of the Civil

Procedure Rules 1998 – made under the Schedule to the Prevention of Terrorism Act 2005. In so far as those Rules relate to closed proceedings, there is additional precedent for such proceedings, for example in the context of the Special Immigration Appeals Commission proceedings and Proscribed Organisations Appeal Commission proceedings.

**Home Office**

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