These notes refer to the Terrorism Prevention and Investigation Measures Bill as introduced in the House of Commons on 23 May 2011

TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Terrorism Prevention and Investigation Measures Bill that was introduced in the House of Commons on 23 May 2011. They have been prepared by the Home Office in order to assist the reader in understanding the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause 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 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.

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 Consequently, in the Prevention of Terrorism Act 2005 ("the 2005 Act"), the Government repealed Part 4 of the 2001 Act and replaced it with a system of control orders to manage the risk to the public posed by suspected terrorists (regardless of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

5. The 2005 Act also contains a power for the court – on application from the Secretary of State – to make a derogating control order against a person. A derogating control order is one that imposes obligations that amount to a deprivation of liberty within the meaning of Article 5 of the ECHR. An example of such a control order would be one imposing a 24 hour curfew – i.e. house arrest. By way of contrast, a non-derogating control order is one in which the obligations imposed do not amount to such a deprivation of liberty. Before the Government could impose a derogating control order, it would need to derogate to the extent strictly necessary from Article 5. No derogation from Article 5 has been made in relation to control orders; only non-derogating control orders have ever been 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 has 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") make 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 provide 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 have not been commenced as a result of the judgment of the European Court of Human Rights 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 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 have also not been commenced.

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 comprise powers for a constable to enter and search premises relating to controlled individuals in specified circumstances for specified purposes. These powers have been commenced. (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 does 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 provides that the list of types of obligations it includes in section 1 is 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, introducing 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).

Other provision

12. Sections 79-81 of the 2008 Act contain technical amendments to the 2005 Act that do not substantively affect the implementation of control orders. These sections have been commenced.

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 (TPIMs). These would be a civil preventative measure intended to protect the public from the risk posed by suspected terrorists 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.

Coalition Government's position on the retention of DNA

16. 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 has decided instead to adopt the "protections of the Scottish model" in relation to the general rules on destruction and retention of such material. It has 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 currently 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 to terrorism prevention and investigation measures).

SUMMARY

17. The Bill consists of 27 clauses and eight schedules.

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

18. Clauses 1-4 of the Bill repeal the 2005 Act and provide that the Secretary of State may impose TPIMs on an individual 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 exists in relation to control orders (reasonable suspicion of involvement in such activity).

19. 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 provides a non-exhaustive list of the measures that can be imposed under control orders but allows the Secretary of State to impose any obligation considered necessary to prevent or restrict an individual's involvement in terrorism-related activity.

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

20. Control orders remain in force for 12 months unless renewed. The 2005 Act does not specify a limit to the number of times that a control order may be renewed, although the statutory test for renewing the control order must be met in order for it to

remain in force – and whether the test is met is considered by the High Court on appeal from the individual.

21. 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 clause gives effect to that time limit.

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

22. Clauses 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, 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 clauses includes an explanation of the applicable case law.

23. 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 clause 26(1)).

Clause 10: Consultation requirements

24. Clause 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 about to be subject to, a TPIM notice for a terrorism-related offence. The clause maintains all the existing 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. Clause 10 delivers this.

Clause 11: Review of ongoing necessity

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

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

26. These clauses 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 clauses also make provision for the Secretary of State to revive a TPIM notice where he or she has previously revoked or allowed a TPIM notice to expire. And the clauses also make provision in relation to the quashing of a TPIM notice or directions by the court in relation to TPIMs and the Secretary of State's powers to impose a replacement notice in those circumstances.

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

27. In addition to the mandatory court review of the imposition of a TPIM notice, clauses 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 a request 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 exist in relation to control orders.

Clauses 19-20: Other safeguards

28. Clauses 19 and 20 place requirements – equivalent to the 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.

Clause 21: Offence

29. Clause 21 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).

Clause 22 and Schedule 5: Powers of entry, seizure, search and retention

30. Schedule 5 introduces specific powers of entry, seizure, search and retention in relation to TPIMs.

Clause 23 and Schedule 6: Fingerprints and non-intimate samples

31. 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.

Clause 24 – 27 and Schedules 7 and 8: Final provisions

32. Clause 24 makes provision in relation to the service of TPIM notices and related notices. Clauses 25-27 make general provisions concerning financial matters, interpretation, the title of the Bill and its extent.

TERRITORIAL EXTENT

33. The majority of the Bill's provisions extend to England, Wales, Scotland and Northern Ireland, but certain provisions do not extend to Scotland. In relation to Wales, Scotland and Northern Ireland the Bill addresses reserved or excepted matters only.

34. This Bill does not contain any provisions falling within the terms of the Sewel Convention. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are amendments relating to such matters which trigger

the Convention, the consent of the Scottish Parliament will be sought for them.

35. In relation to Wales, the provisions of the Bill do not relate to devolved matters or confer functions on the Welsh Ministers. If amendments are made to the Bill that trigger a requirement for a legislative consent motion, the consent of the National Assembly will be sought for them.

36. No provisions of the Bill relate to devolved matters in Northern Ireland, or confer functions on the Northern Ireland Ministers. If amendments are made to the Bill that trigger a requirement for a legislative consent motion, the consent of the Northern Ireland Assembly will be sought for them.

COMMENTARY ON CLAUSES

Clause 1: Abolition of control orders

37. Clause 1 repeals the 2005 Act. It needs to be read in conjunction with clause 25 and Schedule 8, which make transitional provision relating to the repeal of that Act.

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

38. *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 Clause 3. *Subsection (2)* provides that the measures that may be imposed are limited to those set out in Schedule 1 to this Bill. 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

39. Schedule 1 sets out an exhaustive list of the types of measures which may be imposed on an individual under this Bill. 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.

40. *Paragraph 1(1)(a)* allows the Secretary of State to require the individual to remain overnight or at specified times overnight at a specified residence – either his or her own residence or a residence provided by the Secretary of State. The hours between which the individual must remain overnight at the residence must be specified by the Secretary of State in the TPIM notice. The term "overnight" is not defined in the Bill, 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]

41. *Subparagraphs (1)(b)* and *(2)* allow the Secretary of State to impose restrictions on the individual's movements outside his or her residence overnight or at specified times overnight. This power could be used, for example, to relax temporarily an overnight residence requirement in a TPIM notice, to allow the individual to attend a particular event on a particular occasion (when he or she would normally be required to remain in the residence for that part of the evening), provided the individual only attends that event and abides by certain other conditions.

42. 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 TPIMs, 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.

43. Where the Secretary of State imposes a residence measure, the Secretary of State must consider requests from the individual for permission to stay overnight at other premises (*paragraph 1(8)*). The Secretary of State may grant such a request subject to conditions – see *paragraph 1(9)* and *paragraph 13(7)*. Examples of such conditions might be that the individual may be required to stay a specified number of hours at that other residence, comply with alternative monitoring or reporting requirements or only stay there in the company of family members.

44. *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.

45. *Paragraph 3* allows the Secretary of State to impose restrictions on an individual entering specified areas or places (for example particular streets or localities 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 is 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

[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*

case may be, give notice before entering a specified area or place and may impose conditions on the individual where they enter 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.

46. *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 return to his or her 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 Bill. Directions given under a movement directions measure may last for as long as the constable considers necessary up to a maximum of 24 hours.

47. *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.

48. *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 they have an interest or over which they 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.

49. *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 an individual from possessing or using electronic communications devices without permission or subject to specified conditions. 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.

50. 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.

51. *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 clause 12(1) which allows for the variation of measures by the Secretary of State).

52. *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 clause 12(1).

53. *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.

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

55. *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

56. 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 be provided or that the individual is escorted by a constable.

57. 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.

58. *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.

Clause 3: Conditions A to E

59. *Subsections (1)* to *(5)* of this clause 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 requires the Secretary of State to have "reasonable grounds for suspecting" involvement in terrorism-related activity.

60. 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.

61. Condition B, when read together with *subsection (6)* and clause 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 a TPIM. See clause 5 and its interaction with clauses 13 and 14, and below.)

62. 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.

63. Condition E (*subsection (5)*) requires the Secretary of State to have obtained the court's permission under clause 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 clause 7 and Schedule 2.

Clause 4: Involvement in terrorism-related activity

64. The Bill 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 clause. *Subsection (2)* provides that relevant activity occurring before the commencement of this Bill nonetheless 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 Bill in imposing TPIMs on an individual.

Clause 5: Two year limit for TPIM notices.

65. This clause 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. For example in 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).

66. *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).

67. *Subsection (4)* provides that the operation of the two-year time limit is subject, in particular, to certain exceptions and interpretations set out in clauses 13 and 14. As noted above, this clause also interacts with condition B in clause 3.

Clause 6: Prior permission of the court

68. This clause 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 clause 3.

69. *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 or having the opportunity to make representations. This is intended to avoid giving an individual advance warning of the Government'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: clause 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 clause 9 makes provision for that review.

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

71. *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 TPIMs) 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 measures to be imposed (in particular 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.

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

72. This clause 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* (clause 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 to immediately 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.

73. 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 decision 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).

Clause 8: Directions hearing

74. *Subsections (1)* and *(2)* of this clause 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. 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 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 (5)* and *(6)*). (Clause 9 makes provision in relation to this review hearing.) S*ubsections (2), (4)* and *(7)* ensure that the individual has the opportunity to make representations at a directions hearing 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).

Clause 9: Review hearing

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

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

77. 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

[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

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 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*.

78. 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 clause 9 together with reliance on existing case law concerning the level of scrutiny applicable for this type of judicial review implements this.

79. *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); that it may discontinue the proceedings in any other circumstances; and that in such other circumstances both the Secretary of State and the individual subject to the measures must first have the opportunity to make representations.

80. *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, if it chooses not to quash the notice or any of the measures imposed under it, may give directions to the Secretary of State for or in relation to the revocation or 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).

Clause 10: Criminal investigations into terrorism-related activity

81. *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

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fundamental human rights under the ECHR.' He noted the distinction made by Lord Justice Carnwath in *OFT v IBA [2004] EWCA Civ 142* between 'a "low intensity" of review, applied to cases involving issues "depending essentially on political judgment", such as matters of national economic policy, where the court would not intervene outside of "the extremes of bad faith, improper motive or manifest absurdity" and, at the other end of the spectrum, decisions infringing fundamental rights where unreasonableness is not equated with "absurdity" or "perversity", and a "lower" threshold of unreasonableness is used, namely whether a reasonable decision-maker, on the material before it, could conclude that the relevant interference was justifiable.'

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.

82. *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 offence and must report on this to the Secretary of State. In relation to this continuing duty of review, the chief officer must consult the relevant prosecuting authority as appropriate.

Clause 11: Review of ongoing necessity

83. The Court of Appeal held in *Secretary of State for the Home Department v MB [2006] EWCA Civ 1140* 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.

84. This clause 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.

Clause 12: Variation of measures

85. This clause 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 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)*).

86. 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.

87. *Subsections (6)* and *(7)* provide that the Secretary of State may exercise these powers to vary the measures imposed under a TPIM notice that has expired without being renewed, or that has been revoked, before that notice is revived under clause 13 and 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 to revive a TPIM notice, but to vary the measures specified in that notice from those that were contained in it prior to its expiry or revocation.

Clause 13: Revocation and revival of TPIM notices

88. *Subsection (3)* provides an individual subject to a TPIM notice with the right to request 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.

89. 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 clause 5, or has previously been revoked and revived. 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 clause 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).

90. *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 renewed (after being in force for one of the two years permitted by Clause 5 without evidence of new terrorism-related activity).

91. The 'counting' of the two year period for which an individual can be subject to a TPIM notice stops at the point at which a notice is revoked. *Subsection (9)* makes provision for the duration of a TPIM notice that is revived. The purpose 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. 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 clause 24).

Clause 14: Replacement of TPIM notice that is quashed etc

92. Clause 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.

93. *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 clause 5).

94. 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.

95. *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 time limits 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 Bill 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.

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

96. Clause 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.

97. *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 to subsequently impose a TPIM notice (and measures) on the same individual, or to do so on the basis of terrorism-related activity previously relied on to exercise such powers.

98. *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 clause 21 (contravention without reasonable excuse of a TPIM), 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.

Clause 16: Appeals

99. Clause 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 are in addition to the automatic review by the court of the imposition of TPIMs under clause 9. Rights of appeal exist against a decision of the Secretary of State to: extend or revive a TPIM notice; vary measures specified in a TPIM notice without the individual's consent; refuse an application for the measures specified in the TPIM notice to be varied;

refuse an application for revocation of the TPIM notice; and to refuse an application for permission in relation to a measure specified in the TPIM notice.

100. *Subsection (7)* sets out that the only powers available to the court on an appeal falling under this clause 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 or in relation to the revocation of the TPIM notice or 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) or conditions to which permission is subject. If the court does not exercise any of these powers it must dismiss the appeal (*subsection (8)*).

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

Clause 17: Jurisdiction in relation to decisions under this Act

102. Clause 17 provides that decisions in relation to this Bill 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 European Convention on Human Rights – in proceedings in the court as defined by clause 26(1), or on appeal from such proceedings.

Clause 18 and Schedule 4: Proceedings relating to measures

103. Clause 18 makes further provision for court proceedings in relation to decisions taken under this Bill.

104. *Subsection (1)* provides that an appeal may only be brought from a determination in TPIMs 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.

105. *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.

106. In practice, as is the case in relation to control orders, the court proceedings 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).

107. 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.

108. 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.

109. *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 Article 6 right to a fair hearing of the individual takes precedence over anything in the legislation – in particular the provision about withholding information from the individual. This provision reflects the House of Lords' October 2007 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 enabling the court to withhold closed material from the controlled person, such that material could only be withheld if it was compatible with Article 6. The wording in paragraph 5 gives effect to the read down in *MB & AF*.

110. 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.

Clause 19: Reports on exercise of powers under Act

111. This clause places a duty on the Secretary of State to report to Parliament on a quarterly basis on the exercise of certain powers under this Bill.

Clause 20: Reviews of operation of Act

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

Clause 21: Offence

113. Clause 21 provides for an offence of contravening measures specified in a TPIM notice without reasonable excuse. The definition of "measures" in clause 2(2) means that this offence extends to the breach by the individual of any provision made in the TPIM notice or otherwise by virtue of Schedule 1. For example, if the Secretary of State grants permission under Schedule 1 (for the individual to do something which the TPIM notice otherwise prohibits that individual from doing) subject to conditions, a breach of those conditions without reasonable excuse will constitute an offence. 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; £10000 in Scotland), or both; and on summary conviction six months' imprisonment or a fine of up to £5000 (£10000 in Scotland), or both.

Clause 22 and Schedule 5: Powers of entry

114. Clause 22 gives effect to Schedule 5. The Schedule provides for powers of entry, search, seizure and retention in a number of scenarios relating to TPIMs. 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 notice) 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. Clause 27(4)(a) disapplies the provisions relating to the seizure of items as evidence of an offence in Scotland. This is in order to avoid making provision in areas that are within devolved competence.

Clause 23 and Schedule 6: Fingerprints and samples

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

116. *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.

117. "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.

118. *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.

119. *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 the Crime and Security Act 2010.

120. *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.

121. *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.

122. *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).

123. 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.

124. *Paragraph 13* covers the uses to which material taken and retained under the previous paragraphs can be put. The purposes set out in *paragraph 13(1)* for England, Wales and Northern Ireland are the same as those set out in relation to material taken under PACE, PACE NI, the 2000 Act and the 2008 Act. Provision in clause 27(4)(b) ensures that in Scotland any samples that are obtained may be used only in the interests of national security or for the purposes of a terrorist investigation. This difference is necessary in order to avoid making provision in areas that are within devolved competence.

Clause 24: Notices

125. Clause 24 makes provision about the service of notices under the Bill. 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 the expiry of that notice). 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.

Clause 25, Schedules 7 and 8: Financial and supplemental provisions

126. *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.

127. *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, 7* and *9* of Schedule 8 provide for a transitional period of 28 days during which existing control orders will remain in force following commencement of this Bill. *Paragraph 3* makes provision for certain control order proceedings under the 2005 Act to continue (or to be brought) after the repeal of that Act, for the purposes only of determining whether quashing is appropriate. And *paragraph 4* has the effect that the Secretary of State may impose TPIMs 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 clause 20 of the Bill.

Clause 26: Interpretation etc

128. Clause 26 sets out the meaning of various terms used throughout the Bill and makes certain provisions for the application of other clauses. In particular, *subsection (2)* has the effect that where a new TPIM notice is imposed on an individual who has already been subject to TPIMs 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 clause 3).

129. *Subsection (3)* provides that where the definition of "new terrorism-related activity" in clause 3(6) refers to a TPIM notice being in force in relation to an individual, a notice that is revived (under clause 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 clause 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 must take place at some point after the original imposition of the measures (not after the revival of the measures).

Clause 27: Short title, commencement and extent

130. Clause 27 sets out the short title of the Bill; that it automatically comes into force the day after the day on which it is passed; and that (in the main) it extends to England, Wales, Scotland (with the exceptions already outlined in relation to Schedules 5 and 6) and Northern Ireland, and may by Order in Council be extended to any of the Channel Islands or the Isle of Man.

FINANCIAL EFFECTS OF THE BILL

131. The financial implications of the Bill for the public sector will be largely neutral. The cost of administering and enforcing the new system of terrorism prevention and investigation measures will be similar to the costs associated with the system of control orders that will be repealed. This is outlined in more detail in the impact assessment that accompanies the Bill.

SUMMARY OF IMPACT ASSESSMENTS

132. The Bill is accompanied by an impact assessment.

133. An overarching equality impact assessment has been produced in relation to the Government's review of counter-terrorism powers – *Review of Counter-Terrorism and Security Powers Equality Impact Assessment (Cm 8006[3]).*

[3] http://www.official-documents.gov.uk/document/cm80/8006/8006.asp

EUROPEAN CONVENTION ON HUMAN RIGHTS

134. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Secretary of State for the Home Department, the Rt. Hon. Theresa May MP, has made the following statement:

> "In my view the provisions of the Terrorism Prevention and Investigation Measures Bill are compatible with the Convention rights."

135. The Government has published a separate ECHR memorandum with its assessment of the compatibility of the Bill's provisions with the Convention rights, which is available on the Home Office web site.

TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

EXPLANATORY NOTES

These notes refer to the Terrorism Prevention and Investigation Measures Bill as introduced in the House of Commons on 23 May 2011 [Bill 193]

Ordered, by The House of Commons,
to be Printed, 23 *May* 2011.

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS
LONDON - THE STATIONERY OFFICE
Printed in the United Kingdom by
The Stationery Office Limited

£x.00

Bill 193–EN 55/1